Identity-Conscious Administrative Law: Lessons from Financial Regulators

*Brian D. Feinstein**

Abstract

Administrative law's conventional mechanisms for bolstering democratic accountability are under strain. Open-access procedures like notice-and-comment rulemaking promise to inject a dose of popular responsiveness into agency decision-making. Well-resourced groups' outsized use of these measures, however, causes that promise to remain unfulfilled. Likewise, assertions that the White House welds a democratic link between administrators and the public—although ascendant in the courts—rest on rusty assumptions about the President's responsiveness to majority preferences, let alone to a national will.

This Article spotlights an overlooked set of identity-conscious measures to enhance agencies' accountability to the public. Counterintuitively, these measures further agencies' accountability by explicitly elevating certain subgroups. From representational mandates for independent commissions to consultation requirements with outside groups, these structures are planted across the administrative state, and are particularly common in financial regulatory agencies.

This Article presents the first accounting of administrative law's myriad identity-conscious measures. Case studies concerning the Federal Reserve and Securities and Exchange Commission reveal that these measures are surprisingly efficacious. Most importantly, they help correct for power disparities that are present in the use of administrative law's more familiar, identity-neutral mechanisms for public influence. These findings offer a prescriptive blueprint; to redress inequities, respond to challenges to the administrative state's democratic bona fides, and ultimately improve decision-making by fostering deliberation among diverse actors, policymakers should turn their attention to identity-conscious agency design.

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* Assistant Professor, The Wharton School of the University of Pennsylvania. I thank Colleen Baker, Mehrsa Baradaran, Suneal Bedi, Vince Buccola, Jessica Clarke, Peter Conti-Brown, Greg Day, Bridget Dooling, Andrew Hammond, Chris Havasy, Steven Hess, John Holden, Sharon Jacobs, Lindsay Sain Jones, Kate Judge, Jeremy Kress, Sarah Light, Goldburn Maynard, Lev Menand, Richard Murphy, Kali Murray, Jennifer Nou, Nick Parrillo, Heidi Schooner, Mike Schuster, Amy Sepinwall, Bijal Shah, Ganesh Sitaraman, Christina Skinner, Glen Staszewski, Matthew Stephenson, Matt Turk, Rory Van Loo, Michael Vandenbergh, Wendy Wagner, Chris Walker, Art Wilmarth, Adam White, David Wishnick, David Zaring, and participants at the Financial Regulation Scholars Seminar Series and at workshops at Boston University School of Law, Vanderbilt Law School, and University of Georgia Terry College of Business for insightful comments. I gratefully acknowledge Syelinda Kithome, Tyler Knox, Jennifer Lee, and Daniel Wang for excellent research assistance.

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INTRODUCTION

On his first day in office, President Joe Biden issued an executive order calling for "a systematic approach to embedding fairness in decision-making processes."[1] The order instructs agencies to determine whether their policies "exacerbate barriers to full and equal participation,"[2] and "work to redress [those] inequities."[3]

Conventional administrative structures to connect agencies to the public are ill-suited for this task. Current measures—which range from notice-and-comment rulemaking to greater presidential control—are intended to enhance agencies' popular responsiveness.[4] In practice, however, they often privilege powerful and unrepresentative voices, thus moving policy away from popular preferences.[5] Poorly designed participatory mechanisms may even reduce the administrative state's perceived democratic legitimacy.[6]

This Article offers a corrective. It identifies a constellation of *identity-conscious* structures, distinct from the neutral measures at the heart of conventional administrative law, that can help tear down what President Biden's executive order terms "barriers to full and equal participation."[7] Reserved seats for underpowered groups on multimember agencies, and requirements that agencies consult with these groups, can amplify voices that are crowded-out in conventional channels.[8] Expanding the use of such measures would redress inequities in administrative decision-making and enhance agencies' democratic responsiveness.[9]

The stakes in pursuing these objectives are substantial. A received wisdom holds that agencies occupy an uneasy place in the constitutional structure because they perform functions that the Constitution assigns to a democratically accountable Congress and President.[10] In response, a central project of administrative law in-

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1 Exec. Order No. 13,985, 86 Fed. Reg. 7009, 7009 (Jan. 20, 2021).

2 *Id.* at 7010.

3 *Id.* at 7009.

4 *See* Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1302, 1308–11 (2016).

5 *See infra* Part I.

6 *See infra* Part I.

7 Exec. Order No. 13,985, 86 Fed. Reg. at 7010.

8 *See infra* Part III.

9 *See infra* Part IV.

10 *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010) ("The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people."); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 374 (2014)

volves crafting measures to enhance popular influence over agency action, thus in theory buttressing the democratic legitimacy of the administrative state.[11]

Lawmakers, judges, and scholars offer two general means of redressing agencies' so-called "democratic deficit."[12] One approach focuses on expanding opportunities for the public to interact with agencies.[13] This project enjoys widespread support. For instance, the most prominent form of participation in agency decision-making, notice-and-comment rulemaking,[14] is codified in the Administrative Procedure Act ("APA"),[15] a "superstatute" with "quasi-constitutional" status.[16]

The other approach places the elected President as the democratic link between agencies and the public, and thus advocates en-

("[T]he transfer of power . . . to administrative agencies . . . open[ed] up opportunities for utterly unrepresentative bodies to make law."); Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2035 (2005) ("Agencies are neither mentioned in the Constitution nor directly responsive to the electorate, leaving their democratic legitimacy unclear. Administrative law scholars have sought to ground the legitimacy of agency actions in a variety of theories."); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) ("Almost fifty years of experience has accustomed lawyers and judges to accept[] the independent regulatory commissions . . . as a 'headless "fourth branch"' of government. . . . [W]e accept the idea of potent actors in government joining judicial, legislative and executive functions, yet falling outside the constitutionally described schemata . . . ." (footnotes omitted) (quoting PRESIDENT'S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 30 (1937))).

11 *See* Seifter, *supra* note 4, at 1302 n.1 (collecting citations).

12 *See* Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 260 (2017) (using the term "democratic deficit" to refer to agencies "lack[ing] Congress's democratic pedigree or its institutional capacity to channel public values"). The civic republicanism of the 1990s also encouraged participation to redress this perceived problem. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1516 (1992).

13 These communications run in both directions: members of the public provide their views to, and receive information from, agencies. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 475 (2003).

14 *See* Seifter, *supra* note 4, at 1308 (labeling notice-and-comment "the most well-known and heralded form of administrative participation").

15 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

16 Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1209–10 (2015); *accord* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1365 (2010); Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363; *see also* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216, 1237 (2001) (labeling "entrenched" laws with certain other characteristics to be "super-statutes").

hanced White House control over administration.[17] Chief Justice John Roberts and Justice Elena Kagan, among many others, endorse greater presidential control to strengthen agencies' accountability to the public.[18] Indeed, the most cited case in administrative law, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[19] rests on this premise.[20]

Both approaches fall far short as means of enhancing agencies' democratic responsiveness. Perversely, because well-resourced groups make better use of formally neutral public-involvement provisions, these measures may move policy further away from popular preferences.[21] Concerning presidential control, the notion that greater White House involvement enhances democratic accountability assumes a President responsive to popular majorities.[22] That assumption fails in the face of a malapportioned Electoral College and disproportionate attention to swing-state denizens and big-money donors.[23]

Both sets of measures rest on flawed assumptions rooted in formal equality. The former set assumes that interested parties have roughly equal access to agencies' channels for public participation, whereas the latter assumes citizens can influence presidential elections on a roughly equal basis through the franchise. That these assump-

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

18 *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020); Kisor v. Wilkie, 139 S. Ct. 2400, 2413 (2019); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

19 467 U.S. 837 (1984).

20 *Id.* at 865 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch . . . to make such policy choices . . . ."); *see also* Cynthia R. Farina, *The "Chief Executive" and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 183 (1997) ("*Chevron*['s] mystique flows from this promise that the ordinary act of statutory interpretation can advance the larger process of reconciling agencies with constitutional democracy."); Peter M. Shane & Christopher J. Walker, Foreword, Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 (2014) (reporting over 68,000 citations to *Chevron* on Westlaw).

21 *See infra* Sections I.A–.B.

22 *See* Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 875–76 (1997) (collecting citations regarding unitary executive theory or presidential control that assert or imply that the President is accountable to the "Median National Voter"); *see also* THEODORE J. LOWI, THE PERSONAL PRESIDENT 103, 117 (1985). *But see* Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 161 (1995) (considering various metrics for democratic accountability). Some scholars adopt multiple metrics. *Compare* Steven Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 36 (1995) (claiming that the President, "alone, speaks for the entire American people"), *with id.* at 67 ("The President . . . [is] the conscious agent[] of . . . a national majority coalition.").

23 *See infra* Section I.C.

tions are so plainly violated raises the possibility that these measures exacerbate rather than mitigate the democratic deficit.[24]

Identity-conscious structures provide a solution. These measures, which elevate specific actors, are already infixed across the administrative state. They are particularly prevalent within banking and securities regulators, which is counterintuitive given the perception that these agencies tend to be more independent than most.[25] Paradoxically, they can increase democratic accountability over agencies by explicitly privileging certain groups. As such, identity-conscious structures depart from administrative law's focus on measures rooted in formal equality to remedy agencies' democratic deficit.[26]

Identity-conscious structures also can be remarkably effective.[27] Consider the Federal Reserve's powerful Federal Open Market Committee ("FOMC"), which sets the nation's monetary policy and enjoys a remarkable degree of independence from political actors.[28] To discourage dominance by New York banks, geography is a factor in the selection of all twelve FOMC members.[29] These geographic quotas matter. When voting on monetary policy, home-region economic conditions exert a statistically significant effect on FOMC members' dissent rates, controlling for other factors.[30] Were geographic dispersion in the FOMC's composition not mandatory, that body likely would have more members from the nation's financial centers—and produce an appreciably different monetary policy.[31]

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24 *See* Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) (positing that greater presidential control over civil servants can move policy away from the median voter's preferences).

25 *See* Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CALIF. L. REV. 327, 338 (2013); *see also* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 602 (2010). That these agencies are often seen as relatively independent of political actors, however, does not imply that they are most insulated from regulated groups.

26 *See infra* Part I.

27 *See infra* Sections II.A.3 & II.B.3.

28 *See* Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. ON REGUL. 257, 295, 300 (2015).

29 The FOMC is comprised of the seven governors of the Federal Reserve System, the president of the Federal Reserve Bank of New York, and the presidents of four of the other eleven Reserve Banks, selected on a rotating basis by group. 12 U.S.C. § 263(a). The Reserve Bank presidents are geographically dispersed, *see id.* § 222, and the D.C.-based governors also must hail from different Federal Reserve districts, *id.* § 241, although this latter requirement is occasionally violated.

30 *See* Ellen E. Meade & D. Nathan Sheets, *Regional Influences on FOMC Voting Patterns*, 37 J. MONEY, CREDIT & BANKING 661 (2005).

31 *See* Brian D. Feinstein & M. Todd Henderson, *Congress's Commissioners: Former Hill*

Despite their efficacy, these mechanisms are mostly absent from the conversation on enhancing agencies' democratic responsiveness. That is a mistake. With greater attention, identity-conscious structures can do even more to redress agencies' democratic deficit. Lawmakers can add representational mandates for multimember commissions and require that agencies consult with diverse advisory committees to give voice to underrepresented groups; judges can assess whether the views of underpowered actors were adequately considered as a relevant factor during hard-look review; and scholars can explore novel mechanisms to promote substantive equality.

This Article proceeds in four parts. Part I catalogs the conventional, identity-neutral mechanisms for public influence on administration: an equal "opportunity to participate,"[32] equal access to agency information,[33] and an equal vote in the election of the President, who, according to Justice Kagan, "supervis[es]" agencies and "in turn answers to the public."[34] These mechanisms share a common foundation in formal-equality principles. Political and economic inequities, however, prevent them from providing a meaningful dose of democratic responsiveness or accountability.

Part II identifies an alternative set of identity-conscious mechanisms, most prominently representational and consultative requirements. These mechanisms—which administrative law scholarship overlooks as a category—feature throughout the administrative state. Although they do not mandate any particular substantive outcome, they do privilege certain actors over others.

Part III presents in-depth case studies concerning two recently established identity-conscious structures: the designated community-bank seat at the Federal Reserve and a requirement that the Securities and Exchange Commission ("SEC") consult with an investor advisory committee. In terms of power, these requirements lie on opposite poles; the former is a seat on the board of arguably the nation's most powerful and independent regulatory agency, whereas the latter is essentially a right to be heard by a commission with a more limited portfolio. Yet Congress created both structures for the purpose of

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Staffers at the S.E.C. and Other Independent Regulatory Commissions, 38 YALE J. ON REGUL. 175, 178, 183–84 (2021).

32 5 U.S.C. § 553(c).

33 *See* Freedom of Information Act, 5 U.S.C. § 552; *see also* Government in the Sunshine Act, 5 U.S.C. § 552b.

34 Kisor v. Wilkie, 139 S. Ct. 2400, 2413 (2019).

elevating overlooked groups in their respective policy domains, and both structures have performed this function successfully.

Part IV discusses the normative and prescriptive implications of this analysis. This Part contends that identity-conscious structures can complement administrative law's conventional measures grounded in formal equality. Specifically, where well-resourced groups dominate avenues of influence that are formally accessible to all, guaranteeing underrepresented interests a seat at the table bolsters agencies' democratic accountability. It can even, the Article concludes, generate more thoughtful and considered policy outcomes.

I. IDENTITY-NEUTRAL MEASURES

Much of administrative law adheres to a principle of formal equality. The concept is rooted in Aristotle's position that a just system must "treat like cases as like,"[35] i.e., that individuals receive equal treatment without regard to aspects of their identities.[36] This identity-neutral approach also is consonant with the anticlassification principle in equal-protection jurisprudence, which holds that it is improper to treat people differently because of their race, sex, or other ascriptive characteristics.[37] It also connects with social-choice theory's concept of *anonymity*, i.e., the requirement that the outcome a voting rule produces be independent of the identities of voters.[38]

The three major efforts to inject democratic accountability into administration are all identity-neutral and grounded in the logic of formal equality. *First*, transsubstantive rules regarding public partici-

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35 Stefan Gosepath, *Equality*, STAN. ENCYCLOPEDIA PHIL. (June 27, 2007), http://plato.stanford.edu/entries/equality [https://perma.cc/HA35-BAHU] (citing ARISTOTLE, NICHOMACHEAN ETHICS (340 BCE)). Aristotle's formulation builds on Plato. *See id.* Technically, Aristotle's formulation also could support substantive equality, based on the criteria on which one classifies cases as alike or different. *See* Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1642 n.42 (2017).

36 *See* Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 4–5 (2011) (critiquing this concept); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1334 (1988) (similar).

37 Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005 (1986). The theory has a place for groups based on nonascriptive characteristics, e.g., immigration status, as well. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 155 (1976). Anticlassification has five relevant features: it treats similar individuals similarly; counsels judges to ensure that the process is fair and displays agnosticism regarding the ends that the process produces; favors simple, manageable, and nonsituational rules; focuses on individuals, not social classes or groups; and is all-inclusive, without bestowing more protection on one person than another. *Id.* at 119–28.

38 *See* HERVÉ MOULIN, THE STRATEGY OF SOCIAL CHOICE 22–25 (1983).

pation in administration open the policymaking process to all on equal terms; anyone, for instance, can submit a comment concerning a proposed rule. *Second*, measures to expand access to government information and meetings also are identity-neutral. *Third*, the bipartisan, generations-long project to augment the President's role in administration, on the theory that this nationally elected official provides a measure of democratic accountability to administration, rests on an assumed neutrality in the treatment of potential voters.[39] This Part discusses each of these efforts in turn.

A. Equal Opportunities to Participate

Today, federal agencies' avenues for public participation arguably are the most comprehensive in the world.[40] That was not always the case, particularly in the administrative state's early decades, when agencies were seen as mechanistic "transmission belt[s]" for effectuating legislative directives.[41] By the late 1930s, however, flaws in the then-prevailing apolitical conception of administration became apparent.[42] Regulation requires balancing competing goals and making value judgments—the stuff of politics.[43] With civil servants and appointees exercising broad delegations of authority concerning politically contested issues,[44] how could institutional designers ensure that agencies are democratically accountable?

The first substantial response developed in the mid-twentieth century was to open administrative processes to greater interest-group

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39 Specifically, to view the President as democratically responsive, one must accept the premise that citizens' ability to select the President is open to all on equal terms, i.e., votes must be tabulated without regard to each voter's identity, and that the rules governing elections are otherwise neutral, objective, and universal.

40 Wendy E. Wagner, *The Missing Link in Citizen Participation in U.S. Administrative Process*, 3 INT'L J. OPEN GOV'TS 65, 65 (2016).

41 Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1675 (1975); *accord* Reagan v. Farmers' Loan & Tr. Co., 154 U.S. 362, 394 (1894) (asserting that agencies merely "carry[] into effect the will of the State as expressed by its legislation"). New Deal-era scholars emphasized agencies' objectivity and expertise, *see, e.g.*, JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 10–17 (1938), thus sidestepping questions concerning the need for political control. *See* Stewart, *supra*, at 1678.

42 *See, e.g.*, PRESIDENT'S COMM. ON ADMIN. MGMT., *supra* note 10, at 30 (decrying the bureaucracy as a "headless 'fourth branch'").

43 *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 100–02 (1994) ("In a world where administration is conceived as apolitical, granting administrators relatively independent authority could be thought to raise few constitutional issues. . . . [Today, however, regulation] can no longer be understood to be neutral, or scientific. Politics is at its core, in the sense that value judgments are pervasive and democratic controls on policymaking are indispensable." (footnote omitted)).

44 *See* Kagan, *supra* note 18, at 2262; Stewart, *supra* note 41, at 1676–77.

involvement.[45] By enabling greater direct participation across the political spectrum, agencies could serve as fora for democratic contestation.[46] Through public participation, "[b]ureaucrats would become democrats."[47] Mechanisms for opening agencies to all on equal terms promised to legitimate the administrative process as popularly accountable.[48]

Passage of the APA constituted the largest salvo in this campaign. The APA requires agencies, with limited exception, to publish written notice of proposed rules in the Federal Register,[49] thus at least notionally informing all interested parties of the agency's planned action. Agencies then must "give interested persons an opportunity to participate in . . . rule making through submission of written data, views, or arguments."[50] Only "[a]fter consideration of the relevant matter presented" may the agency issue a rule.[51]

More broadly, the D.C. Circuit endorsed the view that "public participation in decisions which involve the public interest is . . . indispensable."[52] Courts in the 1960s and 1970s imposed new public-participation requirements on agencies' adjudications, rulemakings, and licensing proceedings. Where a statute required the agency to hold a "public hearing," courts looked favorably upon any hearing where regulated interests and public interest groups were able to make statements and ask written questions, finding that this hearing provided "a meaningful opportunity to be heard."[53] Concerning

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45 *See* Stewart, *supra* note 41, at 1715.

46 *See* Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1497 (1983) (stating that pluralism holds that "the key to administration [is] participation," because participation by a broad array of interests enables agencies to "reflect[] the voice[s] of the people").

47 *Id.*

48 *See* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 53 (2006); Bressman, *supra* note 13, at 475; Stewart, *supra* note 41, at 1683, 1687.

49 5 U.S.C. § 553(b).

50 *Id.* § 553(c).

51 *Id.* Formal rulemaking, which is rarely used, requires even more: court-like proceedings with more detailed participatory rights for interested parties. *Id.* §§ 556–557. Although the APA's purpose was to promote reasoned decision-making and safeguard affected parties' liberty interests rather than to increase participation per se, it certainly had the latter effect as well. *See* Bressman, *supra* note 13, at 474.

52 Off. of Commc'n of the United Church of Christ v. FCC, 465 F.2d 519, 527 (D.C. Cir. 1972).

53 Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 630–31 (D.C. Cir. 1973). For some subjects for which Congress did not mandate that agencies conduct adjudicatory hearings, courts found that constitutional due process nonetheless requires one. *See* Henry J. Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267, 1311–12 (1975). For the diversity of cases involving

rulemaking, where an agency engaged in rulemaking fails to consider material comments from outside groups, that failure may "become[] of concern."[54] Likewise, interested parties must be allowed to intervene in licensing proceedings, because the "Congressional mandate of public participation" in agency proceedings goes beyond merely "writing letters" and other passive expressions.[55]

Finally, the Supreme Court liberalized standing doctrine so that "those whose interests are directly affected" by an agency action could challenge that action in court.[56] In some quarters, litigation initiated by special-interest groups and self-defined public-interest lawyers was seen as an alternative political process.[57] To close the circle, the prospect of being hauled into court by an aggrieved interest group after promulgating a rule may spur agencies to involve these groups early in the rulemaking process.

To their proponents, these measures effectuated a reinvention of administrative law as "a perfected political process," as Professor Lisa Schultz Bressman recounts.[58] In June 2020, eight of the nine Supreme Court Justices endorsed the view that the APA promotes public accountability.[59] By submitting comments in rulemakings, intervening in agency adjudications, challenging agency decisions in court, and the

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property deprivations that require a hearing, see, for example, Goss v. Lopez, 419 U.S. 565 (1975) (firing a civil servant); Arnett v. Kennedy, 416 U.S. 134 (1974) (suspending a high school student); Goldberg v. Kelly, 397 U.S. 254 (1970) (terminating welfare benefits to a former recipient). Further, nonparties were afforded standing to intervene in agency adjudications under a broad set of circumstances. *See generally* Nat'l Welfare Rts. Org. v. Finch, 429 F.2d 725 (D.C. Cir. 1970); Off. of Commc'n of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Stewart, *supra* note 41, at 1748–52.

54 Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973).

55 *United Church of Christ*, 359 F.2d at 1004.

56 Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 157 (1970); *see also* Scenic Hudson Pres. Conf. v. Fed. Power Comm'n, 354 F.2d 608, 614 (2d Cir. 1965) (holding that conservation groups and small-town governments' interest in "the maintenance of natural beauty, and the preservation of historic sites" afforded them standing to sue to block an agency's approval of a generating plant); Stewart, *supra* note 41, 1723–56.

57 *See* Stewart, *supra* note 41, at 1761.

58 Bressman, *supra* note 13, at 475; *see also* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 23 (1985) (viewing direct participation in agencies as tapping into a "deep strain[]" of "political egalitarianism in the American character" that "rekindles the nostalgic image of the town meeting").

59 Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905 (2020) ("The APA 'sets forth the procedures by which federal agencies are accountable to the public . . . .'" (quoting Franklin v. Massachusetts, 505 U.S. 788, 796 (1992))); *id.* at 1929 n.13 (Thomas, J., concurring in the judgment in part and dissenting in part) ("[N]otice and comment . . . at least attempts to provide a 'surrogate political process' that takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process." (quoting Michael Asimow, *Interim Final-Rules: Making Haste Slow*, 51 ADMIN. L. REV. 703, 708 (1999))).

like, citizens can make their voices heard. Channels for public participation that are open to all confer a democratic pedigree on agency action, the thinking goes, and thus legitimize it.[60]

By the mid-1970s, optimism that greater avenues for public participation would enhance agencies' democratic legitimacy began to fade.[61] Public choice scholars charged that, rather than aggregating and balancing the preferences of diverse factions, these new avenues for participation entrenched powerful, narrow interests—exacerbating the regulatory capture that they were intended to mitigate.[62]

In fact, businesses' and business associations' comments dominate agency inboxes,[63] and these groups' submissions tend to present more sophisticated analyses.[64] Their dominance is especially striking in highly technical subjects, where their information and financial advantages, coupled with collective action problems stymieing others' participation, is particularly pronounced.[65]

By contrast, ordinary citizens rarely utilize these open-access procedures. Several studies in the 1990s found that the median number of comments per rulemaking is between six and thirty-three.[66] The high-

60 *See* Seifter, *supra* note 4, at 1319 ("[P]articipation may be especially valuable in the administrative state, which has long battled perceived illegitimacy—the fear that broad-scale governance by unelected bureaucrats does not comport with our constitutional system."); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 Nw. U. L. Rev. 173, 175 (1997) ("Greater participation is generally viewed as contributing to the democracy . . . of decisions by otherwise out-of-touch bureaucrats."); *see also* Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 Geo. Wash. L. Rev. 1343 (2011) (explaining that public participation in agency rulemaking "help[s] us view the agency decision as democratic and thus essentially self-legitimating").

61 *See, e.g.*, Stewart, *supra* note 41, at 1763.

62 *See* Shapiro, *supra* note 46, at 1498; Richard A. Posner, *Theories of Economic Regulation*, 5 Bell J. Econ. & Mgmt. Sci. 335 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971); William A. Niskanen, Jr., Bureaucracy and Representative Government (1971); *see also* Nicholas Bagley, *The Procedure Fetish*, 118 Mich. L. Rev. 345, 392 (2019) (similar argument).

63 A large body of empirical literature has found that businesses make outsized use of participatory mechanisms. *See* Daniel E. Walters, *Capturing the Regulatory Agenda: An Empirical Study of Agency Responsiveness to Rulemaking Petitions*, 43 Harv. Env't L. Rev. 175, 183–90 (2019) (summarizing this literature). *But see id.* at 184 (concluding that this influence is more apparent in some areas—like notice-and-comment rulemakings—than others—like rulemaking petitions—and often falls short of the "capture" label).

64 *See* Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 Duke L.J. 943, 951 (2006); *see also* Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. Pol. 128 (2006).

65 *See* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 Duke L.J. 1321, 1325 (2010).

66 *See* Coglianese, *supra* note 64, at 950; William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional*

est-profile proposed rules may receive thousands, or even hundreds of thousands, of comments, but the vast majority of these submissions are virtually identical.[67] When citizens do engage, their participation is highly stratified by socioeconomic status.[68]

As political scientist E.E. Schattschneider famously observed, "[t]he flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent."[69] That matters because upper-class voices tend to articulate different preferences than others on a host of regulatory issues, particularly concerning economic regulation.[70] Where higher-income and lower-income citizens' preferences diverge, elected officials strongly favor the former group.[71] Given the pluralists' objective to create an alternative political process within agencies,[72] it is unsurprising that the project suffers from similar pathologies—thus showing the limits of expanding formally equal participatory opportunities as a means of addressing agencies' democratic deficit.[73]

B. Equal Access

Transparency-promoting statutes also promise to inject a measure of democratic accountability into administration. Most prominently, the Freedom of Information Act ("FOIA")[74] generally requires agencies to provide information to members of the public who request it.[75]

Policy Analysis, 64 PUB. ADMIN. REV. 66, 68 (2004); Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RSCH. & THEORY 245, 250–64 (1998). The reported median varies based on each study's research design.

67 *See* Coglianese, *supra* note 64, at 959; Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 73 (2013).

68 SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, VOICE AND EQUALITY 2 (1995).

69 E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE 35 (1960).

70 *See* Benjamin I. Page, Larry M. Bartels & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSPS. ON POL. 51, 53–59 (2013) (detailing differences in public opinion by income).

71 *See* MARTIN GILENS, AFFLUENCE AND INFLUENCE 97–123 (2012).

72 *See* Bressman, *supra* note 13, at 475.

73 *See* Richard Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking via Pre-Notice Transparency*, 47 WAKE FOREST L. REV. 681, 682–83 (2012); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 1027, 1029 (1997).

74 5 U.S.C. § 552.

75 *Id. But see id.* § 552(b)(1)–(9) (exemptions to FOIA).

Relatedly, the Government in the Sunshine Act[76] mandates that most "meeting[s] of an agency" be open to the public.[77]

Congress and the courts view these laws as bolstering democratic accountability.[78] At their core they are equal-access mandates, grounded in a presumption that agencies' democratic accountability can be advanced through adherence to formal-equality principles. For instance, the Supreme Court characterizes FOIA as granting all requesters "an equal . . . right to information,"[79] essentially on equal terms.[80] The Sunshine Act is similarly grounded in formal-equality principles.[81]

These equal-access transparency statutes yield markedly unequal outcomes. Commercial interests dominate the FOIA docket at many agencies, overwhelming agency staff and crowding out others' requests.[82] Commercial requesters are able to do so because of their greater resources and deeper knowledge of the information-request process through repeated interactions.[83] As a consequence, not only does this measure rooted in formal equality fail to promote that end, but FOIA may even *exacerbate* substantive inequities.[84] The Sunshine Act produces similarly unequal results.[85] The conclusion is familiar:

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76 5 U.S.C. § 552b.

77 *Id.* § 552b(b).

78 *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242–43 (1978) (viewing FOIA's purpose as "ensur[ing] an informed citizenry, vital to the functioning of a democratic society, [and] needed to . . . hold the governors accountable to the governed"); H.R. REP. NO. 94-880, at 2 (1976) ("The basic premise of the Sunshine legislation is that . . . [government] should be fully accountable to [the people] for the actions which it supposedly takes on their behalf."); David Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 102 (2018) (asserting that the enacting Congress believed FOIA would "bring about a more effective, responsive, and democratic regulatory state").

79 U.S. Dep't of Def. v. Fed. Lab. Rels. Auth., 510 U.S. 487, 499 (1994); *accord* WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW 370 (3d ed. 2009) ("FOIA is basically an egalitarian statute.").

80 Although agencies can recoup more of their costs from commercial requesters than from journalists or other requesters, these differences are marginal. *See* David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1117 (2017).

81 *See* Thomas H. Tucker, Commentary, *"Sunshine"—The Dubious New God*, 32 ADMIN. L. REV. 537, 537 (1980).

82 *See* Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1381 fig.1, 1422 (2016) (illustrating, with a bar graph, that commercial requesters constitute a majority of FOIA requests to certain federal agencies).

83 *Id.* at 1414.

84 *See* Pozen, *supra* note 80, at 1117.

85 The Sunshine Act's open-meeting mandate led to representatives of regulated industries, but not the general public, attending agency meetings. Tucker, *supra* note 81, at 542. It also arguably encourages agency officials to forgo substantive deliberation at now-open meetings and

once again, a statute grounded in formal equality fosters a markedly unequal outcome.[86]

C. *Presidential Control & The Equal-Vote Assumption*

Beginning in the 1980s, administrative law turned to greater presidential control to remedy agencies' democratic deficit.[87] Proponents of presidential control argue that, because the President is elected by an undifferentiated public, she can provide a democratic link between voters' preferences and agency actions.[88] According to then-Professor Elena Kagan, the presidency's indivisibility makes the holder of that office a clear focal point for voters, who can ascribe credit or blame for bureaucratic actions to a single actor.[89] The President's national constituency motivates her to care about these ascriptions.[90] Thus, the President is uniquely suited to provide democratic accountability to administration,[91] while avoiding the potential for capture or factional influence that previous measures brought with them.[92]

Over the past several decades, this rationale has served as a lodestar for successful efforts to empower the President and reduce the role of other actors in administration. Most notably, President Reagan issued an executive order in 1981 requiring executive agencies to submit their proposed major rules for centralized review by the Office of

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instead simply use the venues to announce their positions. Randolph May, *Reforming the Sunshine Act*, 49 ADMIN L. REV. 415, 416 (1997).

86 *See* Kwoka, *supra* note 82, at 1414 ("In some ways, regulated industry's advantage in FOIA requesting is akin to its documented advantages in other administrative processes, such as notice-and-comment rulemaking.").

87 *See* Farina, *supra* note 73, at 991 (summarizing this view). Adherents of this view of presidential control are situated across the ideological spectrum. *Compare* Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting), *with* Kagan, *supra* note 18, at 2332. Some couch their arguments strictly in pragmatic terms, whereas others also see presidential control under a "unitary Executive theory" as constitutionally mandated. *Compare* Lessig & Sunstein, *supra* note 43 (former view), *with* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (latter view). Greater *congressional* control over administration, most notably through oversight, also reduces agencies' democratic deficit. *See* Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1187, 1245–48 (2018).

88 *See* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 95 (1997).

89 *See* Kagan, *supra* note 18, at 2331–38.

90 *See id.* at 2384 ("Presidential administration . . . advances political accountability by subjecting the bureaucracy to the control mechanism most open to public examination and most responsive to public opinion."); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 36–43 (1995).

91 *See* Kagan, *supra* note 18, at 2332 ("[P]residential control of administration . . . possesses advantages over any alternative control device in advancing these core democratic values.").

92 *See* Lessig & Sunstein, *supra* note 43, at 105–06.

Information and Regulatory Affairs in the White House Office of Management and Budget ("OMB").[93] A version of that requirement has been in effect in every subsequent administration.[94] Other Presidents have gone further still.[95]

Eight current Supreme Court Justices endorse the view that presidential control confers legitimacy on agencies based on the President's perceived democratic accountability.[96] Further, the idea that greater presidential involvement in administration mitigates agencies' democratic deficit motivates three major judicial doctrines: deference to agencies' statutory interpretations, restrictive standing requirements, and limited congressional constraints on the President's removal power.

First, *Chevron* holds that courts must defer to an agency's reasonable interpretation of an ambiguous statute.[97] The *Chevron* Court reasoned that substituting an agency's judgment in place of a court's is warranted in this circumstance because "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch . . . to make such policy choices."[98] In other words, presidential control over administration enhances democratic accountability.[99]

Second, in *Lujan v. Defenders of Wildlife*,[100] the Supreme Court held that an environmental group lacked standing to challenge an agency action because the group did not aver suffering a concrete, particularized injury.[101] The Court reasoned that the President, not private individuals or interest groups, is responsible for ensuring that agencies act in the "public interest."[102] By contrast, private plaintiffs "are not accountable to the people," as the Court stated in June 2021

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93 Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,195–96 (Feb. 17, 1981).

94 *See, e.g.*, Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9340 (Jan. 30, 2017); Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993).

95 *See, e.g.*, Exec. Order No. 13,771, 82 Fed. Reg. at 9339 (President Trump requires agencies to eliminate at least two regulations for each new regulation that they issue); Kagan, *supra* note 18, at 2289–99 (noting that President Clinton regularly issued directives to agency officials concerning the exercise of authorities that were statutorily assigned to those officials).

96 *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020) (Roberts, C.J., joined by Thomas, Alito, Gorsuch & Kavanaugh, JJ.); Kisor v. Wilkie, 139 S. Ct. 2400, 2413 (2019) (Kagan, J., joined by Ginsburg, Breyer & Sotomayor, JJ.).

97 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

98 *Id.* at 865.

99 *See* Farina, *supra* note 20, at 183.

100 504 U.S. 555 (1992).

101 *Id.* at 578.

102 *Id.* at 576–77.

in *TransUnion LLC v. Ramirez*.[103] In effect, the Court reversed course from its earlier pluralist inclination to bolster accountability via an expansive standing doctrine and instead endorsed presidential control.

Third, in striking down two for-cause removal protections for independent agency officials, the Court has twice explained that these protections (combined, in both cases, with other design features) weaken public control over administration through the President. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[104] the Court stated that "[t]he growth of the Executive Branch . . . heightens the concern that it may slip from the Executive's control, and thus from that of the people," making explicit the people-president-agency accountability chain.[105] Ten years later, the Court returned to this rationale to invalidate another for-cause removal protection in *Seila Law LLC v. Consumer Financial Protection Bureau*.[106]

These cases shift administrative power to the White House and away from judges (*Chevron*), private litigants (*Lujan*), and the heads of independent agencies (*Free Enterprise* and *Seila*). All rely at least in part on the principle that the President is the democratic link between the public and administrative agencies. Coupled with recent Presidents' push for greater White House control over regulatory developments, the clear trend over the past several decades is greater presidential influence on administration.

Like the public participation framework, presidential control rests on a formal-equality rationale. For the President to provide democratic legitimacy to administration, she must be democratically accountable to a "national constituency" and, thus, "responsive to the interests of the public as a whole," according to Professors Peter Strauss and Cass Sunstein (and echoed by many others).[107] That claim

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103 141 S. Ct. 2190, 2207 (2021).

104 561 U.S. 477 (2010).

105 *Id.* at 499.

106 140 S. Ct. 2183, 2207 (2020) (asserting a judicial "duty to ensure that the Executive Branch is overseen by a President accountable to the people").

107 Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 190 (1986); *accord* Kagan, *supra* note 18, at 2335; MASHAW, *supra* note 88, at 95–96, 152; *see also* Lessig & Sunstein, *supra* note 43, at 105–06 ("[B]ecause the President has a national constituency . . . it appears to operate as an important counterweight to factional influence over administration."); Calabresi, *supra* note 90, at 36 (declaring that the "President's national voice" is essential "because he, and he alone, speaks for the entire American people"); Mashaw, *supra* note 17, at 95–96 ("[I]ssues of national scope . . . are the essence of presidential politics. . . . [Thus,] delegations to administrative agencies take[] on significance as a device for facilitating responsiveness to voter preferences expressed in presidential elections.").

presumes that all voters have an opportunity to influence presidential behavior through their exercise of the franchise.[108]

Accordingly, the nexus between presidential control and democratic accountability is weakened when some voters count less than others. The more elections stray from equally weighted voting—i.e., a decision rule in which the weight assigned to a voter's selection does not hinge on that voter's identity—the less able presidential control is to redress agencies' democratic deficit.[109]

The claim that the franchise tethers the President, and thus agencies, to popular preferences breaks down under scrutiny.[110] As an initial matter, this supposed electoral connection disappears in a President's second term.[111] It also is questionable even when a presidential candidate has an election on the horizon. Political science research casts cold water on the claim that an electoral incentive motivates Presidents to pursue policies that appeal to a broad cross section of Americans—let alone to Justice Kagan's presumed "preferences of the general public" in today's polarized landscape.[112] Presidents often pursue particularistic, even unpopular, policies to appeal to a subset of their supporters.[113] That Presidents use agencies to serve factional interests[114] calls into question their responsiveness to their overall electoral coalition, much less any supposed national will.[115]

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108 *Cf.* Reynolds v. Sims, 377 U.S. 533, 558 (1964) ("The conception of political equality . . . can mean only one thing—one person, one vote." (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963))).

109 In social choice terms, the election result must be independent of the voters' identities. *See* MOULIN, *supra* note 38, at 22–25. That "anonymity requirement," in the parlance of social choice, is foundational to the anticlassification principle. *See* Michael C. Dorf, *A Partial Defense of an Anti-Discrimination Principle*, ISSUES LEGAL SCHOLARSHIP, Aug. 2002, at 1, 3–4.

110 For an overview of these arguments, see Michael A. Livermore, *Political Parties and Presidential Oversight*, 67 ALA. L. REV. 45, 81–86 (2015).

111 *See* Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 634 (2016).

112 Kagan, *supra* note 18, at 2335. For an account of mass political polarization, see Paul Pierson & Eric Schickler, *Madison's Constitution Under Stress: A Developmental Analysis of Political Polarization*, 23 ANN. REV. POL. SCI. 37, 44 (2020).

113 *See* DOUGLAS L. KRINER & ANDREW REEVES, THE PARTICULARISTIC PRESIDENT 17–18 (2015).

114 *See* Bressman, *supra* note 13, at 504 n.197 (collecting citations).

115 Presidential control rests on several other questionable assumptions as well, e.g., that voters possess sufficient information to electorally reward or punish a President for regulatory decisions and that voter preferences can be aggregated using fair voting procedures to produce a stable preference ordering. *See* BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER (2007) (arguing that many voters are not only misinformed, but also irrational); MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 3–4 (1996) (reporting wide variation in voter knowledge of politics); KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951) (showing that rank-order electoral systems with

The United States' winner-take-all electoral system encourages Presidents to adopt this strategy. Under this system, a candidate in a two-person presidential race can eke out a victory by appealing to a bare majority of voters in states with a bare majority of electors while ignoring the rest of the electorate, to say nothing of nonvoters.[116] Far from being "responsive to the interests of the public as a whole,"[117] a President may focus on marginal supporters in key swing states. It follows that the views of voters that are unlikely to be persuaded are heavily discounted, regardless of whether those extra-marginal voters reside in swing or uncontested states.

In addition, the malapportioned Electoral College and the disproportionate attention that candidates pay to primary voters' and donors' preferences also call into question the President's assumed majoritarian connection.[118] Taken together, these features of presidential politics cast serious doubt on the President's ability to redress agencies' democratic deficit.[119]

II. IDENTITY-CONSCIOUS MEASURES

Alongside these identity-neutral mechanisms for popular influence in administration are a second set of structures—mostly overlooked and never before considered as a group—that advance a markedly different conception of public accountability. Requirements that certain interests be represented on multimember commissions, mandates that agencies utilize advisory committees or consult with specified outside groups, and intra-agency advocacy offices all privilege groups that are perceived to be underrepresented. In that impor-

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more than two options and several desirable characteristics will not yield a stable outcome); *see also* Stephenson, *supra* note 24, at 56–57 (summarizing other critiques); Farina, *supra* note 73, at 998 ("[W]hen citizens must choose among candidates who run on multi-faceted policy platforms—there is a bundling problem."). Although not an assumption per se, it is also worth noting that some accounts of presidential control rest on a thin conception of democratic accountability as mere majority rule, without any accounting for minority rights or input. *See* Mathews, *supra* note 111.

116 *See* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1233–34 (2006).

117 Strauss & Sunstein, *supra* note 107, at 190.

118 *See* Gray v. Sanders, 372 U.S. 368, 378 (1963) (acknowledging the Electoral College's "inherent numerical inequality"); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 576 (2014); Douglas Kriner & Andrew Reeves, *The Electoral College and Presidential Particularism*, 94 B.U. L. REV. 741, 745–46 (2014).

119 *See* Stephenson, *supra* note 24, at 55; Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 574 (2003).

tant sense, therefore, they depart from administrative law's conventional focus on formal equality.

Instead, these measures have roots, in part, in substantive-equality principles. Although substantive equality resists straightforward definition, the concept encompasses measures to redress disadvantage, including via facilitating participation and altering structures that generate inequitable results.[120] In constitutional discourse, the closely-related antisubordination principle counsels in favor of identity-conscious policies to advance a favored outcome; focuses on specific groups; and, when viewed in isolation, advantages members of underpowered groups at the expense of others.[121] Nonetheless, the connection between identity-conscious administrative measures and these principles has its limits; the former seek to amplify certain voices in the policymaking process, not mandate any particular policy outcome.

This Part introduces a set of administrative structures that are explicitly conscious of individuals' identities, privileges of certain groups, and seeks to use the law to elevate the status of these groups. These measures fall into two categories: representational mandates and consultative requirements.

In lumping these structures as identity-conscious, I do not mean to suggest that, for any given one of these structures, lawmakers' primary aim was to elevate groups that are commonly overlooked in agencies.[122] Legislative enactments are rarely monocausal or tidy.[123] This Article argues, however, that the concept of amplifying voices that are perceived as under-powered weaves a common thread throughout these structures.

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120 *See* Sandra Fredman, *Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights*, 16 HUM. RTS. L. REV. 273, 281–90 (2016).

121 *See* Fiss, *supra* note 37, at 158. Where anticlassification is color blind, value neutral, and objective, antisubordination is status-aware, consequentialist, and subjective. *Id.* at 119–28, 158; *See also* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2122 (2018) (distinguishing between anticlassification, which prohibits de jure differential treatment based on certain classes, and antisubordination, which bars the use of government institutions to "perpetuate the de facto, even if not de jure, second-class status of some members of society").

122 For example, the "insurance seat" on the Financial Stability Oversight Council ("FSOC"), *see infra* note 128, could be seen both as providing a voice for insurance companies on the FSOC at a time when some observers thought that the federal government would regulate insurance *and* as itself a sign that "Dodd-Frank's drafters saw insurance firms . . . as well within the FSOC's purview." Hester Peirce, *Title V and the Creeping Federalization of Insurance Regulation*, *in* THE CASE AGAINST DODD-FRANK: HOW THE "CONSUMER PROTECTION" LAW ENDANGERS AMERICANS 105, 106 (Norbert J. Michel ed., 2016) (latter view).

123 *See* Peter Conti-Brown & Brian D. Feinstein, *The Contingent Origins of Financial Legislation*, 99 WASH. U. L. REV. (forthcoming 2022).

Identity-conscious measures are not nearly as prevalent or consequential as the transsubstantive rules and presidential control mechanisms described above. Unsurprisingly, therefore, scholars often overlook them.[124] Specifically, the idea that these measures can be used—and to some extent *are* being used—to further antisubordination is often ignored.

That is a mistake. As this Part and Part III show, greater use of identity-conscious measures would serve as a corrective for shortcomings with identity-neutral structures.

A. Representation Requirements

1. Agency Leaders

Statutory mandates that agency heads and other executive branch leaders hail from particular sectors or possess certain demographic profiles exist throughout the administrative state. In all, fifty-eight different representational requirements or prohibitions are present across twenty-five executive branch entities.[125] These requirements cover some of the most consequential positions and entities in government, from the Secretary of Defense to the Federal Reserve System, which contains seven representation requirements.[126]

The requirements can be classified into four groups: (1) mandates that specific economic sectors or other groups be represented; (2) re-

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124 To be sure, the related idea that lawmakers "stack the deck" in designing agencies to privilege favored groups is not novel. Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 261 (1987) ("[B]y controlling the details of procedures and participation, *political actors stack the deck in favor of constituents who are the intended beneficiaries of the bargain struck by the coalition which created the agency*."). The trio of social scientists writing as "McNollgast" posited the same several decades ago. Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 443 (1989) [hereinafter McCubbins et al., *Structure and Process*] (positing that politicians can design agency structures and processes to "create[] a decisional environment that causes the agency to be responsive to the constituency interests that were represented in the enacting coalition"). That a subset of these measures is explicitly identity-conscious is, however, rarely appreciated.

125 Specifically, they are present for twelve independent agencies; eleven government corporations, quasi-governmental organizations, and government-sponsored enterprises; and two government-established private regulators. *See* Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 857–61 (2014) (categorizing these organizations).

126 To be sure, these twenty-five entities with representational requirements constitute a fraction of the structures within the executive branch. Political scientists David Lewis and Jennifer Selin report 115 executive departments, independent agencies, government corporations, and subdepartment bureaus with a significant degree of autonomy and power. DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES, at A1–A8 (1st ed. 2012).

quirements pertaining to appointees' ethnicity, gender, or geography; (3) directives that boards be "fairly balanced;" and (4) prohibitions on individuals from certain backgrounds. Table 1 identifies the agencies, government corporations, and other entities in each category.

TABLE 1. REPRESENTATIONAL REQUIREMENTS BY AGENCY

Economic Groups	**Personal Characteristics**
Amtrak Corporation for Public Broadcasting Export-Import Bank Board Fannie Mae Federal Home Loan Bank Boards Federal Prison Industries Federal Reserve Banks' Boards of Directors Federal Reserve Board of Governors Financial Stability Oversight Council Freddie Mac Legal Services Corporation Municipal Securities Rulemaking Board National Association of Registered Agents and Brokers National Cooperative Bank Railroad Retirement Board	Corporation for National and Community Service Corporation for Public Broadcasting Federal Home Loan Bank Boards Federal Reserve Board of Governors National Indian Gaming Commission National Science Foundation Securities Investor Protection Corporation Women's Bureau (Department of Labor)
"Fair Balance"	**Prohibitions**
Federal Reserve Board of Governors Commodity Futures Trading Commission Corporation for Public Broadcasting Federal Reserve Banks' Boards of Directors Legal Services Corporation National Credit Union Administration Securities Investor Protection Corporation	Federal Reserve Banks' Boards of Directors Federal Reserve Board of Governors Municipal Securities Rulemaking Board National Credit Union Administration Securities Investor Protection Corporation Secretary of Defense U.S. Postal Service Board of Governors

Representational requirements are particularly common in financial regulatory agencies; thirty-eight percent of government entities containing at least one representational requirement are banking or securities regulators. Further, many of these agencies contain multiple representational requirements. Figure 1 shows the overlapping requirements in finance- and securities-related agencies; Figure 2 provides similar information concerning other entities.

FIGURE 1. REPRESENTATIONAL REQUIREMENTS IN FINANCIAL- AND SECURITIES-RELATED ENTITIES

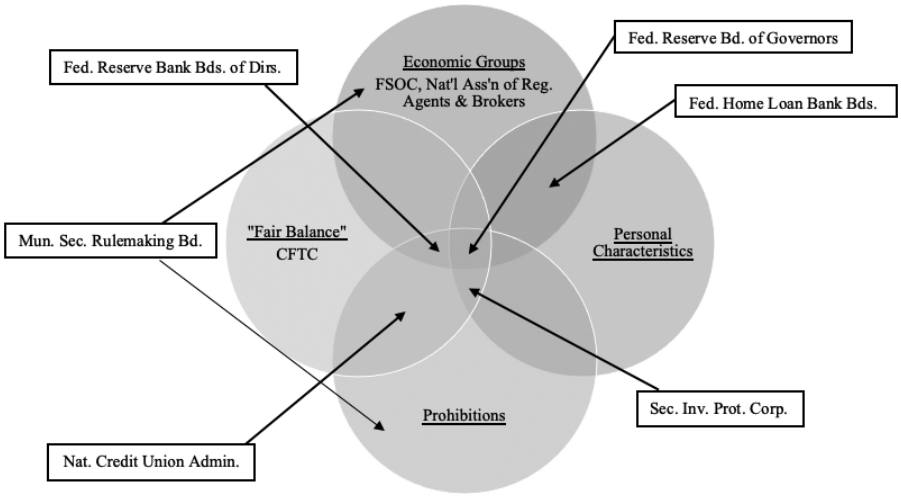
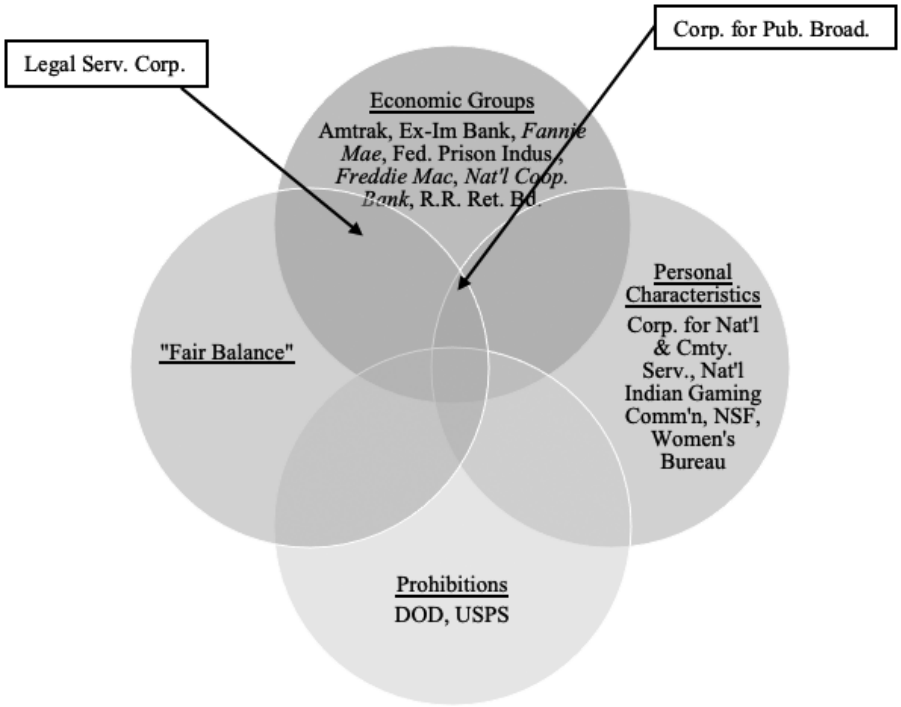


FIGURE 2. REPRESENTATIONAL REQUIREMENTS IN OTHER EXECUTIVE-BRANCH ENTITIES



The figures show Congress's particular emphasis on representational requirements for financial regulators. That focus is surprising. A prevailing wisdom holds that these agencies are among the most insu-

lated from outside influence.[127] Congress's inclusion of enhanced representational requirements on these bodies may be an attempt to manage that independence, i.e., to ensure that it is exercised by leaders attuned to a set of interests that the enacting legislative coalition favors.

The following discussion provides greater detail concerning the four categories of representational requirements:

- The largest category, economic groups, includes thirty-five requirements across fifteen entities. For instance, the Financial Stability Oversight Council ("FSOC") has a designated seat for an appointee with "insurance expertise."[128] Several of these requirements mandate representation of groups that are commonly considered to lack relative political power. For example, the boards for Fannie Mae and Freddie Mac—government-sponsored enterprises that are currently in government conservatorship—must include at least one advocate for consumer, community, or low-income households.[129] Other requirements specify that smaller firms be represented, including on both the Federal Reserve Board of Governors and the boards of the regional Reserve Banks.[130]

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127 *See* Gadinis, *supra* note 25, at 338; Bressman & Thompson, *supra* note 25, at 602.

128 12 U.S.C. § 5321(b)(1)(J). With a state insurance regulator placed in a separate, nonvoting seat on the FSOC, this insurance-expertise seat is presumed to refer to private-sector experience. *Id.* § 5321(b)(2)(C). The other requirements in this category are 45 U.S.C. § 231f(a) (Railroad Retirement Board must include one representative each for employers and employees), 47 U.S.C. § 396(c)(3) (Corporation for Public Broadcasting must have one representative each for permittees and licensees of public television and of public radio), 12 U.S.C. § 302 (Federal Reserve Banks' Class B and Class C directors must be selected from among certain economic sectors), 15 U.S.C. § 6754(c)(1) (National Association of Registered Agents and Brokers board must have three members with "expertise and experience with property and casualty insurance producer licensing" and two members with "expertise and experience with life or health insurance producer licensing"), 18 U.S.C. § 4121 (Federal Prison Industries directors must include representatives of industry, labor, agriculture, and retailers and consumers), 15 U.S.C. § 78o-4(b)(1) (Municipal Securities Rulemaking Board must include representatives of institutional or retail investors in municipal securities, divided into in seven specific subcategories); 49 C.F.R. § 700.2(a) (2021) (the government corporation doing business as Amtrak must include, inter alia, one board member representing labor and one representing business interests), and those listed below in note 129.

129 12 U.S.C. § 1723(b) (Fannie Mae); 12 U.S.C. § 1452(a)(2)(A) (Freddie Mac); *see also* 12 U.S.C. § 1427(a)(3)(B)(ii) (at least two directors of each Federal Home Loan Bank must "represent[] consumer or community interests"); 12 U.S.C. § 3013 (National Cooperative Bank board must include a member "representing low-income cooperatives"); 42 U.S.C. § 2996c (Legal Services Corporation's board must include "eligible clients").

130 12 U.S.C. § 241 ("In selecting members of the Board [of Governors of the Federal Reserve System], the President shall appoint at least 1 member with demonstrated primary experience working in or supervising community banks having less than $10,000,000,000 in total

- Eight requirements pertain to appointees' personal characteristics, namely, gender, ethnicity, or geographic origin or current location. For instance, the Women's Bureau of the Department of Labor must be headed by a woman,[131] and a majority of commissioners on the National Indian Gaming Commission must be members of a Native American tribe.[132]
- Seven prohibitions on appointees with certain professional backgrounds exist. For instance, no more than one member of the National Credit Union Administration's three-person board may have been recently employed or affiliated with an insured credit union.[133]
- Finally, the organic statutes for eight entities include "fair balance" language concerning board composition.[134] For

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assets."); 12 U.S.C. § 635a ("Of the five members of the [Export-Import Bank] Board appointed by the President, not less than one such member shall be selected from among the small business community and shall represent the interests of small business."); 12 U.S.C. § 3013 (one member of the National Cooperative Bank's board must be "selected from among proprietors of small business concerns . . . which are manufacturing or retailers"); 12 U.S.C. § 304 ("The Board of Governors of the Federal Reserve System shall classify the member banks of the district into three general groups or divisions designating each group by number. Each group shall consist as nearly as may be of banks of similar capitalization. . . . No officer or director of a member bank shall be eligible to serve as a class A director unless nominated and elected by banks which are members of the same group as the member bank of which he is an officer or director.").

131 29 U.S.C. § 12.

132 25 U.S.C. § 2704. The boards for two other independent agencies contain less specific exhortations to promote diversity. 42 U.S.C. § 1863 (National Science Foundation board selection must "give due regard to equitable representation of scientists and engineers who are women or who represent minority groups"); 42 U.S.C. § 12651a (Corporation for National and Community Service board "shall be diverse according to race, ethnicity, age, gender, and disability characteristics"). Four entities have geographic diversity mandates. 12 U.S.C. § 244 (Board of Governors of the Federal Reserve System); 12 U.S.C. § 1427(b)(1) (Federal Home Loan Bank boards); 15 U.S.C. § 78cc (Securities Investor Protection Corporation); 47 U.S.C. § 396 (Corporation for Public Broadcasting).

133 12 U.S.C. § 1752a. The other prohibitions are 39 U.S.C. § 202 (Postal Service governors "shall not be representatives of specific interests using the Postal Service"), 15 U.S.C. § 78o-4 (a subset of Municipal Securities Rulemaking Board members must be "independent of any municipal securities broker," dealer, or advisor), 15 U.S.C. § 78ccc (two directors of the Securities Investment Protection Corporation cannot be associated with a broker, dealer, or national securities exchange), 12 U.S.C. § 244 (members of the Board of Governors of the Federal Reserve System cannot be officers, directors, or stockholders in bank or similar financial institution), 12 U.S.C. § 303 (similar prohibition concerning Class B and Class C directors of the Federal Reserve Banks), 10 U.S.C. § 113(a) ("A person may not be appointed as Secretary of Defense within seven years after relief from active duty as a commissioned officer . . . ."). *But see* S. 84, 115th Cong. (2017) (waiving the preceding prohibition with respect to General James Mattis); Act of Jan. 22, 2021, Pub. L. No. 117-1, 135 Stat. 3 (similar waiver with respect to the unnamed first appointed Defense Secretary in the Biden administration, a position later filled by former General Lloyd Austin).

134 12 U.S.C. § 1752a (National Credit Union Administration appointments must "give

> instance, the Commodity Future Trading Commission ("CFTC") must be "balanced" among commissioners with "demonstrated knowledge in futures trading or its regulation, or the production, merchandising, processing or distribution of one or more of the commodities" under the CFTC's jurisdiction.[135]

Concerning this last category, there is some evidence that, when making appointments, the President and Senate honor these fair-balance requirements. By way of illustration, consider the composition of the CFTC, which has a fair-balance requirement, versus the SEC, which covers similar regulatory turf but does not include this statutory mandate.[136] To undertake this comparison, I collected data from these agencies' websites regarding the most recent professional experiences for commissioners who were appointed from the private sector between 1975 (the year of the CFTC's establishment) and 2020. Figure 3 displays these professional backgrounds.

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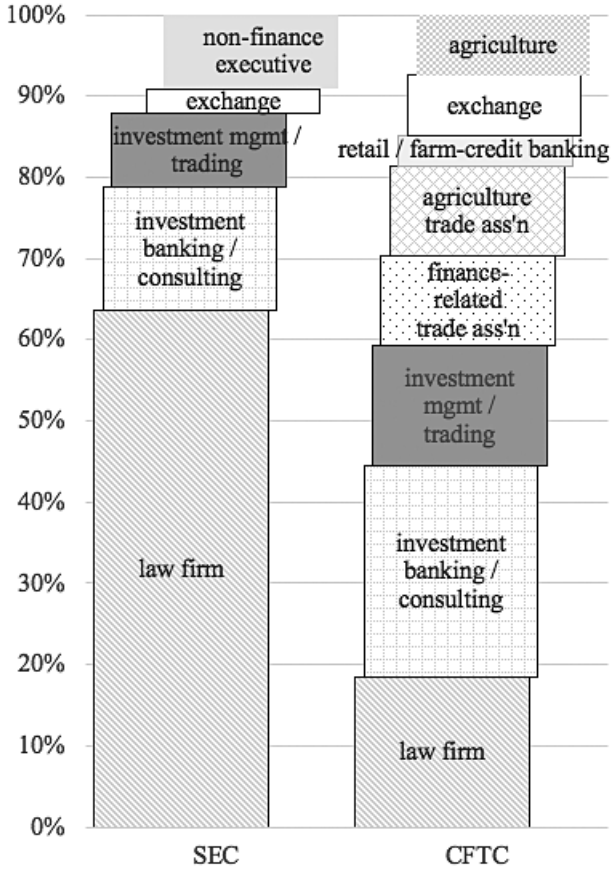
consideration to individuals who, by virtue of their education, training, or experience relating to a broad range of financial services, financial services regulation, or financial policy, are especially qualified to serve on the Board"); 12 U.S.C. § 241 (Federal Reserve Board of Governors must be selected with "due regard to a fair representation of the financial, agricultural, industrial, and commercial interests"); 12 U.S.C. § 302 (Class A directors of Federal Reserve Banks selected to represent banks in their size group); 7 U.S.C. § 2 (Commodity Futures Trading Commissioners' "demonstrated knowledge . . . [must be] balanced with respect to" several subjects, including "futures trading or its regulation, or the production, merchandising, processing or distribution of . . . [covered] commodities"); 42 U.S.C. § 2996c (Legal Services Corporation board must be, inter alia, "generally representative of the organized bar, attorneys providing legal assistance to eligible clients, and the general public"); 15 U.S.C. § 78ccc (three of the seven directors of the Securities Investor Protection Corporation must be "representative of different aspects of, the securities industry"); 47 U.S.C. § 396 (Corporation for Public Broadcasting members shall be "as nearly as practicable a broad representation of . . . various professions and occupations, and various kinds of talent and experience appropriate to the functions and responsibilities of the Corporation").

135 7 U.S.C. § 2.

136 *See* Roberta Romano, *The Political Dynamics of Derivative Securities Regulation*, 14 YALE J. ON REGUL. 279, 282 (1997).

FIGURE 3. SEC AND CFTC COMMISSIONERS FROM THE PRIVATE SECTOR, 1975–2020



As the figure shows, the professional backgrounds of CFTC and SEC appointees from the private sector differ markedly. Since its establishment in 1975, CFTC appointees have hailed from an eclectic set of environments: not only traditional finance (thirteen of twenty-seven appointees from the private sector) and law (five appointees), but also farming (two), agricultural trade groups (three), finance-related trade groups (three), and farm-credit banking (one).[137] By contrast, among the thirty-three SEC commissioners appointed from the private sector since that same year, twenty-one arrived from law firms, nine from traditional finance, and three from business roles.[138]

137 *See Chairman & Commissioners*, CFTC, https://www.cftc.gov/About/Commissioners/index.htm [https://perma.cc/7E3S-CHDR]; *Former Commissioners*, CFTC, https://www.cftc.gov/About/Commissioners/FormerCommissioners/index.htm [https://perma.cc/GB86-NY9B].

138 *See Current SEC Commissioners*, SEC, https://www.sec.gov/Article/about-commissioners.html [https://perma.cc/9WJT-44W5]; *SEC Historical Summary of Chairmen and Commissioners*, SEC, https://www.sec.gov/about/sechistoricalsummary.htm [https://perma.cc/32Q3-NF7C].

2. *Sub-Agency Offices*

In addition to leaders on multimember agencies, lower-level offices across the administrative state are dedicated to advancing the views of discrete interests within agencies.[139] In all cases, received wisdom considers these elevated groups to be disadvantaged in normal policy channels. For instance, Congress established the Office of Partnerships and Public Engagement within the Department of Agriculture to ensure that "small, beginning, socially disadvantaged, or veteran farmers or ranchers" would have a seat at the table when that department makes policy decisions.[140] Other offices, inter alia, analyze the impact of regulations on household energy costs for minorities,[141] advocate for small businesses during asbestos-removal rulemakings,[142] and consult with Native American leaders regarding telecommunications policy.[143]

Another set of offices is tasked with representing "the public interest." For instance, the Taxpayer Advocate Service is charged with proposing administrative changes to mitigate problems that taxpayers encounter, with the Internal Revenue Service Commissioner required to respond to the Service's recommendations.[144] Sometimes referred to as ombudsmen, public advocates, or regulatory contrarians,[145] public-oriented offices in this spirit are a key element of several proposals to militate capture of financial regulators.[146]

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139 This category overlaps with what Professor Margo Schlanger labels "[o]ffices of [g]oodness," i.e., advisory offices that are dedicated to promoting certain values and nested with agencies. Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 60–62 (2014). Whereas I focus on offices that elevate discrete groups in policymaking, Schlanger's category also encompasses offices that promote specific values. *See id.* For instance, various departments' offices of civil rights and civil liberties, which promote adherence to civil rights and civil liberties law both internally—e.g., by administering equal employment opportunity programs—and externally—e.g., by ensuring that investigatory and law enforcement agencies do not violate civil liberties laws. *See id.* In this way, these offices may adopt an anticlassification posture rather than an antisubordination one. *Id.*

140 7 U.S.C. § 6934(c)(1).

141 42 U.S.C. § 7141(c)(3) (Office of Minority Economic Impact, Department of Energy).

142 *About the Office of Small and Disadvantaged Business Utilization (OSDBU)*, EPA, https://www.epa.gov/aboutepa/about-office-small-and-disadvantaged-business-utilization-osdbu [https://perma.cc/ZEZ9-QK6S].

143 Establishment of the Off. of Native Affs. & Pol'y in the Consumer & Governmental Affs. Bureau, 22 FCC Rcd. 11104 (2010).

144 26 U.S.C. § 7803(c)(2)(A)–(c)(3).

145 *See* Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629, 1632–33 (2011); Wagner, *supra* note 65, at 1414.

146 *See* Saule T. Omarova, *Bankers, Bureaucrats, and Guardians: Toward Tripartism in Financial Services Regulation*, 37 J. CORP. L. 621, 658–59 (2012); JAMES R. BARTH, GERALD CAPRIO JR. & ROSS LEVINE, GUARDIANS OF FINANCE 215–24 (2012); *see also* Rachel E. Barkow,

3. Impact

To the extent that they shift the mix of voices away from those that dominate open-access venues for participation, representational requirements advance substantive equality via three pathways.[147] *First*, commissioners' backgrounds influence their policy positions and priorities. A large and disparate body of research reveals that government officials hailing from industry adopt a more industry-friendly posture than officials with other backgrounds. Cross-national research reveals that, controlling for other factors, central bankers with prior experience in the financial sector adopt a more deregulatory posture than central bankers without this experience.[148] Officials with other professional backgrounds also find ways to move policy closer to their former sector's preferences. For instance, FCC commissioners with prior industry experience tend to adopt a more industry-friendly posture.[149] Likewise, one would expect officials from traditionally underpowered sectors to similarly pull policy in their direction.[150]

This influence may be more subtle, and thus unlikely to be fully reflected in, say, voting records or other observable behavior. For instance, Professors James Cox and Randall Thomas argue that SEC attorneys' professional backgrounds are likely to influence their agenda-setting priorities and cultural biases, which are difficult to measure directly.[151]

Insulating Agencies: Avoiding Capture Through Institutional Design, 89 TEX. L. REV. 15, 62 (2010) (arguing that "public advocate[s] . . . charged with representing the public's interest before" agencies generally can reduce capture).

147 *See* Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 841–43 (2021) (noting that ombudsman offices "must be designed with care to ensure that they have an appropriate degree of influence and stay true to their assigned functions").

148 ELISA MARIA WIRSCHING, THE REVOLVING DOOR FOR POLITICAL ELITES: AN EMPIRICAL ANALYSIS OF THE LINKAGES BETWEEN GOVERNMENT OFFICIALS' BACKGROUND AND FINANCIAL REGULATION (2018).

149 William T. Gormley Jr., *A Test of the Revolving Door Hypothesis at the FCC*, 23 AM. J. POL. SCI. 665 (1979). *But see* Ed deHaan, Simi Kedia, Kevin Koh & Shivaram Rajgopal, *The Revolving Door and the SEC's Enforcement Outcomes: Initial Evidence from Civil Litigation*, 60 J. ACCT. & ECON. 65 (2015) (finding that SEC enforcement actions do not yield significantly different outcomes based on whether the lead SEC attorney handling the matter had previous private-firm experience); Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y 203, 221 (2006) (noting that these studies' small sample size and the collinearity between professional background and partisan identification frustrate firm conclusions regarding the independent effect of background on commissioner behavior).

150 *Cf.* Dal Bó, *supra* note 149, at 218 (finding that the existence of a utilities "consumer advocate" within state government is associated with lower electricity prices for consumers).

151 *See* James D. Cox & Randall S. Thomas, *Revolving Elites: The Unexplored Risk of Capturing the SEC*, 107 GEO. L.J. 845, 899 (2019).

More generally, the notion that individuals adopt the beliefs and behaviors of their surrounding culture and, thus, that conduct reflects social influence, is a mainstay of social psychology.[152] That insight is relevant here for several reasons. For one, because an "official is more likely to take a phone call from someone he knows than from a person he does not know,"[153] social ties carried over from prior employment affect the mix of outside opinions that the official considers.[154] Homophily, or the tendency for people to associate with those that they perceive as similar, also may deepen ties between an agency official hailing from a given community and other members of that community.[155] Relatedly, officials also can be subject to pressures to conform to their perceived in-group to avoid cognitive dissonance.[156]

Further, an organization's culture and values leave a substantial imprint on its members, and these deeply ingrained folkways affect their members' behavior later in their lives, often in unconscious ways.[157] Indeed, many scholars have observed this sort of "cultural capture" or "deep capture" concerning the revolving door between investment banks and financial regulators.[158] Bankers presumably are not the only professionals subject to cultural capture. After all, employment is a significant source of value-socialization among elites generally.[159] Taken together, this research in social psychology and or-

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152 *See, e.g.*, ELLIOT ARONSON, TIMOTHY D. WILSON & ROBIN M. AKERT, SOCIAL PSYCHOLOGY 250–97 (4th ed. 2002).

153 Daron Acemoglu, Simon Johnson, Amir Kermani, James Kwak & Todd Mitton, *The Value of Connections in Turbulent Times: Evidence from the United States*, 121 J. FIN. ECON. 368, 371 (2016).

154 *See* SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 92–104 (2010).

155 *See* Miller McPherson, Lynn Smith-Lovin & James M. Cook, *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. SOCIO. 415, 429 (2001).

156 *See* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 640 (2004) (providing an overview of this social-psychological literature).

157 *See* John Van Maanen & Edgar H. Schein, *Toward a Theory of Organizational Socialization*, *in* RESEARCH IN ORGANIZATIONAL BEHAVIOR 209 (Barry Staw ed., 1979); *see also* Christina Parajon Skinner, *Misconduct Risk*, 84 FORDHAM L. REV. 1559, 1582–87 (2016) (discussing how culture spreads through networks among investment bankers).

158 *See* Cox & Thomas, *supra* note 151, at 889–99; James Kwak, *Cultural Capture and the Financial Crisis*, *in* PREVENTING REGULATORY CAPTURE 71 (Daniel Carpenter & David A. Moss eds., 2014); Gadinis, *supra* note 25, at 348–49; CHRISTOPHER ADOLPH, BANKERS, BUREAUCRATS, AND CENTRAL BANK POLITICS 32–37 (2013); Claire Hill & Richard Painter, *Compromised Fiduciaries: Conflicts of Interest in Government and Business*, 95 MINN. L. REV. 1637, 1669–70 (2011).

159 *See* ROBERT D. PUTNAM, THE COMPARATIVE STUDY OF POLITICAL ELITES 21–25 (1976).

ganizational theory points to the conclusion that agency appointees' past employment matters—and, thus, that representational requirements matter.

Second, a commissioner's background may influence the views and behavior of *other* commissioners. Research on deliberation reveals that ideological diversity in groups encourages moderation,[160] as Part IV discusses in greater detail. In the judicial context, for instance, Professor Richard Revesz's examination of a subset of D.C. Circuit cases reveals that "a judge's vote . . . is greatly affected by the identity of the other judges sitting on the panel."[161] Likewise, Professors Thomas Miles and Cass Sunstein find that "both Democratic and Republican appointees show far more political voting patterns when they are sitting on unified panels."[162] With divided panels, by contrast, "the role of politics is greatly dampened."[163]

Essentially, exposure to diverse perspectives leads people to alter their positions for several reasons. For one, ideological diversity alters the pool of information available when making decisions, thus leading individuals down a different decisional path.[164] In addition, the desire for one's peers to view them favorably pulls individuals' positions toward those of their colleagues.[165]

To illustrate how representation requirements can influence policy via these first two channels, let us return to the Federal Reserve. Recall that the FOMC's membership is drawn from Fed governors and regional Reserve Bank presidents, and that geographic-diversity requirements are present for both positions.[166] Concerning the first channel, a large body of literature demonstrating that home-district economic conditions affect FOMC members' positions on monetary

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160 *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 87–93 (2000) (providing an overview of this literature); *see also* Loretta Breuning, Gregg Henriques, David M. Allen, Cailin O'Connor, James Owen Weatherall & Elizabeth A. Reedy, *Introduction: Definition, Manifestations, and Theoretical Issues*, *in* GROUPTHINK IN SCIENCE 1 (David M. Allen & James W. Howell eds., 2020) (discussing the phenomenon of "groupthink" and its biochemistry).

161 Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997).

162 Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 852 (2006).

163 *Id.*

164 *See* Sunstein, *supra* note 160, at 92 (presenting this "limited argument pools" explanation).

165 *Id.* at 88 (the "social comparison" explanation).

166 *See supra* note 29. The terms "Fed" and "Reserve" refer to the Federal Reserve.

policy supports the claim that individuals' backgrounds influence their behavior.[167]

Although the second pathway eludes direct testing, the conditions for these effects are present on the FOMC. Consider that the first formal opportunity for Fed governors and presidents to participate in Committee meetings is during an "economics go-around," in which, inter alia, each Reserve Bank president reports on economic conditions in their region.[168] One cannot directly test the effects of this exchange of location-based information on policy outcomes, but it is noteworthy that this precondition for the changing of one's views is built into the format of FOMC meetings.

Third, a commissioner's background may push extra-agency actors with similar profiles toward greater engagement. In legislative settings, constituents are more likely to contact their legislator when they are of the same race.[169] A similar dynamic may be at play concerning agencies.[170] Indeed, as discussed below, a Federal Reserve governor holding the Board's community-bank seat regularly encourages community-bankers to contact the Fed.[171] To the extent that seeing oneself descriptively represented on a commission dais could motivate one to engage more with the identity-neutral mechanisms described above, well-designed representation requirements could help correct participatory imbalances associated with some of these mechanisms.

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167 *See, e.g.*, Stefan Eichler & Tom Lähner, *Regional House Price Dynamics and Voting Behavior in the FOMC*, 52 ECON. INQUIRY 625, 641 (2014); Meade & Sheets, *supra* note 30, at 661; John A. Gildea, *The Regional Representation of Federal Reserve Bank Presidents*, 24 J. MONEY, CREDIT & BANKING 215, 224 (1992).

168 Henry W. Chappell, Jr., Rob Roy McGregor & Todd A. Vermilyea, *The Role of Bias in Crafting Consensus: FOMC Decision Making in the Greenspan Era*, 3 INT'L J. CENT. BANKING 39, 42 (2007). An "economics go-around" is followed by a "policy go-around," where FOMC members describe their policy preferences. *Id.* All twelve presidents, even those not currently serving on the FOMC, and seven governors participate in both rounds. *Id.*; *About the FOMC*, BD. GOVERNORS FED. RSRV. SYS. (Oct. 1, 2021), https://www.federalreserve.gov/monetarypolicy/fomc.htm [https://perma.cc/Q348-Z3T7].

169 *See* Claudine Gay, *Spirals of Trust? The Effect of Descriptive Representation on the Relationship Between Citizens and Their Government*, 46 AM. J. POL. SCI. 717, 717–18 (2002).

170 *Cf.* CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN-AMERICANS IN CONGRESS 217 (1995) (discussing the "psychological needs" that descriptive representation meets).

171 *See infra* Section III.A.

4. Constitutional Considerations

Some scholars view appointment requirements for principal officers as unconstitutional.[172] The Appointments Clause directs that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" all principal officers "whose Appointments are not herein otherwise provided for, and which shall be established by Law."[173] Because congressionally-imposed appointment requirements limit the President's choice set, the argument goes, they impermissibly intrude on the President's exclusive authority to make nominations to principal offices.[174] In response, defenders of appointments requirements note that these offices are "established by Law" by Congress.[175] Because imposing appointment requirements falls within Congress's office-creation authority, those in this camp conclude that these measures are constitutional.[176]

Although courts have not squarely addressed this question, caselaw and history counsel in favor of these measures' constitutionality. In *Myers v. United States*[177]—which adopted a generally expansive view of presidential power over officers—the Supreme Court stated in dicta that Congress could prescribe "reasonable and relevant qualifications and rules of eligibility" when establishing offices.[178] Although Congress cannot name individuals to executive positions or restrict the President's options to a specific list,[179] Congress possesses broad authority to impose credential, group-representation, and partisan-balance requirements on principal offices.[180] These requirements date to the early republic; the first Congress mandated that the Attorney General and U.S. attorneys be "learned in the law."[181] Since then,

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172 *See, e.g.*, Hannah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 746 (2008).

173 U.S. CONST. art. II, § 2, cl. 2.

174 *See* Volokh, *supra* note 172, at 746.

175 E. Garrett West, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 170–71 (2018) (quoting U.S. CONST. art. II, § 2, cl. 2).

176 *Id.* at 182–83.

177 272 U.S. 52 (1926).

178 *Id.* at 129; *see also* Bowsher v. Synar, 478 U.S. 714, 740 (1986) (Stevens, J., concurring in the judgment) ("[I]t is entirely proper for Congress to specify the qualifications for an office that it has created . . . .").

179 Buckley v. Valeo, 424 U.S. 1, 126–40 (1976) (per curiam) (former is unconstitutional); *Bowsher*, 478 U.S. at 727 (latter is unconstitutional).

180 *See* Feinstein & Henderson, *supra* note 31, at 180–84 (classifying these requirements).

181 Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92.

Congress has enacted hundreds more appointments requirements without serious challenge to their constitutionality.[182]

B. Consultative Requirements

A second set of identity-conscious structures compels agencies to look outside of government to solicit the views of underrepresented groups. These consultative requirements fall into two buckets: requirements to convene and respond to government-supported advisory committees, and mandates to consider the views of specific outside groups.

1. Advisory Committees

Advisory committees, which are comprised of extra-governmental actors and counsel agencies on discrete subjects, feature prominently across the administrative state.[183] In 2019, agencies convened 958 committees, comprised of over 70,000 members from the private and nonprofit sectors—five times the total number of executive branch appointees and registered federal lobbyists combined.[184] The government expended nearly $400 million on their operations that year.[185] In most cases, agency heads hold final authority for selecting advisory committee members.[186]

Most advisory committees are subject to the Federal Advisory Committee Act of 1972 ("FACA").[187] FACA is grounded in formal-equality principles in some respects. Enacted roughly contemporaneously with FOIA and the Sunshine Act, it also contains open-records and open-meeting requirements.[188] The statute also provides that cov-

182 *See Myers*, 272 U.S. at 265–74 (Brandeis, J., dissenting) (listing statutes).

183 *See generally* Brian D. Feinstein & Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 GEO. L.J. 1139, 1147–51 (2020) (providing an overview of advisory committee practices and governing law).

184 *Compare id.* at 1141 (reporting number of appointees), *with Lobbying Data Summary*, OPENSECRETS, https://www.opensecrets.org/lobby [https://perma.cc/38JR-VKBY] (reporting number of lobbyists).

185 *Reporting Fiscal Year 2019 Government Totals*, FACA DATABASE, https://www.facadatabase.gov/FACA/apex/FACAPublicTotals?fy=2019 [https://perma.cc/9LSK-5ZRX].

186 *See* Federal Advisory Committee Management, 66 Fed. Reg. 37,728, 37,743–45 (July 19, 2001); *The Federal Advisory Committee Act (FACA) Brochure*, GEN. SERVS. ADMIN., https://www.gsa.gov/policy-regulations/policy/federal-advisory-committee-management/advice-and-guidance/the-federal-advisory-committee-act-faca-brochure [https://perma.cc/6M3S-4H89].

187 5 U.S.C. app. §§ 1–16.

188 *See id.* § 10(a)–(d) (upcoming committee meetings must be publicized in the Federal Register and open to the public, "[i]nterested persons shall be permitted to attend, appear before, or file statements with any advisory committee," and meeting minutes and other committee documents must be available, subject to certain limitations, for public inspection).

ered advisory-committee rosters be "fairly balanced in terms of the points of view represented."[189] Whether they achieve "fair balance"—which the statute does not define—has not been resolved.[190]

Many advisory committees are statutorily exempt from FACA, however, and these tend to depart from any aspiration to "balance" in favor of explicit identity-consciousness. Financial regulators are once again illustrative. Of the nineteen committees that counsel agencies on financial regulatory matters, eight have charters that require their memberships to be drawn from groups that are conventionally perceived as underrepresented.[191]

Consider, for instance, the Office of the Comptroller of the Currency's ("OCC") Minority Depository Institutions Advisory Committee, which advises the OCC on its statutory mandate to strengthen the minority-owned banking sector.[192] The Committee's charter provides that members are to include "officers and directors of minority depository institutions" and others committed to supporting those institutions.[193] The OCC has not strayed from that goal in selecting members. Nine of the Committee's twelve members are directors or

189 *Id.* § 5(b)(2).

190 *See* Feinstein & Hemel, *supra* note 183, at 1167 (finding that advisory committees are not ideologically balanced, instead favoring the President's preferences, and noting that other potential forms of balance have not been studied).

191 These eight committees are the Consumer Financial Protection Bureau ("CFPB") Consumer Advisory Board, CFPB Community Bank Advisory Council, CFPB Credit Union Advisory Council, Federal Deposit Insurance Corporation ("FDIC") Advisory Committee on Community Banking, FDIC Advisory Committee on Economic Inclusion, Office of the Comptroller of the Currency ("OCC") Minority Depository Institutions Advisory Committee, OCC Mutual Savings Association Advisory Committee, and Treasury Department Community Development Financial Institutions Fund's Community Development Advisory Board. *See All Agency Accounts*, FACA DATABASE, https://www.facadatabase.gov/FACA/apex/FACAPublicAgencyNavigation [https://perma.cc/3KSA-MRBB].

192 OFF. OF THE COMPTROLLER OF THE CURRENCY, MINORITY DEPOSITORY INSTS. ADVISORY COMM., CHARTER 1 (2020), https://www.occ.treas.gov/topics/supervision-and-examination/bank-management/minority-depository-institutions/minority-depository-institutions-advisory-committee-charter.pdf [https://perma.cc/92L2-K3NB]; *see also* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 308, 103 Stat. 183, 353–54 (codified as amended in scattered sections of 12 U.S.C.). Regulators define minority-owned banks as depository institutions where African Americans, Asian Americans, Hispanic Americans, or Native Americans own at least fifty-one percent of the voting stock. FED. DEPOSIT INS. CORP., STATEMENT OF POLICY REGARDING MINORITY DEPOSITORY INSTITUTIONS (2021), https://www.fdic.gov/regulations/laws/rules/5000-2600.html#fdic5000policyso [https://perma.cc/DW2U-XMB2].

193 OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 192, at 2.

executives of minority-owned banks;[194] the other three are bankers specializing in community reinvestment.[195]

This Committee provides a prime example of identify-conscious structures that advance substantive equality. Minority-owned banks are underpowered in the conventional, formal-equality-based avenues for influence.[196] By funding the committee, the OCC subsidizes their participation, placing a thumb on the scale where identity-neutral mechanisms do not.

This OCC committee is far from alone in this endeavor. Agencies across the administrative state convene advisory committees to provide dedicated hotlines for voices that may be underrepresented in the conventional open-access channels. Among financial regulators, advisory committees provide counsel concerning "unbanked" communities,[197] Native Americans residing on reservations,[198] farmers,[199] small

194 *Committee Members, Meetings, and Advisory Reports*, FACA DATABASE, https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=A10t0000001gzwkAAA [https://perma.cc/WH6E-Y4MP]; *see also* sources cited infra note 195.

195 *See Natalie Abatemarco*, NAT'L INST. OF PUB. FIN., https://nipf.org/speakers/abatemarco-natalie/ [https://perma.cc/C6VU-QZAV]; C. Jerome Brown, LINKEDIN, https://www.linkedin.com/in/cjeromebrown/ [https://perma.cc/9H9J-7MNM]; *see also* Janet Fix, *Texas Capital and Texas National Banks: Collaborating for Mutual Benefit*, CMTY. DEV. INVS., May 2018, at 11.

196 In particular, Black-owned banks have been subject to generations of discrimination. *See generally* MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP (2017). Today, they hold roughly two percent of total deposits. Maude Toussaint-Comeau & Robin Newberger, *Minority-Owned Banks and Their Primary Local Market Areas*, 41 ECON. PERSPS., no. 4, 2017, at 1, 6.

197 *CFPB Consumer Advisory Board*, FACA DATABASE, https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=A10t0000001gzxiAAA [https://perma.cc/98HN-KZBA]; *FDIC Advisory Committee on Economic Inclusion*, FACA DATABASE, https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=A10t0000001gzraAAA [https://perma.cc/V2FF-JL5D].

198 *Community Development Advisory Board*, FACA DATABASE, https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=A10t0000001gzvqAAA [https://perma.cc/72DS-2UU5].

199 *FDIC Advisory Committee on Community Banking*, FACA DATABASE, https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=A10t0000001gzslAAA [https://perma.cc/U982-FH9D]; *CFPB Community Bank Advisory Council*, FACA DATABASE, https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=A10t0000001gzzuAAA [https://perma.cc/U79C-YJDQ].

credit unions,[200] and mutual savings associations,[201] among other groups.[202]

Further, even committees that are subject to FACA's fair-balance requirement can advance substantive equality. Achieving balance in the economic sector may in effect amplify voices of those that are underrepresented in identity-neutral mechanisms like notice-and-comment rulemaking. For instance, balanced committees that advise financial regulators include, inter alia, seats for farmers,[203] businesses that utilize capital markets for their funding,[204] buyers of retail insurance products like life insurance and annuities,[205] and retail investors.[206]

2. Outside Groups

Agencies are often obliged to consult outside of the advisory committee framework with specific interest groups that are perceived as underrepresented. Most prominently, the Regulatory Flexibility Act[207] requires agencies to take affirmative steps to solicit comments from small businesses on proposed rules.[208] Agencies must flag, at sev-

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200 *CFPB Credit Union Advisory Council*, FACA DATABASE, https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=A10t0000001gzyEAAQ [https://perma.cc/J8M9-4PZF].

201 *OCC Mutual Savings Association Advisory Committee*, FACA DATABASE, https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=A10t0000001gzsZAAQ [https://perma.cc/E3AV-JBN7].

202 *See, e.g.*, *CFPB Consumer Advisory Board*, *supra* note 197 (consumers of retail financial products generally); *Community Development Advisory Board*, *supra* note 198 (community development-focused public interest organizations); *FDIC Advisory Committee on Community Banking*, *supra* note 199 (community banks); *CFPB Community Bank Advisory Council*, *supra* note 199 (same).

203 *See CFTC Agricultural Advisory Committee*, FACA DATABASE, https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=A10t0000001gzmEAAQ [https://perma.cc/M3DN-2FNQ].

204 *See CFTC Global Markets Advisory Committee*, FACA DATABASE, https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=A10t0000001gzn2AAA [https://perma.cc/NXE4-262X].

205 *See Treasury Department Federal Advisory Committee on Insurance*, FACA DATABASE, https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=A10t0000001gzzxAAA [https://perma.cc/X2YR-6QVQ].

206 *See SEC Asset Management Advisory Committee*, FACA DATABASE, https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=A10t0000004TdgLAAS [https://perma.cc/9G9D-W2NB]; *SEC Fixed Income Market Structure Advisory Committee*, FACA DATABASE, https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=A10t0000001gzyIAAQ [https://perma.cc/J72F-Z2EZ].

207 Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601–612).

208 *Id.* Several later laws revised and extended these requirements. *See* Small Business Jobs

eral different stages in the rulemaking process, any proposal that "is likely to have a significant economic impact on a substantial number of small entities."[209] They must provide this notice not only in the Federal Register, but also through direct notification or in publications that small business owners are likely to read.[210]

Several agencies must go further. The Consumer Financial Protection Bureau ("CFPB"), Environmental Protection Agency ("EPA"), and Occupational Safety and Health Administration are required to meet with small-business panels to hear their recommendations prior to issuing a proposed rule.[211]

Although these consultative requirements tend to involve small business, that is not their exclusive focus. For instance, the President has ordered all executive agencies to consult with Native American tribal officials "in the development of regulatory policies that have tribal implications."[212] Before issuing a covered final rule, executive agencies must provide OMB with a summary of that consultation, the concerns that tribal leaders raised, and the agency's response.[213]

3. Impact

Consultation requirements with outside groups and, especially, advisory committees generate several substantial advantages for their members in influencing agencies. *First*, both entities enjoy privileged access to policymakers. For outside groups with which agencies must meet, that outsized access is self-explanatory. For advisory committees, in many cases agency heads and other high-ranking appointees

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Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504; Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376 (2010); Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857.

209 5 U.S.C. § 602(a)(1).

210 *Id.* §§ 602(c), 605(b).

211 *Id.* § 609(a)–(d).

212 Exec. Order No. 13,175, 3 C.F.R. 304, 306 (2001).

213 *Id.* Other agencies go beyond their statutory obligations to conduct targeted outreach to ensure that a balanced and diverse set of interests have input into their policy proposals. In the process of updating its 1982 forest-management rules, the Forest Service held public meetings and listening sessions aimed at soliciting the views of four diverse stakeholder groups: recreational and commercial users of national forests, Native American communities, subnational government officials, and scientists. MICHAEL SANT'AMBROGIO & GLEN STASZEWSKI, PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING: FINAL REPORT FOR THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 53 (2018). A pilot program developed by the Cornell e-Rulemaking Initiative and implemented for some Department of Transportation and CFPB rulemakings also affirmatively targeted several often-overlooked stakeholders groups to participate. Cynthia R. Farina, Mary J. Newhart, Claire Cardie & Dan Cosley, *Rulemaking 2.0*, 65 U. MIA. L. REV. 395, 397 (2011).

attend these bodies' hours-long meetings. The Comptroller of the Currency, for example, attended sixteen of the last seventeen meetings of the Minority Depository Institutions Advisory Committee, for which meeting minutes are available.[214] In some cases, agency officials are even *required* to formally respond to their advisory committees' recommendations.[215]

In other cases, advisory committees are the first extra-governmental actors that are consulted at key points, providing them with a first-mover advantage.[216] For instance, the process by which the EPA Administrator proposes changing air-quality standards involves a complex and technical series of mandatory steps. For one key step in this process—the Human Health Risk and Exposure Assessment—the EPA's Clean Air Scientific Advisory Committee ("CASAC") provides comments prior to members of the public.[217] Where advisory committees are the first outside groups to comment, their views may serve as an anchoring device, providing the extra-agency baseline to which other extra-agency actors' positions are compared.[218]

Second, covered outside groups and advisory committees receive subsidies to promote their participation. Recall that agencies must provide enhanced notice to small businesses of rules that may affect them, thus subsidizing their information-search costs.[219] For advisory committees, the subsidy is more direct: the government convenes a committee and pays its members' travel and, occasionally, consulting expenses.[220] In effect, agencies subsidize committee members' participation.[221] The government's organizing and funding roles also may encourage the strengthening of ties among groups represented on the

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214 *Minority Depository Institutions Advisory Committee*, OFF. COMPTROLLER CURRENCY, https://www.occ.treas.gov/topics/supervision-and-examination/bank-management/minority-depository-institutions/minority-depository-institutions-advisory-committee.html [https://perma.cc/27PB-BJ4V] (reporting meetings from March 2013 through September 2020). That number includes meetings attended by the Acting Comptroller. The Committee advises the OCC on, inter alia, "potential regulatory changes or steps that may promote the health and viability of minority depository institutions." *Id.*

215 *See infra* Section III.B.

216 *See* RACHEL AUGUSTINE POTTER, BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY 75 (2019).

217 U.S. ENV'T PROT. AGENCY, 452/R-08-004, INTEGRATED REVIEW PLAN FOR THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR PARTICULATE MATTER (2008).

218 *See* Adrian Furnham & Hua Chu Boo, *A Literature Review of the Anchoring Effect*, 40 J. SOCIO-ECON. 35, 35 (2011).

219 5 U.S.C. §§ 602(a)(c), 605(b).

220 15 U.S.C. § 78qq(e)(f).

221 *See id.*; *see also* K. Sabeel Rahman, *Envisioning the Regulatory State: Technocracy, Democracy, and Institutional Experimentation in the 2010 Financial Reform and Oil Spill Statutes*, 48

advisory committee: the government essentially bears the transaction costs associated with building alliances among committee members, thus reducing barriers to collective action.[222]

Third, advisory committees often are the first—and sometimes the only—extra-governmental actors that are consulted regarding a proposed rulemaking.[223] For instance, when the EPA Administrator must decide whether to propose changing an air quality standard, she has essentially two types of documents before her: a series of technical reports by EPA civil servants and comments on those reports by CASAC. Only after the Administrator has acted on the information provided by civil servants and CASAC may the general public comment on the proposed rule.[224] Where advisory committees are the first outside groups to comment, their views may serve as an anchoring device, providing the extra-agency baseline to which other extra-agency actors' positions are compared.[225] Further, for rules that are essentially finalized prior to the issuance of a notice of proposed rulemaking—i.e., where the notice-and-comment period is merely perfunctory—advisory committees may be the *only* outside voices that the agency seriously considers.[226]

Finally, when advisory committees publicly criticize their host agency, their official status may give added weight to their critiques. James Miller resigned from the Defense Science Board after the Department of Defense forcibly removed Black Lives Matter protestors from Lafayette Square in Washington, D.C.[227] His resignation to protest this removal received national media coverage.[228] Had Miller not served on this advisory committee, his views likely would not have received the same amount of attention. Media interest in these "in-

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HARV. J. ON LEGIS. 555 (2011) (describing agencies' privileging expertise, which is costly to obtain).

222 *See generally* MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION (1965).

223 *See* POTTER, *supra* note 216, at 75.

224 *See Process of Reviewing the National Ambient Air Quality Standards*, EPA, https://www.epa.gov/criteria-air-pollutants/process-reviewing-national-ambient-air-quality-standards [https://perma.cc/3QC9-XLBQ].

225 *See* Furnham & Boo, *supra* note 218, at 35.

226 *See* POTTER, *supra* note 216, at 37 (describing this view of the notice-and-comment process).

227 James N. Miller, *A Letter to Defense Secretary Mark Esper*, WASH. POST (June 2, 2020), https://www.washingtonpost.com/opinions/2020/06/02/secretary-esper-you-violated-your-oath-aiding-trumps-photo-op-thats-why-im-resigning [https://perma.cc/RC2J-ZA49].

228 *See, e.g.*, *id.*; Ryan Browne, *Official Resigns from Pentagon Advisory Board over Esper's Perceived Support for Clearing Protest Outside White House*, CNN (June 2, 2020, 11:37 PM), https://www.cnn.com/2020/06/02/politics/james-miller-resigns-defense-advisory-board/index.html [https://perma.cc/44V9-CUM3].

sider" critiques may even propel agency leaders to be particularly solicitous of committee members.

III. Identity-Conscious Administration in Action

To better understand how identity-conscious mechanisms empower their intended beneficiaries, this Part presents case studies on two recent innovations: the mandate that at least one member of the Federal Reserve's Board of Governors possess "primary experience working in or supervising community banks,"[229] and the requirement that the SEC consult an Investor Advisory Committee.[230]

In terms of subject matter, these two finance-related structures do not—and indeed cannot—reflect the regulatory state's diverse and expansive aims. Neither do they truly focus on the most disadvantaged groups. Larger or more sophisticated interests may crowd out community banks and retail investors in administrative law's identity-neutral channels, but one can hardly say that these groups are disadvantaged in society overall; they are the "small haves" rather than the "have-nots."[231]

Notwithstanding these limitations, I spotlight these case studies because they capture the reality that representational requirements are most commonly situated in banking and securities regulators. The case studies, therefore, serve as a demonstration project; they can be replicated within agencies across the administrative state, with a focus on groups far beyond community bankers and retail investors—including, as discussed below in Part IV, subordinated racial, socioeconomic, and other groups.

In other respects, the Fed's community-bank seat and the SEC's Investor Advisory Committee could not be more dissimilar. The former is a presidential appointment to one of the most powerful and independent policymaking institutions in the nation, whereas the latter is a purely advisory, part-time role.[232] Yet they share three key commonalities. Both structures are identity-conscious; Congress established both to elevate interests widely perceived as underrepresented in agency decision-making; and both have risen to the occasion.

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229 Terrorism Risk Insurance Program Reauthorization Act of 2015, Pub. L. No. 114-1, § 109(a), 129 Stat. 3, 9 (2015) (amending 12 U.S.C. § 241).

230 15 U.S.C. § 78pp.

231 I thank Professor Andrew Hammond for this point.

232 12 U.S.C. § 241; 15 U.S.C. § 78pp.

A. The Federal Reserve's Community-Bank Seat

1. Background

Compared to their much larger competitors like the scandal-prone Wells Fargo and the "celebrity CEO"-led JPMorgan Chase,[233] community banks tend to fly under the radar. Their defining feature is a $10 billion ceiling on assets.[234] Most community banks are well under this limit; in 2013, the mean community bank reported $206 million in assets on its balance sheet.[235] They operate in limited geographic areas, emphasize conventional banking activities like residential mortgage and small-business loans, and have relatively small asset bases.[236] Their lending decisions tend to eschew statistical models in favor of personal relationships and localized knowledge.[237] They are considered economic lifelines in many small towns, which often are poorly served by larger financial institutions.[238] The smallest community banks—those with less than $50 million in assets—are concentrated in the rural Midwest and tend to focus on farm loans.[239]

By the 2010s, a growing consensus in Washington held that financial regulation uniquely burdened community banks.[240] (Professors Heidi Mandanis Schooner, Jeremy Kress, and Matthew Turk have challenged this view, pointing to the community bank lobby's suc-

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233 *See, e.g.*, Emily Flitter, *The Price of Wells Fargo's Fake Account Scandal Grows by $3 Billion*, N.Y. TIMES (Feb. 21, 2020), https://www.nytimes.com/2020/02/21/business/wells-fargo-settlement.html [https://perma.cc/6YDN-L6L5]; Kana Inagaki, *Jamie Dimon Gets Celebrity Welcome*, WALL ST. J. (Mar. 24, 2011, 12:55 PM), https://blogs.wsj.com/japanrealtime/2011/03/24/jamie-dimon-gets-celebrity-welcome-in-japan/ [https://perma.cc/XQ4Y-MAGG].

234 *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S HANDBOOK: COMMUNITY BANK SUPERVISION 1 (2018); FED. DEPOSIT INS. CORP., COMMUNITY BANKING STUDY 1–3 (2012).

235 *See* Tanya D. Marsh, *Reforming the Regulation of Community Banks After Dodd-Frank*, 90 IND. L.J. 179, 188 (2015).

236 *See* Marshall Lux & Robert Greene, *The State and Fate of Community Banking* 11–13 (Harvard Kennedy Sch. Mossavar-Rahmani Ctr. for Bus. & Gov't, Working Paper No. 37, 2015), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/Final_State_and_Fate_Lux_Greene.pdf [https://perma.cc/VJ5H-NASF].

237 *Id.* at 5; *see also* Marsh, *supra* note 235, at 192.

238 *See* Marsh, *supra* note 235, at 192; *see also* Lux & Greene, *supra* note 236, at 5.

239 *See* RON FELDMAN, KEN HEINECKE & JASON SCHMIDT, FED. RSRV. BANK OF MINNEAPOLIS, QUANTIFYING THE COSTS OF ADDITIONAL REGULATION ON COMMUNITY BANKS 3, 12 (2013), https://www.minneapolisfed.org/~/media/files/pubs/eppapers/13-3/epp_13-3_community_banks.pdf [https://perma.cc/W2KP-M6CF].

240 *See, e.g.*, Marsh, *supra* note 235, at 216–24; Arthur E. Wilmarth, Jr., *A Two-Tiered System of Regulation is Needed to Preserve the Viability of Community Banks and Reduce the Risks of Megabanks*, 2015 MICH. ST. L. REV. 249, 282–88; Robert DeYoung & Denise Duffy, *The Challenges Facing Community Banks: In Their Own Words*, 26 ECON. PERSPS., no. 4, 2002, at 2, 12–13.

cesses.[241] This Article does not take a position on this debate; what matters for this case study is that, during the 2010s, the prevailing view was that community banks were overmatched.[242]) Proponents of the consensus view focus on four perceived differences between community banks and their larger competitors.

First, standardized regulations conflict with community banks' business models. Whereas large banks tend to offer borrowers a standard menu of loan options,[243] community banks often offer customized loans based on the borrower's specific situation.[244] Critics of the Dodd-Frank framework argue that its standardization of forms and types of financial products is poorly suited for community banks' more personalized business model.[245]

Second, economies of scale may enable larger banks to better shoulder regulatory costs, thus placing smaller banks at a competitive

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241 *See* Jeremy C. Kress & Matthew C. Turk, *Too Many to Fail: Against Community Bank Deregulation*, 115 Nw. U. L. Rev. 647, 680–81 (2020); Heidi Mandanis Schooner, *Regulating Angels*, 50 Ga. L. Rev. 143, 160–61 (2015). In one light, the consensus view is self-defeating; that a consensus holds that community banks are underpowered is arguably a sign of their power. *See* John Heltman, *Is the Fed's Community Banker Seat Worth the Trouble?*, Am. Banker (Aug. 2, 2017, 3:59 PM), https://www.americanbanker.com/news/is-the-feds-community-banker-seat-worth-the-trouble [https://perma.cc/XQT5-L6QN] (discussing the claim that community banks' overregulation is "one of the few areas of bipartisan agreement" (quoting Professor Peter Conti-Brown)).

242 *But see* Schooner, *supra* note 241, at 160–61 (contemporaneous dissenting voice); *Regulatory Landscape: Burdens on Small Financial Institutions: Hearing Before the Subcomm. on Investigations, Oversight & Reguls. of the H. Comm. on Small Bus.*, 113th Cong. 8–9 (2013) [hereinafter *Hearings on Small Financial Institutions*] (statement of Adam Levitin, Professor of Law, Georgetown University Law Center) (same). Despite some recent cracks in the foundation, it remains the conventional wisdom today. *See* Kress & Turk, *supra* note 241, at 680–81.

243 *See* Wilmarth, *supra* note 240, at 288–92.

244 *See id.*

245 *See, e.g.*, *Hearings on Small Financial Institutions*, *supra* note 242, at 2–4 (statement of Hester Peirce, Senior Research Fellow, Mercatus Center, George Mason University) (asserting that the Dodd-Frank "standardized model" is "just designed with large financial institutions in mind" and "does not work well" for community-based financial institutions who must get to know their customers, tailor products to their needs, and deal with consumers "based on their individual facts and circumstances"); Tanya D. Marsh & Joseph W. Norman, *The Impact of Dodd-Frank on Community Banks*, 1–2, 39 (Wake Forest Univ. Legal Stud., Paper No. 2302392, 2013). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302392 [https://perma.cc/KN2F-GKEX] ("[T]he focus on standardization of consumer financial products, like home loans and checking accounts, fails to recognize the value to consumers of the community banking model, which emphasizes relationship banking, personalized underwriting, and customization of financial products to meet the specific needs of customers and communities."). Small-bank exemptions from certain regulations arguably are no panacea, given the resource costs associated with determining how to comply with an exemption and the legal risk associated with getting this determination wrong. *See Hearings on Small Financial Institutions*, *supra* note 242, at 2–4.

disadvantage.[246] For example, between 1999 and 2015, Congress required financial institutions to provide all of their customers an annual notice of their privacy policies.[247] Whereas large banks automated the mailing of paper notices, many community banks did not have the resources to do so.[248] As a result, small bank employees spent time stuffing envelopes to most of their customers every year while large banks did not incur this expense.[249]

Of course, snail mailing privacy notices involves just one small corner in a labyrinthine financial regulatory system. The particular regulatory regime that a bank faces turns on that bank's charter type and location,[250] with most institutions answering to multiple federal and state agencies.[251] The Federal Reserve's financial regulations alone comprise at least fifty-one different parts of the Code of Federal Regulations (with each part containing multiple regulatory requirements) and eighteen guidance documents.[252] And these regulatory obligations are growing.[253] Thus, the consensus view holds that

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246 *See* GREGORY ELLIEHAUSEN, BD. OF GOVERNORS OF THE FED. RSRV. SYS., THE COST OF BANK REGULATION: A REVIEW OF THE EVIDENCE 25 (1998), https://www.federalreserve.gov/pubs/staffstudieS/1990-99/ss171.pdf [https://perma.cc/8BN7-VS9N].

247 *Compare* Gramm-Leach-Bliley Act, Pub. L. 106-102, § 503, 113 Stat. 1338, 1439 (1999) (enacting this requirement), *with* Fixing America's Surface Transaction Act, Pub. L. 114-94, § 75001, 129 Stat. 1312, 1787 (2015) (substantially modifying the requirement).

248 Although customers could opt into electronic delivery, *see* 12 C.F.R. § 1016.9(a) (2020), most customers received mailed notices annually during this period. *See* 83 Fed. Reg. 40,945, 40,947 n.27 (Aug. 17, 2018) (to be codified at 12 C.F.R. pt. 1016).

249 *See Hearings on Small Financial Institutions*, *supra* note 242, at 5–8 (statement of B. Doyle Mitchell, Jr., President and Chief Executive Officer of Industrial Bank). More recently, research has shown that the CFPB's qualified mortgage rule—which requires lenders to demonstrate that a borrower has the ability to repay a mortgage loan and that the loan does not contain features such as balloon payments—disproportionately affects banks with fewer than ten billion in assets. James DiSalvo & Ryan Johnson, *Banking Trends: How Dodd-Frank Affects Small Bank Costs*, 1 ECON. INSIGHTS, no. 1, 2016, at 14, 15. The CFPB, however, exempts banks under a two billion asset threshold from this rule. 12 C.F.R. §§ 1026.43(e)(5), 1026.35(b)(2)(iii)(B)–(C) (2020).

250 *See* Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677, 677 (1988).

251 *See* MARK JICKLING & EDWARD V. MURPHY, CONG. RSCH. SERV., R40249, WHO REGULATES WHOM? AN OVERVIEW OF U.S. FINANCIAL SUPERVISION (2010) https://fas.org/sgp/crs/misc/R40249.pdf [https://perma.cc/EFB3-XVGQ].

252 *See generally All Regulations*, BD. GOVERNORS FED. RSRV. SYS. (June 14, 2021), https://www.federalreserve.gov/supervisionreg/reglisting.htm [https://perma.cc/W5V3-DBLU]; *Compliance Guides for Small Entities*, BD. GOVERNORS FED. RSRV. SYS. (Feb. 8, 2018), https://www.federalreserve.gov/supervisionreg/cgdefault.htm [https://perma.cc/J2XY-W7DB].

253 From 1990 to 2005, federal agencies issued more than 800 new financial regulations. Stephanie E. Dreyer & Peter G. Weinstock, *Less Is More: Changing the Regulator's Role to Prevent Excess in Consumer Disclosure*, 123 BANKING L.J. 99, 103 (2006). During the twenty-first century, three major federal laws imposed substantial new obligations on banks: the USA

economies of scale and the indivisibility of some compliance costs place large banks at an advantage relative to their smaller counterparts.[254]

According to then-Fed Chair Janet Yellen, "[w]ith respect to supervisory regulations and policies, [the Fed] recognize[s] that the cost of compliance can have a disproportionate impact on smaller banks, as they have fewer staff members available to help comply with additional regulations."[255] Unsurprisingly, community bankers share this view.[256]

Third, community banks are perceived to be outgunned in Washington relative to their larger competitors.[257] The revolving door spins much more frequently to Wall Street than it does to smaller community banks.[258] The consequent ties between large banks and regulators arguably lead to agency capture—to the detriment of smaller banks (among others).[259] Whether because of more successful lobbying efforts, closer professional ties with regulators, or some other reason, large banks have racked up a series of legislative successes in recent decades.[260]

PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, and the Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), which was arguably the most consequential development in banking law since the Great Depression. *See* Marsh, *supra* note 235, at 210.

254 *See generally* ELLIEHAUSEN, *supra* note 246 (reviewing this literature). To put these differences in perspective, a simulation of the costs of a hypothetical regulation on banks of various sizes reveals that the regulation reduces the return-on-assets for the median bank with less than $50 million in assets by 22.5 basis points, but only reduces that figure for the median bank with $500 million to $1 billion in assets by 3.7 basis points. FELDMAN, ET AL., *supra* note 239, at 3 (also reviewing this literature).

255 DiSalvo & Johnson, *supra* note 249, at 14.

256 *See* FED. DEPOSIT INS. CORP., *supra* note 234, at B-1 to B-4.

257 *See* Wilmarth, *supra* note 240, at 335 (describing "strong evidence of 'regulatory capture' by large financial institutions" during the 1990s and 2000s, attributable to (1) "large-scale political contributions," (2) "an intellectual and policy environment that strongly favored deregulation and a 'light touch' approach to supervision," and (3) "a 'revolving door' . . . between the top echelons of Wall Street and the financial regulatory agencies"). *But see* Kress & Turk, *supra* note 241, at 681 (claiming that the "small-bank lobby . . . is among the most successful political interest groups in U.S. history and has wielded outsized influence over financial regulation since the early nineteenth century.").

258 *See* Hill & Painter, *supra* note 158, at 1669–71.

259 *See id.*; Timothy A. Canova, *Financial Market Failure as a Crisis in the Rule of Law: From Market Fundamentalism to a New Keynesian Regulatory Model*, 3 HARV. L. & POL'Y REV. 369, 384 (2009) (arguing that the "revolving door" between financial institutions and financial regulators "ha[s] contributed to the capture of key federal regulatory agencies").

260 *See, e.g.*, Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (lifting restrictions on multi-line firms engaged in commercial banking, investment banking, and insurance sales); Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No.

Finally, adherents of the view that financial regulation generates a greater relative burden for smaller banks point to the divergent fortunes of large and small banks as regulation has ramped up over the past several decades. The number of community banks and their market share both have been declining for decades, with the downward trend in market share accelerating around the time of the Dodd-Frank Act's enactment.[261] The difference in size between the average non-community bank and the average community bank increased over six-fold between 1984 and 2011.[262]

2. *Connecting Lombard Street to Main Street*

In this climate, community banks' trade association stepped in to lobby for a new law requiring that one member of the seven-member Federal Reserve Board of Governors possess primary professional experience concerning community banks.[263] That individual's expertise, the association argued, would "ensure that [Federal Reserve] regulations intended for the largest banks do not unintentionally sweep in community banks."[264]

That view resonated with Senator David Vitter (R-LA) who introduced a measure mandating that at least one Board member have "demonstrated primary experience working in or supervising community banks."[265] Echoing the received wisdom described above, Vitter argued that regulations favor large banks, attributing this develop-

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103-328, 108 Stat. 2338 (permitting interstate bank mergers). Even Dodd-Frank—which increased regulatory requirements on systemically important banks—also benefited these banks in that a "too big to fail" designation may be interpreted as implicit government backing, thus making these firms relatively more attractive to capital markets. *See* William C. Dudley, President, Fed. Rsrv. Bank of N.Y., Ending Too Big to Fail, Remarks at the Global Economics Forum, New York City (Nov. 7, 2013) ("The fact that firms deemed by the market to be too big to fail enjoy an artificial subsidy in the form of lower funding costs distorts competition . . . .") (transcript available at https://www.newyorkfed.org/newsevents/speeches/2013/dud131107.html [https://perma.cc/8HC3-RR28]). Whether this subsidy outweighs the greater regulatory burden that too-big-to-fail firms shoulder is, however, up for debate. Abby McCloskey, *Why Big Banks May Be at an Annual $14 Billion Disadvantage*, AM. BANKER (Oct. 24, 2013, 12:00 PM), https://www.americanbanker.com/opinion/why-big-banks-may-be-at-an-annual-14-billion-disadvantage [https://perma.cc/7BUW-X748].

261 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 12 and 15 U.S.C.); *see* Lux & Greene, *supra* note 236, at 16.

262 *See* Marsh, *supra* note 235, 188.

263 Tim Zimmerman, *Miki Bowman for the Federal Reserve*, INDEP. BANKER, (Aug. 27, 2018), https://independentbanker.org/2018/08/tim-zimmerman-miki-bowman-for-the-federal-reserve/ [https://perma.cc/A4E5-HWT2].

264 160 CONG. REC. 12,292 (2014).

265 *Id.* at 12,298 (Amendment No. 3550).

ment to "an unmistakable trend away from having adequate representation [on the Board] from folks with community bank experience."[266] Instead, Vitter claimed, the Board was "completely dominated by . . . folks with megabank and academic economist experience."[267]

Vitter was correct. Although community banks were no David facing the megabanks' Goliath—their trade association is considered a potent force in Washington[268]—they had no presence on the Fed. Whereas small-bank executives had served on the Board for decades beginning with its inception in 1914, only two had joined since 1950.[269] That lack of representation is particularly surprising considering that ninety-eight percent of all federally insured banks are community banks.[270] As a solution, Vitter proposed community-bank representation on the Board to "even the playing field . . . [and make policy] fairer for smaller institutions."[271]

Opposition to the measure was tempered,[272] and Congress passed Vitter's proposal by overwhelming majorities in 2015.[273] For the first time, the Fed's authorizing statute contained a specific group-repre-

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266 *Id.* at 12,291.

267 *Id.*

268 *See The Hill's Top Lobbyists 2019*, THE HILL (Dec. 12, 2019, 6:00 AM), https://thehill.com/business-a-lobbying/business-a-lobbying/474162-the-hills-top-lobbyists-2019 [https://perma.cc/5NV7-N98K] (including two officers of the Independent Community Bankers of America on a list of powerful lobbyists).

269 These two are William Sherrill (1967–1971) and Elizabeth Duke (2008–2013). Earlier in the Fed's history, members William Harding (1914–1922), Daniel Crissinger (1923–1927), Henry Moehlenpah (1919–1920), John Mitchell (1921–1923), Joseph McIntosh (1924–1928), M.S. Szymczak (1933–1961), James Vardaman, Jr. (1946–1958), and Lawrence Clayton (1947–1949) all had prior community-bank experience. *See People*, FED. RSRV. HIST., https://www.federalreservehistory.org/people [https://perma.cc/4MSM-97A4]. Determining which institutions qualify as "small" or "community" banks in the past is an impressionistic exercise, aided by Maple Tech's "US Bank Locations" database. *See* US BANK LOCATIONS, https://www.usbanklocations.com/ [https://perma.cc/BRU7-HVN6].

270 Heltman, *supra* note 241.

271 160 CONG. REC. 12,292 (2014).

272 Most notably, although then–Fed Chair Janet Yellen was receptive to the prospect of a community banker on the Fed's Board, she cautioned that a statutory mandate went too far. After all, Yellen reasoned, the number of useful professional backgrounds for a Board member exceeds the Board's seven seats. *See* Pedro Nicolaci da Costa, *Senate Approves Move to Reserve Fed Seat for Community Banks*, WALL ST. J. (July 17, 2014, 2:16 PM), https://www.wsj.com/articles/BL-REB-26840 [https://perma.cc/7GEP-HYZ7]. Yellen therefore favored preserving flexibility "rather than for the indefinite future locking in and earmarking particular seats for particular purposes." *Id.*

273 160 CONG. REC. 12,296 (2014) (reporting 97-0 Senate vote on the Vitter Amendment); *All Information (Except Text) for H.R. 26 – Terrorism Risk Insurance Program Reauthorization Act of 2015*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/26/all-info?r=1&s=2 [https://perma.cc/PKT2-8Q3D] (reporting a 416-5 vote in the House and 93-4 vote in the Senate).

sentation requirement: that a community banker or bank supervisor hold at least one seat on the Board.

Congress's decision to privilege community bankers and supervisors on the Board was a departure from past practices. The Board's extant requirements of "fair representation" of economic interests and geographical diversity were considerably more ambiguous—and therefore malleable—than the new community-bank requirement.[274] Although the Fed's first few decades witnessed some professional diversity,[275] by the 2000s, academic economists and large-bank executives and lawyers dominated the Board.[276] And despite a seemingly straightforward statutory mandate for geographic diversity across the twelve Reserve districts, ambiguity about what ties are sufficient for an individual to be "from" a given district allows for gamesmanship.[277] That Reserve districts—particularly those districts with borders that do not correspond to state lines—lack a natural constituency to advocate for them also may encourage Presidents to skirt this geographic-diversity requirement.[278]

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274 The Banking Act of 1935 requires Board appointments to involve "due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country." 12 U.S.C. § 241. Further, no more than one member may be selected from any given Federal Reserve district. *Id.* The governance of the Federal Reserve banks in each of these twelve districts also involves a dose of corporatism; a nine-member board of directors governs each Reserve bank, with a set number of seats representing member banks and the general public, "with due but not exclusive consideration to the interests of agriculture, commerce, industry, services, labor, and consumers." 12 U.S.C. § 302. A predecessor of the Banking Act, the Federal Reserve Act of 1913, contained similar requirements. *See* Federal Reserve Act, Pub. L. No. 63-43, § 10, 38 Stat. 251, 260 (1913) ("[T]he President shall have due regard to a fair representation of the different commercial, industrial and geographical divisions of the country" on the five-member Board.).

275 For instance, Rudolph Evans (1942–1954) was a livestock farmer and agriculture regulator; Andrew Mellon (1921–1932) was a steel magnate (and also a bank founder, although steel was his primary means to wealth); Milo Campbell (1923–1923) came to the Board from the National Milk Producers' Federation and, before that, a series of seemingly unrelated state and local positions; and Frederic Delano (1914–1918) came from railroads, *See People*, FED. RSRV. HIST., https://www.federalreservehistory.org/people/ [https://perma.cc/4MSM-97A4].

276 160 CONG. REC. 12,291 (2014) (statement of Sen. David Vitter); *see also* Paul H. Kupiec, *Commentary on 'Presidents, Politics, and the Federal Reserve Board Governors: Is There a New PhD Standard?,'* AM. ENTER. INST. (July 16, 2019), https://www.aei.org/articles/commentary-presidents-politics-federal-reserve/ [https://perma.cc/A9FV-CPX3].

277 *See* George Selgin, *Many Places Are Like Home for Fed Board Nominees*, L.A. TIMES, Feb. 23, 2020, at A20 (describing how Fed vice chair Randal Quarles was labeled a Coloradan because he lived there as a child); Clifford Krauss, *Fed Governor Is Confirmed Despite Regional Resistance*, N.Y. TIMES, Nov. 25, 1991, at D3 (stating that Harvard economist Lawrence Lindsey was classified as "from" Virginia because he lived there for three years while working at the White House).

278 Occasionally, however, senators from the affected region object to attempts to violate the supposed spirit of this requirement. *See, e.g.*, Krauss, *supra* note 277, at D3.

Congress's addition of a community-bank seat went beyond these existing requirements. Unlike the undefined fair-representation requirement, the new provision's specificity meant that assessments of whether a given nominee met the criterion would be relatively straightforward.[279] And unlike the Reserve's district-based, geographic-diversity requirement, the new provision had a built-in constituency—community bankers—to police potential violations.[280]

The new provision was noteworthy for several other reasons as well. For one, Congress had not tinkered with the structure of the Board—which is insulated from political control to a unique degree[281]—for eighty years. Furthermore, mandating a specific seat for a discrete interest arguably constitutes a tacit rejection of the Banking Act's legislative purpose: to present "a national viewpoint . . . without regard to the special interests of any particular group or locality."[282] By explicitly reserving a seat for community bankers or supervisors, Congress jettisoned this approach.

3. Impact

President Donald Trump nominated Michelle Bowman to fill the new community bank seat in April 2018, and she was confirmed for a term beginning that November.[283] Bowman's biography seems perfectly tailored for the position; she served as Kansas State Bank Commissioner and, before that, an executive of the Farmers & Drovers Bank, a single-branch bank located on Main Street in Council Grove, Kansas (population 2,182) which was founded by Bowman's great-great-grandfather.[284]

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279 *See* 12 U.S.C. § 241.

280 *See id.*

281 *See* Conti-Brown, *supra* note 28, at 259–60 (stating that the Fed's "unique independence" stems from norms and practices, rather than statutory text); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 841 (2013) (noting that the Fed's organic statutes include "almost all of the indicia of independence studied here").

282 H.R. REP. NO. 74-742, at 10 (1935) (report from the Committee on Banking and Currency to accompany H.R. 7617, dated April 19, 1935). Indeed, the Board's structure was designed to "emphasize" that privileging of "the national economic life" over merely "a majority of special interests." *Id.* at 6.

283 Nick Timiraos, *Trump to Nominate Richard Clarida, Michelle Bowman to Fed Board*, WALL ST. J. (Apr. 16, 2018, 6:14 PM), https://www.wsj.com/articles/trump-set-to-nominate-richard-clarida-michelle-bowman-to-fed-board-1523900241 [https://perma.cc/UR66-SRK3]; Neil Haggerty, *Bowman Confirmed for 14-Year Term at Fed*, AM. BANKER (Sept. 12, 2019, 2:17 PM), https://www.americanbanker.com/news/michelle-bowman-confirmed-for-14-year-term-at-fed [https://perma.cc/EM6Y-TCCT].

284 Brian Cheung, *Miki Bowman Confirmed as Fed's Small Bank-Focused Governor*, YA-

According to Professor Sarah Binder, the new seat served as "a good reminder that Congress ultimately remains in the driver's seat in shaping the governance of the Fed."[285] Here, Congress's message was that "the Fed shouldn't overlook Main Street interests in setting monetary policy and executing its supervisory powers."[286] That message was received: Bowman's words and deeds reveal a policymaker who viewed her role as two-way conduit between community banks and the Fed.[287]

Bowman's confirmation hearing left no doubt that she saw herself as an advocate for community banks. "It's important that we understand the pain points for those community banks," she told senators, concluding that a regulatory "burden," which she "witnessed firsthand" as a community banker, was adversely affecting the sector.[288] In making that case, she drew on her experience as a small-bank compliance officer and promised, if confirmed, to bring a Main Street perspective to ensure rules are "appropriately tailored" to smaller financial institutions.[289] As chair of the Fed's Smaller Regional and Community Banking Subcommittee, she is now well-positioned to do so.[290]

HOO FIN. (Nov. 15, 2018), https://finance.yahoo.com/news/miki-bowman-confirmed-feds-small-bank-focused-governor-195200509.html [https://perma.cc/3XUP-EFMT]; *Annual Estimates of the Resident Population for Incorporated Place in Kansas: April 1, 2010 to July 1, 2019*, U.S. CENSUS BUREAU, (Oct. 7, 2021), https://www.census.gov/data/tables/time-series/demo/popest/2010s-total-cities-and-towns.html#tables [https://perma.cc/NYS7-KS2Q].

285 Jeff Kearns, *Congress Moves to Require Fed Board Include Community Banker*, BLOOMBERG, (Dec. 11, 2014, 4:14 PM), https://www.bloomberg.com/news/articles/2014-12-11/congress-poised-to-require-fed-board-include-community-banker [https://perma.cc/K3JW-M2V3].

286 *Id.*

287 In one sense, the question of whether the Fed received Congress's message resists a direct answer, because the actions the Fed would have taken but-for this provision are unknowable. That most Board votes during Bowman's tenure have been unanimous—with the occasional dissent or abstention by Lael Brainard or, very rarely, Randal Quarles—further stymies comparisons between Bowman and her colleagues' records. *Board Votes*, BD. GOVERNORS FED. RSRV. SYS. (Jan. 2, 2019), https://www.federalreserve.gov/aboutthefed/boardvotes.htm [https://perma.cc/U8LQ-2M72]. Accordingly, we look to Bowman's positions and actions to shed light on this question.

288 Paul Kiernan, *In Miki Bowman, Smaller Banks Await a Potential Fed Ally*, WALL ST. J. (Nov. 1, 2018, 12:46 PM), https://www.wsj.com/articles/in-miki-bowman-smaller-banks-await-potential-fed-ally-1541090793 [https://perma.cc/EU3H-JCWR].

289 *Id.*

290 *See* Michelle W. Bowman, Fostering Closer Supervisory Communication, Remarks before the Conference of State Bank Supervisors (Apr. 2, 2019) [hereinafter Bowman, Apr. 2019 Remarks] (transcript available at https://www.federalreserve.gov/newsevents/speech/bowman20190402a.htm [https://perma.cc/JX32-G763]).

On the Board, Bowman sees herself as a voice for community banks—and believes that her holding this specific seat obliges her to perform this function. For instance, in June 2019 testimony to the Senate Banking Committee, she remarked:

> I am humbled . . . to serve as the first Governor to fill the role Congress designated for someone with community banking experience . . . Since my confirmation last year, I have worked to fulfill my unique role . . . by traveling widely and listening closely to community bankers, to consumers, small business owners, and community leaders. . . . I am making sure these unique perspectives are represented in the Federal Reserve's deliberations and decision making . . . .[291]

Indeed, her public remarks almost always acknowledge her status as the first occupant of this designated seat and convey that she views this status as a charge to specifically represent community banks and their communities on the Board.[292] Sometimes, she alerted community bankers to specific proposed regulations—e.g., a potential change in the threshold for which a residential real-estate appraisal is necessary—for which "[i]t is important for the [Federal Reserve] . . . to receive input directly from community bankers."[293] In other remarks, she encouraged state bank supervisors to "just pick up the phone," because "we would . . . all benefit from more informal, and more fre-

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291 *Nominations of Thomas Peter Feddo, Nazak Nikakhtar, Ian Paul Steff, Michelle Bowman, Paul Shmotolokha, and Allison Herren Lee: Hearing before the S. Comm. on Banking, Hous., & Urb. Affs.*, 116th Cong. 10 (2019) (statement of Michelle Bowman, Member, Board of Governors of the Federal Reserve System).

292 *See, e.g.*, Michelle W. Bowman, Empowering Community Banks, Remarks before the Conference for Community Bankers (Feb. 10, 2020) (transcript available at https://www.federalreserve.gov/newsevents/speech/bowman20200210a.htm [https://perma.cc/5FQL-5THC]); Michelle W. Bowman, Introductory Remarks at a Fed Listens Event by the Federal Reserve Bank of St. Louis (Sept. 4, 2019) (transcript available at https://www.federalreserve.gov/newsevents/speech/bowman20190904a.htm [https://perma.cc/HQY8-EXZK]); Bowman, Apr. 2019 Remarks, *supra* note 290; Michelle W. Bowman, Agriculture and Community Banking, Remarks before the Ag Lenders Conference (Mar. 28, 2019) [hereinafter Bowman, Mar. 2019 Remarks] (transcript available at https://www.federalreserve.gov/newsevents/speech/bowman20190328a.htm [https://perma.cc/6HPB-SU5L]); Michelle W. Bowman, A Conversation on Community Banking, Remarks before the Conference for Community Bankers (Feb. 11, 2019) [hereinafter Bowman, Feb. 2019 Remarks] (transcript available at https://www.federalreserve.gov/newsevents/speech/bowman20190211a.htm [https://perma.cc/3MCT-QFQ5]).

293 Bowman, Feb. 2019 Remarks, *supra* note 292.

quent contact."[294] That message conveyed a sense of accessibility and informality that is rarely associated with the Federal Reserve.[295]

Bowman did not, however, present her role only as a conduit to convey community banks' views to the Fed. She also aimed to educate that sector about the Fed's positions,[296] including via writing a regular column for the Fed's *Community Banking Connections* publication and speaking to community-banking groups.[297]

Data on Fed governors' speaking engagements provide another perspective on Bowman's attention to the community-banking sector. Figure 4 displays the average number of speeches per year that Board members who served during a portion of the 2010–2020 period delivered to community bankers or their state supervisors, as well as those delivered to all other groups. Figures 4 and 5 show the proportion of speeches per year that were delivered to community bankers or their state supervisors. As the figures show, Bowman has made substantially more speeches to community-bank groups than any other Board member in the past decade, both in terms of raw numbers and as a proportion of her total speeches.

294 Bowman, Apr. 2019 Remarks, *supra* note 290.

295 *See* PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE 79, 266 (2017) (referring to the Fed as "cloistered, genteel," and "opaque").

296 *See, e.g.*, Bowman, Mar. 2019 Remarks, *supra* note 292, at 2 ("I hope to help you better understand the role of the Federal Reserve and what we are trying to accomplish.").

297 Michelle Bowman, *A Message from Governor Bowman*, CMTY. BANKING CONNECTIONS, no. 1, 2020, at 1.

FIGURE 4. FED BOARD MEMBERS' SPEECHES TO COMMUNITY BANKERS & OTHER AUDIENCES

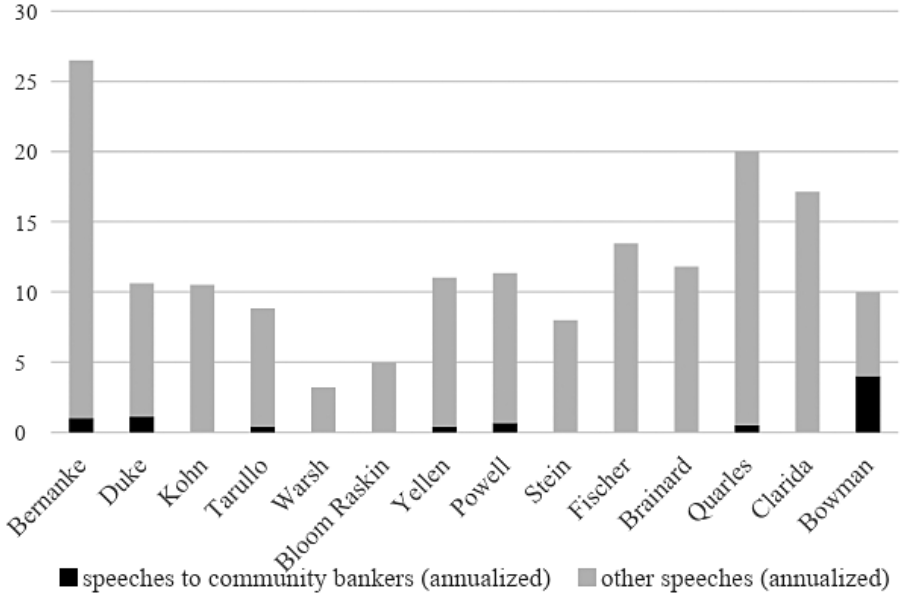
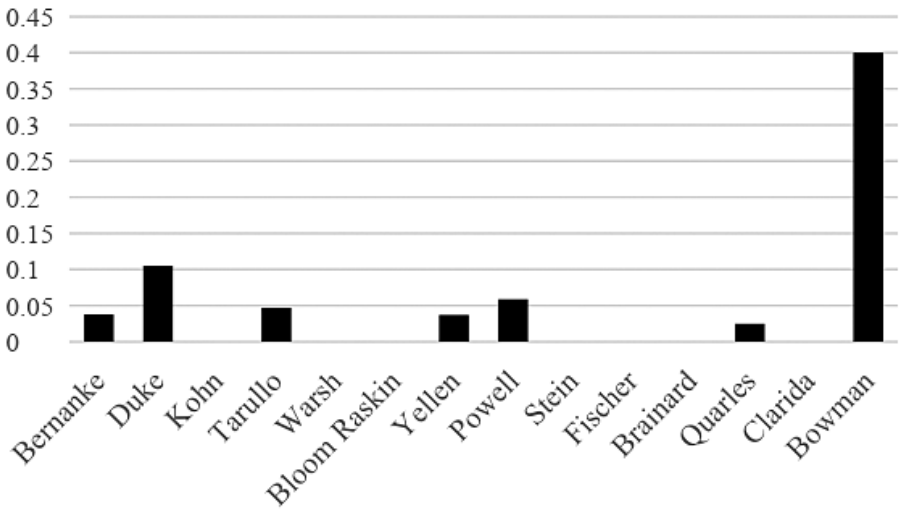


FIGURE 5. PROPORTION OF FED BOARD MEMBERS' SPEECHES TO COMMUNITY BANKERS



Comparing Bowman to Elizabeth Duke, who served on the Board from 2008 to 2013, is instructive. Like Bowman, Duke came to the Board by way of a community bank.[298] Duke, however, did not

298 *Elizabeth A. Duke*, FED. RSRV. HIST., https://www.federalreservehistory.org/people/elizabeth-a-duke [https://perma.cc/H3KT-95YY] (stating that Duke previously served as an executive at TowneBank); *Insured U.S.-Chartered Commercial Banks that Have Consolidated Assets of*

hold a Board seat reserved for someone with that experience, as that statutory provision was enacted after her resignation. Although Duke presented the second-most speeches to community bank groups, Bowman's presentations to these groups dwarf Duke's by a factor of four. That substantial difference suggests that Bowman's appointment to a seat expressly reserved for community bankers and supervisors motivated her to interact more with these groups than Duke had, who has an otherwise similar biography.

B. The SEC's Investor Advisory Committee

1. Background

Since at least the 1980s, a vocal group of political observers has charged that the SEC is captured by the large, well-resourced, and sophisticated interests that it regulates—at the expense of poorly organized retail investors.[299] This favoritism is partially rooted in informational asymmetries between Washington and Wall Street. When crafting new regulations, the SEC tends to rely on information provided by the financial services industry.[300] The result, according to Professor Adam Pritchard, is "regulation that largely benefits the big players in the securities industry."[301]

On the enforcement side, the SEC historically has been less likely to pursue actions against politically connected firms, controlling for other factors.[302] After commencing an enforcement action, it tends to

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$300 Million or More, Ranked by Consolidated Assets, FED. RSRV. STAT. RELEASE (Mar. 31, 2008), https://www.federalreserve.gov/releases/lbr/20080331/default.htm [https://perma.cc/NJ6Y-79YL] (reporting that TowneBank held $2.6 billion in assets in 2008). Earlier in her career, Duke had served in high positions in two large banks, Wachovia and SouthTrust, and the tiny Bank of Tidewater. *See Elizabeth A. Duke*, *supra*.

299 *See* Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 922 (1994) (summarizing this literature). These large interests include institutional investors, investment managers, and broker-dealers. Notably, earlier scholars—including George Stigler—considered the SEC to be relatively insulated from capture. *See, e.g.*, G. William Schwert, *Public Regulation of National Securities Exchanges: A Test of the Capture Hypothesis*, 8 BELL J. ECON. 128 (1977); George J. Stigler, *Public Regulation of the Securities Markets*, 37 J. BUSINESS 117 (1964).

300 *See* A.C. Pritchard, *The SEC at 70: Time for Retirement?*, 80 NOTRE DAME L. REV. 1073, 1089–92 (2005). A similar dynamic was at play concerning deregulatory efforts during the 2000s, which tended to benefit large firms and were criticized for having little public input. *Id.* at 1083, 1089.

301 *Id.* at 1090.

302 Maria M. Correia, *Political Connections and SEC Enforcement*, 57 J. ACCT. & ECON. 241, 242 (2014) (reporting a lower likelihood of SEC enforcement actions for politically connected firms). *But see* Jonas Heese, Mozaffar Khan & Karthik Ramanna, *Is the SEC Captured? Evidence from Comment-Letter Reviews* 2–3 (Harvard Bus. Sch., Working Paper No. 17-087, 2017), https://dash.harvard.edu/bitstream/handle/1/33111777/17-087%20%282%29.pdf?sequence

adopt a more lenient posture toward larger firms and their employees relative to similar actions involving smaller firms.[303] And when it does penalize large firms, those penalties fall almost exclusively on shareholders, not executives.[304]

The SEC's perceived failures exploded onto the public conscience in the 2000s—a decade bookended by headline-grabbing accounting scandals at Enron and other public companies, as well as the unraveling of Bernie Madoff's pyramid scheme. Both episodes caught the SEC flat-footed.[305] Its inactivity stood in contrast to the New York Attorney General's Office, where Eliot Spitzer and his successors were celebrated for aggressive investigations into Wall Street.[306] Spitzer delighted in the contrast.[307]

The SEC's revolving door to Wall Street may explain its relatively hands-off approach toward enforcement. The SEC has one of the highest employee turnover rates in government, with officials often landing at highly profitable banks or their law firms.[308] That lucrative revolving door may encourage underenforcement.[309] Or, alternatively, it may encourage regulators to focus on enforcement of highly techni-

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=1&isAllowed=y [https://perma.cc/458Z-EF9E] (finding a higher likelihood of SEC comment-letter reviews for politically connected firms).

303 *See* Urska Velikonja, *Waiving Disqualification: When Do Securities Violators Receive a Reprieve?*, 103 CALIF. L. REV. 1081, 1115 (2015) (reporting that the bulk of the formal waivers that the SEC granted to enforcement respondents were to large investment banks); Stavros Gadinis, *The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers*, 67 BUS. LAW. 679, 679 (2012) ("[D]efendants associated with big firms fared better in SEC enforcement actions . . . in three important dimensions.").

304 *See* Kara Scannell, Liz Rappaport & Jess Bravin, *Judge Tosses Out Bonus Deal*, WALL ST. J. (Sept. 15, 2009, 12:01 AM), https://www.wsj.com/articles/SB125294493976909051 [https://perma.cc/RZ4P-QHR8].

305 *See* Kara Scannell & Jenny Strasburg, *Madoff Report Reveals Extent of Bungling*, WALL ST. J. (Sept. 9, 2009, 12:01 AM), https://www.wsj.com/articles/SB125210039740087421 [https://perma.cc/6LYV-KMNJ]; Doyle McManus, *Sources: SEC Didn't Keep a Close Watch on Enron*, L.A. TIMES (Feb. 3, 2002, 12:00 AM), https://www.latimes.com/archives/la-xpm-2002-feb-03-fi-sec3-story.html [https://perma.cc/HX75-S7UQ].

306 *Cf.* Paul Harris, *Eliot Spitzer: Wall Street's Fallen Angel*, GUARDIAN (Feb. 26, 2011, 7:05 PM), https://www.theguardian.com/world/2011/feb/27/eliot-spitzer-wall-street-fallen-angel [https://perma.cc/D96R-FVM4] (noting Spitzer's reputation at that time as the "Sheriff of Wall Street").

307 *See* Caroline Humer, *U.S. Judge Weighs in on 2003 Analyst Deal*, REUTERS (Mar. 18, 2010, 4:04 PM), https://www.reuters.com/article/wallstreet/update-1-u-s-judge-weighs-in-on-2003-analyst-deal-idUKN1823252420100318 [https://perma.cc/XKK8-7S6Z] (quoting Spitzer on the SEC's lackadaisical approach to investment research by conflicted sell-side analysts: "For the SEC to join with the banks to diminish consumer protections . . . is absolutely and fundamentally violative of their duty to the public . . . .").

308 *See* JONATHAN R. MACEY, THE DEATH OF CORPORATE REPUTATION 215–52 (2013).

309 *Id.* at 215–27.

cal regulations, rather than on simpler violations like pyramid schemes, to signal their skill to prospective private-sector employers.[310] In either case, the picture that emerges is that of a regulator captured by the firms that it oversees.[311]

2. Nudging the SEC

With that image in mind, Congress included a provision in the landmark Dodd-Frank Act establishing the SEC Investor Advisory Committee.[312] The Committee is charged with advising the SEC on essentially its entire regulatory portfolio.[313] In creating the Committee, Congress aimed to shift the mix of advice that the SEC receives away from Wall Street and to individual investors.[314]

The Dodd-Frank Act requires that the Committee include ten to twenty members representing the interests of individual and institutional investors, specifically naming retail investors in mutual funds and employees with pension-fund investments.[315] Today, academics, investment managers serving both retail and institutional investors, and the president of an investor-advocacy nonprofit group hold these seats.[316] The statute also reserves seats for the newly created SEC Investor Advocate, a representative of state securities commissions, and a representative of senior citizens' interests.[317]

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310 *Id.*

311 *See* Stephen Labaton, *Agency's '04 Rule Let Banks Pile Up New Debt*, N.Y. TIMES (Oct. 2, 2008), https://www.nytimes.com/2008/10/03/business/03sec.html?hp=&pagewanted=print [https://perma.cc/2YNU-ZFTV]; Pritchard, *supra* note 300, at 1089–92.

312 15 U.S.C. § 78pp.

313 *See id.* § 78pp(a)(2) (authorizing the Committee to advise on "securities products, trading strategies, and fee structures, . . . disclosure[s], . . .[and] initiatives to promote investor confidence and the integrity of the securities marketplace," among other subjects).

314 *See* Addison Braendel & Seth Chertok, *Investment Advisers: Investor Protection Act of 2009*, 3 BLOOMBERG L. REPS., nos. 31–35, 2010, at 40, 43.

315 *See* 15 U.S.C. § 78pp(b)(1)(D).

316 *See Spotlight on Investor Advisory Committee*, SEC (Feb. 14, 2017), https://www.sec.gov/spotlight/investor-advisory-committee.shtml [https://perma.cc/NY4M-NV3L]. In some respects, the Committee still falls short of representing the diverse array of investor interests. It includes no Black committee members, and skews toward large-cap, index-fund investors. *See* Press Release, House Comm. on Fin. Servs., Waters and Beatty Blast Lack of Diversity on SEC Advisory Committees, (Jan. 14, 2020), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=406067 [https://perma.cc/KY3T-S8XZ]; *Legislation to Further Reduce Impediments to Capital Formation: Hearing on H.R. 31, H.R. 1800, H.R. 1973, and H.R. 2274 Before the Subcomm. on Cap. Mkts. & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 113th Cong. 166 (2013) (statement of David Weild, Chairman & CEO, IssuWorks).

317 *See* 15 U.S.C. § 78pp(b)(1)(A)–(C).

Although the SEC had established an investor-focused advisory group on its own authority one year prior to the Dodd-Frank Act,[318] the entity that Congress created in 2010 went beyond those efforts. Most importantly, the Dodd-Frank Act requires the SEC to respond to all of the Committee's recommendations.[319] For every recommendation that the Committee makes, the SEC must "promptly issue a public statement" that both assesses the recommendation and "discloses the action, if any, the [SEC] intends to take with respect to the . . . recommendation."[320]

That "assessment and action" requirement is sui generis. Incredibly, there is no record of any member of Congress ever introducing a bill with similar language prior to the Dodd-Frank Act.[321] Neither is there an account of how the provision ended up in the Dodd-Frank Act; it was added late in the process and without debate.[322]

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318 *See* SEC. & EXCH. COMM'N, INV. ADVISORY COMM., CHARTER (2009), https://www.sec.gov/spotlight/invadvcomm/invadvcomm-charter.pdf [https://perma.cc/ZQ6J-REHR].

319 Congress also exempted the Committee from FACA. *See* 15 U.S.C. § 78pp(i). That law mandates "fairly balanced in terms of the points of view represented" and subjects advisory committees to freedom-of-information and open-meetings requirements. 5 U.S.C. app. 2 §§ 5(a)(2), 10. By exempting the Committee from FACA, Congress reaffirmed its intent to create a consumer-focused body, rather than a balanced one, and gave the Committee the green light to operate with minimal public scrutiny if it so desired.

320 15 U.S.C. § 78pp(g)(2).

321 Several subsequent measures included similar language. *See* SEC Small Business Advocate Act of 2016, Pub. L. No. 114-284, 130 Stat. 1447 (codified as amended at 15 U.S.C. § 78qq) (materially identical language concerning the SEC Small Business Capital Formation Advisory Committee); Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, 132 Stat. 1296 (2018) (codified as amended at 15 U.S.C. § 80c-1) (materially identical language concerning recommendations from an annual public-private forum on capital formation); Digital Accountability and Transparency Act of 2012, H.R. 2146, 112th Cong. (materially identical language—in bill that passed House but was not voted on in Senate—concerning a proposed Federal Accountability and Spending Transparency Advisory Committee).

322 The only statement in the Congressional Record concerning the Investor Advisory Committee is an anodyne description from the Investor Protection Act's sponsor. *See* 155 CONG. REC. 19276 (2009) (statement of Rep. Mary Jo Kilroy) ("A permanent . . . Committee will . . . provid[e] investors a greater voice within the SEC."). The public-assessment requirement was introduced in the Senate via an amendment to an amendment of the Dodd-Frank Act and passed without debate. 156 CONG. REC. 8861 (2010).

Previously, the idea of a statutorily established investor advisory committee was floated in a 2009 Treasury report and included in two House bills introduced between that report's publication and the Dodd-Frank Act's passage in 2010. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM 15 (2009); Investor Protection Act of 2009, H.R. 3817, 111th Cong.; Investor Advisory Committee Act of 2009, H.R. 3318, 111th Cong. None of these proposals contained a public-assessment requirement, and there was virtually no House committee or floor debate about either bill's proposed advisory committee.

After passage, the Committee's boosters expressed optimism that it would amplify investors' voices and guard against capture.[323] Investor advocate Barbara Roper, for instance, viewed the Committee as a solution to small investors' collective-action problem: "[I]nvestors often lack the organization, manpower and resources to . . . interact effectively with SEC leaders and staff," Roper stated in congressional testimony.[324] As a result, the SEC's agenda is often "developed with minimal impact from investors, while industry is involved at every step of the process."[325]

3. Impact

How has the Committee influenced securities regulation? At the very least, it has the SEC's ear. A rotating subset of commissioners—typically two or three, but sometimes all currently serving commissioners—attend the Committee's meetings.[326] More significantly, the SEC frequently pursues Committee recommendations, with some proposals leading to changes in policy. Figure 6 displays the disposition of the Committee recommendations issued between 2012 and 2018.[327]

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323 *See* ANDY GREEN & ANDREW SCHWARTZ, CTR. FOR AM. PROGRESS, CORPORATE LONG-TERMISM, TRANSPARENCY, AND THE PUBLIC INTEREST 28 (2018); Rick A. Fleming, Inv. Advoc., Sec. & Exch. Comm'n, Examining the Dodd-Frank Act and the Future of Financial Regulation, Keynote Address at the University of Maryland Robert H. Smith School of Business Center for Financial Policy (Nov. 16, 2016) (transcript available at https://www.sec.gov/news/speech/fleming-speech-keynote-address-111616.html [https://perma.cc/DBW3-QYRK]).

324 *Enhanced Investor Protection After the Financial Crisis: Hearing Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 112th Cong. 58 (2011) (prepared statement of Barbara Roper, Director of Investor Protection, Consumer Federation of America).

325 *Id.* at 9 (statement of Barbara Roper, Director of Investor Protection, Consumer Federation of America).

326 *See Spotlight on Investor Advisory Committee*, *supra* note 316 (including lists to minutes of recent Committee meetings, which include lists of attendees).

327 Substantially implemented proposals:

- (A) Strengthen rules regarding solicitation and advertising for private placements (Oct. 12, 2012); Response: issued rules regarding some recommendations (July 10, 2013). *See* SEC. & EXCH. COMM'N, OFF. OF THE INV. ADVOC., REPORT ON ACTIVITIES: FISCAL YEAR 2015 (2015) [hereinafter 2015 REPORT].
- (B) Company data filed with the SEC should be in machine-readable format (July 25, 2013); Response: issued rules encouraging data-tagging. *Id.*
- (C) Strengthen crowdfunding regulations (Apr. 10, 2014); Response: issued rules (Oct. 30, 2015). *Id.*
- (D) Reduce the trade settlement cycle from three days after a trade to one day (Feb. 12, 2015); Response: issued a rule reducing it to two days (Mar. 22, 2017). *See* Press Release, Sec. & Exch. Comm'n, SEC Adopts T+2 Settlement Cycle for Securities Transactions (Mar. 22, 2017), https://www.sec.gov/news/press-release/2017-68-0, [https://perma.cc/5SG8-CL9H].
- (E) Greater disclosures in bond markets (June 7, 2016); Response: issued rules

(Nov. 17, 2016). *See* SEC. & EXCH. COMM'N, OFF. OF THE INV. ADVOC., REPORT ON ACTIVITIES: FISCAL YEAR 2018 (2018) [hereinafter 2018 REPORT].

- (F) Run a pilot study regarding transactions fees (Apr. 17, 2018); Response: issued rule (Dec. 19, 2018); Rule stayed pending resolution of litigation (Mar. 28, 2019). *See* SEC. & EXCH. COMM'N, INV. ADVISORY COMM., RECOMMENDATION OF THE INVESTOR ADVISORY COMMITTEE IN SUPPORT OF THE TRANSACTION FEE PILOT FOR NMS STOCKS (2018), https://www.sec.gov/comments/s7-05-18/s70518-4409794-175667.pdf [https://perma.cc/38T4-UDY7].

Partially implemented proposal:

- SEC should implement a pilot program to increase the minimum bid/ask tick sizes (Jan. 31, 2014); Response: pilot program approved (May 6, 2015). *See* 2015 REPORT, *supra*.

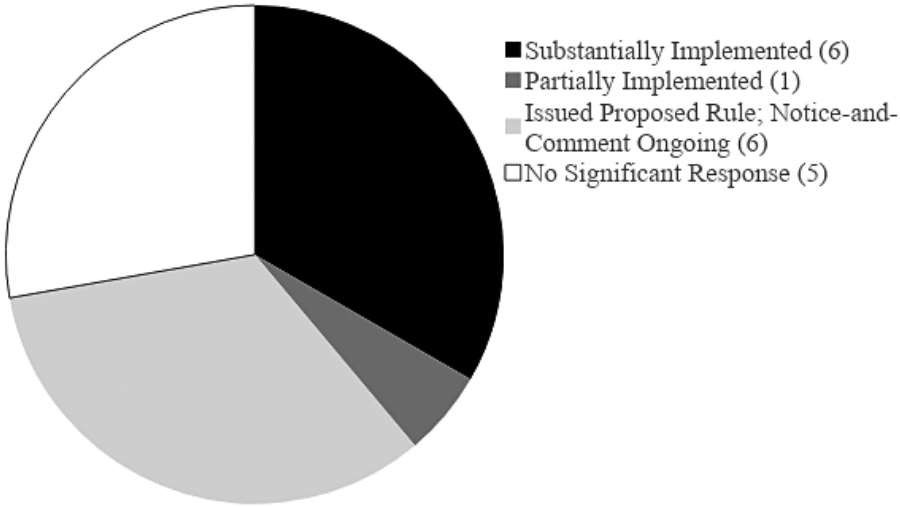
Proposals for which the SEC issued a proposed rule or notice-and-comment is ongoing:

- (A) Require target-date funds to include illustration showing asset and risk postures (Apr. 11, 2013); Response: public comments sought (Apr. 3, 2014). *Id.*
- (B) Encourage or require the use of universal proxy cards that include candidates' names (July 25, 2013); Response: issued proposed amendments to proxy rules (Oct. 26, 2016). *See* SEC. & EXCH. COMM'N, OFF. OF THE INV. ADVOC., REPORT ON ACTIVITIES: FISCAL YEAR 2019 (2019) [hereinafter 2019 REPORT].
- (C) Establish a fiduciary duty for broker-dealers when giving personalized advice (Nov. 22, 2013); Response: public comments sought (June 1, 2017). *See* 2018 REPORT, *supra*.
- (D) Revise criteria for accredited investor status (Oct. 9, 2014); Response: report issued (Dec. 18, 2015) and public comments sought (June 18, 2019). *See* 2019 REPORT, *supra*.
- (E) Require standardized disclosure of aggregate mutual fund costs (Apr. 14, 2016); Response: public comments sought (June 4, 2018). *Id.*
- (F) Improve disclosures related to human capital (Mar. 28, 2019); Response: proposed rule published and public comments sought (Aug. 8, 2019). *Id.*

Proposals for which the SEC has not issued a significant response:

- (A) Request congressional authorization to fund more frequent advisor exams via user fees (Nov. 22, 2013); No known response. *See* Ronald J. Triche, *SEC Investment Advisory Committee Adopts Recommendations*, NAT'L ASS'N PLAN ADVISORS (Nov. 25, 2013), https://www.napa-net.org/news-info/daily-news/sec-investment-advisory-committee-adopts-recommendations [https://perma.cc/RT8F-XF6U].
- (B) Ensure impartial disclosure of early results of proxy votes (Oct. 9, 2014); No known response. *See* 2019 REPORT, *supra*.
- (C) Create a searchable database of securities law violators (July 16, 2015); No known response. *See id.*; 2015 REPORT, *supra*.
- (D) Identify ways to secure external funding for law school investor advocacy legal clinics (Mar. 8, 2018); Response: proposal discussed during an SEC Investor Advocacy Clinic Summit on April 4, 2019. *See* 2018 REPORT, *supra*; SEC. & EXCH. COMM'N, OFF. OF THE INV. ADVOC., REPORT ON ACTIVITIES: FISCAL YEAR 2020 (2020) [hereinafter 2020 REPORT].
- (E) Encourage companies to improve disclosure of corporate governance-related risks (Mar. 8, 2018). Response: proposal discussed during an SEC public roundtable on November 15, 2018. *See* 2020 REPORT, *supra*.

FIGURE 6. SEC RESPONSES TO INVESTOR ADVISORY COMMITTEE RECOMMENDATIONS 2012–2018



As Figure 6 shows, the SEC undertook some formal response for thirteen of the Committee's eighteen recommendations.[328] Although this tendency does not prove a causal link, the fact that the SEC by law must respond expeditiously to each of the Committee's recommendations grants the Committee a powerful agenda-setting function. Whereas comments from members of the public may disappear into the ether, that is not so for the Committee's recommendations.

The SEC's drafting of Regulation Best Interest, a rule to elevate the standard of care for investment professionals, illustrates the range of responses that the Committee's recommendations provoke. The Committee recommended, first, that the SEC apply the same standard to situations in which an adviser urges an investor *not* to change her portfolio as would apply to an adviser's urging the investor to buy or sell securities.[329] The SEC adopted the Committee's proposed change.[330]

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328 These responses ranged from soliciting public comments on the Committee's proposal to issuing a rule that substantially tracks it.

329 INV. ADVISORY COMM., RECOMMENDATION OF THE INVESTOR ADVISORY COMMITTEE REGARDING PROPOSED REGULATION BEST INTEREST, FORM CRS, AND INVESTMENT ADVISERS ACT FIDUCIARY GUIDANCE 3 (2018), https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-on-proposed-reg-bi.pdf [https://perma.cc/MNP6-32XK].

330 *Compare* Regulation Best Interest, 83 Fed. Reg. 21,574 (proposed May 9, 2018) (proposed version of Regulation Best Interest without "no recommendation" directive), *with* Regulation Best Interest, 84 Fed. Reg. 33,318 (July 12, 2019) (to be codified at 17 C.F.R. pt. 240) (final rule containing "no recommendation" directive).

In that same rulemaking, the SEC declined to follow the Committee's recommendation that investment advisers' explicit fiduciary standard of conduct also apply to broker-dealers.[331] Yet the SEC could not simply ignore the Committee's advice. Instead, it is under a legal obligation to "promptly issue a public statement . . . assessing" each Committee recommendation, which compels it to demonstrate that it at least gave serious consideration to the Committee's position.[332] Accordingly, the SEC explained at length in the final rule why it concluded that this "one size fits all" approach would be suboptimal.[333] Thus, even when the Committee's views do not carry the day, those views can focus the SEC's attention on the Committee's priorities and compel commissioners to give them serious consideration.

Further, the Committee's agenda-setting function extends beyond the SEC. Members of Congress often take their cues from Committee statements.[334] Legislators encourage the SEC to act on Committee proposals,[335] and urge their colleagues to support Committee-endorsed legislation.[336] Committee proposals also may garner greater

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331 INV. ADVISORY COMM., *supra* note 329, at 5 & n.16.

332 *See* 15 U.S.C. § 78pp(g).

333 84 Fed. Reg. at 33,330 & n.123.

334 *See, e.g.*, *Application of Environmental, Social, and Governance Principles in Investing and the Role of Asset Managers, Proxy Advisors, and Other Intermediaries: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 116th Cong. 3 (2019) (statement of Sen. Sherrod Brown, Member, S. Comm. on Banking, Hous., & Urb. Affs.) (endorsing the Committee's proposal that public companies' filings include human-capital disclosures); *Legislative Proposals to Modernize Business Development Companies and Expand Investment Opportunities: Hearing Before the Subcomm. on Cap. Mkts. & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 114th Cong. 3 (2015) (statement by Rep. Carolyn Maloney, Member, H. Comm. on Fin. Servs.) (asserting that the Committee's proposed revised definition of an accredited investor is "a very good starting point for this discussion").

335 *See, e.g.*, *Oversight of the U.S. Securities and Exchange Commission: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 115th Cong. 65 (2018) (written question of Sen. Robert Menendez) (urging SEC chair Jay Clayton to "personally take another look" at the Committees recommendations regarding Regulation Best Interest); *Nomination of Jay Clayton: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 115th Cong. 123 (2017) (written question of Sen. Catherine Cortez Masto) (asking Jay Clayton, if confirmed to the SEC, to commit to respond to Committee recommendations within sixty days); Press Release, Sen. Elizabeth Warren, Levin, Reed, Markey, Warren Urge SEC to Protect Investors (Sept. 23, 2014), https://www.warren.senate.gov/newsroom/press-releases/levin-reed-markey-warren-urge-sec-to-protect-investors [https://perma.cc/F5Y5-W33A]; Press Release, House Comm. on Fin. Servs., Waters Calls on Hensarling to Protect Investors, Fund SEC Exams (July 11, 2014), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=388883 [https://perma.cc/D3AC-Q5WD]; *Oversight of the SEC's Agenda, Operations, and FY 2015 Budget Request: Hearing Before the H. Comm. on Fin. Servs.*, 113th Cong. 11–12 (2014) (statement of Mary Jo White, Chair, Securities and Exchange Commission, regarding Committee proposals on data-collection formats and the use of user fees to fund more frequent examinations of investment advisers).

336 *See, e.g.*, 162 CONG. REC. 905–07 (2016) (Rep. John Carney favorably noting that the

media attention because of the Committee's imprimatur.[337] Alongside its almost-unmatched statutory power to focus the attention of the SEC on its proposals, the Committee's ability to amplify its message on Capitol Hill and in the media makes it a significant voice in securities regulatory debates.

Finally, that Congress later replicated the Committee's novel "assessment and action" requirement for other advisory groups suggests that Congress viewed the Committee's structure as effective. As discussed above, the statutory mandate that the SEC publicly respond to all Committee recommendations was unique; there is no record of any lawmaker proposing such a measure—let alone Congress enacting one—prior to the establishment of the Investor Advisory Committee in 2010.[338] In 2016 and again in 2018, however, Congress created new SEC advisory entities with materially identical provisions.[339] Congress's replication of this novel requirement likely indicates that it finds it consequential.

The roles that the Federal Reserve's community-banker seat and the SEC's Investor Advisory Committee play are not unique. Although not nearly as prevalent as identity-neutral measures, similar identity-conscious structures exist across government, as Part II detailed. The case studies in this Part have demonstrated that they can be remarkably effective in bolstering groups that are seen as under-

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Committee recommends altering the definition of an accredited investor); 163 CONG. REC. H263 (daily ed. Jan. 10, 2017) (similar).

337 *See, e.g.*, Editorial, *Keeping Track: Drug Sentences and Crowdfunding*, N.Y. TIMES (Apr. 10, 2014), https://www.nytimes.com/2014/04/11/opinion/keeping-track-drug-sentences-and-crowdfunding.html [https://perma.cc/V8JQ-WZNF]; Suzanne Barlyn, *COMPLY-U.S. SEC May Get a Push Toward Broker Reforms*, REUTERS (Nov. 21, 2013), https://www.reuters.com/article/brokers-fiduciary/comply-u-s-sec-may-get-a-push-toward-broker-reforms-idUSL2N0J51UU20131121 [https://perma.cc/9D7R-GTVX]; Editorial, *A Disappointing Debut*, N.Y. TIMES (May 5, 2013), https://www.nytimes.com/2013/05/06/opinion/a-disappointing-debut-at-the-sec.html [https://perma.cc/BLE8-JRS9]. In addition, Committee members writing op-eds in their individual capacity often include their Committee affiliation in their byline, perhaps because that status gives added weight to their views. *See, e.g.*, J.W. Verret, *SEC Hits Back at Unofficial Regulators of Public Companies*, FIN. TIMES (Sept. 18, 2019), https://www.ft.com/content/0c8c09e8-444d-32fc-9a2c-3f483c5d72ff [https://perma.cc/Q8ZC-M7PJ].

338 *See* sources cited *supra* note 322.

339 *See* 15 U.S.C. § 78qq (materially identical language concerning the SEC Small Business Capital Formation Advisory Committee); 15 U.S.C. § 80c-1 (materially identical language concerning recommendations from an annual public-private forum on capital formation). Bills proposing similar structures in other agencies also received broad support—although ultimately insufficient for passage. *See, e.g.*, H.R. 2146, 112th Cong. (2012) (materially identical provision for proposed Federal Accountability and Spending Transparency Advisory Committee to focus on government-wide spending; bill passed the House but was not scheduled for a vote in the Senate).

represented in administrative law's conventional, identity-neutral mechanisms. With these insights as foundation, Part IV takes a normative turn, arguing that greater use of these structures would increase the administrative state's democratic accountability, among other benefits, and offers insights regarding how to design new identity-conscious structures.

IV. Implications & Prescriptions

"The history of administrative law," Professors Sidney Shapiro, Elizabeth Fisher, and Wendy Wagner write, "constitutes a series of ongoing attempts to legitimize unelected public administration in a constitutional liberal democracy."[340] Because they structurally advantage some groups over others, administrative law's conventional responses are not up to the task alone. As Part I described, identity-neutral avenues for popular participation in agency decision-making and public access to agency information disproportionately benefit the well-resourced. For greater presidential control to enhance agencies' democratic responsiveness, a set of herculean assumptions regarding the identity-neutrality of the franchise must be met. Given these considerable shortcomings, adding countervailing identity-conscious structures would provide a needed corrective.

Parts II and III provided a roadmap for that project. Recall that, in creating a community-bank seat on the Fed and an investor committee to advise the SEC, Congress strayed from the identity-neutral framework that undergirds much of administrative law. Small banks were seen as outmaneuvered in Washington, resulting in a regulatory system that placed them at a competitive disadvantage.[341] Likewise, some observers viewed regulated interests as having captured the SEC's policymaking machinery at the expense of a diffuse and poorly organized investor class.[342] Both observations are consistent with Professor John Coffee's characterization of financial regulatory politics as an "inherently one-sided battle" between deep-pocketed, sophisticated players in the financial services industry and other affected par-

340 Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 Wake Forest L. Rev. 463, 463 (2012).

341 *See* Wilmarth, *supra* note 240, at 335 (presenting this view with respect to community banks).

342 *See* Macey, *supra* note 299, at 922 (summarizing the view that the SEC discounts retail investors' views); *see also* Sec. & Exch. Comm'n, *The Role of the SEC*, Investor.gov, https://www.investor.gov/introduction-investing/investing-basics/role-sec [https://perma.cc/9MNF-NKXG] (defining the SEC's tripartite mission to include "protect[ing] investors").

ties.[343] Recognizing the one-sided nature of these contests, Congress decided to "even the playing field," as Senator Vitter characterized the community-bank seat.[344]

This Part builds on the insights in Parts II and III to argue that thoughtfully designed identity-conscious structures should occupy a more prominent place in administrative law. It begins with a discussion of five likely results that we would reap from sowing the administrative state with identity-conscious structures.

In light of these benefits, identity-conscious structures provide a blueprint for future institutional designers: identify interests that are numerous in society but marginalized via existing avenues of influence, and give them a seat at the table. Accordingly, this Part then pivots to discuss the mechanics of doing so.

A. The Case for Identity-Conscious Administration

Identity-conscious structures offer five primary benefits: these measures can (1) enhance agencies' democratic connection by providing under-voiced groups with representation commensurate with their numbers; (2) build relationships between agencies and those communities; (3) facilitate the monitoring of agencies by resource-constrained outside groups; (4) shift policy to be more attuned to underrepresented groups' interests; and (5) ultimately even generate better policy from a social-welfare perspective.[345] Section IV.A discusses each of these advantages in turn.

1. Providing Greater Voice

By now, the notion that identity-conscious structures can amplify the voices of under-resourced groups needs little elaboration. Where identity-neutral measures fail to approximate within agencies the mix of viewpoints in the public sphere, the agency's democratic accountability is called into question. Greater use of identity-conscious measures can provide an antidote, ensuring that the interests at the table when agencies make policy are proportional to those in society writ large.

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343 John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1031 (2012).

344 160 CONG. REC. 12,292 (2014).

345 I consider these likely effects to be *advantages* of identity-conscious structures and frame this subpart accordingly. Naturally, that judgment is reversible depending on one's views concerning the group in question.

However, greater voice for underrepresented groups—without more—raises concerns about tokenism. Identity-conscious measures amplify voices from underpowered groups, but do not command any particular substantive outcome. By diversifying the voices in the conversation while still permitting the same interests to form a majority—and thus to determine the outcome—the argument goes, identity-conscious measures risk merely providing a legitimating gloss on the same disparate outcomes.[346]

This concern, although important, should not be exaggerated; identity-conscious structures are by no means a false hope. Even where members of underrepresented groups do not possess the votes needed to dictate policy, their enhanced presence can be consequential. As Sections IV.A.2 and IV.A.3 explain, elevating the voices of underrepresented groups can benefit those groups irrespective of whether that elevation alters outcomes. More importantly, Sections IV.A.4 and IV.A.5 show that greater representation of minority interests *can* in fact move outcomes, even where those interests still fall far short of commanding a majority.

2. Building Relationships

In the legislative context, shared characteristics between constituents and elected officials—which political scientists term *descriptive representation*—brings with it a host of benefits, regardless of the level of policy congruence between constituent and lawmaker or the lawmaker's influence on legislation.[347] These benefits include a greater sense of engagement, access, and efficacy,[348] all of which are "psychological needs that are no less important for being intangible."[349]

The impact of constituents' greater connection to, and thus comfort with, elected officials with whom they share an important aspect of their identity manifests itself in several ways. As discussed above, constituents are more likely to contact their member of Congress

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346 *See* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1145–54 (1991) (raising these concerns in the context of other mechanisms to promote minority representation on majoritarian bodies). For another perspective on how procedural fairness can paper over disparate substantive outcomes, see Rory Van Loo, *Federal Rules of Platform Procedure*, 88 U. CHI. L. REV. 829, 893 (2021) ("Procedural focus . . . risks buttressing the existing institutions and legitimizing the harms they cause.").

347 SWAIN, *supra* note 170, at 217.

348 Lawrence Bobo & Franklin D. Gilliam, Jr., *Race, Sociopolitical Participation, and Black Empowerment*, 84 AM. POL. SCI. REV. 377, 379 (1990).

349 SWAIN, *supra* note 170, at 217.

when they share the same race.[350] Thus, descriptive representation can strengthen ties between members of historically subordinated groups and the polity.[351]

Descriptive alignment between constituent and representative also affects the representative's behavior. For instance, analysis of a large-scale database of congressional correspondence to agencies reveals that lawmakers are more likely to pursue constituency-service requests with agencies when the lawmaker and constituent share the same race, gender, or veteran status, controlling for other factors.[352]

It is easy to see how these findings could translate to administrative fora. Although social-science research concerning descriptive representation in administrative agencies is not nearly as developed as in the legislative context, one expects a similar logic to apply: citizens may be more likely to reach out to agency officials with similar identities or backgrounds as them, and these officials may be more responsive when they share features in common with members of the public who contact them.

As the cliché goes, a relationship is a two-way street. Here, that means that identity-conscious measures may not only encourage citizens to contact agencies, but also induce agencies to reach out to citizens on the latter's terms. Rulemaking dockets are often long, highly technical, and essentially unintelligible to the lay reader.[353] To some extent, those features may be unavoidable in complex policy areas. More perniciously, however, well-resourced groups sometimes flood agencies with excessive information, which the agency is then legally obliged to consider in informal rulemakings.[354] This phenomenon, which Professor Wendy Wagner terms *information capture*, leads less well-resourced groups lacking "the time, the resources, or the expertise to continue reviewing all of the information that becomes part of the rulemaking record."[355] Further, with participation in rulemaking dominated by well-resourced groups, agency officials may begin to see

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350 David E. Broockman, *Distorted Communication, Unequal Representation: Constituents Communicate Less to Representatives Not of their Race*, 58 AM. J. POL. SCI. 307 (2014); Gay, *supra* note 169, at 717–18.

351 Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes,"* 61 J. POL. 628, 650–52 (1999).

352 *See* Kenneth Lowande, Melinda Ritchie & Erinn Lauterbach, *Descriptive and Substantive Representation in Congress: Evidence from 80,000 Congressional Inquiries*, 63 AM. J. POL. SCI. 644 (2019).

353 *Cf.* Wagner, *supra* note 65, at 1369.

354 *Id.* at 1325.

355 *Id.*

these groups—and not other stakeholders—as their primary audience. As a result, rules are needlessly complex: pellucid to those in-the-know, but impenetrable to others.[356]

Again, identity-conscious structures could be curative. Consistent engagement with under-resourced groups, which these measures mandate, reminds agency officials that they have stakeholders beyond those familiar faces that are fluent in bureaucratese.[357] Greater awareness of these relationships may encourage agencies to strive for clear, accessible writing to the extent possible. Dialogue with a broader set of stakeholders may also motivate agencies to reform the procedures that make information capture by well-resourced groups possible.

3. Enhancing Oversight

Identity-conscious structures can also improve information-revelation and the monitoring of agencies. Even when their views do not carry the day, critiques emanating from minority-interest structures within an agency can alert powerful allies in Congress, the media, and elsewhere to take up the cause. Thus, identity-conscious measures can encourage oversight of agencies by a wider set of outside groups.

Affected individuals and groups often have reason to monitor agencies' activities. One set of monitoring devices is grounded in formal equality: all citizens, for instance, can read about agency actions that must be published in the Federal Register, obtain information via FOIA, or attend agency meetings pursuant to the Sunshine Act.[358]

Yet these methods of continuous monitoring are costly, time consuming, and may be prohibitive for under-resourced groups.[359] The more efficient solution is to place what social scientists Matthew McCubbins and Thomas Schwartz label a "fire alarm" within the agency, i.e., a mechanism that will automatically alert an interested outside group of a disfavored action by the agency, without that group needing to undertake costly auditing to discover such actions on its own.[360] Once an alarm is activated, the group can spring into action.

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356 *See id.*

357 *See id.*

358 *See supra* Part I.

359 *See* McCubbins et al., *Structure and Process*, *supra* note 124, at 434. Relatedly, similar individuals who receive small benefits (or detriments) from an agency may find it challenging to organize collectively and bear these monitoring costs. *See generally* OLSON JR., *supra* note 222.

360 Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984). Although McCubbins and Schwartz focus on congressional oversight, their terminology applies to other extra-agency monitors, such as interest groups or journalists, as well.

The Export-Import Bank, a government corporation, contains such a fire alarm. The Bank's advisory committee, which regularly consults with the Bank's board, must include two representatives of environmental groups.[361] Should those representatives learn of planned financing for a project with potential adverse environmental implications, they can alert other environmental groups, aligned politicians, and media. Similarly, the Federal Reserve case study also shows how officials placed within an agency can assist likeminded outside groups' monitoring efforts. Governor Bowman's frequent interactions with community bankers enable them not only to communicate their views to a Fed insider, but also to learn what Fed actions that may affect their banks are on the horizon.[362]

Just as fire alarms obviate the need for firefighters to expend resources actively searching for fires, so too can particular representatives "on the inside" reduce the need for outside groups to engage in costly monitoring of agencies. Because monitoring costs are largely fixed,[363] the subsidy that fire alarms provide to outside entities is of greater value to smaller or less wealthy groups. In this way, representation and consultative requirements perform an additional equalizing function, helping to level the playing field between high- and low-resource groups concerning oversight of agency activities.

4. Shifting Policy

Although identity-conscious measures do not command any particular substantive outcome, they may nonetheless encourage outcomes that are more favorable to their subjects. These effects are perhaps most readily apparent where individual officials hold discretion over policy implementation. For instance, studies have found that greater racial and gender diversity among line-level bureaucrats leads to better outcomes for those groups across an eclectic set of outcomes, from federal farm-loan originations to local policing practices.[364]

Diversity at the top also matters. Specifically, the presence of out-group members in a deliberative body—even when those out-group

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361 EXP.-IMP. BANK, CHARTER OF THE ADVISORY COMMITTEE (2019).

362 *See supra* Section III.A.

363 *See* McCubbins & Schwartz, *supra* note 360.

364 *See* Jason A. Grissom, Emily C. Kern & Luis A. Rodriguez, *The "Representative Bureaucracy" in Education: Educator Workforce Diversity, Policy Outputs, and Outcomes for Disadvantaged Students*, 44 EDUC. RESEARCHER 185, 186 (2015) (summarizing this literature); *see also* Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 433 (1992) (similar effects in judicial proceedings).

members do not command a majority—can alter outcomes, moving the body's conclusion toward the out-group's position.[365]

My research with Peter Conti-Brown and Kaleb Nygaard reveals one way in which greater representation of subordinated groups can move policy outcomes.[366] We have examined how racial diversity in the boards of directors of the twelve regional Federal Reserve Banks is associated with the extent to which commercial banks that they supervise comply with the Community Reinvestment Act of 1977 ("CRA").[367] The CRA charges the regional Reserve Banks to evaluate covered banks' "record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution."[368] Congress's purpose in enacting the CRA has typically been understood as redressing racial discrimination and elevating minority borrowers and communities.[369]

Conti-Brown, Nygaard, and I have found that greater representation of minority groups on the relevant Reserve Bank boards is closely correlated with higher Fed-supervised commercial banks' scores on their CRA examinations.[370] This finding suggests that, when faced with a regulator governed by a larger number of Black or Hispanic directors, commercial banks engage in greater CRA lending.[371] That this shift occurs, despite the fact that Black and Hispanic directors never comprise a majority of Reserve Bank board members, suggests that greater representation of under-voiced groups can be consequential even when those groups cannot dictate outcomes. Perhaps, rather than seeing other commissioners as an immovable voting bloc, deliberation involving minority-interest commissioners and persuasion by minority-interest advisory committees can change minds.

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365 *See* Sunstein, *supra* note 160, at 88–90 (summarizing this literature).

366 Brian D. Feinstein, Peter Conti-Brown & Kaleb Nygaard, Board Diversity Matters: An Empirical Assessment of Community Lending at Federal Reserve-Regulated Banks (Oct. 30, 2021) (unpublished working paper) (on file with author).

367 12 U.S.C. §§ 2901–2908.

368 *Id.* § 2903(a)(1).

369 *See* Griffith L. Garwood & Dolores S. Smith, *The Community Reinvestment Act: Evolution and Current Issues*, 79 FED. RSRV. BULL. 251 (1993).

370 *See* Feinstein et al., *supra* note 366. This finding is based on an identification strategy that controls for the state regulatory climate, local economic conditions, and all year-level confounders. *See id.*

371 *See id.*

5. *Improving Decision-Making*

Diverse institutions may benefit not only members of the newly empowered groups, but also society writ large. For one, access to diverse situational knowledge may provide policymakers with relevant information that would otherwise have been absent. In turn, that greater knowledge can be marshaled to craft objectively "better" policies (in a social welfare-maximizing sense). For instance, when the Department of Transportation began work on a proposed rule regarding a new time-management system for motor carriers, the Department agreed to include the rulemaking in a pilot study to enhance participation in rulemaking by targeting "newcomers to participate," among other measures.[372] During a discussion with truck drivers, drivers described instances when similar time-management systems compelled them to stop driving and pull over in an unsafe area or while very close to their destination.[373] These episodes arguably could not be recounted as effectively by a second-degree narrator, e.g., a trucking industry association or union's government affairs representative. As a result of the truckers' participation, regulators may have received a more complete picture of the object of their regulations than they otherwise would have.[374]

Further, workplace diversity in the private sector yields economic benefits under certain conditions.[375] For instance, members of corporate boards of directors with collegial, egalitarian cultures tend to view board diversity as a business asset.[376]

Likewise, scholars have found benefits to diversity in government entities with similarly collegial, nonhierarchical cultures: multimember judicial panels. Specifically, the impact of judges' ideologies or the

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372 *See generally* Cynthia R. Farina, Mary Newhart & Josiah Heidt, *Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts*, 44 ENV'T L. REP. 10,670 (2014).

373 *Id.* at 10,674.

374 *See id.* ("While stories of this kind may not often radically shift agency thinking, they can provide relevant contextual information that could help the agency understand more fully the impact its proposal is likely to have 'on the ground.'").

375 Nonetheless, research on the effects of private-sector workplace diversity reaches mixed conclusions. *See, e.g.*, Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 ADMIN. SCI. Q. 229 (2001) (discussing conflicting conclusions regarding the effects of work-group diversity); Stephanie J. Creary, Mary-Hunter ("Mae") McDonnell, Sakshi Ghai & Jared Scruggs, *When and Why Diversity Improves Your Board's Performance*, HARV. BUS. REV. (Mar. 27, 2019), https://hbr.org/2019/03/when-and-why-diversity-improves-your-boards-performance [https://perma.cc/64SW-99J6] (describing similar mixed conclusions in the literature on gender and other forms of diversity on corporate boards).

376 Creary et al., *supra* note 375.

partisanship of the President that appointed them is blunted when judges sit on ideologically diverse panels.[377]

More generally, Professor Cass Sunstein argues that ideological heterogeneity encourages agencies to reach less extreme outcomes.[378] Drawing on social psychology, Sunstein presents two pathways by which groups go to extremes: a *social comparison* explanation, i.e., that people adjust their behavior so that their peers will see them favorably, and a *limited argument pools* explanation, namely, that people are influenced by the arguments that they encounter.[379] Both explanations indicate that sustained encounters with dissimilar colleagues promote moderation. Nothing about these explanations implies that these effects are limited to *ideological* diversity. Diversity across a host of characteristics presumably has similar moderating effects.

A growing body of research shows that as administrative agencies and other policymaking institutions become more polarized,[380] we see an increased likelihood of large swings in policy—and thus greater regulatory uncertainty—following presidential transitions,[381] leading to a decrease in the ability of the government to address the nation's problems.[382] To the extent that identity-conscious structures promote moderation and policy stability, they therefore are likely to have a positive effect.

B. Where to Start

Given these benefits of greater use of identity-conscious structures, how should institutional designers proceed? This Section addresses two fundamental questions. *First*, which institutions should establish or empower identity-conscious structures, and how? *Second*,

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377 *See, e.g.*, Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2156 (1998).

378 *See* Sunstein, *supra* note 160, at 88–90; *accord* Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 75–78 (2018) (summarizing related scholarship).

379 *See* Sunstein, *supra* note 160.

380 *See* Feinstein & Henderson, *supra* note 31, at 235 n.266 (polarization across institutions).

381 *See* Scott R. Baker, Nicholas Bloom & Steven J. Davis, *Measuring Economic Policy Uncertainty*, 131 Q.J. ECON. 1593 (2016); Michael D. Bordo, John V. Duca & Christoffer Koch, *Economic Policy Uncertainty and the Credit Channel: Aggregate and Bank Level U.S. Evidence over Several Decades*, 26 J. FIN. STABILITY 90 (2016); Brandon Julio & Youngsuk Yook, *Political Uncertainty and Corporate Investment Cycles*, 67 J. FIN. 45 (2012).

382 *See* Frances E. Lee, *How Party Polarization Affects Governance*, 18 ANN. REV. POL. SCI. 261, 274 (2015).

which underrepresented or disadvantaged groups ought to be the focus of these structures? Discussion of the first question focuses on Congress and the courts. Concerning the latter question, I conclude that, although the optimal targets of these structures may vary based on the agency and issue area, there is good reason to begin these efforts, particularly in the realm of financial regulation, by empowering groups focused on racial equity.

1. With Congress

Although agencies can do some of this work sua sponte,[383] the lion's share of the effort must come from new congressional enactments. New representational requirements on commissions and statutory requirements that agencies respond to comments from specified interests both require congressional authorization. Although agencies can create advisory committees and new offices within agencies advocating for underpowered groups in agency decision-making, congressional involvement would ensure greater durability.

Would Congress want to redress inequalities in participation? After all, Congress is subject to the same outsized pressures from well-resourced groups as agencies are.[384] Going further, a Congress that is spurred to cater to powerful interests may even create structures to *reinforce* inequities.[385] Indeed, this dynamic was present in the regional Federal Home Loan Banks as originally constituted. The banks were governed by nine-member boards of directors selected, with equal representation, by small, medium, and large member-banks in the region.[386] It took a crisis—the savings-and-loan debacle of the 1980s—for Congress to recognize that this allocation facilitates cap-

383 For instance, agencies can form new advisory committees without needing to seek congressional authorization. *See* Feinstein & Hemel, *supra* note 183, at 1154 n.86. That action would effectuate a recommendation in a report recently issued by the Administrative Conference of the United States: that agencies identify individuals and groups with "experiences, views, or other information relevant to [a] rulemaking" but "who are likely to be absent," and conduct "robust, targeted outreach" to these groups. SANT'AMBROGIO & STASZEWSKI, *supra* note 213, at 28. More durable structures, however, would require congressional support.

384 *See* Dorie Apollonio, Bruce E. Cain & Lee Drutman, *Access and Lobbying: Looking Beyond the Corruption Paradigm*, 36 HASTINGS CONST. L.Q. 13, 47 (2008).

385 *Cf.* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1788 (2013) (referring to a tendency in public law whereby scholars identify a suboptimal incentive structure that afflicts policy actors and then prescribe some corrective that similarly situated policy actors should adopt).

386 Federal Home Loan Bank Act, Pub. L. No. 72-304, § 7(d), 47 Stat. 725, 730 (1932).

ture and to amend the boards' structures to mandate more diverse representation, including consumer and community advocates.[387]

Lawmakers' impulse to establish inequality-reinforcing structures, however, likely is tempered because such actions are, relatively speaking, straightforward, traceable, and thus easy for the public to understand and assign blame.[388] If legislators mandate that appointees with Wall Street megabank experience must be represented on financial regulatory commissions, for instance, they risk reaping a whirlwind. That capture narrative would be easily cognizable and traceable to Congress; it is the stuff of headlines.[389]

By contrast, expansion of identity-neutral measures like public participation also facilitates capture,[390] but in a manner that is less traceable. Essentially, whereas politically powerful interests could encourage Congress to create both facially neutral structures *and* inequality-reinforcing ones that benefit them, voters' greater ability to understand the latter measures presumably would discourage lawmakers' relative use of them.[391]

2. With the Courts

Courts also could promote the use of identity-conscious structures aimed at furthering substantive equality. For instance, whether an agency adequately considered the views of underpowered interests could be a "relevant factor" during hard-look review.[392] This concept should be familiar to judges; the notion that courts ought to be particularly mindful that all affected interests have a seat at the table in agency decision-making essentially imports John Hart Ely's advocacy

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387 *See* N. Eric Weiss, Cong. Rsch. Serv., RL32815, Federal Home Loan Bank System: Policy Issues 2 (2007).

388 *See* R. Douglas Arnold, The Logic of Congressional Action 27 (1990).

389 *See, e.g.*, Natalie Kitroeff & David Gelles, *Before Deadly Crashes, Boeing Pushed for Law that Undercut Oversight*, N.Y. Times, Oct. 28, 2019, at A1, A20 (front page story, published following two fatal Boeing 737-MAX crashes, that criticized Congress for passing a law "mandat[ing] regulatory capture" over aviation-safety oversight, including by establishing an industry-dominated safety advisory committee (quoting Doug Anderson, a former attorney in the Federal Aviation Administration's office of chief counsel)).

390 *See supra* Section I.A.

391 *See* Arnold, *supra* note 388, at 27 (explaining that lawmakers are motivated to promote policies with general benefits where voters can trace an observed policy effect back to the lawmaker).

392 *Cf.* Bressman, *supra* note 13, at 529 (proposing that courts reimagine *State Farm*'s reasoned-decision-making requirement to "promote accountability by ensuring public participation in or oversight of the administrative process"); *see also* Stewart, *supra* note 41, at 1787 (proposing that courts "give special weight to those interests that are likely to be 'underrepresented'" in agency decision-making processes).

for "representation reinforcing" judicial review into administrative law.[393]

Judicial deference doctrine is particularly well-suited to encourage agencies' use of these measures. As *United States v. Mead Corp*.[394] provides, judicial review of agencies' statutory interpretations is less deferential where those interpretations appear in more informal vehicles, like guidance documents and opinion letters.[395] That sliding scale of deference is grounded, in part, on the fact that these informal procedures are not "subject to the rigors of the [APA], including public notice and comment."[396] In other words, because public participation is important, courts reward agencies that provide for it in their policymaking process.

Given that open-access provisions like notice-and-comment privilege certain voices over others, however, the Supreme Court also should consider whether the policy under review was the product of a process that included identity-conscious structures to correct for these sorts of imbalances. The Court would then assign a higher degree of deference to agency decisions that meet this standard.[397]

3. Start with a Focus on Racial Justice

The pool of underpowered groups with legitimate claims to beneficial identity-conscious structures is large, whereas seats on multimember commissions and appointees' time devoted to advisory committees are scarce resources. How can one determine which interests ought to be elevated? The answer to this question must be context-specific, depending on the particular array of actors involved in a policy domain, their historic treatment, and their current relative power.

Nonetheless, efforts to advance substantive equality via identity-conscious structures ought to begin with African Americans.[398] Re-

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393 JOHN HART ELY, DEMOCRACY AND DISTRUST 87–88 (1980); *see also* Bressman, *supra* note 13, at 483–84 (describing a similar application of Ely's theory to administrative law).

394 533 U.S. 218 (2001).

395 *Id.* at 231; *see also* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000).

396 Reno v. Koray, 515 U.S. 50, 61 (1995) (quoting Koray v. Sizer, 21 F.3d 558, 562 (3d Cir. 1994)).

397 This proposal evokes Wendy Wagner's call for judicial review to vary based on "the level of vigorous and balanced engagement by interest groups." Wagner, *supra* note 65, at 1327.

398 *Cf.* Fiss, *supra* note 37, at 150 (describing how the original aim of antisubordination in constitutional law was to improve the status of African Americans). Scholars later extended the concept to women and a limited number of other groups that have borne the brunt of systemic discrimination. *See* Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 369–77 (2006).

turning once again to finance as this Article's motivating example, African Americans' financial position is on average considerably more precarious than that of other groups. The net worth of the median Black household in the United States is one-tenth that of white households.[399] Substantial gaps also exist with respect to median income, employment rates, and other measures of economic health.[400] Concerning financial services specifically, 20.6 percent of Black households in 2013 were "unbanked," meaning that no household member had a checking or savings account, compared to 3.6 percent of white households.[401] African Americans pay higher rates for mortgages and other loans, more fees for basic banking services, and are more likely to be foreclosed on and sued by creditors than whites (all controlling for other relevant factors).[402]

At the same time, African Americans are substantially underrepresented among financial regulators, accounting for only three percent of appointees to financial regulatory agencies and four percent of these agencies' senior staff throughout history.[403] Today, National Credit Union Administration chair Rodney Hood and Deputy Treasury Secretary Adewale Adeyemo are the only serving Black appointees.[404] Black representation among financial regulators substantially trails that among members of Congress, federal courts, and large public companies' boards of directors.[405]

This near absence of African American financial regulators matters regardless of its effects on policy. In the legislative context, minority representation brings benefits apart from the content of that representation. Specifically, shared characteristics between constituents and elected officials—i.e., descriptive representation—fulfills a "host of psychological needs that are no less important for being intangible,"[406] including a greater sense of engagement, access, and effi-

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399 Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-White Wealth Gap*, Brookings (Feb. 27, 2020), https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/ [https://perma.cc/72E6-WW6Z].

400 *Id.*

401 Fed. Deposit Ins. Corp., 2017 FDIC National Survey of Unbanked and Underbanked Households 1, 3 (2018), https://www.fdic.gov/householdsurvey/2017/2017report.pdf [https://perma.cc/MSP9-RAWK].

402 *See* Baradaran, *supra* note 196, at 8.

403 Chris Brummer, What Do the Data Reveal About (the Absence of Black) Financial Regulators? 8, 10 (Mar. 15, 2021) (unpublished working paper) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3656772 [https://perma.cc/82EH-3BY9]).

404 *Id.* at 6–7.

405 *Id.* at 1–2.

406 Swain, *supra* note 170, at 217.

cacy.[407] It is easy to see how these findings translate to administrative fora.

The dearth of African American financial regulators also matters for substantive outcomes. Although definitive proof that a lack of diverse regulators *caused* a given outcome often is elusive, some hints are present at the CFPB. Finance scholars Charlotte Haendler and Rawley Heimer's examination of the resolutions of consumer complaints against financial-services companies filed with the CFPB reveals a lower rate of restitution for complaints filed by residents of predominantly African American areas during the Obama Administration.[408] That "financial restitution gap" grew during the Trump Administration; the difference in the likelihood of receiving restitution for complainants living in areas in the bottom versus top quintile in terms of African American population increased from 0.64 percentage points under President Obama to 2.73 percentage points under President Trump.[409] A similar financial restitution gap exists for complainants living in high- versus low-income areas.[410]

The Trump Administration's lighter consumer-financial regulatory posture cannot explain these differences in firms' *relative* treatment of different racial and economic groups. Neither can the claim that African Americans and lower-income consumers tend to use different types of financial products and deal with different companies, as the authors accounted for these controls and other factors.[411]

Accordingly, Haendler and Heimer speculate that firms adjust their willingness to settle a customer's complaint based on their perceptions of how attuned regulators would be to that particular complainant.[412] In other words, when firms bargain in the shadow of the law, they account for the prospect that the law enforcer may prioritize some people over others.[413]

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407 Bobo & Gilliam, Jr., *supra* note 348, at 379.

408 Charlotte Haendler & Rawley Z. Heimer, The Financial Restitution Gap in Consumer Finance: Insights from Complaints Filed with the CFPB 14 (Feb. 9, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3766485 [https://perma.cc/X8PB-AJ82].

409 *Id.*

410 *See id.* (reporting that the difference in the likelihood of receiving restitution for complainants living in high-income versus low-income areas increases from 1.12 percentage points under Obama to 1.99 percentage points under Trump).

411 *Id.* at 2, 10–11. Further, the share of complaints also is roughly equal in low socioeconomic-status areas as in high socioeconomic-status areas. *Id.* at 2.

412 *See id.* at 16–17, 26.

413 *See id.* at 25–26.

How could financial firms have gotten that idea? The Trump Administration's de-emphasis on structures elevating subordinated groups provides one obvious clue. For instance, Acting CFPB Director Mick Mulvaney removed the enforcement powers of the CFPB's Fair Lending Office,[414] a prime example of a mission-driven agency office described above.

Or consider the CFPB's Consumer Advisory Board, established pursuant to the Dodd-Frank Act to advise the CFPB regarding essentially its entire regulatory portfolio.[415] The Board is required to include "experts in . . . community development, fair lending and civil rights, . . . representatives of depository institutions that primarily serve underserved communities, . . . representatives of communities that have been significantly impacted by higher-priced mortgage loans," and two other categories.[416] It is no great stretch to consider these categories as targeting, at least in part, African Americans and other underserved minorities. Acting Director Mulvaney dismissed all twenty-five members of the Board,[417] many of whom possessed professional expertise focused on these statutorily listed marginalized groups.[418] He later reconstituted the Board, with only two of the eight new members meeting the statutory criteria.[419]

These and other moves to dismantle identity-conscious structures sent a clear message to regulated firms regarding the CFPB's priorities. Had the Bureau instead enhanced its structures designed to spotlight subordinated groups, that action would have sent a contrary signal to financial firms—and, consequently, could have led to very different firm behavior than what Haendler and Heimer observe.

The relative absence of African American financial regulators also can matter for regulatory priorities. Sometimes, the placement of

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414 *See* Kate Berry, *CFPB's Mulvaney Strips His Fair-Lending Office of Enforcement Powers*, AM. BANKER (Feb. 1, 2018, 6:43 PM), https://www.americanbanker.com/news/cfpbs-mulvaney-strips-his-fair-lending-office-of-enforcement-powers [https://perma.cc/P85E-9Z4L].

415 12 U.S.C. § 5494(a).

416 *Id.* § 5494(b).

417 Chris Arnold & Avie Schneider, *Mick Mulvaney Effectively Fires CFPB Advisory Council*, NPR (June 6, 2018), https://www.npr.org/2018/06/06/617612219/mick-mulvaney-effectively-fires-cfpb-advisory-council [https://perma.cc/J7A2-DUM5].

418 CONSUMER FIN. PROT. BUREAU, ANNUAL REPORT OF THE CONSUMER ADVISORY BOARD 20–26 (2017), https://files.consumerfinance.gov/f/documents/cfpb_cab-annual-report_fy2017.pdf [https://perma.cc/95AV-TX4E].

419 *See* Francis Monfort, *CFPB Restores Advisory Boards with New Appointments*, MORTGAGE PRO. AM. (Sept. 11, 2018), https://www.mpamag.com/us/news/general/cfpb-restores-advisory-boards-with-new-appointments/110881 [https://perma.cc/WX9A-XZPL]. The two members meeting the statutory criteria are the president of a historically Black university and the CEO of a grant-making organization focused on social and economic justice and the arts. *See id.*

proposals benefiting African Americans lower on the political agenda—and thus the allocation of fewer resources to these proposals—can even lead to adverse effects that are unpredictable ex ante.

Consider the fate of the CFPB's auto-lending guidance. Auto dealers facilitate financing from banks and other lenders for many auto loans. At their discretion, dealers may add basis points to the loan, pocketing some of the markup.[420] In response to studies showing racial discrimination in dealer markups, the CFPB issued guidance in 2013 stating that "lenders may be liable" for dealers' discriminatory practices.[421]

The CFPB aggressively enforced that policy for almost five years.[422] Then, in late 2017, the Government Accountability Office announced[423] that the guidance document qualifies as a rule for purposes of the Congressional Review Act,[424] which enables Congress to utilize a fast-track mechanism to repeal it—provided that Congress acts within sixty days.[425] Here, because the CFPB misclassified the policy as guidance instead of a rule, that sixty day period was tolled until 2017.[426] Shortly thereafter, a Republican-led Congress passed, and President Trump signed, a disapproval resolution using this review mechanism.[427] The CFPB could no longer pursue discrimination in

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420 CONSUMER FIN. PROT. BUREAU, CFPB BULLETIN 2013-02, at 1 (2013), https://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf [https://perma.cc/5DLX-S98A].

421 *Id.* at 3. The CFPB's guidance focused on banks and other "indirect" lenders rather than on auto dealers directly because the Dodd-Frank Act exempts the latter group from the Bureau's jurisdiction. 12 U.S.C. § 5519.

422 *See, e.g.*, Press Release, Consumer Fin. Prot. Bureau, CFPB and DOJ Order to Pay $80 Million to Consumers Harmed by Discriminatory Auto Loan Pricing (Dec. 20, 2013), https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-order-ally-to-pay-80-million-to-consumers-harmed-by-discriminatory-auto-loan-pricing/ [https://perma.cc/PMN8-ZZYY].

423 Opinion Letter, B-329129, from U.S. Gov't Accountability Off. to Sen. Patrick J. Toomey on Applicability of the Congressional Review Act to Bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act (Dec. 5, 2017), https://www.gao.gov/assets/690/688763.pdf [https://perma.cc/ZL4A-JJLY].

424 5 U.S.C. §§ 801–808.

425 *Id.* For brevity's sake, I omit several complications regarding this limitations period. For more details, see RICHARD S. BETH, CONG. RSCH. SERV., RL31160, DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT (2001), https://www.senate.gov/CRSpubs/316e2dc1-fc69-43cc-979a-dfc24d784c08.pdf [https://perma.cc/Z6G4-UNBZ].

426 Neil Haggerty, *Trump Makes Repeal of CFPB Auto Lending Rule Official*, AM. BANKER (May 21, 2018, 3:31 PM), https://www.americanbanker.com/news/trump-makes-repeal-of-cfpb-auto-lending-rule-official [https://perma.cc/NX39-9TWN].

427 *Id.*

auto lending in "substantially the same form" without Congress's approval.[428]

Had the CFPB adhered to the procedural requirements of rulemaking and issued the policy as a rule instead of guidance in 2013, it would have avoided this outcome. Congress would have been compelled to act during a sixty-day period during the Obama Administration. Had it done so, President Obama almost certainly would have vetoed the resolution, and given Congress's composition at the time,[429] his veto would have been sustained.

To be sure, the CFPB could not possibly have predicted in 2013 that its decision to issue a guidance document rather than promulgate a rule would follow a convoluted causal chain to this outcome. The agency, however, presumably was aware of the basic tradeoff involved in deciding whether to draft guidance or begin a rulemaking: rules are resource intensive to promulgate but relatively durable once finalized, whereas guidance is less costly to develop but more easily changed by subsequent officials.[430] Given the CFPB's expansive mandate and the number of rules that the Dodd-Frank Act requires it to issue,[431] devoting rulemaking resources to auto-lending discrimination would involve opportunity costs that agency leaders may not have deemed worthwhile in light of other priorities. Even if the CFPB could not have anticipated the actual chain of events, it did know the nature of the bargain: making policy through guidance saves resources for other priorities that are more important to the CFPB, but presents a heightened risk of later policy disruption. Here, that gamble did not pay off. Although firm predictions regarding historical counterfactuals are elu-

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428 *See* 5 U.S.C. § 801(b)(2).

429 Most notably the Senate had fifty-four democrats, as well as Senator Bernie Sanders, who caucuses with the Democrats. *Senate Map*, N.Y. TIMES (Nov. 29, 2012) https://www.nytimes.com/elections/2012/results/senate.html?mtrref=www.google.com&assetType=REGIWALL [https://perma.cc/2A4Y-DC6F]. Given that only a single Democrat senator did eventually support the repeal of the rule in 2017 (Senator Manchin from West Virginia), *see* sources cited *supra* notes 380 and 425, it is highly unlikely that the necessary sixty-seven senators would have voted for a repeal.

430 Specifically, courts grant greater deference to rules, *see* United States v. Mead Corp., 533 U.S. 218 (2001), and ossified rules are harder for subsequent administrations to change, *see* Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 123–24 (2018). The costs involved in rulemaking, however, are relatively high. *See id.* at 87 (discussing opportunity costs in rulemaking).

431 *See* DAVIS POLK & WARDWELL LLP, DODD-FRANK PROGRESS REPORT (2016), https://www.davispolk.com/files/2016-dodd-frank-six-year-anniversary-report.pdf [https://perma.cc/HBF2-KBBW] (reporting that the Dodd-Frank Act requires sixty-three consumer-protection rulemakings); Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 344–47 (2013) (describing the CFPB's authority).

sive, it is certainly possible that greater minority representation among the CFPB's leadership, advisory committees, or other structures would have yielded different priorities—and a better outcome for African American borrowers.

Greater use of identity-conscious structures offers a course correction. The establishment of new advisory committees focused on fair lending, access to financial services in historically subjugated or marginalized communities, and the like would be a good start.[432] Requirements that a certain number of appointees to multimember financial regulatory commissions have experience serving underresourced populations would be even stronger medicine.

Note that this recommendation seeks to elevate individuals with professional expertise and experience concerning historically subjugated or marginalized groups—not necessarily individuals that are *members* of these groups. That distinction engenders two advantages. First, it avoids a constitutional challenge. Notwithstanding the long-established gender and ethnicity requirements for some executive appointments,[433] requirements that appointees possess certain ascriptive characteristics raise equal protection concerns.[434] Second, oppositional elected officials may find it more difficult to game a service-based representational requirement than a group-membership-based one. The former requirement compels officials to identify someone who has dedicated a significant portion of their professional life to working on behalf of a group—a costly signal of one's values and priorities. In contrast, the latter requirement merely asks officials to identify individuals with a certain skin color, gender, or other ascriptive character-

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432 Given longstanding discriminatory treatment and disparate racial impacts concerning consumer finance, *see* BARADARAN, *supra* note 196, at 8, the lack of an advisory committee comprised of members of these groups and focused on these issues is a substantial oversight. The two committees that come closest to achieving such goals are the FDIC Advisory Committee on Economic Inclusion and the OCC Minority Depository Institutions Advisory Committee. The former focuses on "underserved populations," without a race- or ethnicity-focused mandate. *Advisory Committee on Economic Inclusion (ComE-IN)*, FDIC (Oct. 1, 2021), https://www.fdic.gov/about/advisory-committees/economic-inclusion/ [https://perma.cc/9KRD-P4BR]. The latter focuses on minority-owned institutions, whose goals may be orthogonal to—or may even conflict with—minority depositors and borrowers. *Minority Depository Institutions Advisory Committee*, OCC, https://www.occ.treas.gov/topics/supervision-and-examination/bank-management/minority-depository-institutions/minority-depository-institutions-advisory-committee.html [https://perma.cc/98K6-RPB5].

433 *See supra* notes 131–32 and accompanying text.

434 *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that the Fifth Amendment imposes equal protection requirements on the federal government via reverse incorporation).

istic, regardless of those individuals' views toward or expertise addressing the needs of that group.[435]

For these reasons, new identity-conscious appointment requirements should eschew mandates that appointees possess certain demographic profiles, and instead focus on professional experiences concerning underserved groups.[436]

Outside of the courts, some observers presumably would object on moral grounds. "Racial quotas," the argument goes, are pernicious in a colorblind society. Even with these measures focused on individuals with professional service to historically marginalized groups rather than on individuals that possess a given demographic profile, the notion that the filling of certain commission seats and agency offices ought to focus at all on demographics is likely to strike some readers as ill-advised.

In response, I note that demographic diversity on administrative bodies is well-established through law.[437] In past generations, when geography loomed larger in Americans' self-conceptions,[438] regional balance was commonly featured in agency design.[439] The Federal Reserve System's twelve districts is one of many examples.[440] With the districts roughly corresponding to population centers at the time of the Federal Reserve Act's enactment in 1913, this geographical parity

435 That is not to say, however, that strategic officials would not game expertise- or experience-based credentials. *See* Thomas O. McGarity & Wendy E. Wagner, *Deregulation Using Stealth "Science" Strategies*, 68 DUKE L.J. 1719, 1757–59 (2019) (discussing how appointees change the composition of science advisory committees by appointing individuals with the requisite credentials but views that lie far from the scientific mainstream and instead align with appointees' priorities).

436 To be sure, determining what professional experiences qualify would introduce complications and shades-of-gray judgment calls, requiring officials to get in the weeds and assess experiences and credentials. These issues are familiar to administrative law scholars from other, closely related contexts. *See* Seifter, *supra* note 4, at 1300 (arguing that differences in the composition and internal governance of interest groups "complicate[] every leading justification of administrative participation and the many practices built atop those justifications").

437 *See, e.g.*, 25 U.S.C. § 2704(b)(3) (stating that at least two of the three members of the National Indian Gaming Commission must be members of a Native American tribe); 29 U.S.C. § 12 (stating that the director of the Department of Labor Women's Bureau must be a woman).

438 *See* DANIEL J. HOPKINS, THE INCREASINGLY UNITED STATES 4–8 (2018).

439 *See* Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 388–92 (2018).

440 12 U.S.C. § 222 (Federal Reserve districts); *see also* 12 U.S.C. § 1423(a) (establishing Federal Home Loan Bank districts); Bulman-Pozen, *supra* note 439, at 391–92 (listing government corporations, federal executive boards, and enforcement regions of independent agencies that are organized by region).

served an identity-conscious purpose: to prevent Wall Street banks' dominance.[441]

Today, regional identification does not exert nearly the same pull over individuals' identities.[442] By contrast, ethnicity, religion, and other demographic characteristics remain important features of citizens' self-conceptions[443]—as well as important predictors of their economic well-being.[444] In this climate, transitioning from identity-conscious administrative structures based on region to those emphasizing professional experience or expertise with subordinated racial or other groups is overdue.

CONCLUSION

Overlooked by scholars, identity-conscious structures that advance substantive equality are present throughout administration—from representational mandates on independent agencies to outside-group consultation requirements. As this Article's case studies concerning the Federal Reserve and SEC show, these structures can be remarkably consequential. Thus, where facially neutral mechanisms exacerbate inequities and reduce agencies' perceived democratic legitimacy, identity-conscious structures can provide a corrective. Their greater adoption would enhance agencies' democratic accountability, subsidize their oversight by a wider set of outside actors, improve their responsiveness to subordinated groups, and even improve policy outcomes.

President Biden's aforementioned first-day executive order calls for "embedding fairness in decision-making processes" to "redress inequities."[445] That is an ambitious charge. To meet it, the White House and lawmakers must look beyond administrative law's conventional identity-neutral mechanisms to identity-conscious structures.

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441 *See* ROGER LOWENSTEIN, AMERICA'S BANK: THE EPIC STRUGGLE TO CREATE THE FEDERAL RESERVE 113 (2015).

442 *See* HOPKINS, *supra* note 438, at 7–8.

443 *See id.*

444 *See* Ann Chih Lin & David R. Harris, *Why Is American Poverty Still Colored in the Twenty-First Century?*, *in* THE COLORS OF POVERTY 1–18 (Ann Chih Lin & David R. Harris eds., 2008).

445 Exec. Order No. 13,985, 86 Fed. Reg. 7009, 7009 (Jan. 20, 2021).