

## Second-Order Participation in Administrative Law

Miriam Seifter



### ABSTRACT

Public participation has long been a cornerstone of administrative law. Many administrative procedures require participation, and underlying normative theories embrace participation as a way to legitimate the administrative state. It is well recognized that interest groups dominate this participation. Yet the implications of interest-group dominance have been largely overlooked. Administrative law takes virtually no notice of how the dependence on interest groups affects the claimed value of participation.

This Article argues that a close study of interest groups is essential to understanding, and ultimately reforming, administrative participation. It introduces the concept of second-order participation to describe the internal operation of interest groups. It then shows that second-order participation complicates every leading justification of administrative participation and the many practices built atop those justifications. These traditional conceptions of participation cohere only if groups actually speak for a membership, or at least provide information about how and for whom they work. Yet interest groups are seldom transparent, and, as this Article shows, they fall along a spectrum of internal governance with varying degrees of member involvement—with the most effective lobbyists tending to have less internal participation or no members at all. Attending to second-order participation thus provides a new framework for understanding participation, and it illuminates a path for reform.

### AUTHOR

Assistant Professor of Law, University of Wisconsin Law School. For helpful comments and conversations, I thank Kent Barnett, Jessica Bulman-Pozen, Ann Carlson, Anuj Desai, Jody Freeman, Brianne Gorod, Emily Hammond, Neil Komesar, Gwyn Leachman, Jon Michaels, Martha Minow, Dina Mishra, John Ohnesorge, Eloise Pasachoff, Jim Rossi, David Schwartz, Ganesh Sitaraman, Cathy Sharkey, Kevin Stack, David Super, Susannah Tahl, Chris Walker, Rob Yablon, Jason Yackee, and generous participants in workshops at the University of Minnesota Law School, Vanderbilt Law School, and the University of Wisconsin Law School. This article also benefited from conversation with students in Ann Carlson's Climate Change and Energy Law workshop at UCLA School of Law. Justin Dreikosen and Bonnie Shucha provided excellent research assistance. Any errors are mine.

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## INTRODUCTION

When it comes to modern administrative procedure, two points are inescapable. First, public participation is a cornerstone of administrative law. The administrative process abounds with opportunities for public participation, and courts and commentators celebrate participation as a crucial way to help legitimate the administrative state and improve agency decisions.<sup>1</sup> Second, interest groups are dominant participants in the administrative policymaking process.<sup>2</sup> Interest groups, much more than individual citizens, play key roles, including meeting with and lobbying agency personnel, commenting on rules, petitioning for agency action, setting standards that agencies adopt as rules, and filing and settling lawsuits against agencies.<sup>3</sup> They have access that most individuals do not have.<sup>4</sup>

The dependence on interest groups to fulfill participation ideals is as understudied as it is widespread. To the limited extent that administrative law's

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1. See, e.g., COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. REP. NO. 77-8, at 103 (1941) (advocating the APA's passage, stating that participation would be "essential . . . to permit . . . agencies to inform themselves and to afford adequate safeguards to private interests"); Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 101 (2003) (describing the Administrative Procedure Act (APA) as "a one-trick pony," because "[a]ll of its basic provisions rely on a single method for controlling the actions of administrative agencies, namely, participation by private parties"); Wendy Wagner, *The Participation-Centered Model Meets Administrative Process*, 2013 WIS. L. REV. 671, 677-78 (2013) (describing the goal of "[m]aximizing the participation of affected parties, without bias or capture," as "central to the design of administrative process"); Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 24 (2012) (noting that "virtually all of the major theories that seek to legitimate administrative decision-making see participation as important"); William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 171 (2009) ("'Public participation' and 'transparency' are hallmarks of American administrative law . . ."); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 17 (1982) ("To the extent that rulemaking has political legitimacy, it derives from the right of affected interests to present facts and arguments to an agency . . . to ensure the rationality of the agency's decision."); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 359 (1972) ("[W]hen government agencies are challenged as being unresponsive to public needs and to the public interest, one 'solution' frequently suggested is to broaden citizen involvement and participation in administrative decision making.");
  2. See *infra* Part I.A. This Article focuses on policymaking processes rather than more run-of-the-mill interactions with the bureaucracy that occur when programs are implemented and enforced.
  3. See *infra* text accompanying notes 70-83.
  4. See *infra* Part I.A. Agencies sometimes come under fire for working too closely with interest groups, or for using interest groups to rally support for agency proposals. See, e.g., Eric Lipton & Coral Davenport, *Critics Hear EPA's Voice in 'Public Comments'*, N.Y. TIMES (May 18, 2015), [http://www.nytimes.com/2015/05/19/us/critics-hear-epas-voice-in-public-comments.html?\\_r=1](http://www.nytimes.com/2015/05/19/us/critics-hear-epas-voice-in-public-comments.html?_r=1) [<https://perma.cc/M8VC-ZK78>].

literature and doctrine have considered the interest group dependency at all, they have generally done so uncritically, portraying a representative system in which groups serve as an intermediary between the public and the government—channeling the majority will, valuable information, or both.<sup>5</sup> But this portrayal is underdeveloped, both theoretically and empirically. We have surprisingly little to say about how interest groups work, for whom they speak, and to what extent their involvement fulfills the rationales for the field's deep commitment to participation.<sup>6</sup> Administrative law, for all its concern with what I call first-order participation—the engagement by interested parties in the many avenues for public involvement in policymaking—has been inattentive to the internal workings of the groups that carry out the vast majority of participation. Administrative law, that is, has not been concerned with second-order participation.<sup>7</sup>

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5. See, e.g., *Nat'l Automatic Laundry & Cleaning Council v. Schultz*, 443 F.2d 689, 694 (D.C. Cir. 1971) (describing interest groups as “an indispensable part of an effective channel of communication between government and the persons whose conduct the government seeks to affect”); Gellhorn, *supra* note 1, at 403 (“The emergence of individuals and groups willing to assist administrative agencies in identifying interests deserving protection, in producing relevant evidence and argument suggesting appropriate action, and in closing the gap between the agencies and their ultimate constituents presents an opportunity to improve the administrative process.”); Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 VAND. L. REV. 1389, 1399, 1401 (2000) (explaining the postwar intellectual view that “[i]nterest groups mobilized voters and represented them in terms that politicians would understand and react to; they promoted mass power,” and that “[i]nterest groups served as a conduit for citizens’ desires in a society whose size and complexity might otherwise create a nation of politically impotent, atomized individuals”); Wendy E. Wagner, *Congress, Science, and Environmental Policy*, 1999 U. ILL. L. REV. 181, 254 n.258 (1999) (“Interest groups are often viewed as necessary intermediaries who fill the void between electorate understanding of the quality of the laws and their representatives who draft or vote on them.”).
  6. See Charles A. Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1259–60 (1966) (casting “large organized interests” as the constituency of administrative agencies, but noting that such interest groups “raise many questions,” including whether and of whom they are representative); Cary Coglianese, *Unequal Representation: Membership Input and Interest Group Decision-Making 2* (1996) (unpublished manuscript) (on file with author) (“When we consider the representational role interest groups play in pluralist, democratic politics, the relative paucity of research on the role of members in the decisions of these groups is striking. As others have noted, a gap exists in what we know about the representational link in interest group decision making.”); cf. Rubin, *supra* note 1, at 101–02 (“One obvious difficulty with the APA’s reliance on public participation is that it forces the statute to depend for its effectiveness on large organizations—business firms, labor unions and, most characteristically, organized interest groups.”). One article, by Mark Seidenfeld, is a notable exception to the general inattention to interest group governance in administrative law scholarship, focusing on how interest group dynamics affect specific collaborative governance initiatives. See Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 413 (2000).
  7. In identifying and exploring second-order participation, this Article shares conceptual ground with other contributions that explore second-order phenomena. See, e.g., Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 811 (2007);

The omission, once examined, is striking. Despite the extensive architecture of participation on which administrative law is built and the prominent role of interest groups as the main participants, administrative law never asks whether interest groups—defined here as groups that advocate before the government on behalf of a constituency broader than a single individual or firm—are fulfilling the ideals of participation. We have no doctrine, no statute or executive order, nor even a normative account that calls for any evaluation of whether groups are effective or ineffective representatives, or whether they are representative at all. For example, there is no inquiry into whether a “citizen group” has one thousand members or one member or no members; whether it is guided by membership input, a Burkean trusteeship, or obligation to a particular donor; or whether its members have the ability and incentives to exit the group if it fails them.<sup>8</sup> There is no attention to whether a group’s name reflects a well-established mission or whether the group is a sham. The administrative process counts on interest groups to accomplish much of what is believed to make the administrative state acceptable, but we seldom look at them closely.<sup>9</sup>

This Article argues that second-order participation deserves far more attention than it has received. To this end, it examines the inner workings of an interest group universe that has gone largely unexplored. Looking within interest groups has the potential to illuminate the quality and nature of participation in administrative governance and, in turn, to challenge and reframe stagnant arguments regarding the value of participation. Courts and scholars typically praise first-order participation using one of four justifications: Participation fosters democracy, checks government power, enhances agency expertise, or enriches civic experience. An understanding of second-order participation turns out to be important to each of these leading justifications for first-order participation. Without this understanding—if we do not know whether groups speak only for a select few, whether they mislead about their representative status, or whether their proffers reflect genuine expertise or pretext—the desirability and doctrinal

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Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1102 (2005); John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205, 210 (2015).

8. See *infra* Part II.B (discussing various concepts of representation).

9. The public choice literature does attend to interest groups insofar as it casts administration as the dispensation of rents to powerful groups, to the detriment of the public interest. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12–33 (1991). But the public choice literature also fails to look within groups, and therefore misses opportunities for more fine-grained assessment of participation. As discussed more below, attention to second-order participation can reveal that participation appears better or worse than a public choice account would have it—better where interest group contributions convey meaningful expertise or speak for a broad public, or worse where the groups exercising influence do not faithfully represent their own members.

inevitability of first-order participation become more fragile. Indeed, it is difficult to give any descriptive or prescriptive account of participation in the administrative process without attention to the interest groups who carry it out.

This Article shows that the leading theories for first-order participation, and the many doctrines and practices built atop those rationales, often rely on mistaken assumptions about second-order participation. Shining a light on second-order participation as a relevant variable illuminates an overlooked reason why and how first-order participation falls short of its traditional justifications. The Article thus highlights a disjunction between administrative law in theory and doctrine and administrative law in practice—another illustration of the “lost world of administrative law.”<sup>10</sup>

First, two leading rationales for first-order participation—rooted in majoritarian decisionmaking and civic engagement—cohere only if groups have internal governance mechanisms that actually facilitate second-order participation. Groups cannot channel the views of the public majority or supply individuals the benefits of partaking in public dialogue, respectively, unless group members play some meaningful role. Yet this premise is often not met. Interest groups fall along a varied spectrum of governance models, with different degrees of divergence between the preferences of the principals (group members) and the actions of the agents (group leaders).<sup>11</sup> These models range from groups that have no members at all to groups that afford members strong voice and exit rights. Groups at the former end of the spectrum are common in advocacy settings, because the features that make groups the most successful lobbyists tend to be at odds with second-order participation—that is, engaging with members can impede a group’s ability to take focused positions, to act quickly, and to appeal to donors.<sup>12</sup> Scholars of political science and sociology have documented this phenomenon of “memberless organizations”<sup>13</sup> and have questioned interest

10. See Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014) (“Our thesis is simple but powerful: the actual workings of the administrative state have increasingly diverged from the assumptions animating the APA and classic judicial decisions that followed.”).

11. Principal-agent slack (and the principal’s concomitant loss of well-being or welfare) is a cost of principal-agent relationships. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (defining agency costs); see also John W. Pratt & Richard J. Zeckhauser, *Principals and Agents: An Overview*, in PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 1, 3 (John W. Pratt & Richard J. Zeckhauser eds., 1985).

12. See *infra* text accompanying notes 200–203; see also Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 1001–08 (2014).

13. See THEDA SKOCPOL, *DIMINISHED DEMOCRACY* 163 (2003); *infra* Part II.C.

groups' ability to represent a broad constituency.<sup>14</sup> These insights, however, have not been incorporated into administrative law. They need to be. Even under generous theories of what it means to represent, the reality of interest group governance precludes a systematic claim that interest groups fulfill the democratic- and engagement-based rationales of participation.

Further, second-order participation complicates the rationales that cast participation as enhancing agency expertise or checking agency excess. This is because the expertise a group claims is often based on its ability to convey a particular constituency's perspective, experience, or concerns; indeed, these types of claims are at the heart of much interest group participation. A group that does not have or engage with a membership cannot reliably convey those sorts of constituency-based insights. Moreover, even when a group's assertions seem independent of a constituency—say, the results of a scientific study—information about second-order participation matters. Understanding the group's sources, funding, and potential biases is important to assessing the reliability of its information and its contribution to agency expertise. These same reasons make second-order participation key to the rationale of checking agency action. A system of checked government works best when a wide variety of voices participates in the adversarial system, but that idea is thwarted if interest groups speak only for management-level elites. And at a minimum, information about second-order participation is an important tool in challenging interest group lobbying or agency decisions relying on interest group inputs: The many actors that resist or oversee agency action, including other interest groups, the media, courts, and Congress, must know enough about a group's constituency, governance, and credibility to call its assertions into question. Finally, even for those who believe participation is just theater or rhetoric—a cynicism unlikely to be consistently true—considering second-order participation remains important. It offers a vocabulary for and greater purchase on why some have lost faith in participation, despite its entrenchment in administrative law's doctrine and discourse.

In addition to providing a new framework for understanding why and how participation falls short of its purported objectives, attention to second-order participation casts new light on familiar administrative law practices and procedures and points to potential modifications. To be clear, shunning interest groups is not the solution. A variety of factors, including information costs and resource allocation, make interest groups a fixture in modern

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14. See generally ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* (Eden & Cedar Paul trans., 1915); *infra* Part II.C.

administrative participation.<sup>15</sup> Instead, in the near term, modest reforms could begin to narrow the gap between participation and its rationales while retaining a prime role for interest groups. In particular, the modes of participation that depend logically on groups' representativeness could require groups to show some markers of second-order participation. And for all modes of participation, simple disclosures about the group's membership, funding, and internal governance should become standard practice. Such disclosures would sometimes educate agencies, who may be unaware of the internal dynamics of groups, especially those they infrequently encounter. More importantly, such disclosures would provide useful information to agencies' many principals—including Congress, courts, the public, and the media—who seek a better sense of the groups to whom agencies listen and whether agencies rely on sound input. This would include helping courts to more accurately apply an array of judicial review doctrines in which participation is relevant—from arbitrary-and-capricious review to *Chevron* Step Zero.<sup>16</sup> Perhaps above all, greater transparency about second-order participation can foster a more candid discourse about what contemporary participation does and does not achieve, and can thus open the door to longer-term consideration of a wider range of alternatives.

The Article proceeds in three Parts. Part I lays out the basic problem. It describes the dominance of interest groups as participants in the administrative process and explains how the variable of second-order participation has the potential to thwart or complicate every leading justification for first-order participation. Part II then explores the landscape of second-order participation, explicating models of interest group governance and their tension with administrative law's core assumptions about first-order participation. Part III reflects on second-order participation's implications for administrative law. It explains how familiar administrative law procedures and doctrines would be strengthened or clarified through attention to second-order participation, and identifies reforms that could help align first-order participation with its rationales.

## I. THE INTERSECTION OF FIRST- AND SECOND-ORDER PARTICIPATION

This Part starts by developing the key premises of the Article: Interest groups are ubiquitous and dominant participants in the modern administrative process, and participation is a deeply entrenched and celebrated feature of

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15. See *infra* Part I.A.

16. See *infra* notes 47–53 and accompanying text (discussing these doctrines).



that process. It then reveals that each leading justification for participation is weakened by inattention to second-order participation.

To pave the way for this discussion, it helps to briefly review some familiar ways in which participation is built into the administrative policymaking process: notice-and-comment rulemaking; petitions for rulemaking; negotiated rulemaking; advisory committees; litigation and settlements; private standard setting; intervention in adjudication; ad hoc consultations and advocacy; and judicial review.

*Notice-and-comment rulemaking.* As the thousands of regulations promulgated each year “wield[] vast power and touch[] almost every aspect of daily life,”<sup>17</sup> the notice-and-comment process under section 553 of the Administrative Procedure Act (APA)—the most well-known and heralded form of administrative participation, in which interested persons may comment on proposed rules<sup>18</sup>—has been celebrated as “a crucial way to ensure that agency decisions are legitimate, accountable, and just.”<sup>19</sup> It is routinely held up as a model for other areas of law<sup>20</sup> and for other countries to follow.<sup>21</sup> Despite well-known skepticism that the process is merely procedural theater,<sup>22</sup> former Office of Information and Regulatory Affairs (OIRA) Administrator Cass Sunstein calls it “immensely important and very substantive,”<sup>23</sup> and surveys show that interest groups regard notice-and-comment participation as effective.<sup>24</sup> Interest groups certainly have not stopped filing comments.

*Petitions for rulemaking.* Participants can seek to force agency action in the first place by filing petitions for rulemaking. Some scholars criticize such petitions for allowing parties to distort agency agendas, while others praise petitions’

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17. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010).

18. 5 U.S.C. § 553 (2012).

19. Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 20 (2012).

20. See generally Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965 (2009); Bierschbach & Bibas, *supra* note 19; Gregory Dolin, *Speaking of Science: Introducing Notice and Comment Into the Legislative Process*, 2 UTAH L. REV. 243 (2014); Victor B. Flatt, *Notice and Comment for Nonprofit Organizations*, 55 RUTGERS L. REV. 65 (2002).

21. See, e.g., Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT’L L.J. 451, 506 (1999).

22. See E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

23. See Tom Fox, *Cass Sunstein on the Virtue of Anxious Leaders*, WASH. POST (June 10, 2015), <https://www.washingtonpost.com/news/on-leadership/wp/2015/06/10/cass-sunstein-on-the-virtue-of-anxious-leaders> [http://perma.cc/XD2J-KZGF].

24. See CORNELIUS M. KERWIN & SCOTT R. FURLONG, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 192 (2011).

ability to help agencies collect better information.<sup>25</sup> Either way, an implicit premise is that rulemaking petitions can sometimes shape what agencies do.<sup>26</sup>

*Negotiated rulemaking.* Negotiated rulemaking<sup>27</sup> calls for agencies to establish a committee of individuals that “represent” relevant stakeholders,<sup>28</sup> which meets, along with agency officials, to work out an agreeable rule. Participation in this context is necessarily meaningful; participants are the ones who actually establish the binding rule.<sup>29</sup>

*Advisory committees.* Roughly one thousand advisory committees provide agencies with input on a wide range of topics.<sup>30</sup> These committees must comprise members that are “fairly balanced in terms of the points of view,”<sup>31</sup> and they may be selected to represent the views of others or to provide individual expertise.<sup>32</sup> Their advice is nonbinding, but is often characterized as influential.<sup>33</sup>

*Litigation and settlements.* Litigation as a tool of participation-infused administrative policymaking received a boost during the 1960s and 1970s when, as noted further below, courts liberalized standing requirements to permit suits by a wider array of interests.<sup>34</sup> Participation through litigation no

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25. See Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321, 325 (2010).
  26. See, e.g., Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy From the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 319 (2013) (finding that EPA made “measurable substantive changes in critical areas” in response to petition to withdraw state authority under the Clean Air Act over a twenty-five-year period).
  27. See Negotiated Rulemaking Act of 1990, 5 U.S.C. § 561 (2012).
  28. See *id.* (requiring that the negotiated rulemaking committee must “adequately represent the interests that will be significantly affected by a proposed rule”).
  29. Negotiated rulemaking is apparently waning in use. See, e.g., Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 996 (2008) (describing the decreasing use of negotiated rulemaking).
  30. See, e.g., *The Federal Advisory Committee Act (FACA) Brochure, An Overview*, U.S. GEN. SERVS. ADMIN., <http://www.gsa.gov/portal/content/101010> [<http://perma.cc/9VW9-PXNV>] (last visited Apr. 2, 2016).
  31. See 5 U.S.C. app. 2 § 5(b)(2) (2012).
  32. See *infra* note 67.
  33. Indeed, it was the perceived influence of federal advisory committees that prompted Congress to enact the Federal Advisory Committee Act, which now requires the committees’ proceedings not only to be balanced in representation, but also to be documented and open to the public. See generally Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51 (1994) (discussing the history of FACA). Steven Croley collects accounts of advisory committees’ influence in his article on the regulatory process. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 118 & n.349 (1998) (stating that advisory committees “play a significant and substantive role in agency decisionmaking and the development of regulatory policy”).
  34. See Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 510 (1985) (“Courts liberalized standing requirements to ensure that beneficiaries had access to the agencies . . .”); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1725 (1975).

doubt gives participants a key role; the plaintiff is “the master of the complaint,” and strategic decisions and persuasive or unpersuasive arguments can change the course of agency action.<sup>35</sup> The participant’s role may be especially weighty when cases are resolved by private settlement, a longstanding practice that has come under new scrutiny.<sup>36</sup>

*Private standard setting.* Agencies may also structure participation by allocating some authority to private entities.<sup>37</sup> Of note here, agencies regularly incorporate privately set standards into federal regulations.<sup>38</sup> There are now approximately ten thousand such standards in the Code of Federal Regulations.<sup>39</sup> The organizations that set such standards—which agencies then promulgate as law—play a significant role in shaping agency policy.

*Intervention in adjudication.* Agencies may opt to set new policies through adjudication,<sup>40</sup> where the primary vehicle for participation is intervention. Intervention rights were broadened around the same time as standing rights,<sup>41</sup> such

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35. See, e.g., *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987) (discussing the well-pleaded complaint rule).
  36. On agency settlement practices, see Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327, 328–29 (1987).
  37. This is properly regarded as a form of participation; the private entities join in the regulatory enterprise and may sometimes dictate outcomes. See generally Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 84 (1990). A private body may be involved in rulemaking, implementation, or enforcement. For one example, I have elsewhere written about the Affordable Care Act’s direction to the National Association of Insurance Commissioners to establish certain standards under the Act. See Seifter, *supra* note 12, at 975–76.
  38. In the National Technology Transfer and Advancement Act of 1995, Congress instructed agencies to adopt technical standards set by “voluntary consensus standards bodies” to “carry out policy objectives or activities” unless doing so would be impractical or unlawful. National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d), 110 Stat. 783. See generally Nina A. Mendelson, *Private Control Over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737 (2014); *Incorporating Private Standards Into Public Regulations*, PENN PROGRAM ON REG.: REG BLOG (Jan. 26–28, 2015), <http://www.regblog.org/2015/01/26/series-incorporation-by-reference> [https://perma.cc/NQS9-69YF]; *Regulating by Reference*, PENN PROGRAM ON REG.: REG BLOG (July 1–2, 2013), <http://www.regblog.org/2013/07/02/regulating-by-reference> [https://perma.cc/C2UW-GPZL] (introducing a series of essays on the topic).
  39. See Peter L. Strauss, *We Decline to Define ‘Reasonably Available’*, PENN PROGRAM ON REG.: REG BLOG (Jan. 26, 2015), <http://www.regblog.org/2015/01/26/strauss-reasonably-available> [https://perma.cc/3Q63-5D4T].
  40. See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 269 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).
  41. See Stewart, *supra* note 34, at 1750.

that “[i]n practice, a wide variety of affected interests . . . will enjoy a . . . right to participate in proceedings before the agency.”<sup>42</sup>

*Ad hoc consultations and advocacy.* A good deal of interaction between agencies and participants occurs through ad hoc means. These may be in-person meetings with agency officials, which are not systematically disclosed, or with OIRA as part of the centralized review process under Executive Order 12,866. That Order, though most often discussed for the roles it preserved for OIRA and cost-benefit analysis, also requires OIRA to meet with interested parties.<sup>43</sup> Ad hoc advocacy may also entail less formal interactions like emails, phone calls, and hallway conversations at conferences.<sup>44</sup> This category includes interactions in the largely unregulated period that occurs before a rule is proposed,<sup>45</sup> and sweeps in allegations that participation goes so far as to encompass private actors actually developing rules that agencies later propose.<sup>46</sup>

*Judicial review.* Finally, doctrines of judicial review of agency action reinforce the emphasis on participation. For example, the “arbitrary and capricious” standard, which applies to all reviewable agency actions absent a contrary statutory command,<sup>47</sup> demands that agencies “consider . . . important aspect[s] of the problem” at issue, including those raised by participants.<sup>48</sup> The *Mead* decision—a key pillar of the “*Chevron* Step Zero”<sup>49</sup> line of cases addressing whether agencies’ statutory interpretations are eligible for *Chevron* deference—focused on whether agency procedures “foster . . . fairness and deliberation,”<sup>50</sup>

42. *Id.* at 1751–52; see Gellhorn, *supra* note 1, at 359–60 (describing trend toward allowing broader intervention); David Livshitz, *Public Participation in Disputes Under Regional Trade Agreements: How Much is Too Much—the Case for a Limited Right of Intervention*, 61 N.Y.U. ANN. SURV. AM. L. 529, 574–75 (2005) (describing “the right of intervention” as “commonplace”). Apart from some vague language in the APA, see 5 U.S.C. § 555(b) (2012), the law governing administrative intervention lies chiefly with individual agencies, see, e.g., A. Everette MacIntyre & Joachim J. Volhard, *Intervention in Agency Adjudications*, 58 VA. L. REV. 230, 233 (1972), and a few (mostly older) judicial decisions, see *infra* notes 169–171.

43. See Exec. Order No. 12,866 § 4(e), 58 Fed. Reg. 51,735 (Sept. 30, 1993).

44. Cf. Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 471–73 (2014) (cataloging avenues of informal consultation between federal agencies and state participants).

45. See Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 111 (2011) (documenting interest group involvement in the pre-notice of proposed rulemaking phase).

46. See, e.g., Coral Davenport, *Taking Oil Industry Cue, Environmentalists Drew Emissions Blueprint*, N.Y. TIMES (July 6, 2014), <http://www.nytimes.com/2014/07/07/us/how-environmentalists-drew-blueprint-for-obama-emissions-rule.html?smid=pl-share> [http://nyti.ms/1ziAtnd].

47. See 5 U.S.C. § 706(2)(A) (2012).

48. See *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

49. See generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

50. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

including whether interested parties had an opportunity to participate.<sup>51</sup> *Skidmore* deference, which applies to agency interpretations of law that do not receive *Chevron* deference, asks, among other things, about an agency's thoroughness and expertise<sup>52</sup>—again, with attention to the agency's “allow[ance] for public input.”<sup>53</sup>

The above examples of participation developed at different times and for different historical, political, and philosophical reasons, but together they reflect a deeply rooted commitment to participation in the administrative process. Participation has become the sort of concept that scholars and judges treat as obviously good, or even as an end in itself.<sup>54</sup>

#### A. Interest Groups in First-Order Participation

Interest groups are dominant participants in the administrative process. At the outset, some definitional groundwork is necessary. My working definition of interest groups, also sometimes referred to as organized interests, includes all organizations that advocate before the government on policy issues and purport to speak for a constituency or cause broader than a single individual or firm. Like many other prominent definitions of interest groups,<sup>55</sup> this definition sweeps in

51. See, e.g., Mary Holper, *The New Moral Turpitude Test: Failing Chevron Step Zero*, 76 BROOK. L. REV. 1241, 1264 (2011) (collecting cases in which “courts have interpreted *Mead* to require agencies to use procedures that guarantee public participation in order to pass *Chevron* step zero”); Sunstein, *supra* note 49, at 225–26 (linking *Mead* to a concern for participation).

52. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

53. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1284 (2007).

54. See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 180–81 (1997) (“Like citizenship, participation is considered tantamount to democracy and democratic processes. Rarely has it been questioned, criticized, or explored.”). Jim Rossi’s contribution is an important exception. Rossi analyzes the values of participation and identifies costs that too much participation can impose. Moreover, in describing potential reforms to limit participation, Rossi raises for discussion the importance of representation. See *id.* at 244–47.

55. Notably, the interest group literature has never settled on a single definition of its subject. In sociology, one prominent definition accords interest group status to any entity with voluntary, unpaid members that seeks to influence government decisions. See FRANK R. BAUMGARTNER & BETH L. LEECH, *BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND POLITICAL SCIENCE* 25–26 (1998) (discussing definitions from David Knoke and other sociologists); David Knoke, *Associations and Interest Groups*, 12 ANN. REV. OF SOC. 1, 2 (1986). Baumgartner and Leech ably summarize other leading definitions of interest groups and the absence of consensus on the definition. As most relevant here, many political scientists define interest groups as any organization that advocates on policy issues and “[is] open to membership,” see, e.g., JACK L. WALKER, JR., *MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS* 4 (1991). Others eschew the limitation of membership and include all advocacy-oriented groups. See, e.g., BAUMGARTNER & LEECH, *supra*, at 30 (collecting sources); KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY,

classic interest groups like trade associations, chambers of commerce, and so-called public interest groups, as well as some other entities like think tanks and unions.<sup>56</sup> The vast majority of the relevant organizations are tax-exempt and governed by various aspects of nonprofit law, as I will discuss further below.<sup>57</sup>

That interest groups are dominant participants in the administrative process is now widely observed.<sup>58</sup> Though this point is so familiar as to feel intuitive, studies demonstrating it are sparse. One reason is the limited availability of data. For example, agencies are generally not required to keep and publish logs of meetings with interested parties.<sup>59</sup> Another is the difficulty of data collection. Information about interventions in adjudications, for example, is not collected in any single place; tabulating interest group involvement thus would be painstaking and error prone. There are also sorting problems. For example, in the notice-and-comment process, it can be difficult to distinguish an individual's independent contribution from an interest-group-generated form letter. Given these obstacles and the familiarity of the interest group dominance, little work has been done to prove the point.

The reforms I discuss in Part III could facilitate future research, but we can already take some initial steps to show interest groups' dominance. First, a small set of relevant empirical studies does exist. For example, studies by Marissa Golden and Susan and Jason Yackee have indicated that interest groups submit the majority of comments in rulemaking proceedings.<sup>60</sup> And interest group

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ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 10 (1986). I avoid a membership-based definition on the ground that membership can be a tricky question, as discussed below, such that the definition can swallow (or taint) the remaining analysis.

56. One could argue that corporations should be included, since individual firms ultimately represent shareholders, and corporate governance has engendered principal-agent problems. But because the law governing the roles of corporate shareholders and directors is sufficiently distinct, and for ease of exposition, I save an analysis of corporate administrative participation for another day.

57. See *infra* Part II.C.

58. See, e.g., Rossi, *supra* note 54, at 194 ("Individuals are most likely to participate in agency decisions by virtue of their membership in interest groups, whether 'public interest' groups, unions, trade associations, corporations, or firms. Hence, when we refer to participation before administrative agencies, we often speak of interest group representation."); Rubin, *supra* note 1, at 101–02 (noting that interest groups are the entities that most commonly comment on rules and seek judicial review of agency action, such that the APA "depend[s] for its effectiveness on large organizations").

59. See *Sierra Club v. Costle*, 657 F.2d 298, 401 (D.C. Cir. 1981); *Action for Children's Television v. FCC*, 564 F.2d 458, 474 n.28 (D.C. Cir. 1977).

60. In a study by Susan Yackee, organized interests' comments made up 85 percent of the sample (1444 of 1693 comments, defining organized interests to include "companies, business and trade associations, unions, other levels of government, and the so-called public interest groups"). Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RES. & THEORY 103, 110 & n.12 (2006) (quoting CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 178 (3d ed. 2003)); see also Marissa Martino Golden, *Interest Groups in*

influence may be even greater than those tallies let on, since comments filed by individual citizens are sometimes drafted and circulated by interest groups for the purpose of mass commenting.<sup>61</sup> As for private meetings with agencies, William West's study concluded that "prenotice participation by nongovernmental actors is confined primarily to organized interests."<sup>62</sup> Private standard setting—by its nature an activity that implicates organizational involvement—is clearly the domain of interest groups.<sup>63</sup>

Second, less formal support also helps illuminate the widespread involvement of interest groups. Taking even a casual look at the other modes of participation identified earlier supports the point. For example, the meetings OIRA convenes pursuant to Executive Order 12,866 tend to be with interest groups.<sup>64</sup> A recent study indicates interest group meetings constituted at least a supermajority—and likely more—of these meetings during a ten-year period.<sup>65</sup> Another indicator is the share of lawsuits against agencies that interest groups

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*the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 253 (1998) (studying eleven regulations from three federal agencies, and finding that zero comments came from individual citizens, whereas most comments came from corporations and trade associations, and to a lesser extent, citizen groups and government entities); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 132–33 (2006) (finding that business and public interest groups alone (not including other types of interest groups) submitted 63 percent of comments in a study of forty rulemakings by four separate agencies); Susan Webb Yackee, *The Politics of Ex Parte Lobbying: Pre-Proposal Agenda Building and Blocking During Agency Rulemaking*, 22 J. PUB. ADMIN. RES. & THEORY 373, 377 (2011) [hereinafter Yackee, *The Politics of Ex Parte Lobbying*] ("It may come as no surprise . . . that a good deal of empirical evidence suggests interest groups are the main participants during the notice and comment period.").

61. See, e.g., Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 130–31 (2012) (describing mass commenting).
62. William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC'Y 576, 585 (2009). These data are particularly hard to come by, and existing studies often do not break down data by organized and non-organized interests.
63. See Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL'Y 131, 150 (2013) (listing the organizations with the most standards incorporated by reference).
64. Note that the Order specifically calls for meetings with "representatives of businesses, nongovernmental organizations, and the public," which might be understood as an expectation of interest group participation. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).
65. See RENA STEINZOR ET AL., CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT 18–19 (2011), [http://www.progressivereform.org/articles/oira\\_meetings\\_1111.pdf](http://www.progressivereform.org/articles/oira_meetings_1111.pdf) [<http://perma.cc/48TQ-3BJT>]. Of the thirty entities that met most with OIRA, ten could arguably be counted as non-interest groups under this Article's definition—two individual corporations and eight law or lobbying firms. The report states that 95 percent of law and lobbying firm appearances were on behalf of "industry groups," and 2.5 percent were on behalf of "public interest groups." *Id.*

bring. One recent study, which analyzed settlements under three environmental statutes, showed that interest groups brought at least 90 percent of the lawsuits.<sup>66</sup> And there are numerous accounts of agencies engaging interest groups in other ways, such as in drafting agency regulations<sup>67</sup> and even coordinating good publicity.<sup>68</sup> Each of these ways of ascertaining interest group dominance has methodological limitations, but each points to the same common-sense fact that participation in much of agency policymaking is an interest group's game.<sup>69</sup>

Another fruitful way to get at the phenomenon of interest group dominance is to see it as a predictable result of administrative procedure and doctrine. The issues addressed by administrative agencies are almost always complex. This means that participation—understanding the issue enough to know what to comment on, what to challenge, and what the effects could be—requires significant investment.<sup>70</sup> First, there are information costs: Participation often requires expertise beyond the ken of most lay persons.<sup>71</sup> Time is another factor. Engaging agencies—whether through written comments, in-person meetings,

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66. A recent student note compiling all lawsuits against agencies arising under the Clean Air Act, Clean Water Act, and Endangered Species Act and settled between 2009 and 2013 indicates that “classic” interest groups brought eighty of eighty-eight suits. Of the remaining eight, one was brought by a state, two by local governments, two by an individual corporation, one by a coalition of corporations, and two by a non-profit law firm representing individual plaintiffs. See Ben Tyson, Note, *An Empirical Analysis of Sue-and-Settle in Environmental Litigation*, 100 VA. L. REV. 1545, app. 1579–1601 (2014).

67. See Wagner et al., *supra* note 45, at 127.

68. See discussion and sources cited *supra* note 4.

69. Even on federal advisory committees, where one might not expect to see interest groups because many committees are required to draw from academic and government pools, the law both sanctions and facilitates the role of interest groups. The applicable guidance identifies different categories of committee members: those who serve to share their individual expertise (designated “special government employees”), and those who “serve as the voice of groups or entities.” See Memorandum from Marilyn L. Glynn, Gen. Counsel, to Designated Agency Ethics Officials Regarding Fed. Advisory Comm. Appointments 2–3 (Aug. 18, 2005), [https://www2.oge.gov/Web/OGE.nsf/Legal%20Advisories/04E39F5397ED0F7E85257E96005FBD36/\\$FILE/05x4\\_.pdf?open](https://www2.oge.gov/Web/OGE.nsf/Legal%20Advisories/04E39F5397ED0F7E85257E96005FBD36/$FILE/05x4_.pdf?open) [<https://perma.cc/5DRD-3KE2>]; see also 41 C.F.R. 102-3.105(h) (2013); Mgmt. & Budget Office, *Revised Guidance on Appointment of Lobbyists to Federal Advisory Committees, Boards, and Commissions* FED. REG. (Aug. 13, 2014), <https://www.federalregister.gov/articles/2014/08/13/2014-19140/revised-guidance-on-appointment-of-lobbyists-to-federal-advisory-committees-boards-and-commissions#h-6> [<https://perma.cc/LY9S-TSUN>].

70. See Rossi, *supra* note 54, at 194 (“Because the costs of individualized participation in policy decision making are often excessive, informal representatives are prevalent as a form of participation in agency decisions.”).

71. See, e.g., Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1378–79 (2010) (discussing information costs as an obstacle to balanced participation); William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J. PUB. ADMIN. RES. & THEORY 495, 498 (2013) (“[T]here is a consensus that . . . information costs limit viable participation primarily to organized interests . . .”).



exchanges at conferences, or more formal intervention or negotiation—requires a substantial investment of time and effort that individuals seldom have, given their own lives and work. And a third factor, tied in large part to the first two, is access. Because interest groups are repeat players with specialized expertise, they can eventually gain greater access to agencies than individuals can. Although agencies rarely articulate any formal preference among participants,<sup>72</sup> in practice, it would be surprising to find that a person off the street could summon a meeting with agency officials in the same way that repeat players do.

This group-favoring structure plays out in each of the modes of participation noted above. For example, the notice-and-comment process advantages interest groups at the outset by inviting comments on existing proposals—often highly technical ones—rather than simply inviting generalized concerns, such that few ordinary individuals are likely to understand the proposal, let alone assemble sophisticated comments.<sup>73</sup> Case law reinforces this advantage by requiring agencies to “respond meaningfully” to comments that are “significant,”<sup>74</sup> “material,”<sup>75</sup> or that “on their face seem legitimate,”<sup>76</sup> but not to undeveloped or frivolous ones,<sup>77</sup> giving agencies incentives to engage with the most sophisticated comments. In the same vein, arbitrary and capricious review, as noted, punishes agencies for failing, *inter alia*, to “consider an important aspect of the problem”<sup>78</sup>—the sort of issue likely to be raised by sophisticated

72. One example of such a preference may be Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999), which requires agencies to meet with states early in the process for actions with federalism implications.

73. I thank David Super for discussion on this point. See Wagner et al., *supra* note 45, at 116 (“[T]he notice-and-comment process . . . may be ‘open’ to all, but in practice accessible to only a few, at least when rules are very complex and technical.”).

74. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977) (“[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”).

75. See *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) (suggesting that agencies must respond to comments that “step over a threshold requirement of materiality”).

76. *Canadian Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001). The response requirement may be cast as a way to ensure that the comment process is meaningful, or an aspect of arbitrary and capricious review, or both. See *Home Box Office*, 567 F.2d 9 (discussing both doctrines); see also John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 934 n.205 (2004). Some subject-specific statutes also require agencies to respond to comments from certain participants. See, for example, the Endangered Species Act, 16 U.S.C. § 1533 (2012), and the Outer Continental Shelf Leasing Act, 43 U.S.C. § 1344(c) (2012), which require agencies to respond to certain comments by state officials.

77. *Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm’n*, 547 F.2d 633, 646 (D.C. Cir. 1976), *rev’d sub nom. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

78. *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

players.<sup>79</sup> Similar factors advantage interest groups in the submission of sophisticated petitions;<sup>80</sup> the pursuit of ad hoc interactions, which favor insiders and repeat players;<sup>81</sup> and in the filing of citizen suits.<sup>82</sup>

Other modes of participation favor interest groups precisely because they presume that groups serve as representatives. This applies to negotiated rulemaking,<sup>83</sup> which includes a statutory mandate to populate the committee with “representatives” of relevant stakeholders, often large swaths of constituents.<sup>84</sup> It also applies to advisory committees, which must comprise a “fairly balanced” set of perspectives.<sup>85</sup> Interest group leaders can lay some claim to representing swaths of stakeholders, and have the sophistication to carry out the complex duties with which advisory committees are often tasked. The same is true for private standard setting. Individuals cannot summon the same expertise, resources, and gravitas, and are not logical recipients of powers to set standards or deliberate over best practices. Finally, where the basis for intervention is that the adjudication implicates a public interest, the moving party, if qualified, is likely to be an interest group, for the structural reasons already canvassed.<sup>86</sup>

79. See Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 476–85 (2005) (finding, inter alia, that agencies were more likely to respond to sophisticated comments, and discussing reasons why agencies may have incentives to pay more attention to such comments).

80. Jeffrey A. Rosen, *A Chance for a Second Look: Judicial Review of Rulemaking Petition Denials*, 35 ADMIN. & REG. L. NEWS 7, 7 (2009) (“Historically, rulemaking petitions have been filed by advocacy groups and NGOs, and occasionally by state governments and business groups . . .”).

81. The role of Congress in facilitating informal interactions with agencies—say, a concerned interest group gets a member of Congress to call an agency and impose pressure—may reinforce the role of interest groups, since they are likely the parties with greatest access to members of Congress. See, e.g., Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 70 (2006) (identifying ways in which members of Congress “supervise agencies informally”); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 42 (1991) (noting that agencies may be “indirectly influenced by the interest groups that influence legislators”).

82. Rossi, *supra* note 54, at 195.

83. See, e.g., Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 922 (2006) (“In negotiated rulemaking, agencies begin a rulemaking by establishing a committee comprising representatives from regulated firms, trade associations, citizen groups, and other affected organizations, as well as members of the agency staff.”).

84. See, e.g., 5 U.S.C. § 565 (2012) (requiring that the negotiated rulemaking committee must “adequately represent the interests that will be significantly affected by a proposed rule”).

85. See 5 U.S.C. app. 2 § 5(b)(2) (2012).

86. Indeed, as I discuss in Part III, the leading case during the expansion of intervention, *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) is one of the few administrative law cases to broach the issue of second-order participation. See *infra* Part III.

## B. Participation's Justifications and the Complication of Second-Order Participation

This Part develops the Article's second premise: Not only are interest groups dominant in participation, but participation is itself revered in administrative law. To be sure, not everyone is sanguine about participation, and I neither make light of that skepticism nor endorse the visions laid out below. Rather, my aim in this Part is to tease out and report the most prominent and accepted justifications for participation. These justifications are woven into administrative law's discourse and baked into its structure. Although the Article's main ambition is to reconsider these justifications by illuminating second-order participation, disaggregating the justifications themselves marks a contribution, for they are often assumed, or disregarded entirely, rather than explained.<sup>87</sup> And, as the discussion below explains, each of these traditional justifications hinges on or would be substantially strengthened by the existence of second-order participation, or at a minimum, by awareness of and attention to its presence or absence.

### 1. More Democratic Results

One prominent justification for public participation in agency decision-making, advanced by scholars, courts, and the executive branch itself, is that participation makes the administrative process more "democratic."<sup>88</sup> This may

87. It may be tempting to disregard some of the justifications as too naïve or unrealistic to warrant further discussion. But I take these doubts to underscore that different justifications have more or less appeal in different contexts. For example, it is easy to want to shun the democratic justification when thinking about a technical EPA water-quality rulemaking: What do the People know about parts per million of obscure chemicals? And it is also easy to reject the expertise rationale when setting a policy so value-laden—say, benefits for same-sex couples, before the point was moot—that it begs for a moral or political call, not an expert one. But swap the scenarios and each justification looks much better. Similarly, the justifications for participation as furthering civic engagement and government checking each appear sound under some sets of circumstances. Thus, for purposes of this Article, I assume all of the traditional justifications have value, such that second-order participation should be considered with respect to each one.

88. The executive branch itself embraces this justification. See *Fact Sheet: Public Comments Make a Difference*, REGULATIONS.GOV, [http://www.regulations.gov/docs/FactSheet\\_Public\\_Comments\\_Make\\_a\\_Difference.pdf](http://www.regulations.gov/docs/FactSheet_Public_Comments_Make_a_Difference.pdf) [<http://perma.cc/64GV-NRXC>] (last visited Apr. 2, 2016) (listing (among others) the "[d]emocratic [p]rinciples" of legitimacy, responsiveness, acceptance, and public interest, as reasons that "[p]ublic participation matters"). Myriad scholarly works refer to the democratic nature of public participation. See, e.g., Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, 57 L. & CONTEMP. PROBS. 127, 129 (1994) ("Indeed, rulemaking procedures are refreshingly democratic: people who care about legislative outcomes produced by agencies have a structured opportunity to provide input into the decisionmaking process."); Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1343–45 (2011) (collecting praise for rulemaking's democratic nature); Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons From*

be valuable because democratic practices are themselves viewed as virtuous. And participation may be especially valuable in the administrative state, which has long battled perceived illegitimacy—the fear that broad-scale governance by unelected bureaucrats does not comport with our constitutional system.<sup>89</sup> If participation is democracy-enhancing, the thinking goes, it may help to shore up agencies' fragile legitimacy.

Democracy, of course, has multiple meanings,<sup>90</sup> and much of the praise of participation's democratic value is vague about what sort of democracy it envisions. Moreover, with important exceptions noted below, those who espouse the democracy justification seldom delve into the difficult question of how agencies should factor public input into their decisions. Here I tease out different schools of thought on how participation may translate into democratic virtue—one envisioning agencies as passive venues for interest group bargaining and others that call for agencies to respond to public input. Because each of these schools of thought calls for agency actions ultimately to track majoritarian preferences, each rests on an assumption that groups feature second-order

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*Administrative Law*, 59 UCLA L. REV. 1188, 1244 (2012) (describing rulemaking as enhancing “democratic legitimacy”). In the courts, *see, e.g.*, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 778 (1969) (Douglas, J., dissenting) (“Public airing of problems through rule making makes the bureaucracy more responsive to public needs . . . .”); *Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1503–04 (D.C. Cir. 1989) (Starr, J., dissenting) (noting “the ready analogy between rulemaking’s notice-and-comment procedures and the democratic process”); *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 951 (D.C. Cir. 1987) (Starr, J., dissenting) (noting that the public participation fostered by notice-and-comment rulemaking serves “democratic values,” and acts as a “Congressionally mandated proxy for the procedures which Congress itself employs in fashioning its ‘rules’”); *Chamber of Commerce of U.S. v. Occupational Safety & Health Admin.*, 636 F.2d 464, 470 (D.C. Cir. 1980) (“[H]ighhanded agency rulemaking is more than just offensive to our basic notions of democratic government; a failure to seek at least the acquiescence of the governed eliminates a vital ingredient for effective administrative action.”); *Pharm. Mfrs. Ass’n v. Kennedy*, 471 F. Supp. 1224, 1235 (D. Md. 1979) (“The goal of rulemaking is to generate the discussion and comment crucial to informed democratic decisionmaking.”). To be sure, not everyone espouses the notion that participation consistently advances or should advance democracy. Jim Rossi has thoughtfully analyzed how too much participation can in fact impede deliberation. *See* Rossi, *supra* note 54. And Edward Rubin has argued for abandoning the “outmoded” and “emotionally resonant” term “democracy” when discussing administrative participation and speaking instead of the extent to which “administrative interaction” serves societal goals. Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 791–92 (2001).

89. *See, e.g.*, Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987 (1997) (“Like an intriguing but awkward family heirloom, the legitimacy problem is handed down from generation to generation of administrative law scholars.”); Seifter, *supra* note 44, at 445 n.4 (collecting sources).

90. *See* Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795, 795 (1999) (“[D]emocracy is an essentially contested concept: there is not just one, but rather a plurality of competing conceptions of democracy . . .”).

participation—specifically, that interest groups faithfully channel the preferences of those they purport to represent.

**a. Populist Pluralism and Interest Representation**

The first democratically oriented justification for participation, now largely out of vogue,<sup>91</sup> flows from what Richard Stewart termed “interest representation”—the administrative law incarnation of a strand of pluralism.<sup>92</sup>

By way of brief review, pluralist theories, rooted in early twentieth century thought,<sup>93</sup> surged in prominence after World War II.<sup>94</sup> As a descriptive matter, pluralism posited that government makes policy by implementing the preferences that result from conflict and compromise between interest groups.<sup>95</sup> Normative backers embraced this account as a desirable way to ensure that policy reflects relevant interests.<sup>96</sup> Interest groups were, obviously, a key piece of the puzzle and were viewed with a now-unfamiliar optimism.<sup>97</sup> On this view, Tocquevillian in its affection for groups,<sup>98</sup> the interest group universe contributed to meaningful expression, political stability, and the absence of coercion.

One strand of pluralism, which Dan Kahan calls the “populist” strand,<sup>99</sup> took hold in administrative law. Whereas the “market variant” of pluralism focuses on preference intensity, and thus rewards the most organized or powerful voices,<sup>100</sup> the populist approach views pluralism as a means of aggregating the preferences of the entire electorate,<sup>101</sup> in this sense reflecting a majoritarian

91. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2266 (2001); see also Seifter, *supra* note 44, at 498.

92. See Stewart, *supra* note 34, at 1723.

93. See generally ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT* (1908); GREGOR MCLENNAN, *PLURALISM* 32 (1995) (describing early 20th century contributions).

94. For a history, see Schiller, *supra* note 5, at 1399.

95. For seminal works, see generally, for example, ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* (1967); DAVID TRUMAN, *THE GOVERNMENTAL PROCESS* (1971).

96. See, e.g., Dahl, *supra* note 95.

97. See Schiller, *supra* note 5, at 1399 (explaining that because “special interests” are now viewed “with a profoundly jaundiced eye,” it is “difficult to recapture the enthusiasm with which postwar thinkers”—including “Daniel Bell, Seymour Martin Lipset, Oscar Handlin, Daniel Boorstin, John Kenneth Galbraith, and Arthur Schlesinger (both father and son) applauded” the interest group).

98. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 218 (Henry Reeve trans., Bantam Books 2000) (1835).

99. See Kahan, *supra* note 90, at 796 (distinguishing between populist and market pluralism).

100. *Id.* at 796, 798; see also Elhauge, *supra* note 81, at 64–65 (explaining how interest group involvement may “offset” potential “majoritarian exploitation” by enabling well-organized, vocal minorities to prevail).

101. Kahan, *supra* note 90, at 796, 798.

view.<sup>102</sup> This is the intellectual foundation for the participation revolution that occurred in the 1960s and 1970s in administrative law.<sup>103</sup> Courts sought to open the process to a wider range of participants than just regulated parties to achieve legitimacy through “fair representation for all affected interests.”<sup>104</sup> They did this by broadening standing doctrine to allow challenges to agency action by regulatory beneficiaries;<sup>105</sup> expanding, in parallel, the criteria for participating in agency proceedings;<sup>106</sup> strengthening the presumption of judicial review of agency action;<sup>107</sup> strengthening procedural requirements for rulemaking;<sup>108</sup> and robustly interpreting other procedural statutes to foster public interest participation.<sup>109</sup> I discuss some of these doctrines, and others, in Part III. The point here is that these changes all sought to use participation to facilitate majoritarian decisionmaking.

But populist pluralism faced substantial criticism, both outside the administrative law literature and within it.<sup>110</sup> A primary worry was that the “chorus” might sing with an “upper-class accent”<sup>111</sup>—that is, that privileged groups would continue to dominate others even when the process was nominally open to all, such that greater opportunities for interest group sparring would

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102. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1543 (1988) (noting that “pluralism is committed to familiar conceptions of majority rule” in the sense that it merely aggregates existing citizen preferences and translates them into law).

103. See, for example, Garland, *supra* note 34, at 510–11, and Stewart, *supra* note 34, at 1760–61, for a description of how administrative law transformed from protecting the autonomy of regulated parties to interest representation.

104. Stewart, *supra* note 34, at 1688, 1712; see also Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 986–87 (1982) (stating that the “intended function” of greater participation before reviewing courts “is to promote political accountability by producing policies that correspond to the will of the public as a whole, or at least to the full range of interests affected by regulatory decisions”).

105. See, e.g., *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153–55 (1970); *Scenic Hudson Pres. Conference v. Fed. Power Comm’n*, 354 F.2d 608, 615–17 (2d Cir. 1965); Stewart, *supra* note 34, at 1723–47.

106. See *Office of Commc’n of the United Church of Christ v. FCC*, 359 F.2d 994, 1001–03 (D.C. Cir. 1966).

107. See *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967); Stewart, *supra* note 34, at 1813.

108. The most aggressive of these decisions were rejected in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), but others linger today in, for example, *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973). See generally Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1094 (1997).

109. See Merrill, *supra* note 108, at 1040 (discussing judicial interpretation of the National Environmental Policy Act and the Freedom of Information Act).

110. See generally, e.g., THEODORE J. LOWI, *THE END OF LIBERALISM* (1969); GRANT MCCONNELL, *PRIVATE POWER & AMERICAN DEMOCRACY* (1966). In the administrative law context, see Stewart, *supra* note 34.

111. E. E. SCHATTSCHEIDER, *THE SEMI-SOVEREIGN PEOPLE* 34–35 (1975).

exacerbate, rather than alleviate, power imbalances.<sup>112</sup> Others feared that reliance on interest groups only fueled the fire of agency capture.<sup>113</sup> And a smaller group noted a point relevant to this Article—that interest groups themselves were suspect as a medium, and their faithful representation of a constituency was questionable at best.<sup>114</sup>

But the legacy of populist pluralism—that of fostering bargaining among all affected parties—remains central to administrative procedure.<sup>115</sup> Even as additional principals beyond the public are built into theories of agency legitimacy,<sup>116</sup> the structure of participation still bespeaks a hope that popular participation will keep agencies in line with the public will. Interest groups remain the primary vehicles for fulfilling that hope.

#### b. Agencies as Responsive Actors

A different version of participation's democratic virtue, reflected in more modern thinking, casts agencies not as merely passive sites for bargaining, but rather as independent actors that do or should make decisions that are responsive to the popular will.<sup>117</sup>

This vision, too, is majoritarian, though not all people who subscribe to it embrace majoritarianism to the same extent. At one end of the spectrum, some have proposed making popular input dispositive, at least on certain issues. Perhaps the leading statement of this view comes from Jerry Frug, whose essay *Administrative Democracy* recommends introducing popular governance into the

112. See *id.*; see also SCHLOZMAN & TIERNEY, *supra* note 55.

113. See Schiller, *supra* note 5, at 1412–14 (describing capture-based critiques of pluralism).

114. Perhaps most notably, Robert Michels's iron law of oligarchy posited that all large groups would ultimately rule oligarchically, inevitably putting the interests of the groups' leaders ahead of its members'. See MICHELS, *supra* note 14, at 25–43, 377. This theory has occasionally been mentioned—though seldom focused on—in the administrative law literature. See, e.g., Stephen F. Williams, *Risk Regulation and Its Hazards*, 93 MICH. L. REV. 1498, 1506 (1995) (reviewing STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: EFFECTIVE RISK REGULATION* (1993)) (noting, with reference to Michels's theory, the possibility that interest group leaders may “shirk”—put their own interests ahead of those of their members).

115. See Wagner et al., *supra* note 45, at 100–01 (“While there are disagreements about whether interest group representation is the best way to ensure government accountability, there are few disagreements that this is currently the method of choice in administrative law.”); see also Gabriel H. Markoff, Note, *The Invisible Barrier: Issue Exhaustion as a Threat to Pluralism in Administrative Rulemaking*, 90 TEX. L. REV. 1065, 1066 (2012) (“If federal administrative law were a building, its foundation would be pluralism.”).

116. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 469–92 (2003) (describing different models of the administrative state); Seifter, *supra* note 44, at 480 & fig.1 (summarizing leading theories of administrative legitimacy).

117. See, e.g., Mendelson, *supra* note 88, at 1350 (“Generally, a government action might be characterized as democratically responsive to the extent it reflects and expresses the popular will.”).

bureaucracy through a combination of decentralization and other mechanisms, such as governing boards with public representatives, modified juries, or binding public hearings.<sup>118</sup> Other scholars, like Nina Mendelson, posit that public input should not be controlling, agreeing with judicial decisions rejecting that possibility,<sup>119</sup> but argue that agencies must act with “especial attention” when a strong majority or supermajority of comments expresses a particular viewpoint and meets certain other criteria.<sup>120</sup> Further down on the spectrum is the view that agencies should consider public preferences in agency decisionmaking, but should follow them only if they square with other legal requirements, such as reasoned decisionmaking and expertise. In the words of Cynthia Farina and her coauthors, this amounts to “deliberative” rather than “electoral” democracy.<sup>121</sup> Finally, under the civic republican strand of deliberative democracy, participation facilitates the engaged deliberation—and ultimately community agreement—that allows agencies to follow the “public interest” or “common good.”<sup>122</sup> In all of these democracy-infused proposals, a key purpose of participation is to

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118. Jerry Frug, *Administrative Democracy*, 40 U. TORONTO L.J. 559, 570–73, 580 (1990); see David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1513 (2013) (arguing that the use of “administrative juries” could help agencies better reflect public preferences); see also Reeve T. Bull, *Making the Administrative State “Safe for Democracy”: A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611, 616, 633 (2013) (describing a “referendum model” in which agencies would make decisions “favored by the largest number of commenters,” but expressing support for non-binding “citizen advisory committees”).
  119. Mendelson, *supra* note 88, at 1374 (“The judicial opinions saying agencies need not do this are clearly correct.”).
  120. See *id.* at 1375. Such special consideration might involve additional steps to further explore public opinion, randomly selected civil juries to provide input, or “elevat[ion] [of] the issue within the executive branch.” *Id.* at 1377.
  121. See Farina et al., *supra* note 61, at 139. Farina et al. emphasize that “rulemaking isn’t a plebiscite” and that more participation in rulemaking is desirable only if the input meets certain criteria. See *id.* at 139; see also Bierschbach & Bibas, *supra* note 19, at 23 (noting that participation “bolsters agency decision-making’s democratic pedigree” by “requiring agencies to ‘balanc[e] all elements essential to a just determination of the public interest’” (quoting *Air Line Pilots Ass’n, Int’l v. Civil Aeronautics Bd.*, 475 F.2d 900, 905 (D.C. Cir. 1973))).
  122. See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1574 (1992). To be sure, Seidenfeld and others frame civic republicanism as a possible antidote to majoritarian tyranny, see *id.*, but this does not preclude civic republicanism from being substantially majoritarian. Because civic republicanism, unlike pluralism, embraces post- and not pre-deliberative agreements and requires participants to collaborate on visions of the common (not just personal) good, it is at its best when deliberation produces a new (majoritarian, if not unanimous) agreement that will best serve all interests. See Sunstein, *supra* note 102, at 1554 (describing the “republican belief in agreement as a regulative ideal”). Short of that ideal, it still tolerates deals among groups. See Seidenfeld, *supra* note 122, at 1532; Sunstein, *supra* note 102, at 1555.



require agencies—to varying degrees and with different levels of independent judgment—to attend to the popular or majority will.<sup>123</sup>

### c. Democracy and Second-Order Participation

Second-order participation is critical to both strands of the democratic-legitimation camp. Because these democratic rationales want agencies to respond to majoritarian input, the interest groups providing that input must actually channel the views of the public. In other words, the participation-as-democracy account depends almost entirely on how well (if at all) participants channel the will of the public majority.<sup>124</sup>

The populist pluralists made this assumption about interest group behavior explicit. The vision, again, was that interest group participation would channel the interests of all affected by regulation; that is how it could serve as a vehicle for majoritarian decisionmaking. And although the scholars in the more contemporary democratic-legitimacy camp do not always say so directly, their praise of participation as making agencies more responsive to the public will also hinges on the assumption that interest groups, as the participants, convey the public will.

To determine whether these assumptions hold, we need to know whose voices interest groups convey, and we therefore need to consider second-order participation. In a proceeding like rulemaking, in which a sea of interest groups stands in for the broader public, second-order participation tells us whether we hear the voices of one hundred representatives of the whole, one hundred individuals with their own agendas, or something in between. In a proceeding like advisory committees or negotiated rulemaking, where a handful of groups are selected as representative of particular slices of the public, it tells us whether those groups are qualified for the task. And in areas like private standard setting, where a single entity is permitted to make decisions on behalf of a broader group of affected persons, second-order participation tells us whether

123. Cf. David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 *FORDHAM L. REV.* 81, 102 (2005) (arguing that rules promulgated with more public participation should get more judicial deference, because, among other reasons, “[c]itizen participation via democracy index rulemaking can also be a means of continually aligning administrative law with community norms”). Still other democracy-focused treatments of participation emphasize other issues, like the importance of including the lay public in agency decisionmaking. See, e.g., Cuéllar, *supra* note 79, at 416–17. And Ronald Krotoszynski argues that the ability to participate in government decisionmaking, in the sense of voicing concerns and receiving an answer, is constitutionally mandated. RONALD J. KROTOSZYNSKI, JR., *RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, “OFFENSIVE” PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES* (2012).

124. For ease of discussion, I will hold off on interrogating the meaning of representation until Part II.

the chosen entity is competent to act for others. In short, second-order participation reveals whether the objectives of the democratic-legitimacy school of public participation are rhetoric or reality.

The democracy rationale, then, is one in which second-order participation plays a direct and critical role. If second-order participation does not exist, the democracy rationale for first-order participation—so commonly touted as participation’s core justifications—falls mostly away.<sup>125</sup>

## 2. Expertise

### a. The Rationale: Better and More Informed Decisions

A second rationale for valuing participation in the administrative process is its ability to enhance agency expertise by providing information that the agency might not otherwise have. Administrators are specialists, but they are of course not omnipotent.<sup>126</sup> Instead, agencies must go out and acquire expertise,<sup>127</sup> and they depend heavily on participants for the information that is “the lifeblood of regulatory policy.”<sup>128</sup>

This information can take multiple forms. In some cases, the information may be technical—for example, information from regulated entities about their existing performance, or data from those seeking regulation regarding the harm to be alleviated. But the information shared through participation need not be technical to be useful. It may be information that is “dispersed in space or time,”

125. I do not mean to suggest that second-order participation alone will guarantee the fulfillment of the democracy rationale; as others have documented, agencies may engage with a skewed selection of groups, such that even representative groups do not convey the views of a majority of the public. *See, e.g.,* Yackee & Yackee, *supra* note 60. But groups acting as representatives of some constituency is a necessary first step.

126. James Landis famously viewed administration as a science that could be resolved objectively by expert administrators. *See* JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 154–55 (1938). In turn, scholars have recognized—while also criticizing it as unrealistic—an expertise-based model of legitimacy, in which the dispassionate knowledge of professional bureaucrats was sufficient to constrain agency discretion. *See* Seifter, *Legitimacy*, *supra* note 44, at 488–89.

127. *See* *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 777–78 (1969) (Douglas, J., dissenting) (“Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice.”); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 *HARV. L. REV.* 1422, 1426 (2011).

128. Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 *MINN. L. REV.* 277, 277 (2004); *see also* Richard Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking Via Pre-Notice Transparency*, 47 *WAKE FOREST L. REV.* 681, 689–90 (2012) (“When an agency turns to policymaking, it must obtain relevant information concerning the problems it confronts. The primary source of this information will generally be, naturally enough, industry contacts.”); Wagner, *supra* note 71, at 1380 (“In most complex rulemakings, the agency appears to be quite dependent on knowledgeable stakeholders to educate it about critical issues peculiarly within their grasp.”).

such that multiple participants can gather it more easily than a single agency.<sup>129</sup> It can also be information about how strongly and widely a particular view is held or simply about what affected individuals think of a given rule.<sup>130</sup> Indeed, often the most important information participants share is about who believes what, with interest group affiliations serving as apparent proxies for sectors or constituencies.<sup>131</sup> Interest group contributions thus routinely begin with statements regarding the breadth of the stakeholders that share the concern at issue.<sup>132</sup>

Like the democracy rationale, the expertise rationale is built into modern administrative law. The desire to enhance agency expertise was a central reason the Administrative Procedure Act provided for participation in rulemaking.<sup>133</sup> It also underlies other familiar facets of the administrative process, such as the reliance on advisory committees to provide input to agencies<sup>134</sup> and the incorporation into federal regulation of standards set in the private sector.<sup>135</sup>

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129. Biber & Brosi, *supra* note 25, at 325 (noting that such information is a common attribute in environmental regulation); *see also* Office of Comm'n of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966) ("The [FCC] of course represents and indeed is the prime arbiter of the public interest, but its duties and jurisdiction are vast, and it acknowledges that it cannot begin to monitor or oversee the performance of every one of thousands of licensees.").

130. *See, e.g.*, Bierschbach & Bibas, *supra* note 19, at 23 (noting that participation "enhances the soundness of agency decisions by improving the quality and variety of the information an agency considers, whether empirical or related to the public's preferences"); Yackee, *The Politics of Ex Parte Lobbying*, *supra* note 60, at 377–78 (distinguishing between "technical" and "political information").

131. *See, e.g.*, ANDREW RICH, THINK TANKS, PUBLIC POLICY, AND THE POLITICS OF EXPERTISE 12 (2004) (noting that interest groups (unlike think tanks) can "rely on the size or strength of a voting constituency to carry weight and influence with policy makers," and that "[w]hile the AARP might produce research . . . millions of older Americans provide their central and strongest organizational leverage for influencing policy"); Fox, *supra* note 23 ("When you set a rule out for public comment, whether it involves air pollution or highway safety or health care, you will often get comments saying, 'This section is going to hurt small business,' or, 'This provision could be changed in a way to get the public safety impact doubled.' Those are phenomenally helpful." (quoting former OIRA Administrator Cass Sunstein)).

132. *See infra* notes 172–173 (gathering examples).

133. *See* COMM. ON ADMIN. PROCEDURE, *supra* note 1, at 102–03 (discussing participation and stating that rulemaking procedures "should be adapted to eliciting, far more systematically and specifically than a legislature can achieve, the information, facts, and probabilities which are necessary to fair and intelligent action").

134. Bybee, *supra* note 33, at 58 ("The obvious and publicly invoked justification for advisory committees is the government's genuine need for information or advice, which the committees can provide at relatively little cost to the government."). As Judge Bybee notes, advisory committees also have a democratic strain, seeking to "bring[] bureaucracy into closer accord with those it must govern." *Id.* at 58 (quoting E. PENDLETON HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST 349 (1936)).

135. *See* Bremer, *supra* note 63, at 140 (identifying reasons for using private standards, including expertise).

### b. Expertise and Second-Order Participation

Second-order participation and interest group governance are also relevant to the expertise justification for participation, albeit in more subtle ways. First, as noted, when it comes to the expertise value of participation, whether the group represents the membership it purports to speak for is often the whole ballgame. That is because, again, a common focus of participant contributions—in settings from rulemaking to advisory committees—is telling the agency how a particular set of stakeholders will be affected or what they think. That is information about a particular swath of the public, and it may be baseless or deceiving if there is no public behind it. Thus, some amount of member engagement is ordinarily a prerequisite to this form of expertise.<sup>136</sup>

Second, even where the content of a group's contribution seems divorced from a constituency—say, the question of how many lives a particular safety measure might save—information about second-order participation matters, because it is important to evaluating reliability. A group's funding and membership structure, or the way that it acquires or generates its information, may indicate that it has a relevant but unrevealed bias or that the information is unsound.<sup>137</sup> This is thought to be a problem, for example, with so-called astroturf groups—those that claim a grassroots cause but in fact have a hidden agenda.<sup>138</sup> To assess the reliability of interest group contributions, agencies need access to indicia of their reliability. This need has been recognized in an array of other

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136. In turn, there can be overlap between democratic- and experience-based rationales for participation: Whether interest groups actually convey constituents' interests affects not only how representative they are for democratic purposes, but also how valid their information is. See Wagner, *supra* note 1, at 674–75 (describing how “robust participation” fosters both engagement with public views and decisions that are based on “a more complete base of information”). Participation as information-sharing has other benefits, too. As Jim Rossi points out, the information shared through participation does not just enable participants to educate administrators; it can also allow administrators to educate participants and participants to educate each other. See Rossi, *supra* note 54, at 187. And in turn, participation may reduce future conflict, facilitate compliance, and reduce enforcement costs. See Gellhorn, *supra* note 1, at 361 (stating that public participation “can ease the enforcement of administrative programs relying upon public cooperation”).

137. See generally THOMAS O. MCGARITY & WENDY E. WAGNER, *BENDING SCIENCE: HOW SPECIAL INTERESTS CORRUPT PUBLIC HEALTH RESEARCH* 38–40 (2008) (describing ways that “advocates can . . . manipulate, undermine, suppress, or downplay unwelcome scientific research”).

138. See generally Lloyd Hitoshi Mayer, *What Is This “Lobbying” That We Are So Worried About?*, 26 YALE L. & POL'Y REV. 485, 559 (2008) (describing astroturf groups); Jonathan C. Zellner, Note, *Artificial Grassroots Advocacy and the Constitutionality of Legislative Identification and Control Measures*, 43 CONN. L. REV. 357, 362 (2010).

contexts, such as in a court's ability to evaluate evidence<sup>139</sup> and a police officer's ability to rely on an anonymous tip.<sup>140</sup> In the context of interest group participation, it requires agencies to consider things like second-order participation, with an eye to the group's structure and funding.

Critically, agencies are not the only audience for this information. An essential theme in administrative law is that agencies must be supervised and that they have many principals, including Congress, courts, the media, and the public.<sup>141</sup> When these principals cannot evaluate how agencies are using information—information about whom they engage, whom they believe, or whom they ignore—they are impeded in their supervisory role. Here, an apt analogy is to reasoning that dominates disclosure in the campaign finance context. As the U.S. Supreme Court has repeatedly recognized, a core reason to uphold disclosure requirements regarding political contributions and advertisements is the importance of “provid[ing] the electorate with information” that will allow them to better evaluate the information they digest, especially where groups may “hid[e] behind dubious and misleading names.”<sup>142</sup> So too with administrative participation: Agencies' principals, including the public, need information that will allow them to make more informed judgments about the inputs into agency decisionmaking.

### 3. Checking Agency Action

#### a. The Value of Checking

A related strain of thought values participation for its ability to create pushback against agency action. The defining feature of this school of thought is that participation acts as a check on government excess and unwelcome agency decisions. Unlike the democracy justification described above, the checking function need not foster majoritarian decisionmaking or be concerned with the popular will, although it may do so. Instead, just as valuably, a vocal minority can act as a check against otherwise majoritarian action. What matters, on this view, is that participation forces agencies to jump through hoops of resistance before reaching decisions, creating a checked, constrained governance

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139. See, e.g., *Parhat v. Gates*, 532 F.3d 834, 847 (D.C. Cir. 2008) (noting, *inter alia*, that a factfinder must be able to assess the reliability of the evidence to determine whether a party has met an evidentiary burden).

140. See, e.g., *Florida v. J.L.*, 529 U.S. 266 (2000).

141. See, e.g., *Kagan*, *supra* note 91, at 2246.

142. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 367 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)).

even absent formal vetoes.<sup>143</sup> Indeed, Jon Michaels has argued that the elevation of civil society to the role of agency watchdog is one pillar of a new system of checks and balances that has emerged with respect to the administrative state.<sup>144</sup> On this view, public participation supplies one way—and as Michaels explains, an ongoing, practical way<sup>145</sup>—to “police the administrative process.”<sup>146</sup> In turn, participation can provide what many believe is most needed in administrative lawmaking: a check against tyrannical, runaway agencies.<sup>147</sup>

The checks participation provides might play out in a number of ways. Public participation can force agencies to rethink initial inclinations, counter tunnel vision, and impede agency power grabs.<sup>148</sup> It may do this, as positive political theorists have taught, by enabling interest group participants to sound “fire alarms” that get Congress’s attention,<sup>149</sup> but it may also check agency action simply by creating blips in the record for judicial review, swaying public opinion, or otherwise gumming up the works of the decisionmaking process. In these ways, participation may foster the Madisonian virtue of avoiding exploitative government power.<sup>150</sup>

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143. Cf. Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 532 (2010) (“[B]urdensome though administrative procedures can be, they do not involve the same types of ‘vetogates’ entailed in getting legislation through Congress and signed by the President.”).
  144. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 530 (2015) (describing “a new separation of powers” that “elevat[es] civil servants and members of the general public and furnish[es] them with the resources to challenge and constrain agency leaders”).
  145. See *id.* at 533–34 (discussing the checks imposed by civil society (and the civil service) as “durable” and “consistent,” and “more reliable and immediate than anything that the legislature or courts could regularly do”).
  146. 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. (forthcoming 2016) (manuscript at 50) (on file with author).
  147. See, e.g., *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) (“It would be a bit much to describe the result as ‘the very definition of tyranny,’ but the danger posed by the growing power of the administrative state cannot be dismissed.”).
  148. See, e.g., Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 263 (1986) (“Even where agencies have not accepted the views of the public, or where courts have declined to overturn agency determinations, public participation has deterred the agencies from straying too far from their assigned missions.”).
  149. See Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166, 176 (1984); see also Jacob E. Gersen & Anne Joseph O’Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1172 (2009) (“Most oversight of agency action occurs through threats by interest groups to sound a fire alarm to Congress because such oversight is cheaper than direct police patrolling, such as regular hearings and investigations by congressional members.”).
  150. See, e.g., THE FEDERALIST No. 51, at 291 (James Madison) (Clinton Rossiter ed., 1999) (prescribing mechanisms “to guard the society against the oppression of its rulers”).

Also in the Madisonian spirit, participation-as-checking is thought to mitigate abuse not just by agencies themselves, but by other participants in the process.<sup>151</sup> Active participation from diverse entities can lessen the risk that factional interests dominate, or even capture,<sup>152</sup> agency decisions.<sup>153</sup> Because such checking often involves questioning the claims or credibility of a particular participant, it is closely tied to the expertise rationale.

Like the other rationales discussed above, the checking rationale, and its anti-capture logic, motivated many extant administrative procedures. Indeed, as Thomas Merrill has explained, many of the same innovations that were part of the democratization of administrative procedure in the 1960s and 1970s—expanded standing, presumed judicial review, and so on—can be understood as judicial attempts to mitigate agency capture.<sup>154</sup>

#### **b. Checking and Second-Order Participation**

Second-order participation plays a similar role in the checking rationale as in the expertise rationale—subtle, but important. One might initially suppose that no particular form of internal governance or participation within interest groups is a prerequisite to a group's ability to resist government action. After all, one could implement a check on agency action without participation at all—say, through appointed inspectors general, stringent OIRA review, procedural veto-gates, and so on.

Yet the vision of public participation as a form of checking agency action requires more. First, to those who believe that interest group checking can improve administrative governance, the makeup of civil society matters. Unlike the participation-as-democracy approach, the checked-government camp does not prioritize majoritarian decisionmaking. But if all participants are on the same team, or speak only for a small subset of interested parties, the checking function will not work at its best.<sup>155</sup> Madison's vision of counteracting powers is best

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151. See THE FEDERALIST No. 10 (James Madison) (discussing safeguards against factions).

152. For a recent treatment, see DANIEL CARPENTER & DAVID A. MOSS, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (2014).

153. See, e.g., Rossi, *supra* note 54, at 184–85 (discussing the possibility that participation may reduce the dominance of factions).

154. See Merrill, *supra* note 108, at 1043 (stating that judges between 1967 and 1983 “thought that by changing the procedural rules that govern agency decisionmaking and by engaging in more aggressive review of agency decisions they could force agencies to open their doors—and their minds—to formerly unrepresented points of view, with the result that capture would be eliminated or at least reduced”).

155. See Michaels, *supra* note 144, at 548–51 (describing civil society as a “broad, diverse, and inclusive community,” and noting that “uneven” participation may not advance the administrative separation of powers as effectively).

realized when entities speaking for diverse interests act at odds with each other.<sup>156</sup> Yet if interest groups lack members or are devoid of internal participation, the only voices likely to be heard are those of the group's management-level actors, not a broader constituency of citizens.<sup>157</sup>

Moreover, even when internal engagement itself is not required, an accounting of second-order participation is. For one thing, a system in which interest groups are charged with pulling fire alarms functions best—that is, Congress and others listening to the alarms are best positioned to evaluate and respond—if they have some sense of the identity of the alarm-puller. In particular, on many issues it will matter whether the complaint being raised is shared by many constituents or few, whether the group is credible, and whether the group has hidden agendas.

Moreover, the vision of participation-as-check is about more than just fire alarms. In Jon Michaels' account, civil society's engagement with agencies forms but one aspect of a tripartite "administrative separation of powers," in which civil society, the civil service, and agency leaders replicate the "rivalrous checks and balances" of the tripartite constitutional design.<sup>158</sup> On this view, the systemic consequences of checking matter, because an ultimate goal of administrative checks and balances is a more accountable government.<sup>159</sup> This requires not just interest groups to effect pushback, but the other institutional players to do so as well. And for that give-and-take to work, each player must have a sense of its target or ally. A watchdog operates most effectively if it knows whether an opposing group has a broad constituency or a narrow one, whether the information the group peddles is impartial or slanted by a particular mission or donor, and so forth.

#### 4. Participation as Civic Engagement

Finally, some commentators have heralded participation for its ability to enhance individuals' experience as citizens and forge more meaningful

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156. See HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 195 (1967) ("The crucial hope is that in a large state there will be more separate interests, and therefore less likelihood that they can combine for effective factious action.").

157. KAY LEHMAN SCHLOZMAN ET AL., *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* 380 (2012) ("Not only are the well educated and affluent more likely to be affiliated with political organizations but, even among members, they are also more likely to be active in those organizations and to serve on the board or as officers.").

158. Michaels, *supra* note 144, at 561.

159. See, e.g., *id.* at 520 (describing the "administrative separation of powers" as part of "the constitutional tradition of employing rivalrous institutional counterweights to promote good governance, political accountability, and compliance with the rule of law").



connections between individuals and their communities, thereby enhancing civic life for all.<sup>160</sup> In this view, an individual who actively participates in some aspect of agency decisionmaking—say, negotiated rulemaking or a citizen advisory committee—may come away with a renewed sense of her community and her role in self-government.<sup>161</sup> She may enjoy the experience and feel more invested in civic life. In turn, she may be a better neighbor and more likely to pitch in to redress issues of public concern. If everyone behaved in this way, society may be more effective, more rewarding, and more peaceful.<sup>162</sup>

Second-order participation is crucial to this rationale. According to scholars like Theda Skocpol and Robert Putnam, the act of engaging in civic life—in reflecting, collaborating, and contributing to common dialogue and activity—enriches the experience of both the individual and community.<sup>163</sup> The political scientist Robert Salisbury, too, has explained how it is specifically the interaction of “belong[ing] to and tak[ing] part in” a group—not just sending money to it—that “enrich[es] the citizenship” of group members.<sup>164</sup> If that is true, then first-order participation actually cannot serve its goals without second-order participation. Group members must actually engage in the group in some way to reap the purported rewards.<sup>165</sup>

## II. UNDERSTANDING SECOND-ORDER PARTICIPATION

Given its centrality to the leading justifications for first-order participation in administrative law, second-order participation deserves greater attention. This is a problem, because administrative law’s discourse and doctrine currently do not consider second-order participation at all. This Part provides a start. It examines the landscape of second-order participation, developing a taxonomy of interest group operations with second-order participation in mind. Ultimately,

160. See, e.g., ROBERT PUTNAM, *BOWLING ALONE* 20 (2000); SKOCPOL, *supra* note 13, at 24–29.

161. Cf. Rossi, *supra* note 54, at 188 (discussing the ability of participation to “help produce better citizens by inspiring a sense of civic responsibility”).

162. Participation may also be an end in itself in the sense that it is viewed as a component of good and fair governing or due process. See *id.* at 187.

163. See PUTNAM, *supra* note 160, at 20 (describing social capital—the resource that is lost with waning civic engagement—as having both private and public benefits); SKOCPOL, *supra* note 13, at 24–29 (discussing, *inter alia*, the societal inequities and loss of “sense of brotherhood or sisterhood” caused by decreased civic engagement).

164. Robert H. Salisbury, *On the Concept of Interest Group Member* (unpublished manuscript presented at the Annual Meeting of the Midwest Political Science Association in Chicago, Political Science Paper No. 257, April 1995) (on file with author).

165. See *id.* at 6 (“Policy advocates without members and organizations that ask only for money from their supporters . . . do not serve this pluralist purpose of enriching the citizenship of their members.”).

this examination reveals a deeper problem: Most of what participation's rationales implicitly assume about interest groups is either wrong or incomplete. In particular, each of the four rationales—some always and some under certain conditions—requires groups to be representative in some meaningful way, but many groups are not. Moreover, the expertise and checking rationales assume away important variables regarding how the information groups share is developed and funded. And as Part III describes, a number of procedures and doctrines built on those rationales fall prey to the same flaws.

#### A. The Myth of Representation

Among those who have considered the role of interest groups as key conduits in administrative participation, the leading rationalization for the status quo is that groups self-police. The logic goes as follows: It is important that groups actually represent their members when they participate in agency decisionmaking, and the requisite representativeness is ensured by voice and exit. Specifically, members' ability to influence group decisionmaking or leave if they are dissatisfied ensures that groups function in representative fashion. The political scientist Terry Moe has summed up "traditional" pluralist thinking on the topic this way: "Because members are presumed to join and quit on the basis of their group goals, the pluralist logic of membership ensures that group goals will reflect member preferences."<sup>166</sup> In theory, voice and exit obviate any attention to how interest groups work: "Internal political processes are not of consequence in this respect," Moe continues, "since . . . member turnover (the exit of dissenters, the recruitment of supporters) will guarantee the group's representativeness in the long run."<sup>167</sup>

This traditional view is sometimes echoed in doctrine. For example, it animates associational standing, both in litigation challenging agency action and beyond. It explains why, even as courts broadened standing to create a greater role for interest groups, courts did not find it necessary to impose any specific representational obligations on such groups: "because it is assumed that, in order to survive, an organization must effectively represent the interests of a substantial proportion of its members, and that any member who objects strenuously to the representation afforded can resign."<sup>168</sup> Similarly, one court stated: "The ability of an organization's constituents to join or quit the group would appear to be a very

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166. TERRY M. MOE, *THE ORGANIZATION OF INTERESTS* 73 (1980). Moe goes on to depart from the traditional view, explaining that individuals' varied motivations for joining and quitting groups makes the availability of exit nondispositive of a group's representativeness. *See id.* at 73–74.

167. *Id.* at 73.

168. Stewart, *supra* note 34, at 1743.

effective means of ensuring the responsiveness of the organization's management . . . ."<sup>169</sup>

Interest groups' own statements fuel the myth of representation. As noted, the claim to speak for a constituency—sometimes a numerous or powerful constituency—is often an interest group's strongest currency. It is therefore typical for groups to frame their participatory contributions around their representative role. The Chamber of Commerce, a frequent administrative participant, presents itself as speaking for "American enterprise," and "represent[ing] the interests of more than 3 million businesses of all sizes, sectors, and regions,"<sup>170</sup> and courts have sometimes credited the Chamber's representative nature.<sup>171</sup> The National Wildlife Federation claims nearly six million "members,"<sup>172</sup> and it advocates before agencies on the premise that it represents millions of "conservation-minded hunters, anglers, and outdoor enthusiasts nationwide."<sup>173</sup> The National Federation of Independent Business (NFIB) identifies itself as "the nation's leading small-business advocacy association, representing members in Washington, D.C. and all 50 state capitals" and counting "about 350,000 [members]."<sup>174</sup> The same sorts of statements about representation are made by interest groups of all stripes and political views. Currently, administrative law mostly takes them at face value.

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169. *Citizens Coal Council v. Matt Canestrone Contracting, Inc.*, 40 F. Supp. 3d 632, 640 (W.D. Pa. 2014) (quoting Karl S. Coplan, *Is Voting Necessary? Organization Standing and Non-Voting Members of Environmental Advocacy Organizations*, 14 SE. ENVTL. L.J. 47, 79 (2005)).
  170. *About the U.S. Chamber*, U.S. CHAMBER OF COMMERCE, <https://www.uschamber.com/about-us/about-us-chamber> [<https://perma.cc/VCY7-W852>] (last visited Apr. 2, 2016).
  171. For one such indication, see *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 763 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 1163 (2015) (stating that an amicus brief filed by the Chamber and joined by National Association of Manufacturers, Coalition for Government Procurement, American Forest & Paper Association, and Association of Corporate Counsel "convincingly demonstrates that many organizations are well aware of and deeply concerned about the uncertainty generated by the novelty and breadth of the District Court's reasoning. That uncertainty matters in the privilege context . . .").
  172. *Who We Are*, NAT'L WILDLIFE FED'N, <http://www.nwf.org/Who-We-Are.aspx> [<https://perma.cc/WMB5-T5PH>] (last visited Apr. 2, 2016).
  173. See Comments on Proposed Rule Definition of "Waters of the United States" Under the Clean Water Act from Jan Goldman-Carter, Senior Manager, Wetlands & Water Res., Nat'l Wildlife Fed'n, to Water Docket, Env'tl. Prot. Agency (Nov. 14, 2014), <http://www.reginfo.gov/public/do/eoDownloadDocument?pubId=&eodoc=true&documentID=1214> [<https://perma.cc/FQ9P-LCA4>] (documenting meeting between NWF and executive branch officials).
  174. See, e.g., Comments on Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units from Dan Danner, President & Chief Exec. Officer, Nat'l Fed'n of Indep. Bus., to Env'tl. Prot. Agency Docket Ctr., U.S. Env'tl. Prot. Agency (May 9, 2014), <http://www.nfib.com/assets/NFIB-New-Source-GHG-Comments-05.09.14.pdf> [<http://perma.cc/LF58-5C35>].

The problem is that, for a variety of reasons, this traditional view does not hold: Voice and exit do not ensure representativeness.<sup>175</sup> Instead, interest groups fall along a spectrum of membership and governance models, some of which do not advance representation at all.<sup>176</sup> Whether the traditional view is apt in any given agency proceeding depends on which groups are participating and the methods of internal governance those groups use.

To develop this claim, the rest of this Part unpacks the meaning of representativeness. It then lays out a spectrum of both voice and exit types by highlighting internal governance mechanisms that interest groups commonly use. Finally, it describes considerations other than representativeness, namely funding and information sources, which should be assessed as part of an inquiry into second-order participation.

## B. The Meaning of Representation

Analyzing groups' representativeness does not require a single, consensus view of what it means to represent—a definition that has challenged political and social theorists for decades.<sup>177</sup> It does, however, require ruling some things in and out.

The version of representation that matters most for the participation rationales described is one of congruence between the views of members and the positions of groups. By congruence, I mean the minimization of slack between group-member principals and group-leadership agents.<sup>178</sup> The objectives of maximizing congruence or limiting slack are familiar in organizational behavior and political theory; the common goal is ensuring that the preferences that are

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175. See Peter H. Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL'Y REV. 553, 570–71 (1997) ("In virtually all groups, leaders exercise decisive control over the organization's crucial information, resources, and incentives, making genuine accountability to members unattainable, even if they desire it."). Maria Cashin notes, along these lines, that "[i]n general, the financially successful 'membership' associations . . . in practice avoid active membership, in terms of governance and activities, for greater flexibility in fundraising, lobbying, and organization." MARIA HOYT CASHIN, *SUSTAINING THE LEAGUE OF WOMEN VOTERS IN AMERICA* 25 (2012).

176. See Seidenfeld, *supra* note 6, at 430–31.

177. The classic work is by Pitkin, who identifies diverse and conflicting meanings of representation. PITKIN, *supra* note 156. More recent treatments include Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214 (2009); Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515 (2003); and IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* (2002). A useful overview of Pitkin's work and more recent developments is Suzanne Dovi, *Political Representation*, STAN. ENCYCLOPEDIA OF PHIL. (2011), <http://plato.stanford.edu/entries/political-representation> [<http://perma.cc/7J7N-UTD4>].

178. See *supra* note 11.

supposed to be conveyed—that is, those of group-member principals—do in fact come through.<sup>179</sup> In assessing the congruence vision of representation, two basic factors—inspired by, but distinct from, Hanna Pitkin’s seminal work—are relevant: authorization and accountability.<sup>180</sup>

Authorization, which was key to Hobbes’ understanding of representation, means here that the group has members and those members have given the group permission to speak on their behalf.<sup>181</sup> Members may do so by paying dues, enrolling, or sometimes even by not opting out—but they must exist and they must consent. Accountability requires that members have some way of making the group answerable to their preferences. Hirschman’s classic model of voice, exit, and loyalty<sup>182</sup> provides one way to understand the potential mechanisms of accountability: Members can respond to the group’s decisions by engaging with them, leaving the group, or expressing agreement by staying put.<sup>183</sup>

Representativeness is a continuum, not a binary. Different ways of structuring internal governance will foster more or less congruence between the positions of the leaders and the members. For example, leaning more heavily on exit than voice will often produce lesser congruence between members and a group’s positions, because exit costs are often high.<sup>184</sup> As discussed more below, this type of governance is common, whether due to a Burkean view that the leader knows

179. See, e.g., *id.* For a helpful discussion bridging both democratic theory and election law, see Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 287 (2014) (using the term “alignment” to refer to the congruence of legislative and voter preferences). For a recent comparison of agency costs in corporations and the political process, see D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 694 (2013).

180. I derive these two principles from Pitkin’s account of “formalistic” representation. See PITKIN, *supra* note 156, at 38–59. My shorthand account, of course, does no justice to her more nuanced exploration. Moreover, my account departs from hers in two significant respects. For Pitkin, authorization and accountability are competing views, not complementary ones. And although she sees reasons to be “sympathetic” to each view, she ultimately finds both insufficient to define representation, indicating instead that no single definition will do. See *id.* at 58–59.

181. See *id.* at 40.

182. See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

183. See, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 376 (2000) (adopting Hirschman’s framework in the context of class action reform); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1266 (2003) (identifying Hirschman’s framework as a way to understand accountability in the context of privatization).

184. Minimizing voice in favor of exit bears some similarity to the notion of treating leaders more as trustees than delegates, in the sense that trustees need not channel the preferences of their constituency on each issue. For an overview of the delegate–trustee distinction, see Dovi, *supra* note 177; see also, e.g., ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL* 140–41 (2007).

best,<sup>185</sup> or from the comparative efficiency of passing off decisionmaking to the group's leadership.<sup>186</sup> In contrast, groups that consult with their members are generally likely to be more representative than those that do not: Individuals' views will be more accurately conveyed to agencies if groups find out what those views are.<sup>187</sup> In some circumstances, it may even be the case that, as Cary Coglianese has said, "[c]onsultation with members constitutes a necessary precondition to effective representation."<sup>188</sup>

To be sure, second-order participation—the umbrella category for voice, exit, and all other aspects of a group's internal operations—is only a proxy for the congruence vision of representation. There could be coincidental congruence even without positive markers of second-order participation, if a group's views happen to align with those of various individuals. We might find, for example, that certain think tanks align with the views of many liberal or conservative Americans, even if those individuals have not authorized the representation and cannot tell the organization what to do. And in some cases, the congruence could exceed that of a group that does afford things like voice and exit rights. But because coincidental representation is happenstance and unstable, I do not include it in my definition of representation, focusing instead on congruence that members can in some sense control.

Below, I explain extant models of voice and exit and describe the implications of each for both the traditional view of interest groups as representative and for participation's justifications. Two notes about the methodology for this discussion: First, it is intended to illuminate some important and overlooked distinctions within the interest group universe, but it is not meant as a precise taxonomy.<sup>189</sup> Second, empirical data on the participation rates of each type

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185. Edmund Burke's philosophy is associated with the idea that representatives should be entrusted with acting in constituents' best interest rather than carrying out constituents' specific wishes. *See, e.g.,* EDMUND BURKE, *BURKE'S POLITICS* 397–98 (Ross J.S. Hoffman & Paul Levack eds., 1949) (discussing a "natural aristocracy"); PITKIN, *supra* note 156, at 128–30 (describing Burke's notion of trusteeship as a model in which representatives "must act for the benefit of the people," but which "does not require consultation or responsiveness to their wishes").

186. As I and others have argued elsewhere, part of the bargain members strike when joining a group is the ability to reduce one's individual cost of participation by delegating day-to-day activities to another. *See* Seifter, *supra* note 12, at 1003.

187. As Mark Seidenfeld has noted, groups that do not consult with members are limited in their ability to accurately reflect members' views. *See* Seidenfeld, *supra* note 6, at 431 (noting that in what he calls "mass membership groups," "group leaders make most decisions about regulatory positions . . . without much influence by members," such that the resulting positions "may deviate significantly from those that best serve their members' interests").

188. Coglianese, *supra* note 6, at 3.

189. Nor is it an effort to provide a universal classification system for interest groups—an effort that has been undertaken extensively by sociologists, political scientists, and economists, with a thousand

of group is scarce and would be context-sensitive—but there is valuable information dispersed across sources in administrative law, nonprofit law, sociology, political science, and case studies of interest groups. Together, as explained below, the available sources indicate that groups on the less representative end of the spectrum play a significant role as administrative participants. Thus, the traditional view is at best overbroad, and at worst wrong.

### C. Models of Second-Order Participation: Voice and Exit

#### 1. Types of Voice

The voice groups provide members can be understood as a spectrum. I begin with groups that allow no voice at all—because they have no members—and move to the high-water mark of internal participation.

##### a. No Participation

Notwithstanding all of the talk of groups as representatives or intermediaries, some do not even claim to have members—not even nominal, checkbook-only members. The no-participation category includes advocacy entities that lobby for issues without claiming members,<sup>190</sup> as well as some entities like think tanks and policy shops.<sup>191</sup> A group with no members cannot fulfill the ideal of representing any particular constituency. Such a group might,

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flowers blooming. See, e.g., BAUMGARTNER & LEECH, *supra* note 55, at 25–28 (summarizing definitions and classifications of interest groups); WALKER, *supra* note 55 (presenting a typology of interest groups based on, for example, whether they are professional associations and whether they operate for-profit). Moreover, groups that I characterize as having less voice or higher exit costs could, under certain circumstances, be more representative than groups with greater voice or lower exit costs—for example, a group with no formal participation rights but a very active membership and responsive leadership could have greater congruence between member and group positions than a group with robust participation rights but very low turnout.

190. This category includes some consumer groups; see, for example, *About Consumer Action*, CONSUMER ACTION, [http://www.consumer-action.org/about/articles/about\\_consumer\\_action](http://www.consumer-action.org/about/articles/about_consumer_action) (last updated Sept. 2014) [<http://perma.cc/B2X5-RLAS>]; education reform groups, see, e.g., STUDENTS FIRST, <https://www.studentsfirst.org> [<https://perma.cc/94T5-R5F5>]; and many others.

191. See generally RICH, *supra* note 131. A variety of studies, including an extensive recent survey by Schlozman, Verba, and Brady, indicate that most groups that lobby the federal government do not have members. See SCHLOZMAN ET AL., *supra* note 157, at 319; see also BAUMGARTNER & LEECH, *supra* note 55, at 31 (“[M]any interest groups have no members at all.”); CASHIN, *supra* note 175, at 23 (estimating that 70% of interest groups in U.S. lobbying have no members); PUTNAM, *supra* note 160, at 49 (discussing 1988 statistics estimating that about half of interest groups had members). These studies shed limited light for purposes of this Article, since the denominator of lobbying entities that each study considers is different from the definitions this Article uses.

of course, convey a particular point of view that swaths of the public share. But as earlier noted, because any people who share the viewpoint have no powers of voice or exit in the group, any alignment between the group and those individuals is incidental and unstable.

#### b. Unstructured Participation

A second type of internal voice among interest groups that participate in the administrative process, and likely the most common, is unstructured participation. These groups have nominal “members”—individuals who send a check and receive a magazine or duffel bag. Such members may or may not express themselves to group leaders, but do not have any formal governance role.

These groups are what Skocpol coined “memberless” organizations in her renowned work on civic engagement, in which she concluded that “the vast majority of recently founded civic associations are bodyless heads.”<sup>192</sup> Skocpol’s accounts explain how, since the 1960s, the internal structure of voluntary associations has changed drastically. Rather than locally organized efforts featuring personal engagement and face-to-face interactions, these groups now involve much less internal interaction.<sup>193</sup> Other scholars have similarly found that interest group dynamics have shifted away from individual involvement and toward centralized, top-down efforts by professional management.<sup>194</sup> This is true even among groups that refer to themselves as membership groups: Grant Jordan and William Maloney note that there are “many pseudo-‘membership’ groups . . . that superficially resemble member-based bodies,” but which are better understood as having “supporters”—“regular financial contributors devoid of any voting or other (internal) democratic rights.”<sup>195</sup> As Ann Carlson has observed with respect to certain national environmental groups, these “are membership organizations in only the loosest sense of the word—anyone who

192. SKOCPOL, *supra* note 13, at 163 (attributing the observation to her colleague Marshall Ganz).

193. See, e.g., Theda Skocpol, *Unravelling From Above*, in TICKING TIME BOMBS: THE NEW CONSERVATIVE ASSAULTS ON DEMOCRACY 292, 300 (Robert Kuttner ed., 1996); see also SKOCPOL, *supra* note 13, at 127 (describing, in a chapter entitled “From Membership to Management,” the shift from “a civil society once centered in nationally active and locally vibrant voluntary membership” to the dominance of “[p]rofessionally run advocacy groups and nonprofit institutions” that are “largely memberless”).

194. See, e.g., PUTNAM, *supra* note 160, at 51 (collecting studies); see also Kate Andrias, *Hollowed-Out Democracy*, 89 N.Y.U. L. REV. ONLINE 48, 50 (2014) (“[E]ven organizations representing the ‘public’ interest are heavily reliant on big donors; elites drive their decisions and shape their messages.”).

195. GRANT JORDAN & WILLIAM A. MALONEY, DEMOCRACY AND INTEREST GROUPS: ENHANCING PARTICIPATION? 33 (2007).



contributes money is considered a member, and membership means little more than that for most members.”<sup>196</sup>

These groups are usually guided by a self-perpetuating leadership, wherein one set of group leaders selects the next. The bulk of charitable nonprofits fit this general description. Newer environmental organizations like the Environmental Defense Fund (EDF) fall into this category, as do very large groups like the U.S. Chamber of Commerce and the AARP. These groups may have nominal members, but they are not legal members with particular participation rights.<sup>197</sup> For example, the three million “members” of the Chamber of Commerce are not accorded any formal participatory role in the Chamber’s policy setting. Similarly, membership in the National Wildlife Federation, which advocates on behalf of nearly six million “members,”<sup>198</sup> does not provide any representational rights to those members.<sup>199</sup> As one former member of the organization’s board of directors put it, “[o]ur relationship with the bulk of the membership is very tenuous. It probably doesn’t exist except in an almost imaginary way.”<sup>200</sup>

It should not be surprising that this model of internal governance is common, particularly in national groups active in the federal administrative process.<sup>201</sup> The traits that make a group effective at lobbying weigh against extensive member involvement.<sup>202</sup> Involving members too much may limit the group’s ability to fundraise, achieve organizational goals, and take care of day-to-day business. Furthermore, consulting with members is seldom the most expedient way to move ahead with a policy agenda: The mechanics of consultation

196. Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 961 (1998).

197. See, e.g., Dana Brakman Reiser, *Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits*, 82 OR. L. REV. 829, 829, 900 (2003) (distinguishing “statutorily empowered” members with voting rights from nominal members who are merely donors).

198. *Who We Are*, *supra* note 172.

199. See RONALD G. SHAIKO, VOICES AND ECHOES FOR THE ENVIRONMENT: PUBLIC INTEREST REPRESENTATION IN THE 1990S AND BEYOND 76–77 (1999) (describing the political connection between the Federation’s members and leaders as “virtually nonexistent”).

200. See *id.* at 76 (quoting former National Wildlife Foundation Board Member John Gottschalk).

201. See PUTNAM, *supra* note 160, at 51 (noting that most citizens groups founded after 1965 “are mailing list organizations, in which membership essentially means contributing money to a national office to support a cause,” such that “[m]embership . . . means moving a pen, not making a meeting”); see also SKOCPOL, *supra* note 13, at 142, 163 (noting that even when groups have a membership, such “members” may be other organizations, may engage with the group only by mail, and are rarely critical to the group’s finances); Schuck, *supra* note 175, at 570–71 (noting that interest groups “tend to be undemocratic in their self-governance”).

202. See JORDAN & MALONEY, *supra* note 195, at 161 (discussing reasons that “large-scale groups seek to limit membership involvement”); SHAIKO, *supra* note 199, at 20–21 (describing tension between organizational maintenance and member involvement).

consume time and resources, and the resulting input may complicate the path forward.<sup>203</sup>

Size also matters, because consultation may be unwieldy, expensive, and impractical in large groups. A large group like the AARP has approximately thirty-five million members, but “only 5 to 10 percent of AARP members participate in local affiliates, and new members join after getting a letter in the mail, not an invitation to a local club meeting.”<sup>204</sup> The size and budget of members may also matter. As Cary Coglianese has observed, organizational members—which have their own staff, can keep up with group activities, and may demand involvement—are more likely to be consulted than individual members of groups.<sup>205</sup>

I call this category unstructured participation because the absence of structured participation rights does not mean there are no ways of communicating with leadership. There are. For example, the Chamber of Commerce regularly hears from some members who have views on the direction the organization is going—at meetings and conferences, through emails and letters, and more. The AARP and EDF, too, solicit member feedback. The difference is that these communications are ad hoc, unstructured, and nonbinding. They do not ensure, or purport to ensure, that the group decisions will reflect the will of the membership. And indeed, the very reasons that some members join interest groups—in particular, to have someone else do the work of advocacy—often leads to low participation rates, with only the most committed or affluent members actively engaged.<sup>206</sup> In this sense, it is market-based pluralism all the way down.

### c. Election-Based Participation

A third type of voice occurs where group members do not participate in group decisionmaking issue-by-issue, but instead limit their participation to electing group leadership. Nonprofit law plays a role in understanding this approach, since most relevant interest group participants are nonprofits. Although

203. Cf. JORDAN & MALONEY, *supra* note 195, at 161 (“Servicing a membership can be a drain on organizational resources . . .”).

204. Skocpol, *supra* note 193, at 300; see also Schuck, *supra* note 175, at 570–71 (stating that members join the AARP to gain “instrumental” benefits, not to participate in the group’s governance). Note that consultation with members by group leaders is not impossible; the locally rooted federations to which Skocpol refers provide a model. See Seifter, *supra* note 12, at 996. But distilling that information in a meaningful way to a single policy position is fraught. See *id.*

205. Coglianese, *supra* note 6, at 4 (“The leaders of groups with organizational members consult with their members significantly more often than do leaders of groups with individual members.”).

206. See, e.g., Lee Drutman, *Trade Associations, the Collective Action Dilemma, and the Problem of Cohesion*, in INTEREST GROUP POLITICS 74, 89–90 (Allan J. Cigler & Burdett A. Loomis eds., 8th ed. 2012).

most nonprofits do not have legal members—that is, members that have rights under state law or the entity’s organizing documents<sup>207</sup>—election-based participation is the most common governance model prescribed by law for nonprofit organizations that do.<sup>208</sup>

Some organizations that have opted to have legal members include older and well-known environmental organizations, such as the Sierra Club,<sup>209</sup> as well as some trade associations.<sup>210</sup> The Sierra Club allows “any person interested in advancing the purposes of the Sierra Club” to become a member, and grants members the right to elect annually the Board of Directors.<sup>211</sup> Five percent of the membership constitutes the required quorum for any vote.<sup>212</sup>

Skepticism abounds about how meaningful this form of participation is. With low quorums and general elections, election-based participation does not hold the same claim to congruent outcomes as issue-based participation.<sup>213</sup>

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207. See MARION R. FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION* 159 (2004) (noting that “[t]he majority of charitable corporations are governed by a self-perpetuating board of directors,” and that only a “minority . . . have members” (which are often the directors themselves)); Reiser, *supra* note 197, at 829–30 (“Today, self-perpetuating boards are the norm and members are rare, particularly among charitable or public benefit nonprofits.”). Reiser reports that the Revised Model Nonprofit Corporation Act, plus forty-six states and the District of Columbia, establish that nonprofits need not have members. *See id.* at 843–49.

208. See FREMONT-SMITH, *supra* note 207, at 159. Organizations may choose to confer additional rights on members through their articles or by-laws. *See id.* They may also create classes of members, not all of whom are entitled to vote, or they may provide for voting only on certain issues. *See* Reiser, *supra* note 197, at 841.

209. See Mark Van Putten, *Foreword: What do Environmental Groups Want?*, in *GOOD COP, BAD COP: ENVIRONMENTAL NGOS AND THEIR STRATEGIES TOWARD BUSINESS* xv, xvi (Thomas P. Lyon ed., 2010). The National Wildlife Federation allows “affiliated partners”—wildlife organizations in the states and territories—to elect the majority of its Board of Directors. *See NWF Affiliate Partners*, NAT’L WILDLIFE FED’N, <http://www.nwf.org/Who-We-Are/State-Affiliates.aspx> [<http://perma.cc/UHK7-J2PF>] (last visited Apr. 2, 2016); NAT’L WILDLIFE FED’N, *IRS FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX* (2013), <http://www.guidestar.org/FinDocuments/2014/530/204/2014-530204616-0b5a3c51-9.pdf> [<http://perma.cc/M27P-HZ3C>].

210. See BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 117, 367 (10th ed. 2011).

211. See SIERRA CLUB, *IRS FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX* 71 (2013), <https://www.sierraclub.org/sites/www.sierraclub.org/files/SC%202013%20Form%20990.pdf> [<http://perma.cc/22J7-VPPT>].

212. *Id.*

213. One might quickly retort that this sounds like representation through Congress. Yet few people say that Congress enacts the will of the majority of the American people; it is well-understood (even without cynicism) that there are a host of complicated interactions and factors that affect what, whether, and how a law gets enacted. My point here is that interest group governance is at least as fraught in terms of its congruence, and often more so.

I also do not suggest that voting can never make a difference in interest group policy. In 2004, the Sierra Club had a widely publicized “takeover” effort wherein members with a particular

#### d. Issue-Based Participation

The final type of voice reflects the peak of representativeness. Groups that follow issue-based participation have members who participate in group decisionmaking on particular issues, not just in elections of group leaders. Group leaders consult regularly with members on things like strategic decisions and policy positions. Periodic group-wide meetings facilitate this sort of interaction, though members may also be consulted through chapter meetings in federated organizations, and by email or conference call. Such groups have been called the “archetypal” interest groups,<sup>214</sup> though the archetype is no longer common.

This group structure is most frequently found in groups with a small number of members and in groups that are, for various ideological or historical reasons, committed to democratic principles. Two examples illustrate this structure. First, in the category of groups with small memberships, some “state interest groups”—organizations of state officials that advocate state interests to the federal government—feature issue-based participation.<sup>215</sup> These groups typically have around fifty members,<sup>216</sup> and while their internal governance practices vary, some offer all members the opportunity to provide input before taking a group position.<sup>217</sup> This may occur through votes at the groups’ annual meetings, or when group leadership circulates a draft version of a policy position to the entire membership and attempts to accommodate suggested revisions.<sup>218</sup> I have elsewhere documented the inevitable principal-agent slack that occurs even in groups that afford issue-based participation.<sup>219</sup> But for present purposes, the point is that issue-based participation offers, on the spectrum herein described, the greatest prospects for member-group congruence.

A second example of an organization offering issue-based participation, the League of Women Voters, is a group committed to democratic principles. The League’s “vaunted grass-roots process” involves conferring with members

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perspective on immigration tried to use the election process to install their preferred leadership. Although it ultimately did not work, the effort was an indication of how concerted effort can make member elections more influential. See Brad Knickerbocker, *A ‘Hostile’ Takeover Bid at the Sierra Club*, CHRISTIAN SCI. MONITOR (Feb. 20, 2004), <http://www.csmonitor.com/2004/0220/p01s04-ussc.html> [<http://perma.cc/5ZAA-CRB4>].

214. Seidenfeld, *supra* note 6, at 429–30 (stating that “[l]iterature on public interest groups has characterized . . . the pure membership group . . . as the archetype of public interest groups,” and defining pure membership groups as member-funded groups that provide for face-to-face interaction among members).

215. See Seifter, *supra* note 12, at 956 (defining “state interest groups”).

216. See *id.*

217. See *id.* at 1002.

218. See *id.*

219. See *id.* at 1001–12 (documenting “the inevitability of imperfect representation”).

through local chapters through “painstaking deliberative exploration,” followed by “national negotiation among positions to produce unified programs.” Participation within the group is integral to the League’s mission, which includes “encourag[ing] informed and active participation in government.”<sup>220</sup> As Cashin writes in her study of the group, “[t]he basic League concept of ‘study-member agreement-action’ would apply to how meetings were run, agendas were reached, debates, and public meetings and materials were handled.”<sup>221</sup>

Even when a group embraces issue-based participation, there can be variation in the extent to which members have input. For example, the NFIB, a lobbying powerhouse that regularly participates in administrative policymaking,<sup>222</sup> features some issue-based participation. Its website states that “NFIB’s members determine NFIB’s policies. Each NFIB member gets ONE vote. No exceptions.”<sup>223</sup> But existing research suggests that the NFIB’s representativeness of small business has two interesting wrinkles.<sup>224</sup>

First, despite its shorthand claim to speak for “small business” generally<sup>225</sup>, the NFIB acknowledges that it has a small and shifting membership—from 600,000 members in 2006 to 350,000 today. The NFIB attributes that change in part to previously playing with the numbers: The NFIB’s president says the organization used to “count members a lot of months, frankly, after their dues

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220. See *League of Women Voters Mission Statement*, LEAGUE OF WOMEN VOTERS, <http://lww.org/content/league-women-voters-united-states> [<http://perma.cc/YP9L-FHNT>] (last visited Apr. 2, 2016).

221. See CASHIN, *supra* note 175, at 87.

222. See Robb Mandelbaum, *Health Care Reform’s Strange Bedfellows*, CNN MONEY (Aug. 10, 2009, 11:31 AM), [http://money.cnn.com/2009/08/10/smallbusiness/nfib\\_health\\_reform.fsb](http://money.cnn.com/2009/08/10/smallbusiness/nfib_health_reform.fsb) [<http://perma.cc/RU5S-FBS2>] (stating that “Democrats and Republicans alike regard the [National Federation of Independent Businesses (NFIB)] as one of the most powerful lobbies in Washington”).

223. See *About NFIB*, NAT’L FED. INDEP. BUS., <http://www.nfib.com/about-nfib> [<http://perma.cc/J4PZ-FRQ5>] (last visited Apr. 2, 2016).

224. None of the examples in this Article is meant to suggest any foul play by the mentioned interest groups, though misleading behavior is likely to occur by some groups on some occasions. The point is that we cannot evaluate representation, and thus cannot evaluate participation, without a clearer sense of who is speaking.

225. For example, the NFIB’s Small Business Legal Center, which litigates on NFIB’s behalf, describes its role as “serv[ing] as the voice of small business in the courts.” *E.g.*, Brief for the Nat’l Fed. Indep. Bus. Small Bus. Legal Ctr. & the Nat’l Ass’n of Home Builders as Amici Curiae in Support of Respondents, *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015) (No. 13-485), 2014 WL 4895268. In a similar vein, the Massachusetts Chapter of NFIB states that it “represents the small Main Street business owners from across the Commonwealth.” William B. Vernon, *NFIB MA Comments on Proposed Regulations for Massachusetts Sick Leave Law*, NAT’L FED. INDEP. BUS. (June 1, 2015), <http://www.nfib.com/article/nfib-ma-comments-on-proposed-regulations-for-massachusetts-sick-leave-law-69511> [<https://perma.cc/JT8U-9WGU>].

expired,” as well as “temporary members” and “prospects.”<sup>226</sup> The NFIB has stopped doing that.<sup>227</sup> Others attribute the small numbers to the fact that NFIB pursues a set of principles rather than focusing solely on its members’ self-interest.<sup>228</sup> The group sometimes takes positions that are, at least in a direct sense, not favorable to small business—for example, opposing “combined reporting” laws that provide a tax loophole to big businesses.<sup>229</sup> Accordingly, some have observed that NFIB members are “self-selecting,” with more “liberal” small businesses not joining.<sup>230</sup> In all events, while the NFIB may faithfully represent those members who choose to join, it does not speak for “small business” generally. And even though the NFIB does, to its credit, disclose its actual membership numbers, the conflicting claim that it is the voice of “small business” may make a greater impression.

Second, despite its embrace of a “one member, one vote” structure, it is not clear how those votes affect the group’s policy positions. One report, based on an interview with the head of NFIB’s research foundation, indicates that membership input “help[s] shape” the NFIB’s positions, and that the group “[g]enerally” would not take a position unless it had support from “at least 70, and probably closer to 80, percent of the membership.”<sup>231</sup> That is a high standard for member input. But another report suggests the NFIB does not always poll its members, does not always poll *all* of its members, and that its members do not always respond to such polls—rather, at least as of the time of the report, it distributed samples to small numbers of members and got low response rates.<sup>232</sup> And sometimes the NFIB departs from its traditional agenda for strategic reasons, like in negotiating with Democrats on healthcare reform, a move that,

226. Robb Mandelbaum, *How the N.F.I.B. Represents Its Members, Part II*, N.Y. TIMES: YOU’RE THE BOSS (Sept. 3, 2009, 9:00 AM), <http://boss.blogs.nytimes.com/2009/09/03/how-the-nfib-represents-its-members-part-ii> [https://perma.cc/6WCT-3DGH?type=source].

227. *See id.* The group also attributes the decline to a purportedly shrinking number of “storefront, mom-and-pop businesses.” *Id.*

228. *See id.*

229. *See* Stacy Mitchell, *Does the NFIB Really Represent the Interests of Independent Businesses?*, INST. FOR LOCAL SELF-RELIANCE (Sept. 3, 2009), <http://www.ilsr.org/does-nfib-really-represent-interests-independent-businesses> [https://perma.cc/K8DZ-KQEP].

230. Mandelbaum, *supra* note 222 (reporting interview with “veteran Democratic lobbyist” Burt Carp).

231. Robb Mandelbaum, *Whom Does the N.F.I.B. Represent (Besides Its Members)?*, N.Y. TIMES: YOU’RE THE BOSS (Aug. 26, 2009, 6:00 AM), <http://boss.blogs.nytimes.com/2009/08/26/whom-does-the-nfib-represent-besides-its-members> [https://perma.cc/FDK8-VG2S?type=source].

232. As of 1999, the group’s chief economist explained the NFIB’s polling methodology involved “sampling”—sending monthly questionnaires to 8000 of the group’s members, which yielded a roughly 30 percent response rate. *See* William C. Dunkelberg, *The Business Economist at Work: The National Federation of Independent Business*, 34 BUS. ECON. 59, 61 (1999).

according to a former NFIB lobbyist, “certainly [raised] some concern that they were going further than their membership might feel comfortable with.”<sup>233</sup> All of this is to say that while the NFIB appears significantly more representative than many other interest groups by the standards of this Article, more fine-grained information would be useful in evaluating the information it presents.

In any event, issue-based participation groups constitute a small portion of interest groups, and organizations with such active internal engagement have been waning.<sup>234</sup> This trend is particularly understandable in the context of administrative participation. Running an organization democratically entails substantial costs for the organization. Prioritizing members’ wishes can substantially blunt a group’s lobbying force.<sup>235</sup> Honoring member input not only takes time and consumes resources, but it can work at cross-purposes with substantive goals or smart lobbying strategy.

This is important for the traditional view of groups as self-policing. The difficulty of lobbying agencies while operating responsively to members means that the percentage of issue-based participation groups that participate actively in the administrative process is likely small. Thus, although groups with issue-based participation offer the greatest support for the traditional reason to ignore second-order participation, they are the exception, not the rule, in the participation universe.

#### e. Voice Through Exit

One other point is worth making about members’ voice. Even if members do not regularly or formally engage in group decisionmaking, under certain circumstances, threats to exit the group can be a powerful form of voice—a governance tool motivating the group to adapt its policies. This is most likely when the group depends heavily on member contributions, such that member departures imperil the group’s existence; in such circumstances, members may threaten exit to effect change.<sup>236</sup> It can also occur when a group gains its stature from representing all or most of a particular sector or set of constituents. Exit as voice is also more likely in groups that are committed to internal democracy.

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233. Mandelbaum, *supra* note 222 (quoting John Motley).

234. See discussion and sources cited *supra* notes 192–194.

235. See *supra* notes 199–201; see also MARYANN BARAKSO, GOVERNING NOW: GRASSROOTS ACTIVISM IN THE NATIONAL ORGANIZATION FOR WOMEN 8 (2004) (noting that the National Organization for Women’s structure as a “highly representative and participatory organization . . . undercuts its leaders’ ability to . . . effect political change”).

236. See Coglianese, *supra* note 6, at 5; Seidenfeld, *supra* note 6, at 430–31.

Andrew McFarland's acclaimed case study of Common Cause, a "non-partisan, grassroots organization dedicated to restoring the core values of American democracy,"<sup>237</sup> provides an example of the threat or fear of exit as a governance tool. At the time that McFarland's study was written, Common Cause received "[n]inety-five percent or more" of its budget "from membership dues and contributions."<sup>238</sup> McFarland explains that such dependence made the group highly sensitive to member exit.<sup>239</sup> The group's founder stated: "collectively, the members hold life-or-death control over the organization. If enough of them fail to renew their memberships, that will be the end of Common Cause."<sup>240</sup> Thus was born a situation in which the group was highly sensitive to potential departures, to the point that the group conducted regular internal polling to avoid inadvertent departures from members' priorities.<sup>241</sup> Overall, however, voice through exit is a strategy that exists more in theory than practice, as I describe more below.

## 2. Types of Exit

As noted, so long as exit is available, a group that provides no or very limited voice can still be representative. Indeed, if exit is perfect—that is, a member leaves the group whenever she disagrees with it—an exit-based governance structure might be just as congruent with member preferences as one with full-fledged voice rights. If all members behave that way, the traditional model holds: The group ends up speaking only for those who concur enough to be spoken for.

The reality is of course more complex, as Terry Moe points out. That is because exit and disagreement are not the same. Whether members avail themselves of exit, assuming it is available, rests on a host of factors. The more apt way of considering the link between exit and representativeness, then, is by considering the members' ability and incentive to leave a group.

237. *About Us*, COMMON CAUSE, <http://www.commoncause.org/about> [<http://perma.cc/MV4E-QZF4>] (last visited Apr. 3, 2016).

238. ANDREW S. MCFARLAND, COMMON CAUSE: LOBBYING IN THE PUBLIC INTEREST 97 (1984). While contributions to Common Cause still constitute the vast majority of its revenue, it now appears that foundations and other organizations contribute a substantial part of that pie, *see* COMMON CAUSE, CREATING A VIBRANT DEMOCRACY: ANNUAL REPORT FOR 2012–2013 27–33, <http://www.commoncause.org/about/newsletters-annual-reports/annual-reports/pdfs/annual-report-2012-2013.pdf>, likely lessening the group's sensitivity to individual members' exit. Members also no longer elect the group's Board of Directors, as they did at the group's founding. Compare MCFARLAND, *supra*, with COMMON CAUSE, IRS FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX 6 (2013), <http://www.commoncause.org/about/financials-and-990s/cc-990-fy2014.pdf> [<http://perma.cc/RK8N-DDNG>].

239. *See* MCFARLAND, *supra* note 238.

240. *Id.* at 97 (quoting JOHN W. GARDNER, IN COMMON CAUSE 118–19 (1972)).

241. *See id.*



Members may lack such incentives for a variety of reasons discussed below, forming a sliding scale of exit costs.

At one end of the spectrum, exit costs are low, and group members have significant incentives to leave the group when they disagree with its policy positions. Low exit costs are most likely under certain, limited circumstances. First, they are most likely where members joined the group in large part to have a voice on issues the group advocates, rather than for other “selective” benefits<sup>242</sup> like magazines or discounts, or for social benefits, like camaraderie or networking. Only if groups feel a connection between their membership decision and the group’s policy are they likely to leave based on policy disagreement. Second, low exit costs are most likely when members are able to actively keep tabs on the group’s actions. This is more likely for institutional members and in groups—often small groups—in which members feel very invested, perhaps in part because group positions are likely to be attributed to them.<sup>243</sup> Third, low exit costs are likely when groups have some alternative path to advocacy, such as a competitor group.<sup>244</sup>

Some trade associations, especially those representing a relatively small sector, exemplify low exit costs.<sup>245</sup> Because members of trade associations are institutions, they are more likely to have a budget to develop their own policy positions and keep tabs on the association’s positions.<sup>246</sup> In addition, some companies are eligible for membership in multiple trade associations, such that they have alternative options for advocacy. And although trade associations do provide professional benefits and camaraderie, the decision whether to be part of the

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242. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

243. Cf. Reiser, *supra* note 197, at 859–60 (explaining why members in nonprofits are seldom active and informed participants).

244. Cf. MCFARLAND, *supra* note 238, at 105 (noting that on one issue, whether the group should have a national or federal focus, member exit in Common Cause was not meaningful because “[t]here is no other lobby for procedural reforms in the state capital with the experience and prestige of Common Cause”).

245. One might point to the occasional, headline-grabbing departure of a national group from the Chamber of Commerce as evidence that the group is representative of any members who choose to stay. See David A. Fahrenthold, *Apple Leaves U.S. Chamber Over Its Climate Position*, WASH. POST (Oct. 6, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/05/AR2009100502744.html> [<http://perma.cc/H8QL-CFZF>]; Danny Hakim, *CVS Health Quits U.S. Chamber Over Stance on Smoking*, N.Y. TIMES (July 7, 2005), <http://www.nytimes.com/2015/07/08/business/cvs-health-quits-us-chamber-over-stance-on-smoking.html?smid=pl-share> [<http://perma.cc/UE7G-52JB>]. But not necessarily. As explained earlier, factors that may lead a member to stay or leave a group are too complicated to read much into silence (just as it is imprudent to read into legislative silence).

246. See Coglianese, *supra* note 6, at 9; cf. Seifter, *supra* note 12, at 1003 (noting that states’ monitoring of state interest groups may vary with state budgets).

group is often shaped substantially by instrumental assessments of the lobbying voice to be gained—though even that assessment may militate toward staying in the group to “participate defensively,” such that members will avoid exiting in favor of mitigating damaging positions.<sup>247</sup>

Nevertheless, most groups that participate in the administrative process do not fit this mold.<sup>248</sup> The characteristics that interest groups need to be successful in their advocacy work—particularly size, flexibility, and resources—are often in tension with the climate that would make members feel compelled to exit on a policy-by-policy basis, or even on the basis of an annual platform.

Higher exit costs are more common. One major reason is that low exit costs exist only when members monitor a group closely and understand well the underlying issues—but one reason many people join groups is to delegate to the group’s leadership the task of keeping tabs on issues.<sup>249</sup> In many groups, members do not engage at all other than sending a donation.<sup>250</sup> Similarly, weak exit is present when individuals join groups for expressive reasons or to acquire selective benefits, as is often the case; people may want a tote bag, or a newsletter or magazine, or member discounts more than they want to lobby federal agencies. And even where group members follow and care about the group’s policy positions and participate in group proceedings, the absence of a viable alternative may prevent members from exiting a group even when they disagree. For example, where there is only one state interest group for a set of state officials, the officials may feel that staying in the group—and having the opportunity to “participate defensively” in the entity that will speak for the states—is worth it.<sup>251</sup> Finally, in some groups, like bar associations and unions, exit is not possible at all, because group membership is mandatory.<sup>252</sup> In those groups, the traditional view falls apart.

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Given the above account of the variety in voice and exit, the traditional view—and the rationales for participation that depend on it—cannot be

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247. See Drutman, *supra* note 206, at 86.

248. Given the factors that give rise to low exit costs, there is some correlation between groups with low exit costs and issue-based participation groups; recall that those groups, too, are likely to be small and oriented toward high levels of engagement.

249. See Reiser, *supra* note 197, at 859–61; Seifter, *supra* note 12, at 956.

250. See PUTNAM, *supra* note 160, at 160 (noting that while “direct-mail organizations” are not “morally evil or politically ineffective,” they “provide neither connectedness among members nor direct engagement in civic give-and-take, and they certainly do not represent ‘participatory democracy’”).

251. See Drutman, *supra* note 206, at 86.

252. See *generally* Friedrichs v. Cal. Teachers Ass’n, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *aff’d by an equally divided court*, No. 14-915, 2016 WL 1191684 (U.S. Mar. 29, 2016) (per curiam) (involving public-sector “agency-shop” arrangements).

systematically true. Voice and exit do not ensure that the positions of interest groups participating in the administrative process are congruent with those of their members. Nor do they even ensure that groups are acting in any representative fashion—defined here to require authorization and accountability—since some groups have no members or have membership that affords no meaningful voice or exit. The specific governance approaches vary substantially among groups, but the traits that make groups most successful at advocacy trend toward less meaningful voice and exit.

One may respond to this by asking: But is it not true that everyone who matters in policymaking, especially agencies themselves, knows that the Chamber, the NWF, and the NFIB are imperfect representatives? A first answer is that these examples are among the best-known administrative participants; that is why there is more information about them, and why there is more public awareness about their role. It is much harder to assess the identity and internal governance of the thousands of other, lesser-known groups who play a role in agency policymaking, and thus much harder to evaluate the information those groups present. Moreover, as noted earlier, the relevant audiences for interest group information include all of agencies' principals, including the general public, other interest groups, Congress, and the courts. These overseers may not be experienced with the issue at hand, leaving them unfamiliar with the pathologies of key groups. Finally, to the extent the takeaway is that participation is not serving its longstanding justifications (because interest groups are not serving their representative role), it is unsatisfying to respond that at least that failure is recognized by agency insiders.

#### D. Information and Credibility

The above factors affecting a group's representativeness are at the heart of understanding second-order participation, but other information also matters: It is important to understand who else the group speaks for and what biases may shape the group's contributions. This information facilitates analysis of a group's expertise, and fosters the informed checking crucial to the operation of administrative checks and balances.

A group's funding structure and major donors are a good place to start. Many groups today either do not receive or are not dependent on dues from members.<sup>253</sup> Instead, membership dues are often nonexistent or nominal, and

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253. See Anthony J. Nownes & Allan J. Cigler, *Big Money Donors to Environmental Groups: What They Give and What They Get*, in INTEREST GROUP POLITICS 108, 110 (Allan J. Cigler & Burdett A. Loomis eds., 7th ed. 2007) (collecting studies indicating that sources such as "private foundations, corporations, government entities and wealthy individuals" provide critical interest group funding);

the bulk of funding comes from private donations, grants and contracts, or profit-generating initiatives like proprietary publications or specialized services.<sup>254</sup> Because the source of an organization's funding must be a priority if the group is to stay operational, there is a strong possibility that a group may cater to its major donors.<sup>255</sup> Depending on the group's governance structure, this may or may not be improper. The point here is that following the money is a relevant consideration when assessing for whom a group really speaks and what sort of influences color its positions.

Funding may be the most telling indicator of a group's potential biases, but it is not the only one. It is also helpful to know what factions within a group are behind a position, since some groups (especially trade associations) may use their representative status to provide cover for one or more members who do not want an argument associated with their own name.<sup>256</sup> Other considerations include whom, other than the constituency for whom it purports to speak, a group counts as associated or affiliated members. For example, some state interest groups may allow private entities to serve as affiliated members, and others allow states to designate private individuals to serve in their stead.<sup>257</sup> Another relevant variable, often hard to pin down, is how the organization generates its information. For example, is the analysis of the hydrological effects of a proposed regulation prepared by a scientist? A policy staffer? Is it obtained through a contract with an outside entity, and if so, whom?<sup>258</sup>

To illustrate the sorts of issues I mean to get at here, consider this example: The Department of Interior stated that it worked closely with the Groundwater Protection Council (GWPC), a state interest group of oil and gas officials, when developing its recent regulations regarding fracking on public lands.<sup>259</sup> The

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Theda Skocpol, *United States: From Membership to Advocacy*, in *DEMOCRACIES IN FLUX: THE EVOLUTION OF SOCIAL CAPITAL IN CONTEMPORARY SOCIETY* 103, 103–36 (Robert Putnam ed., 2002) (stating that “[m]embers are a nonlucrative distraction”).

254. See, e.g., CASHIN, *supra* note 175, at 51 (noting the prevalence of interest group reliance on federal contracting for funding); Skocpol, *supra* note 193, at 300 (“By now, almost all are led by resident professional staffs, and funded more by outside donors or commercial side ventures than from membership dues.”).

255. See, e.g., Seidenfeld, *supra* note 6, at 433 (stating that groups that receive significant funding from sources other than members “are especially susceptible to co-optation by their patrons”).

256. See Drutman, *supra* note 206, at 74, 85.

257. See Seifter, *supra* note 12, at 966–67.

258. On the ways in which scientific findings may be manipulated to support policy ends, see MCGARITY & WAGNER, *supra* note 137.

259. See Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 78 Fed. Reg. 31,636, 31,640 (May 24, 2013) (to be codified at 43 C.F.R. pt. 3160); Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015) (to be codified at 43 C.F.R. pt. 3160).

GWPC purports to speak for “the state agencies that protect and regulate ground water resources.”<sup>260</sup> My previous research, however, indicated that the group had only twenty-eight states as members and received substantial funding from private sources.<sup>261</sup> The disclosure platform the GWPC and another group created, now incorporated into state and federal regulations, has been controversial.<sup>262</sup> Knowing for whom a group speaks could illuminate what agencies, courts, other interest groups, and the public should make of the agency-group collaboration.

The account above would be even stronger with more fine-grained data—say, if we could parse in detail exactly how much internal participation influential groups afford and how their membership rolls change over time. But groups tend not to disclose that data, nor do they have to under current law. The next Part considers how administrative law’s procedures and doctrines might take greater account of second-order participation, and how reforms, particularly disclosure requirements, may help.

### III. IMPLICATIONS FOR ADMINISTRATIVE LAW’S THEORY AND PRACTICE

The discussion so far provides a new way to understand why and how participation as currently practiced is not living up to its purported values. The sense that participation fails to live up to its values may be widespread already; second-order participation helps to articulate why and begin to measure the gap.

This Part shifts focus to second-order participation’s implications for administrative law’s procedures and doctrines. As Part III.A details, in certain contexts—where procedures are premised on representation—imposing some requirements that groups actually foster internal participation could help strengthen or clarify the procedures, whereas ignoring second-order participation risks weakening or muddling them. And even beyond those specific contexts, disclosure-based requirements—eliciting information about second-order participation—could help better realize participation’s values and allow richer

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260. *State Membership*, GROUND WATER PROT. COUNCIL, <http://www.gwpc.org/about-us/state-membership> [<http://perma.cc/6UDF-GDCV>] (last visited Apr. 3, 2016).

261. Seifter, *supra* note 12, at 1011.

262. See KATE KONSCHNIK ET AL., HARVARD LAW SCH. ENVTL. LAW PROGRAM POLICY INITIATIVE, LEGAL FRACTURES IN CHEMICAL DISCLOSURE LAWS: WHY THE VOLUNTARY CHEMICAL DISCLOSURE REGISTRY FRACFOCUS FAILS AS A REGULATORY COMPLIANCE TOOL 3 (2013), <http://blogs.harvard.edu/environmentallawprogram/files/2013/04/4-23-2013-LEGAL-FRACTURES.pdf> [<http://perma.cc/4X2V-EUSM>]; Amanda C. Leiter, *Fracking, Federalism, and Private Governance*, 39 HARV. ENVTL. L. REV. 107, 145 (2015) (“In the absence of additional requirements, FracFocus gives participating companies the ability to tout their transparency without guaranteeing that their disclosures are complete and accurate.”).

assessment of the participatory system we have. I discuss these disclosure-based reforms in Part III.B.

#### A. Representation-Dependent Participatory Mechanisms: Requiring Second-Order Participation

First, there are some administrative law procedures and practices that rely, expressly or implicitly, on the premise that the participant speaks for others. These are situations where the participant's contribution is most valuable if—or, sometimes, incompetent unless—the participant is acting in representative fashion. The logic of these doctrines would be substantially strengthened by grappling forthrightly with second-order participation, and ultimately requiring some form of it.

*Private standard setting.* To start, consider the common practice of federal adoption of privately set industry standards.<sup>263</sup> A rationale for this practice is that privately set standards already represent the shared wisdom of the sector, so there is no need for the federal government to recreate the wheel.<sup>264</sup> But if the organization advancing the standard does not have a broad membership, or does not afford those members mechanisms of accountability, the rationale weakens. Indeed, even if a group has a broad membership and has majority support for a position, the agency might rightly want to consider the extent and content of dissenting views, a concern that underlies the Supreme Court's concern about majority factions in private industry in the famous *Carter Coal* case.<sup>265</sup> In practice, private standard setting runs the gamut from highly participatory protocols within “standards development organizations” to much more ad hoc processes within sectors or consortia.<sup>266</sup>

263. See *supra* text accompanying notes 37–39 (discussing widespread use of the practice).

264. See *supra* note 134; cf. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 535–37 (1935) (government's rationale for “codes of fair competition” under the National Industrial Recovery Act was that the codes would “consist of rules . . . deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems.”).

265. There, the Court rejected a provision granting a contingent of private coal producers the power to set minimum wages. *Carter v. Carter Coal Co.*, 298 U.S. 238, 297, 309–11 (1936). “The power conferred upon the majority,” the Court worried, “is, in effect, the power to regulate the affairs of an unwilling minority”—which the Court deemed an unacceptable proposition where the coal producers were not “presumptively disinterested” like government officials. *Id.* at 311. Presumably the Court would have been more comfortable with an arrangement in which the “disinterested” agency could know and independently evaluate the views of both the industry majority and minority.

266. See Stacy Baird, *The Government at the Standards Bazaar*, 18 STAN. L. & POL'Y REV. 35, 42 (2007).

The relevance of participation in private standard setting is already reflected, albeit underdeveloped and underenforced, in the minimal requirements under the applicable Office of Management and Budget (OMB) Circular.<sup>267</sup> That document calls for groups whose standards agencies select to be “voluntary consensus standards,” developed through processes characterized by “[o]penness,” “[b]alance of interest,” “[d]ue process,” “[a]n appeals process,” and “[c]onsensus.”<sup>268</sup> Yet this requirement is not only vague, but also not mandatory.<sup>269</sup> Rather, despite the Circular’s praise for internal participation, it ultimately accepts virtually any private standard setting process “on the same footing” as those that meet its consensus criteria.<sup>270</sup> Focusing on second-order participation could underscore why the Circular’s preference for participation exists and prompt greater elaboration and enforcement.

*Advisory committees and negotiated rulemaking.* Second-order participation is also important to the logic of two related avenues of participation: federal advisory committees and negotiated rulemaking. Both procedures include some premise of representation. In negotiated rulemaking, the representation requirement is direct: The rule must be negotiated by individuals who can represent relevant stakeholders.<sup>271</sup> In many advisory committees too, the government specifically seeks members who can relay the perspective of a broader group.<sup>272</sup>

Again, attention to second-order participation is important to the logical foundation of each of these modes of participation. Each rests on the expectation that, for example, the environmental or consumer-advocate representative on the committee is competent to act as a spokesperson. Requiring some form of second-order participation, such that the representative must have authorization and accountability, would strengthen these procedures’ footings.

*Public-interest intervention.* Similar reasoning makes second-order participation relevant to those who seek to intervene in administrative adjudications on the ground that they represent the perspective of a certain subset of the public. In those situations, second-order participation is relevant to determining whether the group is qualified for the role it seeks. This is the view that the D.C. Circuit suggested in the leading case on administrative intervention,

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267. *Circular No. A-119 Revised*, WHITE HOUSE: OFFICE MGMT. & BUDGET (Feb. 10, 1998), [http://www.whitehouse.gov/omb/circulars\\_a119](http://www.whitehouse.gov/omb/circulars_a119) [<https://perma.cc/4G32-28GM>].

268. *See id.*

269. *See* Mendelson, *supra* note 38, at 754–55.

270. Baird, *supra* note 266, at 46; *see Circular No. A-119 Revised*, *supra* note 267.

271. *See supra* note 28.

272. *See supra* note 68 (describing guidance distinguishing between representative members and those advancing their own individual views).

*Office of Communication of United Church of Christ v. FCC*.<sup>273</sup> The court stated that intervention to vindicate the public interest was appropriate when sought by “responsible and representative groups”—a category that would “tend to be representatives of broad as distinguished from narrow interests” and might include “civic associations, professional societies, unions, churches, and educational institutions or associations.”<sup>274</sup> This standard has not gotten much judicial or academic attention since, and it may well be limited by factors specific to the FCC.<sup>275</sup> Yet one can see its logical appeal: In intervention claiming to vindicate a public interest, the participant’s role and value is enhanced by its ability to speak for some broader public.<sup>276</sup>

### B. Solving Participation’s Puzzles: Disclosure of Second-Order Participation

As the above discussion indicates, some of administrative law’s procedures call for actual second-order participation. But even outside of those contexts, disclosure-based reforms are an important step toward reclaiming the vision of participation that motivated its propagation through administrative practice. Such disclosure might accomplish a few things. First, as explained in Part II, by revealing more and more useful information about administrative participants, disclosure could help fulfill the vision of participation as enhancing expertise and checking agencies. Disclosure would better inform agencies about the parties with whom they are dealing—information that agencies may already grasp for repeat players, but not necessarily for other participants. Just as importantly, disclosure would provide agencies’ many overseers—including Congress, courts, the public, and the media—with a window into the entities and the information shaping agency decisions, thereby providing tools to challenge agency decisions or to more accurately apply judicial review doctrines in which participation is a factor. The disclosures themselves might also reform interest group behavior, spurring greater precision in the information advanced and stemming the most egregious overclaiming regarding membership and representativeness. And finally, shining more light on second-order participation should help identify the

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273. *Office of Commc’n of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

274. *Id.* at 1005.

275. *See Stewart*, *supra* note 34, at 1730.

276. Requiring second-order participation in these contexts has the potential initially to disadvantage certain groups—namely large groups with dispersed members, for whom organization and internal engagement are more difficult. *See OLSON*, *supra* note 242; Elhauge, *supra* note 81, at 37–40. This is troubling, since many such groups are the very public interest groups that the participation revolution sought to include. But the solution, in my view, is not to ignore representational failures in contexts that require representation. Instead, we might consider ways to foster groups’ representation in those contexts, including through grants or outreach programs—a topic worthy of further work. I thank Neil Komesar for discussion on this point.



gap between the theory and practice of participation and start a dialogue about broader, long-term alternatives to the status quo.<sup>277</sup> This Part first identifies specific procedures and doctrines that might be enriched by greater disclosure of second-order participation, and then considers how disclosure-based requirements could be implemented.

### 1. Examples

*Executive Order 12,866.* Perhaps the best known executive order in the administrative process is Executive Order 12,866, mentioned in Part I—President Clinton’s update to previous executive orders prescribing centralized control and review of the regulatory process.<sup>278</sup> As noted, the Order’s consultation provision sought “to promote democratization . . . by requiring the OIRA Administrator to meet with members of the public and to convene conferences to this end.”<sup>279</sup> One prominent criticism of this process is that it provides avenues for influential entities—often industry groups—to covertly influence the policymaking process.<sup>280</sup> To be sure, the process is supposed to be transparent, with sunlight acting as a disinfectant to the risk of capture.<sup>281</sup> But the transparency is limited. The Regulatory Review Dashboard identifies the groups with which OIRA meets, but it usually lists only acronyms, and it can be difficult to tell whom the groups represent, whose agenda is being advanced, and whether the purported goal of democratizing the process is being realized or undermined in any given rulemaking.<sup>282</sup>

277. Indeed, this view—that transparency itself can prompt self-regulation—was embraced by the IRS when it revised Form 990 to require disclosure of more information about the internal operations of tax-exempt organizations, in part to reduce abuses. *See Hearing on Tax-Exempt Charitable Organizations Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 110th Cong. 11 (2007) (statement of IRS Comm’r in the Tax Exempt and Government Entities Division, Steven Miller). I thank Susannah Tahk for raising this point.

278. President Obama reaffirmed this executive order. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

279. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 17–18 (1995); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

280. *See* Lisa Heinzerling, *Classical Administrative Law in the Era of Presidential Administration*, 92 TEX. L. REV. *SEE ALSO* 171, 176–77 (2014) (stating that “OIRA review . . . offers the tantalizing possibility of influence without fingerprints” and that the process “favor[s] regulated industry”).

281. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (embracing “greater openness, accessibility, and accountability in the regulatory review process”); *cf.* LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1914) (“Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).

282. *See* Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1311 (2006) (“The meeting log on OIRA’s web site still uses acronyms such as ‘CAIR’ and ‘NBP’ to indicate the subject of the meeting, and the affiliations of those attending the meetings (much less their clients) are still not clear.”). This is not the only limit on the Regulatory Review Dashboard’s advancement of transparency. *See* Lisa

Attention to second-order participation might make the 12,866 disclosures more meaningful—for example, through a requirement that the website disclosing 12,866 meetings also contain a one-page statement from each group explaining whom it represents, how it is funded, and how it is internally governed. In turn, evaluation of these statements could provide a clearer and more accessible window into how the Order is performing. I do not mean to suggest that this would revolutionize the OIRA process, much less address all criticisms leveled at OIRA; far from it.<sup>283</sup> But it is a way in which disclosure of second-order participation can better fulfill Executive Order 12,866's goal of allowing the public to understand with whom OIRA is dealing—and could prompt political responses where the resulting picture is unsatisfactory.

*Executive Order 13,132.* Similar disclosures could better illuminate the consultation process under Executive Order 13,132—the Federalism Executive Order.<sup>284</sup> This Order, issued by President Clinton, is intended to embed in the administrative process a commitment to federalism values.<sup>285</sup> It prescribes a consultation process in which, for actions with “federalism implications,” federal agencies must consult with states early on—to learn from state input, avoid unnecessarily preemptive regulation, and minimize burdens on states.<sup>286</sup> Through this process, the Order seeks, among other goals, to foster governance that is “closest to the People” and to honor states’ “unique authorities, qualities, and abilities to meet the needs of the people.”<sup>287</sup> In the administrative federalism literature, scholars have embraced both the idea of a consultation process and its underlying objectives,<sup>288</sup> with the chief complaint being that agencies do not always adhere to the Order’s requirements.<sup>289</sup>

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Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 364 (2014) (stating that, because the Regulatory Review Dashboard also provides an incomplete picture of which rules are being reviewed by OIRA, “it misleads at the same time it informs”).

283. For example, this reform might not even be needed where the groups involved in meetings are repeat players with well-known track records. And it would not address other concerns, like the lack of disclosure of intra-executive branch contacts. See Heinzerling, *supra* note 280, at 176.

284. Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

285. For an explanation of the Order, see for example, Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125, 2156–57 (2009).

286. See *id.* at 2140; see also Seifter, *supra* note 44, at 464–65.

287. See Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

288. See, e.g., Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 526–27 (2012) (“There appears to be consensus that the requirements of the preemption provisions of E.O. 13132—including consultation with the states . . . —are sound.”).

289. Although early studies indicated that the Order was observed primarily in the breach, see, e.g., Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 784 (2004); Sharkey, *supra* note 285, at 2138, scholars have recently noted somewhat of a shift toward greater agency attention to

Attention to second-order participation could shed helpful light on this process. As Catherine Sharkey has observed, identifying an appropriate representative of state interests is a “formidable challenge[]” for the Order’s consultation requirement.<sup>290</sup> A variety of state officials and organizations could, in theory, lay claim to the role.<sup>291</sup> I have explained elsewhere that, in practice, the consultation meetings under the Order ordinarily occur with state interest groups.<sup>292</sup> These groups may or may not represent the views of all or even most states, much less of state citizens.<sup>293</sup> Looking at second-order participation within these groups could prompt more realistic assessments of whether the Order’s aims are being served by the existing process.

*The National Environmental Policy Act (NEPA).* NEPA, a statute intended to ensure both that agencies consider environmental impacts and that the public plays a role in the decisionmaking process,<sup>294</sup> requires agencies to prepare an environmental impact statement for federal actions significantly affecting the quality of the environment.<sup>295</sup> By regulation, one factor that determines whether an effect is “significant” is whether it is “likely to be highly controversial.”<sup>296</sup> But measuring controversy is tricky business; it calls for agencies to determine whether there is a “substantial dispute,”<sup>297</sup> and in turn requires agencies to take some sort of pulse of public opinion. In one case, for example, a court held that the definition was met because roughly 85 percent of the 450 comments filed opposed the agency’s proposal and criticized the agency’s initial study as incomplete.<sup>298</sup> Such tabulations of filed comments are plainly a very rough proxy for measuring a dispute; they say nothing about the breadth of the pool of stakeholders that support or oppose an action and nothing

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preemption issues, see Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 594–95 (2011); Seifter, *supra* note 12, at 973 & n.85; Sharkey, *supra* note 288, at 531–32.

290. Sharkey, *supra* note 288, at 583.

291. See *id.* at 588. Sharkey proposes an attorney-general notification provision for the Order, grounded in the idea that the attorney general could then contact “the relevant state agencies, officials, or other appropriate representatives.” *Id.*

292. See Seifter, *supra* note 12, at 972–73.

293. See *id.*

294. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (explaining these purposes).

295. 42 U.S.C. § 4332(c) (2012).

296. 40 C.F.R. § 1508.27(b)(4) (2013). I thank Steph Tai for raising this point.

297. See, e.g., *Town of Cave Creek, Ariz. v. Fed. Aviation Admin.*, 325 F.3d 320, 331 (D.C. Cir. 2003).

298. See *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001); see also *Found. for N. Am. Wild Sheep v. U.S. Dep’t of Agric.*, 681 F.2d 1172, 1182 (9th Cir. 1982) (effects “highly controversial” where the agency “received numerous responses from conservationists, biologists, and other knowledgeable individuals, all highly critical of the [Environmental Assessment (EA)] and all disputing the EA’s conclusion”).

about who has not been represented.<sup>299</sup> Considering second-order participation could provide a truer and more useful way to gauge a substantial dispute.

*Administrative settlements.* Recent years have witnessed heated criticism of agencies settling cases brought against them by private litigants. This practice is not new,<sup>300</sup> but the most recent critiques decry a pattern of collusive behavior in which special interests are able to pen their positions into law through closed-door consent decrees.<sup>301</sup> These critics call for, among other reforms, more lenient standards of intervention so that a broader range of interests can be heard in these settlement discussions.<sup>302</sup>

More information about second-order participation could help shape both the assessment of the problem and the nature of any remedy. The logic of the critique is one of agency capture by minority faction; its normative baseline is a flavor of participation's democratic justifications, under which agencies should be responsive to a broad, as opposed to narrow, public. Second-order participation does not tell us whether that is the right normative baseline, but it could help us measure to what extent the problem is occurring: With whom are agencies settling, and do their memberships and biases reflect only a narrow perspective? Second-order participation can also inform assessment of whether the proposed remedy—more permissive intervention—would solve the problem: For whom would the intervener be speaking, and would that constituency correct the bias?

*Advancing doctrine and dialogue.* Looking forward, greater transparency about second-order participation could also improve the application of doctrines that consider participation and begin to advance longstanding debates in administrative law. Although a full treatment of these implications is a topic for future work, I describe several possibilities here.

Part I noted that several doctrines of judicial review place value on agencies' provision of avenues for participation. Courts could apply these doctrines in a more accurate and fine-grained manner with access to information about second-order participation. For example, consider judicial review of notice-and-comment rulemaking. A court reviewing an agency's consideration of comments would be better able to discern whether an interest group comment was

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299. One possibility is that the remaining 15 percent of the commenters supported the proposal and represented very broad constituencies, such that they numerically outweighed those in the 85 percent.

300. See Percival, *supra* note 36, at 328 (describing administrative settlement as a frequent practice).

301. See WILLIAM KOVACS ET AL., U.S. CHAMBER OF COMMERCE, SUE AND SETTLE: REGULATING BEHIND CLOSED DOORS (2013), <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf> [<http://perma.cc/7LMQ-R7YG>].

302. See *id.* at 28–29.

“significant” or “material”—thus requiring an agency response<sup>303</sup>—if the court could also see whether the group accurately portrayed the comment’s representativeness and whether it appeared tainted by bias or conflict of interest. Similarly, in applying arbitrary and capricious review, information about second-order participation could illuminate the expertise, or lack thereof, of groups the agency heeded in its decisionmaking, especially where the group’s representativeness is material to the content of the information conveyed.<sup>304</sup> As to the agency’s interpretation of the relevant statute, information about second-order participation could make meaningful the concern for fairness and deliberation articulated in *United States v. Mead*.<sup>305</sup> Did the agency’s process actually elicit and consider input from the relevant stakeholders, and not just entities carrying a hollow mantle of representativeness?<sup>306</sup> And if the agency failed the *Mead* inquiry, information about the groups that participated could inform the application of the deference due under *Skidmore v. Swift*,<sup>307</sup> which asks, among other things, about an agency’s thoroughness and expertise.<sup>308</sup>

More broadly, second-order participation disclosures could help advance dialogue regarding persistent questions that underlie longstanding administrative law debates. Two such questions are the extent to which agencies are more or less politically accountable than other branches<sup>309</sup> and the extent to which agencies are more expert (or more adept at processing information) than other branches.<sup>310</sup> Studies that glean not just which entities participated in a particular agency decision, but also what memberships were represented by those entities, who funds the entities, and so on, can provide a new way to discuss (and back up) claims that agencies are or are not marshaling expertise or hearing from a balanced public. These considerations are relevant to, for

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303. See *supra* notes 73–74.

304. See *supra* text accompanying notes 46–48.

305. 533 U.S. 218, 230 (2001).

306. See *supra* text accompanying notes 49–51.

307. 323 U.S. 134, 140 (1944).

308. See *supra* text accompanying notes 51–53.

309. See, e.g., Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81, 95–99 (1985).

310. See, e.g., Cass R. Sunstein, The Most Knowledgeable Branch (July 14, 2015) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2630726](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2630726) [perma.cc/B6WD-ALK4].

example, ongoing debates over *Chevron*<sup>311</sup> and the scope of the nondelegation doctrine.<sup>312</sup>

## 2. Implementing Disclosure

To operationalize disclosure, interest groups could be required, or incentivized through a voluntary process, to share certain types of information along with their participatory contribution.<sup>313</sup> The requirement or incentive could be implemented as a judicial gloss on the APA and other statutes that provide for participation,<sup>314</sup> or it could be imposed through a new statute or Executive Order. This disclosure could involve a one- to two-page form. The form would require information falling into three categories: (1) the group's membership—whether it has members, how many, and what membership means; (2) the group's internal governance—who decides group policy and to what extent the membership is included in decisionmaking; and (3) the group's funding structure and major funders.

One might bristle, initially, at the additional burden such disclosures would impose on organizational participants. But in context, the burden seems slight. It would be in the same spirit of the Rule 26.1 statement that organizations already submit when filing a brief in federal courts of appeals, which requires groups to identify parent corporations and publicly held corporations that own 10 percent or more of its stock.<sup>315</sup> Similarly, it would be only somewhat more onerous—yet much more informative—than existing lobbying disclosures under the Lobbying Disclosure Act, which require

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311. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). For a recent slight to *Chevron* that has renewed debate over the doctrine's role, see *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

312. See, e.g., DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

313. Cf. Schuck, *supra* note 175, at 595 (stating that “government can seek to increase the accountability of interest groups both to their members and to the public by requiring the groups to disclose pertinent information about their transactions”).

314. A court could conclude, for example, that the notice-and-comment process or judicial review were not meaningful without such disclosures. Cf. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973). Such a gloss could be applied to a number of other participation provisions as well—for example, that a “fairly balanced” advisory committee under FACA, “representative” negotiated rulemaking under the Negotiated Rulemaking Act, or adjudicative intervention under agency rules are not meaningful unless the participants are transparent about their identities. Because this gloss has a basis in the text and purposes of the aforementioned statutes, it should not be regarded as a problem under *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978). See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (“*Vermont Yankee* stands for the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA.”).

315. See FED. R. APP. PROC. 26.1 (corporate disclosure statements).

lobbyists within the statutory definition<sup>316</sup> to provide very basic information about their business and expenditures and even less about their interest group clients.<sup>317</sup> Furthermore, other than the identities of major funders, the new disclosure requirement would not contain much information not already publicly available on the revised IRS 990 forms, which most participating interest groups must file—though it would do so more succinctly, in a more accessible location, and with less noise of irrelevant data.

Discussion of mandatory disclosure by private groups often spurs talk of the First Amendment, but the First Amendment would not bar the scheme proposed here. Even assuming that inquiries into second-order participation would take the form of state action, as opposed to norms or optional incentives, mandatory disclosure of a group's internal workings requires no more than<sup>318</sup> "exacting scrutiny"—a "substantial connection' between the disclosure requirement and a 'sufficiently important' governmental interest."<sup>319</sup> And here, the connection is straightforward: There is a governmental interest in the integrity of the administrative process that is served by knowing what entity is speaking and for whom. This is analogous to the governmental interest in identifying conflicts of interest through the Rule 26.1 disclosures noted above, and to the governmental interest in "provid[ing] the electorate with information' about the sources of election-related spending."<sup>320</sup> Moreover, on the other side of the ledger, the burden on speech or the freedom of association is weak. Unlike in cases where disclosure has been invalidated, the disclosure of things like governance structures, funding sources, and membership arrangements does not raise the specter of harassment or reprisal.<sup>321</sup> There

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316. See 2 U.S.C. § 1602 (2012).

317. See 2 U.S.C. § 1603(b) (2012) (requirements for lobbying registrations); see also Anita S. Krishnakumar, *Towards A Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 516–17 (2007) (calling for reforms to require greater disclosure from interest groups).

318. No more, and maybe less. See *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1312 n.2 (9th Cir. 2015) (noting that "most of the cases in which we and the Supreme Court have applied exacting scrutiny arise in the electoral context," though also identifying cases outside that context in which the standard has been applied).

319. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366–67 (2010).

320. *Id.* at 367 (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)); see also *Doe v. Reed*, 561 U.S. 186, 199 (2010) (upholding disclosure requirement relating to referendum petitions based on government interest in integrity of the election process).

321. See *Doe v. Reed*, 561 U.S. 186, 200 (2010) ("[W]e have explained that those resisting disclosure can prevail under the First Amendment if they can show 'a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976))); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462–63 (1958).

are important, age-old debates about the extent to which the state—here, the bureaucracy—should meddle in the affairs of private groups, but the so-called invasion here is so modest that it scarcely triggers them.

To be sure, disclosure-based reforms have limitations, and the details of any such reforms will require further development. For example, groups can sometimes skirt or thwart disclosure requirements by creating shadow entities that are not subject to the requirements.<sup>322</sup> And it is uncertain to what extent the relevant listeners—agencies, courts, Congress, the media, and other groups—would use the newly available information, at least without additional incentives to do so. Deciding how vigorously to pursue disclosure-based reforms in light of these obstacles will call for judgments about how much divergence between participation ideals and interest group practice to tolerate and where to draw the boundaries of intervention. These questions ought to be part of a new research agenda, one attuned to the role of second-order participation.

### CONCLUSION

Administrative law is built on public participation. Courts and scholars have long taken pride in that fact, holding up participation as the virtuous means to important ends. This Article shows that existing conceptions of participation are incomplete. Considering second-order participation—the internal operations of the interest groups that dominate the administrative process—provides a way to clarify which values participation does and does not serve, and how it falls short of its leading justifications.

In the short term, greater disclosure, along with more attentive application of procedures that already call for interest groups to act as representatives, would be useful reforms. Future work should consider broader, longer-term alternatives to the reigning paradigm of participation. Such alternatives could include ways for agencies to work around groups to engage citizens directly; ways for agencies to induce groups to undertake greater member involvement; and ways for the executive branch itself to foster representation through institutional design, including through offices devoted to advocacy on behalf of underrepresented constituents. Any exploration of such alternatives must also include efforts to distinguish circumstances in which public input is truly valuable from those in which it is not a priority. But the first step is recognizing second-order participation as a

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322. See Mayer, *supra* note 138, at 546 (“[I]t is now well accepted that a charity can effectively engage in unlimited lobbying by creating a closely affiliated social welfare organization that receives non-deductible contributions.”).



relevant variable. With the realities of second-order participation in mind, we can begin to update the discourse, theory, and practice of administrative participation.