Administrative Law, Filter Failure, and Information Capture

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Abstract

There are no provisions in administrative law for regulating the flow of information coming in or leaving the system or to ensure that regulatory participants can keep up with a rising tide of issues, details, and technicalities. Indeed, a number of doctrinal refinements, intended originally to ensure that executive branch decisions are made in the “sunlight,” inadvertently create incentives for participants to overwhelm the administrative system with complex information, causing much of the decision-making processes to remain, for all practical purposes, in the dark. As these agency decisions become increasingly obscure to all but the most well-informed insiders, administrative accountability is undermined as entire sectors of affected parties find they can no longer afford to participate in this expensive system. Pluralistic oversight, productive judicial review, and the opportunities for intelligent agency decision-making are all put under significant strain in a system that refuses to manage — and indeed tends to encourage — excessive information. This article first discusses how parties can capture the regulatory process using information that allows them to control or at least dominate regulatory outcomes (the information capture phenomenon). It then traces the problem back to a series of failures by Congress and the courts to require some filtering of the information flowing through the system (filter failure). Rather than filtering information, the incentives tilt in the opposite direction and encourage participants to err on the side of providing too much rather than too little information. Evidence is then offered to show how this uncontrolled and excessive information is taking a toll on the basic objectives of administrative governance. The article closes with a series of unconventional, but still relatively straightforward, reforms that offer some hope of bringing information capture under control.

In the early 1970s, legal visionaries like Joseph Sax, Lynton Caldwell, and Ralph Nader pressed for a system of rules that would give the public greater access to administrative decisions.¹ Their battle against smoke-filled rooms populated only by well-heeled insiders bore fruit, and Congress and the Executive Branch adopted important reforms aimed at letting the sun shine in.

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An explosion of laws followed, requiring open records, rigorous processes for advisory groups, access to congressional deliberations, and demands that agencies go the extra mile to include all interested participants and take their views into consideration. During this same time, the courts also stepped up their oversight of the agencies. Most notably, they expanded standing rules to enable public interest representatives to challenge agencies in court when agency rules diverge significantly from promises made by Congress.

A few commentators have expressed misgivings about the trend, but the overwhelming majority views these reforms as important steps in right direction. This is not surprising, since equal access, transparency, and judicial review are considered cornerstones of accountable government. Not only do such open government initiatives enhance oversight of agencies by affected groups, they also facilitate checks and balances within government itself.

But every successful reform movement has its unintended consequences. What few administrative architects anticipated from the new commitment to "sunlight" was that a dense cloud of detailed, technical, and voluminous information would move in to obscure the benefits of transparency. And because rulemaking processes are by their very nature blind to the risks of excessive information, committed as they are to the flow

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2 The Freedom of Information Act, 5 U.S.C. § 552
3 The Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2.
6 See generally Richard Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669 (1975) (documenting and critiquing the liberalization of standing rules and the resulting greater judicial oversight of agency rulemakings through what he calls "interest representation model").
7 Stewart in particular expressed great skepticism that broad participation rights would transfer naturally to the vigorous representation of all interests affected by the regulatory proceedings. Id. at 1763; see also id. at 1803 (worrying that “[f]ull implementation of the formal participation and standing rights that are central to the interest representation model of administrative law would enormously increase the expense of the administrative process and might, in practice, increase the barriers to participation by interests that are not well-organized or affluent.”).
8 See, e.g., Stephen G. Breyer et al., Administrative Law and Regulatory Policy: Problems, Text, and Cases 24-32 (1999) (describing chronological development of administrative law from 1962 to the present that highlights the importance of these principles in the contemporary evolution of administrative law).
9 Cf. Richard J. Pierce, Jr., Administrative Law Treatise § 7.10 at 502-03 (2008) (observing that “[i]t is simply impossible for the President even to be aware of all of the policy decisions agencies make. His staff assigned to this task is too small to engage in detailed scrutiny of all major policy decisions.”).
10 Justice Brandeis' phrase -- "sunlight is to be the best of disinfectants", see Louis D. Brandeis, What Publicity Can Do, Harper's Wyly., Dec. 20, 1913, reprinted in Louis D. Brandeis, Other People's Money and How the Bankers Use It 92, 92 (1932), has been repeated almost like mantra in some administrative law and regulatory circles. See, e.g., Steven Aftergood, Reducing Government Secrecy: Finding What Works, 27 Yale L. & Pol'y Rev. 399, 399 (2009) (quoting Brandeis and arguing that the notion of transparency is critical to the integrity of government); Paula J. Dalle, The Use and Misuse of Disclosure as a Regulatory System, 34 Fla. St. U. L. Rev. 1089, 1096 (observing that “[c]ommentators describing the origins of the disclosure requirements of the securities acts frequently quote Louis Brandeis, that “[s]unlight is . . . the best of disinfectants.”).
of information and expansive participation, a new phenomenon that I’ll call “information capture” is taking hold.

In the regulatory context, information capture refers to the excessive use of information and related information costs as a means of gaining control over regulatory decision-making. A continuous barrage of letters, telephone calls, meetings, follow-up memoranda, formal comments, post-rule comments, petitions for reconsideration, and notices of appeal over the life cycle of a rulemaking from knowledgeable interest groups can have a “machine-gun” effect on overstretched agency staff.\textsuperscript{11} The law does not permit the agency to shield itself from this flood of information and focus on developing its own expert conception of the project. Instead, the agency is required by law to “consider” all of the input received.\textsuperscript{12}

To make matters worse, as the issues grow more numerous and technical, less-well financed interest groups find it hard to continue to participate in the process. They often lack the time, the resources, or the expertise to continue reviewing all of the information that becomes part of the rulemaking record. Yet as their engagement wanes, so does the pluralistic engine considered so fundamental to the administrative process. They can no longer provide a means of culling out extraneous information and other chaff from the rulemaking through their vigorous engagement. Incentives to load as much information as possible into the system, combined with a reduction in the number and diversity of affected parties participating in the rulemaking process, set the stage for information capture.

The root cause of information capture is not administrative law’s commitment to open government and transparency, but rather its failure to require participants to filter the information they load into the system, termed “filter failure” here.\textsuperscript{13} In most social and legal settings, participants have meaningful incentives to process and hone the information they communicate. Most notably, they want to be sure that the desired message is communicated in an efficient and effective way. Administrative law, by contrast, imposes almost no filtering requirements or incentives on any of its participants who engage in the rulemaking and instead produce strong incentives for precisely the opposite behavior at key points in the process.

Unlike the older conceptions of capture that depend fundamentally on the vulnerability of the hearts, minds, and stamina of agency staff to special interests, information capture flourishes even when agency officials are determined to resist this pressure.\textsuperscript{14} Even more insidious, under the right circumstances capture will take place even if the dominant participants are not trying to manipulate the system. It is as if the logic of the administrative process creates a gravitational field that attracts more and more information. Even if the consequences are unintended, the parties with the resources to feed the information monster will benefit, to the detriment of actors with

\textsuperscript{11} JAMES LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 71 (1960).
\textsuperscript{12} 5 U.S.C. § 553(c).
\textsuperscript{13} See infra notes 18-20 and accompanying text.
\textsuperscript{14} See infra note 86 and accompanying text.
fewer resources and to the detriment of the administrative system as a whole. Moreover, once excessive information begins to gum up the works, simple fixes are no longer possible. Radical institutional overhaul becomes the only viable remedy.\textsuperscript{15}

This article focuses on filter failure and the resulting information capture arising in EPA’s pollution and toxics regulations, but this may only be the tip of the iceberg. Many other areas of social policy, well beyond environmental law, may be damaged by administrative law’s naïve presupposition that agencies can absorb and process unbounded information. The notion of “the more information, the better” may have originated in the middle of the last century when information was a scarcer resource.\textsuperscript{16} But now, in the electronic age, this cliché is clearly outdated. Indeed, other institutions recognize that effective filtering of information is a prerequisite to effective decision-making.\textsuperscript{17} This article is thus part of a larger project that examines the range of challenges created by the administrative state’s obliviousness to the effects of excessive information in a variety of regulatory settings.

The argument that administrative law’s utter inability to recognize and address information excess – its filter failure – significantly undermines the law’s ability to ensure administrative accountability in certain areas of regulation unfolds in four parts. The first section isolates the phenomenon of information capture in EPA’s rulemakings and sets it against more traditional theories of capture and models of interest group participation. The second section discusses how current administrative laws and processes exacerbate, rather than counteract, excessive information costs and information capture. The third section highlights some of the adverse consequences that flow from a legal system that remains indifferent to information excess. The fourth and final section proposes some unconventional reforms designed to address these problems.

I. THE BASICS OF INFORMATION CAPTURE AND FILTER FAILURE

In administrative law, the absence of limits on the quality, quantity, or the content of information submitted to the agency makes the temptation to inundate the agency with reams of technical details and multiple arguments all but irresistible. Indeed, a variety of doctrinal and statutory incentives unwittingly encourage regulatory participants to load the administrative system with more and more information in ways that ultimately undermine pluralistic oversight by creating unfair advantages to those advocates who have the resources to engage in these excessive processes. At the root of the problem is “filter failure” – a refusal of administrative law to restrict the amount or nature of information coming in or leaving the system. The absence of filters, when combined with strong incentives for parties to overload the system, puts the regulatory system at risk of information capture, where some parties can control or at least dominate regulatory outcomes using information.

\textsuperscript{15} See infra Part III.D.
\textsuperscript{16} See, e.g., HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS 242 (4th ed. 1977) (criticizing organizations’ information systems as generally not being designed “to conserve the critical scare resource – the attention of managers”).
\textsuperscript{17} See infra notes 21-24 and accompanying text.
This section sets out the mechanics of this filter failure and resulting information capture. After providing a more complete explanation of these phenomena, the section explores some features of EPA rulemakings that cause them to be particularly vulnerable to information capture. The section closes with a discussion of how information capture fits into the theoretical literature more generally.

A. The Basics of Information Capture

Information capture involves either the inadvertent or the strategic use of costly communications – well beyond what is necessary to convey the message – to gain control over regulatory outcomes. Information capture can be undertaken by stakeholders or even the agency itself. Since the prize is control over the regulatory outcome, information capture can be waged by different parties at once (i.e., a stakeholder and the agency), often using multiple strategies. To be a serious player in this game, a participant must enjoy convenient access to relevant information, a significant reserve of resources (mostly technical and legal), and high stakes and motivation. To win, a player need not convince their opponents of the merits of their case, he need only wear them down enough to cause them to throw in their towels and give in.

The root cause of information capture is “filter failure,” a basic failure of the administrative process to force participants to ensure that the information they provide meets the needs of the audience and situation. The need for filters or limits on information that are mindful of the capabilities and limitations of the audience is relatively well accepted, see, e.g., Paul Grice, Logic and Conversation, In Studies in the Ways of Words 22, 26 (1989) (offering as a cooperative principle that conversation be based on the needs and purposes of the situation), although it may not be totally worked out, even in studies of language like linguistics. See, e.g., Henry E. Smith, The Language of Property: Form, Context, and Audience, 55 Stanford L. Rev. 1105, 1133 (2003) (observing how linguistics have focused traditionally on the costs of information from the perspective of the speaker, rather than the audience). Shirky’s most valuable contribution is to focus attention on these filters and away from more abstract worries about “information overload” that are often used without considering the unique features of the receiving institutional or social setting.

In Smith’s model of information, “the aim is to maximize the net benefits of communication, that is the excess of the benefits of communication over the costs of production and process. ‘Processing costs’... include the costs incurred by a cognitive agent in receiving information from a message.” Id. at 1108.

See, e.g. id. at 1136 (noting how most information theory assumes that the communications are cooperative in nature).
Many areas of law are sensitive to the problem of information excess and even consciously require actors to filter information before it will be recognized by the legal system. Professor Henry Smith writes with great admiration about property rules that tend to encourage the approximate “optimization” of information through simple rules that other owners can respect. Contract rules may be even more exemplary in calibrating the level of detail and volume that is reasonable for a given contract to the capabilities of the parties. Many court battles, at least at the appellate level, involve explicit limits on the pages, margins, and even font size of briefs, the time allocated for oral argument, and the number of pages of attachments. And trials before juries – however indirectly – require counsel to distill and abbreviate the key message for a group of lay persons with average attention-spans and educational levels. Trial courts also impose a number of important filters on evidence in order to ensure that counsel, rather than the judicial system, bears the cost of processing this information prior to introducing the evidence at trial.

But administrative law is different. A commitment to open government and full participation is understood to preclude limits or filters on information, and the administrative system operates on the working assumption that all information is welcome and will be fairly considered. Indeed, the historic myth of agencies as experts may have locked the courts into a kind of unrealistic expectation with regard to the unlimited capacity of agencies to resolve any question put to them. In their high hopes for the administrative state, the courts and even Congress and the President seem to have designed the system with “the fallacy of thinking that ‘more information is better.’”

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21 See id. at 1114, 1155 (arguing that the law does a relatively good job at minimizing third-party processing costs in property law).
22 See, e.g., id. at 1177-90 (discussing the ways that contract law develops to take into account information costs).
23 Virtually every article providing tips for appellate brief-writing emphasizes the need for being as succinct as possible and sharpening arguments to make them accessible to the busy judicial panel. See, e.g., Shari M. Oberg & Daniel C. Brubaker, Supreme Review, 87 MICHIGAN BAR J. 30 (2008); Michael J. Traft, Special Considerations in Appellate Briefs, APPPI MA-CLE 14-1 (2008).
24 See, e.g., Fed. R. Evid. Rule 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”); see also Dale A. Nance, The Best Evidence Principle, 73 IOWA L. REV. 227, 229 (1988) (arguing that “the modern rules of evidence were instituted primarily for the control of lawyers rather than for the control of juries”).
25 See, e.g., Sheila Jasanoff, Transparency in Public Science: Purposes, Reasons, Limits, 69 LAW & CONTEMP. PROBS., Summer, 21, 21-22 (2006) (discussing the commitment to and gradual expansion of the public’s right to access information underlying agency decisions); see generally infra Part II.A.
26 See, e.g., Reuel E. Schiller, The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law, 106 MICH. L. REV. 399, 417 (2007) (describing how in the early and mid 1900’s agency experts were viewed as neutral specialists able to successfully implement Congress’ more general policy solutions and identify the “objectively correct solution[s] to the country’s problems.”)
Yet without filters, parties have little reason to economize on the information they submit to agencies. Participants are not held to any limits on the information they file, nor must they assume any of the costs the agency incurs in processing their voluminous filings. Indeed, a variety of court rulings actually encourage regulatory participants to err on the side of providing far too much information, rather than too little. But as information costs rise, so do the costs of participation and this can affect the ability of some groups to continue to participate in the process and ultimately may cause thinly financed groups to exit for lack of resources.

In a participatory system already struggling against the odds to generate balanced engagement from a broad range of affected parties, filter failure is likely to be the last straw. Pluralistic processes integral to administrative governance threaten to break down and cease to function when an entire, critical sector of affected interests drops out due to the escalating costs of participation. Instead of presiding over vigorous conflicts between interest groups that draw out the most important issues and test the reliability of key facts, the agency may stand alone, bracing itself against a continuous barrage of information from an unopposed, highly engaged interest group. The agency will do its best to stay abreast of the information, but without pluralistic engagement by the opposition, which helps filter the issues, and without the support of procedural filters that impose some discipline on the filings of dominant participants, the agency may find itself fighting a losing battle. A system that puts the decision-maker at the mercy of an unlimited flood of information from an unopposed group, who in turn can reinforce its filings by a credible threat of litigation, is captured by information. See Figure 1.

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28 Participants might be naturally inclined to filter communications occurring in individual meetings, hearings, or phone calls with an agency staffperson. See, e.g., Andrea Bear Field and Kathy E.B. Robb, EPA Rulemakings: Views from Inside and Outside, 5 NATURAL RESOURCES AND ENVIRONMENT, Summer 5 (1995) (advocating this type of control over short term communications). However, over the long-term and across the life cycle of a rule’s development, the incentives tend in just the opposite direction.

29 The Freedom of Information Act is an exception to this general rule; it allows the agency to ask the requester to reimburse it for its reasonable expenses incurred in responding the information request. See 5 U.S.C. § 552(a)(4)(A) (authorizing federal agencies to set fees for search and duplication which are "limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication.").

30 See infra Parts II.A. and B. (discussing these legal incentives). In theory, the point at which information costs are higher than necessary depends on the intended audience. See, e.g., Smith, supra note 19, at 1157 (taking care to avoid the goal of “optimizing” information but instead attempting to highlight how the law sometimes is attentive to trade off the costs of communication shouldered by the communicator and those that are imposed on the audience). Obviously, determining this precise point will be both difficult and quite contestable. Conveniently, however, since the focus on this article is on “filter failure” and the nearly complete absence of any restrictions on the flow of information through the system, the argument is simply that some types of filters or restrictions are required. Other commentators may wish to debate how to determine the right level or approach to filtering in different administrative settings. I dodge this bullet, although I strongly suspect that ultimately the resolution will come from pragmatic experimentation with various types of information filters and incentives, until a relatively acceptable balance has been struck.
From the standpoint of a resourceful party, the ability to gain control of the rulemaking process through the use of excessive information may even be turned into a strategic advantage.\textsuperscript{31} Using technical terms and frames of reference that require a high level of background information and technical expertise, and relying heavily on “particularized knowledge and specialized conventions,”\textsuperscript{32} these fully engaged stakeholders can deliberately hijack the proceedings. Aggressively gaming the system to raise the costs of participation ever higher will, in many cases, ensure the exclusion of public interest groups that lack the resources to continue to participate in the process. Doing so all but assures the aggressor will enjoy an unrestricted playing field and the ability to control the “public” input through all phases of the rulemaking life cycle.

Even when agency staff can withstand the technical minutia coming at them at high speed and under tight time constraints, they face an administrative record that is badly lopsided, and threats of lawsuits against the substance of their regulation that come predominantly from only one sector (industry). That may not cause them to cave in to each and every unopposed comment and technical addendum, but it likely affects at least some of the choices incorporated into the final rule.\textsuperscript{33} And when time is short, information capture becomes even more severe. Agency staff, even those who began their careers as environmental missionaries, may find themselves relieved to have regulations written by industry since doing so ensures a quicker path toward a final, binding rule.\textsuperscript{34}

\textsuperscript{31} See generally infra Part III.A. (describing this in more detail).
\textsuperscript{32} See, e.g., Smith, supra note 18, at 1167 (describing all of these features as negative aspects of information).
\textsuperscript{34} See infra Part III.A.2.
Given the high stakes involved, this lack of information filers represents a debilitating weakness in the administrative law system. Indeed, when administrative law is viewed from the perspective of information theorists, its design appears curiously primitive. Nobel Prize-winning thinkers like Herbert Simon have long stressed that the “major problem” with organizations today is their failure to realize that it is attention, not information, that is the limiting ingredient. These limitations are most pressing when an organization faces time constraints in decision-making. An entire discipline – the mathematical theory of information – is dedicated to studying ways to streamline communications and limit information externalities. The economic theory of information, which studies inefficiencies and related defects created by various types of information costs, is now a burgeoning field. And even within law and economics, a number of scholars have developed a robust literature examining how certain types of information costs – most notably those resulting from asymmetrical information – affect the effectiveness of legal rules. All of this work suggests that the law should pay closer attention to the need to filter information. However, legal analysts may have their work cut out for them in considering how to do so given the rather mature state of administrative law.

B. Environmental Rulemakings and their Susceptibility to Information Capture

So far, this discussion of information capture has been largely abstract. To make the concept at least a little more concrete, it may be helpful to consider the concept of information capture in the context of a typical Environmental Protection Agency (EPA) rulemaking.

In the vast majority of EPA’s rulemakings, the agency is tasked by Congress with setting industry- or product- specific rules that limit pollution or restrict the availability of

35 See, e.g., Smith, supra note 18, at 1125 (observing that “[b]ecause the stakes can be quite high in the law, the costs involved in the informational tradeoff sometimes require intervention, so that they may be more fully internalized by those sending messages about legal relations.”).
36 See, e.g., id. at 241-43. Dr. Simon observes, for example:
   The major problems of organization today are not problems of departmentalization and coordination of operating unites. Instead, they are problems of organizing information storage and information processing—not division of labor, but factorization of decision-making. These organizational problems are best attacked, at least to a first approximation, by examining the information system and the system of decisions it supports in abstraction from agency and department structure.
37 See, e.g., id.
38 See, e.g., ROBERT B. ASH, INFORMATION THEORY (1965); CLAUDE E. SHANNON & WARREN WEAVER, THE MATHEMATICAL THEORY OF COMMUNICATION (1949).
40 For a sample of this body of scholarship, see, e.g., Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 YALE L.J. 87, 91 (1989); Smith, supra note 18, at 1111 (beginning this task in the area of property and contract law).
chemicals or pesticides.41 In most cases, the agency must also calculate the cost burden on industry and factor that into the rule to ensure that the technologies, methods of inspection, and so on are practically available to all practicing industries.42 These types of health-related regulations not only comprise a large portion of the EPA’s workload but also comprise a large share of rules promulgated by the Occupational Safety and Health Administration (OSHA) for the workplace,43 by the Consumer Product Safety Commission (CPSC) for a variety of consumer products,44 and by the Food and Drug Administration (FDA) for some food products, cosmetic products, food additives, and drugs.45 Indeed, most public health and environmental protection occurs through these product–industry- or site specific rulemakings that target particular risks and attempt to restrict them to reasonable levels.46

Even though establishing pollution standards tend to dominate the agencies’ rulemaking agendas, these standards are rarely covered in the news.47 The agency rules that do gain the most attention -- setting air standards for the country, allowing coal plants to trade mercury emissions, restricting roads in national forests, and regulating tobacco -- are atypical. These newsworthy rules are almost always national in scope, the health and environmental consequences are obvious and hence salient, and they have a robust mix of affected parties engaged in a fight over them.48

41 See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136a (2000) (requiring manufacturers of new pesticides to conduct specific tests on the pesticide and obtain registration from the EPA before marketing the pesticide); TSCA, 15 U.S.C. § 2604 (requiring manufacturers of new chemicals to submit a premanufacture notification); Clean Water Act (CWA), 33 U.S.C. § 1321(a)(2) (2000) (prohibiting the point source discharge of pollution without a permit that, in turn, is based on the capabilities of the best available technology); RCRA, 42 U.S.C. § 6922 (2000) (requiring generators to test their wastes to determine whether they are hazardous); id. §§ 6923-25 (2000) (requiring transporters and treatment, storage, and disposal units handling hazardous wastes to self-identify and follow regulatory requirements); Clean Air Act (CAA), 42 U.S.C. § 7412(i) (2000) (prohibiting the emissions of air toxins in major amounts without a permit that specifies emissions limits for the source).

42 For example, in setting technology-based standards under the Clean Water Act, EPA must consider the cost to industry, but in doing so, it generally considers features such as the age of equipment and facilities involved, the process employed, potential process changes, nonwater quality, environmental impacts including energy requirements, economic achievability, and other such factors as the EPA Administrator deems appropriate. See, e.g., Effluent Limitations Guidelines and New Source Performance Standards for the Concentrated Aquatic Animal Production Point Source Category, 69 Fed. Reg. 51,891, 51,896 (Aug. 23, 2004) (to be codified at 40 C.F.R. pt. 451); see also 33 U.S.C. § 1314(b)(2).

43 See, e.g., 29 U.S.C. §§ 655(a) and (b) (requiring the Secretary of Labor to establish mandatory nationwide standards governing health and safety in the workplace).


46 See generally JOHN APPLegate et al., THE REGULATION OF TOXIC SUBSTANCES AND HAZARDOUS WASTES at chpt. 6 (2000) (setting out these different standard-setting programs in greater detail).

47 See, e.g., Wagner, Barnes and Peters, supra note 33.

48 See, e.g., STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 160 (2008) (characterizing each of these rules as involving “enormously important to regulatory decisions that sparked intense national debates and implicated billions of dollars. Indeed, . . . [these same rules] would all unquestionably make a short list of some of the most significant regulatory activity in more than a decade.”).
But EPA issues only a few such very visible rules each year. The other 300 or more “bread and butter” rules (mostly pollution control standards), get far less attention.\footnote{Coglianese estimated that EPA promulgated 334 rules per year from 1986-1990. See Cary Coglianese, “Challenging the Rules: Litigation and Bargaining in the Administrative Process,” U. of Michigan Dissertation unpublished, at 2, n.2 and app.1 (1994).} And indeed, their relative obscurity is central to understanding why they may be uniquely susceptible to information capture. While many of these rules have significant implications for public health and environmental protection,\footnote{In the Clean Air Act, for example, Congress attempted to reduce the emissions of air toxins by major industries by ninety percent. Indeed, almost all of the pollution control standards under the statutes cited at supra note 41, involve imposed some restrictions on industrial operations that were initially unregulated with regard to pollution. A much more difficult question arises with respect to what the public health consequences are for the range of plausible alternative standards for each of these pollution control rules. In other words, how many more lives does the most rigorous version of the pollution control standard save as compared to the weakest plausible standard under consideration? Because these standards involve multiple sub-issues which directly affect the timing and enforceability of the rule as well as its coverage and stringency, there are likely to be potentially significant differences for many of the rules, however. See infra notes 61-73 and accompanying text; see also Wendy E. Wagner and Lynn Blais, Children’s Health and Environmental Exposure Risks: Information Gaps, Scientific Uncertainty, and Regulatory Reform, 17 DUKE ENVIRONMENTAL LAW AND POLICY FORUM 249, 256-8 (2007) (describing some of the enforceability and related problems with these rules that significantly undermine their protective qualities). Indeed, the fact that the environmental groups do participate in nearly half of these rules, despite the barriers discussed in infra Part III.A., suggests that EPA’s development of these standards do matter, potentially quite a lot, to public health.} the EPA rulemaking process does not require the actual public health benefits to be calculated or considered.\footnote{This type of modeling is only done, at best, for “significant” rulemakings determined generally by their costs to industry. Executive Order 12866. These bread and butter rules rise to this level only infrequently, see, e.g., Wagner, Barnes, & Peters, supra note 33, leaving any analysis of public health benefits largely uncharacterized.} In fact, because the agency is generally regulating the pollution source, rather than the environment itself, the direct implications for public health and environment are not considered germane to the rule. If an interest group – pro or con – is interested in such information, it must model the health implications of different source standards on its own.\footnote{See Constance A. Nathanson, Social Movements as Catalysts for Policy Change: The Case of Smoking and Guns, 24 J. HEALTH POL’Y, POL’Y & L. 421, 445 (1999) (arguing that a “credible risk” is needed to get the public engaged). In discussing his difficulty in making worker safety issues salient for the news and foundations, a prominent epidemiologist reported that after laying out all of the worrisome risks for a reporter, reporter asked; “but where are the dying orphans”?} This seems rare, but in cases where it has been done, the public consequences can prove to be quite significant.\footnote{See, e.g., OSHA, Occupational Exposure to Benzene, 52 Fed. Reg. 34460, 34461 (stating that “OSHA estimates that the new standard [for benzene exposure in the workplace] will prevent a minimum of 326 deaths from leukemia and disease of the blood and blood-forming organs over a working lifetime of 45 years”). Interestingly, the public visibility of analogous pollution control standards, as mentioned, has generally been much lower and the public health benefits are more obscure. Recently, however, there has been increased interest in the cumulative health risks associated from these standards. See, e.g., Dina Capiello, In Harm’s Way, The Houston Chronicle, January 16, 2005 (prize winning investigative study of inexplicable high concentrations of air toxins in local communities, some of which may be in compliance with existing standards); Brad Heath & Blake Morrison, “Health risks stack up for students near industrial plants.” USA Today, Dec. 10, 2008, at A2 (article in a series documenting uncontrolled hazardous air pollutants in potentially dangerous concentrations near a large number of schools throughout America).}
At the same time that the public benefits of pollutant standards are unspecified, the consequences for industry are clear, immediate, and direct. A worried regulated party can identify countless issues relating to the imposition of a pollution control standard that may affect their operations and ultimate profitability. For example, in a decision about how to set technology-based controls for industry the following questions might be raised: What are the best technologies available in the market? How good are they, or do they vary according to the plant in which they are installed? Are most industry participants the same, or do they break into subgroups that in turn should be treated differently? How easy are the various technologies to install and operate in most industries? How should the new pollution control technology be monitored and reported? The answers to these questions, and many more like them, determine the rigor of the standards EPA promulgates.54

In a proposed rule, the agency will offer a proposal for addressing these many, technical questions. Because the agency’s proposal depends on mastering many of the issues of concern to industry, these plans are typically developed with heavy involvement from industry years before the proposed rule is actually published and formally shared with the public.55 As might be expected, moreover, regulatory energies tend to focus like a laser on the alternative compliance options and their costs for industry, with the possible differences in public benefits completely ignored or quickly drowned out by the hubbub relating to the technical details.56 After the resulting proposed rule is published,

54 See generally D. Bruce La Pierre, Technology-Forcing and Federal Environmental Protection Statutes, 62 IOWA L. REV. 771, 810-11 (1977) (specifying three steps in setting technology-based standards: (1) categorizing industries; (2) identifying the contents of their respective wastewaters; and (3) identifying the range of control technologies available); see also Sanford E. Gaines, Decisionmaking Procedures at the Environmental Protection Agency, 62 IOWA L. REV. 839, 553 (1977) (discussing questions regarding the effectiveness of pollution control technologies under various plant ages, sizes, and manufacturing conditions).

55 See, e.g., NEIL GUNNINGHAM ET AL., SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY 44 (1998) (noting the “clear imbalance of knowledge between regulators and industry” with regard to setting technology-based standards).

56 There are very powerful, public-benefitting reasons to bracket a consideration of these health and environmental benefits in setting these pollution control standards (whether they be technology-based or simply source- or waste-specific). Because the actual health and environmental benefits are difficult to identify with quantitative precision, requiring an industry to instead “do its best” given available technologies allows for less litigation (from industry) and as a result more expeditious standard-setting. The discussion here should not be read to suggest that I am arguing that this approach to standard-setting in many media is a mistake or needs to be revised. See, e.g., Wendy E. Wagner, The Triumph of Technology-Based Standards, 2000 U. OF ILLINOIS L. REV. 83. However, as a matter of process, it does seem problematic for public health consequences to be ignored for many and likely most of EPA’s rulemakings, particularly since they are the mechanism for highlighting the public’s stakes in the issue and thus generating greater public oversight. Although the suggestion is developed later, this oversight should be redressed by a requirement – perhaps imposed instead of the RIA process – that agencies always characterize the public and environmental benefits of varying control options to provide the public and their representatives a better basis for understanding the implications of the rule and gauging their involvement in its design. See infra Part B.2. If this cannot be done quantitatively for some or all benefits, then qualitative estimates and descriptions are sufficient as well as discussions of why the uncertainty remains. As is also suggested below, if the analysis here is correct, then the RIA process completely misses the true analytical needs of regulators – these low salience rules – and concentrates energies one issues (compliance
the agency must solicit comments on the rule from all interested parties. Based on those comments and any other information presented to it, the agency will revise the rule and publish it in the *Federal Register*.

Both because the issues are so important to stakeholders and because there is no limit on communications, it is not surprising that for most rules promulgated by EPA, the rulemakings involve a very large amount of documentation, much of which is highly technical. (While this technical information is very relevant to industry it is largely obscure to the public.) The index of the rulemaking record for a single pollution control standard often runs into the hundreds of pages. Federal Register explanations supporting the rule can be 50 to 100 pages in length, and even the rule itself can be almost that long. Virtually every page, moreover, is filled with technical discussions that assume a high level of specialized knowledge. Yet, in the hundreds of pages of documentation, it is rare for even one sentence to discuss the implications of the rule for public health or the environment. The final rule, with all its accompanying

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57 See, e.g., Wagner, Barnes and Peters, supra note 33.
58 Id.
59 The detailed, technical features of the rules should not be underestimated. The following excerpt is from EPA’s explanation on how it responded to significant comments to its pollutant standards for the emissions of hazardous air pollutants from Acrylic and Modacrylic Fiber Production. This excerpt is not exactly a random selection, but it is a relatively representative sample of the level of specialized knowledge and background information that EPA demands from its readers:

ii. *Can the pollution prevention control techniques being used by several of the plants with suspension spinning operations be used for the solution process in existing facilities?* Although the air emission and source characteristics for all other emission point types (i.e., tanks, equipment components, wastewater treatment units) are similar throughout the source category, the solution and suspension processes associated with the spinning operations differ from each other in the processing steps and the acrylonitrile concentrations in the process materials and associated emissions. Solution polymerization spin dope for fiber production contains, by product and process design, a significantly higher concentration of residual AN monomer than does suspension polymerization. The public comments [filed by industry argued that the application of the pollution prevention techniques being used for suspension processes (e.g., steam stripping of excess monomer, scavenger solvents) to existing solution processes is not viable because of the physical nature of the solution polymerization process. Specifically, application of high efficiency residual AN polymer steam stripping (incorporated to reduce downstream emissions) is technically feasible to incorporate into the suspension process and is not feasible for a solution polymerization process because the latter does not produce a solid polymer product that can be introduced to direct steam contact without contamination. At solution polymerization facilities, other pollution prevention or source reduction measures which formed the initial technical basis for determining the 100 ppmw action level for all spinning lines may not be capable of achieving the higher AN removal rates of the higher residual monomer concentration present in solution polymerization fiber spinning operations. We agree with the public comments that incorporating the pollution prevention techniques to an existing solution process spinning line is not viable.

documentation, then forms the backdrop or “record” against which the agency is tested to determine whether its final rule is reasonable, or at least not arbitrary.\textsuperscript{60}

A closer look at a single, bread and butter rule illustrates at least a few of the problems that can arise in these unwieldy rulemakings, particularly when the agency is engaged in a time-sensitive project. Consider, as an example, the rule promulgated in the mid-1990’s regulating the emissions of toxic air pollutants from chemical storage tanks in “tank farms” at large petrochemical plants.\textsuperscript{61} In this rule, the emissions standards were unusually straightforward – for most tanks, EPA required lids with tight seals to keep them from emitting significant quantities of toxic pollutants into the air.\textsuperscript{62} But this emissions standard did not resolve all critical regulatory issues; chief among them was how to make sure that these tanks would not leak if the seal became loose or worn. On this issue, EPA could have required the industry to install continuous emissions monitors at the rim of the tanks that would trigger an alert if a worrisome level of toxins was detected at the edge or over the surface of a tank. Or EPA could have required regular inspections of the tanks with a “sniffer,” much like what natural gas companies use to detect gas leaks. Instead, in the final rule, EPA simply requires “visual” inspections by a company employee to ensure the seal is in tact. With regard to the frequency of this self-monitoring, EPA could have required weekly or even monthly examinations given the seemingly low expense of the visual self-inspection; EPA, instead set the inspection interval at one year.\textsuperscript{63} Indeed, under the rule, if a leak is discovered in the course of this annual check-up, the company is given another 45 days to correct the problem, and the opportunity to self-administer up to two additional, 30-day extensions.\textsuperscript{64} And to complete the picture, records of the industry’s compliance with these self-inspection requirements are stored onsite and are not filed with the state EPA.\textsuperscript{65}

How could these strikingly permissive enforcement requirements survive the fierce adversarial pressures of administrative rulemakings? The docket index, documents in the record, and proposed rule itself provide a clue. The proposed rule, which included three other subparts, was over 187 pages long.\textsuperscript{66} Just on the storage tank rule alone, EPA met with industry groups at least three times before publishing the proposed rule, communicated with them through letters, and prepared at least 15 background documents.\textsuperscript{67} After publication of the proposed rule, 22 industries and industry associations – nearly all of them household names – and a smattering of public interest advocates – more precisely, two public interest groups and four states or state regulatory

\textsuperscript{60} See, e.g., Edison Elec. Inst, v. OSHA, 849 F.2d 611, 617-18 (D.C. Cir. 1988).
\textsuperscript{62} See 40 C.F.R. § 119(a) (providing extremely detailed requirements that amount to requiring a seal and floating lid for most tanks).
\textsuperscript{63} See 40 C.F.R. § 120(a)(2).
\textsuperscript{64} See 40 C.F.R. § 120(a)(4).
\textsuperscript{65} See 40 C.F.R. § 123.
associations -- engaged first in formal notice and comment and then presented their concerns at a public hearing. The documents from this formal public input span over 5,000 pages, 4,800 of which were contributed by industry. EPA’s technical document responding to all comments identified more than 120 issues in contention — more than a dozen on the storage tanks rule alone. The final rule and preamble gained still more girth — this time reaching 223 pages and over 195,000 words in the Federal Register. With a statutory deadline looming, the agency pushed the process through in 2 and a half years from start to finish. However, because of a vocal constituency of unhappy interest groups, within 18 days after publishing the final rule, the EPA reopened public comment on one of the key issues in the rulemaking and received another sixty formal communications. Before it could issue a revised rule, one of the companies petitioned for reconsideration of the entire rulemaking. The agency ultimately issued a proposed clarification to the original rule two years later, received another 20 comments on its proposed clarification, and issued a final revised rule at the end of 1996.

Despite all this activity, the final rule offers no explanation as to why the regulation of storage tank emissions is so lenient and provides no indication that any stakeholders were unhappy with the approach. One can surmise that there were simply too many battles — each of them intricate and time-consuming — for the two public interest representatives and four state regulatory groups to keep up with all of the moving parts. One can also surmise that in slogging through the 120 contested issues under a tight schedule, the agency itself had to tread lightly on issues for which the industry might have claimed superior knowledge. Alternatively, perhaps it threw bones to industry representatives as a way to get their buy-in on other issues, particularly when it suspected those concessions would not be caught or litigated by public interest groups who would be reluctant to delay the rule with litigation unless it involved a crucial issue cutting to the very heart of EPA’s air toxic program.

Ironically, in fact, demands by the public interest groups for expeditious rulemakings may actually make the information capture phenomenon worse. As lawyers know well, deadline suits are almost impossible to lose and serve a vital public purpose; without the suits industry has no restrictions on their polluting activities and the environment and public health are unprotected. However, in the context of information capture, these deadline suits put the agency between a rock (information battering by the industry) and a hard place (a deadline suit by environmental groups). When faced with lawsuits from all sides, the natural path of least resistance is to promulgate a final rule quickly and, if there is not time to respond to all of industry’s complaints, to give in to many of them just to get the rule out the door. As the nation’s top environmental lawyers, most of whom worked first for EPA before advising industry, observe: “The reason that the Agency is generally receptive to well-reasoned technical comments [from

68 See id. at Section IV.D. and F.
70 See Final Rule, 59 Fed. Reg. at 19405-410, 19445-49 (describing the comments and significant changes to the rule based on those comments).
72 See id. at Section VIII.
73 See id. at Section IX.
industry] . . . is to withstand judicial review. The heart of a regulatory program is more likely survive over the long term.  

C. Information Capture’s Fit with Existing Theories

The complicated nature of most of these environmental standards, coupled with the obscurity of their direct public benefits, leads to significant possible disparities among affected parties in their capability to participate. Regulated groups typically have more resources and more information and enjoy more immediate payoff from participating relative to other affected groups. Public interest groups, by contrast, may appreciate the importance of rigorous pollution rules for public health in the abstract, but lack resources to participate in the several hundred rulemakings per year, each of which involve a great deal of costs relative to the more intangible benefits. As a result, it becomes impossible for interest groups to engage industry in a way that resembles anything like a balanced adversarial process. That leaves the regulatory agency, also overwhelmed by paper and data, on its own.

Collective action theory already highlights the grim plight of public interest groups who are saddled with multiple handicaps in organizing and participating. The resultant under-representation of the diffuse public – at least relative to their actual stake in the issue – is a constant worry for political processes.

Information capture, however, adds a new worry to the collective action story: It reveals that the costs of organizing are not the only impediment that public interest representatives need to overcome. Instead, inflated information costs, beyond what is

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74 Field & Robb, supra note 28, at 7.
75 See infra Part III.A.
76 See generally Croley, supra note 48, at 29-52 (providing a thorough overview of the public choice concerns about collective action barriers, which also raising questions about some of the conclusions).
77 See, e.g., RONALD J. HREBENAR, INTEREST GROUP POLITICS IN AMERICA 329-30 (1997) (discussing the impediments faced by representatives of the diffuse public in relation to more concentrated interests and their struggles to keep up in recent times); NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS, IN LAW, ECONOMICS, AND PUBLIC POLICY 69-72 (1995) (describing collection action problems with particular reference to how they impede smooth functioning of the political process), Nicholas Bagley & Richard L. Revesz, Centralized Review of the Regulatory State, 106 COLUM. L. REV. 1260, 1285-90 (2006) (same); see also Colin S. Diver, The Optimal Precision of Administrative Rules, 93 YALE L.J. 65, 99 (83) (observing how “widely dispersed costs or benefits are less effectively represented in policymaking than concentrated costs or benefits. Thus we would expect error-correction to favor interests championed by enforcers and regulated firms and to undervalue interest of unorganized beneficiaries of government programs.”).
78 The focus in much of the commentary on public engagement in administrative rulemaking focuses primarily on the costs to nonprofits of organizing and neglects the equally important costs associated with accessing and processing the relevant information, which can vary significantly between rules. See, e.g., Cary Coglianese, Citizen Participation in Rulemaking: Past, Present, and Future, 55 DUKE L.J. 943, 966 (2006) (surmising that the lack of public participation in e-rulemaking is due in large part to the “opportunity costs”, including more recreational opportunities and a concern that one comment will not make a difference in any event; but missing the arguably more important impediment posed to highly voluminous and technical information that must be processed before one can even determine whether they have a stake in the issue or can identify meaningful ways to engage); Stewart, supra note 6, at 1760-70 (focusing on stakes-related features that tend to disadvantage the public interest groups, but neglecting to
justified or necessary, further drive up the cost of participation and simultaneously lower the payoff, at least to public interest groups who will find it increasingly difficult to translate the issues into tangible public benefits. In economic terms, as the costs go up and the payoff goes down, these thinly financed and “salience-dependent” groups that represent the public will drop out of the process. Indeed, they may even drop out midway through, after realizing that they can no longer justify their involvement to donors and other funders.

These rising information costs can take a variety of forms in the regulatory system. Communications bulging with undigested facts are the most common type of information excess and include redundancies and peripheral issues that must be culled out; discussions that are pitched at too specialized a level or demand an unreasonable level of background information from the reader; and discussions that delve into very intricate details, many of which are of trivial significance. All of these information excesses serve to inflate the participants’ costs in processing the information. Secrecy and deception also impose unjustified information costs on other participants if they are not able to access the information cheaply or at all. Even thinly supported litigation threats and marginally meritorious lawsuits can increase information-related costs for

consider the added barriers arising from the high costs of processing the relevant information that further disadvantage these groups).

79 See, e.g., Nathanson, supra note 52, at 422 (1999) (discussing the importance of a “credible risk” to environmental and public health campaigns; without this risk, the effort is severely handicapped). Information externalities, then, may be particularly costly for public interest representatives since it not only increases the costs of their participation but at the same time decreases their ability to “sell” their involvement to donors, thus further shrinking the payoff.

80 Neil Komesar observes that an individual's participation is based upon the relative costs and benefits of that participation, a calculation that not only varies by issue, but also by institution. When the costs of information are lowered and information becomes more accessible, participation increases. Similarly, when the benefits to participation rise—for example, through damage awards in tort claims—participation by those claimants increases. It is this combination of lower costs and higher benefits that explains the comparative advantages of the tort system relative to the regulatory system in providing improved access to needed information regarding health and environmental protection. See KOMESAR, supra note 77, at 8.

81 See also Smith, supra note 19, at 1153-55 (defining information externalities roughly as those “[c]osts are most likely not to be internalized by a sender of a message,” which Smith then demonstrates graphically).

82 For examples, see, e.g., supra note 59, supra notes 61-73 and accompanying text. Information costs include costs associated with accessing and processing information. Information processing costs can arise from: information that requires specialized training or extensive background expertise; information that is voluminous; information that is dense and complex; and information that is poorly organized and not explained in clear ways. Access costs arise primarily from asymmetric information by one or more of the participants and, at its extreme, involves the refusal of a party to share the information. The importance of these different types of information costs to rational behavior is still being worked out, but their basic features – of raising the costs of audiences to understand a message – seems well-accepted. For some of the ongoing work that attempts to better understand how these species of information costs affect behavior, see, e.g., Haruo Horaguchi, The role of information processing cost as the foundation of bounded rationality in game theory, 51 ECONOMIC LETTERS 287 (1996); Stephen Morris & Hyun Song Shin, Optimal Communication, 5 JOURNAL OF THE EUROPEAN ECONOMIC ASSOCIATION 594 (2007).

83 See supra note 82.
recipients (i.e., defendants) to unreasonable levels.\textsuperscript{84} Familiar concepts like “nuisance litigation” and extortive settlements refer at base to the concept that the audience – or defendant – incurs excessive information costs as a result of plaintiffs’ abuse of process.\textsuperscript{85}

The results of this information capture resemble the outcomes expected from more traditional forms of capture, but the mechanisms are actually quite different and at odds with these early public choice models. Most versions of old-fashioned agency capture depend on malleable agency staff and officials to be wooed by contributions or promises of future employment.\textsuperscript{86} If the soul of the regulatory official is not for sale, then this traditional form of agency capture is ineffectual. Information capture, by contrast, thrives regardless of and even in cases where officials are principally opposed to the skewed outcomes that may result. The end result, however, is the same. Just like old-fashioned capture, in information capture the stakeholders with relatively greater resources are able to dominate the outcomes and often do so free of oversight by onlookers, not because the deals have been struck through financial inducements, but because they are so technical and complicated that in practice they happen at an altitude of technicality that is out of the range of vision of the full set of normally engaged and affected parties.

Information capture also fits neatly within existing political science models of interest group participation, although again its existence as a phenomenon seems to be missing in existing theory. Professor James Q. Wilson’s classic four quadrant typology of regulatory spheres, for example, recognizes that when pluralism fails and only one interested party is present, the agency will be “captured” in an entrepreneurial setting of rulemaking.\textsuperscript{87} Yet Prof. Wilson seems optimistic that this type of one-sided participation is the exception rather than the rule, at least for public health and environmental rules, because of the existence of public interest nonprofits and the availability of courts.\textsuperscript{88} Through these assumptions, Prof. Wilson betrays a possible blind spot with regard to filter failure and resulting information capture. Professor Gormley’s quadrants of regulatory participation come much closer to recognizing the existence of information

\textsuperscript{84} See, e.g., Coglianese, \textit{supra} note 49, at 149 (recounting anecdote in which industry petitioned in the hope of getting rule adjustments but the agency held firm and the industry ultimately voluntarily dismissed its petition).


\textsuperscript{86} See, e.g., Bagley & Revesz, \textit{supra} note 77, at 1284 (observing how capture theory is based on the premise that well-organized groups gain an advantage through contributing votes and resources); Michael E. Levine & Jennifer L. Forrence, \textit{Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis}, 6 J. OF L., ECON., AND ORG. 167, 178 (1990) (describing capture theory as the “adoption by the regulator for self-regarding (private) reasons, such as enhancing electoral support or postregulatory compensation, of a policy which would not be ratified by an informed polity free of organization costs”).

\textsuperscript{87} See JAMES Q. WILSON, THE POLITICS OF REGULATION 367 (1980) (providing four quadrants where interest group pressures vary substantially from one quadrant to another)

\textsuperscript{88} See, e.g., id. at 385 (suggesting that environmental groups can hold industry accountable and participate equally in regulation).
capture since he qualifies as subject to one-sided interest group dominance (what he calls “fit for the boardroom”) those rules where the information is highly complex. But these rules must also be nonsalient, by which he means rules that do not interest the public, and which he assumes, like Prof. Wilson, generally do not include health or environmental rules. Prof. Gormley’s neglect of filter failure and corresponding information excesses also seem to cause him to miss potentially important interactions between his own two variables, complexity and salience.

More specific references to an information capture-like phenomenon did arise during the early period of social regulation, but these accounts mysteriously seemed to fizzle out before they developed into more robust explanatory models. James Landis, for example, observed in 1960 that regulated industry -- in large part through the never-ending stream of information -- has a “daily machine-gun like impact” on the agency that leads to an industry bias. And Jaffe suggested as early as 1954 that by virtue of their continuing presence, regulated parties “capture” agencies through the constant stream of information they provide to agencies. Later, in 1978, Professors Owen and Braeutigam noticed how stakeholders could use information games – filing voluminous and technical comments for example – to gain control over the agency.

90 See id. at 599 (“A highly salient issue is one that affects a large number of people in a significant way.
Expressed a bit differently, salience is low unless the scope of conflict is broad and the intensity of conflict is high.”)
91 See id. at 600 (including in the high complexity, low salience rules: “Cable Television Regulation, Antitrust Regulation, Securities Regulation, Insurance Regulation., Banking Regulation, Telephone Regulation, Transportation Regulation, Hospital Regulation and Patent Regulation”; and listing as salient issues: “Hazardous Waste Regulation, Air Quality Regulation Water Quality Regulation, Occupational Safety, and Health Regulation”)
92 The strategic ability to move rules that have the capability of being “salient” into the “nonsalient” pile through information capture seems to escape Gormley’s model. In retrospect Gormley’s classification system could easily be amended to define salient as practically inaccessible the public. This friendly amendment acknowledges the multiple reasons why interest groups (particularly public interest groups) may or may not engage in a rule and also notices how complexity makes the engagement increasingly unlikely for public interest groups, thus creating a feedback effect between the variables.
93 The possibility of information capture seemed to be largely dismissed by the late 1970’s, based in part on a renewed faith in pluralistic processes made possible by the courts’ expanded scope of pre-enforcement judicial review. Croley, for example, argues that the agencies typically account for information biases introduced by regulated parties, in part because the adversaries will be quick to counteract this type of informational pressure. See, e.g., Croley, supra note 48, at 294 (observing that “if one group supplies an agency with incomplete or biased information, another group with adverse interests will have opportunities to challenge or rebut it.”); see also infra Part III.A.
94 See, e.g., Louis L. Jaffe, supra note 48, at 293 (recounting this theory of capture that is based on information, but concluding that support for the hypothesis is limited to nonexistent).
96 See BRUCE M. OWEN & RONALD BRAEUTIGAM, THE REGULATION GAME: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS 4-5 (1978) (advocating as a tactic that special interests should make strategic use of information and litigation in order to gain control over the proceedings);
In any case, these prescient sightings of information overload still miss the important intersection between information theory and administrative law that information capture helps bring into focus. The problem is not just that interested parties can strategically bombard the agency with information in order to overwhelm them. It is that the administrative system is so completely oblivious to information costs that it not only neglects requiring some information filtering, but it collectively creates strong incentives for information excess. While much of the resulting information overload may result from inadvertence – a blind, but rational response to rules of administrative process – the system’s obliviousness to information also creates space for strategic gamesmanship. Information excess then can be a conscious strategy deployed by resourceful participants to exhaust their adversaries, reduce the accountability of the rulemakings outside of the immediate circle of those “in the know,” and browbeat the agency into capitulating into many of their demands by reinforcing each technical complaint and criticism with a credible threat of litigation.

Information capture and the accompanying notion of filter failure not only focus the analyst on the perverse role that information can play in administrative law, but it fills some gaps in existing theories of interest group participation and agency accountability. For example, information capture embellishes in important ways on familiar concepts such as “agency costs,” “monitoring costs,” and “slack,” terms that generally refer to the costs or capacity for stakeholder oversight of agency decisions.\(^97\) When information capture is taken into account, it becomes not only important to think of whether the average agency “monitoring costs” are high or low, but also to assess the difference in the monitoring costs between the most informationally advantaged and the least informationally advantaged participants in the rulemaking process (assuming that their stakes are roughly equivalent).\(^98\) References to monitoring costs or slack that aggregate all interest groups as an undistinguished unit risk missing a critical variable in the accountability equation.

Information capture, in contrast to older versions of capture, is also more apolitical and value-neutral than the iron triangles of political theory that seem to depend on the prospect of campaign contributions and similar financial inducements and on the predisposition of agency personnel to these inducements.\(^99\) While a sharp disparity in resources is one factor in predicting the onset of information capture in administrative law, it is not decisive. Poorly financed groups can succeed in information capture if the

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\(^{97}\) See, e.g., Levine & Forrence, *supra* note 86, at 180 (discussing these terms and coining the term slack to refer to the discretion a regulatory enjoys which is free from accountability).

\(^{98}\) There may be extraordinary “slack” for an agency official when viewed from the vantage point of an attentive, but informationally exhausted public interest group that cannot keep up with the information, but very little “slack” in the careful, information intensive positions, arguments and documentation that a common set of regulated parties produce over the lifecycle of regulation. Cf. Levine & Forrence, *supra* note 86, at 185, 187, 190 (discussing “slack” on average for a give rule or policy and noting how it is often very high in high information setting, but not discussing how different interest groups may provide a regulator with very different amounts of slack in a single rulemaking).

\(^{99}\) See, e.g., HREBENAR, *supra* note 77, at 263 (describing Iron Triangles formed in part from contributions to officials which creates the cozy relationships).
issue is salient and the stakes are high enough for them. Additionally, in situations where a group holds information advantages, they can engage more inexpensively than other groups, even when they lack other types of resources.

The most important contribution of the concept of information capture, however, is to encourage the rethinking of the basic model for agency accountability. Information capture and filter failure underscore how requiring agencies to open their rules to comments, without limits or penalties, runs the risk of inviting kitchen sink, scattershot types of comments that can occupy shelves of docket space and can exhaust attentive participants. Information capture highlights how enlarging access to the courts can inadvertently provide a strategic tool for the advantaged stakeholders to extort the agency and threaten them into submission. And even the dedication to transparency contributes to information capture since it flags for onlookers just how complex the rule is without providing any incentive or mechanism for them to engage in participating. At the same time, for engaged and resourceful onlookers, a transparent rulemaking provides more opportunity to trawl the record for weak assumptions, concessions of uncertainty, and ultimately to increase the issues in dispute.

II. HOW ADMINISTRATIVE LAW ENABLES INFORMATION CAPTURE

The APA and related open government statutes create the perfect substrate for the growth and nourishment of information capture. This section isolates the rules of the “rulemaking review game” that not only tolerate excessive information and decline to filter it, but that actually produce a variety of incentives for players, including the agency itself, to overload the system with information or otherwise gain an edge through their superior access to key information. Through a variety of judicially-created requirements, these rules of the game lay the groundwork for escalating information costs that then serve to estrange the marginally-financed interest groups, undermine the hope of pluralistic engagement that could help the agency sift through at least some of the incoming information, and ultimately put the agency at the mercy of the party in control of most of the relevant information. After an overview of how the law creates perverse conditions for information capture, the next part then surveys the current landscape for signs of damage.

A. Filter Failure in the Administrative Procedure Act

The Administrative Procedure Act (APA) displays great faith in the capacity of agencies in particular and the administrative state more generally to process information, no matter how overwhelming. This confidence is evidenced in nearly every nook and cranny of the APA. The APA’s command that “the agency shall give interested persons
an opportunity to participate in the rule making through submission of written data, views, or arguments” is an inviolate principle for rulemaking. The Senate Report supporting the original APA aspired to ensure that an agency’s “[n]otice must fairly apprise interested persons of the issues involved, so that they may present relevant data or argument.” The Attorney General’s Manual on the APA, issued one year later, similarly recommends that “each agency should schedule its rule making in such fashion that there will be sufficient time for affording interested persons an opportunity to participate in the rule making.” Courts have taken these aspirations seriously. “If an agency does neglect to provide this information, . . . and that neglect adversely affects a party’s ability to provide meaningful comments, a reviewing court will hold the rule invalid.”

Accordingly, notice and comment – the period explicitly designed to open the doors to any and all information that any party wishes to provide – not only discourages agencies from placing any limits on the content, technicality or volume of this information, but requires agencies to keep the period open long enough to ensure that anyone who has information to share can participate. A rule can also be remanded if the agency has neglected – however inadvertently – to make a complete library of relevant documents available for commenters to use in formulating their arguments.

Agencies are further required by law to “consider”, which generally means to process and then respond, to all significant comments. If the agency does not do this, it again runs the risk of having its rule rejected by the court. A court, for example, may remand a rule if the agency too quickly dismisses a comment as unduly vague or non-specific and refuses to address the commenter’s concerns in the final rule. As the D.C.

103 5 U.S.C. § 553(c).
106 Id., § 7.3 at 426, citing Global Van Lines v. ICC, 714 F.2d 1290 (5th Cir. 1983).
107 See, e.g., Edward Rubin, It’s Time to Make the Administrative Procedure Act Administrative, 89 CORNELL L. REV. 95, 114 (2003) (observing that “[o]nce the notice is given, anyone may send the agency a comment, and agencies always accept these comments (indeed, how could they not, unless they returned the envelope for insufficient postage?)”).
108 See, e.g., Gerber v. Norton, 294 F.3d 173, 181 (D.C. Cir. 2002) (holding that the Fish and Wildlife Service’s failure to make the map of the off-site mitigation area available for public viewing in the issuance of an incidental take permit deprived plaintiff of meaningful opportunity to comment and required that the case be remanded back to the agency).
110 See generally MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 44-49 (1988)); Stewart, supra note 6, at 1717-60 (discussing the importance of responding to comments in surviving judicial review).
112 See, e.g., Adams v. EPA, 38 F.3d 43, 51-53 (1st Cir. 1994) (concluding that EPA erred in ignoring comments for vagueness and holding that EPA had sufficient notice from the comments for materiality purposes that imposed a requirement on EPA to respond; because it ignored the comments, EPA’s resulting action was thus arbitrary and capricious).
Circuit held in reversing one of FDA’s good practices rules, “It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered.”

As a result, agencies comply, perhaps too conscientiously, with the letter of the law. Even for the minor rules, EPA typically prepares a 100 plus page report on its response to comments, as well as anywhere from a few to dozens of pages of “significant changes” in the small, three column type of the Federal Register. “[I]n one major rulemaking, EPA wrote thousands of pages explaining how it resolved hundreds of issues based on its consideration of over one hundred studies and over one hundred thousand comments it received in response to its notice of proposed rulemaking.”

B. Courts Encourage Information Excess

In the abstract, courts would seem ideally suited to provide a reality check on Congress’ unrealistic faith in the agency’s ability to stay abreast of the avalanche of information that must be processed when developing a rule. But as lawyers fully appreciate, the courts’ substantive rules rarely succeed in simplifying processes, but instead tend to make complex systems worse. The courts’ interpretation of administrative law is no exception. In the APA case law, the courts have generally reinforced, and even expanded, the incentives for information excess and filter failure.

1. Incentives for the Agencies to conduct Rulemakings that are Informationally Excess

The courts’ first unhelpful contribution to administrative process is to relegate to obscurity the one provision Congress did make for requiring agencies to filter information. In the APA, the agency is required to provide a “concise general statement of their basis and purpose [for the rule].” This provision was intended by Congress to force the agencies to ensure that their rules are accessible to the general public, as well as amenable to review by courts and the legislature. “The rationale of this requirement is to enable the public to determine the actual basis and objectives of the rule and to facilitate

113 Nova Scotia, 568 F.2d at 252.
114 See, e.g., EPA, National Emission Standards for Hazardous Air Pollutants (NESHAP) for Primary Aluminum Reduction Plants--Background Information for Promulgated Standards, Summary of Public Comments and Responses (1997) (an example of the type of document EPA prepares for all rules, including smaller rules like this one, that explains the agency’s response to significant comments).
115 See infra note 142-144 and accompanying text
116 See, e.g., PIERCE, supra note 9, §7.4 at 444.
117 Cf. Carol M. Rose, Crystals and Mud in Property Law, 40 STAN. L. REV. 577, 578-79 (1988) (noting the perverse role that courts can play in “muddying” rules and how “straightforward common law crystalline rules have been muddied repeatedly by exceptions and equitable second-guessing, to the point that the various claimants . . . don’t know quite what their rights and obligations really are”).
118 Cf. MASHAW, supra note 102, at 126 (observing that “[i]t seems virtually undeniable that the major procedural developments in American administrative law from the Administrative Procedure Act to the present have been the work largely of the courts or of the chief executive”).
meaningful judicial review.”120 With respect to its meaning, the provision was initially understood, even by the courts, to require agencies to explain in basic terms “what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.”121

Despite the intent of the provision, courts hold an agency in violation of the “concise general statement” requirement only when the agency fails to provide enough information, not when it provides too much.122 There appear to be no cases on the books in which a court rejects a rule because an agency’s lengthy and highly technical preamble is not “concise” or comprehensible enough. By contrast, and while the agency need not discuss every minor facet of its proposal,123 the courts will remand rules for insufficiency when major issues are left unaddressed.124 From this case law, Prof. Pierce concludes that “[t]he courts have replaced the statutory adjectives, ‘concise’ and ‘general’ with the judicial adjectives ‘detailed’ and ‘encyclopedic.’”125

The demise of the “concise general statement” is just the beginning of the trouble, however. Not only do the courts reject the need for filters on the agencies’ communications (despite some congressional intent otherwise), but the courts greatly exacerbate the risk of information excess and inaccessible rulemakings through their opinions. By far the strongest incentive for agencies to actively load their rule and record with details and defensive statements is the “hard look” doctrine.126 This test emerged in

122 See, e.g., Independent U.S. Tanker Owners Comm v. Dole, 809 F.2d 847 (D.C. Cir. 1987) (holding that Secretary of Transportation’s statement of basis and purpose failed to provide adequate account of how rule served Merchant Marine Act’s objectives and the rule was vacated).
123 See, e.g., Kennecott Copper Corp. v. EPA, 462 F.2d 846, 850 (D.C. Cir. 1972) (upholding EPA’s general statement in setting air quality standards because the “regulation contains sufficient exposition of the purpose and basis of the regulation as a whole to satisfy this legislative minimum”); Automotive Parts & Accessories Association v Boyd, 407 F.2d 330 (1968) (rejecting a claim that the statement was insufficient because certain details were lacking); MCI Worldcom, Inc. v. FCC, 209 F.3d 760, 765 (D.C. Cir. 2000) (“[a]n agency is not obliged to respond to every comment, only those that can be thought to challenge a fundamental premise.”) (citation omitted).
124 See, e.g., National Nutritional Foods Ass’n v. Weinberger, 512 F.2d 688, 701 (2d Cir. 1975) (holding that the FDA has failed to provide an adequate statement supporting a rule because it lacked a “detailed record” and “thorough and comprehensible statement of the reasons for its decision” that establish the basis for the agency’s rule); Lloyd Noland Hosp. & Clinic v. Heckler, 762 F.2d 1561, 1567 (11th Cir. 1985) (holding that agency’s statement was inadequate because it failed to give the facts underlying the conclusion);
125 PIERCE, supra note 9, §7.4 at 445.
126 Professor Pierce argues that:
To have any reasonable prospect of obtaining judicial affirmance of a major rule, an agency must set forth the basis and purpose of the rule in a detailed statement, often several hundred pages long, in which the agency refers to the evidentiary basis for all factual predicates, explains its method of reasoning from factual predicates to the expected effects of the rule, relates the factual predicates and expected effects of the rule to each of the statutory goals or purposes the agency is required to further or to consider, responds to all major criticisms contained in the comments on its proposed rule, and
the early 1970’s as a way to increase oversight over what was then viewed as unbridled discretion by agencies and a serious risk of agencies being captured by the interests they were charged with regulating. In “hard look” review, the court closely scrutinizes the agency’s rule to ensure that it has adequately considered all comments and supported its contested assumptions.127 As the D.C. Circuit reminded the agencies: “What we are entitled to at all events is a careful identification by the Secretary, when his proposed standards are challenged, of the reasons why he chooses to follow one course rather than another.”128 However, when a rulemaking has dozens or even hundreds of moving parts, this puts agencies in a “no win” situation. For substantial rules, the “reviewing court, assisted by able counsel for petitioners, almost always can identify one or more issues the agency addressed poorly in its statement of basis, and purpose.”129

Adding to the litigation worries created by “hard look” review is the occasional demand by courts that the agency develop substantial evidence in support of its protective regulation.130 The Supreme Court set the bar quite high for this substantial evidence requirement in Benzene.131 In rejecting OSHA’s argument that the science was too uncertain to determine the precise level at which the carcinogen benzene became unsafe, the Court demanded that the agency assemble “substantial evidence” in support of its standards if it expected to survive judicial challenge.132 In response to the Supreme Court’s Benzene decision, commentators observed that OSHA found itself forced to engage “in this exceedingly precise analysis with full knowledge that the estimates provided by existing risk assessment models could vary millionfold, depending upon the model selected.”133 Other federal agencies also felt compelled to provide detailed technical explanations for their standard-setting decisions to avoid the outcome reached in Benzene.134

explains why it has rejected at least some of the most plausible alternatives to the rule it has adopted.

Pierce, supra note 9, § 7.4 at p.442.

127 See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1, 40 (D.C. Cir. 1976) (Leventhal concurring and arguing for “hard look” review).


129 Pierce, supra note 9, §7.4 at 457.

130 Benzene immediately produced immediate ripples in the case law. In Gulf South Insulation v. United States Consumer Prod. Safety Comm’n, 701 F.2d 1137 (5th Cir. 1983), the Fifth Circuit overturned the Consumer Product Safety Commission’s (CPSC) ban on the use of urea-formaldehyde insulation (UFFI) in residences and schools holding the agency’s supporting record to be complete; "To make precise estimates, precise data are required." Id. at 1146 Somewhat similarly, in Leather Industries v. EPA, 40 F.3d 392 (D.C. Cir. 1994), the D.C. Circuit not only invalidated EPA’s model because of EPA’s failure to refine the model to address specific activities, but it also invalidated EPA’s working assumption regarding the phytotoxicity of selenium, an assumption made necessary by limitations in available evidence. “While the EPA ‘may ‘err’ on the side of overprotection,” it “may not engage in sheer guesswork.” Id. at 408. The court did not suggest, however, that the agency had ignored relevant information, nor did it explain how the EPA would go about gathering additional information.


132 See, e.g., ELIZABETH FISHER, RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM 107-112 (2007) (describing the more tolerant view of OSHA standard-setting because of the rampant uncertainties).


134 See, e.g., JOHN D. GRAHAM ET AL., IN SEARCH OF SAFETY: CHEMICALS AND CANCER RISK 151 (1988) (“Since the Supreme Court’s 1980 benzene decision, federal agencies have felt compelled to use such
The only responsible course of action when faced with these doctrinal demands is for the agency to engage in defensive overkill when developing rules. In the rulemaking environment created by the case law, every comment that raises a credible-sounding issue, even a peripheral one, must receive a complete and detailed response. In preparing its rule for challenge, the agency will also work hard to support, or at least give the appearance of supporting, every assumption incorporated into the rule with information from the technical and scientific literature. Moreover, because the agency is not expected to be “concise” in its use of information, and there is no requirement that this information be even moderately accessible to a general audience, there are no downsides for the agency to include pages of technical verbiage designed to fend off litigation. Indeed, it is rational for it to do so.

In practice, at least in contemporary judicial review, “hard look” and Benzene’s demand for a substantial scientific record are the exception rather than the rule; most courts reviewing EPA technical rulemakings grant the agency considerable deference. Yet the chance that the agency will get unlucky and draw a “hard look” panel remains a distinct risk, and it is nearly impossible for an agency to know in advance what the panel’s predilection will be. Mashaw observes that because of this significant unpredictability in the applicable standard of review, the courts essentially function “as numerical risk estimates to support both priority-setting and standard-setting decisions.”; Frank B. Cross, Beyond Benzene: Establishing Principles for a Significance Threshold on Regulatable Risks of Cancer, 35 EMORY L.J. 1, 12 43 (1986) (arguing that judicial review forces agencies to provide detailed technical explanations for standards); Howard Latin, Good Science, Bad Regulation, and Toxic Risk Assessment, 5 YALE J. ON REG. 89, 132 (1988) (“[T]he Court's benzene decision has ... induced federal agencies to conclude that they must provide quantitative risk estimates even if they lack confidence in the resulting judgments.”); Richard J. Pierce, Jr., Two Problems in Administrative Law: Political Polarization on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking, 1988 DUKE L.J. 300, 311 (arguing that courts often require “that agencies 'find' unfindable facts and support those findings with unattainable evidence”).

Prof. Pierce describes what the agencies must do to avoid the risk of having their rule remanded as arbitrary and capricious, which includes a demand that they:

- respond to all major points made in comments, state the factual predicates for its rule,
- support the factual predicates by linking them to something in the record of the rulemaking, explain its reasons for resolving issues as it did, relate its findings and its reasoning to decisional factors made relevant by its statute, and give reasons for rejecting plausible alternatives to the rule it adopted.

PIERCE, supra note 9, §7.1 at 413.

Sheila Jasanoff, Science at the Bar: Science and Technology in American Law 91 (1997) (noting that “[j]udicial withdrawal from the supervision of technical decisions in the 1980s avoided the pitfalls of overzealous review but only by reinstating an unrealistic and anachronistic vision of agency expertise”); R. Shep Melnick, Regulation and the Courts: The Case of the Clean Air Act 356 (1983 (concluding that judges have wisely realized their own limitations and overturned only those standards based on "glaring error")

See generally ROBERT KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 223, 225 (2003) (underscoring how uncertainty in judicial review, coupled with adversarialism, leads to counterproductive delays and skews in power resulting from lawsuits); Mashaw, supra note 102, at 165 (underscoring that “most seem to argue that the real impediment created by judicial review is uncertainty” in how they will analyze the rule).
robbed roulette wheels churning out results – either ‘case dismissed’ or ‘remanded to the agency for further development’ – in a fashion that approximate chance.”

It is this chance that the judicial roulette wheel will settle on a “hard look” standard that leads agencies to assume the worst. Prof. Melnick observes: “Since agencies do not like losing big court cases, they reacted defensively [to the courts’ requirements], accumulating more and more information, responding to all comments, and covering their bets. The rulemaking record grew enormously, far beyond any judge’s ability to review it.” And “[t]hus began a vicious cycle: the more effort agencies put into rulemaking, the more they feared losing, and the more defensive rulemaking became.” Indeed, not only is there no filter to limit the information agencies need to support their rulemakings, but from their perspective, providing excessive information is a winning strategy.

Although filter failure and information costs have not been factored directly into the scholarly complaints about the current state of judicial review, many critics do identify the adverse consequences associated with the unnecessary expansion of the rulemaking and accompanying record. Professor Pierce, a long time critic of “hard look,” argues that this unrestricted form of judicial scrutiny has forced agencies to engage in excessive data analysis and explanation, filling hundreds of pages of the Federal Register that courts ultimately “may, or may not, consider an adequate response to the 10,000-1,000,000 pages of comments” received. In her study of the effects of judicial review on EPA, O’Leary similarly concludes that “the proliferation of court decisions has forced what one EPA staff member called ‘non-user-friendly’ regulations. According to EPA technical staff, the Office of General Counsel often rewrites regulations, notices, and proposals in anticipation that a lawsuit is imminent. Lawyers have the last word in most EPA actions.” And in an article on Vermont Yankee, Prof. Stewart also takes note of the informational consequences of hard look review: “In response to these [hard look] rulings, agency lawyers sought to bolster the agency’s position by elaborate documentation, while respondents and intervenors submitted contrary documentation which they themselves developed or obtained from agency files through Freedom of Information Act litigation. These various documents provided an elaborate record for judicial review . . . .”

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138 MASHAW, supra note 102, at 181; see also KAGAN, supra note 137, at 223, 225 (underscoring how uncertainty in judicial review, coupled with adversarialism, leads to counterproductive delays and skews in power resulting from lawsuits).
139 See, e.g., PIERCE, supra note 9, § 7.4 at p.449-50 (discussing how State Farm requires agency to respond to all comments and criticisms and the resultant adverse effects that it has on the agency).
141 Id.
Yet, even if the courts were consistently deferential, agencies might still perceive some benefits to producing records and rules that provide communications that are far more technical, lengthy, and detailed than is needed or justified under the circumstances. An overly complex rulemaking offers an agency the benefit of exhausting its adversaries. The enormous size and breathtaking detail and technicality may even help discourage some courts that might otherwise be inclined to review the agency’s decision with some care. Melnick in fact speculates about “judicial exhaustion” that characterizes some courts’ reviews of agency actions.\footnote{R. Shep Melnick, “Courts and Agencies” 14 (draft available on faculty home page August 2009), available at http://www.bc.edu/schools/cas/polisci/meta-elements/pdf/melnick/courts-and-agencies.pdf.}

In these cases the courts may resort to a deferential approach simply because they lack the deferential stamina to do anything else.

Thus, what began in 1947 as a hopeful, “concise general statement” has been transformed through sixty years of litigation into a lengthy, technical, and often incomprehensible jumble. While the goal of “hard look” review may have been noble in theory, in practice this form of judicial review appears to have led to precisely the opposite of what its proponents seemed to imagine.\footnote{In advocating for hard look, William Pedersen itemized the types of requirements that should be imposed on the agencies. Note how with the benefit of hindsight, it becomes clear how each of these requirements ultimately imposes cumulative information burdens on agencies that are likely to lead to excess from either the interest groups or the agency itself:}

First, both the essential factual data on which the rule is based and the methodology used in reasoning from the data to the proposed standard must be disclosed for comment at the time a rule is proposed. To the extent they are not available at that time, they must be disclosed when they become available. Second, the agency's discussion of the basis and purpose of its rule—generally contained in the “preambles” to the notices of proposed and final rulemaking and in the accompanying technical support documents—must detail the steps of the agency's reasoning and its factual basis. Third, significant comments received during the public comment period must be answered at the time of final promulgation. However, comments must meet a standard of detail equal to that required of the agency in promulgating its rule before they will be considered significant. Fourth, only objections to the regulations which were raised with some specificity during the public comment period, and to which the agency thus had an opportunity to respond, may be raised during judicial review.


\footnote{See, e.g., id. 66-70 (describing how EPA attorneys play a large role in forming the administrative record and will tend to include a great deal of material to protect the agency from suit); Melnick, supra note 140, at 256 (citing studies and concluding that because of aggressive judicial review, the agency lawyers are the biggest “winners”; [f]requently—especially on remand—they end up writing substantial portions of the regulations.”).}
2. Parallel Incentives for Interest Groups to Engage in Information Capture

These incentives for information excess arising from judicial review do not only affect the agencies, but also affect interest groups that participate in the rulemaking process. The signal the case law sends to these parties is quite similar to that transmitted to the agencies; namely to include in their comments highly specific, very detailed, extensively documented comments on every conceivable point of contention, and to back up their comments with the threat of litigation. Attorneys working primarily for industry stress that the most important task for their clients is to “build the best record” that they can and observe that “[w]ritten comments are the single most effective technique” for doing so: “Make sure that you submit to the Agency all relevant information supporting your concerns in the rulemaking. This is the best way to convince the Agency to responds favorably to your concerns.” Since there are no limits to the information that agencies are expected to process, there is no need for these commentors to provide succinct statements of their complaints. Instead, they can leave the task of processing the information to the agencies.

Several unrelated doctrines further reinforce these incentives for stakeholders to use information as an offensive weapon in their dealings with agencies. First, the courts generally require that only parties that file comments during the notice and comment period can later be involved in litigation against the agency. This requirement originates from the notion that before seeking judicial redress, a party must exhaust their administrative remedies. Some operative statutes also impose this requirement on rulemakings.

While the courts’ demand that parties exhaust their administrative remedies was originally conceived of as a way to save agency resources by limiting litigation, when viewed from the perspective of information, this requirement actually increases the burden on agencies. Rational parties will react by erring on the side of providing too much rather than too little. Indeed, the rule not only suggests that a party must file a comment before they can litigate, but they must file that same, specific comment before they can raise it in court. If a party neglects to raise an argument during the comment period, however preliminarily, it is generally foreclosed from raising the issue later. Since the threat of litigation may be the only, or at least the best, way for stakeholders to

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148 Field & Robb, supra note 31, at 9-10 (collecting the most important advice from the top attorneys interviewed for their report).
149 See generally McKart v. United States, 395 U.S. 185 (1969) (setting out the reasons for exhausting remedies first within the agency before raising the issue with the court).
151 See, e.g., Clean Air Act, 42 U.S.C. § 7606(d)(7)(B) (“[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review” with limited exceptions).
152 See, e.g., NRDC v. Thomas, 805 F.2d 410 (D.C. Cir. 1986) (arguments not raised during comment period may be foreclosed in later proceedings).
get the agency’s attention during the rulemaking process, they have strong incentives to lay the groundwork for future legal action and to err on the side of including every plausible argument in their comments.

Additionally, and more worrisome from the standpoint of information excess, the courts have made it clear that more general comments from affected parties – even if lodged in writing and on time – are usually not material enough to matter legally. To preserve issues for litigation, affected parties are thus best-advised to provide comments that are specific, detailed, and well-documented. This seemingly reasonable requirement for specificity again encourages interested parties to provide too much documentation, too many specifics, and too much detail, rather than too little.

Finally, through judicial review the courts have made it clear that the agency ignores these material comments at its peril. This, however, creates a situation where interested parties can overwhelm the rulemaking process when it is in their interest to do so. With no limits on the extent or nature of the information they can file, the temptation to drown the agency in criticisms and accompanying documentation is likely irresistible, at least for some resourceful interested parties. As the D.C. Circuit remarked in a case with a record that spanned more than 10,000 pages:

[T]he record presented to us on appeal or petition for review is a sump in which the parties have deposited a sundry mass of materials that have neither passed through the filter of rules of evidence nor undergone the refining fire of adversarial presentation. . . The lack of discipline in such a record, coupled with its sheer mass . . . makes the record of information rulemaking a less than fertile ground for judicial review.

In his case study of an OSHA rulemaking, Prof. Schmidt traces how the successful parties carefully laced the record with multiple grounds for suit and then used those issues to hold the agency hostage to their viewpoints. On the other hand, when a participant fails to lodge comments and preserve its right to

153 See, e.g., Portland Cement Ass’n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973) (holding that a commenter can’t merely assert that a general mistake was made; it must provide specific evidence and argumentation as to the nature of that mistake and its implications).
154 See supra note 148 and accompanying text.
155 See, e.g., PIERCE, supra note 9, §7.4 at 443 (“If a comment criticizes in detail some characteristic of the agency’s proposed rule, . . . , and the agency retains that characteristic in the final rule without including in its statement of basis and purpose a relatively detailed response to that criticism, a reviewing court is likely to hold the rule unlawful . . . .”).
156 Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1052 (D.C. Cir. 1979); see also Florida Peach Growers Ass’n v. Department of Labor, 489 F.2d 120, 129 (5th Cir. 1974) (lamenting that the record is “some 238 documents occupying approximately two and one half feet of shelf space” that contains a mix of technical information); Aqua Slide ‘N’ Dive Corp. v. CPSC, 569 F.2d 831, 837 (5th Cir. 1978) (observing that judicial review was complicated by the record that consisted of a “jumble of letters, advertisements, comments, drafts, reports and publications . . . run[ning] for almost 2,000 pages . . . [with] no index”)
judicial review, the agency discounts and in some cases completely ignores them.\footnote{See id. at 77.}

In sum, the case law makes it clear that every possible criticism and issue needs to be raised by interested parties in writing, in detail, and ideally with full documentation before the comment period closes. If this doesn’t occur, the party effectively waives its opportunity to raise the issues in future litigation. Rational interest groups will respond to these requirements by raising every conceivable complaint so as to preserve their right to judicial review. If the interest group thinks strategically, they will also consider the added bonus that their excessive communications and filings might even wear the agency down.\footnote{See also infra note 238.}

C. Administrative Processes in the Shadows

Because information is central to rulemakings, participants that enjoy privileged access to information may find that they also enjoy special advantages in the process. The agency becomes dependant on their counsel. Yet, rather than correct for these information imbalances, the administrative process actually allows these groups to enjoy a further edge on their opponents by creating opportunities and incentives for agencies to meet with these particularly knowledgeable groups outside of the formal process. The APA does require communications between agencies and stakeholders to take place in the “sunlight”, but this is practically limited to the period between publication of the proposed and final rules. Both before and after this transparent process, informationally endowed stakeholders and agency staff can negotiate regulatory policies in the shadows, where they are typically free of mandatory docket and recordkeeping requirements. In these darkened settings, unnecessarily high information costs arise more from information inaccessibility than from information excess, and these costs fall exclusively on the subset of groups who are not included in these \textit{ex parte} communications. An analysis of the high information costs arising from the case law is thus not complete without a discussion of how it allows some participants to gain information-related advantages over others during these other stages of the rulemaking process.

1. Participating in the Development of the Proposed Rule

Despite the considerable attention devoted to open government memorialized through notice and comment and judicial review, these events are only a part of the larger rulemaking lifecycle. Based on his experience as General Counsel of EPA, Prof. Elliott observes that “[n]otice-and-comment rulemaking is to public participation as Japanese Kabuki theatre is to human passions – a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.”\footnote{E. Donald Elliott, \textit{Reinventing Rulemaking}, 41 DUKE L.J. 1490, 1492-93 (1992).} These venues range from “informal meetings with trade associations and other constituency groups, to roundtables, to floating ‘trial balloons’ in speeches or leaks to the trade
press.” On the surface, while proposed rules appear to be drafted by agency staff based on internal technical analyses, in fact, most proposed rules may be the result of extensive negotiations with interested parties that remain unrecorded and unacknowledged. The only residual signs of this early deal-making may arise in vague, post hoc rationalizations scattered throughout a proposed rule preamble.

There are several strands of judicial doctrine that inadvertently encourage agencies to work with affected parties in the shadows rather than in the sunlight as anticipated by the APA. First, and perhaps most important, the courts have made it painfully clear that if a rule is to survive judicial review, it must be in essentially final form at the proposed rule stage. Material changes made after this point require a whole new notice and comment process and may even require the agency to start over. To avoid the need to make “material” changes, the agency is eager to get it right the first time. In fact, the basic incentive for agencies to produce nearly complete proposed rules actually arises from the commitment to “due process” embedded by the courts into informal rulemakings, which in theory demands that parties have an opportunity to comment on all significant aspects of the rule.

The prospect of a seemingly endless cycle of notice and comment provides a powerful incentive for the agency to publish a proposed rule that has been heavily vetted before it is publicly aired as an informal proposal. In doing so, the agency will find it

161 Id. at 1493.
162 William Pedersen, then an attorney with EPA, described how the “real” decisionmaking process for rules often occurred. See Pedersen, supra note 146, at 55-57. Most, if not all of this information is considered “deliberative process” and thus is hidden from view.
163 See, e.g., Shell Oil Co. v. EPA, 950 F.2d 741, 757-63 (D.C. Cir. 1991) (holding that agency failed to provide meaningful notice and comment opportunities on issues in the final rule; the issues were raised by commenters during the notice and comment process); Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098 (4th Cir. 1985) (same); Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1021 (D.C. Cir. 1978) (same); see also Environmental Integrity Project v. EPA, 423 F.3d 992 (D.C. Cir. 2005) (vacating EPA rule setting forth monitoring requirements because the agency “flip flopped” after notice and comment and the final rule was not a logical outgrowth of the proposed rule, thus violating the notice and comment requirements of the APA).
164 See, e.g., Jack M. Beermann & Gary Lawson, Reprocessing Vermont Yankee, 75 GEORGE WASH. L. REV. 856, 893-900 (2007) (criticizing courts for adding requirements that agencies must go through second notice and comment process when the final rule is not the “logical outgrowth” of the proposed rule and discussing how that impedes agency adaptability to new information during the notice and comment period); see generally PIERCE, supra note 9, at § 7.3 (discussing the extensive case law on whether an agency’s notice was adequate based on subsequent developments occurring after the proposed rule in the course of the rulemaking).
165 See, e.g., Elliott, supra note 160, at 14995 (observing that “[b]ecause of the need to create a record, real public participation-the kind of back and forth dialogue in which minds (and rules) are really changed-primarily takes place in various fora well in advance of a notice of proposed rulemaking appearing in the Federal Register”).
166 Cf. Rubin, supra note 107, at 111 (arguing that this type of procedural requirement is modeled after the “due process” protections in adjudication).
in their interest to reach out to the most knowledgeable and litigious stakeholders. At the very least, such pre-Notice of Proposed Rulemaking (pre-NPRM) discussions will educate the agency about difficult technical issues and provide the agency with a means of anticipating and addressing these issues in the proposed rule without being caught off-guard. At most, engaging these stakeholders in the development of a proposed rule might help get their buy-in and cause them to be less inclined to undo the proposed rule by filing material comments later in the process.

As mentioned earlier, the agency is also well-advised to dump all that it has learned from these extensive pre-NPRM discussions directly into the preamble of the proposed rule.\textsuperscript{168} Since there are effectively no filtering requirements on the agency’s proposal, and since including all of this detail helps protect against the risk of “material” comments (which has the potential to set the process back), the incentives for information excess in the proposed rulemakings are again clear and unequivocal. The agency’s rational response to these incentives, however, obviously raises the risk that the proposed rule and the final rule will be much less accessible, particularly to those who were not involved in these pre-NPRM negotiations.\textsuperscript{169} If affected parties have been left out of the pre-proposed discussions and are faced with the prospect of processing and critiquing a one-hundred page, opaque explanation and discussion in a few months, it is at least possible that they will choose to forgo this rather time-intensive exercise.\textsuperscript{170} Creating this voluminous record may also benefit the agency since it is likely to lower the risk of material comments and the number of comments in need of response.

Ideally, the courts would foreclose substantive communications that occur between stakeholders and the agency that do not occur in the sunlight. Instead they allow the agency to freely negotiate its rules during the pre-proposed rule process without the significant encumbrance of transparency requirements. Ex parte contacts must be logged in the public record only after the proposed rule is published and generally not before.\textsuperscript{171}

In these darkened settings, unnecessarily high information costs can arise, not only from excessive detail in the agency’s proposal, but from the fact that some of this detail may be unexplained and effectively unintelligible to those who did not take part in the pre-NPRM deliberations. Still more problematic, the added costs generally fall on only one sector – in environmental rulemakings often the same sector of affected parties that is already strapped for resources to participate. Somewhat ironically, in fact, it is

\textsuperscript{168} See infra notes 213-218 and accompanying text.

\textsuperscript{169} See, e.g., Elliott, supra note 160, at 1492 (“What was once (perhaps) a means for securing public input into agency decisions has become today primarily a method for compiling a record for judicial review. No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties”).

\textsuperscript{170} See infra Part III.A.

\textsuperscript{171} See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977) (holding that “communications which are received prior to issuance of a formal notice of rulemaking do not, in general have to be put in a public file [but] once a notice of proposed rulemaking has been issued, . . . any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding, [should avoid ex parte contacts and place any such contacts in the public file]”).
processes intended by the courts to ensure that rulemakings are accessible and accountable to the public that cause this inequitable access.

2. *Renegotiating the Final Rule after Publication*

Rulemaking in the shadows occurs again after the rule is finalized, although this time the agency’s interest in continuing to work on the rule arises only in cases where a party has filed, or perhaps threatens to file, a petition for judicial review. During this post-rule litigation, the court processes impose some structure on the parties. However, these court processes require only very limited transparency for negotiations that take place between the litigants.\(^{172}\)

Litigation thus opens the doors to a second round of negotiations that, even more than the pre-NPRM period, can involve secret deals over details, interpretations, and related features of a rule with only a narrow slice of the affected interests.\(^{173}\) In his study of EPA’s RCRA rulemakings, for example, Coglianese concludes that this post-rule “litigation offers interest groups and the agency an opportunity to do something they were not permitted to do in the notice-and-comment period: negotiate in secret.”\(^{174}\) A trade association’s general counsel elaborated: “[Litigation] is often a vehicle to kind of lead to a revision of regulations. . . There are a number of cases that are filed and automatically stayed because we are filing them just so we go back to the agency and basically kind of renegotiate the regs.”\(^{175}\) Another corporate counsel remarked: “It is almost like having another rulemaking with those people who care enough about the issues to spend the time, being the ones who get to play.”\(^{176}\) These negotiations also “hold an added degree of secrecy given their privileged status”\(^{177}\) and can help “immunize agency officials from oversight by third parties such as the Office of Management and Budget.”\(^{178}\) Information costs rise as accountability mechanisms decline at this late stage in the rulemaking.

\(^{172}\) Even after a court opinion is issued, negotiations often continue and can lead to mutually accommodating resolutions. *See, e.g.*, Coglianese, *supra* note 49, at 169. But it seems more likely that in these post-opinion negotiations, accountability is slightly higher not only because the results are more visible but because the options have been potentially limited by the courts’ ruling and by the litigation process itself which tended to tee up and simplify the issues under dispute.

\(^{173}\) As one regulator insider summarized in an interview with Prof. Coglianese in his study:

> I see this litigation as just a continuation and a narrowing of the regulatory process, and I think most of the players do too. . . . Once it’s all over at the official stage, you start the second stage and you start it by filing litigation so that you can be at the table and work it out with only those people who are really interested. You’ve narrowed the universe from the general public down to those who really care, and you can get down to business. Litigation just happens to be the way you do it.


\(^{174}\) *Id.* at 153.

\(^{175}\) *Id.* at 127.

\(^{176}\) *Id.* at 131.

\(^{177}\) *Id.* at 154.

\(^{178}\) *Id.* at 190.
In most cases there is also a fair amount of room remaining in the post-rule stage to negotiate with respect to the substance of a rule. While any direct changes to the text of the rule must go through a new notice and comment period, other changes, including official interpretations, policy guidances, and enforcement priorities, escape this fate. As Prof. Schmidt found in his case study, these interpretive guidances can be sufficiently meaningful to lead a litigant to voluntarily dismiss its case.

The significance of these post-rule negotiations is spotlighted in Prof. Coglianese’s study, but are surprisingly unexplored elsewhere in the literature. To the extent these post-litigation settlements occur – and Coglianese’s statistics showed they occurred in about one quarter of his sample of significant rules promulgated under the Resource Conservation Recreation Act (RCRA) – they provide yet another vehicle for driving up the information costs for outsiders who are not included in the negotiations. It is particularly problematic that these secret negotiations with a small group of affected parties occur in response to the liberalized judicial review process, a legal intervention that was intended specifically to heighten agency accountability rather than reduce it.

D. Summary.

Administrative law is not simply passive in its tolerance of unlimited information; it actually exacerbates the problem of information excess by creating multiple incentives for rulemaking participants to overload the system with a variety of information costs. The “rulemaking review game,” for example, produces incentives for stakeholders to fill the record with intricate details, raise every argument, err on the side of including attachments that may not be terribly helpful, engaging in negotiations outside of the formal parameters of notice and comment, and raising every litigation threat that is within their grasp. For their part, agencies are foreclosed from trying to limit the information presented to them. They must respond to all comments that are material, no matter how many, how technical, or how poorly framed. They must solicit input and keep comment periods open until everyone has the chance to submit volumes of information. They, too, face incentives to pass off their own analysis in undigested, often incomprehensible form to the larger public and, perhaps worst of all, to work closely with at least some of the affected parties in the shadow of the APA, before the proposed rule and after the final rule is published.

179 See, e.g., Richard Stoll, Coping with the RCRA Hazardous Waste System: A Few Practical Points for Fun and Profit, 1 ENVTL. HAZARDS 6 (July 1989) (describing the considerable “play” remaining in compliance with hazardous waste rules that EPA filled with private letters, obscure guidance documents, and hidden statements in unrelated final rule preambles).
180 See Schmidt, supra note 157, at 79.
181 In his dissertation, Coglianese also observed that nearly half (44%) of the RCRA rules (these were significant RCRA rules) ended up with at least one petition filed seeking judicial review. Coglianese, supra note 49, at 95. About half of those cases settled, and most of those settlements involved only one set of interests. Id. at 155.
III. CONSEQUENCES

“The ‘rules of the game’ powerfully affect who wins, who loses, or who even is allowed to play.”\(^{182}\) The rules of the game discussed in the previous section tolerate unlimited and unnecessarily excessive information; create positive incentives for participants to actually engage in these excessive, unfiltered communications; and encourage the agency to work more closely and largely out of the reach of the APA with some participants who enjoy an information-based edge over their opponents. This section considers the consequences that flow from this game. If all participants and agencies behave rationally in response to these rules, what are the consequences for policymaking and accountable government?

The first and most substantial section in this part unpacks the practical implications of these rules for interest group representation in EPA rulemakings. While the extent and practical implications of this information capture remain unclear, the snapshots of evidence that are available indicate that existing mechanisms for ensuring agency accountability, at least with respect to EPA’s complex rulemakings, are in need of repair. The other three sections explore other adverse consequences of this filter failure and information capture for agency governance, which include the inhibition of creative policymaking, the limitations of transparency and open government as means for ensuring pluralistic engagement, and the difficulties of reversing information excesses once they have entered the system.

A. Information Capture and Pluralism: Theory and Practice

The administrative state is built on an assumption that pluralistic processes will provide the primarily means for keeping agencies accountable. Rigorous engagement by a diverse and balanced assortment of affected interests, reinforced by an ability to challenge regulations in court, equates roughly with a form of democratic oversight. Professor Rubin argues that this pluralistic engagement is so important to current conceptions of administrative process that the APA is essentially a “one-trick pony”: “All of its basic provisions rely on a single method for controlling the actions of administrative agencies, namely, participation by private parties.”\(^{183}\) Indeed, even in the Attorney General’s Report that helped make the case for passage of the APA, the need for this pluralistic oversight of agencies was considered pivotal to the success of the administrative state: “Participation by these groups [economic and community-based] in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests.”\(^{184}\)

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\(^{182}\) Christopher J. Boss, PESTICIDES & POLITICS: THE LIFE CYCLE OF A PUBLIC ISSUE 13 (1987); see also Croley, supra note 48, at 69 (arguing that “focusing only on decisionmakers’ incentives, motives, and goals without consideration of how they are shaped, reinforced, and altered by the decisionmaking procedures will yield incomplete understandings of regulatory outcomes”).

\(^{183}\) Rubin, supra note 107, at 101.

Scholars writing in administrative law echo this faith in pluralistic processes and observe its success over the decades, with particular emphasis on environmental regulation. Professor James Q. Wilson, for example, observes how: “EPA has had to deal with as many complaints and lawsuits from environmentalists as from industry, despite the economic and political advantage industry presumably enjoys.” In their study of interest group politics, Professors Loomis and Cigler conclude that by the early 1980s a “participation revolution” had arisen comprising citizens and special interest groups seeking collective material benefits for the public at large: “The free-rider problem has proven not to be an insurmountable barrier to group formation, and many new interest groups do not use selective material benefits to gain support.” Professor Bosso adds to this positive characterization in his study of pesticide politics; “By the mid-1980s, however, we find a diversity in representation that, on the surface at least, gives pluralists some vindication.” More recently, in his book on public interest regulation, Professor Croley argues that “[w]hile one can still distinguish among regulatory decisions according to the amount of public attention they generate or the number of outside participants they involve, few agency decisions with significant stakes escape public attention or participation completely. Regulatory decisionmaking is seldom done in the dark anymore.”

The existence of filter failure and possibility of information capture, however, cast doubt on these optimistic portrayals of the regulatory process, at least for a potentially important area of regulatory activity where information costs are particularly high. This is because information costs not only increase the costs of participation substantially, particularly for groups that lack inside information, but the resulting clouding of the issues can simultaneously work to reduce the payoff or benefits from participation for these same groups. The escalating information costs, in turn, may tilt the playing field so significantly against those with the least resources that the natural pluralistic processes that underlie rulemaking systems cease to function. This section collects evidence of possible imbalance in interest group engagement in EPA rulemakings where information costs are likely to be very high and uncontrolled by adversarial counter-pressure. While information capture is not the only explanation for this pluralistic breakdown, it is the primary contender and, at the very least, deserves to be taken seriously.

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185 See, e.g., Stewart, supra note 6, at 1683 (“Today, the exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy.”) (footnote omitted).
186 Wilson, supra note 87, at 385.
188 Bosso, supra note 182, at 245. This is in part because “[e]nvironmental policies, by their nature, prompt acrid disputes among equally determined and almost permanently mobilized sets of claimants because they exhibit structures of incentives more contagious to conflict than do agricultural subsidies or water projects.” Id. at 252.
189 CROLEY, supra note 48, at 291-92.
190 See supra Part I.B.
191 See supra notes 50-53 and accompanying text.
Before continuing, it is important to underscore that information capture will not afflict all rules. Some rulemakings are very much in the public eye, despite their complexity, and thus manage to rise above the battles over details to highlight their implications for a broader audience. In these settings a balanced array of interest groups compete for the short attention span of political officials and the public and dedicate considerable time to determining how to make their case persuasively. The resulting, self-imposed filtering of information and more balanced engagement evidenced in these rules occur because natural pluralistic processes are working. In his book, Professor Croley provides compelling case studies of such high visibility rules promulgated by several agencies, including EPA. But his case studies all focus on examples that involved not just vigorous engagement by the public interest community, but that were actually triggered by petitions filed by these very groups. Such rulemakings, however, seem to be the exception rather than the rule, at least at EPA.

The exploration of the information capture phenomenon in this section considers only those rules that generally do not make it into the newspaper and are largely obscure to the public, even though they make an important contribution to the protection of public health and the environment. It is difficult to determine how many rules fit into this group relative to the “newsworthy” rules. However, the fact that EPA promulgates more than 300 rules per year, coupled with the fact that most of EPA’s rulemaking assignments involve highly technical pollution control regulations, suggests that a significant share of EPA’s rulemakings might be susceptible to information capture.

1. Basic Imbalances in Resources and Information

The most obvious way that filter failure exacerbates preexisting imbalances in interest group participation is to make the costs of participation much higher than is necessary – so high, in fact, that in many cases it functions as a barrier to entry. When a regulatory participant is not required to filter the information he shares with the agency—indeed when the system instead actually encourages information excess, then the other participants may find themselves investing a good deal of resources and energy merely trying to keep up with the flood of issues and information, much of which might be peripheral or even irrelevant. As a strategic matter, in fact, excessive detail, technical issues, and side-bars may actually help price out these less well-financed adversaries, or at least drive up their costs of engaging in the regulatory exercise.

Pluralistic processes are undermined by a system that becomes oblivious to the costs required of participants to engage in a meaningful way, particularly when there is no chance of fee reimbursement at the end of the process. Groups that already struggle

192 These are the case studies that Croley considers in his book. See CROLEY, supra note 48, pt. 3 and p.242 (conceding that his primary case studies were all prompted by lawsuits against the agencies by public interest organizations).
193 See id. at 242-23.
194 See supra Part I.B. and infra Parts III.B.2. and 3.
195 See supra Part I.B.
against organizational and related collective action impediments to represent the public interest cannot keep up. In such a system the rich become richer (or at least more dominant) by glutting the system with information excess, forcing their opposition out of rulemaking proceedings.196

In these regulatory settings characterized by escalating information costs, it is generally (but perhaps not always) the public interest groups that find themselves on the short end of the participation stick. The resources of public nonprofits are typically smaller in comparison to their regulated opponents, particularly with respect to the resources available to participate throughout the entire rulemaking life cycle.197 It is also the case that these public interest groups have a stake in almost all of EPA’s rulemakings: Regulated parties, by contrast, will find only a few rules of direct relevance to their individual operations198. As a result, the environmental nonprofits have much less to spend and far more to spend it on, as compared to particular industries. These cumulative disparities in resources do not mean that the public interest groups cannot be effective, but it underscores how they must pick their battles among rules, at least as long as EPA promulgates more than 300 rules a year.199

There is one last source of possible disparity in participation that arises from differing levels of access to key information relevant to the rule. Some of this critical information is more readily available (due to greater access and specialized knowledge) to some groups than to others. Regulated industries, for example, enjoy considerably more inside information about how their plants run, how pollution control equipment might or might not work once in place, what approaches have and have not been considered or tried, and a host of other technical information that proves central to the rulemaking.200 In such rulemakings, the cost for a nonprofit to participate is higher relative to its industry counterpart because of the added resources needed for them first to access and then to master this technical, inside information. Thus not only will they have fewer resources, but public interest groups may face higher costs to participation per rule than their adversaries.

Resource and information disparities are only the beginning of the trouble when it comes to ensuring pluralistic oversight of these complicated rulemakings. In the remainder of this section, more subtle but potentially significant information-related

196 This is precisely the intuition of Gormley in identifying “complexity” as one of the two variables that can cause regulatory problems to fall out of direct mechanisms of public oversight and engagement. See Gormley, supra note 89.

197 See generally HREBENAR, supra note 77, at 261-67 and 329-30 (describing underfunded public interest groups); Stewart, supra note 6, at 1767-70 (same and highlighting process-related handicaps that result from imbalance).

198 Cf. supra note 54 and accompanying text.

199 It might be further argued that the stakes of these regulated industries is actually higher per capita than environmental nonprofits. Since this involves incommensurables – life versus profit losses – however, it seems more contestable. In any event, since this added skewing factor only further tilts the rulemaking towards the regulated industry it can be bracketed as yet another, reinforcing factor for purposes of argument.

200 See supra note 54 and accompanying text.
factors further increase the gap between the “haves” and the “have-nots” in participating in EPA rules that are highly technical and complex.

2. Information Symbiosis

The administrative process encourages the agency to “know thine enemies”, at least if these groups hold in their possession technical facts and details that might prove particularly successful in challenging the rule later. Interest groups with extra knowledge or facts relevant to a rule are likely to enjoy special participatory advantages in the process and may even find themselves working side-by-side with the agency as it develops its proposed rule.

In most complex rules, the agency appears to be quite dependant on these knowledgeable stakeholders to educate it about the critical issues peculiarly within their grasp. Such communications can be quite a bonus for these select groups too, since it provides them with the opportunity to shape or even frame the agency’s regulatory project in the course of their tutorials and informal discussions. Despite the obvious dangers of this pre-proposal intimacy, as a legal matter the agency appreciates that if it doesn’t engage in this type of due diligence and doesn’t reach out to the most knowledgeable stakeholders, these groups are likely to torpedo its final rule using specialized information to support their contention that the rule will pose undue costs, operational difficulties or a range of other hardships. Conveniently the law also places no restrictions on these pre-proposed rule communications with interest groups. Conferences, meetings, telephone conversations, sharing drafts of proposed rule, etc. are not limited, and need not even be recorded, in the administrative record for the rule if the agency prefers to keep them under wraps.

Under such circumstances, even those agency staffers skeptical of industry claims may actively seek out their help in developing the proposed rule in order to reduce the risk of successful challenges down the road. As one agency staff put it, in developing the proposed rule “We help them; they help us.” These relationships do not form because the staff hopes to be employed later with industry, enjoys meals and conferences in luxurious locations, or even because they are directed to “play nice” with favored interest groups by an appointed official high up in the agency, as traditional capture predicts.

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201 As Croley notes, “agencies depend upon information to do whatever they aim to do. Those with the most information, with the most credible and verifiable information, will have a greater opportunity to influence administrative decisionmakers.” Croley, supra note 48, at 135. He suggests, however, that this neutral test of providing valuable information means that administrative processes produce a leveling effect on participation. Id. at 136. This logical inference, however, neglects the information costs and the possibility that they can be so high as to actually screen participation or viable engagement.

202 Interested parties engaged in these communications will include them in the administrative record when it suits their purpose, however. In some cases interest groups even request EPA background documents through the Freedom of Information Act and include them in their comments to make sure they are part of the record. See, e.g., Pedersen, supra note 146, at 68-70 (observing that “this tactic [to use FOIA to access agency documents and then to communicate them back to the agency to ensure that they make their way into the administrative record] has worked fairly well for those who use it, even though the statute probably wasn’t intended for that purpose”).

Under the analysis here, the working relationships, primarily with regulated parties, form at the pre-proposal stage in large part because of the agency’s desire to produce a rule that withstands judicial review. For environmentally minded staff eager to get the final rule in place so as to create some type of binding requirement on the polluting activities of industry, these pre-Notice of Proposed Rulemaking (pre-NPRM) collaborations are legal necessities.

To the extent that administrative processes encourage agencies to work closely with industries in the development of the proposed rule, however, it may create significant imbalances in interest group representation at this critical stage of the rulemaking process. In contrast to industry, public interest groups have little to no unique information to bring to the table. In any event, because of their limited resources, public nonprofits are unlikely to dedicate as many resources at such an early stage of the rule, choosing instead to reserve their fire power to written comments that can be backed by the threat of litigation.

There is not a lot of scholarly attention to these incentives for extensive pre-NPRM interest group communications, but what has been written presents a persuasive case that early contacts with interest groups, particularly those groups with specialized knowledge, may be both extensive and influential. These predictions are borne out by the scant systematic evidence currently available. In a preliminary study examining interest group participation in EPA rules governing hazardous air pollutant standards, industry had more than 700 times more communications (i.e., meetings, letters, and telephone calls) docketed, on average, with EPA during the pre-NPRM stage than public interest groups and more than 50 times more contacts with EPA recorded as compared with state regulators. These striking disparities in participation on the air toxic standards are reinforced by Coglianese’s study of significant EPA’s hazardous waste rules promulgated from 1988 to 1991. Based on more than 40 interviews with EPA and stakeholders involved in EPA rules, Coglianese concludes “‘[i]n the rule development phase, industry groups tend to dominate because of the information they can provide to

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204 Specifically one attorney interviewed in the Field and Robb report observed: The reason that the Agency is generally receptive to well-reasoned technical comments, explains Rogers, is that if you point out specific problems with a regulatory program, then those drafting the rules will generally try to solve those problems. They will do so not only because they want to appear to be reasonable and responsive to public comments, but also because their willingness to refine a regulatory program to address identified flaws in the program—should help that program withstand judicial review.

Field & Robb, supra note 30, at 50.


206 See Wagner, Barnes, and Peters, supra note 33, at 15 (reporting that based on the pre-NPRM contacts that EPA did docket, there were on average 127 communications per rulemaking (i.e., meetings, telephone conversations, and letters) with industry; 0.2 communications (on average spread over a number of rules) with the public interest groups; and 3 communications with state and local regulators on average, per rule).
the agency staff as they write a rule. . . . Corporations and trade associations get involved in the development of nearly every significant EPA rule.”

What develops from the administrative process during the development of the actual rule, then, is a form of information symbiosis between the agencies and the most knowledgeable and resourceful groups. The agency appreciates that the only way to get its rule through is to work closely with its fiercest allies early in the rulemaking. In fact, EPA’s own training materials openly encourage these early contacts with its adversaries. “Negotiation and consultation with outside parties are an important part of the rulemaking process at EPA.... [This contact] brings outside information and perspectives to the Agency’s decisions[,]. . . . builds support for the Agency’s decisions[,] and increases the overall efficiency of EPA’s decision making process.” Coglianese quotes an EPA official who further underscores the importance of close relations with industry during the development of the proposed rule:

We try to bring them in as early as possible on what we are required to do and request their help very early on and usually this is appreciated because that way they have input as opposed to EPA unilaterally going out and looking at various textbooks and writing rules that are ridiculous because we don’t fully understand what the hell we are regulating. So it works out better by working very closely with the people that we are going to regulate and we do this in various ways. We meet with them, we have industry-agency workgroups that will meet together.

This enthusiasm for early and frequent stakeholder input is not lost on regulatory participants. Industry in particular appreciates that their best shot at having a significant influence is during the rule’s formative stages. Legal counsel for industry advise them to “[g]et involved during the preproposal phase of an Agency Rulemaking. That is when the regulation writers want reliable technical information . . . and are thus most receptive to comments from interested persons.”

Indeed, there are several accounts of industry

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207 Coglianese, supra note 49, at 75. Coglianese’s dissertation is brimming over with illustrative quotations. Among them is a quote from an EPA official who praised litigious trade groups for their diligence in assisting EPA, even after suing the agency for the same rule that the official helped develop: The trade association “cooperate[d] with the agency, bend[ing] over backwards to help us in any way that we wanted. All we had to do was ask and they would do that. It was literally a pleasure working with those people.” Id. at 191.

208 Id. at 42, quoting from US Environmental Protection Agency Fact Sheet 12, Regulation Management Series (revised Feb. 1992).

209 Id. at 38-39.

210 Field & Robb, supra note 30, at 9 (1990). One attorney interviewed in the Field and Robb report elaborated:

The reason that the Agency is generally receptive to well-reasoned technical comments, explains Rogers, is that if you point out specific problems with a regulatory program, then those drafting the rules will generally try to solve those problems. They will do so not only because they want to appear to be reasonable and responsive to public comments, but also because their willingness to refine a regulatory program-to address identified flaws in the program-should help that program withstand judicial review.

Id. at 50.
not only commenting, but actually drafting the proposed rule as part of these pre-NPRM discussions.\footnote{Id. at 52 (crediting one attorney with pointing the advantages of providing draft language for the proposed rule and concluding that “whatever the Agency does not take out [of your draft rule] reflects your thinking and has your perspective.”). As an official in a corporate office explained with respect to their involvement with EPA on a rule:

I led an effort – which took about 9 months – to develop using our internal design and operating practices for our [operations], to develop an actual regulation and a preamble and it wound up being a 300-page document with lots of technical data to submit to the agency before they even really started their regulatory process, as a way to influence their thinking on what it ought to look like. And we carefully tied it to the statutory mandate and documented all of the design standards and operating procedures that we used – why they were important, where they were used, what the benefits were – and put that in front of the agency well in advance of their process to influence how they went about it. It had a tremendous impact.

Coglianese, supra note 49, at 47.}

3. \textit{Imbalances in Notice and Comment}

In an idealized version of administrative rulemaking, the agency single-handedly prepares a proposal that provides a thoughtful, holistic approach to the problem.\footnote{\textit{Cf.} \textsc{Wesley A. Magat, Alan J. Krupnick \& Winston Harrington}, \textsc{Rules in the Making: A Statistical Analysis of Regulatory Agency Behavior} 32, 33-38 (1986) (providing a flow chart and elaboration on this ideal (and possibly historic) approach to rulemaking).} This proposed rule is then subjected to vigorous, diverse comments which lead the final rule to be a bit more complex, intricate, and technical, but generally does not deviate in material ways from the agency’s initial proposal. While interest groups in this ideal process might differ in the resources and information available to them, their disparities are not significant in advantaging some groups over others. The proposed rule is generally accessible to all, and specialized knowledge is not needed to evaluate and comment on it.

However, if the pre-NPRM process discussed in the previous section is even partly accurate, then the prospect of balanced engagement by a diverse group of stakeholders faces low odds. During the notice and comment period, all parties are supposed to be on equal footing, at least in theory. In practice, however, rather than an accessible, concise proposal, the proposed rule at this point in the process is likely to be a messy composite of the various stakeholders’ concerns, suggestions, and technical amendments. Much like a contract between elite parties, the resulting proposed rule and perambulatory explanation may be extraordinarily detailed and even unfocussed or meandering – well beyond what might be expected to truly attract “public” notice and comment.\footnote{As Professor Watts observes: “a notice of a final rule could be thought of as speaking \textit{to interested parties and to the courts} in that it aims to justify the validity of that particular rule in terms sufficient to stave off or to withstand judicial challenge and perhaps also to win a broader public relations battle.” Kathryn Watts, Proposing a Place for Politics in Arbitrary-and-Capricious Review, SSRN draft at 25 (forthcoming 119 Yale Law Journal 2009) (emphasis in the original); \textit{see also supra} Part II.B.1.} Moreover, since the agency is not required to filter or limit any of its discussion or even the text of its proposed rule, the agency is likely to err on the side of over-reacting and over-explaining. With the threat of judicial review looming, the agency operates defensively, working overtime to anticipate all major issues in its
proposed rule in an effort to stave off litigation and devastating material comments, without worrying about the barriers that its less expert readers might encounter in understanding and evaluating the proposed rule.

In this prolix state, affected groups require greater resources to offer meaningful comments on the proposed rule, especially if they were not privy to much of the specialized information that went into the proposal. While there have been no efforts to measure resources needed to understand an average EPA proposed rule, the literature offers a number of anecdotes suggesting that these barriers can be quite high. Indeed, a random sample of any of EPA’s technology based standards should convince a skeptical reader of the near-unintelligibility of these rules, even without reading the more dense preambles the agency prepares to defend its rule. Reinforcing these general claims about a very high and likely excessive level of detail and technicality in many EPA rulemakings are some preliminary measures that reveal relatively long preambles and debates over dozens of significant issues per rule for at least one set of pollution control standards. While the EPA’s rules are likely to vary in their complexity, then, the fact that they are generally quite complicated and technical seems uncontestable.

More revealing of actual barriers to participation in these public health rules are early empirical studies that document significant imbalances between regulated parties and public interest groups during the comment process. While these studies do not provide any diagnosis for this imbalance, the studies are at least consistent with the consequences expected to flow from information capture. For example, in the study on hazardous air pollutant rules previously mentioned, industry comments (industry plus

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214 Indeed, buried deep under technical assumptions and impenetrable draft rules could lurk significant concessions that occurred during these pre-NPRM discussions. Other long passages may be a defensive maneuver by the agency to first anticipate detailed criticisms and then respond to them. But an interest group who is not engaged in the issues pre-NPRM may find these cumulative passages quite time-consuming to decipher and understand, and might often conclude after the investment that they are unable to assess their significance for how public health might be affected. Monitoring requirements that must be conducted annually rather than weekly; techniques for measuring emissions that involve larger margins of error than more expensive measurement techniques; pollution control equipment that does not function well at high temperatures – all of these adjustments or decisions may impact the levels of pollution going into the air, but given the main source of litigation-concern, these issues will be framed and addressed primarily to the agency’s most fierce opponent – industry.

215 See, e.g., Coglianese, supra note 49, at 51 (quoting EPA staff office discussing how one rule, for example, involved 481 commenters, required 800 hours from one contractor alone in one week to begin to assemble and process the comments, and resulted in 1600 hours in EPA staff time in one week alone to process the comments right before the final rule was promulgated); Carol M. Rose, Rethinking Environmental Controls: Management Strategies for Common Resources, 1991 DUKE L.J. 1, 1, (asking in despair, “How can we make sense of environmental law? Our legislators churn out great undigestible masses of statutes about the environment, which in turn are interpreted by mounds of regulations, all densely packed with bizarre terms and opaque acronyms.”); Wilson, supra note 87, at 283 (citing as an example a huge record compiled for an OSHA standard that took the agency four years to process and that included 105,000 pages of testimony “in addition to uncounted pages of documents”).

216 See, e.g., 40 C.F.R. Part 63 (technology-based standards for hazardous air pollutants).

217 See Wagner, Barnes, & Peters, supra note 33, at 16 (average of 37 pages per final rule, but reaching above 100 pages in some cases)

218 See id. at 15 (average of 29 comments on a proposed rule that were considered “major,” but reaching a maximum of 52 changes in the sample)
industrial associations) accounted for more than 82 percent of all of the comments received by EPA, with extensive industry involvement in 100 percent of the rulemakings. By contrast public interest representatives, which include state and local regulators as well as nonprofits, participated in only half of the rules, with comments across all rules that averaged 6 percent of the total.219 In his study of RCRA rules, Coglianese similarly found imbalance in commenters, with businesses participating in 96 percent of the rules and national environmental groups participating in 44 percent.220 He also found that “nearly 60 percent of all of the participants in RCRA rulemakings . . . came from industry; only 4 percent from the environmental community.”221 These EPA-focused studies are complemented by a study of 40 “low salience” rules from four different agencies done by Professors Yackee and Yackee. They found that business interests submitted 57 percent of comments, whereas non-governmental organizations submitted 22 percent and public interest groups submitted 6 percent.222 While their study concludes that business dominates the comment process in these low salience rulemakings, the authors do not provide measures of the technicality of the rules. Hence, it is not possible to determine how their results intersect with the information capture hypothesis. Nevertheless, their study does suggest that imbalances in participation result in rulemakings that are obscure to the public.

Equally important in assessing the strength of pluralistic oversight is an assessment of the actual influence of the commenters. One can at least hold out some hope that parties that dominate the information flow may not necessarily enjoy similar levels of influence in affecting the actual substance of the final rule. Yet, based on several snippets of evidence, it appears that voluminous filings of technical comments do translate relatively directly into influence in the final rule. First, if each detailed and well-supported comment raises a litigation risk, then the agency can be expected to make changes that are roughly proportional to the total number of comments, rather than favoring those coming from an under-represented constituency.223 In his case study of OSHA, for example, Schmidt found that it was the litigation-backed comments that were the most influential precisely because they posed immediate risks to the fate of the rule.224 Second, and in this same vein, industry comments are likely to be more factually and technically oriented given their specialized knowledge and attentiveness to compliance-related details. These technical facts constitute the agency’s soft spot in litigation, and the agency is purported to be particularly amenable to making changes in its final rule based on comments that are technical in nature.225 Finally, the preliminary

219 See Wagner, Barnes, & Peters, supra note 33, at 22.
220 See Coglianese, supra note 49, at Table 2-2, p.73.
221 Id. at 70-71 (17.3 percent came from state and local governments and 10.5 percent come from federal government; the total number of participants was 1607).
223 See supra notes 135-144 and accompanying text.
224 See Schmidt, supra note 157.
225 See, e.g., Field & Robb, supra note 30, at 10; id at 50 (noting that industry counsel agree that “the arguments that stand the greatest chance of being listened to by the Agency are those that address technical aspects of a proposed rule rather than the legal basis of that rule.”). Moreover, if industry has already had extensive discussions with the agency to convince it to consider its material changes during the pre-NPRM, its formal comments are likely to be aimed primarily at chipping away at the rule on smaller details rather
empirical evidence that bears on commenter influence reveals that industry continues to dominate the changes made between the proposed and final rule. Both the Yackee and Yackee study and the preliminary study on hazardous air pollutants traced “influence” by statistically linking the comments with changes in the final rule. Both found that the number of comments was the best predictor of influence; industry dominated the comment process and their comments also dominated the changes the agency made in the final rule. In the hazardous air pollutant study, for example, agencies made more than 7.5 changes per rule, on average, in response to industry demands, as compared with an average of 2.6 changes in favor of the public interest groups.

4. Counterpressure against Information Capture and Interest Group Imbalances

Even if the pressures for information capture are in fact strong and unrelenting, there are other institutional mechanisms that would seem, in theory, to help agencies resist the pressure. Such counterpressure could occur by instituting rigorous information filters on participants or simply by offsetting the imbalances with some form of political or staff push-back. These additional institutional interventions are considered in this section. Ultimately, however, none appear capable of counteracting information capture, at least not in a significant way.

a) Courts as Filters

While the courts create many of the significant incentives for information capture through their interpretation of APA, in the narrow context of individual cases, the courts are actually quite adept at forcing powerful information filters on participants. Through page and brief limitations, litigation helps focus and narrow the issues in dispute. If adversaries are involved in the litigation, their adversarial disagreements help to limit and sharpen the issues, dropping out peripheral or weak concerns. There are also far fewer information-related imbalances at the appellate stage since factual disagreements are generally limited to the finite administrative record. Thus, while the appellate cases can still be unwieldy, the judicial process provides, for the first time, some incentives for parties to process the information before they communicate it. than radically reconfiguring the proposal. By contrast, the public interest groups’ primary concerns and comments may take on some basic, framing decisions fundamental to the development of the rule. To the extent that these groups’ changes tend in this more “material” direction, though, they are more likely to receive a chilly reception from the agency since they technically require the agency to promulgate a supplemental or second proposed rule, which involves an additional notice and comment process. In terms of the time involved, it may be quicker to reject these groups’ significant comments and risk being sued; this may be actually quicker than accepting these groups’ changes and triggering notice and comment all over again.

226 See Yackee & Yackee, supra note 222; Wagner, Barnes and Peters, supra note 33, at 15.
227 See Wagner, Barnes, and Peters, supra note 33, at 24.
228 Cf. Smith, supra note 19 (observing how formal forums can involve more extensive filtering for the participants)
229 See supra note 23.
231 But see Wilson, supra note 87, at 284 (observing that court access is expensive).
However, the effectiveness of the courts as information filters is only as good as the cases that come to them, and this proves to be a significant limitation in several respects. The first is that courts will not preside over all cases where information capture may have taken hold – only those challenges that are brought to it for adjudication. In some cases, public interest groups may select captured rulemakings specifically to highlight for the court the imbalance in the agency’s analysis. However, the statistics suggest that if information capture is a relatively prevalent phenomenon in some areas of rulemaking, then many of these rules are not receiving this judicial scrutiny. Prof. Coglianese’s statistics indicate that of EPA’s significant hazardous waste regulations promulgated over a three year period, only about a quarter of the rules were actually briefed in court.\footnote{See supra note 181.} Half were not challenged; and half of the remaining cases settled before oral argument. Interestingly, in fact, some of these cases may have settled precisely because the parties did not want to invest the time or energy (or litigation risk) in processing their claims for the courts. Prof. Coglianese found in his study that “[o]ne reason groups select or settle issues is that the court imposes page limits on briefs and a time limit on oral argument.”\footnote{Coglianese, supra note 49, at 163.}

Adding to the courts’ limitations is the fact that these settlements that occur on the courthouse steps may actually make information capture worse, rather than better. As discussed earlier, in these judicial settlements, the litigants (which may be disproportionately the same parties that dominated earlier phases of the rulemaking)\footnote{See infra note 240 and accompanying text.} are able to take one last bite out of the rulemaking through confidential settlement negotiations.\footnote{Also as discussed, the resulting settlements can lead to significant changes, affecting for example how the agency will interpret or enforce the rule, but these changes may not be subject to notice and comment and may not even be shared openly with the public. See supra notes 179-180 and accompanying text; cf. Schmidt, supra note 157 (discussing OSHA’s settlement with one party which involved altering its enforcement guidance); Field & Robb, supra note 30, at 53 (stressing the advantages of negotiating with the agency rather than litigating and how that allows other issues to be addressed as well, even if they weren’t part of the original legal challenge).} Even more troubling, in some cases, these post-rule settlement negotiations may actually undo some of the pluralistic gains made earlier in the process. Prof. Coglianese, for example, observed that “[i]n the wood preserving rule, the 267 individuals and groups filing comments on the rule narrowed down to three groups in court. Greenpeace and the Environmental Defense Fund were extremely active in the rulemaking, but did not enter the litigation. As a result, positions these environmental groups successfully advanced in the rulemaking were later directly undercut in the litigation process.”\footnote{Coglianese, supra note 49, at 153.}

A second and related limitation to the courts’ filtering effectiveness is their dependence on litigants to raise the issues in need of vetting. Specifically, if industry is the primary litigant, then only industry’s complaints will be aired in court; the possibility that the rule is not protective enough will not be presented to the court for resolution.
The resulting narrowing of the issues raised in litigation will likely mirror the imbalance in interest group representation occurring at earlier phases of the rulemaking. As noted previously, public interest groups appear to file comments on only about half of all EPA’s rulemakings (industry files comments on nearly all of them).\(^\text{237}\) As a result, environmental groups are only able to file suit for half of all rulemakings since they have not exhausted their remedies on the other half. Additionally, evidence reveals that the delay common to litigation is highly attractive to industry, but constitutes a negative feature for environmental groups since it delays pollution regulation.\(^\text{238}\) Thus, even when they have a claim and can file suit, because of the very different payoffs, environmental groups may be less inclined to file suit against the substance of EPA’s rules.\(^\text{239}\) The available evidence on challenges to EPA supports these concerns: Industry challenges more EPA rules and possibly far more than environmental groups.\(^\text{240}\)

b) Offsetting Imbalance in Interest Group Representation with Civic-Minded Government Employees

One corrective that could be quite effective in counteracting imbalances in participation (although it does not stem the rising information costs) is the civic commitment of agency staff. Agency staffers are not automatons that respond unthinkingly to gluts of information that threaten to undermine their regulatory mission.

\(^\text{237}\) See supra notes 220-222 and accompanying text.

\(^\text{238}\) For example, Owen and Braeutigam suggest in their “strategies for established firms and industries” to game the APA: “The delay which can be purchased by litigation offers an opportunity to undertake other measures to reduce or eliminate the costs of an eventual adverse decision. These measures include strategic innovation, legislative proposals, and lobbying activity. If the administrative process goes on long enough, it is even possible to ask for a new hearing on the grounds that new and more accurate information may be available. The agency usually cannot resist the effort to delay through exhaustion of process because this would be grounds for reversal on appeal to the courts.” Owen and Braeutigam, supra note 96, at 5; see also Sidney A. Shapiro & Thomas O. McGarity, Not so Paradoxical: The Rationale for Technology-Based Regulation, 1991 Duke L.J. 729, 736-37 (observing that “[b]ecause judicial review ‘delay[s] the implementation of OSHA standards by an average of two years,’ a company or trade association could save its industry $320,000 by filing an appeal, assuming an eight percent annual interest rate . . . [thus a trade association] could afford legal fees of up to $640 an hour and still save its members money compared to the costs of immediate compliance with the OSHA standard”); cf. Mashaw, supra note 102, at 174 (noting how the timing of review and associated compliance costs affect a party’s stake in challenging a rule in court).

By contrast, environmental groups often see delay as a window during which health is not sufficiently protected. See, e.g., Hrebener, supra note 77, at 262 (observing that “[t]ime delays often benefit the corporate interests while creating a disadvantage for consumer groups” and linking this not only to regulatory consequences but the costs of engaging in the process). While EPA’s standards may be a disappointment, further delaying their implementation could be worse. See, e.g., Stewart, supra note 6, at 1772 (noting that increased formalities like judicial review “may work to the disadvantage of public interest groups by exhausting their limited resources and providing organized interest a basis for delaying agency enforcement actions”); cf. Mashaw, supra note 102, at 174 (noting how the timing of review and associated compliance costs affect a party’s stake in challenging a rule in court).

\(^\text{239}\) For the same reasons, they will be more inclined to sue EPA for missing its statutory deadlines set for issuing the rule.

\(^\text{240}\) See, e.g., Yackee and Yackee, supra note 222; Lettie Wenner, The Reagan Era in Environmental Regulation, in Conflict Resolution and Public Policy 46 (Miriam K. Mills Ed. 1990). In Coglianese’s study which considers hazardous waste rules closest to those likely to be subject to filter failure, he reports that of the 13 of the 28 significant rules challenged in court, 101 total petitions were filed: “91 percent of these 65 groups were corporations or trade associations, while only 8 percent were environmental organizations.” Coglianese, supra note 49, at 101.
Committed EPA staff is likely to be extremely important forces in pushing back against unilateral pressure from one group, particularly industry. In his excellent study, Croley notes – with ample evidence – the important role of agency leadership and staff in keeping public beneficiaries in mind.\textsuperscript{241}

In practice, however, this professional ballast might not be sufficient to eradicate, or even significantly reduce the information capture phenomenon. First, given the incentives created by the structure of administrative law itself, particularly through judicial review, it will be an uphill legal battle for these civic minded staff to surmount all of the one-sided pressures described earlier. Preliminary evidence of changes made to final rules based on skewed industry participation further increase the worry that the agency may be capitulating to a number of industry demands, although how important these numerous concessions are remain to be seen.\textsuperscript{242} However, even assuming that the legal obstacles are not overpowering, this model of administrative law presents a very different mechanism for accountability than the process outlined in the law books. For example, if agency staff are the primary means for promoting the public interest (and pluralistic mechanisms of oversight are effectively abandoned), the hiring of staff needs to be done in a transparent and explicit way that consistently favors those who have views like those working in public interest groups. Administrative law will also have to come to terms with the notion of reduced accountability and transparency when decision-making authority is delegated wholesale to a trustworthy professional workforce. None of this is to suggest that the agency may not help buffer against information capture; but it does suggest that this more informal role played by agency staff needs more systematic confirmation and may needed additional process checks before dismissing information capture’s potential significance.

c) White House Analysis Requirements and Political Interventions

A number of legislative and executive innovations, such as cost-benefit analysis, would seem, in the abstract, to counteract filter failure head-on by forcing agencies to analyze the implications of their rules and share those analyses with the public.\textsuperscript{243} These requirements endeavor to provide onlookers with even

\textsuperscript{241} See, e.g., Croley, supra note 48, at 159 (positing that “[j] it is plausible that agency regulators are motivated to do so as a result of their own commitments to the common good, which might after all account for why they became regulators in the first place”); id. at 282 (concluding from his case studies how the APA processes helped agencies inoculate rules from interest group pressures and allowed “public-interested administrators . . . pursue regulatory goals they believed advanced social welfare in the face of substantial opposition”).

\textsuperscript{242} See supra notes 224-226 and accompanying text.

\textsuperscript{243} Some of the more significant information generation requirements imposed on the agencies that can apply during informal rulemaking include: the National Environmental Policy Act, 42 U.S.C. §4321 et seq. (assessing environmental impacts); the Paperwork Reduction Act, 44 U.S.C. § 3501 et seq. (requiring clearance procedures for federal forms, recordkeeping, and amendments pertaining to electronic information), Regulatory Flexibility Act, 5 USC 601, as amended (providing comprehensive reviews of regulatory activities and to consider impacts of rules on small businesses), Executive Order 12,866, 58 Fed. Reg. 51,735 (1993) (requiring a regulatory impact assessment (otherwise known as a cost-benefit analysis) on influential rules and that these rules be cleared through the Office of Management and
more accessible and digestible snapshots of the costs and benefits of regulation as well as the implications of regulation for vulnerable groups, like small businesses and irreversible environmental commitments.\textsuperscript{244}

While the concept of these analytical requirements is quite appealing from an information processing perspective, they have not lived up to their potential in practice and seem to suffer from filter failure as well.\textsuperscript{245} Retrospective studies of the National Environmental Policy Act (NEPA) and the Regulatory Impact Assessment (RIA) process consistently find that the agency’s analyses tend to be very lengthy (reaching into the hundreds or thousands of pages), highly technical, and so laden with assumptions that the summary tables provide an unreliable overview of the contents of the larger document.\textsuperscript{246} For example, in its comprehensive study of the agency’s compliance with NEPA, the Council on Environmental Quality concluded that rather than providing a candid assessment of the project, the agencies generally turned the environmental impact statement (EIS) into a “litigation-proof” document that did not adequately raise or consider alternatives or engage in the underlying facts in a rigorous way.\textsuperscript{247}

However, even if these centralized analyses do not completely counteract filter failure, they still might provide valuable mechanisms for the White House or other high level political officials to gain purchase on regulatory issues and intervene more directly in ways that offset participatory imbalances arising from information capture.\textsuperscript{248} Much

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  \item Winston Harrington, Lisa Heinzerling, & Richard D. Morgenstern, Controversies Surrounding Regulatory Impact Analysis, in Reforming Regulatory Impact Analysis 12-13 (Winston Harrington, Lisa Heinzerling, & Richard D. Morgenstern eds. 2009) (touting these advantages of the RIA process). At the same time, these salience-raising analyses provide a door through which White House offices enter to review the agency’s preferred course of action. Indeed, this form of political oversight offers in theory the opportunity for push-back on information capture. Some and perhaps most of this failure may be attributable to how these provisions are designed. For example, virtually all of the information and analysis requirements are imposed on agencies without protecting them from candid disclosures or litigation-generating admissions against interest. These added analyses are also often prepared near the end of the process, when the decision is close to final. Winston Harrington, Lisa Heinzerling, & Richard Morgenstern, What We Learned, in Reforming Regulatory Impact Analysis, supra note 245, at 224-25 (discussing this). As a result, the reports serve in practice only to increase the agency’s vulnerability to lawsuits and unwelcome political pressure if the agency slips and includes, in writing, some admissions against interest. Not surprisingly, agency general counsel and other high level officials appear to play a very heavy hand in the drafting of the document, just as they do for proposed and final rules, and sometimes limit the analysis, potentially substantially. Id. at 221-22 (recounting how the agency considered only one alternative). The ability of these analytical documents to penetrate through the informational fog appears well out of reach, at least currently.
  \item Id. at 226 (observing based on the chapter case studies that “RIAs have become huge, dense documents that are almost impenetrable to all but those with training in the relevant technical fields . . . . [but that] even to the well-trained eye, RIAs are often opaque”).
  \item See, e.g., John D. Graham, Saving Law through Administrative Law and Economics, 157 University of Pennsylvania Law Review 395, 473-74 (2008) (describing extensive White House deliberations over features of EPA rules that were not clear from the RIAs, but related to the costs and benefits of the regulation).
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like the model for civic minded staff within the agency, this political ballast – occurring through the White House and the Office of Management and Budget (OMB) – would in theory push back against one-sided pressure to keep these rules on a level playing field. While most would prefer that this political counter-pressure takes place “in the light” rather than outside the public oversight as is currently the case, the fact that it occurs at all may be chalked up as a victory over the skewed results that might otherwise arise from information capture.

Current evidence of OMB’s involvement in EPA’s rulemakings suggests that rather than taking the side of environmental groups, it far more often sides with industry. One of the primary justifications for stronger White House and OMB involvement is to counteract the perceived ideological bent of mission-oriented bureaucrats. Former OMB appointees openly concede that they regarded balancing out the “laser”-like focus of the environment-minded EPA as one of their more important roles. More recent studies of OMB in particular confirm its general, anti-environmental bent. Thus, if information capture tends to lead to a skew towards business, existing studies provide no basis for thinking that White House and OMB review helps protect against it.

249 Lisa Schultz Bressman and Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 Mich. L. Rev. 47, 78, 86 (2006) (noting that 97 percent of EPA respondents stated that White House involvement was either not visible or only somewhat visible to the public and that a majority of EPA respondents believe the White House is more susceptible to faction capture than EPA); see also Sally Katzen, *A Reality Check on an Empirical Study: Comments on “Inside the Administrative State,”* 105 Mich. L. Rev. 1497, 1502-03 (2007) (conceding the lack of transparency but arguing that the results of White House involvement provided greater political accountability, a point discussed later).

250 See, e.g., Bagley and Revesz, *supra* note 77, at 1261-62.

251 Katzen, *supra* note 250, at 1505 (observing how EPA focuses like a laser on protecting the environment and OIRA takes “a broader view and consider[s] how, for example, an environmental proposal will affect energy resources, tax revenues, health policy, etc.”).

252 In their study of top EPA officials’ view of OIRA during the Bush I and Clinton administrations, Professors Bressman and Vandenbergh report that the strong majority (70 percent) reported that the “White House readily sought changes that would reduce burdens on regulated entities, and veered from those that would increase such burdens.” Bressman and Vandenbergh, *supra* note 249, at 87. Prof. Croley made similar, although not quite as strong observations about OIRA’s tilt during the White House review process: 56 percent of the meetings OIRA conducted to discuss rulemakings were exclusively with industry as compared with 10 percent that were held exclusively with public interest groups. See Steven P. Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. Chi. L. Rev. 821, 865-66, 858 (2003). Finally, in a GAO study, about 70 percent of the rules that OIRA “significantly affected” and for which comments were available involved reinforcing the views of industry. U.S. Gen. Accounting Office, *Rulemaking: OMB’s Role in Reviews of Agencies’ Draft Rules and the Transparency of Those Reviews* 11 (2003).

253 To the extent that these centralized review processes could ultimately make matters worse, rather than better with regard to information filtering, the good news is that they only apply to some of the most significant rules, which are likely to be the most salient. But the glass is more likely half empty. These significant rules seem to be those mostly likely to escape the most entrenched forms of information capture. See *supra* notes 192-194 and accompanying text [beg of iii on croley] To think that these salient rules actually escape information capture only to be selected, because their significance, into a more highly politicized setting where they are put at real risk of old-fashioned political capture, presents a bleak picture of administrative process.
5. Summary

Even if the description of information capture is incomplete in some details, in
broad strokes a picture emerges of a process in which costs mount and participants are
winnowed at each successive stage of a rulemaking, in consequence of the lack of
information filtering. The resulting information excesses in these settings cause
adversarial and pluralistic processes to break down due to the substantial demands on the
time and energy of interest groups who must keep up with the growing issues and record.
Once information costs are factored into the evaluation of administrative processes, it
becomes clear that these processes may not be neutral after all. In the end, the result
looks much the same as the type of agency capture that initially motivated these oversight
processes in the beginning.

B. Constrained Decision-making

Professor James Q. Wilson writes that “government management tends to be
driven by the constraints on the organization, not the tasks of the organization.” The
possibility that the agency may spend more time with the constraint of organizing,
processing, and responding to information than actually synthesizing it into a coherent
regulatory policy seems more than a hypothetical worry. The mounds of highly technical
information streaming in, coupled with a judicially enforced requirement that the agency
must “consider” all of it, puts a strain on the agency’s ability to make coherent decisions.
The most obvious effect of this strain is to divert some of the agency’s limited attention
away from producing coherent regulatory policies and toward information
management. Indeed, processing this incoming information can become so central to

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254 This is the fundamental point where I depart from Croley’s analysis. See CROLEY, supra note 48, at 74-75. Once information costs are considered, the processes are not neutral. Information costs do provide a way for more powerful interests to outcompete less powerful interest groups. Indeed, these advantages occur because of administrative processes and rules, not in spite of them. More specifically, Croley seems to assume that access in most cases will be both a necessary and a sufficient condition for participation. Here I argue that it may be a necessary condition, but it is clearly not sufficient in most cases. For example, he argues that “[b]ecause the procedures through which agencies identify and evaluate regulatory alternatives provide opportunities for a wide variety of interests to supply administrators with facts and arguments, and similarly to question the facts and arguments provided by competing interest or generated by agencies themselves, regulatory decisionmaking procedures provide significant protection against informational capture.” Id. at 75. But if the information involved in participating is extremely voluminous and technical, then access is not “free” in practice and information begins to impede the extent that parties can participate in reality. My analysis also takes issue with Croley’s argument that administrative processes provide agencies with the discretion to consider information comprehensively. See, e.g., Croley at 75 (“agencies are equipped [through administrative procedures] to assess information about regulatory ends and means, and in particular to do so with informational independence from those interests with the biggest stake in regulatory outcomes.”). Instead, I argue, the administrative processes tend to tether the agency to the informational priorities of the dominant stakeholders.


256 See, e.g., SIMON, supra note 16, at 242 (observing how many “systems were not designed to conserve the critical scarce resource—the attention to managers—and they tended to ignore the fact that the information most important to top managers comes mainly from external sources and not from the internal records that were immediately accessible for mechanized processing.”).
the agency’s daily work that organizing and processing information could even surpass the energies dedicated to the agency’s mission of producing creative, effective public-benefitting regulations.

Agencies, wisely, have tried to delegate much of the burden of information management to contractors, but in these settings separating information management from decisionmaking is not always easy. For example, contractors are often assigned the job of summarizing public comments and preparing the agency’s comprehensive response to them. They are also heavily involved in the technical analysis that precedes development of the proposed rule. Both of these responsibilities place the contractors in key roles of regulation development. As a result of this intimate involvement of contractors, there is growing concern that contractors, rather than EPA, may be left making the key policy decisions simply by virtue of fulfilling their contracts. Professor Verkuil, for example, worries that because of this extensive contractor involvement in rulemakings, “[r]ationality review by the agency may be fast becoming a misnomer.” An increasingly heavy reliance on contractors to process large amounts of the information relevant to a regulation may also lead EPA to “look ‘less for technical geniuses’ [in hiring staff] and more for generalists who can oversee and communicate with technical consultants. This has affected morale, as EPA technical staff at times resent not being able to use their expertise.”

Filter failure and the resulting risk of information capture in administrative process not only divert agency attention away from the central task of policymaking, but it risks allowing the participants to control the regulatory agenda. Incremental, muddling through in response to interest group input – or “satisficing” – will replace comprehensive problem solving. This is exacerbated by the fact that under the current structure of notice and comment, “private parties can be relied upon to tell the agency what it is doing wrong [in specific rulemakings], but not how it might improve.” In such a system, the agency is given little or no credit for imaginative problem-solving. In fact, a rule seems more likely to survive judicial review if the agency is particularly vigilant about responding to the priorities and issues their adversaries raise, even it means forgoing the development of their own conception of a more holistic regulation. This judicially imposed demand puts the agency at the mercy of its adversaries and cedes to them some measure of control over the regulatory blueprint.

257 See, e.g., Paul R. Verkuil, The Wait is Over: Chevron as the Stealth Vermont Yankee II, 75 GEO. WASH. L. REV. 921, 928 (2007) (observing that “Agency officials, overwhelmed by a workload produced in part by perceived views of hard look review requirements, are increasingly delegating the rationality assignment to private contractors and signing off on the results.”)

258 See, e.g., id.

259 See, e.g., MAGAT, KRUPNICK & HARRINGTON, supra note 212, at 31-38.

260 Verkuil, supra note 257, at 929.

261 O’Leary, supra note 143, at 565.

262 See, e.g., WILSON, supra note 255, at 283 (expressing concern and quoting others with the concern that the threat of judicial review will cause agencies to resist change or take risks on policies, “especially those that embody novel ideas or approaches”).

263 Rubin, supra note 107, 103 (arguing that “policy formation concerns a much less strict conception of notice, grounded in considerations of optimal information flow, not fairness to individuals”).
One group of commentators concludes that, based on these process-based incentives, “it seems best to regard the regulatory agency as an endogenous force whose behavior can be strategically manipulated by the firms it regulates.”

The most significant problem with “satisficing” as a way to develop regulatory policy, however, is the possibility that the groups that constrain the agency in these ways will not represent a cross section of the affected interests but instead will be badly skewed or even one-sided. In her study of the effects of judicial review on EPA, O’Leary concludes that “[m]atters suitable for litigation are the ‘squeaky wheels that get the grease,’ while other important environmental problems fall by the wayside.” “Squeaky wheels” drive the formulation and solutions to the regulatory problem at hand, thus narrowing the conception and analysis as well as limiting the range of best policy responses. And the agency’s legally-based preoccupation with these squeaky wheels may be badly out of line with the public interest, the aggregate views of all affected parties, and the original goal of the statute. As a result, a “system predicated on building consensus and refracting interests may prove painfully incapable of policymaking that transcends particularistic demands.”

If administrative incentives actually do cause the agency to aim for a proposal that withstands the criticisms of the litigious interest groups rather than one that provides comprehensive and responsible regulation, then the ideal of agencies has been significantly compromised. The solution lies not in providing more process and judicial review, but elsewhere.

C. Strategic Use of Information Capture

Information capture represents the dark side of a “transparent” “equal” and “open” system of government: It enables participants to legally undercut one another and

264 OWEN AND BRAEUTIGAM, supra note 96, at 9.
265 Judge Garland suggests this worry in passing, but with respect only to economic regulation. In economic regulation his concern is apparently that the incumbents will engage the agency and that the future beneficiaries will not be represented in judicial review or interest representation. See Merrick B. Garland, Deregulation and Judicial Review, 98 HARV. L. REV. 505, 591 (1985).
266 O’Leary, supra note 143, at 549.
267 Stewart worried – even in the early years of the interest representation model – that “[j]udicialization of agency procedures and the expansion of participation rights may . . . aggravate the tendency for the agency to assume a passive role, focusing on the unique character of each controversy in order to reach an ad hoc accommodation of the particular constellation of interests present.” Stewart, supra note 6, at 1773. The possibility of these ad hoc, unprincipled decisions arising from interest representation seemed to be Stewart’s largest concern as well, although he also gestured to the added possibility that the ad hoc analysis might also not take into account all of the interests affected. Id. at 1789
268 BOSSO, supra note 182, at 255.
269 Prof. Schiller recounts how in the New Deal, agencies were supposed to serve “as a counterweight to the incredible power wielded by large corporations. . . . The administrative state equalized the playing field by placing the government on the side of the people rather than having it simply act as a neutral ‘umpire’ in a dispute between two unequal parties.” Schiller, supra note 26, at 429; see also MELNICK, REGULATION AND THE COURTS, 76-80, 129-35, 157-62, and 261-269 (1986) (discussing cases where courts emphasized that agency role was to protect public health and the environment).
manipulate the agency with elaborate information-based strategies. Basic inequities among interest groups with regard to the resources available to participate can even be exacerbated by these principles for open government, at least in some settings. As Professor Mashaw intuits: “if interest group theory works even somewhat similarly to what the public choice fraternity believes, transparency is a double-edged sword.”

Indeed, the abuse of transparency and open government are well known by regulatory insiders. More than 30 years ago, Professors Owen and Braeutigam underscored how stakeholders’ “ability to control the flow of information to the regulatory agency is a crucial element in affecting decisions.” Based on this power, they observe how these stakeholders can make available “carefully selected facts,” withhold others, and if delay is useful, “flood the agency with more information than it can absorb.” When the agency seeks a particularly damaging piece of information that can’t be legally withheld, they observe how the interest group’s “best tactic is to bury it in a mountain of irrelevant material” or provide it but simultaneously “deny its reliability and to commence a study to acquire more reliable data.”

Published advice by legal counsel to industry betray similar, albeit less candid strategies to use information strategically during the rulemaking process. One interviewee in the Coglianese study – a corporate counsel – provided a succinct summary of their methods: “We will try to build a record that’s persuasive . . . to sort of overwhelm the agency and create for them the impression that the world out there wants them to do something else.” Another group of industry attorneys observed that EPA’s aversion to litigation was often exploited – “many people may file suit [against EPA] just to ‘get a seat at the negotiating table.’”

“Good government” reforms can also be used as Trojan Horses to surreptitiously introduce new strategic tools for controlling regulatory processes through information capture. For example, the tobacco lobby was the architect of both the Data Access and the Data Quality Acts that passed Congress as appropriation riders about a decade ago. Both acts were purportedly passed to improve the scientific integrity of regulatory decisions. Yet, as the sponsorship might suggest, these provisions were motivated by

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270 Cf. CROLEY, supra note 48, at 305 (touting how APA processes stave off rent-seekers and keep regulatory outcomes more public benefitting).
271 MASHAW, supra note 102, at 190.
272 OWEN AND BRAEUTIGAM, supra note 96, at 4.
273 Id. at 4. These techniques can also be deployed in more adversarial settings to overcome the opposition’s efforts. For example, “[i]f another party has supplied damaging information, it is important to supply contrary information in as technical a form as possible so that a hearing is necessary to settle the issues of ‘fact.’” Id. They even advise the regulated parties to deploy decentralized information systems so that officials can be selected who can testify truthfully on what they know, but be carefully protected from other, conflicting or damaging sources of information. Id.
274 Coglianese, supra note 49, at 52.
275 Field & Robb, supra note 30, at 53.
more than tobacco’s selfless effort to get government running on the right scientific track. The Data Access Act, for example, allows any party to access the data from any federally funded study that forms the basis for regulation; but private research that informs regulatory requirements (most of which is produced by regulated parties) is unaffected and remains out of public reach. In the case of the Data Quality Act, however, the agencies got the last laugh. The courts and Congress declined to provide judicial review of the complaint process, and, at the same time industry use of the Act was put under the spotlight because of concerns about abuse. As a result and much to the disappointment of its proponents, the Data Quality Act falls short of providing a judicially-enforced mechanism for launching additional, information-based challenges to agency rulemakings.

In settings where information capture is likely to take hold, rules providing for transparency and open government need to be vigorously examined for signs of mischief. Information capture also reminds us that these commitments to open government are not ends in themselves, but merely “institutional design tools” used to effectuate good government. Their effectiveness should thus not be taken for granted.

D. Information out of Control

One of the fundamental characteristics of information capture, at least in theory, is that the information excesses and accompanying imbalances in participation will grow worse over time and resist easy fixes. Professor Schuck writes eloquently about a related phenomenon, which he called legal complexity. In these complex legal landscapes, he writes, “it is no longer enough to know one’s location and destination; one cannot survive without a great deal of local knowledge about when the buses run, whether cabs will venture into certain neighborhoods, . . . and where it is safe to walk. . . . Experienced guides equipped with maps and special know-how are essential . . . .” As this dense landscape becomes more and more complex and labyrinthine, it may even begin to outstrip the ability of these experts to navigate the terrain. At some point, the issues,

278 See, e.g., id.
280 See, e.g., Mooney, supra note 276.
281 Cf. CROLEY, supra note 48, at 293 (shrugging off public choice predictions and concluding that the best antidote for a rigorous regulatory system is “increased transparency and participation”).
282 Cf. MASHAW, supra note 102, at 191 (nothing that “[t]ransparency thus becomes a strategic institutional design tool, not an end in itself”); Jasanoff, supra note 25 (noting the limits of transparency in promoting rigorous regulatory science).
Some EPA rules and regulatory programs appear destined to be on a path toward potentially hopeless complexity. In his article on the topic, now more than a decade old, Professor Orts writes about the problem of “juridification” where laws and requirements proliferate and become increasingly complex until the entire regulatory structure “breaks down under its own weight.” Others have echoed these concerns. Professor McGarity in his classic article on ossification noticed an upward trajectory in the complexity and technical detail in Federal Register preambles. In his study of pesticide policy, spanning from the 1940s through the 1980s, Professor Bosso similarly observes that the “[o]ne dynamic that stands out . . . [is] that objective conditions have evolved to higher orders of complexity, but the fundamental relationships paradoxically remain pretty much the same.”

All of these observations raise the rather obvious question of how to put the brakes on a system that is likely to grow only more informationally overloaded and complex over time, in ways that might even lose sight of the original motivating purpose of regulation. It is difficult to imagine that agencies will be able to resist this pull toward increasing complexity on their own, particularly in light of the mandatory open door policies that they have maintained for so long. Instead, process changes coming from outside the agencies are needed. Several possible reforms are discussed next.

IV. Reform

In this section, I argue that there are a number of changes, many of them relatively straightforward, that should help counteract current incentives for information excess and the resulting break-down of pluralistic processes. Before discussing these reforms, however, it is important to place information capture in perspective one last time. Despite the evidence supporting its existence and potential significance, information capture runs contrary to how a number of leading administrative scholars conceive of environmental regulation. Professor Sunstein and Justice Breyer, in particular, write about a regulatory process that suffers from too little information. Instead of viewing the regulatory process as one that is effectively captured by the most knowledgeable insiders, they describe a regulatory system that is too easily influenced by misinformed public opinion and even public hysteria that derails sensible regulation and leads to inefficient pollution standards. Their reforms attempt to circumvent these

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285 See McGarity, supra note 133. For a visual representation of the growth of environmental regulations since 1972, see http://www.law.drake.edu/facStaff/docs/T_40_compared.JPG (provided by Prof. Jerry Anderson, Drake Law School)
286 Bosso, supra note 182, at 235.
287 See supra notes 185-189 and accompanying text.
public passions and biases through the use of more rational regulatory tools and expert bodies, some of which could actually aggravate information capture.\textsuperscript{289}

These conflicting conceptions of environmental regulation are not as problematic as they first appear. It need not be the case that one vision is correct and the other is wrong, or even that the truth lies somewhere in-between. Instead, both conceptions of environmental regulation may well be roughly accurate; they simply focus on different aspects of the regulatory process. In fact, the possibility of different sectors of regulation, each with very different participatory characteristics, fits exactly within the model developed by Gormley in the 1980s.\textsuperscript{290}

In identifying possible reforms, then, particular care must be taken to ensure that whatever is proposed for one type of regulatory problem occurring in one part of the system will not have adverse side effects on other sectors of regulation with different characteristics and problems.\textsuperscript{291} The following sections identify possible mechanisms to counteract information capture in highly complex and technical rulemakings. On their face, the proposed reforms would seem to be benign or even moderately helpful in other areas of regulatory activity, including those that concern Sunstein and Breyer. Creating better opportunities for more creative decision-making insulated from interest group politics, a reform recommended below, for example, seems in keeping with the spirit of the reforms offered by Sunstein and Breyer. Ultimately, however, further analysis is needed to evaluate whether implementing these reforms will cause unintended side effects in spheres of regulatory activity where information capture is not a problem.

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\textsuperscript{289} See, e.g., BREYER, supra note 288, (recommending that an elite group of “super regulators” make regulatory decisions rather than basing regulations on public preferences, as is currently the case); Cass R. Sunstein, Cognition and Cost-Benefit Analysis, 29 J. Legal Stud. 1059 (2000) (recommending the use of cost-benefit analysis to correct for numerous cognitive deficits in public assessment of risk); see also CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION (1996) (recommending the use of cost-benefit analysis to correct for various undesirable effects of public governance).

\textsuperscript{290} See Gormley, supra note 89, at 600, 607; see generally supra notes 89-92 and accompanying text.

\textsuperscript{291} Some of the sharpest criticisms of the work of Sunstein and Breyer take issue with their tendency to overgeneralize about the regulatory state from their more narrow examples of problematic rulemaking and to ignore the dominant role of industry in their analysis. See, e.g., FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2005) (systematically arguing against the use of cost-benefit analysis as urged by Sunstein and others); David Dana, Setting Environmental Priorities: The Promise of a Bureaucratic Solution, 74 BOSTON U. L. REV. 365, 376-81 (1994) (questioning Breyer’s neglect of interest group politics in his analysis and suggesting that this is a serious omission); Eric J. Gouvin, A Square Peg in a Vicious Circle: Stephen Breyer’s Optimistic Prescription for the Regulatory Mess, 32 HARV. J. ON LEGIS. 473, 482-83 (1995) (criticizing Breyer’s analysis for totally ignoring public choice theory); Lisa Heinzerling, Justice Breyer’s Hard Look, 8 ADMIN. L. J. 767, 767 (arguing “that the set of agency decisions that are “in fact highly irrational” is, for Breyer, small but not empty”); Stephen F. Williams, Risk Regulation and its Hazards, 93 MICH. L. REV. 1498, 1504-06 (1995) (criticizing Breyer for neglecting to account for interest group politics in his analysis).
This final section opens with a roadmap that outlines the overall objectives for reform and then identifies how specific reforms fit within these objectives. The remaining sections then consider the reforms in more detail. While some of the proposals are unconventional, none of them will require radical changes to the existing administrative system.

A. Plan for Reform

The bulk of the reforms presented in this section are directed at fixing the breakdown in the pluralistic process that results when information capture afflicts administrative rule making. The adversarial back-and-forth between interest groups, when it works, helps to filter information naturally by eliminating some of the peripheral or poorly supported arguments and sharpening the discussion of issues most critical to decision-making. While an adversarial approach to regulatory deliberations is inefficient and creates a range of problems, it is, and likely will remain, a primary mechanism for ensuring administrative accountability. Therefore, the most straightforward approach for reform is to revitalize the pluralistic process in these complex rulemakings.

The reforms offered in this section suggest three general ways to strengthen the pluralistic process in rulemakings. The first two sets of reform focus on increasing the diversity of participation among affected groups by reducing the high costs which serve as a barrier to participation. Specifically, the first reforms address the ever escalating information-related costs required to participate in the rule-making process, while the second set of reforms focus on finding ways to subsidize or reward thinly financed groups so as to increase their engagement in these complex and technical processes. The third reform, by contrast, is designed to encourage the courts to evaluate rulemakings based on the extent to which the rule makings were informed by a pluralistic process rather than by focusing on, and second-guessing, the substance of the agency’s rule.

A second type of reform circumvents adversarial processes altogether and instead advocates for the creation of a “litigation free space” in which regulators are expected to innovate and devise effective regulatory solutions free of constraints imposed by interest group pressures. One of the disadvantages of rigorous adversarial processes, even when they work, is that the participants’ agenda can control the regulators’ framework for thinking about the problem. This reform would create an opportunity for the agency to initiate the regulatory project without regard to these constraints imposed by interest

See generally KAGAN, supra note 137; Stewart, supra note 6.

Implicit in this effort to reinforce pluralistic processes (although as will become clear that is not the sole ingredient to reform) is the implicit argument that adversarialism should not be dismissed across the board and is sometimes beneficial (at least in settings where there are no alternatives for sharpening the deliberations). Cf. KAGAN, supra note 137, at 226 (conceding the benefits of adversarial legalism with respect to is potential to “give all interests a voice” but arguing that when used without limits, it “can make the government disproportionately responsive to those who do wield them [the mechanisms of adversarial legalism]” (emphasis in original)). In situations where information costs are likely to rise very high and the parties are equally matched, adversarialism may be one of the best mechanisms available to control information costs, particularly if those costs have grown higher than can be realistically addressed through other means.
groups. Indeed, under this reform the agency would not only have the opportunity to consider regulatory alternatives free from stakeholder and legal distractions, but would be required to do so.

A third reform focuses on the problems that have been created by possible information capture in the past. These reforms strive to penetrate through enormous rulemaking records to ensure that the finalized regulations have not drifted too far from their statutory and public missions and to reopen them when they have.

B. Reforms to Reinvigorate Pluralistic Engagement in Rulemakings

While existing administrative procedures impose no filter on the information used to support the rulemaking process, there appears to be an assumption that some filtering will nevertheless take place through pluralistic oversight. The problem with this assumption is that in some, and perhaps many, settings, the information related costs associated with participation are so high that an entire sector of affected interests may not be able to participate. When this happens, the adversarial process breaks down, leading to information capture.

There are several ways to reinvigorate interest group engagement in complicated rulemakings. Each is discussed in turn.

1. Information Filters on Participants

The most straightforward reform institutes flat restrictions on the information that participants can load into the rulemaking process. Establishing simple filters on the level and type of these communications will not solve all problems – there will still be a temptation to fill comments with highly specialized and undigested information. Nonetheless, establishing such filters would be a good start. At the very least the filters would force all participants to begin to control information excess at the marginal level.

The first set of recommended reforms place mandatory limits on the size of the communications that participants can share with the agency, including minimum standards to ensure the reliability of technical assertions. These restrictions could be quite unremarkable – for example, imposing page and volume limits on the filings, much like the limits placed by appellate courts on appellants. Participants would also be required to verify the reliability of the data presented and provide supporting analysis for critical assertions of fact. Although these suggestions are simple, they might be quite effective in capping the amount of information that a party can introduce to the regulatory system.


295 This proposal also shifts primary information filtering responsibility on the participants, who generally are best able to do this processing at the lowest cost. But see Alan Raul & Julie Zampa Dwyer, Regulatory Daubert, 66 Law & CONTEMP. PROBS. 7 (Fall 2003) (effectively recommending that the agency should be held responsible for filtering the reliability of communications coming from affected parties).
Evidence suggests that investing energy and time in collating, digesting, and communicating issues in a succinct way can dramatically improve the quality of a communication, while also increasing the likelihood that the recipient (here the agency) will receive the intended message. As one trade association explained to Prof. Coglianese in his study:

When we started our comments took up a space on my bookshelf this thick [gesturing about 1 ½ feet]. So to me the fact that we whittled it down to 100 pages [to meet the appellate court’s page limit] is pretty remarkable. There were a lot more issues that we conceded later were not – you know we were just whining – we didn’t have a good recommendation for an alternative approach for EPA to take. So a lot of issues fell off over the years.

Even if establishing page limits does not yield significant benefits in every case, establishing these limits signals that information flowing into the agencies should be restricted and, at the very least, would initiate a conversation about how to encourage participants to be more concise and clear in the information they submit to the agency.

A second, related information filter involves limiting the number of contacts between agency staff and stakeholders throughout the rulemaking cycle. This could be accomplished directly by allowing only a few communications between a stakeholder and the agency per rule (a total of three communications, with page limits for example), or it could be accomplished indirectly by requiring the agency to log all ex parte communications into the rulemaking docket and ensuring that detailed records of each communication are available upon request. Unlike the current process, which places no limits or recording requirements on ex parte communications occurring before the publication of the proposed rule, requiring greater transparency for these communications has the potential to improve accountability and may even cause the participants engaging in these pre-NPRM contacts to use them sparingly.

Finally, the agency itself should be encouraged to filter the communications incorporated into proposed and final rules to ensure the rules are accessible to a diverse, albeit sophisticated, group of affected parties. As discussed earlier, the “concise

296 See, e.g., Smith, supra note 19, at 1150 (observing that information theory suggests that “[t]he more impersonal contexts will require greater formality, so that the typical audience member will not incur large processing costs.”)

297 Coglianese, supra note 49, at 160. Another attorney conceded that their appellate brief was unsuccessful in part because they failed to do an adequate job controlling information excess: The brief “was so filled with so many issues of such a technical nature that I think we got lost in explaining basically how simple this one [issue] was.” Id. at 160.

298 This might not be practical without a modification of the current rules discussed later, however. See infra Part IV.A.3. Since a flat restriction on the number of communications can be circumvented through trade associations, subsidiaries, etc., the best approach may simply involve requiring a complete record of all communications.

299 The proposal here does not suggest that the general public should be able to pick up the Federal Register and understand the EPA’s perambulatory explanation of a proposed rule. It is intended to suggest, however, that an environmental lawyer or even a law student should be able to read a preamble and understand most of it, at least after spending a few hours with it.
general statement” requirement in the APA has effectively been ignored and, if anything, rewritten by the courts to instead demand a defensive, “encyclopedic” statement from the agency.\textsuperscript{300} While the judicial demands that cause the agency to behave in this way should be significantly altered (as discussed below)\textsuperscript{301} the courts should also give some meaning to the “concise general statement” if, for no other reason, than to signal the value of its underlying aspiration. Doing so would involve encouraging the courts to remand rules that are too obtuse, disjointed, and assume too high a level of technical information for the average, elite reader. The court clearly has this authority under the “concise general statement” clause of the APA.\textsuperscript{302} While the interpretation of such an aesthetic-based test could vary across judicial panels,\textsuperscript{303} any damage resulting from this variability would be limited. After all, the court would only be remanding the rule for a clearer explanation, a demand that might annoy and embarrass the agency but should take no more than a month or two to satisfy.\textsuperscript{304}

2. Reinvigorating the Public Interest Groups

The reforms presented thus far focus on imposing information filters to help level the playing field with regard to the costs of participation in the rule making process. A complementary approach makes participation in these adversarial processes more affordable for public interest groups.\textsuperscript{305} This could be accomplished by directly

\textsuperscript{300} See supra notes 119-125 and accompanying text.
\textsuperscript{301} See infra Part IV.A.3.
\textsuperscript{302} 5 U.S.C. § 553(c).
\textsuperscript{303} A basic test would require, for example, that the basic thrust and requirements of the rule be discernable from the preamble and that important passages (like the significant changes from the proposed rule) be comprehensible to those who otherwise lack specialized knowledge.
\textsuperscript{304} The biggest problem with this reform is that it suggests that the courts only require a succinct statement at the final rule stage, where such a demand may be the least helpful to stakeholders. To remand a rule for lacking a “concise general statement” at the proposed rule stage, however, would necessitate an entirely new notice and comment period, which could pose a hardship on the pace of rulemaking and invite more strategic use of the requirement by those interest groups who benefit from delay.
\textsuperscript{305} The role for an ombudsman to serve certain citizen constituencies along the lines of the small business administration may also be worth consideration in light of existing information excesses that may handicap citizen groups from accessing many technical environmental regulations. The Small Business Regulatory Enforcement Fairness Act of 1996 was based in part on a concern that information excesses precluded the smaller businesses from keeping up with bigger competitors in the provision of regulation. Pub. L. No. 104-121, 1996 U.S.C.C.A.N. (110 Stat.) 857 (to be codified in scattered sections of 5 U.S.C., 15 U.S.C., and 28 U.S.C.). The Act, among other things, provides small businesses with an agency ombudsman and related advocates to help protect their interests. See, e.g., Thomas O. Sargentich, Recent Developments: Regulatory Reform and the 104th Congress: The Small Business Regulatory Enforcement Fairness Act, 48 ADMIN. L. REV. 123, 124-25 (1997) (describing these qualities of the Act). The need for adequate representation in public health and environmental regulation is at least as pressing for communities located in areas with heavy pollutant loads. Currently these groups – without or even with legal assistance – confront a wall of complexity and strategic evasion that makes it next to impossible for them to press their claims or even determine the source of excess pollution in their communities. See, e.g., Dina Capiello, In Harm’s Way, The Houston Chronicle, January 16, 2005. An ombudsman whose sole task is to navigate potentially affected communities through the regulatory maze may help cut through these problems while also making the issues a bit more salient, even on a national level.
subsidizing public interest group participation on specific, at-risk rulemakings. Alternatively, rewards could be offered to indirectly increase incentives for public interest group participation. For example, a monetary prize and positive publicity could be awarded to the author of the most meaningful public-benefitting set of comments on a complex rule, particularly if the party approaches the issues from the perspective of how it could better protect public health or the environment. Much like architectural prizes, there could even be law school or graduate student competitions not only for commenting on a rule, but for proposing compelling policy innovations. Interest groups would then be permitted to challenge the rulemaking on behalf of the winning submitter if her comments are ignored and would be entitled to reasonable attorney fees if the group substantially prevailed in the litigation. Through these mechanisms, interest groups and like minded experts might find that the prospect of remuneration provides an incentive to engage in these complex rulemakings, which overcomes the disincentives to participate created by the information capture phenomenon.

A more indirect approach to increasing the benefits of participation to public interest groups is to raise the public visibility of the more obscure and complex environmental rulemakings. A rulemaking that becomes newsworthy because of its public interest implications also becomes one that interest groups will find marketable and donor-friendly. (On the other hand, if nonprofit resources are scarce and finite, raising the salience of one rule may simply lead the groups to withdraw their engagement from another less newsworthy rule.)

If increasing the salience of a rule does increase the resources available for public interest engagement, the agency under this proposal would be required to provide an estimate of the public health benefits of the rule and an assessment of what alternate versions of the rule might accomplish in public health terms. For example, the agency would be required to estimate the health and environmental benefits that would result from the promulgation of a particular pollution control standard and to estimate these same benefits associated with other, alternative versions of the standard. Public health assessments in these cases, by their nature, cannot be very detailed – the uncertainties make this futile -- but the results of a basic assessment might help identify an informative range of possible health and environmental consequences, at least qualitatively. Resources currently devoted to Regulatory Impact Assessments, which tend to highlight

306 See, e.g., Stewart, supra note 6, at 1711 (discussing, with some reservations, the possible use of a specialized, high-level government advocate to represent diffuse interests); see also id. at 1761, n.439 (providing a relatively extensive bibliography of proposals in the early 1970’s for the creation of advocate agencies to represent the interest of poor or other underrepresented groups in consumer protection and related proceedings). If public interest groups are subsidized, however, it is critically important that the subsidies require them to engage in the low salient, highly technical rules vulnerable to information capture rather than other, more publicly visible controversies where they are likely to have a presence with or without public subsidies.

the costs of regulation at the expense of assessing and raising the visibility of the public health benefits, could be used to fund these public health oriented analyses.  

More attention should also be given to the choice of legislative standards and regulatory tools with respect to their potential for increasing the salience of EPA’s rules. For example, performance standards, like ambient air standards or related types of innovations, seem more likely to engage balanced constituencies in discussions about how they are set as compared with technology-based standards and standards governing industrial activities and operations (like many of the rules governing hazardous waste operations in the RCRA). These standards may be at higher risk of falling prey to information capture because they involve complex processes and because the health implications associated with them are more difficult to evaluate.

Cf. Harrington, Heinzlerling, & Morgenstern, supra note 244 (providing case studies of high profile RIAs at EPA that raise a number of challenging questions about the value of the RIA process, at least as currently practiced, and open the door to considering the reallocation of these analytical resources to more productive endeavors).

As a legislative matter, information capture may also provide a barometer to help identify when certain added requirements on regulatory agencies are likely to improve or instead exacerbate information capture. Evidence that a new process requirement might inflate information costs or make a process susceptible to information capture could create a presumption against the new process in open debate that needs to be overcome by the proponent. See, e.g., Sargentich, supra note 305 (arguing this problem afflicts the Small Business Reform Act); supra note 276-280 and accompanying text (discussing problems with the Data Quality and Data Access Acts in this regard). Alternatively, there could be mandatory look-back studies, say every three years, done by the Congressional Research Service to evaluate how various processes affect information management in the agencies and also to determine whether they are used by a balanced constellation of groups or instead used primarily by dominant or rich stakeholders.

I have been a longtime proponent of these standards, see Wendy E. Wagner, The Triumph of Technology-Based Standards, 2000 U. ILL. L. REV. 83.

See, e.g., National Ambient Air Quality Standards of the Clean Air Act, 42 U.S.C. § 7409(b)(1) (2000). For a slightly more extended discussion of why these standards are likely to invite a more balanced group of affected parties, see Lynn Blais & Wendy Wagner, Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts, 86 TEXAS L. REV. 1701, 1722 (2008). These performance standards are generally premised on health outcomes or related measures, so the salience accompanies the exercise and is harder to shake out, even with voluminous records and very complicated and technical issues. Indeed, commentators who are particularly enamored with performance standards as a preferred means of regulation seem intuitively to appreciate that they work better than other standards in part because they are direct and goal oriented, and thus cut through the many steps and assumptions that underlie many other types of regulatory standards. See, e.g., Stephen D. Sugarman & Nirit Sandman, Fighting Childhood Obesity through Performance-based Regulation of the Food Industry, 56 DUKE L. J. 1403, 1411-13 (2007) (touting the virtues of performance standards as to compared to command and control standards based on these general virtues).

Market-based programs may also suffer from information capture if there are a number of hidden details that determine how well the market will work or how well it will address the health issues on the table. See, e.g., Lisa Heinzlerling, Selling Pollution, Forcing Democracy, 14 STAN. ENVTL. L.J. 300, 318 and 320-25 (1995) (concluding, based on detailed investigation of the congressional debates, that the title IV market “created by the 1990 Amendments owes much of its content to the influence of special interest groups” but that much of these deals were invisible and hidden under the seemingly accessible market-based approach).
3. A Participation-Based Standard for Judicial Review

Since the courts inadvertently create many of the incentives for regulatory participants to engage in information capture, correcting the standards for judicial review should be a top priority. The courts’ current approach to judicial review is to evaluate the agency’s rule based on the information filed by interest groups in protest to the rule and to determine, as a substantive matter, whether the agency’s response was arbitrary. Agencies risk being reversed if their final rule is considered inadequate in light of a significant comment raised on the proposal.

The proposal here shifts the courts’ focus from substance to process. The proposed reform links the standard for review to the rigor of interest group engagement in a rulemaking. Rulemakings dominated by one set of interests from start to finish would trigger a skeptical review. On the other hand, if the underlying interest group representation was healthy, vigorous, and diverse, the court would create a strong presumption in favor of the result the agency reached.

The logic behind the approach is that a robust, pluralistic process is likely to discipline the outcomes and results. By contrast, where it is evident that the development of the rules did not involve diverse participation from affected interest groups, the courts are needed to ensure that the deals incorporated into the rule do not stray too far from the statutory goals or facts in the record. Indeed, for rules that are developed without strong political oversight and adversarial vetting, the courts may be the last hope in providing some accountability.

The standard for review, then, would depend on the robustness of the process underlying the rulemaking. See Figure 2. If a diverse and balanced group of affected parties is involved throughout the rulemaking, then the agency’s rule would be afforded considerable deference from the court – a “soft glance” or something similar. On the other hand, if one party dominates all phases of the rulemaking and then sues the agency for failing to make certain accommodations based on its comments, the court would have a strong presumption against the challenger. In this case, the court would afford the

314 Prof. Rubin’s idea of breaking the ties between rulemaking and stakeholder comments helped generate some of the recommendations provided here. See generally Rubin, supra note 107. Specifically, Prof. Rubin proposes a significant shift in the basis for judicial review that parallels, or at least has a proposal that seems quite complementary to this proposal since it tries to break this link between stakeholder pressure and regulatory analysis. See generally id. at 157-63. As discussed in infra note 336, however, there are some significant differences that lead the proposals in slightly different directions with respect to redressing information capture.
315 See, e.g., Thomas McGarity, Professor Sunstein’s Fuzzy Math, 90 GEORGETOWN L. REV. 2341, 2372 (2002) (agreeing with Sunstein on the idea of a more deferential standard of review in which “‘courts should play an exceedingly deferential role’” and “‘should give agencies the benefit of every reasonable doubt.’”) In an earlier article, McGarity provided greater elaboration on how this more deferential test might work. Under his formulation, judges would adopt the posture of a “pass–fail” professor reviewing a research paper on a complex problem on a topic outside her field of expertise. McGarity, supra note 133, at 1452–54.
agency still more deference, along the lines of “clear error” used in the appeal of fact from jury trials. By contrast, if a challenger was unable to engage in the rule making process because it lacked sufficient resources or specialized knowledge, but its members took a great interest in the consequences of the rule, then the court (almost like it treats parties proceeding pro se) would adopt a presumption in favor of their petition and afford the rule a “hard look”. Effectively, the courts’ review – ranging from hard look to considerable deference – would be calibrated to the robustness of the pluralistic process.

Figure 2: A Flow Chart of the Participation-Based Standard for Judicial Review

At present, there appears to be little connection between the robustness of the pluralistic process and the level of scrutiny afforded to an agency’s rule. Instead, the rigor of the agency’s process is evaluated only with regard to whether the agency complied with a short check-list of APA requirements, like providing a publicly accessible record, providing ample opportunity for notice and comment, etc. The apparent assumption underlying the courts’ process-based review is “if you build it [an open and transparent administrative system], they will come”. If, as now seems clear, many affected interests “might not come” when information capture has taken hold of the rulemaking process, the courts’ obligation to dig deeper into the record to evaluate the rigor of the pluralistic process seems inescapable.

This participation-based standard for judicial review thus seeks to use the courts to help level inherent participatory imbalances rather than being used, however unwittingly, to aggravate them. If the agency is not attentive to vigorous engagement by

316 Actually, this seemed to be clear at least to political scientists more than two decades ago. See Gormley, supra note 89.
the full range of affected parties, for example, it would risk a “hard look” review of its rule if one of the underrepresented groups decides to file a challenge. Indeed, because of this risk, the agency would have litigation-based incentives to take the comments of underrepresented parties quite seriously, despite their small number. Even more importantly, they would have strong incentives to reach out and engage groups that are likely to be under-represented in the rule-making process.

Calibrating the judicial review standard to the level of pluralistic participation in the rule making process may even provide the dominant stakeholders with some incentives to engage their adversaries in the substance of a rulemaking. If these dominant stakeholders wish to threaten the agency with a credible risk of reversal by the courts (i.e., a “soft glance” review standard rather than “clear error”), they would need their adversaries to be present at least during the notice and comment period. These incentives for balanced involvement in the rule making process might at least partly counteract the incentives these same stakeholders currently have, via information capture, to overwhelm adversaries with voluminous information about specialized issues and contestations that weigh down the rulemaking and make it less accessible.\textsuperscript{317}

The recommended adjustment to judicial review – tying judicial deference to the robustness of the pluralistic process – might even make judicial review more predictable. A number of commentators have suggested that the uncertainty associated with judicial review causes some of the most serious problems in agency behavior.\textsuperscript{318} This uncertainty can cause agencies to act defensively, bloating the record and rule well out of proportion to what is necessary. Even more importantly, stakeholders can take advantage of the situation by using the threat of judicial review as a strategic tool, even when their claims are weak.\textsuperscript{319} To the extent that the test suggested here can be implemented in a more consistent and predictable way than the current approach to judicial review, some of the uncertainty will be reduced and the resulting, perverse incentives will be dampened.\textsuperscript{320}

\textsuperscript{317} Cf. Elliott, supra note 160, at 1495-96 (“If the notice-and-comment procedure is to function to promote genuine dialogue, as opposed to merely giving parties a chance to put their objections and the agency’s answers on the record for judicial review, it will have to be re-engineered to promote the substance of dialogue through the process of representation.”).

\textsuperscript{318} See, e.g., MASHAW, supra note 102, at 165 (concluding the most commentators “seem to argue that the real impediment created by judicial review is uncertainty”); see also supra notes 137-141 and accompanying text.

\textsuperscript{319} See supra note 275 and accompanying text.

\textsuperscript{320} Since judicial review can be employed not only to alter the rule but also to delay the proceedings and forestall compliance costs or other unwanted outcomes, the proposal will not protect against all information-related abuses. An additional adjustment to this pluralistic-based review standard would attempt to reduce even more of the benefit (and incentive) for using litigation in part as a way to delay the rulemaking. The most obvious approach would be to keep the final rule in place pending ultimate reversal by the courts, or even better, to actually delay the ability of a stakeholder to bring a case until it is ripe and imposes specific losses on a party. Prof. Mashaw persuasively argues for the completely elimination of pre-enforcement review, not only to redress some of this strategic abuse, but also to reduce some of the uncertainties faced by the courts in resolving pre-enforcement challenges. See generally MASHAW, supra note 102, at 177 (suggesting that altering the timing of judicial review may help reverse the strong incentives that some parties have to challenge rules excessively). If the parties must wait until a tangible harm occurs to the challenger, then in adjudicating the claim, the court will be presented with real facts rather than abstracted argument and hypothetical worries. Id. at 178-80. As Mashaw concedes, however,
This calibrated approach to judicial review is not a panacea, however. A number of impediments must be addressed if the reform is to be successful. First, the courts would need a way to determine, with some consistency, when this “imbalance” has occurred. This involves first identifying who the potential affected groups are and fitting them into categories of “affected interests.” Conveniently, for most environmental rulemakings, categorizing participants according to the interests they represent should not be too difficult.321 Second, the test requires determining when the ratio between a dominant group and other affected parties constitutes an unacceptable “imbalance”. For a variety of reasons, this point of “imbalance” needs to involve more dramatic skews than simply the point where the number of commenters from industry are slightly greater or fewer than the number of commenters from public interest groups.322 Instead, imbalance would need to be set at a point where, for example, the ratio of one set of affected parties relative to the other group is 4 to 1; 10 to 1; or even 25 to 1. Under the current docket rules, the comment process may provide the appropriate place to assess this balance or imbalance. If docketing were required for all communications, including those occurring during the pre-NPRM stage, then all contacts could be added from the rulemaking docket to determine the extent to which participation is balanced or imbalanced.

Even with relatively clear rules for determining imbalance and the corresponding standard for review, there will be inevitable variations in how courts employ the applicable “soft glance” or “hard look” tests. These variations, however, are likely to be more modest and less worrisome than the roulette-like variations in the courts’ opinion, which currently range from hard look to super deference, depending on the panel.323 If the recommended reform were implemented, at least the variation in rulings would be within categories of a single standard of review, rather than the full range of possible standards.

There are other possible problems with practical implementation of this proposal. First, while the dramatic under-representation of a party creates the risk of a “hard look” review, if they are not present at all in notice and comment (their presence is zero), they would lose the opportunity to sue because they lack standing.324 As an unintended side

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321 Empirical studies of stakeholder participation in EPA rulemakings by Coglianese, supra note 49 and Yackee and Yackee, supra note 222, for example, did not suggest any difficulty with categorizing stakeholders into affected groups.
322 Such a point of imbalance would mean that the use of “soft glance” is the exception rather than the rule since rarely would rules receive this kind of balanced vetting.
323 See supra notes 137-141 and accompany text.
324 See supra notes 149-152 and accompanying text. This may not be unusual. Coglianese found that environmental groups provided comments on only 44% of the EPA rules governing hazardous waste.
effect, then, the proposal might make the agency and dominant stakeholders more, not less, eager to use information capture as a means of cutting underrepresented groups out of the rulemaking process. The solution here might be to broaden standing to include, in extreme cases, those parties who did not file comments, but who have a compelling reason to enlist the courts in review and can justify their inactivity during the notice and comment period.

Second, a collection of stakeholders, particularly public interest groups, may actually game the revised approach by holding back on their comments during notice and comment in the hope of using the “hard look” threat against the agency later, during litigation (or settlement negotiations). Although this does not seem likely for a host of reasons, the suggested rules do open the door to this new type of strategic action. The solution here may be to add a more rigorously enforced “good faith” requirement to the petition process. The petitioners would again need to explain why they were not able to participate more vigorously during the rulemaking process and convince the court that they were proceeding in “good faith” in the challenge that followed.

Third, there might be a temptation by some stakeholders to further redirect their energies from formally participating in the process during notice and comment to informally communicating with the agency, particularly during the pre-NPRM stage of the rulemaking. The corrective in this case could be to require a complete accounting of all interest group participation occurring throughout the entire life cycle of the rule’s development and to have the courts consider those docketed communications when assessing imbalance. Additionally, the courts could overrule current precedent that requires the proposed rule to be reopened for comment if the agency makes material changes in a final rule. Instead, material changes (provided they result from comments) would be allowed as long as the changes do not substantially handicap one or more affected parties in significant and inequitable ways.

 handling and disposal during the period under study; industry, by contrast, provided comments on 96% of the rules. See Coglianese, supra note 49, at Table 2-2, at 73. State and local regulators may have been involved in the 56% of rulemakings that lacked public interest representations, and thus picked up the slack for their absence. However, it is possible that for at least a significant set of rules – say 30% or so – there was no public interest representation at all, either by the nonprofits or by government regulators who sometimes (although not always) step in the shoes of the public interest.

If some of the current figures are correct, then if industry used this strategy, they would be able to file very few – perhaps no more than one comment among themselves – to be considered under-represented relative to environmental groups. See id. at 70-71 (observing in his study that the relative ratio of industry to public interest commenters was about 15:1; the ratio of industry to state or local regulators was about 5:1). The public interest groups, by contrast, would have to come to terms with the delay that resulted from their legal challenge. This might not be problematic in rules where delay is actually environmentally beneficial (when standards are being loosened, rather than strengthened), however. It also may not be terribly problematic if the public interest group is petitioning for suit with a plan to settle the case swiftly, and thus plans to use the threat only to gain more concessions from the agency through post-rule negotiations.

See supra note 298 and accompanying text.

See supra notes 163-167 and accompanying text.
Once the kinks are worked out, if this revised approach to judicial review still seems sensible, it could be implemented interstitially by the courts or, ideally passed into law as an amendment to the APA. A Congressional amendment would provide the clearest and most democratic way to usher in the new approach to judicial review. This may be politically unrealistic, however. The courts could also make many of these recommended changes through their interpretative authority; indeed in most cases the proposals simply scale back previous judicial inventions. Incremental experimentation by the courts may, in fact, be desirable to give the approach a test run before it becomes codified as law.

B. Bypassing Adversarial Constraints: Policy in the Raw

Even if the previously recommended reforms are implemented, agencies are still likely to focus most of their attention on comments that present a credible risk of judicial review, and, as a result, may have less time to develop creative and more comprehensive solutions to regulation. As discussed in Part III, by requiring the agency to be responsive to all criticisms, the courts effectively place the agency in a reactive role. Rather than focusing its energies on developing public-oriented regulatory policy, the agency finds instead that it must devote most of its analysis to preparing rules that can withstand fierce attack from an aggressive group of affected interests and respond to the flood of information loaded into the system by these same groups.

Unlike the reforms presented in the previous section, the proposal presented in this section attempts to address the problems created by information capture not by reinforcing adversarial processes, but by circumventing them, at least at an early stage of policy development. Specifically, this “policy in the raw” reform requires the agency to be largely, if not completely insulated from stakeholders and political input during the embryonic stage of the development of its regulatory proposal. Although affected parties would become important later in refining and even rejecting the proposals developed during this period, interest groups would become involved only after the agency has had the opportunity to frame and consider regulatory solutions free from their input and pressure.

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328 Such a revision to the APA may not be amenable to industry since it will curb some of their gains from defects in the system over the last four decades. This, in turn, could fracture congressional support for what would otherwise seem a bipartisan, process-neutral amendment.

329 See, e.g., Pierce, supra note 142.

330 See supra notes 140-144 and accompanying text.

331 Cf. Stewart, supra note 6, at 1807 (observing that “[t]he only conceivable way out of the labyrinth would seem to be a new and comprehensive theory of government and law that would successfully reconcile our traditional ideals of formal justice, individual autonomy, and responsible mechanisms for collective choice, with the contemporary realities of decentralized, uncoordinated, discretionary exercises of governmental authority and substantial disparities in the cohesiveness and political power of private interests. Such a conception may well be unattainable, and in any event will not be achieved in the foreseeable future.”)

332 Cf. Rubin, supra note 107, at 157-63 (advocating that the agency be insulated from stakeholder pressure by the standard of review – an instrumental rationality standard; rather than actually isolating the agency staff as proposed here).
While the details may be best left for a later discussion, in broad strokes the “policy in the raw” proposal involves a two step rule development process. At the “raw” stage, a small team of highly regarded “policy wonks” from inside the agency would be assembled to develop a pre-proposal. They would start with the statutory mandate and sketch out a “goal” statement based on that text alone. They would then work – essentially in complete isolation – to develop a pre-proposal that best accomplishes that goal. Unlike the current approach to rulemaking, this “policy in the raw” stage would be led by an agency team that is completely unconnected with and ideally not even aware of stakeholder pressures, litigation concerns, or other legal concerns relating to the rulemaking. Their deliberations would be shielded from all stakeholder input, including friendly guidance from staff in the General Counsel’s Office or from politically appointed officials. They would also be free to approach the proposal in whatever way they see fit. There would be no requirement that they use analytical tools like cost-benefit analysis, formal alternatives analyses, or other forms of impact assessment, although the team would be free to use these analytic tools if they felt that doing so was helpful and consistent with the statute’s goal.

The pre-proposal developed by this team would be subject to peer review or, as appropriate, input from a Federal Advisory Committee Act (FACA) advisory group comprised of a mix of policy analysts and other specialists (but not stakeholders). The team would have the option of using the comments, suggestions, and questions raised during this review process to modify the pre-proposal, but they would be under no obligation to so. Any modifications would be wholly at the agency team’s discretion and there would be no risk of judicial reprimand if the team chose to disregard suggestions made during this review.

The final pre-proposal, along with the comments of peer reviewers or the FACA committee, would be published on the internet and available in hard copy. The preliminary proposal would be expected to be detailed and comprehensive, yet also accessible to regulatory experts who lack specialized knowledge about the issues addressed by the rule. The agency team responsible for preparing the pre-proposal would operate much like academics – producing innovative, yet effective proposals and enjoying reputational rewards based on the quality of their work. Particularly good teams or team members might find their visibility among policymakers and academics to be enhanced when they produce particularly inspired proposals. Ideally the teams would

333 This is similar to the “goal statement” urged by Rubin, although it is more preliminary and is not vetted through interested parties. See id. at 163 (recommending that “a new APA should require that a document published at the time the agency decides to proceed with rulemaking explicitly state this goal before any effort has been made to determine the means by which the goal should be implemented.”)

334 See, e.g., Holly Doremus, Scientific and Political Integrity in Environmental Policy, 86 TEXAS L. REV. 1601 1644-46 (2008) (advocating “limit[ed] contacts between political appointees and nonmanagement career technical staff during the technical stages of regulatory development” in order to improve the integrity of science used for policy).

335 See, e.g., Thomas O. McGarity, The Internal Structure of EPA Rulemaking, 54 LAW & CONTEMP. PROBLEMS, No. 4, 57, 70-73 (1991) (discussing how EPA initiates a rulemaking and the composition of the initial “Workgroup” that drafts the first proposal, which can include agency lawyers and generally includes legal considerations at an early stage of proposal development).
attract high caliber candidates both because the unconstrained nature of the work would be inviting and because there would be opportunities for individual accolades for work well done. To maintain these reputational benefits, the team would be encouraged to develop pre-proposals that are detailed, thoughtful and well supported. Poor analysis, half-based innovations, or proposals with thin support could lead to embarrassment within the policy analysis community.

Establishing an initial “raw” stage for regulatory policy development would counteract information capture in a number of subtle, but important, ways. First, the proposals developed as part of this process would likely be much more accessible to a wide group of affected parties than existing proposals. Unlike the existing policy making process, which is rife with incentives to inflate information costs (from the perspective of some stakeholders, the more esoteric the rule the better), proposals developed “in the raw” would be designed to engage a broad audience. After all, the reputational advantages that may accrue to team members will not be realized if very few individuals understand the rule. Pre-proposals developed in the raw will therefore be written to give interested parties an appreciation of the nature of the rulemaking project, its likely direction, and how it might fit with other rules. Moreover, because the implications of the rule will be easier to understand, public interest groups will be better able to highlight the value of their engagement for donors and members. A more accessible and coherent proposal also provides a benchmark or point of reference against which future (potentially more complex and detail-oriented) proposals can be compared and evaluated. This is a particularly valuable benefit in light of the fact that the complex proposed and final rules discussed earlier seem to be inaccessible in part because there is no clear point of entry for developing an understanding the relevant issues.

Second, “policy in the raw” allows an agency team to innovate in ways that are decoupled from the participatory and litigation processes. This creates the opportunity for more candid and creative analysis. Similar to the proposal advanced by Prof. Rubin for an “instrumental rationality” approach to rulemaking, during the “raw” stage of policymaking, the agency would focus on the policy puzzle at hand rather than on simply anticipating and reacting to what the stakeholders might say about their proposal.336

336 As mentioned above in note 314, Prof. Rubin also proposes a policymaking process that strives to decouple the process from stakeholders by basing judicial review on “whether the rule that agency has promulgated is likely to achieve its stated goal”. See Rubin, supra note 107, at 163. This “rational instrumentality fit with the goal is reinforced analytically by cost-benefit analysis.” Id. at 163, 157-161. Unlike Rubin, however, the judicial review approach proposed here is more deferential to the agency on the substance of its rule, and the pre-proposal is insulated from stakeholders entirely and is also largely free of any threat of judicial review other than ensuring that the raw proposal is completed. Although both of us seem eager to provide the agency with more incentives to develop comprehensive, intelligent and innovative policies, my concerns arise from the problem of information capture. By contrast, because information capture is not among the evils Rubin considers, see id. at 162-63, Rubin’s proposals are largely insensitive to the danger and some facets of his proposal may risk exacerbating these problems, at least for the subset of rules susceptible to information capture. See, e.g., id. at 164-65 (recommending early involvement of stakeholders and harder look by courts that combined could perpetuate information capture in at-risk rules); see also id. at 164 (positing that “There is evidence . . . that the influence of special interests on government decision makers is less disproportionate than is often assumed, and the multiplicity of voices may ultimately counterbalance each other.”).
Finally, the “raw” period of policy development provides the agency with a “litigation free zone” for conducting meaningful alternatives assessments on competing proposals. Currently, agency lawyers and political advisors appear to exert a heavy hand in the agency’s self-assessments required under Executive Order or by statute. These advisors rightfully worry that an agency’s honest evaluation of its proposal against alternatives may actually put its preferred policies at risk by exposing important advantages of competing approaches that might otherwise have gone unnoticed by opponents. Conducting analyses in an environment free from these political and litigation pressures should result in a more meaningful assessment of alternatives.

The crux of this proposal is to establish an early, unconstrained period of policy development during which the agency can develop one or more basic proposals for addressing the regulatory problem at hand. How this pre-proposal then fits into the existing rulemaking process warrants further discussion. One approach would be to use the pre-proposal as the principal background document upon which the proposed rule is based. A team of EPA staff (including representatives from the program office and the General Counsel’s office) would ground truth the proposal in light of the various interest group and legal constraints. This team could alter or even reject the pre-proposal in its entirety in their development of the proposed rule. However, to afford the pre-proposal some stature and significance, the presumption should be that the pre-proposal would form the basis for the proposed rule. The agency would need to explain in the preamble of its proposed and final rules why it chose to deviate in significant ways from the pre-proposal. These explanations, in turn, would be subject to judicial review.

It bears mention that this “policy in the raw” recommendation parallels negotiated rulemaking but takes essentially the opposite tack. In negotiated rulemaking, the agency identifies the major interested parties and meets with them to negotiate a proposed rule. Rather than looking to the stakeholders to assist in developing a regulatory proposal, the “policy in the raw” approach eschews the use of stakeholders during the initial stages of policy development except to provide information upon request. The hope is that the policies developed “in the raw” will be more complete and targeted than proposals that are developed based on the idiosyncratic concerns of selected interest groups. The resulting proposal should also be much clearer and more accessible with respect to the logic and assumptions underlying the rule. Likewise, the contribution the rule makes

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337 Wendy Wagner, The Clean Air Interstate Rule RIA: Advocacy Dressed up as Policy Analysis, in Harrington, Heinzerling, & Morgenstern, supra note 244, at 66-68 (detailing these litigation-based incentives in the RIA process).
338 See, e.g., Harrington, Heinzerling, & Morgenstern, supra note 245, at 224-25 (proposing that RIAs be done somewhat earlier in the process to ensure that they provide a meaningful analysis of alternatives).
340 Judge Wald, for example, expresses concern about the consensual nature of negotiated rulemaking and the after-the-fact nature of the agency’s explanation for a proposed regulation: “The consensus could also be pure political logrolling ... rather than rational decisionmaking.” Patricia M. Wald, Negotiation of Environmental Disputes: A New Role for the Courts?, 10 Colum. J. Envtl. L. 1, 22 (1985).
341 For concerns about the public accessibility of negotiated rulemakings, see William Funk, When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest -- EPA’s Woodstove Standards, 18 Envtl. L. 55, 79 (1987) (expressing concern over EPA’s preamble being an "after-the-fact rationale
to the protection of health and the environment should be more explicit and easy to understand.

C. Redressing Information Capture of the Past.

Altering regulatory processes in the future will do nothing to address the information capture that has afflicted rules promulgated in the past. The approach presented in this section relies on a somewhat unconventional adversarial process to address these problems. 342 Unlike reforms for reinvigorating the pluralistic engagement in proposed rulemakings presented previously, ensuring a diverse mix of affected parties is not important to this reform. On the contrary, this proposal focuses instead on “dividing and conquering” those parties that have successfully used information capture in the past by creating competition between them. 343

Competition-based regulation is easiest to understand in the context of product licensing. In current product licensing, the EPA determines which products are not “unreasonably unsafe” (or the equivalent) through complex and generally unopposed process that often involve only the manufacturers of the product at issue. Because some of these processes may be dominated by these manufacturers, EPA’s deliberations may not benefit from pluralistic oversight. As a result, there is a risk that the decisions made by the agency will diverge from both statutory goals and what rigorous fact-finding might reveal due to information capture.

EPA does not have the resources to review these past decisions and, even if it did, it seems unlikely that reviews would involve participation from a diverse set of interest groups. The alternative here attempts to devise ways to encourage the regulated

342 Information specialists may have other organization-based or process-based suggestions for how information excesses of the past can be brought under control in the future. If a rule remains highly complex and opaque, even after implementation, then information audits may be used to help clarify or sort the issues according to their significance and endeavor to reduce the unnecessary ambiguities or technical details in the future. These systems may also help organize the constant influx of administrative materials by, for example, sorting documents and inputs according to their materiality, reliability and relevance with different electronic signatures for higher, medium, and lower quality filings based on these factors (material, reliable, relevant). However this is accomplished, the point here is simply that these types of informational economics be brought to bear with some force on the administrative state. As Simon observes: “When we find the right way to summarize and characterize that information—when we find the pattern hidden in it—its vast bulk compresses into succinct laws, each one enormously informative.” SIMON, supra note 16, at 227. While it is beyond the scope of this project to identify how these types of informational management schemes might be implemented, it appears that the capacity to accomplish this type of informational downsizing and filtering, even on existing rules, exists and could prove helpful. 343 For a fuller version of this proposal, see Wendy E. Wagner, Using Competition-Based Regulation to Bridge the Toxics Data Gap, 83 INDIANA L. J. 629 (2008); see also DAVID DRIESEN, THE ECONOMIC DYNAMICS OF ENVIRONMENTAL LAW 153-61 (2003) (introducing the idea of a competitive-based private claim available to first-movers to recoup costs associated with environmental innovation).
parties themselves to challenge the licensing decisions that are too lenient. Specifically, the manufacturer of a “green” product could file a petition alleging that a competitor’s product, which occupies the same market niche, is much more hazardous in a variety of ways and therefore should be regulated more stringently. The types of regulatory requirements that might be imposed on this inferior competitor could range from labeling requirements (that highlight the risks associated with using the product relative to superior products) to actually banning the inferior product if its risks are “unreasonable” in light of the alternatives. The process would be initiated by a petition filed by the “green” company and would involve an adjudicatory hearing where the manufacturers would battle each other on the facts. EPA would make a final decision on the merits and issue regulations accordingly.344

A similar process might be established for reviewing pollution control standards. A “green” company could petition the EPA to set more stringent limits for discharges from a category of industry because of the ready availability of “green” methods and technologies that significantly reduce pollution below the current permitted levels.

One of the key attributes of this approach is that it provides incentives for adversaries to dredge up useful information regarding optimal environmental solutions that might otherwise be lost in the mounds of undigested regulatory filings. By relying on manufacturers to root out information on inferior competitors, and providing a forum for establishing more stringent regulation on those competitors, the proposal unleashes energy that those outside the competitive process, including regulators, will have difficulty duplicating.345 An added benefit of this approach is that market forces will help to triage the regulatory process. Competitive energy will focus on the worst products and processes (i.e., those for which “green” alternatives have the greatest competitive edge) The striking similarity of this proposal with recent proposals for competition-based reform of the patent system—where non-patent-holders could file petitions to cancel a patent as invalid—at test to the increasing recognition by policymakers of the valuable role market forces can serve in supporting regulatory decisions and processes.346

The petition process could also be available for any party willing to bring a case against an inferior product, not just the manufacturers or other regulated parties who stand to benefit financially. Thus, if industry proves reluctant to engage in the process but there are established differences between products, public interest advocates could

344 EPA regulators would adjudicate these competitive claims through adversarial hearings in formal rulemaking fashion. If a product is certified as superior, the certification could be useful not only to consumers, but also to insurers, investors, and might even ward off tort litigation since it would indicate that the manufacturer produced at least a “reasonable alternative design.” See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998).
345 Undoubtedly, manufacturers will sometimes overstate the risks of competitor products, but adversarial adjudications help protect against this overstatement by providing competitors with a full opportunity to rebut or disprove allegations of risk.
press the charge in their stead.\textsuperscript{347} In these settings where the petitioner is not the company standing to profit monetarily from the claim, the petitioner could also be awarded attorney fees for substantially prevailing, as well as a possible bonus fee, to be paid at the discretion of the “superior company” as a way of an expected, but not mandated “thank you.”\textsuperscript{348}

V. Conclusion

A commitment to open government and equal access is rightly central to administrative process and these objectives remain the continuing focus of legislators, administrators and the courts. The assumption that these goals alone will ensure accountable government, however, has generally been taken for granted, and, over time it has become increasingly evident that significant design flaws are emerging in the system that threaten to undermine these objectives. Chief among these design flaws is administrative law’s obliviousness to the impact that excessive information can have on the effective functioning of the system. There are no provisions in administrative law for regulating the flow of information coming in or leaving the system or to ensure that regulatory participants can keep up with this rising tide of issues, details, and technicalities. Indeed, a number of doctrinal refinements intended originally to ensure that executive branch decisions are made in the “sunlight,” inadvertently create incentives for the administrative system to be overwhelmed with information. Rather than illuminating the process, these reams of comments and reports replete with inaccessible techno-jargon, create a dark cloud that obscures the decision-making process and ultimately undermines pluralistic oversight, productive judicial review, and opportunities for intelligent agency decision-making.

While the reader hopefully finds the discussion of filter failure and information capture presented in this paper convincing, it is more important that the larger question of how information should be used to support administrative law be addressed. While information may have been a scarce commodity in the 1940s when the foundation for the administrative state was being laid, this is no longer the case. Existing administrative processes suffer from too much information rather than too little. Other areas of law have developed rules that explicitly discourage parties from playing strategic games with information and encourage communications between participants to be productive and efficient. It is past time for the administrative system to take note and change its ways.

\textsuperscript{347} See Wagner, supra note 343, at 641 (discussing an example based on asphalt sealant).
\textsuperscript{348} While the competitive-based approach to regulation targets existing products and regulations, it might also be available to work prospectively in cases where regulated participants are well established and new regulations – perhaps climate change or nanotechnology – are coming along the pike. In these settings, if the agency has several alternative proposals that emerge from its rulemaking process, there could be a brief six month or one year window during which competitors could petition for the most ambitious proposal in order to establish a market edge. While some of this type of adversarialism may emerge in comment periods (or be squelched in comment periods), by attaching a clear reward to the claim or position, it may draw competitors out of the closet and turn them against one another.