

THE PARTICIPATION-CENTERED MODEL MEETS ADMINISTRATIVE PROCESS

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In this Article, I use Neil Komesar's participation-centered model as a tool for gaining new insights into the balance and vigor of pluralistic participation in administrative process. This preliminary investigation exposes a number of ways in which well-meaning administrative process requirements may actually impede, rather than encourage, engagement from a broad spectrum of affected participants. Legal processes that depend on robust engagement from affected groups require rigorous analysis to ensure that they are in working order. Komesar's model provides the type of exploratory tool needed to understand whether these processes are in fact doing what they promise and to troubleshoot how they might go wrong.

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INTRODUCTION

It is difficult to imagine any point in U.S. history that involved institutional failures—in the courts, market, and regulation—that are as complex or as consequential as those we face today. In the space of just a few years, the financial institutions in the United States collapsed, the Gulf of Mexico was polluted to unprecedented levels by a continuous gush of oil, and numerous workers were tragically killed in preventable workplace accidents like the Big Branch mine collapse and the explosion at the British Petroleum Texas City refinery.¹

Hundreds and perhaps thousands of law review articles have been written over the last decade trying to gain purchase on these slippery institutional problems, and countless authors are struggling to identify metrics and conceptual frameworks for how to think about institutional reform. Even within the narrower confines of administrative law where many of these institutional problems originate, theorists acknowledge that development of the field is stymied by a lack of empirical evidence and a coherent model of how administrative process should function.²

Neil Komesar's *Imperfect Alternatives* enters this desolate scene and illuminates the institutional darkness by providing a framework for understanding the basics of institutional design.³ In his book, Komesar identifies balanced and vigorous engagement by a broad spectrum of affected parties as one of the central goals of democratic institutions and then develops a model for measuring this engagement in a way that allows for cross-institutional comparisons.⁴ But his method does still more. It also provides a diagnostic tool for explaining participation failures and imbalances by modeling the underlying dynamics of participation.⁵ Armed with this information—about the capabilities of an institution to engage participants and the reasons for possible failure—

1. See generally Rena Steinzor, *The Truth about Regulation in America*, 5 HARV. ENVTL. L. & POL'Y REV. 323, 323 (2011).

2. See, e.g., Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 536 (2005) (discussing how little is known about agency regulation in practice); Peter H. Schuck, *Professor Rabin and the Administrative State*, 61 DEPAUL L. REV. 595, 612–13 (2012) (noting how Robert Rabin consistently highlights the lack of empirical and theoretical progress in administrative law); Mark Seidenfeld, *The Quixotic Quest for a "Unified" Theory of the Administrative State*, 5 ISSUES LEGAL SCHOLARSHIP 14–15 (2005), <http://www.degruyter.com/view/j/ils.2005.5.issue-1/ils.2005.5.1.1056/ils.2005.5.1.1056.xml?format=INT> (discussing other normative visions that could replace the interest group model and concluding that no “unified” theory will likely emerge).

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

4. *Id.* at 7–8.

5. See *infra* Part II.

analysts can redesign institutional processes from the top down, rather than simply muddling through.

While the most celebrated quality of Komesar's *Imperfect Alternatives* is its capacity to enable institutional comparisons, the insights that the model generates when applied within a single institution are at least as spectacular. Accordingly, in this Article I use Komesar's model as a tool for getting inside the black box of administrative law to better understand the actual workings of participation. This preliminary investigation exposes a number of ways in which well-meaning administrative process requirements may actually be impeding, rather than encouraging, engagement from the full spectrum of affected participants. Perhaps even more important, the initial discoveries discussed here are likely only the tip of the iceberg. Legal processes that depend on robust engagement require rigorous analysis. Komesar's analysis provides the type of exploratory tool needed to understand how these processes work and troubleshoot how they might go wrong.

This examination of administrative process using Komesar's participation-centered formula proceeds in three parts. Part I recalls the basics of the model and situates the model within administrative practice. Part II uses the model to identify possible explanations for participatory shortfalls in administrative process in recent years. Part III concludes with preliminary suggestions for reform. As an important aside, the reader is forewarned that the application of Komesar's *Imperfect Alternatives* in this Article draws on only a part of his methods of comparative institutional analysis, and perhaps even more unforgivable, fails to acknowledge much of Komesar's other valuable work over the years, including his numerous contributions as both mentor and colleague.⁶

I. KOMESAR'S BASIC MODEL AND ITS COMPATIBILITY WITH ADMINISTRATIVE LAW

In *Imperfect Alternatives*, Komesar develops a model that compares institutions based on how well each brings out the diversity of interests on a given issue. Given the wide range of issues he considers, Komesar does not attempt to argue that maximizing participation should be the overarching normative goal of institutional performance. But when it

6. Although a self-proclaimed "hermit," Neil is in fact Mr. Collegiality—sponsoring conferences, reviewing multiple drafts, brainstorming half-baked ideas, and sparking collaborations and networks with folks (like me) that he barely knows, at least when he first contacts them. Because of his generous spirit, like many others at this Symposium, Neil has become not only one of my most treasured colleagues, but a treasured friend.

comes to administrative process, maximizing the full spectrum of participants is in fact one of the central institutional objectives. Thus, in applying the participation-centered model in administrative law, I use the maximization of balanced participation as both a descriptive characteristic and a normative goal. In doing so, I confess to taking Komesar's methods further than he himself suggests, but, in doing so, I do not believe I have violated the spirit of his analysis.

This first Part discusses Komesar's basic model, highlights its significant contribution to institutional analysis, and then attempts to operationalize it within administrative law. Regardless of whether Komesar's model is used descriptively or normatively, it offers a valuable tool for comparing very different institutional approaches to advancing social goals.

A. The Basic Model

One of the most ingenious features of *Imperfect Alternatives* is its central proposition that the vigor of all processes—from legislatures to courts to markets—can be measured and then compared by how well an institution engages the full spectrum of interested participants. By adopting a process goal to measure institutional performance, the comparison of institutional choices can skillfully bracket substantive policy choices that otherwise might hang up the analyst in endless, contestable choices.⁷ Moreover, since the idea is to find the best process of decision making, one can isolate and measure key features of a process without becoming mired in substance. Even if substantive choices re-enter the analysis later, in providing a single, process measure for institutional performance, Komesar's approach moves the analysis forward and forces critics to develop a better test.

More important than convenience, however, is the fact that this process focus best captures one of the central goals of democratic institutions. The legitimacy and rigor of a decision-making process in the United States is measured in large part by how well it engages the diverse views of the participants in a balanced way.⁸ Ex ante, before a decision is made, this robust participation ensures that all groups have access and a voice, which gives the forum legitimacy.⁹ Through their

7. KOMESAR, *supra* note 3, at 33–34 (“To the extent that multiple goals exist, however, one obvious challenge is melding them into a workable sense of the good. . . . [Yet i]t is the choice of institutions not the choice of goals that concerns us here.”).

8. *See generally id.* at ch. 3 (elaborating on this measure of democratic engagement in a chapter exploring the dynamics of the political (legislative and executive) branches of government).

9. *See, e.g.,* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 175–76 (1990).

input, institutional decision makers are assured a more complete base of information from which to make decisions. Although decision makers often do far more than simply mirror the input of the diverse participants in developing policy,¹⁰ the fact that the decision makers are forced to consider the full range of interests is a point in favor of a given process.

Ex post, after a decision is made, continued, vigorous engagement by diverse participants ensures that there is some accountability—political or otherwise—for the decisions being made.¹¹ Appeals, impeachments, and judicial challenges all provide sobering post hoc assessments that encourage decision makers to take all information into account and to do so in a thoughtful, rational way.

As long as this democratic oversight is comprehensive and balanced, the risk that the decision maker will play favorites or make arbitrary decisions is reduced. Komesar's model thus reminds us that, all else being equal, institutions that solicit diverse, balanced engagement are likely to function better than those that do not.

It is surely no coincidence that this concept of maximizing diverse engagement is also a central measure of the health and vigor of other, important social processes. Many philosophers of science, for example, identify as one (if not *the*) defining quality of rigorous "science" whether research has been intently scrutinized by a diverse and balanced group of experts.¹² Philosopher Helen Longino argues, for example:

[T]he greater the number of different points of view included in a given [scientific] community, the more likely it is that its scientific practice will be objective, that is, that it will result in descriptions and explanations of natural processes that are more reliable in the sense of less characterized by idiosyncratic subjective preferences of community members than would otherwise be the case.¹³

10. See generally BRIAN J. COOK, *BUREAUCRACY AND SELF-GOVERNMENT: RECONSIDERING THE ROLE OF PUBLIC ADMINISTRATION IN AMERICAN POLITICS* (1996) (discussing how government agencies do not simply reflect the interest group preferences that are expressed on a given issue, but public administration goes further to "help to create, to express, and to realize a nation's public purposes").

11. This mechanism of accountability is known as "overhead democracy." See EMMETTE S. REDFORD, *DEMOCRACY IN THE ADMINISTRATIVE STATE* 70–71 (Roscoe C. Martin ed., 1969); KENNETH J. MEIER & LAURENCE J. O'TOOLE, JR., *BUREAUCRACY IN A DEMOCRATIC STATE: A GOVERNANCE PERSPECTIVE* 6 (2006) (describing the operation of overhead democracy).

12. See, e.g., STEVEN COLE, *MAKING SCIENCE* 14 (1992); HELEN E. LONGINO, *SCIENCE AS SOCIAL KNOWLEDGE: VALUES AND OBJECTIVITY IN SCIENTIFIC INQUIRY* 68 (1990).

13. LONGINO, *supra* note 12, at 80.

Efficient markets, as Komesar notes, are also marked by their accessibility to all interested parties.¹⁴ Well beyond the functioning of legal institutions, then, it is widely accepted that vigorous processes are by definition those that engage the full spectrum of participants in a balanced way.

Using diverse and balanced engagement as his institutional metric through the participation-centered model, Komesar then draws out a few simple variables that predict when various sets of participants will in fact engage in an institutional process.¹⁵ This participation-centered model is based on the basic idea that affected groups participate on a given issue when their benefits, typically measured as the group's average per capita stakes, exceed their costs. In instances where only a fraction of unidentified members of the general public is put at risk or injured, these average per capita stakes can be quite low because the stakes are averaged out across the entire population.¹⁶ On the cost side of the equation, the costs of engagement include not only the costs of organizing, but also the combined costs of access to the institution and the costs of information, broadly defined.¹⁷ Issues that promise diffuse benefits to the general public are again likely to involve underrepresentation by those interests because of the costs of organizing. But Komesar notes that for social issues that involve small, but incrementally significant gains for the public interest, there are sometimes catalytic subgroups that can act as representatives of the dormant majority.¹⁸ The model thus accounts for the realities of representation, even regarding diffuse majoritarian interests.

After mapping the characteristics of the participants through the participation-centered model (the first step), comparative institutional analysis then takes these findings and matches the participants' capabilities against institutional alternatives.¹⁹ This second step involves institutional choice through a more open-ended comparative analysis of the abilities of the competing institutions. The goals used by the analyst at this second step may include an effort to maximize engagement by the full range of affected parties while avoiding situations of bias, where certain groups dominate at the expense of others.²⁰ Yet at this step, maximizing engagement may not be the only or even the primary institutional goal. Other goals involve, for example, identifying decision

14. See KOMESAR, *supra* note 3, at 98–99.

15. *Id.* at 8.

16. *Id.*

17. *Id.*

18. See *id.* at 73–74.

19. See, e.g., *id.* at pt. III.

20. See, e.g., *id.*

makers best able to process the information competently or swiftly, particularly in the many circumstances when institutions are likely to fail together in their ability to ensure diverse and balanced participation.²¹

B. Administrative Law and the Participation-Centered Model

While the importance of maximizing diverse and balanced participation is implicit in U.S. institutional design, it is an explicit goal of administrative process, which makes administrative law a particularly good institutional setting for applying the participation-centered model.²² In administrative law, agency bureaucrats and appointees are held accountable through a pluralistic system of oversight whereby the affected parties are invited to comment and then have an opportunity to seek judicial review of agency rules that stray outside the authorization of the statute or are arbitrary with respect to the agency's underlying choices.²³ In order to make this administrative law work, however, the full range of affected groups must participate throughout the process without allowing one set of interests to dominate the process and capture the agency.²⁴

Maximizing the participation of affected parties, without bias or capture, is so central to the design of administrative process that Professor Edward Rubin argues that the Administrative Procedure Act (APA) is essentially a "one-trick pony": "[a]ll of its basic provisions rely on a single method for controlling the actions of administrative agencies, namely, participation by private parties."²⁵ 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 [economic and community-based] groups in the rule-making process is essential in order to permit administrative agencies to inform themselves and to

21. *See id.* at 160–61 (describing how the abilities of various decision makers to understand complex technical issues embodied in industrial custom are among the considerations that inform an identification of the best institution to determine reasonableness).

22. *See, e.g.*, MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 45–54 (1988) (describing the pluralistic and postpluralistic models of judicial review, both of which depend on a constellation of diverse interest groups to engage with and ultimately sue the agencies).

23. *See* Administrative Procedure Act, 5 U.S.C. § 706 (2006).

24. *See, e.g.*, BRUCE M. OWEN & RONALD BRAEUTIGAM, THE REGULATION GAME: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS 4–5 (1978); Ernesto Dal Bo', *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y 203 (2006).

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

afford adequate safeguards to private interests.”²⁶ Administrative process thus makes the participation-centered model’s central goal of maximizing balanced participation both relevant and concrete—not simply a theoretical ideal.

Beyond spotlighting the central objective of administrative process, the participation-centered model also provides the impetus for measuring how well the process is meeting this goal.²⁷ The model’s variables, coupled with the admonition that all affected groups should be engaged vigorously and in a balanced way, provides an empirically testable measure of the adequacy of a process.²⁸ Moreover, to the extent that diverse, robust engagement is not the appropriate measure, the model challenges dissenters to identify alternative benchmarks. Through this explication of factors that have previously been taken for granted, the participation-centered model begins a discussion about institutional design that can, at least in theory be described, measured, and adjusted to improve the functioning of institutional processes.

II. APPLYING THE MODEL TO ADMINISTRATIVE PROCESS

The true test of a model is whether it yields useful discoveries, and Komesar’s model passes this test with flying colors by identifying ways that some administrative processes may actually serve to impede diverse engagement rather than encourage it. This Part first discusses how Komesar’s participation-centered model highlights both the need for empirical study and the significance of the growing evidence of pluralistic collapse in various regulatory arenas. Komesar’s model is then used to investigate the potential causes of this participatory breakdown and, in doing so, exposes systematic imbalances in participation throughout the life cycle of a rule, where participation can be badly skewed in favor of dominant minoritarian interests. These cumulative findings call into question the pluralistic promise of the “interest group

26. FINAL REPORT OF THE ATT’Y GEN.’S COMM. ON ADMIN. PROCEDURE 103 (1941).

27. It is important to note that Komesar’s model offers a way to measure the diversity and richness of the participants in different settings or over time, and does not purport to provide some independent litmus test on institutional well-being.

28. For an application of the test to administrative law, see, for example, Jason Webb Yackee & Susan Webb Yackee, *A Bias towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 128 (2006) (identifying a “bias towards business”); and Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 3 ADMIN. L. REV. 99, 125 (2011).

representation” model as a means for ensuring agency accountability and underscore the need for further research.²⁹

A. Imbalanced Participation in Some Administrative Processes

Since the primary mechanism in administrative law for ensuring the accountability of agencies (called the “fourth branch of government”) is through vigorous participation by all affected interests, it is important to assess whether this vigorous engagement is occurring in practice. In the 1970s, when the importance of balanced engagement for public-interested rules became a key ingredient to administrative accountability, there was concern that public interest groups in particular could not keep up with their well-financed opposition.³⁰

Much to the surprise of most observers and academics, however, interest group activity appeared relatively high during this early period of social regulation. Public interest groups in particular were seen to go toe-to-toe with regulated industry throughout the 1970s in keeping agencies on track. Professor James Q. Wilson, for example, observed 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.”³¹ In their study of interest group politics, Professors Allan Cigler and Burdett Loomis concluded 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: “[t]he 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.”³² Even in his classic article, *The Reformation of American Administrative Law*, Richard Stewart seemed more concerned in the 1970s about public interest groups overwhelming the system or failing to represent their

29. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1760–80 (1975).

30. 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); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 99 (1983) (“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.”).

31. JAMES Q. WILSON, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357, 385 (James Q. Wilson ed., 1980).

32. Allan J. Cigler & Burdett A. Loomis, *The Changing Nature of Interest Group Politics*, in INTEREST GROUP POLITICS 1, 10 (Allan J. Cigler & Burdett A. Loomis eds., 1983).

clients' interests than the possibility that they may be largely absent from the regulatory scene.³³

Yet forty years later, there is growing evidence that vigorous pluralistic engagement has dropped off, potentially significantly, with highly skewed participation in some public-benefiting rulemaking areas. Jason and Susan Webb Yackee's seminal study published in 2006 suggests that, regardless of what might have been the case in the 1970s, there is now a "bias towards business" in both interest group engagement in public-spirited rules and in the changes made to the rules as a result of this imbalanced participation.³⁴ For public-relevant rules, there is not only a dearth in public interest representation relative to regulated industry, but there is no participation by those who represent the diffuse beneficiaries in roughly half of the hundreds of rules that have been the subject of study.³⁵ This complete absence of public interest representation in at least half of the public-oriented rules provides particularly compelling evidence of participatory imbalances.

At this point, Komesar's model has not only reminded us of the central importance of pluralistic engagement, but it has provided the impetus to seek out empirical measures to gauge whether this participation is actually occurring in practice. Empirical studies conducted to date give reason for concern. Komesar's model next

33. See, e.g., Stewart, *supra* note 29, at 1767–68 (rejecting the need for subsidizing public interest groups, presumably because such subsidies are not needed to ensure their engagement in most settings); *id.* at 1764 (expressing misgivings about representative abilities of public interest groups); *id.* at 1778–79 (expressing a concern that courts would be used by so many diverse interests that the development of uniform rules of decision by the courts would become effectively impossible).

34. See Yackee & Yackee, *supra* note 28.

35. See Maureen L. Cropper et al., *The Determinants of Pesticide Regulation: A Statistical Analysis of EPA Decision Making*, 100 J. POL. ECON. 175, 178, 187 (1992) (examining interest group engagement in pesticide registrations between 1975 and 1989 and finding environmentalists participated in 49% of the cancellations); Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 253–54 (1998) (studying eight rules promulgated by EPA and NHTSA, using content analysis to determine who participates and influences federal regulations, and finding no citizen engagement in five of the eight rules); Wagner et al., *supra* note 28, at 128 (discovering that public interest groups participated in notice and comment for less than half (48%) of the rules setting emission standards for hazardous air pollutants from major categories of industry); Yackee & Yackee, *supra* note 28, at 131, 133 (studying forty lower-salience rulemakings promulgated by four different federal agencies and finding that business interests submitted 57% of comments, whereas nonbusiness or nongovernmental organizations submitted 22% of comments, of which 6% came from public interest groups); Cary Coglianese, *Challenging the Rules: Litigation and Bargaining in the Administrative Process* 50 tbl.2-2 (1994) (unpublished Ph.D. dissertation, University of Michigan) (on file with author) (finding that businesses participated in 96% of rules and that national environmental groups participated in 44%).

becomes the tool of choice for exploring these processes in more detail to look for clues as to how they may be failing.

B. Understanding the Lack of Balanced Engagement in Some Areas of Administrative Process

After underscoring the need to assess the rigor of pluralistic engagement in administrative process, Komesar's model then takes us inside the rulemaking process to understand why this imbalanced participation may be occurring. Recall that his approach models the participation of each affected group based on whether the costs exceed the benefits to engaging on a given issue. More specifically, a group of affected interests will participate when their stakes are greater than the costs of participation. The most straightforward approach to a diagnostic investigation of imbalanced participation, then, is to consider the variables and subvariables that affect participation, one at a time.

1. COSTS OF PARTICIPATION

There are several variables that can impede participation—the cost of organizing, the cost of information, and the cost of access.³⁶ Each cost is considered in turn.

a. Cost of Organizing

Collective action obstacles are an ever-present worry for the administrative state since they lead to underrepresentation of the public interest.³⁷ Komesar's model underscores the important role of collective action problems by noting that one of the primary costs of participation is the cost of organizing.³⁸ When public interest groups that represent diffuse interests must compete against the associations and trade groups sponsored by regulated parties, it is difficult for them to keep up.

What seems less clear, however, is whether these collective action difficulties provide a complete explanation for the imbalanced engagement by public interest groups in some areas of rulemaking. Is this underrepresentation of the diffuse public solely the result of high organizing costs once set against the low per capita stakes of the general public? Or are there other, reinforcing reasons why the public interest

36. See, e.g., KOMESAR, *supra* note 3, at 8. The cost of accessing an institution is usually assumed to approach zero or, when it does not, is a subset of the larger cost of information.

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

38. See, e.g., KOMESAR, *supra* note 3, at 8.

groups, which constitute a catalytic subgroup within the otherwise diffused, generally low average stakes of the general public, are absent in so many public-benefitting rules? Particularly if public interest engagement is dropping over time,³⁹ it seems that collective action may be only a partial explanation. Armed with Komesar's participation-centered model, the detective work continues.

b. Cost of Information

In theory, information in the administrative state is free. The Freedom of Information Act (FOIA),⁴⁰ Government in the Sunshine Act,⁴¹ and related open records initiatives are designed to ensure the low-cost availability of virtually any information relevant to understanding a rule. Now, in the age of electronic dockets, the costs of searching, pulling, and viewing agency records are even lower.⁴² A quick and dirty appraisal leads to a conclusion that information costs are not an impediment to participation in the administrative state.

Those immersed in regulatory practice know, however, that while information may be free, there is a lot of it, and it can be mind-numbingly complex.⁴³ A typical, forty-plus page preamble and rule published in the Federal Register typically demands dozens of hours of research and drafting time from a savvy public interest staffer who plans to submit a comment.⁴⁴ If the staffer also reviews background information or comments filed by others, the time spent to prepare comments on a rule easily doubles. With hundreds of rules published just

39. Empirical evidence on public interest engagement during the 1970s is scant. This work can be done with existing records, but simply has not been conducted. Evidence of an increase in the number of environmental, public-benefitting rules that are promulgated without vigorous public interest representation is based only on comparing anecdotes about the process in the 1970s with more rigorous empirical evidence of how the process is working today.

40. The Freedom of Information Act, 5 U.S.C. § 552 (2006 & Supp. V 2011).

41. Government in the Sunshine Act, 5 U.S.C. § 552b (2006 & Supp. V 2011).

42. See, e.g., CARY COGLIANESE, FEDERAL AGENCY USE OF ELECTRONIC MEDIA IN THE RULEMAKING PROCESS: REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (July 2011), available at <http://www.acus.gov/wp-content/uploads/downloads/2011/08/Coglianesse-Report.pdf> (describing the innovations that agencies are using in electronic rulemaking and ways these innovations could be improved).

43. See, e.g., Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1347–51 (2010).

44. This estimate is based in part on interviews. See, e.g., Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1746 (2012).

by EPA annually,⁴⁵ the workload to submit comments on the environmental rules alone would seem to far exceed a public interest group's capacity.⁴⁶

The time and energy dedicated to *processing* an agency's preamble, draft rule, and supporting information is thus another subcategory of information costs that must be factored into the participation calculation. When the costs of processing are excessive, the ability of thinly financed groups to participate drops correspondingly.⁴⁷ Komesar's model shows us how this is so.⁴⁸ By allowing information costs to rise through these processing costs, an agency's rulemaking process jeopardizes engagement by the already fragile constituencies that are needed to ensure balanced engagement.⁴⁹

In the abstract, administrative process could be designed to keep processing costs to a minimum; participants would be encouraged to be succinct in their comments and agencies would face penalties if their explanations are opaque or if their records or justifications are unnecessarily bloated or hard to decipher. In reality, however, administrative process is oblivious to the participatory impediments posed by information-processing costs.⁵⁰ Indeed, perhaps because it is so committed to sunlight, administrative law seems to assume that more information is better.⁵¹ Even the preference for succinct communications referenced in the APA—namely that the agency is required to provide a “*concise general statement of their basis and purpose [for the rule]*”⁵²—has been effectively read out of the statute. As Richard Pierce observes, “[t]he courts have replaced the statutory adjectives, ‘concise’ and ‘general’ with the judicial adjectives ‘detailed’ and ‘encyclopedic.’”⁵³

Yet administrative process not only tolerates rising information costs; it actively encourages parties, including the agency itself, to load

45. Professor Cary Coglianese estimated that the EPA promulgated 334 rules per year from 1986 to 1990. Coglianese, *supra* note 42, at 50 tbl.2-2.

46. Public advocates will also attempt to engage in rules promulgated by the Food and Drug Administration, the Occupational Safety and Health Administration, the Nuclear Regulatory Commission, and the Consumer Product Safety Commission, to name a few.

47. Wagner, *supra* note 43, at 1335.

48. *Id.* at 1335 n.43 (citing KOMESAR, *supra* note 3, at 8).

49. *Cf.* HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS 242 (4th ed. 1997) (criticizing organizations' information systems as generally not being designed “to conserve the critical scarce resource—the attention of managers”).

50. Wagner, *supra* note 43, at 1339.

51. For the full argument, see *id.* at 1351–72.

52. 5 U.S.C. § 553(c) (2006) (emphasis added).

53. 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.4, at 596 (5th ed. 2010).

superfluous information into the record. Obfuscation is a winning strategy for virtually all insiders to the administrative state.

The courts, through their common law adjustments of the APA, are the ringleaders in creating multiple, overlapping incentives for information cost inflation within administrative process. For example, the courts have warned participants that challenges to agency rules in court can occur only when the problems with a rule have been raised “with specificity” during notice and comment.⁵⁴ Commenters thus understand that they are best advised to create a record of every conceivable issue worthy of challenge.⁵⁵

Agencies’ incentives for information loading run in parallel to those of interested parties. Courts review challenges to an agency’s rule based in part on how well the agency responds to facts and related arguments raised by commenters. Like interested parties, then, agencies are encouraged to be overly thorough, to be exhaustive, and to leave no stone unturned.⁵⁶ Professor Shep Melnick observes: “Since agencies do not like losing big court cases, they react[] defensively, 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.”⁵⁷ 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.”⁵⁸

Even worse, the courts have invented a “logical outgrowth” test that strongly encourages agencies to develop a rule proposal that is overly comprehensive in anticipating subsequent rule changes as a result of notice and comment.⁵⁹ Under this test, any material changes made to

54. See generally Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 34 n.112 (1984–85); *McKart v. United States*, 395 U.S. 185, 194–95 (1969) (setting out the reasons for exhausting remedies first within the agency before raising the issue with the court).

55. Andrea Bear Field & Kathy E.B. Robb, *EPA Rulemakings: Views from Inside and Outside*, 5 NAT. RESOURCES & ENV’T 9, 9–10 (1995) (recounting advice from regulatory attorneys regarding the importance of including all relevant information in communications with rulemaking agencies).

56. Professor Richard Pierce describes to what lengths agencies must go to show they have adequately considered all comments. See PIERCE, *supra* note 53, § 7.1, at 559.

57. R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 247 (1992).

58. *Id.*

59. See, e.g., *Env’tl. Integrity Project v. EPA*, 423 F.3d 992, 997–98 (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); *Shell Oil Co. v. EPA*, 950 F.2d 741, 750–52 (D.C. Cir. 1991) (holding that though commentators raised issues during the notice and comment process, the agency failed to provide

final rules that are not presaged in the proposal force a new proposed rulemaking, with its own separate notice and comment period. Agencies thus again face legally backed incentives to develop a proposed rule that is as complete as possible.⁶⁰

Finally, while open records are central to administrative law, even here asymmetries in participation can lead to programs that cause some of the relevant information to be blocked from view. Despite the fact that a substantial portion of the information used to set product licensing and other environmental standards is based on the information submitted by private parties,⁶¹ trade secret and related classification programs have developed (apparently in response to aggressive protections advocated by regulated parties) that create substantial barriers to the public disclosure of this private data. In pesticide licensing, for example, the public cannot view the manufacturers' toxicity studies that form the basis for the agency's decision until after the decision is final.⁶² Even then, interested citizens must go to a Washington, D.C. office to view the documents and sign certification papers;⁶³ the public viewers' names and addresses are also required, by law, to be shared with the manufacturers.⁶⁴

Public barriers to information classified as trade secret protected are even higher; information is classified in some programs based only on the manufacturers' unsubstantiated claim that there is some trade secret value to the information.⁶⁵ Industry overclaiming of trade secrets is now a well-documented problem and logically follows from the potential benefits that regulated parties enjoy precisely because of the lack of

meaningful notice and comment opportunities on issues in the final rule); *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1104–05 (4th Cir. 1985) (holding that interested parties did not have a fair opportunity to contribute to the process because they were not notified of the potential scope and substance of the final rule); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1030–31 (D.C. Cir. 1978) (holding that because the agency's decisions were "far from the 'logical outgrowth' of the preceding notice and comment process," the agency improperly denied participants chance to comment).

60. See, e.g., E. Donald Elliott, *Re-inventing Rulemaking*, 41 DUKE L.J. 1490, 1495 (1992) ("Because 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*.").

61. See, e.g., 7 U.S.C. § 136a(h)(3)(A)(ii)(III) (2006) (requiring manufacturers of new pesticides to conduct toxicity testing).

62. § 136h(g)(1).

63. See § 136h(g)(1)–(2).

64. § 136h(g)(2).

65. See, e.g., Mary L. Lyndon, *Secrecy and Innovation in Tort Law and Regulation*, 23 N.M. L. REV. 1, 34–39 (1993) (discussing the costs of broad protections for confidential business information).

public access to information regarding the toxicity of their products.⁶⁶ Nevertheless, as a result of this overgenerous trade secret privilege, some of the critical information underlying regulation is completely unavailable to the public, regardless of whether the public interest groups have the resources to digest the information if it were made publicly available.

In sum, Komesar's participation-centered model highlights the central role that rising information costs play in administrative law. Applying it to environmental regulation reveals ways that the regulatory process not only tolerates the inflation of information costs, but may actively inflate these costs through inadvertent, but perverse institutional design choices. As a result, the cumulative barriers to balanced and vigorous participation may actually arise not in spite of administrative law, but because of it.

c. Cost of Access

Administrative process not only promises to keep information costs low, but it also promises participants open, low-cost access to the decision-making process. Agencies actively solicit comments on their proposals and are expected to keep the record open until all parties have adequate time to comment.⁶⁷ Anyone can access these proposed rules by accessing the Federal Register, which is available on the Internet and through many public libraries. Anyone can also submit comments on proposed rules; there generally are no limits or constraints on the size, length, or form of the comments, and the comments can be submitted by mail or e-mail.⁶⁸ While filing a judicial challenge to a rule is more expensive since it involves some legal expertise, even this procedural move is not terribly costly, at least in relation to other court challenges. Within legal institutions, then, it is difficult to imagine a more generous system for encouraging participation from all affected groups.

As with information costs, however, a superficial understanding of the administrative process yields a misleadingly happy ending—it is easy to assume that access costs are trivial and pose no barrier to balanced engagement by affected groups. Because anyone can study and submit comments and their comments must be considered by the agency, so this

66. See, e.g., Wendy Wagner & David Michaels, *Equal Treatment for Regulatory Science: Extending the Controls Governing the Quality of Public Research to Private Research*, 30 AM. J.L. & MED. 119, 129–35, 151–54 (2004).

67. Administrative Procedure Act, 5 U.S.C. § 553(c) (2006).

68. See, e.g., *Participate Today!*, REGULATIONS.GOV, <http://www.regulations.gov/#!home;tabsearch> (last visited Mar. 5, 2013) (locate a document you wish to comment on and click the “Submit a Comment” link on the Search Results page or the Document Details page).

upbeat story goes, administrative design invites precisely the kind of pluralistic-based accountability that is its hallmark.

Yet the real story of administrative process is different; it involves multiple points of access, each of which appear to provide significant opportunities for imbalances in influence. These multiple access points may not be equally available or affordable to all affected parties and thus they limit the practical ability of some groups to engage at critical points in the rulemaking life cycle. Like information costs, moreover, these added access costs may be largely invisible and even undocumented. But also like information costs, the cumulative access costs—once cataloged—may be so high that in practice they serve to preclude balanced participation on most rules. The net result again is a regulatory system that is not practically open or accountable to all, but instead caters primarily to the well-financed groups.

The first major access point missed by the simple notice and comment story occurs during the development of the agency's proposal. During this often long and arduous period—called the “pre-NPRM” process (meaning that it occurs before the “Notice of Proposed Rulemaking” during which comments are solicited)—there are generally no formal procedures governing the agencies' docketing of communications with affected groups.⁶⁹ Indeed, the courts' “logical outgrowth” test strongly encourages these undocumented sidebars, since it requires the agency to start the proposed rulemaking exercise all over again if significant changes are made after the comment process.⁷⁰ The agency thus has strong, judicially imposed incentives to get the proposal as complete as possible by ensuring that at least the most litigious groups are satisfied with the proposed rule. Moreover, there is no requirement in most programs that the agency track these pre-NPRM contacts.

Despite the potential importance of this rule development process as an additional access point, precious little is known about interest group engagement during this period.⁷¹ In an empirical study of some Clean Air Act rules that several colleagues and I conducted, however, it was clear that this important stage of the rule life cycle was neither balanced nor

69. See, e.g., William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC'Y 576, 580 (2009) (noting the irony of how mechanisms for institutional accountability may tend to shift the actual policy making to an earlier point in the process where the mechanisms are not in full effect).

70. See *supra* note 59 and accompanying text.

71. Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1496 (2012) (discussing the lack of empirical study of this stage of the rulemaking).

equally open to all affected groups.⁷² Instead, regulated parties heavily dominated the process; on average there were 140 agency contacts with regulated parties per rule as opposed to less than one contact per rule with public interest groups.⁷³ These communications included not only meetings, letters, information sharing, and telephone calls, but also involved sharing drafts of proposed rules for comment well before their formal publication.⁷⁴ Where were the public interest groups during this important period of rule development? We hypothesized that the public interest groups could not afford to dedicate their scarce resources to this time-consuming work since it is hard to claim credit from successes achieved in black-boxed negotiations. Thus, although technically access to the agency during the pre-NPRM period might be free,⁷⁵ because it involves extensive negotiation and repeat play—none with credit—it appears to attract only the richest stakeholders with the most immediate gains who can afford to participate.

Another generally ignored access point that likely takes a toll on the balance and diversity of participants is White House review, or more specifically review by the Office of Information and Regulatory Affairs (OIRA). Pursuant to an Executive Order first issued in 1981 by President Ronald Reagan,⁷⁶ OIRA reviews significant rules at both the proposed and final stages.⁷⁷ In the course of its review, OIRA sometimes makes substantial changes.⁷⁸ In most cases, however, these changes are difficult to trace and, in virtually all cases, the changes are unexplained.⁷⁹ Because of their important role in altering the substance of some agency rules, OIRA has become an important access point for interest groups wishing to influence a regulation. Indeed, interest group lobbying of OIRA is so popular that it is considered a cottage industry inside the

72. See Wagner et al., *supra* note 28. The Clean Air Act implicitly encourages EPA to maintain records of pre-NPRM communications through comprehensive docket and judicial review requirements. See 42 U.S.C. § 7607(d) (2006).

73. See Wagner et al., *supra* note 28, at 128–29.

74. See *id.* at 125.

75. It is possible, however, that the agency is more amenable to communications with groups that hold out a greater risk of litigation and possess information of use to the agency. This may also favor regulated parties in some settings.

76. Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

77. See Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

78. For facts and figures on OIRA review, go to the Office of Management and Budget's Regulatory Dashboard. Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, *Dashboard*, REGINFO.GOV, <http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp> (last visited Feb. 24, 2013). The percentage of changes that do not involve material changes can be identified in the dashboard as well. See *id.*

79. See Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1157 (2010).

beltway.⁸⁰ This added access point thus creates still more costs to the ability of interest groups to influence agency rules, and as a result more thinly financed groups would seem at greatest risk of dropping out. Preliminary empirical evidence shows in fact that, like the pre-NPRM process, OIRA meetings are more frequently held with regulated industry than with the public interest groups.⁸¹ There is also preliminary evidence that the effects of OIRA review tend to favor industry in the aggregate.⁸²

Third, when an interest group files a petition seeking judicial review of an agency rule, the agency can settle that challenge in secret if the terms of the settlement do not materially change the text of the rule.⁸³ These rule settlements constitute yet another, largely invisible access point to the rulemaking process. In theory, this access point might be used more equally by all participants, although one study suggests it too is industry dominated.⁸⁴ But regardless, it is another access point that advantages those who file judicial challenges over those who do not.

Finally, political interference through congressional oversight hearings can be used to bully agencies into revising their regulatory proposals or abandoning regulatory projects entirely. In his 2012 article, Professor Thomas McGarity documents this political “blood sport” that

80. See, e.g., Paul Gilman, *The Nat'l Acad. of Scis., Improving the Use of Science in the Administrative Process* 100–01 (Sept. 10, 2012) (transcript on file with author).

81. See RENA STEINZOR, MICHAEL PATOKA & JAMES GOODWIN, *CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT* 34–37 (2011), available at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

82. See Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 858, 865–66 (2003). In their study of top EPA officials' view of OIRA during the George H.W. Bush and Bill Clinton administrations, Professors Lisa Bressman and Michael Vandenberg report that the strong majority (more than 60%) reported that the “White House readily sought changes that would reduce burdens on regulated entities, and veered from those that would increase such burdens.” Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 86–87 (2006). Professor Steven Croley made similar, although not quite as strong, observations about OIRA's tilt during the White House review process: 56% of the meetings OIRA conducted to discuss rulemakings were exclusively with industry as compared with 10% that were held exclusively with public interest groups. Croley, *supra*, at 858. Finally, in a GAO study, about 70% of the rules that OIRA “significantly affected” and for which comments were available involved reinforcing the views of industry. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-929, *RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS* 11 (2003), available at <http://www.gao.gov/assets/160/157476.pdf>.

83. See, e.g., Jeffrey M. Gaba, *Informal Rulemaking by Settlement Agreement*, 73 GEO. L.J. 1241, 1245–48 (1985) (discussing rulemaking settlements).

84. See Coglianese, *supra* note 45, at 147–53.

grants meaningful access, via Congress and related political channels, to interest groups to alter or derail agency regulations.⁸⁵ These legislative interventions create yet another access point that is costly to employ but can be used to yield substantial influence on the final regulatory results.

With the realization that rulemakings not only involve the familiar notice and comment stage, but also numerous other important points of access, the cumulative costs to an interested party seeking to influence a rule rise considerably. The possibility that public interest groups will be able to participate “toe-to-toe” with well-financed groups on publicly benefiting rulemaking, as they apparently did in the 1970s, seems increasingly remote.

d. Sum

Komesar’s participation-centered model reminds us that administrative legitimacy requires engagement of the full spectrum of affected parties, but this will occur only when the costs of participation are not so high as to favor the rich stakeholders over the more thinly financed groups. Popular portrayals of administrative law may lead us to believe that we still live in the middle of the last century where access and information costs appear to have been more manageable, but Komesar’s model reveals that the accretions of process innovations, access points, and information costs can lead to an institutional process that in reality is not equally open to all participants. While we cannot tell what this means to the substance of the rules, we do know from Komesar’s model that administrative process is not always informed by a diverse group of affected parties, at least for some sets of public-benefiting rules.

2. THE BENEFITS OF PARTICIPATION

While the benefits (or stakes) to various groups to participate would seem fixed and largely external to the process, even the stakes can be affected by process deficiencies. Specifically, as the costs of information rise, the issues can become mired in complexity, obscuring the benefits to some groups of remaining active on the issue. Since the stakes or benefits to a participant are necessarily only the perceived and not the actual stakes, moreover, this perception is likely to be influenced by the way the issues are framed. If the rules are obtuse and their implications and requirements are difficult to access, for example, it will be harder for the catalytic public interest subgroups to activate the dormant majority

85. See Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671 (2012).

(or more precisely, the dormant majority's donations) to care about or, perhaps more urgently, donate to these issues.⁸⁶ Perhaps that is why public interest groups, by some accounts, prioritize those rules for which they could file potentially salient and winning lawsuits over other rules that will entail more complex and entrenched technical battles that may not be amenable to translation to the larger dormant majority.⁸⁷ In fact, representation challenges may add yet more space between the true, public interest and what the diffuse public might perceive to be at stake based on what public interest representatives choose to highlight as important.⁸⁸

The public interest, in this way, is likely to take a double hit as a result of the rising information and access costs that only further fragment and complexify the underlying issues at stake in regulatory battles. On complicated environmental issues, the rising costs end up having a negative feedback effect on the perceived public importance of the issues.⁸⁹ As a result, the gulf continues to grow between the perceived stakes of the regulated industry (who face immediate payoffs that typically take the form of reduced compliance costs) and the diffuse public (who enjoy only probabilistic gains that are difficult to make salient). Even in the event that the relationship between processes and perceived stakes is more complex, the fact that there is a link between the costs and the perceived benefits from participation is an important insight that Komesar's model reveals through its relational variables.

III. REFORMING INSTITUTIONS

Komesar's participation-centered model takes a complicated system and develops a simple model for how it works and why it might not. As just one of literally hundreds of examples, the model manages to expose basic questions about administrative process that have largely been ignored. Perhaps even more valuable, by connecting critical process

86. There is nothing contagious or "sticky" about highly technical and often poorly explained debates over what constitutes the best technology for reducing emissions from industrial smoke stacks, for example. It is difficult to communicate these issues in ways that effectively catalyze the dormant majority. See MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 89–99 (2000).

87. See, e.g., Wagner, *supra* note 44.

88. See, e.g., KOMESAR, *supra* note 3, at 73–74. Of course, this public interest representation model is hardly ideal. See, e.g., Matt Stephenson & Howell Jackson, *Lobbyists as Imperfect Agents: Implications for Public Policy in a Pluralist System*, 47 HARV. J. ON LEGIS. 1 (2010).

89. Cf. Constance A. Nathanson, *Social Movements as Catalysts for Policy Change: The Case of Smoking and Guns*, 24 J. HEALTH POL. POL'Y & L. 421, 445 (1999) (arguing that a credible risk is needed to get the public engaged).

features (access and information) to the goal of ensuring democratic accountability, potentially significant deficiencies in institutional design are exposed and the most promising paths for reform illuminated.

The next step, not attempted in this Article, develops reform options by considering whether there are other institutional designs that better engage a diverse range of participants than the status quo. In some cases, for example, tort law may be superior to environmental regulation, at least when victims experience harms that they can press in court.⁹⁰ Even if the least imperfect option is to stay within a given institution, however, the analysis is not done. Using Komesar's model, the reformist can identify features of the process that appear most significant in blocking affected parties or otherwise facilitating imbalanced participation. Indeed, thanks to the participation-centered model, the analyst can identify ways that information costs may be bloated unnecessarily, access costs may be on the rise, or stakes may be artificially depleted. The institutional process can then be redesigned in ways that lead to more balanced participation in the future.

CONCLUSION

Komesar's model exposes the basic mechanics of what has for far too long been treated as a black box of agency decision making. *Imperfect Alternatives* makes us aware of the otherwise taken-for-granted fact that generally the best institutional processes are those that engage the full range of affected groups, without domination of some interests over others. Decision makers are still free to reach decisions that diverge significantly from the recommendations of these groups, but they do so only under the watchful eye of engaged participants. When these processes work correctly, decision makers are not only more informed, but they are also held accountable for their decisions.

While the least imperfect of the institutional alternatives may still produce results that stray far from this ideal of vigorous and balanced participation by all affected interests, Komesar's model tells us why, and what we, as analysts and institutional designers, can do to produce stronger institutions. Regulatory failures will not end in this new world of Komesarian enlightenment, but our institutional future will surely be a lot brighter.

90. See, e.g., KOMESAR, *supra* note 3, at ch. 6; Wendy E. Wagner, *When All Else Fails: Regulating Risky Products through Tort Litigation*, 95 GEO. L.J. 693 (2007).