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Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions

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CAN IGNORANCE BE BLISS? IMPERFECT INFORMATION AS A POSITIVE INFLUENCE IN POLITICAL INSTITUTIONS†

*Michael A. Fitts**

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Promoting the development and dissemination of economic and political information has clearly become a common legal solution to a variety of public policy problems and market breakdowns. Applying the perspective of two important legal approaches, law and economics and civic virtue,¹ many scholars have demonstrated the theoretical and practical values of increased information in enhancing both public and private decisionmaking.²

The approach of law and economics can be traced back to early scholarship on private commercial and corporate markets. This literature envisioned a state of "perfect information" and zero transaction

1. I use the term civic virtue, though this school can also be identified more generally as civic republicanism.

2. See *infra* notes 20-66 and accompanying text.

costs as the ideal environment for facilitating "pareto-superior" exchanges and moving toward the economic ideal, "pareto optimality."³ In order to improve imperfect markets, therefore, the early law-and-economics literature often suggested that the government should step in, through either the adoption of legal rules requiring disclosure of information by private parties, the direct production of information by public sources, the creation of property rights in information, or some combination thereof.⁴ Similarly, in response to analogous concerns in the governmental sphere, law-and-economics scholars (especially many who are writing in the public choice tradition)⁵ have found that the public has a disincentive to gather political information due to serious free-rider problems.⁶ The solution offered recently by some of these scholars, like many of their private law predecessors, has been to adopt a variety of legal doctrines that either increase the availability of information to the general public or improve the ability of private individuals and diffuse groups to collect such information.⁷

From a quite different perspective (though in some respects pursuing oddly parallel goals), recent writings in the civic virtue tradition have applauded attempts to stimulate rational dialogue by expanding the amount of information available to the public and to actors in

3. See Coase, *The Problem of Social Cost*, 3 J.L. ECON. 1, 8 (1960) (noting that with zero transaction costs, efficient distribution of resources is achievable regardless of how courts set the initial entitlement). Unfortunately, because information ordinarily has many of the qualities of a public good (namely, it is freely available to the public without possibility of exclusion of free riders and without increasing costs to producers) the private market frequently fails to stimulate adequate levels of information. See Grossman & Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 AM. ECON. REV. 393 (1980).

4. As a consequence, the private free-riding tendency not to produce information could be minimized. See *infra* note 24 and accompanying text.

The assumption that economic agents prefer to have better information if they can acquire it without cost is implicit in models determining efficient information structures and even in models of optimal search: In these models, the costs of information acquisition and transmission and the costs of search are the only factors that limit the quest for more information.

L. PHILLIPS, *THE ECONOMICS OF IMPERFECT INFORMATION* 12 (1988).

5. Public choice is "the application of economic [models] to political decisionmaking." Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. REV. 554, 560 n.17 (1986).

6. Moreover, this incentive supposedly affects groups differently: the rise of so-called special interest groups in a variety of legislative and administrative contexts is said to be largely the result of asymmetry in information acquisition between more diffuse groups and more concentrated groups. Narrowly focused, more concentrated groups, according to this analysis, have an information/transaction-cost advantage in pursuing their political interests because they suffer from fewer and less-pronounced collective action problems. See *infra* notes 28-32 and accompanying text.

7. Toward this end, legal and other mechanisms would be adopted that ease disclosure of information into the public domain. Such mechanisms include strict enforcement of the first amendment, expansive disclosure requirements, and "liberal" techniques of statutory construction and judicial review. See *infra* notes 38-48 and accompanying text.

Congress and administrative agencies. This literature envisions deliberation on ethical norms as being enhanced by the ability of diverse groups to present their views in the political sphere,⁸ thereby increasing the variety of perspectives.⁹

Despite these persuasive arguments, there are times when we might well prefer to be less informed. For example, many people would prefer *not* to know a major piece of personal information, the specific date of their own death.¹⁰ This article explores the ramifications of this powerful insight in the arena of public decisionmaking by detailing the advantages which can flow from the structure of some political institutions that limit political information.

In developing this argument, I will rely principally on the literature on political parties and party identification, suggesting that both the value and viability of parties depend on their ability to limit certain types of information and to channel information to centralized political institutions. In this sense, the present analysis is a sequel to a prior article, in which I relied on the literature on political parties to highlight some of the benefits of political centralization and the potential costs of certain decentralizing reforms advanced in the civic virtue literature.¹¹ Here, I argue that if one focuses on questions of *mass*

8. In particular, checks and balances, decentralized units of decisionmaking, and proportional representation have been offered as beneficial techniques for "proliferating points of access" to governmental deliberations, expanding the number and types of groups that are able to introduce their particular perspective into the public debate. See *infra* notes 60-65 and accompanying text.

9. Of course, in comparison to the classic law-and-economics perspective, civic virtue advocates emphasize the value of information in terms of improving the ethical decisionmaking of public and private decisionmakers. As set forth below, rational dialogue is supposed to "make us think from the point of view of everyone" by elucidating differing viewpoints, perspectives, and backgrounds, forcing us to appreciate our differences and to feel empathy and respect for those who do not share our background and viewpoint. Under this framework, information is not simply a utilitarian exchange of price or similar information about goods and services; it encompasses the examination from different perspectives of the normative value of different life styles. From this intellectual free exchange and dialogue, which tracks many traditional liberal defenses of the first amendment, an agreement on social ends and an appreciation of private autonomy is supposed to be furthered. Thus, while law-and-economics scholars emphasize the value of information in improving the instrumental ability of private actors to achieve or further their own preexisting goals, civic virtue scholars see the exchange of viewpoints as helping to shape those very goals.

10. See, e.g., Fitts & Fitts, *Ethical Standards of the Medical Profession*, 297 ANNALS 17, 25 (1955). In a quite different area, the law of evidence, courts routinely exclude information from admission on the grounds that its prejudicial effect "substantially outweighs" its probative value. See FED. R. EVID. 403. Needless to say, the list of information society might prefer individuals not to know is extensive. See, e.g., C. BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 21 (1989) (summarizing numerous examples).

11. See Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988) [hereinafter Fitts, *Vices of Virtue*]; see also Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L.J. 1651 (1988). While the political party approach has not been explored by civic virtue and law-and-economics scholars, political parties appear to enjoy the strong support of "a large majority of

political organization and *group* dialogue, channeling information to central political institutions, rather than simply permitting its diffusion among the public, can be seen as a valuable tool in several different ways. In particular, limiting information can sometimes narrow and rationalize political choice, promote greater popular accountability (especially among the poor), stimulate group dialogue, and forge political agreements.¹² Based on these observations, I will sketch four separate explanations (what I will crudely call models) of how *less* information can be beneficial.

The first model suggests that more limited information can improve the rationality of decisionmaking itself. In recent years, social psychologists have begun to examine the complex process through which decisionmakers evaluate new information and make decisions about appropriate action. This still-evolving and somewhat controversial literature suggests that the use of certain simplifying devices, heuristic shortcuts which in effect exclude information and narrow choices, can improve decisionmaking.¹³ As outlined below, party identification, and party influence more generally, have served this role for the public, especially the poor, by ignoring certain types of political information and emphasizing others.

The second model suggests that less information sometimes can further traditional utilitarian goals by helping to overcome various collective action problems. As numerous economists and political scientists have noted, many collective action problems (in other words, many problems of group government organizations) stem from situations in which individuals' or groups' pursuit of their narrow self-in-

mainstream political scientists" concerned with government organization, see L. SABATO, *THE PARTY'S JUST BEGUN: SHAPING POLITICAL PARTIES FOR AMERICA'S FUTURE* 2 (1988), and offer an important contrast to the usual law-and-economics and civic virtue perspectives. As a strong advocate of political parties, E.E. Schattschneider, once wrote, "modern democracy is unthinkable save in terms of the parties. As a matter of fact, the condition of the parties is the best possible evidence of the nature of any regime." E. SCHATTSCHEIDER, *PARTY GOVERNMENT* 1 (1942). While political parties probably enjoyed their greatest academic support in the 1940s and 1950s, there has been renewed scholarly interest of late, in part for the reasons suggested in this article.

12. It should be noted that group dialogue in the political context often occurs in fundamentally different ways from dialogue in the adjudicatory context.

As developed below, part of the argument is based on the potential advantages of more centralized information systems. In this sense, limiting information means limiting (or failing to subsidize) information in one context as compared to another. At the same time, I also suggest that along certain dimensions dispersed information may have negative effects on an absolute level, regardless of whether resources used to develop information are transferred to a more centralized information structure.

13. Analogous observations have been made in social science theory, philosophy, literary theory, and private law literature. See *infra* notes 68-75 and accompanying text.

terest makes most or all parties worse off.¹⁴ Government dominated by special interest groups is thought to create an important example of this difficulty. Although the traditional law-and-economics solution is to expand the ability of diffuse groups to acquire information, these problems also can be reduced by *decreasing* the ability of narrower interest groups and individual politicians to develop information independently.¹⁵ Social and political structures that downplay certain information, especially strong political parties and party identification, have often helped overcome the influence of narrower constituencies in this way.

The third model suggests that less information can make it easier to reach political agreements and to overcome stalemates because actors with less information may avoid politically contentious issues. While confronting problems normally improves the political process, in some contexts less information can serve to remove intractable controversies from the political agenda.¹⁶ For example, many budget problems and political party divisions appear to have resulted from our inability at times to prioritize among issues and to balance confrontation with avoidance in this way.

Finally, as a normative, ethical matter, vagueness about a group's

14. See generally R. HARDIN, *COLLECTIVE ACTION* (1982); M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

15. The problem and solution can thus be conceptualized as a prisoners' dilemma, the classic game-theory predicament in which two cohorts in crime are individually offered a reduced sentence if they squeal on their compatriot. Although they will both be better off if they both stonewall their interrogators, the private incentive is to squeal, disadvantaging both. While the usual method for avoiding this perverse incentive is to reach a prior agreement not to accept the interrogator's offer (thereby allowing private and group incentives to converge), the alternative social-intervention technique hypothesized here is not to allow the interrogator's offer to be communicated in the first place, that is, to keep both the prisoners ignorant of what appears to be their immediate self-interest, thereby furthering their joint long-term interests. In this way, ignorance would promote both efficiency and cooperative goals. Needless to say, this approach would be valuable primarily where high transaction costs and strategic behavior preclude the parties reaching a prior enforceable agreement, the normal law-and-economics/public choice solution to this problem.

An analogous issue can arise in the antitrust context, where market actors likely to enter into a price-fixing conspiracy are restricted in communicating information about certain market activity. See, e.g., *United States v. Container Corp.*, 393 U.S. 333 (1969); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921). See generally R. HARDIN, *supra* note 14, at 131.

16. Examining such problems can cause political divisions that, in retrospect, almost everyone would agree should have been avoided. As an example of this view, Rawls has suggested that the willingness to accept certain issues as beyond public purview is a precondition to the stability of many liberal states. See Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 *PHIL. & PUB. AFF.* 223, 251 (1985). Information limitations can serve an analogous function by downplaying certain issues. Cf. P. ORDESHOOK, *GAME THEORY AND POLITICAL THEORY* 58 (1986) (increases in number of participants increases the probability of a voting cycle). To some degree, this may be viewed as a philosophical or ideological prisoners' dilemma, and thus, a variant of the second model. In this case, however, the prisoners' dilemma is ordinarily viewed as overcoming ideological stalemate, rather than avoiding the inefficiency of interest group government.

or an individual's place within the political system can serve to create a real-world veil of ignorance — a state of imperfect information about our own or other groups' place in society that can reduce self-interest in social decisionmaking processes. In this way, vagueness about the political position of different groups can promote public acceptance of and desire for resource distribution, help stimulate a rational dialogue, and even further a political consensus.¹⁷ Indeed, the existence of a greater historical consensus on separation-of-powers issues at various points in our history, I suggest below, can be understood in terms of this analysis and the viability of a strong *two*-party system.¹⁸ Conversely, the recent proliferation of separation-of-powers confrontations can be seen as partly resulting from the breakdown of this process and from the effect of doctrinal changes supported in some of the civic virtue and law-and-economics literatures.

My purpose in explicating these circumstances is not to suggest that less information is presumptively a good thing. Except for the resource cost of acquiring the information, dialogue and exchange of information ordinarily improve deliberative as well as utilitarian processes.¹⁹ There are clear advantages to open discussion, and dangers in information limitation, such as political tyranny, that need not be elaborated here. Needless to say, my goal is not to challenge widely held beliefs about the first amendment or the value of free intellectual exchange in our society.

Rather, I have two objectives. First, based largely (but not exclusively) on the political party literature, I propose to develop these four models, or ideal types, demonstrating how the organization of political institutions can be beneficial (in terms of social goals with which many would agree) by downplaying various types of public information. In this sense, my purpose is academic: to explicate and understand several analyses of various types of information that are different from the

17. Significantly, this limitation on information improves decisionmaking in a different way than civic virtue theory envisions. Civic virtue writers conceive of the decisionmaking capabilities of political actors as being improved by discussion — even confrontation — with opposing viewpoints and perspectives. In other words, our ability to undertake ethical deliberation is improved by increasing our world of information. To this extent, civic virtue seems to view political actors as more inherently virtuous and empathetic — a resource that can be tapped and motivated through discussion with other participants. In the circumstances noted here, however, it may be that our capacities for deliberation over social ends are improved by limiting our informational world — by veiling the real world applications of our decisions. See *infra* notes 173-77 and accompanying text.

18. See *infra* notes 199-205 and accompanying text.

19. Nothing said here denies that the insights of civic virtue and law and economics offer powerful critiques of legal institutions and useful avenues for reform. Indeed, as suggested below, many of my observations are quite compatible with classical economic theory as it would likely be applied to the analysis of party-based political structures.

normal law-and-economics or civic virtue insights about public institutions. Although the United States has never had strong parties as compared to countries such as Great Britain, historically its parties have performed these functions to some extent and perhaps would have to a greater degree had they been stronger or structured differently. Thus, quite apart from the factual issue of how significant these effects are in a particular context, they represent alternative approaches that need to be weighed in policy analysis.

My second objective is more practical: to use these analyses to understand and, in part, defend several government reforms that diverge from some current legal trends. These reforms are limited departures from the usual civic virtue and law-and-economics approaches and from the general presumption in favor of information proliferation. They include changed rules on campaign contributions to individual politicians; reduced access to administrative agencies and Congress; and centralization devices such as party identification and party conventions. These changes would reduce support for dispersed sources of information while, in other cases, strengthening the comparative informational advantages and accountability of certain central institutions. Although giving institutions or individuals the power to *decide* how information should be shaped can create serious dangers, the way political institutions are organized can channel information to the advantage of the society as a whole.

Organizationally, the discussion will proceed as follows. In Parts I and II, I shall summarize the law-and-economics and civic virtue perspectives on the value of political information and their proposals for reforms in the political process that would stimulate greater political information. These two literatures are often viewed as distinct in their objectives: one seeking to improve means/ends rationality; the other seeking to improve goal formation — a function that I loosely describe as normative, ethical, or value-based. Nevertheless, they share some common practical approaches where information is concerned. In Part III, I shall discuss the instrumental advantages to limiting political information, focusing particularly on the role of political party identification and party organization generally in promoting rational decisionmaking (section III.A), overcoming the perverse influence of special interest groups (section III.B), and surmounting political stalemate (section III.C). These sections cover, respectively, models one, two, and three described above. Finally, in Part IV I shall explore the normative value of more limited information, based partly on the approach of Rawls' veil of ignorance (model four). This Part explores such issues as delegation of legislative authority, separation-of-powers

confrontations, and pluralist versus constitutional decisionmaking, all in the context of the breakdown of political parties.

Clearly, each model focuses on a different type of information — information about the often confusing range of diverse political options; about constituent or pork-barrel projects; about potentially divisive and destructive political debates; and about the impact on different groups of alternative social policies. In each case, however, strong political parties can be seen as performing a positive role in reducing such information. Moreover, while we probably cannot create strong parties, and indeed would not want to in certain contexts, some current proposed changes in government structure, which I will explore in each section, may be helpful in furthering the beneficial aspects of the strong party tradition.

I. THE VALUE OF INFORMATION IN PUBLIC DECISIONMAKING UNDER THE LAW-AND-ECONOMICS MODEL

A. *General Problems with Limited Information*

Perhaps the most fundamental tenet of law and economics is the autonomy of individual choice.²⁰ Taking the individual's valuation of personal utilities as a given, law-and-economics scholars generally seek to fashion various social or legal decisions that will maximize social welfare, in either a Pareto-superior or a Kaldor-Hicks sense.²¹ While the precise mental processes through which individuals arrive at their market choices are seldom the focus of law-and-economics analysis, this literature does recognize that preferences, as well as the individual's ability to locate avenues for pursuing them, are dependent upon the information available to the individual.

Unfortunately, because perfectly functioning markets assume perfect information, the law-and-economics scholars face a significant

20. The discussion that follows, like the description in the succeeding section on civic virtue, seeks to sketch broad outlines of a literature in which there are obviously many different strands, some of which may be in tension with my general summary. For this reason, I claim only to be establishing an "ideal type," which serves to capture many of the central insights and directions of a literature and can be helpful in understanding and comparing the perspectives of different approaches. See M. WEBER, *ECONOMY AND SOCIETY* 9 (1978) [hereinafter M. WEBER, *ECONOMY AND SOCIETY*]; M. WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 91-112 (E. Shils & H. Finch eds. 1949) [hereinafter M. WEBER, *METHODOLOGY*].

21. See B. ACKERMAN, *ECONOMIC FOUNDATIONS OF PROPERTY LAW* xi-xiv (1975); A.M. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 7-10 (2d ed. 1989); R. POSNER, *ECONOMIC ANALYSIS OF LAW* 11-17 (3d ed. 1986). Of course, there is an extensive literature questioning whether or to what extent this is an appropriate basis for decisionmaking. See, e.g., *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980); Kennedy, *Cost-Benefit Analysis of Entitlement Programs: A Critique*, 33 STAN. L. REV. 387, 401-21 (1981); Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592 (1985).

problem in ensuring that markets produce information sufficient to justify deference to individual choice. Information is often a public good, that is to say, an item freely available to the public without possibility of exclusion.²² Due to free-rider problems, such goods are likely to be produced suboptimally, absent government intervention. Since it is often difficult to exclude information in economic and political markets from free use by others, there is a disincentive to produce it at appropriate levels.²³

The early law-and-economics literature sought to grapple with this problem primarily in the commercial law context, pointing out the large efficiency loss due to imperfect information, and the resulting creation of suboptimal markets in commercial transactions and corporate stock. As a remedy, several government interventions were proposed for stimulating the production and dissemination of information, including having direct public production, requiring bargaining parties to disclose material conditions, proxy statements, labels, and warranties, and assigning property rights to the least cost

22. There are two additional problems, one technical and one philosophical, which are not explored in depth in this article. First, as a technical matter, the individual knows whether the information is valuable only *after* she expends the effort to acquire it. Logically, neither the society nor the individual can make a prior utility calculation that the information should have been secured, or, more broadly, make a judgment with respect to a class of decisions that a given amount of information should have been acquired, or a specific system used to acquire it, without first acquiring the information. Any judgment about proper resource allocations for information must be imperfect, based on predictions on the value of the information for that or similarly situated persons. Thus, inductive judgments about information acquisition are inherently imperfect. Only after obtaining the information — making the decision — can one know whether it was justified. See generally H. RAIFFA, *DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY* (1968).

Second, apart from these technical problems, there is a philosophical problem with information acquisition. To the extent that the acquisition of the information changes the nature of the individual, it may be philosophically impossible, even understanding the "value" of the information, to know whether or not it should be acquired under an economic model. The answer depends upon which individual — the one with or without the information — is making the decision. If the individual's views on the value of the information change, it is logically impossible to determine whose autonomous preferences should be respected. See D. PARFIT, *REASONS AND PERSONS* 219-43 (1984); Ainslie, *Beyond Microeconomics: Conflict Among Interests in a Multiple Self as a Determinant of Value*, in *THE MULTIPLE SELF* 133 (J. Elster ed. 1986); Kelman, *Choice and Utility*, 1979 *WIS. L. REV.* 769, 779. For this reason, one's philosophy of information acquisition is directly relevant to whatever structure is employed for government organization.

These problems obviously may be more significant with respect to some issues than to others. As one moves from micromanagement questions, such as consumer search strategies, to issues concerning alternative states of political organization, both of these difficulties may be exacerbated. The more fundamental the question being researched, the more varied the potential states of the world and the more likely the individual in that new state is to be different from the decisionmaker in the existing world.

23. See Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609 (National Bureau of Economic Research 1962); Arrow, *Limited Knowledge and Economic Analysis*, 64 *AM. ECON. REV.* 1 (1974).

avoider.²⁴

This perspective was later extended to the public sphere in order better to understand the general problems of political organization and the perverse advantages enjoyed by certain groups in influencing public policy.²⁵ As to the organizational problems, since politics and the exercise of power are almost necessarily group activities, information usually becomes important only to the degree that the group with which one is associated is able to assimilate it and exercise influence. As a result, the public good/collective action problem inherent in the information market is compounded by the collective action problem of group political organization: “[I]gnorance is rational because the costs of obtaining a collective good are shared by many, and no one individual’s contribution . . . is thus likely to make a difference.”²⁶ According to this model, therefore, “one can expect individuals to be

24. See, e.g., O. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985); O. WILLIAMSON, *MARKETS AND HIERARCHIES* (1975). An extensive literature has arisen regarding how various institutional frameworks can economize and facilitate greater exchanges of information. As a general matter, this literature reflects a careful balancing of the need to create sufficient incentives for individuals to generate information against the problems created when information, once created, is not available. Since the processes of bargaining to acquire information and of knowing initially how much information to bargain for are inherently imperfect, a strict property limitation on information would be counterproductive.

25. As in the private sphere, information is advantageous in the public context because it facilitates individuals’ and groups’ ability to identify their interests and to use governmental intervention to promote these interests.

Of course, some legal scholars view the public sphere, in contrast to the private market, as a fundamentally redistributive enterprise, rather than as an efficiency-enhancing process. According to this rent-seeking model, information in the public sphere tends to be purely redistributive, with the benefits of action predicated merely on one’s comparative ability to understand and press one’s interest in *competition with* one’s opponents for the same resources. For descriptions, see Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50 (1987). Macey claims:

[T]he same invisible hand that leads to wealth creation in private market transactions causes massive economic inefficiencies and social instability when it is set loose in the political sphere. . . . As a consequence of the government’s ability to coerce, rationally self-interested citizens have incentives to organize into special interest group coalitions in order to demand regulation that makes them better off.

Id. at 57; see also Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 133 (1989) (“For some, the only public purpose worthy of respect seems to be the elimination of the public sector itself.”); Rose-Ackerman, *Progressive Law and Economics — And the New Administrative Law*, 98 YALE L.J. 341, 342 (1988) (“Scholars in all three traditions [in law and economics] are skeptical about the legitimacy of legislative and bureaucratic processes and share a confidence in the value of market outcomes”). For examples, see TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (J. Buchanan, R. Tollison & G. Tullock eds. 1980); Crain & Tollison, *Constitutional Change in an Interest-Group Theory of Government*, 8 J. LEGAL STUD. 165 (1979); Crain & Tollison, *The Executive Branch in the Interest Group Perspective*, 8 J. LEGAL STUD. 555 (1979). In other words, because of the coercive powers of the state, information is more likely to be a zero-sum game, a process of rent-seeking, with negligible social value. *But cf.* Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 AM. ECON. REV. 561 (1971) (discussing the redistributive and efficiency consequences of information in private markets).

26. Oppenheimer, *Public Choice and Three Ethical Properties of Politics*, 45 PUB. CHOICE 241, 243 (1985).

relatively uninformed about and unmotivated by the collective consequences of their political behavior."²⁷

Beyond this general disincentive to service adequate levels of information, the differential access to information among competing groups also presents problems in political organization. As a variety of scholars have detailed, discrete groups with a high degree of interest in specific outcomes often enjoy organizational advantages because information is costly to obtain and because such groups enjoy lower transaction costs. More diffuse groups, on the other hand, often have free-rider problems in obtaining the information, even though as groups they may care more about the particular outcome.²⁸

According to the economic analysis, moreover, this differential access often disadvantages large segments of society, even though most, if not all, citizens are part of at least one special interest group in one political context or another. In the first place, the organizing advantages of special interest groups often outweigh the need to counteract any majoritarian bias in our political system. According to the economic model, they serve to supply a greater advantage to narrow groups than is justified by the weight of their interests.²⁹ More importantly, it is argued, because virtually all of us are part of both special interest groups and diffuse groups in different contexts, many groups

27. *Id.* at 245; see also Macey, *supra* note 25, at 77:

As a general matter, citizens will have little incentive to inform themselves of the nature of the various statutes passed in the ordinary course of a legislative session because the cost of such legislation is lower than the cost of acquiring such information. And even if the costs of acquiring information about a proposed statute are low relative to the effects of the statute, the costs of organizing an effective political coalition to oppose such a statute is sufficiently high that expending resources to discover the economic effects of ordinary laws remains irrational for the ordinary citizen.

28. This important observation about the effect of group size on group activity was made many years ago by Mancur Olson. M. OLSON, *supra* note 14. This insight has since been expanded into a richer typology of possible incentives to group action. See, e.g., R. HARDIN, *supra* note 14; M. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS 64-127 (1981); J. WILSON, POLITICAL ORGANIZATIONS 327-45 (1973); Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357, 357-72 (J. Wilson ed. 1980). For empirical evidence, see, for example, J. FERREJOHN, PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947-1968 (1974); C. LINDBLOM, POLITICS AND MARKETS (1977); G. MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY (1966). According to this analysis, the "tendency of our factional politics to redistribute wealth from large groups to small ones [may have] produced the opposite of the oppressive majorities that the Framers feared." Bruff, *Legislative Formality, Administrative Rationality*, 63 TEXAS L. REV. 207, 216 (1984); see also Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 745-46 (1985); Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 266 (1982).

29. In other words, the power of special interest groups does not further Kaldor-Hicks "efficiency" in government, but may do the exact opposite: it may bias the system beyond what the "preferences" of the narrow group warrant. See Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); Mashaw, *supra* note 25, at 127 ("analysts in the 'interest group' tradition predict that governmental programs will be too large, directed at the wrong ends and perversely redistributive"). See generally M. OLSON, THE RISE AND DECLINE OF NATIONS (1982).

in our society are disadvantaged by this process. In effect, special interest government can often create a type of social prisoners' dilemma, where most citizens are made worse off by pursuing their self-interest as part of many successful special interest groups.³⁰ In its extreme form, members of Congress or other political actors enter into explicit or implicit agreements to support a general system of legislation enacting different group projects, a process described as "universalism."³¹

30. See generally M. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977). Technically, this is supposed to create a prisoners' dilemma deadweight loss, whereby the majority of citizens end up paying for more public services than their demand would justify, since they pay for their own interest groups' projects (and those of other groups) with higher tax dollars. This system is supposedly inefficient in a Kaldor-Hicks sense because, at least in a perfect world, most of us could be made better off by not initiating the distributive scheme and retaining some previously spent tax dollars. Macey explains it this way:

Since most groups expect to be net losers from a pervasive system of special interest group activities, these groups have a strong incentive to enact constitutional rules that raise the cost of rent seeking generally — even if doing so means forgoing a certain measure of favorable legislation later on. The costs of giving up this favorable legislation are outweighed by the benefits of being protected from the expense of paying for the wealth transfers that go to others.

Macey, *supra* note 25, at 73-74; see also Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Bruff, *supra* note 28, at 216 ("When groups compete for legislation, each has an incentive to demand its private benefits, even though the net result of the process is a welfare loss to all."); McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 118 (1987).

31. Of course, it is possible to argue, contrary to the textual thesis, that a system of political universalism, where each interest group is more likely to be assured its piece of the political pie, protects the lot of the worst off, and is thus defensible on redistributive grounds. Although intellectually intriguing and undoubtedly true in particular cases, this argument appears factually problematic in the United States today, at least according to the public choice perspective.

According to this analysis, universalism is supposed to promote equality by minimizing the possibility that any one group is left out of the ruling political coalition — in other words, by improving the position of what would be the worst-off group in a majority rule system. And while protecting the group that would have been worst off may reduce the size of the overall pie, in universalism all participants may be willing to buy into the agreement because they do not know *ex ante* whether they will be in that group. See Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734, 737 (1983) ("In a pluralist society, crosscut by many cleavages and partitioned into a multiplicity of preference clusters, political satisfaction is distributed much more equally."); cf. THE FEDERALIST NO. 10, at 62 (J. Madison) (P. Ford ed. 1898) (where there is "a greater variety of parties and interests," it is "less probable that a majority of the whole will have a common motive to invade the rights of other citizens").

In this sense, universalism could be rationalized using a type of Rawlsian veil-of-ignorance analysis, whereby everybody is willing to accept fewer social resources in order to improve the position of the worst-off group (which *might* be them), and to ensure the continuation of the political distributive system. See Rawls, *supra* note 16; Barry, *Is Democracy Special?*, in PHILOSOPHY, POLITICS AND SOCIETY 155, 179 (P. Laslett & J. Fishkins eds. 1979); Weingast, *A Rational Choice Perspective in Congressional Norms*, 23 AM. J. POL. SCI. 245 (1979). Since pursuit of Kaldor-Hicks efficiency is not necessarily consistent with Rawls' "difference principle," the resulting system may violate norms of efficiency under public choice models, but comport with some sense of political morality. The reason the system is politically acceptable is simply that no group knows *ex ante* who will be the worst off.

Unfortunately, this argument succeeds only if one views universalism as protecting the worst off *in society*, as distinguished from those who happen to lose in a *particular* political coalition game. According to many observers, however, the losers in political majoritarian politics tend not to be disproportionately the worst off in society, but rather simply interest groups who are not part of the majority coalition. See R. DAHL, A PREFACE TO DEMOCRATIC THEORY 133 (1956); Ackerman, *supra* note 28, at 745-46; Sandalow, *Judicial Protection of Minorities*, 75

For this reason, despite the benefits of special interest group influence, such as facilitating greater pluralism and perhaps greater dialogue, the public choice analysis suggests that our current political system has probably tilted too far in their direction.³²

B. *The Influence of Special Interest Groups in Public Law*

The greater ability of concentrated groups to secure information has consequences in two different political and legal contexts, which are related but sometimes have been treated separately in the litera-

MICH. L. REV. 1162, 1190-91 (1977). See generally Fitts, *Vices of Virtue*, *supra* note 11, at 1579-84. To the degree that many different groups tend to be winners and losers in different majoritarian coalitions, there would likely be a social advantage by limiting the universalistic cycle.

32. To be sure, it might be suggested that universalism (and interest group pluralism generally) is beneficial, despite its inefficiencies, because it furthers resource redistribution within a progressive taxation system. Ultimately, however, this argument appears to falter on factual grounds, at least according to the economic perspective.

To put the thesis in its clearest form: interest group pluralism supposedly creates an overproduction of government resources by ensuring that the important actors on a particular issue are disproportionately those who benefit — the special interest groups — while the diffuse groups who pay the taxes are less organized. Assuming the tax system is both exempt from this interest group process and is progressive, universalism would thereby serve to create a bias in favor of redistribution. While a costless redistributive system would do more, within our current political environment where we must generate the political will to redistribute, pluralism would facilitate redistribution. Thus, some might argue, it is appropriate in certain instances to redistribute through pluralism, recognizing there will be some deadweight loss, but a redistributive advantage. Cf. Markovits, *Duncan's Do Nots: Cost-Benefit Analysis and the Determination of Legal Entitlements*, 36 STAN. L. REV. 1169, 1174-77 (1984) (positive distributive impacts may outweigh concerns for efficiency).

This defense of pluralism, it should be noted, differs from the traditional pluralist claim that most interests would be represented within a pluralist community, ensuring that the pluralist compromise would adequately reflect a legitimate accommodation among existing parties. See *infra* note 93. As noted above, the political economy literature has demonstrated persuasively the existence of pervasive collective action problems that undermine this analysis: some groups are not part of, or are at a market disadvantage in, pluralist politics. See *supra* note 28 and accompanying text. The above analysis suggests, rather, that, given a preexisting redistributive tax structure, some differential distribution may exist, but is "ethically" beneficial. While the relevant constituencies are included — those who wish distribution — there is a veil of ignorance with respect to those groups who are likely to pay, or at least their costs have already been established.

Unfortunately, while intriguing, the argument ultimately seems factually problematic. As numerous scholars have observed, wealthier groups often have an *organizational* advantage in pluralist politics; the poor are often the diffuse group that is kept out of the pluralist distributive debate. See THE BIAS OF PLURALISM (W. Connolly ed. 1969); K. SCHLOZMAN & J. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 87, 395-403 (1986). Moreover, the dispersion of political responsibility endemic to pluralist politics can confuse the public, especially the poor and less educated. See Burnham, *The Turnout Problem*, in ELECTIONS AMERICAN STYLE 97, 131-33 (A. Reichley ed. 1987). Finally, and most importantly, there is evidence that the tax system, especially during times of so-called "normal" politics, when numerous tax loopholes are secured, is *not* exempt from this pluralist bias. See G. Cox, M. McCubbins & B. Weingast, Congress and the Distributive Tendency in Tax Policy (unpublished manuscript on file with author); McClure and Zodrow, *Treasury I and the Tax Reform Act of 1986: The Economics and Politics of Tax Reform*, 1 ECON. PERSP. 37, 37-38 (1987). A government which makes decisions through a pluralist process in *both* tax and expenditure contexts cannot claim this normative defense.

ture. The first is electoral. Special interest groups, because they tend to be more concentrated, are supposed to have disproportionate advantages in determining their interests on specific issues, securing the information with respect to those interests, and notifying political representatives about their desires.³³ In effect, they enjoy reduced transaction costs in securing the information necessary to engage in electoral political action. More diffuse groups experience serious collective action problems in organizing institutions for the purpose of securing and delivering information necessary to pursue their electoral positions.³⁴

A second and related context in which special interest groups are said to exercise disproportionate influence over government behavior occurs in the formulation and implementation stages of government decisions.³⁵ In such cases,³⁶ government actors vested with supposedly final decisionmaking authority (such as Congress or the President) find that their decisions or the implementation of their decisions in administrative agencies can be perverted by special interest groups that have a marked advantage in affecting the execution of broad directives or mandates within the bureaucracy.³⁷

33. See K. SCHOLZMAN & J. TIERNEY, *supra* note 32.

34. *Id.*

35. See Bruff, *supra* note 28, at 244; B. OWEN & R. BRAEUTIGAM, *THE REGULATION GAME: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS* 1-13 (1978); *CASE STUDIES IN REGULATION: REVOLUTION AND REFORM* 7-10 (L. Weiss & M. Klass eds. 1981). For the classic view on interest group government, see T. LOWI, *THE END OF LIBERALISM* (1969) and Lowi, *Two Roads to Serfdom*, 36 AM. U. L. REV. 295 (1987).

36. As a theoretical matter, some political science literature analyzes these latter situations as agency-principal problems, in which the principal (the President or Congress) has difficulty ensuring that its subordinate — the administrative agency — is fulfilling its mandate. See McCubbins, Noll, & Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 247 (1987). According to this analysis, special interest groups often have a marked advantage in perverting the "principal's" intent, especially in light of the difficulty in monitoring the complex decisions emanating from the administrative bureaucracy, and increasing the costs of monitoring by the principal.

37. Indeed, a variety of scholars have also pointed out the independent influence of *government agencies* in perverting implementation of government programs. Because of their differential access to information regarding the facts of the substantive programs over which they have responsibility, they are thought to skew the policy agenda in favor of maximizing the agency budget or furthering its bureaucrats' career goals. See R. ARNOLD, *CONGRESS AND THE BUREAUCRACY* (1979); G. BENVENISTE, *BUREAUCRACY* 71-111 (1977); D. MUELLER, *PUBLIC CHOICE* 156-70 (1979); W. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

Obviously, the two circumstances are related: the influence of special interest groups in the formulation and execution of policy is in part due to their powers in affecting the initial political judgment. Nevertheless, control over information and contacts can be important in legislation and administration for reasons unrelated to the electoral influence of special interest groups; administrative and executive actors may be dependent on contacts and knowledge obtained by those most knowledgeable in the area. In addition, those most likely to pay attention to what administrative and legislative officials are doing, and to alert the public or special interest groups

C. Solutions to the Special Interest Group Problem

To overcome the lack of informational parity among diffuse and concentrated groups in these various contexts, and to surmount the general lack of incentive to generate political information, several scholars, relying on law-and-economics theories, have defended a variety of political institutions and legal mechanisms that would expand political information.³⁸ The most important is disclosure of government activities, on the ground that enforcement and disclosure will improve diffuse groups' oversight of governmental activities. Because obtaining information is more costly for diffuse groups, and because monitoring government is more difficult for such entities, it becomes important for information to be available at no cost. "By supporting the freedoms of speech and press," it is suggested, "one can increase the likely caliber of [rationality] in political action by increasing the availability of free and relatively inexpensive information."³⁹ While "[i]ndividuals may not seek information, [they] may process it if it is very easily acquired."⁴⁰

A similar analysis has also been used to support recent law-and-economics proposals to transform the nature of statutory construction and judicial review.⁴¹ Like the first amendment scholarship, the assumption of this approach is that "citizens have poor information about the actions of legislators" and "legislators have few incentives to

when policies diverge from what was intended, can be important and powerful groups to these officials.

38. To be sure, there are cases where the economics literature recognizes that less information can be advantageous even apart from the costs of generating it. See, e.g., Hirshleifer, *supra* note 25, at 568. In addition, it should be recognized that market participants who possess less information can sometimes rely on the superior knowledge of others. See Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information*, 127 U. PA. L. REV. 630, 638 (1979); McKelvey & Ordeshook, *Information, Electoral Equilibria, and the Democratic Ideal*, 48 J. POL. 909 (1986) (arguing that under certain conditions uninformed voters can rely on polls of public opinion instead of candidates' declared positions to decide for whom to vote). Indeed, some of the arguments set forth in this article and in the traditional party literature are consistent with these observations.

39. Oppenheimer, *supra* note 26, at 253.

40. *Id.* Thus, the first amendment and disclosure requirements regarding legislative and administrative operations can all serve to increase the availability of such information, and, in so doing, supposedly improve the relative ability of diffuse groups to participate effectively in government.

41. The subject of statutory construction has enjoyed a resurgence in recent years, much of it with the goal of using varying techniques to improve judicial decisionmaking. See, e.g., Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Eskridge, *Public Values in Statutory Construction*, 127 U. PA. L. REV. 1007 (1989). Some interesting scholarship, however, especially that of Jon Macey and Susan Rose-Ackerman, suggests that interpreting legislation according to its publicly stated goals can overcome the informational disadvantages of diffuse groups in overseeing legislative deliberations. See Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Rose-Ackerman, *supra* note 25.

reveal deals that would not be obvious to superficial observers.”⁴² To overcome this deficiency, “[t]he aim of judicial review should . . . be to make legislators more responsible to the electorate by assuring that information about legislative bargains is more likely available, [improving the public’s] capacity to monitor the output of congressional bargains.”⁴³ Courts should thus construe statutes according to their “public” explanations, rather than according to their technical terms or deals that were supposedly formulated behind the scenes, thereby serving to equalize the ability of diffuse groups and more concentrated groups to oversee legislative deliberations. In this way, statutory construction would improve the informational abilities of the diffuse public to monitor government, helping to minimize the organizational advantages of special interest groups.⁴⁴

Finally, a related analysis has been applied by administrative law scholars to the monitoring of government bureaucracies. As noted above, although delegation is intrinsic to operations in the Post-New Deal state, execution will necessarily involve a deviation from the initial legislative judgment. This deviation, moreover, can be affected differentially by special interest groups.⁴⁵ While the proposed solutions to this problem have been varied, many scholars express a common approach and purpose: to increase the oversight of administrative agencies so as to counteract the differential informational advantage of special interest groups. The most important such proposed technique is to make decisionmaking by administrative agencies more open to the public through “hard look” judicial review, enhanced procedures under the Administrative Procedures Act, and supplementation of intervention rights.⁴⁶ A variation on this theme is to improve the accessibility of executive information to legislative review by expanding the requirements of the Freedom of Information Act, and, perhaps, by expanding legislative oversight.⁴⁷ Finally, some have argued that pres-

42. Rose-Ackerman, *supra* note 25, at 349. Rose-Ackerman also urges courts to “encourage deliberation” in Congress, thereby making a direct link between the law-and-economics and civic virtue approaches.

43. *Id.* at 351.

44. A visible institution such as the presidency is also supposed to help overcome the relative organizational disadvantages of diffuse groups by surmounting their informational and transactional disadvantages through visibility and ease of monitoring. See Fitts, *Vices of Virtue*, *supra* note 11, at 1606.

45. See *supra* notes 34-37 and accompanying text.

46. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1782 (1975); Bruff, *supra* note 28, at 248 (“modern legal requirements defining administrative rationality share with legislative formality the effect of ensuring that public policy will be supported by coalitions representing a set of values that is relatively widely accepted”).

47. See, e.g., Kronman, *The Privacy Exemption to the Freedom of Information Act*, 9 J. LEGAL STUD. 727, 734 (1980).

idential oversight of administrative agencies, through such techniques as enhanced review of agency regulations, can provide the needed expansion of diffuse political oversight necessary to counteract the organizational advantages of special interest groups.⁴⁸

II. THE VALUE OF INFORMATION UNDER THE CIVIC VIRTUE MODEL

Although civic virtue scholars come to these issues from a markedly different perspective from the approach discussed above, many also appear to be exploring different mechanisms for stimulating the production and dissemination of information among political institutions.⁴⁹ According to this viewpoint, a major purpose of government is to create a full and developed dialogue among political and social actors representing a rich diversity of social, economic, and ideological viewpoints.⁵⁰

A. An Overview

At its core, the philosophical concern of civic virtue is the influence of self-interest in political decisionmaking. In this sense, it is di-

48. See Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979); Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEXAS L. REV. 469, 520-24 (1985); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 663-64 (1984). Although all of these proposals may in their specific requirements lead to different policy outcomes, their common underlying goal is to improve political oversight of administrative behavior by disseminating greater public information about government activities, thereby overcoming the collective action problems of information acquisition and counterbalancing the differential advantage of the special interest groups in influencing administrative behavior.

49. See generally Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) (summarizing civic republican approach to political institutions). In the following discussion I will focus principally on Sunstein's scholarship, both because he appears to have become a "leader" of this approach, and because he consciously and thoughtfully seeks to summarize and rationalize a broad spectrum of legal opinions and secondary literature focusing on the structure of political institutions. Where applicable, I will note differences between his approach and that of others writing in the tradition. Frank Michelman, for example, appears to focus more on the Supreme Court, rather than political institutions generally, as the center of the civic virtue dialogue. See Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) [hereinafter Michelman, *Traces of Self-Government*]. But cf. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1531 (1988) (appearing to recognize a more institutionally pluralist conception of dialogue).

50. See generally Sunstein, *supra* note 49; Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 429, 510 (1987) (simultaneous presidential, legislative, and judicial control can, "by proliferating the points of access to government . . . , increase the opportunity for groups to seek and obtain reform" and "bring about something close to the safeguards of the original constitutional framework"). Sunstein has also argued for a dispersal of power in administration because, as in the case of separate branches, usually "at least one branch will be responsive to the interests of politically weak groups and thus will become an advocate for reform." *Id.* at 489-90.

rected toward one of the same goals that led Rawls to develop his heuristic device, "the original position"⁵¹ — to make decisionmakers "think from the point of view of everybody."⁵² Because of the social biases created by individuals' knowledge of their own social positions and the effect of agreements on their individual welfare, Rawls originally proposed the veil as a mental filter that would serve to excise decisionmakers' knowledge of their own place in society and their own belief systems.⁵³

The value of this device in stimulating a "true" dialogue has been questioned, however, on the grounds that the original position appears to excise important information about decisionmakers as real people. How, it has been asked, can a normatively attractive social consensus be achieved by disembodied individuals lacking knowledge of real people and their human motivation — "good" or "bad"?⁵⁴ In short, "[f]or republicans, the problem with the original position as a guide to political institutions or as a political ideal is that it is too solitary and insufficiently dialogic."⁵⁵

In their design of political institutions, therefore, civic virtue scholars seek to create a rational dialogue through the opposite technique: lead decisionmakers in the real world, obviously possessing full knowledge of their own social positions and belief systems, to engage in the type of normative discussion that Rawls believed would occur behind the veil. In this case, however, the bias of political actors' social backgrounds would be overcome by increasing the number of dialogic par-

51. J. RAWLS, *A THEORY OF JUSTICE* 11-12 (1971).

52. Sunstein, *supra* note 49, at 1569 (quoting Okin, *Reason and Feeling in Thinking about Justice*, 99 *ETHICS* 229 (1989)). Of course, the veil can further other purposes as well.

53. J. RAWLS, *supra* note 51, at 17-22.

54. See generally L. LARMORE, *PATTERNS OF MORAL COMPLEXITY* 59-66 (1987); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1984); Nagel, *Rawls on Justice*, in *READING RAWLS* 8-10 (N. Daniels ed. 1975). The veil of ignorance, it also has been argued, incorrectly portrays man as a narcissistic, nonvirtuous decisionmaker, who can engage in public responsibilities and decisionmaking only if he is unaware of its impact on his own interests.

55. Sunstein, *supra* note 49, at 1571 (footnote omitted); cf. Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 *HARV. L. REV.* 10, 60 n.240 (1987) (Rawls "assumes a single and universal perspective from which all expectations can be discerned" and is "insufficiently sensitive to the possibility of competing perspectives").

This does *not* suggest that Rawls' overall theory is inconsistent with the civic virtue perspective. For one, the veil is a device ultimately intended to inform the situated reader — as a thought experiment. See, e.g., Baker, *Sandel on Rawls*, 133 *U. PA. L. REV.* 895, 898 (1985); Okin, *Reason and Feeling in Thinking and Justice*, 99 *ETHICS* 229, 246 (1989). In addition, Rawls does not suggest the veil of ignorance should be recreated in existing political institutions, only used as a heuristic device for thinking about a just structure for society. See J. RAWLS, *supra* note 51, at 195 (discussing application of principles of justice to structure of political institutions). For this reason, it can reasonably be argued that civic virtue is a consistent extension of the Rawlsian approach to the structure of political institutions. See Sunstein, *supra* note 49, at 1567 n.160, 1571 n.183.

ticipants and *expanding* the information base. Political actors would thus “generate institutions that will produce deliberation among the differently situated, not mimic decisions . . . made by the unsituated.”⁵⁶

The difference in technique between the Rawlsian veil of ignorance and rational dialogue under the civic virtue model should be underscored.⁵⁷ The structure of the veil of ignorance presumes that decisionmaking may be improved and dialogue promoted by excising information — that is, by disembodied individuals from knowledge of their society and values. The approach of civic virtue theory, however, views dialogue from a different perspective: the presumption is that a rational dialogue cannot take place absent knowledge of one’s values and society. To ensure that real-world decisionmaking will not be biased, or at least that the bias will be reduced, civic virtue relies on a social dialogue encompassing a wide variety of individuals from different perspectives and walks of life. The resulting exchange and expansion of information, it is supposed, will lead participants to broaden their perspectives and “think from the point of view of everyone” — largely what the veil is intended to achieve.⁵⁸ Quite simply, under the civic virtue view, “the purpose of politics is . . . the transformation of private interests into public interests through discussion and persuasion.”⁵⁹

B. *Legal Application*

To achieve these goals, the civic virtue literature generally explores a variety of new or expanded doctrines and institutions that would ensure diverse informational inputs. As a general matter, these doc-

56. Sunstein, *supra* note 49, at 1571; *see also id.* at 1575, 1586 (footnotes omitted): Impartiality within republican theories . . . require public-regarding justifications offered after multiple points of view have been consulted and (to the extent possible) genuinely understood.

[T]he basic constitutional institutions of federalism, bicameralism, and checks and balances share some of the appeal of proportional representation, . . . proliferat[ing] the points of access to government, increasing the ability of diverse groups to influence policy, multiplying perspectives in government, and improving deliberative capacities. Sunstein also remarks that “politics should . . . allow for a measure of critical distance from and scrutiny of [citizen] desires, bringing new information and different perspectives to bear.” *Id.* at 1544; *see also* Michelman, *Traces of Self-Government*, *supra* note 49, at 76 (“The norm of justice to parties itself commands that no other norm should ever take a form that preempts questions or exempts from reason-giving.”).

57. Indeed, as will be seen, the difference has practical significance because real-world attempts to further dialogue on one dimension may be in tension with techniques used to further it along another. *See infra* notes 212-17 and accompanying text.

58. *See* Sunstein, *supra* note 49, at 1569 (quoting Okin, *supra* note 55, at 229).

59. Mashaw, *supra* note 25, at 130.

trines and institutions would serve to proliferate the points of access to government and disperse power, thereby increasing the opportunity for different groups to find institutional representation within the federal government and to participate in public dialogue. Recent proposals for supplementing checks and balances; facilitating independent and "insulated" political representation; promoting "consistency" and "high visibility" in statutory construction; requiring proportional representation; and ensuring presidential, judicial, and legislative participation in and oversight of administrative decisionmaking are all intended to expand and diversify expressed opinions.⁶⁰

These proposals are outgrowths of earlier doctrinal developments in administrative, first amendment, and race discrimination law. In administrative law, the so-called "hard-look" doctrine and earlier attempts to expand procedures and supplement intervention by a wide variety of groups were originally advanced on the ground that they would force agency officials to engage in a dialogue with the courts and other social actors.⁶¹ This exchange, overseen by the courts, was intended to force agency officials to come to understand the limitations of their own position as well as to reveal any blatantly improper or illicit motives.⁶² Similarly, first amendment and race discrimination law has on occasion sought to force public decisionmakers to reveal and explain their reasons for acting to extend a benefit, thereby help-

60. See Fitts, *Vices of Virtue*, *supra* note 11, at 1586-92 (summarizing authors). See generally Michelman, *Traces of Self-Government*, *supra* note 49, at 33 ("The dialogic themes express the vision of social normative choice as participatory, exploratory, and persuasive, rather than specialized, deductive or demonstrative."); Sunstein, *supra* note 49, at 1557 ("Republicans envision [the government] process as a forum in which alternative perspectives and additional information are brought to bear . . . increasing available opportunities [for input] and information."). Of course, this approach is not necessarily true of all writers who might be viewed as writing in the civic virtue tradition. See, e.g., B. ACKERMAN, *SOCIAL JUSTICE AND THE LIBERAL STATE* (1980) (developing a more objectively limited and nonculturally dependent conception of dialogue); Michelman, *Traces of Self-Government*, *supra* note 49 (appearing to develop a more court-centered approach to dialogue).

61. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1811-13 (1978); Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1267-71, 1278-82 (1982); Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 182-83; see also *Greater Boston Television Co. v. FCC*, 444 F.2d 841, 850-53 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). But see *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978). See generally Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 301 (1975) (Structural due process "envision[s] the Supreme Court as structuring a dialogue between the state and those whose liberty its laws confine, a dialogue in which the continuing legitimacy of a law turns on the current willingness and ability of the state to come forth with rational justifications for the law's continued enforcement.").

62. See Sunstein, *supra* note 50, at 471 (concluding that the hard-look doctrine is "an effort to 'flush out' illegitimate or unarticulated factors . . . to ensure that those factors are available for discussion and comment during and after the rulemaking process"); *id.* at 478 ("A firm judicial hand has disciplined administrative outcomes by correcting parochial or ill-reasoned decisions and serving as a significant deterrent.").

ing to reveal whether or not the true motive for the government action was a permissible one.⁶³ In general, the legal admonition that political actors “listen” and “respond” to the arguments of others is the normative linchpin of the civic virtue perspective. By seeking to understand and to converse with all relevant actors, decisionmakers should better understand the limitations of their own viewpoint, both factually and normatively.⁶⁴ While recognizing the clear “participation” benefits to diverse informational inputs,⁶⁵ this approach focuses on the quality of political decisions made in a framework of public dialogue.

Thus, while the standard law-and-economics and civic virtue analyses of the public interest are often treated as antagonistic, they have a common perspective on the issue of information. Both generally favor increased levels of information — either through the government’s production of information and the assignment of property rights (the law-and-economics view), or the proliferation of the points of access to government (the civic virtue view). The law-and-economics approach emphasizes the utilitarian value of information — its ability to reveal productive or exchange opportunities for furthering means/end rationality. Civic virtue, on the other hand, views the elucidation of opinions primarily as serving a value-based function, leading people (by the exchange of information and ideologies) to recognize the bias of their own positions, and to change their preferences or values — that is, to help identify ends. Taken together, however, these two traditions show that information can be of benefit normatively as well as instrumentally.⁶⁶

63. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 532, 548-54 (1980) (Stevens, J., dissenting); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103, 114-17 (1976); *Saia v. New York*, 334 U.S. 558 (1948); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); see also Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518 (1970). But see *Board of Regents v. Roth*, 408 U.S. 564 (1972) (procedural due process does not require hearing of first amendment claim by fired state employee absent entitlement). Similarly, the protection of “public discourse” under the first amendment is quite compatible with the civic virtue approach. See, e.g., Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 693 (1990).

64. See generally Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 4 (1979); Michelman, *Formal and Associational Aims in Procedural Due Process*, in NOMOS XVIII: DUE PROCESS 126, 127 (1977); Tribe, *supra* note 61; Tribe, *The Emerging Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy and Due Process of Lawmaking*, 10 CREIGHTON L. REV. 433, 444 (1977); Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213 (1983) (discussing the “new legal process” view of dialogue); Ackerman, *Why Dialogue?*, 86 J. PHIL. 5 (1989).

65. See, e.g., Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981).

66. Of course, there are potential differences. For example, proliferating points of access can in some cases *diminish* the amount of information, or at least merely change the type of information, rather than increase its overall level.

III. LIMITED INFORMATION AS A POSITIVE INFLUENCE IN DECISIONMAKING: THE UTILITARIAN VALUE OF PARTY IDENTIFICATION AND RELATED INSTITUTIONS

Despite these important arguments in favor of more information, less information can be advantageous along several dimensions, even when viewed in light of the goals articulated by the civic virtue and law-and-economics traditions. A variety of legal and political institutions that serve to create less information are useful in pursuing some of the long-term goals of one or both traditions. This Part focuses on the utilitarian benefits of party identification and limited information as devices for improving reasoning processes (section III.A), overcoming perverse interest group incentives (section III.B), and avoiding political stalemate (section III.C). These are models one, two, and three, as sketched earlier in this article.⁶⁷ I also consider the significance of these effects to several possible governmental reforms (section III.D), and the problems they can present to the civic virtue and law-and-economics perspectives (section III.E).

A. *Limited Information as a Value in Promoting Rational Decisionmaking (Model I)*

At first glance, it is difficult to understand how less information can improve reasoning processes. As noted above, under a traditional economic or utilitarian model of decisionmaking, each new piece of information should be integrated according to its probative impact on events and marginal judgments; the information should enhance rather than undermine utilitarian decisionmaking. Since, under this analysis, "the costs of information acquisition and transmission and the costs of search are the *only* factors that limit the quest for more information,"⁶⁸ expansion of information should be presumptively advantageous. Similarly, under a value-based view of rational dialogue, the greater the number of perspectives, the less likely should be the bias or irrationality of the ultimate judgment.⁶⁹ Thus, generally speaking, more information should improve ethical decisionmaking as well.

Diverse literatures from social psychology, philosophy and organization theory, however, indicate that this process can be more complicated than this general description suggests. In situations of high

67. See *supra* text accompanying notes 12-16.

68. L. PHILLIPS, *supra* note 4, at 12 (emphasis added).

69. See *supra* notes 56-58 and accompanying text. Of course, there are *some* limits on public discourse, at least according to some civic republicans. See Michelman, *Law's Republic*, *supra* note 49, at 1527 (public discourse should not be "considered or experienced as coercive, or invasive, or otherwise a violation of one's identity or freedom").

complexity or uncertainty,⁷⁰ decisionmakers are often aided by "heuristic" devices, which affect the use of information in two different and subtle ways.⁷¹ First, a heuristic boils down a complex of information into a shorthand analytic framework.⁷² Economists would view this process as decreasing the marginal costs of transmitting the information, though the number of actual verbal communications (that is, the amount of dialogue, in a colloquial sense) would ordinarily be reduced as well.⁷³ Second, and more importantly, in order to facilitate analysis of the information actually transmitted, the heuristic *also* serves to exclude some information. This limitation, in fact, is a precondition to effective comprehensive analysis. As Christopher Schroeder has observed, "comprehensive rationality . . . reduces choice to an analysis of the efficacy of available alternatives to achieve predetermined goals . . . inevitably entail[ing] simplification, both in the specification of goals and in the modeling methods employed to predict the extent to which alternatives achieve them."⁷⁴ In the absence of such limitations, deci-

70. The problems of rational decisionmaking in such situations have been extensively investigated. See generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (D. Kahneman, P. Slovic & A. Tversky eds. 1982); Tversky & Kahneman, *Rational Choice and the Framing of Decisions*, in RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY 67 (R. Hogarth & M. Reder eds. 1987). As Daniel Farber observes, decisionmakers "systematically deviate from rationality in considering combinations of risks; they ignore background information in assessing new data; and they are easily swayed by trivial changes in the presentation of information." Farber, *Environmentalism, Economics, and The Public Interest*, 41 STAN. L. REV. 1021, 1035 (1989).

71. For a discussion of the value of limited information in organization theory, see D. BRAYBROOKE & C. LINDBLOM, A STRATEGY OF DECISION 53 (1963); J. MARCH & H. SIMON, ORGANIZATIONS 203-04 (1958); H. SIMON, ADMINISTRATIVE BEHAVIOR 80-83 (1976); H. SIMON, MODELS OF BOUNDED RATIONALITY (1982); A. WILDAVSKY, SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS 36 (1979).

72. Sociologists might call this an ideal-type. See *supra* note 20.

73. This process is the basis of decreased "costs" in an economic sense. In an informationally perfect world, the heuristic would serve as a "sufficient statistic." See B. LINDGEN, STATISTICAL THEORY 191-205 (1962).

74. Schroeder, *Rights Against Risk*, 86 COLUM. L. REV. 495, 502 n.29 (1986). In other words, the process of comprehensive rational decisionmaking itself, as the philosophers of the social science and organization theory point out, requires a dwarfing of marginal variables to facilitate analysis. For a law-and-economics explanation of this process, see A.M. POLINSKY, *supra* note 21, at 4 ("The art of economics is picking assumptions that simplify a problem enough to better understand certain features of it, without inevitably causing those features to be unimportant ones."); R. POSNER, *supra* note 21, at 16 ("[A]bstraction — reductionism, if you like — is the essence of scientific inquiry. A scientific theory must select from the welter of experience that it is trying to explain . . .") (footnote omitted). For an organization-theory explanation, see D. BRAYBROOKE & C. LINDBLOM, *supra* note 71, at 117 ("The synoptic approach makes such comprehensive demands for information and analysis that theories are desperately needed merely to discipline the gathering of information and to organize the multiple implications of whatever evidence is gathered."); A. WILDAVSKY, *supra* note 71, at 36 ("[A]nalysis welcomes constraints. If everything is seen as possible, nothing can be done."); J. MARCH & H. SIMON, *supra* note 71, at 139 ("Choice is always exercised with respect to a limited, approximate, simplified 'model' of the real situation"). A somewhat similar tradeoff is presented in the choice between rulemaking and adjudication in administrative law. Cf. Diver, *Policy-making Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 430 (1981).

sionmakers often cannot engage in effective analysis, tending (in a type of information overload) to miss “the forest for the trees” and to use the greater information in a stochastic manner.⁷⁵

1. *The Value of Party Identification and Related Party Structures*

Although the significance of heuristics and information overload in a variety of contexts is a subject of legitimate controversy,⁷⁶ two of the most important tools of national political organization — strong parties and party identification — appear to serve this function both in theory and in practice. As I have argued previously, political parties are rightfully praised for their ability to disseminate their message broadly to the public.⁷⁷ At the same time, however, their power and influence is also achieved — especially at the national level — by channeling and implicitly reducing the number of public communications about political actors, programs, and policies. The reason this occurs is that political parties seek to focus the public’s attention on a visible cue — party identification — which is intended both to simplify a vast amount of information about individual candidates, and, in order that it will be understood and followed, to overshadow and dwarf the static of individual political communications.⁷⁸ “[P]olitical parties

75. See, e.g., D. BRAYBROOKE & C. LINDBLOM, *supra* 71, at 51, 113, 117; A. WILDAVSKY, *supra* note 71, at 32, 36; D. KATZ & R. KAHN, *THE SOCIAL PSYCHOLOGY OF ORGANIZATIONS* 507 (2d ed. 1978); J. STEINBRUNER, *CYBERNETIC THEORY OF DECISION* 12 (1974). Indeed, investigations in the natural sciences may involve something like the same process. See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

76. Compare Grether, Schwartz & Wilde, *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277 (1986) (criticizing use of information overload analysis in legal context) with Edwards & von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225 (1986) (suggesting application of psychological literature to the law).

77. See Fitts, *Vices of Virtue*, *supra* note 11, at 1606. What follows is not intended to deny the importance of this fundamental advantage. Rather, I outline here the related positive benefits of the channeling (and implicit limiting) of information undertaken by some political parties.

78. See D. PRICE, *BRINGING BACK THE PARTIES* 110 (1984); Popkin, Gorman, Phillips & Smith, *What Have You Done For Me Lately? Toward An Investment Theory of Voting*, 70 AM. POL. SCI. REV. 779, 780 (1976); see also *infra* note 138.

Of course, it can be argued that parties should not be dependent on limited information once the party label has been established in the public consciousness. Under this reasoning, while party identification does depend on a heuristic label that inherently simplifies and limits information and communications, once that label is publicized and understood, the public should then simply evaluate the complex world of diverse communications in light of the label, through a type of reflective equilibrium. As a factual matter, however, this bifurcated process is difficult to achieve: the proliferation of informational inputs appears to overwhelm the label in a type of information overload. Moreover, given the limited amount of time the public has to spend listening to political communications, more time spent on individual communications necessarily means less time spent on information about the party, and a reduced significance of the party label. See M. WATTENBERG, *THE DECLINE OF AMERICAN POLITICAL PARTIES* (1984); Richardson, *Constituency Candidates Versus Parties in Japanese Voting Behavior*, 82 AM. POL. SCI. REV. 695, 700 (1988). While the public may be more capable of undertaking this effort now than in the past, see Fitts, *Vices of Virtue*, *supra* note 11, at 1640 (summarizing authors), there is

originated in large part from the need of voters for a guide, a set of symbolic shortcuts, to the confusing and often trackless political terrain."⁷⁹ The simplification of the general wealth of political information in a party label can facilitate the ability of a diffuse public — which often cares very little *individually* about those political events, though very much in the aggregate — to follow political affairs.⁸⁰ In short, because people are uninformed on most issues, “democracy [may be] best served by reducing and simplifying those choices to a single electoral choice.”⁸¹

Based on this benefit, the traditional party identification, which was generally criticized during the 1950s and 1960s,⁸² has now garnered some academic respectability and praise, as have political parties as organizations *structurally impelled* to create this symbol.⁸³ Faced with the necessity of forging a program and platform attractive to a majority of the population and capable of rationalizing the running of government, party forces must draw connections between issues, programs, and interests that may not be apparent in the din of diverse, decentralized individual political conversation, but would nevertheless be attractive to a winning coalition. By drawing these linkages, party forces serve to highlight the interrelationship between issues — that is, to create a heuristic device. Moreover, while the political party organization itself obviously creates some new information — the party label — it succeeds in getting the public to understand and use that label partly by simplifying (and, in so doing, necessarily limiting) the wealth of political information about candidates and government. In effect, party identification is maintained by the fact that the party exercises greater control than individual politicians over political resources and communications. The result is that political events are more accessi-

continuing indication that it has difficulty keeping abreast of political events and is advantaged by the party label, *see* E. SMITH, *THE UNCHANGING AMERICAN VOTER* (1989).

79. F. SAUROF & P. BECK, *PARTY POLITICS IN AMERICA* 503 (6th ed. 1988). Indeed, party identification has been aptly described as the “party in the electorate.” *Id.* at 160.

80. In contrast to more concentrated special interest groups, the diffuse public simply cannot take the time, and in some cases does not have the ability regardless of time, to engage in rational political dialogue or to understand marginal utilities or benefits of alternative policies. Given the collective action problem of political mobilization, it is not rational for the public to expend much effort. The party label is an important shorthand device enabling diffuse publics to deal with public issues in a modern industrial society.

81. J. WILSON, *THE AMATEUR DEMOCRAT* 343 (1962); *see also* M. MCGERR, *THE DECLINE OF POPULAR POLITICS* 206 (1986) (noting that decline of partisanship “presented a complex, less accessible political world”).

82. *See, e.g.*, A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, *THE AMERICAN VOTER* (1960).

83. *See, e.g.*, Popkin, Gorman, Phillips & Smith, *supra* note 78.

ble and more important to the public.⁸⁴

Some critics correctly question the ability of the public to agree on the party linkages at various times, rightly observing that the question is one of balance between simplification and specification.⁸⁵ Certainly, American history includes examples of groups, especially blacks, that were excluded from political debate and power partly by the duopoly of a two-party system. Despite this, however, the simplification of party labels has also served at times to promote public understanding of political events, especially among less educated and poorer groups.⁸⁶ To the extent that the voting public focuses on this information, and is less likely to dwell on the often confusing static of diverse individual political conversations, the instrumental rationality of its decisions can be improved.⁸⁷

84. See M. MCGERR, *supra* note 81, at 134 ("Traditional party journalism . . . eased readers' participation in politics by creating an accessible political world[;] [p]arty papers made politics seem important, simplified issues, [and] encouraged the public to judge men and measures with the yardstick of partisanship . . ."); R. ENTMAN, *DEMOCRACY WITHOUT CITIZENS* 137 (1989) ("The decline of participation in the U.S. has historically paralleled the dwindling of the partisan press and the rise of objectivity.").

85. See S. SAUROF & P. BECK, *supra* note 79, at 58 (1988); A. WARE, *CITIZENS, PARTIES AND THE STATE* 238 (1987); Miller, *supra* note 31. Indeed, Morris Fiorina, who has written extensively about the importance of strengthening party organization, has recently noted that some of the breakdown of party influence *may* simply be a result in part of popular preference for divided government. See Fiorina, *An Era of Divided Government*, in *DEVELOPMENTS IN AMERICAN POLITICS* (B. Caine & G. Peele eds.) (forthcoming 1990).

86. The binary choice offered in two-party rule may also be one means for overcoming the social costs of political Condorcet cycling, the endless voting cycle created when voting is multi-peaked. See H. ROSEN, *PUBLIC FINANCE* 111-15 (1984); P. ORDESHOOK, *GAME THEORY AND POLITICAL THEORY* 56-59 (1988). This is not only because political parties exercise agenda control, thereby eliminating such cycling, but also because a socialization process may occur that will make positions among political actors more "single peaked," and thus not subject to cycling. As Albert Weale has observed, "The effect of a two-party system is to force voters to think of issues in the same way, namely in terms of a choice between party A and party B." Weale, *Social Choice Versus Populism? An Interpretation of Riker's Political Theory*, 14 *BR. J. POL. SCI.* 369, 373 (1984); cf. Mashaw, *supra* note 48, at 99 (noting that dialogue can produce single peaked distribution in some contexts). From the perspective of some legal academicians exploring literary theory, political parties might also be a means of helping to forge a rough type of interpretative community, which can be viewed as a prerequisite to meaningful *group* dialogue or understanding. See Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739, 745 (1982) (observing that interpretation can be objective within a given legal interpretative community). Of course, there is a fundamental question whether an interpretative community *in the literary or philosophical sense* can or should be established in the political or legal system. See Kahn, *Community in Contemporary Constitutional Theory*, 99 *YALE L.J.* 1 (1989); Mann, *The Universe and the Library: A Critique of James Boyd White as Writer and Reader*, 41 *STAN. L. REV.* 959 (1989). See also Post, *supra* note 63 (discussing some of the tension between community and civic dialogue in the first amendment context).

87. Indeed, this benefit might be understood in terms quite compatible with some aspects of economic and civic virtue *theory* — namely, the value of a principal/agency relationship between the public and government officials. For the economics theory, see Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 *AM. ECON. REV.* 777 (1972); Jensen & Meckling, *Theory of the Firm: Managerial Behavior Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305 (1976). For the civic virtue theory, see Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 69-72 (1985); Farber & Frickey, *The Jurisprudence of Public*

2. Party Identification and Public Dialogue

The simplification of political dialogue inherent in party identification has historically provided another instrumental benefit: improved "communication" between government and the public, and, in this sense, enhanced government accountability to public judgments, especially those of the poor.⁸⁸ In a dispersed environment of diverse political dialogue, the meaning of electoral events is more often unclear, as hundreds of individual candidate peculiarities determine particular electoral decisions with respect to congressional seats and state offices. This is especially true because voting is disproportionately retrospective, with voters responding best to clear government *actions*;⁸⁹ in a government of dispersed powers, government actions are less likely to be the subject of popular affirmation or retribution, since no individual government official or party controls government sufficiently to be held responsible and subject to clear retrospective evaluation.⁹⁰ Political parties, to the extent they control government, can serve as a structure that frames issues and programs in clear and simple terms for the whole public.⁹¹ While there may be a reduction in rational dialogue in a legal or philosophical sense, which cannot be ignored, there can be a quite different benefit in systemic political accountability — in a sense, mass public communication and dialogue through the

Choice, 65 TEXAS L. REV. 873, 912 n.224 (1987). In the eyes of many political scientists, strong party identification effectively limits popular oversight of day-to-day government activities, reducing political evaluations to general retrospective assessments about whether the party is acting consistently with the voters' general views and interests. See M. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS (1981); V.O. KEY, THE RESPONSIBLE ELECTORATE (1964). In this sense, it establishes a principal/agency relationship between the people and their government, necessarily giving the agent (that is, government leaders) some leeway. To the extent that the public is better at evaluating the general results of government actions, than at guiding specific future strategies, the generality of party identification may offer an advantage in promoting long-term rationality in voting.

88. See Fitts, *Vices of Virtue*, *supra* note 11, at 1639-43.

89. See V.O. KEY, *supra* note 84, at 63 ("[T]he major streams of shifting voters graphically reflect the electorate in its great, and perhaps principal role as an appraiser of past events, past performance, and past actions. It judges retrospectively; it commands prospectively only insofar as it expresses either approval or disapproval of that which has happened before."); M. FIORINA, *supra* note 87, at 5-6; cf. J. CLUBB, W. FLANIGAN & N. ZINGALE, PARTISAN REALIGNMENT: VOTERS, PARTIES AND GOVERNMENT IN AMERICAN HISTORY 30-32, 267 (1980) (arguing that the major realignments in American political history depend on rejection and affirmation by the electorate of the parties' actions in power).

90. As V.O. Key wrote, "[t]he vocabulary of the voice of the people consists mainly of the words 'yes' and 'no.'" V.O. KEY, POLITICS, PARTIES, AND PRESSURE GROUPS 544 (5th ed. 1964).

91. Of course, dialogue between courts and Congress has been a frequent subject of academic analysis. See A. BICKEL, THE LEAST DANGEROUS BRANCH 26 (1962); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 14-35 (1957); L. FISHER, CONSTITUTIONAL DIALOGUES (1988). The literature on party organization suggests that, at least in a systemic sense, this conversation may be undermined for the public by the decline of parties.

electoral system.⁹²

To be sure, no one suggests that party identification is a *perfect* heuristic.⁹³ As a practical matter, no such device can exist.⁹⁴ By defi-

92. Indeed, along these same lines, there is some possibility that this simplification may have a significant effect on the ability of the political system to enter into high politics, that is, to precipitate what political scientists call a critical election, one of those rare constitutional movements which is the basis for Bruce Ackerman's proposed system of judicial review. See Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1049-51, 1053-54 (1984) (claiming that the role of the courts is to perfect the political understanding reached during prior periods of "high politics"); see also Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989). Several scholars believe that a prerequisite to high politics is political control and accountability of government in one party's hands, such that the party's actions can become the subject of a comprehensive public retrospective evaluation. With the breakdown of the parties, there is some doubt whether in the future our political system will be able to precipitate as easily such high political debate, at least in a critical election sense. See D. BRADY, *CRITICAL ELECTIONS AND CONGRESSIONAL POLICY-MAKING* 165-66, 179 (1988); W. BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* 191 (1970); J. CLUBB, W. FLANIGAN & N. ZINGALE, *supra* note 89, at 161-62 (1980) ("[U]nified and sustained partisan control of government was a necessary and obvious condition for the policy innovations we usually see as the products of partisan realignments."); R. RUBIN, *PRESS, PARTY, AND THE PRESIDENCY* 216-17 (1981). If true, this structural change may also suggest that events like the failed Supreme Court nomination of Judge Robert Bork are a result of the traditional testing of the high political moment, as Ackerman argues, see Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988), but are also influenced by the breakdown of political parties, which makes it structurally more difficult for the "moment" to engulf all branches today.

93. Scholars have explored other types of heuristics, although they have been considered far more controversial. During the 1950s, a variety of political scientists, reacting in part to the rise of Nazi Germany and to McCarthyism, criticized the ideological bent of American politics, fearing that an ideological debate among the "masses" would promote McCarthyism and perhaps lead to fascism. See M. ROGIN, *THE INTELLECTUALS AND MCCARTHY: THE RADICAL SPECTER* 16-18 (1967) (summarizing authors). While this literature clearly overstated its position, it implicitly argued that the mass public needed a heuristic device by which it could rationally judge political life. Free-wheeling discussion and dissemination of information, especially in an abstract framework, supposedly obscured popular understanding of political events.

The solution traditionally offered to these difficulties was pluralism. A self-interested and narrowly focussed debate, according to this thinking, would serve as an important heuristic to channel political thinking. By keeping debate narrowly self-interested, it could facilitate the ability of the public, especially the poor and less educated, to participate effectively in politics. See C. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY* 229-32 (1965); M. ROGIN, *supra*. This conclusion claimed some support from the literature favoring incremental decisionmaking in a wide variety of public policy contexts as a means of improving rationality. See, e.g., D. BRAYBROOKE & C. LINDBLOM, *supra* note 71, at 243; Lindblom, *The Science of "Muddling Through"*, 19 PUB. ADMIN. REV. 79, 86 (1959); see also Diver, *supra* note 74 (advocating the use of incremental decisionmaking in all uncontroversial cases not threatening disastrous missteps or disenfranchisement); Miller, *supra* note 31, at 736 ("[O]rganizations in a pluralist society have an incentive to confine their actions to the businesslike pursuit of their narrow defining interests and not to pursue broad ideological goals."). While the cost of this increase in control over immediate events was an abandonment of political debate over more long-term, philosophical issues, this vice was supposed to have a potential virtue in political understanding and control.

Unfortunately, pluralism ignored or at least undervalued pervasive transaction costs, wealth effects, and the philosophical and normative vacuity of self-interested thinking. See *supra* text accompanying notes 26-31 and note 31. For this reason, while the normative defense of political parties has sometimes accepted the value of self-interest as a rationalizing device, see Fitts, *Vices of Virtue*, *supra* note 11, at 1641, many political scientists have advocated overcoming these other criticisms of pluralism through a different heuristic device — party identification. This system supposedly allows the public to have a manageable understanding of the comprehensive public issues that some pluralists thought would overwhelm it.

nitition, a heuristic simplifies and abstracts from reality, based on the decisionmaker's judgment as to what is important, as well as her need to facilitate analysis of social problems.⁹⁵ As civic-virtue and other writers have pointed out repeatedly and correctly, existing social institutions and heuristic devices necessarily *bias* public judgments.⁹⁶ Indeed, the argument on behalf of a two-party system (as opposed to a one-party system) is based on the need for alternatives to and criticism of a particular party perspective.⁹⁷ Ultimately, the question is one of balance. The political party approach cautions, however, that a constant increase in the diversity of political inputs, which check each perspective with other perspectives,⁹⁸ will not *eliminate* the use of heuristic devices; they are inherent in human processing of information.⁹⁹ In the absence of strong parties and party labels, members of the public may well generate their own types of anchoring devices which can be worse.

94. See *supra* notes 74-75 and accompanying text.

95. This is perhaps one reason that some common law legal analysts and interdisciplinary legal scholars criticize each other's analytic methodology as simplistic. On one level, they are both correct, since all models simplify reality to facilitate understanding. See M. WEBER, *METHODOLOGY*, *supra* note 20, at 20; cf. B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 10-15 (1977) (distinguishing between "scientific policymakers" and "ordinary observers" as alternative paradigms of legitimate legal analysis); R. POSNER, *supra* note 21, at 16 ("[A]bstraction — reductionism, if you like — is of the essence of scientific inquiry. A scientific theory must select from the welter of experience that it is trying to explain, and it is therefore necessarily unrealistic when compared directly to actual conditions.") (footnote omitted).

96. We all have come to understand the pervasive influence of anchoring phenomena and social background in conceptual thinking. See C. BAKER, *supra* note 10, at 14-22; J. ELSTER, *SOUR GRAPES* (1983); Baker, *The Ideology of the Economic Analysis of Law*, 5 *PHIL. & PUB. AFF.* 1 (1975); Sunstein, *Legal Interference with Private Preferences*, 53 *U. CHI. L. REV.* 1129 (1986) (arguing that legal intervention despite private preferences may be justified when those preferences depend on the legal and social orders). See generally K. MANNHEIM, *IDEOLOGY AND UTOPIA* (1954); Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 *S. CAL. L. REV.* 617 (1973).

97. See A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 140-41 (1957); E. SCHATTSCHNEIDER, *supra* note 11, at 60.

98. See Sunstein, *supra* note 96, at 1154 ("A political process that subjects private choices to critical scrutiny will in this sense produce better laws than a process that takes them as exogenous."); Michelman, *Traces of Self-Government*, *supra* note 49, at 76 ("The norm of justice to parties itself commands that no other norm should ever take a form that preempts questions or exempts from reason-giving."); cf. Minow, *supra* note 55, at 74 ("Justice depends on the possibility of conflicts among the values and perspectives that justice pursues.")

99. See sources cited *supra* note 71. As Cass Sunstein recognizes: "If the ideas of endogenous preferences and cognitive distortions are carried sufficiently far, it may be impossible to describe a truly autonomous preference. . . . It is difficult indeed to generate a baseline from which to describe genuine autonomy and an approach that tries to abstract entirely from social pressures is unlikely to be fruitful." Sunstein, *supra* note 96, at 1170-71. Ultimately, political understanding can benefit from organizing principles, ideal types, which facilitate understanding of political action. Competing political parties perform this role for a modern industrial society. See *supra* note 86 (discussing the possible need for an interpretative community to engage in group dialogue).

B. *Limited Information as a Benefit in Promoting Utilitarian Efficiency (Model II)*

The political party literature thus indicates that less information and party identification can serve as a heuristic device to simplify and organize political information. This approach also suggests a second possible utilitarian benefit to more limited information: minimizing groups' narrow pursuit of self-interest that, from a societal perspective, would have led to a reduction in social welfare through the process of universalism described above. Put another way, less information may help forge a sense of collective responsibility, without which the pursuit of self-interest may make many citizens worse off.¹⁰⁰ This is the classic prisoners' dilemma, which was described earlier as Model II.¹⁰¹

1. *The Influence of Special Interest Groups*

As discussed above, a major reason often offered for the heightened and potentially perverse influence of narrow constituencies in congressional and administrative decisionmaking is the splintering of governmental power among different government actors. The increasing independence of representatives within Congress is thought in many cases to advantage narrow interest groups that can secure a legislative foothold and trade that position for influence within the legislative process. This independence is secured, to a large degree, by representatives delivering discrete services to their districts in the form of constituent services, pork-barrel legislation, or other concentrated benefits. The cost of these services, however, is *other* constituent services and pork-barrel legislation obtained by *other* representatives — so-called universalism — resulting in reduced social welfare. Once a regime of universalism has been established, moreover, there is no basis for *individual* legislators or their constituents to opt out of the system.¹⁰² As in the prisoners' dilemma, many groups would be better off, under this analysis, if representatives could reach a binding agreement to end the system.¹⁰³

100. Limited information is beneficial for the *individual* in this context, it should be noted, only if similarly situated political actors are also restrained by the information limitation, so as to avoid the prisoners' dilemma. As in the case of the prisoner's dilemma there would be an *individual* instrumental advantage to this type of information. See *supra* note 15.

101. See *supra* notes 14-15 and accompanying text.

102. If the constituents should elect a civically virtuous representative, she alone would not be able to change the nature of the regime or political bargains, but could only deprive her constituents of their piece of the pie.

103. For a general description of this process, see L. DODD & R. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE (1979); M. FIORINA, *supra* note 30; Shepsle & Weingast, *Legislative Politics and Budget Outcomes*, in FEDERAL BUDGET POLICY IN THE 1980'S 343 (1984).

2. Party Identification

There is good reason to believe, however, that strong party identification (as well as strong party control over political resources that help maintain that identification) may tend to reduce this problem, especially at the national level. Strong parties, which control political resources and create strong party identification, thereby diminish the ability of legislative representatives to communicate effectively information to their constituents regarding any delivery by the representatives of special services peculiar to their particular districts.¹⁰⁴ In a sense, strong party identification, which is created and reinforced by strong party influences over communications, creates a verbal or psychological centralization of authority by leading constituents not to focus on any special services — individual or legislative — that might be performed by their representatives, but rather to vote and debate on the success or failure of the party as a whole. In this environment, representatives obviously have less of an ability or incentive to spend their time distinguishing themselves from the party or leaders and performing discrete legislative, constituent, or symbolic activities,¹⁰⁵ and more reason to work with party leaders in favor of a general party program for which they would be held accountable.¹⁰⁶ Although dialogue and information ordinarily are viewed as forging a sense of community, here the opposite can be true: the absence of information

From the opposite perspective, a more centralized government structure often appears to avoid some of these problems. See Inman, *Markets, Governments, and the "New" Political Economy*, in 2 HANDBOOK OF PUBLIC ECONOMICS 647, 692-739 (A. Auerbach & M. Feldstein eds. 1987) (reviewing public choice literature on centralized rule); Inman, *Federal Assistance and Local Services in the United States: The Evolution of a New Federal Fiscal Order*, in FISCAL FEDERALISM AND QUANTITATIVE STUDIES (H. Rosen ed. 1988) (discussing the benefits of a majority rule system, as opposed to a dispersed system, in federal grant programs); J. COGAN, THE EVOLUTION OF CONGRESSIONAL BUDGET DECISIONMAKING AND THE EMERGENCE OF FEDERAL DEFICITS (The Hoover Institution Working Paper No. E-88-33, 1988) (concluding that legislative decentralization has led to deficits).

104. To be sure, the traditional picture of the party machine is of an organization *facilitating* graft. As the text suggests, however, party *identification* can obviate the need for the party to undertake such distributions in order to maintain its strength.

105. As has been observed: "So long as individual candidates have some freedom to tailor their positions to their particular districts, they will naturally be perceived more favorably than an institution, such as Congress, or . . . the chief executive, that in effect is constrained to adopt a single national position." B. CAINE, J. FERREJOHN & M. FIORINA, *THE PERSONAL VOTE* 200 (1987).

106. See sources cited *infra* note 138. The textual argument, it should be noted, is the political counterpart of a negative-information thesis first put forward by economist Richard Hirshleifer in the case of certain types of insurance contracts. See Hirshleifer, *supra* note 25. As Hirshleifer observed, market participants in insurance may be better off if precluded from securing information about future events that would merely have distributional consequences. The reason is that the attempt to acquire the purely distributional information will lead to a social deadweight loss. As a result, Hirshleifer reasoned, contrary to the classic economic analysis of information, legal prohibitions on the acquisition of such information can *enhance* social utility. Here, there may be similar utilitarian benefits to limited information in the public context.

about individual actors and their distinctions may create a greater sense of collective identity and responsibility.¹⁰⁷

Strong political parties and party identification help overcome this problem, it is important to emphasize, by reducing the incentive of narrow individual constituencies to act on information about their self-interest.¹⁰⁸ To draw the crude analogy to public choice theory, they should help solve the prisoners' dilemma by "depriving" the public within a particular congressional district of the information that its political representative can offer a "special deal."¹⁰⁹ This lack of knowledge helps to decrease the probability that the district will pursue its immediately apparent self-interest. The result is that individual members of Congress are more likely to be held accountable for their contribution to the general effectiveness of government performance than for their narrow, marginal efforts to obtain special advantages for their district or for individual constituents. All things being equal, therefore, there is less reason for members of Congress to spend time distinguishing themselves politically and symbolically from the rest of their party. Rather, they will throw their support and assistance to the party as a whole, since it is its success, ultimately, that is more likely to ensure the individual's reelection. As a result, the political influence of diffuse groups should be enhanced.

Indeed, an analogous argument has been made about the effect of political parties and party identification on the incentive for political actors to take actions with a longer time horizon. A political party that exists as a stable institution extending across careers and political generations may tend to mask the temporal distinctions between lead-

107. Of course, some believe there are potential benefits to the breakdown of party identification. The dispersion of influence and rise of independent political power accompanying the decline of parties facilitate greater dialogue between individual representatives within Congress and between branches of government. Moreover, to the extent that universalism reigns in Congress, it may improve the ability of narrower groups, such as traditionally excluded minorities, to secure *some* institutional representation within the polity, although, *absent prejudice*, narrow groups are generally thought to enjoy organizational advantages in today's political process. See Ackerman, *supra* note 28, at 745-46.

Finally, from the opposite perspective, the decentralization of power might be thought to raise concerns of tyranny or of narrow groups gaining extra influence through their control of centralized institutions. The political party's greater emphasis on centralization may not fully resolve the internal question — what organization theory would call a principal/agency problem — of ensuring that party leaders are responsive to their party constituents. The traditional view is that a two party framework ensures a measure of accountability. See Fitts, *Vice of Virtue*, *supra* note 11, at 1610-12.

108. Obviously, this is different from the typical law-and-economics or civic virtue solutions that seek either to implement a tit-for-tat strategy or to instill altruism or virtue. See R. AXELRÖD, *THE EVOLUTION OF COOPERATION* (1984); R. FRANK, *PASSIONS WITHIN REASON* (1988); M. TAYLOR, *ANARCHY AND COOPERATION* (1976); Hansmann, *The Role of Nonprofit Enterprise*, 89 *YALE L.J.* 835, 848-54, 859-62 (1980); Sunstein, *supra* note 87.

109. See *supra* note 15 (describing the prisoners' dilemma).

ers of the same party. With this "ignorance" of personal differences between party members, there can be less of an incentive, all things being equal, to pass off budget deficits or other problems to future party decisionmakers, who are linked to present political leaders by party ties and popular party identification. In this type of environment, it is possible that the President and subordinates who will soon become party leaders know that the public is more likely to hold the party and future party leaders accountable for current policies. Parties and party identification thus would serve to help promote longer temporal accountability by masking individual distinctions between party successors.¹¹⁰ To the extent that political parties decline as collective institutions extending across administrations and political personalities, this temporal accountability becomes more attenuated, if not broken. Politicians can be more confident that successors within the party will not be held responsible for earlier actions, thereby exacerbating any temporal collective action problems.¹¹¹

C. *Limited Information and Nonideological Political Parties as a Benefit in Overcoming Political Stalemate (Model III)*

A third and related way that less information and stronger party identification can benefit utilitarian decisionmaking is by obscuring the existence of political divisions and issues, thereby facilitating agreement and political action. This is an example of Model III, as outlined earlier.¹¹²

110. As V.O. Key argued:

Expression of electoral disapprobation . . . depends on the existence of political parties with some continuity and some sense of corporate accountability. When a President seeks reelection, he cannot avoid that accountability; his record is approved or it is not approved. When the President's party puts forward a nominee as a successor to the incumbent, the candidate must, if the electorate is to be effective, be accountable for the record of his party. When such a presidential candidate seeks to work out of such responsibility, he attempts to subvert a basic tenet of the constitutional customs.

V.O. KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY 474 n.3 (1961). See generally Cremer, *Cooperation in Ongoing Organizations*, 101 Q.J. ECON. 33 (1986).

111. The result *could* be a greater likelihood of such temporal collective action problems as budget deficits. See Cogan, *supra* note 103 (linking the decline of parties to budget deficits). See generally J. BUCHANAN & R. WAGNER, DEMOCRACY IN DEFICIT: THE POLITICAL LEGACY OF LORD KEYNES 17-18 (1977) (arguing that deficits are a result of temporal collective action problems).

112. See *supra* text accompanying note 16. To some extent, the value of political parties in improving the rationality of voting, see *supra* section III.A, while at the same time avoiding some issues (as outlined here in section III.C) might be seen as pursuing objectives that are potentially in tension. A similar charge can be made against traditional defenses of pluralism. In this case, however, political parties are thought to improve the rationality of voting about those issues on the political agenda and to be better able to avoid other potentially destructive issues by keeping them off the political agenda. Political party supporters would explain the difference as simply "want[ing] to offer voters *some* choice but not [too much] choice." Orren, *The Changing Styles of American Party Politics*, in THE FUTURE OF AMERICAN POLITICAL PARTIES 4, 15 (J. Fleishman ed. 1982) (emphasis in original). As E.E. Schattschneider observed, "[d]emocracy is not to

Of course, the need for agreement is relative and is ordinarily outweighed by the fundamental value in confronting and resolving social issues. It can be necessary, however, to overcome the status quo by prioritizing among the infinite number of controversies that can be placed on the political agenda. Rawls, for example, has argued that avoiding certain issues is a necessity in the modern liberal state.¹¹³ This avoidance is achieved not only by explicit constitutional prohibition, such as the separation of church and state,¹¹⁴ but also by the way political institutions, such as strong parties and party identification, are structured so as to keep political actors focused on some issues and not on others — that is, to facilitate ignorance of some issues. This process is similar to the manner in which party identification overcomes interest group universalism, except in this case party identification and other related devices can serve to overcome ideological and other stalemates.

1. *The Literature on Nonideological Parties*

This controversial argument can be traced to the pluralists, who suggested that structures that keep debate focused on today's problems, such as incremental budgeting systems, facilitate agreement and government action.¹¹⁵ Because any *general* rejection of compre-

be found *in* the parties but *between* the parties." E. SCHATTSCHNEIDER, *supra* note 11, at 60 (emphasis in original). In this sense, parties can be seen on some dimensions as facilitating political clarity — even ideology — and on other dimensions as removing issues from the political agenda.

113. See Rawls, *supra* note 16; see also Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 17 (1987) (calling for a "remov[al] from the political agenda [of] the most divisive issues, pervasive uncertainty and serious contention about which must undermine the bases of social cooperation"). As Stephen Holmes has observed: "In a liberal social order, the basic normative framework must be able to command the loyalty of individuals and groups with widely differing self-understandings and conceptions of personal fulfillment. As a result, theorists of justice can achieve their principal aim only by steering clear of irresolvable metaphysical disputes." Holmes, *Gag Rules or the Politics of Omission*, in CONSTITUTIONALISM AND DEMOCRACY 19, 20-21 (J. Elster & R. Slagstad eds. 1988).

114. See Holmes, *supra* note 113, at 19-58 (discussing this and a variety of other legal techniques). Sunstein recognizes the benefits of omission in this special case. See Sunstein, *supra* note 49, at 1555 n.85 ("[R]emoval of religion from the political agenda protects republican politics by ensuring against stalemate and factionalism.").

115. See A. WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* (3d ed. 1979); Wildavsky, *Rescuing Policy Analysis from PPBS*, 29 PUB. ADMIN. REV. 189 (1969); see also A. BENTLY, *THE PROCESS OF GOVERNMENT* 447-59 (1908); R. DAHL, *supra* note 31, at 141-45; C. LINDBLOM, *supra* note 93, at 3-34, 87-101; D. TRUMAN, *THE GOVERNMENTAL PROCESS* 501-35 (1951). *But cf.* A. WILDAVSKY, *THE "NEW" POLITICS OF THE BUDGETARY PROCESS* 423-26 (1988) (recognizing many of the trade-offs involved in this approach). While ignorance of long-term issues may minimize certain types of analysis, it can have advantages in reaching agreements where there is little to gain from increased scrutiny. Analogous arguments about ignorance facilitating moral consensus have been made in the private law literature. See, e.g., G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* 38-39 (1978).

hensive analysis is highly questionable,¹¹⁶ however, the political party approach has pursued the benefits of less absolute limitations on information.

Coalitional, as distinguished from ideological, politics is the best example. According to this perspective, synoptic-ideological analysis often stimulates informational inputs and conflict which can be profitably avoided through a more focused political process. In particular, nonideological politics, which deemphasizes any *overarching* ideological framework, is thought to avoid raising some issues, thereby "serv[ing] as a method for aggregating popular choices, tying these conflicts over courses of action to a broader program, and . . . making compromise rather than veto the general form of resolution."¹¹⁷

For similar reasons, such devices as party identification, closed primaries, and centralized party conventions,¹¹⁸ as well as some restrictions on access to decisionmaking and bargaining in Congress and executive agencies,¹¹⁹ are thought to serve as a means of avoiding or delaying resolution of some issues by keeping them out of public debate and the public "consciousness."¹²⁰ Indeed, the increasing use in recent years of government commissions appointed by the President or Congress to decide major issues of policy, such as the deficit, social security, or the future of the MX missile, represents an attempt to re-create outside the public eye the informal bargaining mechanism

116. The narrowness of decisionmaking within a pluralist framework has been frequently criticized when used as a general model for government decisionmaking. At best, avoidance is only an intermediate, not a universal, goal.

117. Orren, *supra* note 112, at 5.

118. See N. POLSBY, CONSEQUENCES OF PARTY REFORM (1983); D. PRICE, *supra* note 78; L. SABATO, *supra* note 11.

119. See S. FRANTZICH, COMPUTERS IN CONGRESS 246-47 (1982) ("With better information, members of Congress [are] able to determine not only the aggregate impact of legislation, but also the specific impact on their districts, . . . heighten[ing] the 'zero sum game' view of politics" and "exacerbate[ing] the problem [of decisionmaking] by laying bare the conflicts over values or parochial interests that were muted when such information was not readily available."); Strauss, *supra* note 48, at 666 (criticizing formalization of Presidential direction over agencies because the visibility of this process might lead Congress to "encumber" the system "in ways restricting the effectiveness of the President's coordinative apparatus."). Similar observations have been made in game theory about the benefits of a "focal point," which avoids bargaining over coordination problems. See A. ROTH, AXIOMATIC MODELS OF BARGAINING (1979); T. SCHELLING, THE STRATEGY OF CONFLICT 70 (1963). For a discussion of the related agenda control benefits of political parties, and their value in creating single-peaked preferences, see *supra* note 86.

120. Nor is this technique foreign to courts. In constitutional law, for example, courts on occasion have left unclear the relative powers of the separate branches in part to facilitate such informal compromises between the branches on a case-by-case basis. See Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 501 (1987). An example of this is the doctrine of executive privilege. *Id.*

among branches that existed with the parties.¹²¹ While all of these are only half-way time-limited measures (complete preclusion would be quite dangerous) the limits on information in these cases can facilitate useful agreement and subsequent action.¹²²

2. *Civic Virtue and Law-and-Economics Attempts To Further Precision*

From a civic virtue perspective, this approach may seem perverse — and certainly it is if carried too far. The foundation of rational dialogue, indeed the normative defense often advanced for the legitimacy of the legal process itself, is the willingness of decisionmakers to respond to and deal with challenges.¹²³ A variety of reforms consistent with the civic virtue perspective, such as the “hard look” doctrine and “proliferation of points of access,” are supposed to confront issues and to “promote access to sources of public deliberation.”¹²⁴ Similarly, law-and-economics proposals to facilitate greater consistency, candor, and oversight through judicial review and statutory construc-

121. See, e.g., 2 U.S.C. §§ 351-61 (1988) (establishing the Commission on Executive, Legislative, and Judicial Salaries); Executive Order No. 12400, 3 C.F.R. 147 (1983) (executive order establishing the presidential Commission on Strategic Forces); 10 U.S.C.A. § 2687 (West Supp. 1989) (authorizing the defense secretary's Commission on Base Realignment and Closure); Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat 1330 (1987) (codified at 2 U.S.C.A. § 901 (West Supp. 1989)) (establishing the National Economic Commission); Executive Order No. 12335, 3 C.F.R. 217 (1981) (executive order establishing the National Commission on Social Security Reform). See generally Greenberg & Flick, *The New Bipartisan Commissions*, 1983 J. COMP. STUD. 3, 19. Indeed, the failure of the National Economic Commission to reach an agreement, in contrast to the success of the social security and base-closing commissions, was attributed to the fact that it was subject to an open-meeting requirement. See, e.g., MacNeil/Lehrer Newshour (Mar. 1, 1989) (comments of Rep. Frenzel).

The literature criticizing the “plebiscitary” presidency is based in part on a similar analysis: a president whose every act is subject to media attention lacks the ability to facilitate compromise and prioritize interests in the resolution of issues. See T. LOWI, *THE PERSONAL PRESIDENT* 134-75 (1985); J. TULIS, *THE RHETORICAL PRESIDENCY* 173-204 (1987). Of course, presidential or congressional commissions can offer another analogous advantage: by lowering the number of actors who participate in decisionmaking, they centralize power and help overcome collective action problems.

122. At the same time, of course, incrementalist decisionmaking can be viewed as *creating* information — that is, information about the results of marginal acts, which then can become the basis of subsequent decisions. See Diver, *supra* note 74.

123. See *supra* notes 64-65 and accompanying text.

124. Sunstein, *supra* note 49, at 1577; see also *id.* at 1562 (discussing the “central republican understanding that disagreement can be a creative force”); *id.* at 1581, 1584 (stating that statutory construction should promote “consistency,” “coordination,” “political accountability,” and “high visibil[ity]”); Bruff, *supra* note 28, at 238 (“[H]ard look review could play the same legitimizing role in administrative law that the jurisprudential school of ‘reasoned elaboration’ once held out for the courts themselves through norms of neutral, consistent, and candid decisional processes.”); J. ELY, *DEMOCRACY AND DISTRUST* 134 (1980) (criticizing legislators’ “propensity not to make politically controversial decisions — to leave them instead to others, most often others who are not elected or effectively controlled by those who are”); cf. Stewart, *supra* note 46, at 1695 (“Individual politicians often find far more to be lost than gained in taking a readily identifiable stand on a controversial issue of social or economic policy.”).

tion (that is, to further a legal and political cost-benefit analysis) are intended to force the public and decisionmakers to deal openly with problems.¹²⁵ As a practical matter, political candidates and parties are routinely castigated in the popular press for not offering the details of their programs or downplaying internal divisions. The presumption is that such obfuscation undermines the electoral connection, namely, the responsiveness of political representatives to the instrumental needs and desires of their constituents, and prevents the development of an effective rational dialogue.¹²⁶

In support of the view that greater information will not cause stalemate, civic virtue scholars suggest that an ideological normative discussion should promote a *convergence* of views on social principles. That is because justifications must be proffered in terms of general normative ideals and not narrow utilitarian benefit. Where decisionmakers are less focused on their own personal utilitarian advantage, it is supposed, they will be *more* likely to converge on first principles, which are presumed to be consensual. If that is true, it would seem unnecessary to reduce dialogue and information in the way suggested above, since ideological confrontation on issues should ultimately lead to a rough consensus.¹²⁷

Whatever the attraction of this perspective in an ideal world,¹²⁸ the party approach suggests that an ideological debate in a real-world political environment, where people are aware of their self-interests

125. See Rose-Ackerman, *supra* note 25, at 354 (urging the courts to review legislation for "consistency" between ends and means in order "to increase the accountability of the legislature to the voting public and to improve deliberation within Congress"); Macey, *supra* note 41, at 251 (calling for system of statutory construction to promote candor and "public regarding goals").

126. According to the textual analysis, if candidates and parties were forced to be open and clearer, the responsiveness of our government, as measured by its utilitarian performance, would be enhanced. For discussion of the other reasons offered for ambiguity, see generally Campbell, *Ambiguity in the Issue Positions of Presidential Candidates: A Causal Analysis*, 27 AM. J. POL. SCI. 284 (1983); Shepsle, *The Strategy of Ambiguity: Uncertainty and Electoral Competition*, 66 AM. POL. SCI. REV. 555 (1972).

127. See Sunstein, *supra* note 49, at 1550 ("The requirement of deliberation embodies substantive limitations that in some settings lead to uniquely correct outcomes."); *id.* ("The requirement of deliberation is designed to ensure that political outcomes will be supported by reference to a consensus (or at least broad agreement) among political equals."); *id.* at 1554 ("[R]epublican approaches posit the existence of a common good, to be found at the conclusion of a well-functioning deliberative process."); Michelman, *Traces of Self-Government*, *supra* note 49, at 24 (While "[m]y reading of the history will not show the standard version mistaken in its ascriptions to republicanism of either the objectivism of public good or the teleology of civic virtue[.], I wish rather to suggest why the civic ideal retains its hold despite its insults to modern sensibilities.").

128. Civic virtue writers have recognized the tensions within an objective view of morality. See, e.g., Michelman, *Traces of Self-Government*, *supra* note 49, at 24 ("[T]he civic ideal retains its hold despite its insults to modern liberal sensibilities."). See generally C. BAKER, *supra* note 10, at 22 ("Our limited rationality and the absence of objective truth undermine[] any basis for confidence that the marketplace w[ill] lead to wisdom."); F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 34 (1982).

and their ideologies differ, can often *exacerbate* divisions and undermine the ability to reach a consensus. There are two related reasons. First, as a general matter, ideological politics tends to raise the stakes of the debate because it requires a consistency in judgment that necessarily precludes everybody from getting "some but never all of what [they] want."¹²⁹ Compromise on the issue at hand can thus be more difficult. Second, this effect is important not only for the resolution of the question at issue, but also for other issues. By definition, when issues are resolved ideologically, a decision about one issue can effectively decide a host of other issues *because it is logically connected by the ideology*.¹³⁰ As a result, the stakes of the discussion in an ideological debate are higher because more potential interests are affected.¹³¹ For both of these reasons, the political party literature suggests that the value in confronting all issues must be balanced against the mediation and consensus-forming benefits of coalitional politics, which in effect keep us unfocused on the long-term or "logical" implications of our actions. Political parties and centralizing structures such as party identification "represent[] the triumph of pragmatic compromise over ideological purity that is an essential feature of American politics."¹³²

129. A. RANNEY & W. KENDALL, *DEMOCRACY AND THE AMERICAN PARTY SYSTEM* 508 (1956) (emphasis omitted). Problems over budget negotiations illustrate the tension. After passage of the 1974 Budget Control Act, each budget item was to be reevaluated in a classic comprehensive approach. See A. SCHICK, *RECONCILIATION AND THE CONGRESSIONAL BUDGET PROCESS* 34 (1981). It was no longer "possible to swap an increase here for a decrease there or for an increase elsewhere without always having to consider the ultimate desirability of programs blatantly in competition." A. WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS*, *supra* note 115, at 136-37.

130. See Miller, *supra* note 31, at 740 (noting that ideological politics ordinarily "entails a large set of universal losers likely to be deeply alienated by the political system").

131. Curiously, this analysis is the exact opposite of the familiar refrain that ideological debate is the worst and most virulent because there is nothing at issue. Indeed, there *is* something at issue, but it is something that allows of no compromise — right and wrong, truth or justice, the structure of the society — and, therefore, can be more significant.

This argument, it should be pointed out, is consistent with the veil-of-ignorance discussion explored in the next section, which examines the potential value of ideological discussions that occur behind a veil of ignorance or a true real-world substitute. If decisions are delegated to administrative agency personnel whose constant turnover complicates any prediction as to their future decisions, or are embodied in constitutional amendments where future application by courts are truly unclear, winners and losers may be less apparent, even though the discussion has major social significance and is truly ideological. Consensus might be possible. See *infra* notes 172-77 and accompanying text. In a real-world political debate that is not subject to a "veil," however, the impact of ideologies on other contexts and interests is more obvious. If political institutions require that discussion be both comprehensive and rational, political agreement as a general matter may be less achievable.

132. Orren, *supra* note 112, at 27. Indeed, it may be the case that imprecision, as advocated in the literatures on pluralist incrementalism and nonideological parties, should be recognized as a real-world means of *promoting* a civic virtue dialogue as well. On a fundamental level, the goal of dialogue, indeed its very justification, is to reach some degree of certainty. A system that converges on such truths, however, will extinguish any need or incentive for continued dialogue. For this reason, institutions that promote uncertainty and imprecision can be viewed as ensuring a continued institutional dialogue; common law decisionmaking and interest group pluralism, the

D. *The Decline of Party Identification: A Case Study in the Instrumental and Utilitarian Problems with Increasing Information*

The utilitarian and instrumental benefits of limited information, discussed above in terms of the political party model, find some factual support in the problems associated with the decline of party identification and party strength over the past thirty years. As numerous scholars have detailed, party identification within the electorate and party strength more generally have diminished, especially since the 1950s, with a majority of the voters now identifying themselves as either independents or only loosely affiliated with a party.¹³³ This decline is especially noteworthy given the fact that the United States, with its dispersed political structure, has never had particularly strong parties,

two greatest "antagonists" of civic virtue, are perhaps the clearest examples. See E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948); see also *supra* note 93. The incremental institutional decisionmaking intrinsic to pluralist processes, and to a lesser extent nonideological parties, focuses clearly on immediate problems and, at the same time, ensures a continued exchange of views and dialogue over time.

In the end, this paradox illustrates the fundamental tension within civic virtue writing itself about dialogue and objective truth, that is, between objective and community truths. The work of Michael Walzer is a good example. See M. WALZER, SPHERES OF JUSTICE (1983). For a recent legal discussion of some aspects of this tension, see Kahn, *supra* note 86; Post, *supra* note 63. Put simply, if there are in fact correct answers, why need institutions for the dialogue be eternal? Pluralism and nonideological parties seek to resolve this conflict in a particularly noncivic-republican manner. Limitations on information and dialogue, under this approach, serve as systems for institutionalizing a *continuing* discussion.

133. See W. CROTTY, AMERICAN PARTIES IN DECLINE (1984); N. NIE, S. VERBA & J. PETROCIK, THE CHANGING AMERICAN VOTER (1979); M. WATTENBERG, *supra* note 78. Indeed, one political scientist has gone as far as to say:

In a world in which political scientists disagree on almost everything, there is remarkable agreement among the political science profession . . . that the strength of American political parties has declined significantly over the past several decades. Regardless of how one measures partisanship — by personal party identification within the electorate, by party discipline in Congress, or by the vitality of party machinery — there is massive evidence attesting to the weakened condition of the parties in the United States.

Orren, *supra* note 112, at 31.

There is evidence in recent years, however, of an increase in party fundraising, as well as party voting and strength in Congress, especially on procedural issues. It is a subject of intense debate whether or in what sense this represents a resurgence of party influence. See, e.g., Schlesinger, *The New American Political Party*, 79 AM. POL. SCI. REV. 1152 (1985). Without doubt, however, the focus of parties has become more national, as state party organizations have declined more precipitously. *Id.* In a forthcoming book, Gary Cox and Mathew McCubbins argue that the decline-of-party thesis is especially overstated in the case of Congress. See G. COX & M. MCCUBBINS, PARTIES AND COMMITTEES IN THE U.S. HOUSE OF REPRESENTATIVES (Nov. 1989 draft on file with the author). Regardless of whether one accepts their ultimate conclusions, their thesis is predicated on the continuing viability of party identification in the electorate and the resulting interest of individual congressmen in a small collective body such as Congress in supporting party centralization in Congress and party efforts. While they appear to be more optimistic than some other political scientists on the continuing strength of party identification, their explanation of its overall impact appears to be consistent with the thesis of this article. For a historical and institutional explanation for the recent rise in party voting in Congress at the same time as party influence has declined nationally, see B. GINSBURG & M. SHEFTER, POLITICS BY OTHER MEANS: THE DECLINING IMPORTANCE OF ELECTIONS IN AMERICA 94-100 (1990).

especially at the national level, as compared to some foreign countries such as Great Britain.

While exceedingly complicated, the reasons for the drop lie partly in the proliferation of political resources that has made possible the dissemination of information independent of the parties. In particular, individual members of Congress have an improved ability to communicate directly with the public because of increased opportunities for individual candidate financing and PAC support;¹³⁴ increases in distributive legislation in the post-New Deal state;¹³⁵ constituency servicing;¹³⁶ greater popular education that has made examination of individual differences among candidates more appealing;¹³⁷ and, perhaps most important, heightened media attention toward individual candidates.¹³⁸ In addition, on the state level, the disaggregation of political offices, whereby individual positions are elected at off-years, minimizes the dependence of individual candidates on party or group performance or assistance.¹³⁹ In this environment, individual politicians — especially incumbents — are better able than in the past to distinguish themselves from their party by emphasizing single issues, personality, and symbolic stands. In general, “the media have supplanted political parties as the main connecting rods between candidates and voters, providing citizens with their only real information during the campaign.”¹⁴⁰ As Morris Fiorina puts it, “Candidates would have little incentive to operate campaigns independent of the parties if there were no means to apprise the citizenry of their independence. The media provide the means.”¹⁴¹ In this situation we have a

134. See L. SABATO, *PAC POWER* (1985).

135. See M. FIORINA, *supra* note 30, at 37-47.

136. See *id.*

137. E. LADD & C. HADLEY, *TRANSFORMATIONS OF THE AMERICAN PARTY SYSTEM* 15-16 (1975).

138. See A. WARE, *THE BREAKDOWN OF DEMOCRATIC PARTY ORGANIZATION, 1940-1980*, at 241 (1985) (noting that critical to the breakdown of parties was “the development of new technologies which could be employed in political campaigning, and the resources which helped incumbents, especially legislators, to divorce themselves from the nominating and electoral activities of their party’s organizations”); Richardson, *supra* note 78, at 700 (concluding that greater party influence in Japan as compared to the United States is due to the fact that in Japan, unlike the United States, the electorate is exposed regularly to information about parties but only intermittently to information about candidates). See generally J. CLUBB, W. FLANIGAN & N. ZINGALE, *supra* note 89, at 278-86 (decline of party identification and strength occurred when “[t]he national information flow increased, became more varied and pervasive . . . , strain[ing] the parties as mechanisms of political mobilization, [] integration, and policy formation”).

139. W. BURNHAM, *supra* note 92, at 94.

140. Orren, *supra* note 112, at 31.

141. Fiorina, *The Decline of Collective Responsibility in American Politics*, 109 *DAEDALUS*, Summer 1980, at 25, 33; see Orren, *Thinking about the Press and Government*, in *IMPACT: HOW THE PRESS AFFECTS FEDERAL POLICYMAKING* 10 (M. Linsky ed. 1986) (quoting James Barber as saying: “The media in the United States are the new political parties. The old political parties

more dispersed dialogue.

To some extent, this phenomenon suggests that "the candidate, the issue, [and] the particular events of the immediate campaign" may count more now than in the past. Obviously, in certain respects this is a political benefit. As two authors put it:

[I]n the contemporary environment of weak partisan loyalties and large numbers of independents, the potential of the campaign for shaping voter perceptions of the candidates may be higher than it has ever been. As long-term voter commitments to [a] party becomes less important, short-term impressions come to predominate.¹⁴²

There is a trade-off, however, in terms of the three benefits of party identification and strength described above. Most importantly:

[S]uch patterns [do not] represent an increase in voter rationality. "Candidate appeal" is often based on the most superficial, contrived kind of media image. "Major issues" are too often a few isolated, symbolically potent issues that happen to be "hot" at the moment — frequently as a result of skilled advertising. And incumbent voting has loosened the link, not only between the issue positions of individual voters and their representatives, but also between national public opinion trends and Congress as a whole.¹⁴³

The resulting behavior is often "less political in a broad, programmatic sense than the reliance on party loyalties and identifications that it replaces."¹⁴⁴

are gone."); M. WATTENBURG, *supra* note 78, at 100 ("Through the media, congressional candidates now have the capability of making themselves far more visible than in the past, and to the degree that their campaigns are run independently of party one would expect a decline in the saliency and intensity of partisan attitudes in the electorate.").

142. See F. SAUROF & P. BECK, *supra* note 79, at 295.

143. D. PRICE, *supra* note 78, at 110. As Saurof and Beck point out:

Recent campaigns have witnessed tremendous swings in public support for candidates right up to election day and an increase in the effectiveness of personal attacks by opponents and single-issue groups through negative television advertising, both signs of an electorate that lacks deep-seated commitments to candidates or to parties.

F. SAUROF & P. BECK, *supra* note 79, at 296 (footnote omitted).

144. F. SAUROF & P. BECK, *supra* note 79, at 488; see also Fiorina, *supra* note 141, at 44 (this "system . . . articulates interests superbly but aggregates them poorly"); Martin Wattenberg suggests:

The party symbol performs a crucial linkage in the representation process because the "constituency can infer the candidates' position with more than random accuracy even though what the constituency has learned directly about these stands is almost nothing." With parties becoming increasingly less likely to perform this linkage and without voter knowledge of congressional candidates' positions, the chances for faithful representation are clearly reduced.

M. WATTENBURG, *supra* note 78, at 112 (footnote omitted) (quoting Miller & Stokes, *Constituency Influence in Congress*, in ELECTIONS AND THE POLITICAL ORDER 371 (A. Campbell ed. 1966)).

This process may affect the presidency as well. In the past, when presidents were chosen by party leaders and relied on party support and political identification for the election, the vote for the president was more often a decision on parties than on individual candidates. Today, in contrast, with independent primaries and independent candidate campaign organizations, the selection of the president is based less on party evaluations and more on public assessments of the

This confusion can have an effect on political participation as well. Unable to rely on the simplicity of political parties, the public, especially the poor and less educated, often appears to care less about politics that it does not understand.¹⁴⁵ This has been accompanied by an unprecedented decline in voter turnouts, which can be attributed in part to the drop in party identification.¹⁴⁶

Beyond these instrumental problems, moreover, some believe there is evidence of a utilitarian cost, both in the increased dominance of special interest groups, and the heightened ideological divisions and stalemate that have been associated with the absence of strong parties. With the drop in party identification and party influence generally, many members of Congress seem to have found it easier, all things being equal, to build an independent constituency through pork barrel projects and constituent servicing. The result, as political scientists

character and personality of individual candidates. The result may be what several political scientists call a "personal president" or a "rhetorical president," who is more subject to immediate public pressures and assessment. This may also mean a decline in the traditional principal/agency relationship between populace and president, and, according to *some* prominent scholars, in the likelihood of institutional effectiveness. See T. LOWI, *supra* note 121; J. TULIS, *supra* note 121; see also *supra* note 87 (discussing political advantages of a principal/agency relationship). A somewhat analogous concern regarding the dwarfing of "soft" or "complex" variables underlies the anxiety over too searching judicial review of agency decisionmaking. See, e.g., Strauss, *Considering Political Alternatives to Hard Look*, 1989 DUKE L.J. 538, 549-50.

145. Michael McGerr describes how old-style party identification helped overcome the collective action problem:

A man's decision to vote at a particular election did not depend solely on the allure of a candidate, the interest of an issue, or the closeness on election; instead, his vote became a testament, regularly given, to his persisting identification with one of the parties.

M. MCGERR, *supra* note 81, at 41; see also Burnham, *supra* note 32, at 132 ("[T]he relative disappearance of partisan terms in campaigns and their replacement by personalistic and imagistic appeals to voters create conditions that make utility calculations difficult, if not impossible, [with the result that] some people will remain far better positioned to make accurate utility calculations than others."); R. ENTMAN, *supra* note 84, at 137 ("The decline of participation in the U.S. has historically paralleled the dwindling of the partisan press and the rise of objectivity."); Abramson & Aldrich, *The Decline of Electoral Participation in America*, 76 AM. POL. SCI. REV. 502 (1982). This is not to argue that all historically excluded groups are necessarily disadvantaged by this decline. As noted above, some politicians (Jesse Jackson, for example), have certainly been quite successful in opening up political structures in particular cases.

146. Walter Burnham summarized this connection:

Inchoate politics, fragmented electoral choices, and personalistic campaign images lead naturally to growth in the number of citizens who have a low sense of their external political efficacy; more citizens who find it difficult or impossible to make a utility calculation different from zero (or perhaps make one at all); and general erosion of the strength of party identification. As politicians' incentives at elections shift more and more to considerations of "every person for himself," the notion of collective will tends to disappear; and so, in a highly selective way, does the active electorate.

Burnham, *supra* note 32, at 123-24 (footnote omitted).

In earlier days, party identification served to filter out many of these individualistic considerations, and highlighted the relationship of the candidate to general political and social interests that are often obscured by expanded and diverse political debate. As David Price observed: "The idea of 'voting for the person and not the party' fits nicely with the individualistic and moralistic strain of American political culture, but neither the virtue nor the rationality of such a stance will bear careful scrutiny." D. PRICE, *supra* note 78, at 110.

have shown, is an environment more conducive to the political universalism described above.¹⁴⁷ At the same time, greater ideological orientation in Congress appears to have led at times to greater stalemate as well.¹⁴⁸

E. *Political Party and Other Reforms as an Attempt
To Channel Information*

Despite the benefits of strong parties, party identification, and more limited information, it is probably neither possible nor advisable to create a strong party system in the form experienced at various times in our history,¹⁴⁹ or in some other countries. For one, resources that were valuable historically in the United States in sustaining stronger parties — notably, extensive graft and patronage — are no longer politically or constitutionally available.¹⁵⁰ In addition, the increased dialogue and diverse participation accompanying the decline of parties have probably provided benefits, especially among previously dispossessed groups, such as blacks, in both substantive influence and participation.¹⁵¹ Finally, while less information may have offered advantages in a pre-technological age when ignorance did not depend upon active government suppression of information, it would be dangerous to attempt to reconstruct that state today, given the potential for tyrannical governmental overreaching.

In light of the instrumental benefits of more limited information described above, however, there are reforms that may be useful methods for channeling information away from narrow constituencies and toward centralized institutions. They would not, and given our political structure probably could not, create truly strong parties. Rather, these proposals would, as some have recommended, simply “restrict[] access to resources and opportunities that would allow legislat[ors] and other politicians] to build strong personal ties to their constituen[ts].”¹⁵² In other words, they would seek to decrease the salience and recognition of narrow group activities — in effect erecting a

147. See Fitts, *Vices of Virtue*, *supra* note 11, at 1628-31 (summarizing the history of this phenomenon).

148. *Id.*

149. For an excellent description of politics during the late 1800s and early 1900s, see M. MCGERR, *supra* note 81.

150. See, e.g., *Branti v. Finkel*, 445 U.S. 507 (1980) (prohibiting dismissal of certain government employees based on party allegiance); *Elrod v. Burns*, 427 U.S. 347 (1976) (holding that the practice of patronage dismissals violates the first and fourteenth amendments).

151. See Ackerman, *supra* note 28, at 744-46; see also *supra* notes 61-65 and accompanying text.

152. B. CAINE, J. FERREJOHN & M. FIORINA, *supra* note 105, at 14.

veil of ignorance around them — while, in some cases, also accentuating the activities of more centralized political units. In a sense, they represent modern-day attempts to reintroduce some modest reductions in information. When they are justified depends to a large extent on how factually significant the effects outlined above turn out to be in individual cases.

1. *Coattail Effects*

One example is the proposal to move the election of members of Congress to several weeks after the presidential election.¹⁵³ The purpose of this change is to increase the salience of that election, that is, its “coattail effects,” in much the same way that party identification in the earlier days overwhelmed the peculiarities of local candidates. By linking the presidential and congressional candidates of the same party in a web of interconnecting interest, the party label would be emphasized and the party strengthened. The result would be a decreased focus on individual candidate behavior and an increased focus on group responsibility. Proposals to move state elections from off-years to coincide with federal elections have similar purposes in terms of strengthening national parties.¹⁵⁴

In addition, and perhaps more importantly, other proposals seek to minimize the independent voice of individual candidates. These include attempts to decrease the financial resources and influence of individual candidates by, for example, reducing their franking privileges; placing limits on PAC contributions and ending open primaries; improving the financial and other resources of parties, including their patronage; and ending the limits on outside contributions to parties.¹⁵⁵

153. See J. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* 93-98 (1986); Cutler, *Party Government Under the American Constitution*, 134 U. PA. L. REV. 25, 38 (1985).

154. See J. SUNDQUIST, *supra* note 153, at 95-98; Sundquist, *Needed: A Political Theory for the New Era of Coalition Government in the United States*, 103 POL. SCI. Q. 613, 631 (1988); Cutler, *supra* note 153, at 38; F. SAUROF & P. BECK, *supra* note 79, at 278 n.8. Of course, to the extent that one views divided government as a result of an *intentional* decision of the voting public, *cf.* Fiorina, *supra* note 85, this change would have less impact.

155. Morris Fiorina has considered a *prohibition* on contributions to individual candidates. See Fiorina, *supra* note 141, at 45 n.30 (“party cohesion would no doubt be strengthened by revising existing statutes to prevent ticket splitting voting and to permit campaign contributions only to parties”). Other proposals do not go so far, though their objective is the same. See Sabato, *Real and Imagined Corruption in Campaign Financing*, in *ELECTIONS AMERICAN STYLE*, *supra* note 32, at 168 (“The long-term objective is clear: beef up the parties so that PACs [and individual candidates] will be limited indirectly.”). Pursuing similar objectives, others have called for direct public subsidization of a party media. See R. ENTMAN, *supra* note 84, at 136-37 (defending proposal on grounds that “[t]he decline of participation in the U.S. has historically paralleled the dwindling of the partisan press and the rise of objectivity; perhaps an injection of party media would reverse the trend”).

Of course, civic virtue proponents have called for limitations on PACs, but ordinarily on

In order for these proposals to have a significant impact, constitutional impediments to some of these limitations might need to be relaxed.¹⁵⁶

2. Government Secrecy

Several other changes might serve to reduce the informational advantages of special interest groups, as well as to facilitate compromise, by creating occasional exceptions to the general trend toward greater sunshine legislation. Decisionmakers might consider, for example, making the floor votes of individual members of Congress secret in some cases (though not the aggregate tally); closing more congressional meetings to the public; and closing more administrative agency operations to public view, including ending *ex parte* contacts.¹⁵⁷ Any restriction on initial public access, though, would need to be accompanied by increased presidential and party involvement; the change would be acceptable only if there were greater central political participation *and* therefore political accountability for the resulting decisions.

Although this is not the place to attempt to delineate any particular cases, some contexts, such as the establishment of overall budget levels in the legislative branch, transmission of agency budgets to Congress by executive agencies, and generation of the executive branch regulatory agenda, seem to be fruitful cases for study. Indeed, some recent budgetary and regulatory reforms have moved in this direction, sometimes with the approval of civic virtue adherents.¹⁵⁸ If successful, the public would focus less on the marginal advantage of specific decisions or actions taken by their individual representatives, and would concern itself instead with the overall party product. At the same time, more central political actors, such as high executive officials and party leaders, would need to be forced by law to participate more visibly, making *them* more responsible to the public for the outcome.

Certainly, there are important trade-offs and dangers implicit in any attempts to limit information, especially if they are applied to the

redistributive grounds. While I am sympathetic to those reasons, that is not the rationale I am advancing here.

156. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (F.E.C. Act provisions limiting certain campaign contributions invalidated under first amendment).

157. See S. FRANTZICH, *supra* note 119, at 238-39 (“[W]ith more recorded votes, members of Congress are on display and can ill afford to be known as people who forsake constituent concerns in the pursuit of party loyalty,” resulting in “reduced . . . power of the leadership.”); Greenberg & Flick, *supra* note 121, at 19-20 (arguing that stalemate and the enhanced influence of narrow constituencies in Congress is due to breakdown of the parties and to enhanced public scrutiny).

158. See Sunstein, *supra* note 50, at 452-63.

adjudicative context.¹⁵⁹ No one is calling for a return to secrecy in government, only greater sensitivity to the political costs of total and immediate disclosure. While any change would need to be carefully identified so as to not undermine other dialogic and participation values, there appear to be specific cases where limiting political information may achieve public benefits.¹⁶⁰

3. *Government Commissions*

In light of this analysis, the value and problems of presidential commissions with less clear institutional accountability can also be better understood. Over the past few years, there have been numerous attempts to erect blue ribbon, high-visibility boards to resolve divisive budgetary and political issues such as the deficit, social security, or the closing of military bases.¹⁶¹ In these instances, Congress and the President have delegated decisionmaking on specific issues to independent commissions with broad mandates to come up with "solutions" for particular problems. While in some cases boards are given final decisionmaking authority, plans are usually submitted to Congress for approval. Obviously, since the original plans could have been considered by Congress without commission review, the rationale for the establishment of commissions, apart from some special expertise of their members, appears to be to bind Congress and the general public morally and politically to the resulting solution.

A large part of the appeal of this device is its informational insulation. Ideally, the commission may serve, much like traditional party identification, to help insulate representatives from constituent and special interest group pressures, erecting a veil over the process of decisionmaking and giving the commission's resulting proposal a public interest veneer once it is introduced back into Congress.¹⁶² In addi-

159. In some cases, special interest groups may have better knowledge of what is occurring behind closed doors, so this veil would have the effect of *increasing* their informational advantage over the public. Moreover, there is a constant concern about the potential for tyranny. As I have suggested previously, however, it is not clear whether stronger centralized power in a two-party sense may not reduce the possibility of tyranny. See Fitts, *Vices of Virtue*, *supra* note 11, at 1610-12.

160. This argument is discussed again below. See *infra* notes 217-26 and accompanying text.

161. See *supra* note 121.

162. See Greenberg & Flick, *supra* note 121, at 19 ("Opening up" of congressional process so that representatives are no longer insulated from interest group pressure by party strength has "so complicated and burdened the legislative bargaining process that recourse to commissions . . . [becomes] almost inevitable."). Unlike the traditional New Deal agency, moreover, which over time has established strong links to congressional oversight committees and to special interest groups concerned with its activities, the high-level commissions can be more insulated from such input. Thus, they can be less likely to suffer from the traditional problem of special interest groups being advantaged by a partial veil. See *infra* notes 163 and 207-11 and accompanying text.

tion, and equally important, the commission permits bargaining outside the formal spotlight of existing legal institutions, hopefully facilitating consensus. While there are obvious problems with this technique, especially if the commission takes the form of the traditional New Deal agency where no single central figure ultimately assumes responsibility for its decisions,¹⁶³ it has served as a modern-day substitute for the parties on some issues where it is limited in time and subject matter and has overall high public visibility for its finished product.

4. *Increasing Voting Turnout*

Finally, recent attempts to deal with declining voter turnout by withholding information about election returns and polls can be valuable for somewhat similar reasons. Voting creates the same type of prisoners' dilemma as do special interest groups. If the public votes *only* for narrow instrumental reasons, individual citizens should not make an effort to vote, since their vote has almost no likelihood of affecting the outcome.¹⁶⁴ Unfortunately, to the extent that everybody fails to vote, this understanding undermines all of our interests by ending or perverting the electoral connection.

Yet the vote has not always been perceived in as cynical a way. Party identification originally helped to fill this void. Part of the reason individuals voted was that they ignored the distinction between individual and group (collective) action, believing in the party as almost a mythical symbol. Voting was a group, not an individual, activity. Thus, just as party identification is a symbol that leads individuals to pursue group interests and may minimize the prisoners' dilemma of special interest government, so the general myths of party identification can lead individuals to ignore their narrow self-interest on the decision of whether to vote at all.¹⁶⁵ Quite simply, our ignorance of

163. See e.g., M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 172 (1955). Thus, in the case of permanent low-level commissions the insulation may serve to exacerbate the influence of specialized constituencies. See McEachern, *Federal Advisory Commissions in an Economic Model of Representative Democracy*, 54 PUB. CHOICE 41 (1987); Petracca, *Federal Advisory Committees, Interest Groups and the Administrative State*, 13 CONG. & PRES. 83 (1976). In addition, it also should be recognized that some aspects of the veil often appear to be more apparent than real. When the proposals on legislative and judicial salaries were ultimately submitted back to Congress, for example, individual members of Congress were clearly held accountable for their decisions, and the increase was defeated. For a discussion of the separation-of-powers aspects of such commissions, and their potential value in furthering a veil of ignorance and political consensus, see *infra* note 211.

164. See N. FROHLICH & J. OPPENHEIMER, MODERN POLITICAL ECONOMY 97-107 (1978); R. HARDIN, *supra* note 14, at 11; Meehl, *The Selfish Voter Paradox and the Thrown-Away Vote Argument*, 71 AM. POL. SCI. REV. 11 (1977).

165. See M. MCGERR, *supra* note 81, at 39-41.

and failure to focus on the "logic of collective action" can help to save us from the perverse consequences of collective action.¹⁶⁶

In light of this historical benefit of ignorance, and of the continuing decline in voting in recent years,¹⁶⁷ there are various changes that can best be understood as seeking to reinforce the ignorance of the collective implications of the voting decision. For example, the periodic effort to prohibit public opinion polls from being taken during the last few weeks before elections, or to stop the networks from announcing the election results in some states before the polls have closed in others, are attempts to reinforce the ignorance of the collective implications of the voting decision.¹⁶⁸ These changes seek to divert the focus away from the individual's impact on group activity. The failure to release this information is supposed to help maintain the belief that *your* vote is important, even though it is virtually impossible in a presidential election that an individual vote will matter in any case, regardless of what the last polls or television returns show. While incremental, these changes illustrate another possible value of limited information.

F. *Implications for Civic Virtue and Law-and-Economics Theory*

The proposals discussed above are admittedly modest and precarious. My purpose is to sketch the outlines of some doctrinal and structural changes that appear to further the party approach, give a sense of their direction, and underscore their potential tension with the civic virtue and law-and-economics approaches.

As noted above, the civic virtue tradition seeks to structure government so as to "proliferate points of access" to legislative and administrative decisionmaking and to expand the dissemination of information opportunities.¹⁶⁹ Law-and-economics proposals to facilitate disclosure of information can have similar effects.¹⁷⁰ Taken individually and on an elite level, there are benefits to many of these changes; they serve, for example, to illuminate the implicit biases of

166. See D. MUELLER, *supra* note 37, at 122-24 (finding that voter participation increases with closeness of elections). There are also important participational and noninstrumental benefits to voting. See, e.g., Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 950-53 (1988). Public behavior reflects this conclusion: much of the public still votes, despite awareness of the collective action problem, partly because they view the decision to vote noninstrumentally. See Farber & Frickey, *supra* note 87, at 893-94, 907.

167. See *supra* notes 145-46 and accompanying text.

168. See, e.g., Blum, *Polling an Attorney for Advice*, Natl. L.J., Nov. 21, 1988, at 10.

169. See *supra* notes 49-66 and accompanying text.

170. See *supra* notes 41-44 and accompanying text.

particular proposals and marginal costs. On a systemic political level, however, there can be trade-offs, especially on the political and electoral system. A general public that finds it difficult to make sense of complex dialogue and splintered government institutions may, at the same time, find it increasingly difficult to understand, care about, or participate in such a general political environment. Compromise and agreement may also be more difficult. Political and legal institutions should be designed to take account of both effects, which can be in tension with one another.

The proposals outlined above are offered as exceptions to common civic virtue or law-and-economics approaches, and serve to channel information and public attention to more centralized institutions. In particular, the bulk of the proposals to strengthen political parties seek to decrease the independent financial or structural ability of entrepreneurial actors to engage in some forms of public dialogue and, in some cases, to increase the influence of centralized institutions such as the parties. In a sense, they change the matrix payoff of information, moving it to support more centralized institutions. No one suggests that any *institution* should be given the power to determine what information should be disclosed, that is, to limit it by prohibition; concerns about tyranny and lack of diverse participation preclude that.¹⁷¹ The way political institutions are organized and the way financial resources are deployed in these cases, however, can serve an intermediate role by shaping the manner in which issues and programs are presented to the public.

IV. LIMITED INFORMATION AS A NORMATIVE BENEFIT IN DECISIONMAKING: VEILS OF IGNORANCE (MODEL IV)

Up to now I have focused on the three *instrumental* advantages to more limited information — improved rationality, utilitarian efficiency, and political agreement. In this section, I turn to examine a fourth model, a type of veil of ignorance which offers a normative advantage in decisionmaking. This benefit can be achieved in theory by excising information about the effect of a decision on different groups, thereby erecting something like a real-world veil of ignorance around the consequences of social policy for individual groups' interests. If successful, this may help promote a rational dialogue and forge a political consensus.¹⁷²

171. The first amendment generally and appropriately serves as a limitation on such intervention.

172. In theory, the consequences for political decisionmaking of such limitations can be three-fold. First, by eliminating self-interest, the veil can serve to stimulate a rational dialogue

While the use of the often-mentioned but seldom-examined device of a veil of ignorance is subject to some theoretical and practical problems that will be developed below, I argue that it has been successful in one important structural public law case related directly to the thesis of this article: party turnover within a government of separated powers. In other words, the veil has been promoted by a well-functioning two-party system. Conversely, it appears to have been undermined by changes advanced at different times in the law-and-economics and civic virtue literatures.

A. *A Theory of the Veil of Ignorance*

Establishing a true veil of ignorance in the real world is obviously a difficult if not impossible task. In general, partial veils of ignorance can be created in public decisionmaking through any technique that serves to introduce a structural impediment to a clear identification of the ultimate winners and losers in a public decision. While it is unnecessary to catalogue all of the specific cases, the most prominent is a constitutional amendment.¹⁷³ In addition, statutes that are expected

which, to the extent that our society enjoys a dominant consensual ideology with respect to a particular issue, helps to forge a consensus. Second, to the extent that the ideology is Rawlsian or utilitarian, the limitations could create incentives for income redistribution. Finally, a limitation on information which is complete, that is, which serves effectively to avoid a particular issue, may avoid destructive philosophical divisions on occasions where there are potentially unresolved philosophical as well as interest group differences. This last case was explored separately *supra* in section III.C, though there clearly are aspects of a real-world veil of ignorance that promote consensus through this type of effect as well.

173. The traditional case where the legal system can impose a modified veil of ignorance is through constitutional amendment under article V. When the populace at large is engaged in constitutional decisionmaking, political actors are necessarily proceeding under some ignorance or imprecision — due both to the implicit agreement that constitutional provisions must be framed in very general terms and to their long-term prospective application. The combination may make it less certain exactly how the provision will be applied as well as what position the framers will be in when it is applied. Indeed, in some cases it may be the framers' descendants who are most affected by the provision, rather than the framers themselves. As a result of this combination of factors, it can be argued that constitutional decisionmaking, while it does have other liabilities noted below, may make individuals more willing to consider such issues from a public-regarding perspective. See, e.g., L. Sager, *The Incurable Constitution* 26 (unpublished manuscript presented at Legal Studies Seminar, University of Pennsylvania (Jan. 26, 1989), and on file with author) ("Decisionmaking about a long-distance Constitution is a special kind of venture, one which reinforces the tendency to generalize away from one's own present time and circumstance to other times and circumstances; a venture, in other words, which encourages the generality of the moral perspective."); J. BUCHANAN & J. TULLOCK, *THE CALCULUS OF CONSENT* 78 (1962) ("uncertainty that is required in order for the individual to be led by his own interest to support constitutional provisions that are generally advantageous to all individuals and to all groups seems likely to be present at any constitutional stage of discussion"); Mueller, *Constitutional Democracy and Social Welfare*, 87 Q.J. ECON. 60, 61 (1973) (the drafters of a constitutional amendment should consider the impact on all citizens and future generations); cf. Ackerman, *supra* note 92, at 1171-73 (population engages in high politics when considering the Constitution); Elliot, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1077, 1106-07 (a constitutional convention would transcend politics as usual and frame the issues on a general and abstract level).

to remain in force for extended periods¹⁷⁴ and delegation of decision-making to administrative agencies¹⁷⁵ can create sufficient ambiguity that the initial decisionmakers have difficulty in calculating the incidence of costs and benefits. In these cases, the veil can be furthered largely by the generality of the rule that is initially adopted, making it unclear exactly how it will be applied.¹⁷⁶ The vagueness can also be created by ambiguity about who will enforce the rule or how they will enforce it (turnover in control of administrative agencies in particular affects both these factors),¹⁷⁷ and by the length of time it will be enforced (due to the length of time constitutional amendments and certain long-term statutes are in effect, the position of the proponents and other groups may change dramatically).

174. The same analysis can be applied to authorizing legislation, or so-called back door spending. To the extent that legislation is general and reasonably can be expected to remain on the books for years to come, its longevity can have a similar type of effect on political motivation as a constitutional amendment. The longer the legislation is likely to stay in effect, the more it may impede the framers' calculation of self-interest. Of course, this argument is predicated on there being greater difficulty in repealing legislation. See, e.g., McCubbins, Noll, & Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Control of Agencies*, 75 VA. L. REV. 431, 435-40 (1989).

175. Delegation of decisionmaking to administrative agencies can, at least in theory, offer a similar normative advantage. When legislation is framed in general terms, or substantive authority is specifically delegated to administrative agencies, the precise application of the provision by the administrative agency is unclear largely because the personnel of the agency are constantly in flux. Thus, there is ambiguity both as to the identity of the executive officials who are subject to the provision and to the nature of the decisions they will make.

Needless to say, this is relevant to both those who might become executive officials and those who will be subject to its structures. While law-and-economics scholars have explored delegation as an efficiency-enhancing (or efficiency-reducing) device in the effective implementation of programs, delegation can also shape and transform the thinking of the initial decisionmakers in Congress in much the same way as the requirement in administrative law that certain types of decisions be made through rulemaking. See Diver, *supra* note 74.

176. See J. BUCHANAN & G. TULLOCK, *supra* note 173, at 120; Bruff, *supra* note 28, at 221 ("A check on the fairness of selecting decision rules is the difficulty in determining who will profit from their later use in specific cases. . . . [A]t the operational stage it is much easier to predict the winners and losers from a change in the decision rules."). To some extent, one might argue that this technique creates consensus by avoidance, obscuring the existence or significance of problems in order to forge agreement. In this sense, it is *similar* to the technique of avoiding intractable debates through ignorance and avoidance, as described in section III.C. On the other hand, at least as an ideal, the technique should only obscure the incidence of costs and benefits of different policies, not the problems themselves.

177. See U.S. CONST. art. I, § 6, cl. 2 (the incompatibility clause); J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 143 (J.W. Gough ed. 1966) (6th ed. 1764) ("[B]ecause it may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from the obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community . . ."); cf. *United States v. Brown*, 381 U.S. 437, 449-50 (1965) (When establishing criminal liability, Congress must "set forth a generally applicable rule . . . and leave to the courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics.").

B. Criticisms of This Approach

As with all approaches to policymaking, however, the veil is subject to both philosophical and practical problems. These difficulties are important in appreciating when and why it may not be a useful technique.

1. Philosophical Critiques

As the philosophical criticisms of Rawls' veil of ignorance outlined above suggest,¹⁷⁸ an informationally restrictive veil may undermine the richness of public dialogue by obscuring interests and issues. In order to promote a rational dialogue, civic theory generally seeks to *expand* the points of access to decisionmaking, thereby forcing government actors to talk to and understand others' viewpoints. Knowledge of one's own position is critical to the clear presentation of one's views.¹⁷⁹ In contrast, the theory behind a veil of ignorance appears to reflect a more skeptical view of human motivation and of the ability to encourage a true dialogue when knowledge of one's self-interest still exists. Its value lies in cases where (and to the extent that) the proliferation of information is likely to *sharpen* people's knowledge of and willingness to pursue their self-interests.¹⁸⁰

Law-and-economics scholars, on the other hand, may also be troubled by the loss of information, though on different grounds. Law-and-economics scholars explore the acquisition of information instrumentally; the question for them is ordinarily whether more expenditure on information would lead to utilitarian advantages for the individual, or, considering externalities, for society in general.¹⁸¹ Under this approach, efficiency concerns are ordinarily treated separately from redistributive concerns.¹⁸² In this sense, for example, dele-

178. See M. SANDEL, *supra* note 54, at 122-32 (arguing one cannot know one's views or interests unless one is situated in a particular context); *supra* notes 54-55 and accompanying text.

179. Ultimately, the value of this exchange depends on the participants' abilities to evince empathy for other positions — a necessary predicate to the normative free dialogue that leads to a consensus or agreement on the normative system. Obviously, one of the main difficulties with this system is that it is subject to serious problems of deception and lack of empathy.

180. Usually, a veil of ignorance is not justified on the grounds that it may serve as a welfare lottery. It does not improve decisionmaking or social welfare merely because people might enjoy their ignorance of future social positions. Rather, it changes their decisionmaking process in ways that should enhance (from an ethical perspective) the group social product, taking away the decisionmakers' sense of their own interest in particular outcomes of the decision. Thus, the choice whether or not to retain such procedures is not ordinarily predicated on the risk aversion of the general population or their decisionmakers. See Mashaw, *supra* note 48, at 88 (discussing delegation in terms of risk aversion). Nevertheless, like Model III, it *can* serve that role.

181. See *supra* note 22 (discussing technical and philosophical problems with the veil-of-ignorance approach).

182. This observation is intended as description, not criticism. Law-and-economics theory ordinarily views redistributive issues as a separate analytic concern. See *supra* note 20 (discuss-

gation is evaluated according to whether the division of labor improves efficiency.¹⁸³ The purpose of the veil of ignorance, on the other hand, is to create a social and political incentive for individuals to be willing to redistribute resources or reach agreements. This is a question of preference formation, which law-and-economics scholars *generally* do not address.¹⁸⁴ It may well be that the veil will create inefficiencies or deadweight losses.¹⁸⁵

2. Practical Problems

Apart from these philosophical differences, attempts to create a real-world veil can raise serious practical problems. Because the techniques for creating a real-world veil lack the precision of Rawls' heuristic device, which by definition perfectly eliminated knowledge of the decisionmakers' place in society, the veil can be either overinclusive or underinclusive.

If it is overinclusive, and too much information is eliminated, ambiguity can create a misidentification of goals, obscure legitimate interests, and dwarf relevant problems. For example, the generality of constitutional decisionmaking and legislative delegation has meant that courts and independent agencies have often been accused of pursuing goals viewed as adverse to the Congress that originally passed the measure.¹⁸⁶ The frequent criticism that New Deal agencies were "captured" by special interest groups clearly falls into this category.¹⁸⁷

ing ideal types). *See generally* A.M. POLINSKY, *supra* note 21, at 7 ("Economists traditionally concentrate on how to maximize the size of the pie, leaving to others — such as legislators — the decision how to divide it."); *id.* at 10 ("For purposes of discussing the legal system, a reasonable simplifying assumption is that income can be costlessly redistributed."); Rose-Ackerman, *supra* note 25, at 342 (law and economics "takes wealth maximization as a first principle").

183. *See* Aranson, Gellhorn & Robinson, *supra* note 30, at 6, 27-30.

184. To be sure, the reaching of agreements can be viewed as an issue of efficiency in the sense of avoiding the collective action costs of achieving consensus.

185. *See* Rose-Ackerman, *supra* note 25, at 344 (stating that welfare economics "generally lacks a realistic view of the working of the political process[,] . . . ignoring political feasibility"). Indeed, one of the most important aspects of the veil — the difference principle — is inconsistent with the approach of Kaldor-Hicks efficiency. The point is simply that in some cases inefficiencies may be justified as the cost of creating the political incentive for redistribution or political consensus.

186. Of course, on one level, the underlying *purpose* of the veil is to pursue goals adverse to the interests of *some* participants in the legislative arena. *See supra* notes 172-77 and accompanying text. The problem is that an *imperfect* veil of constitutional decisionmaking can go beyond this, obscuring resolution of certain problems and leaving it to the courts and agency bureaucrats to fill in this vagueness by pursuing their own independent objectives. That certainly appears to be one of the current "conservative" critiques of judicial and agency usurpation. *See, e.g.,* J. RABKIN, *JUDICIAL COMPULSIONS* (1989); M. SHAPIRO, *WHO GUARDS THE GUARDIANS: JUDICIAL CONTROL OF ADMINISTRATION* (1988). An earlier "liberal" generation had similar problems with the hold-over New Deal Court. *See* A. BICKEL, *supra* note 91, at 90.

187. *See* M. BERNSTEIN, *supra* note 163, at 86-87.

On the other hand, if the veil is underinclusive, too little information may be excised, allowing some but not all political actors to pierce the veil. For example, to the extent there is *not* turnover in the groups to which a statutory or constitutional requirement applies and to the extent its impact is clear, the extended length of time it is expected to be in effect can exacerbate divisions and increase attempts at rent-seeking. This would occur, for example, as groups such as pro- or anti-abortion advocates fight "to the death." Due to the clarity of the issue and its long-term impact, they continue to battle rather than compromise.¹⁸⁸ Similarly, to the extent that only a *sub*group can foresee the impact of a rule, as in the case of some delegations to administrative agencies, the veil may *increase* social differences, as some advantaged groups use it as a mechanism to appropriate social resources to themselves.¹⁸⁹

These trade-offs can be seen in a variety of different public law debates. For example, a great deal of academic paper has been consumed criticizing backdoor budget authority. In an attempt to promote instrumental rationality, many have criticized such budgeting on the ground that it avoids yearly analysis of the costs of programs. In addition, the use of different funding devices (backdoor versus ordinary appropriation statutes) can further fiscal illusion, according to this line of reasoning, by hiding the true costs of programs.¹⁹⁰

Nevertheless, backdoor budget authority, as opposed to yearly appropriation statutes or other time-limited legislation, can provide a normative advantage in some respects. An appropriation statute is limited to one year only, and thus will generally have an impact only for that limited time. Those voting for the particular item are more likely to know precisely who will or will not benefit from the legislation. In contrast, an authorization bill, or a bill granting backdoor budget authority, lasts in perpetuity, unless Congress can overcome inertia and repeal it. In areas where Congress can expect to see a large turnover in the groups or institutions that will be subject to the partic-

188. See, e.g., J. MANSBRIDGE, WHY WE LOST THE ERA 194 (1986) (defeat of ERA was a result of "[t]rying to legislate a broad principle through the constitutional amendment process"; "basic issues were at stake" and "the final result had to be victory for one side and defeat for the other"); Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 879 (1975); Macey, *supra* note 25, at 52 (stating that according to law-and-economics theorists "special interest groups place an especially high value on constitutional rules, because such rules are harder to repeal and therefore more durable than ordinary legislation").

189. See *infra* notes 208-09 and accompanying text. For an effort to explain administrative procedures in terms of assisting different groups in monitoring bureaucracies, see McCubbins, Noll, & Weingast, *supra* note 36.

190. Cf. Goetz, *Fiscal Illusion in State and Local Finance*, in BUDGETS AND BUREAUCRATS: THE SOURCES OF GOVERNMENT GROWTH 176, 177 (T. Borcherding ed. 1977).

ular restriction or statutory limitation, these bills may create some greater incentive for Congress to reach a greater level of consensus and equality. Such areas include limitations on the executive branch, rules about the procedures of Congress, and overall levels of taxation.¹⁹¹ The reason for this incentive is that more groups will potentially be subject to the limitation.¹⁹²

Indeed, this is the type of technique that Congress used to reach agreement on budget cuts in the Balanced Budget and Emergency Control Act of 1985, popularly known as Gramm-Rudman-Hollings.¹⁹³ By setting budget targets years ahead, the precise incidence of budget reductions was less predictable to the Congress that originally passed the measure. In effect, ignorance about specific outcomes can help forge a consensus and create a disincentive against the singular pursuit of narrow group advantage, at least *ex ante*.¹⁹⁴

A similar debate has occurred regarding the early law-and-economics argument, advanced originally by Landes and Posner, that the long-term enforceability of statutes by independent courts *facilitated* rent-seeking by ensuring that deals would continue to push benefits in perpetuity to the narrow group which originally secured passage of the legislation.¹⁹⁵ Under the early law-and-economics view, the longer the statute's existence, the *more* likely it was to facilitate rent-seeking by narrow groups, and to heighten political divisions. This is due to the greater discounted benefit to their present political activity. To the

191. See *infra* section IV.C.1. As noted above, this argument is predicated on the greater difficulty in repealing legislation. See *supra* note 174.

192. Another example can be found in the events surrounding the original passage of the income tax during the Civil War. After Congress was unable to increase traditional property taxes, the effects of which would have been perfectly clear, agreement was ultimately reached on an income tax, largely because the effect of the then-novel tax on different constituencies was unknown. See J. Alt, *The Evolution of Tax Structures* 36-50 (1982) (unpublished manuscript on file with author).

193. Pub. L. No. 99-177, 99 Stat. 1037 (codified at 2 U.S.C. §§ 901-22 (1988)).

194. While such programs may be less "efficient" than lump-sum distributions, they can create the political will to redistribute or reach agreements. For similar reasons, a variety of internal legislative rules can be viewed as attempts to erect veils of ignorance over legislative activity, helping to promote consensus. For example, the rules of procedure for each Congress are set by the prior Congress and can be amended only through intervention, sometimes requiring super-majorities, at the beginning of that Congress. The system has been the subject of some academic criticism on the grounds that each new Congress should generate independently, or at least be able to repeal through majority vote, all of its rules each term. See Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 407-12, 425 n.215. Because legislative procedure is ordinarily agreed upon at a time when participants are less clear about the effect of the rules on their interests, however, they may be less likely to consider marginal instrumental advantages and, therefore, more likely to reach a consensus.

195. See Landes & Posner, *supra* note 188.

extent that the future application of the provision is clear, and the position of the proponents static, this analysis seems persuasive.

In cases where the groups subject to the limitation might change over time, however, such statutes may be *less* likely to promote narrow, interest group rent-seeking, and more likely to further *general* agreement and redistribution, since the group can no longer be assured that it will be in a position to benefit from the statute.¹⁹⁶ The clearest examples, as outlined below, are statutes limiting executive powers where party control of the executive branch is expected to change over time, or broad, all-encompassing tax statutes. In such cases, in periods of rapid turnover and long-term application, there may be some greater likelihood of reaching a consensus and less likelihood that actors will pursue their narrow marginal advantage at the cost of a broader societal benefit.¹⁹⁷

C. *Separation-of-Powers Problems: A Case Study in the Value of the Veil and Political Parties*

While a veil can be generally useful in these various ways, it is important to appreciate that a properly functioning two-party system can also be quite successful in establishing its own type of macro-political veil of ignorance. As noted above, delegation to administrative agencies may create a veil through different techniques of constitutional and statutory decisionmaking, helping sometimes to forge a political consensus and overcoming the advantages of special interest groups. A brief review of the history of separation-of-powers confrontations suggests that political parties have been important in this process. Conversely, their breakdown has had a negative impact on those relations. The consensus and breakdown can be seen in two different contexts — (1) control of the presidency and Congress, and (2) control of executive agencies.

1. *Control of the Presidency and Congress*

For much of the past one hundred years, the American political system has been heavily influenced by two political parties that each had the potential over time to capture any or all of the political branches.¹⁹⁸ When one party was dominant for a brief period, moreover, it was usually able to control all branches of government. In

196. See *supra* note 173 (discussion of constitutional change in self-interest).

197. See *infra* section IV.C.1.

198. The following discussion draws heavily upon B. Ginsburg & M. Shefter, *Political Parties, Electoral Conflict, and Institutional Combat* (unpublished manuscript on file with the author). See also B. GINSBURG & M. SHEFTER, *supra* note 133.

such an environment, individual politicians and political parties did not ordinarily envision their interests as necessarily connected or linked to the power of any one institution. While there clearly were constitutional crises between branches during this period, it was not *demonstrably* in the interest of a particular party or politician to concentrate power in any one institution — especially in a constitutional sense — since the party might later be excluded from this power center. In effect, a veil of ignorance existed in both statutory and constitutional debates regarding the likely beneficiary of institutional powers. As compared to today, there also was generally more agreement over the extent of constitutional authority vested in executive and legislative officials.

In recent years, especially since 1968, however, this fluidity has changed. Because of the decline of political parties and a variety of other historical reasons, no party has recently been able to dominate both branches simultaneously. To the extent there has been influence, moreover, the Democratic party has had greater control of the legislative branch during this period, and the Republican party has more often controlled the presidency.¹⁹⁹ Indeed, given the incumbency advantage in Congress, and the Republicans' recent advantage in presidential elections, most current political actors seem to expect that the pattern will continue. One result of this situation is that the parties and individual politicians now tend to envision their political interests as tied to the particular institution that they inhabit and to the enhancement of the statutory and constitutional powers of that institution.²⁰⁰ No longer need Democrats fear that reduced presidential powers will block a modern Franklin Roosevelt; or Republicans fear that enhanced executive powers will serve as the engine for a new New Deal revolution. This has been accompanied, not surprisingly, by a resurgence in separation-of-powers confrontations between the president and the legislative branch. These include battles over legislative

199. See Ferejohn & Fiorina, *Incumbency and Realignment in Congressional Elections*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 115 (J. Chubb & P. Peterson ed. 1985) (noting the decreased association between presidential and congressional voting and the electorate's seeming preference for a Republican in the White House); Fiorina, *supra* note 85 (documenting the history of divided government and its possible explanations); Clymer, *Political Terrain Seen as Changing*, N.Y. Times, Sept. 3, 1989, at 27, col. 1 (discussing reasons for increasing Republican control of the presidency and Democratic control of the Congress). While many have speculated on the reasons for our present divided government, there is probably no generally accepted explanation.

200. This appears to be a result of the institutionally specific control of parties as well as the general breakdown of parties. For, with the general breakdown of parties and the rising independence of politicians, even if formal political control of the branches did change, it is uncertain whether individual politicians would see their interests as tied to other branches that they *individually* would be unlikely to control.

veto, ²⁰¹ legislative oversight, executive privilege, ²⁰² executive foreign policy independence, ²⁰³ and judicial and executive nominations. ²⁰⁴ In the aggregate, these seem unusual in our political history. ²⁰⁵

While there probably are a variety of social and economic reasons for this resurgence, one additional explanation is that the veil of ignorance over the institutional position of political interests and actors has been lowered. Constitutional and statutory debates over institutional powers no longer occur behind a veil that protects the identity of the political participants. For the foreseeable future, it seems likely that strong legislative influence will be tied to the interests of the Democratic Party and strong presidential power to the Republican Party. The loss in fluidity — the lowering of the veil — has undermined political agreements over the constitutional and statutory powers of the separate branches. ²⁰⁶

201. See *INS v. Chadha*, 462 U.S. 919, 969-74 (1983) (White, J., dissenting) (outlining the consensus that used to exist between Congress and the executive over the necessity and propriety of the legislative veto); B. CRAIG, *CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE* 36, 106-07, 160 (1988) (discussing acquiescence of the executive branch to the legislative veto prior to the explosion of its use in the 1970s, and the Justice Department's opposition to the legislative veto under the Carter and Reagan administrations); Breyer, *The Legislative Veto After Chadha*, 72 *GEO. L.J.* 785, 787 (1984) (suggesting that the legislative veto acted as a compromise on many separation-of-powers issues). For a detailed account of the history of the legislative veto, including the consensus on its use in the 1930s, see generally B. CRAIG, *THE LEGISLATIVE VETO: CONGRESSIONAL CONTROL OF REGULATION* 15-43 (1983).

202. See *Morrison v. Olson*, 487 U.S. 654, 699-701 (1988) (Scalia, J., dissenting) (detailing recent confrontation over executive privilege); Olson, *The Impetuous Vortex: Congressional Erosion of Presidential Authority*, in *THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH* 231-42 (L. Crovitz & J. Rabkin eds. 1989) [hereinafter *THE FETTERED PRESIDENCY*] (cataloguing congressional "encroachments" on supposedly traditional executive powers).

203. See generally Koh, *Why The President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L.J.* 1255, 1259-73 (1988) (faulting the special congressional committee established to investigate the Iran-Contra scandal for not trying to understand the incident as part of the post-Vietnam breakdown of the consensus between the executive and Congress on foreign affairs).

204. See Totenberg, *The Confirmation Process And The Public: To Know or Not to Know*, 101 *HARV. L. REV.* 1213 (1988) (contrasting the confrontation over the Bork nomination with the previous confirmation process for Supreme Court Justices); *Chopping Down the President*, *Wall St. J.*, Feb. 27, 1989, at A10, col. 1 (suggesting a breakdown of bipartisanship on executive appointments concerning foreign affairs).

205. See generally B. Ginsburg & M. Shefter, *supra* note 198; Monaghan, *The Confirmation Process: Law or Politics*, 101 *HARV. L. REV.* 1202 (1988); Totenberg, *supra* note 204; *Chopping Down the President*, *supra* note 204, at A10, col. 1 (discussing Tower nomination). For this reason, claims that institutional arguments need not be influenced by predictions of political effect can be hazardous. See Sunstein, *supra* note 50, at 462-63 ("[T]here is no necessary connection between antiregulatory politics and executive control. In a different administration, executive centralization might have the opposite result."). Obviously, this can be a common problem in debates over institutional choice. See Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 *Nw. U. L. REV.* 646, 665-66 n.134 (1988) (discussing charges of political bias in other institutional competence debates).

206. To public choice theorists, this breakdown of cooperation is familiar: it is analogous to the public choice problem of maintaining cooperative behavior once the point of the end of the

2. Control of Government Bureaucracy

The second way in which the veil has been pierced can be seen in the oversight by congressional committees of agency implementation of statutes. As several political scientists have detailed, delegation often imposes a veil of ignorance about congressional actions upon the diffuse public, but less so upon specially interested groups.²⁰⁷ In particular, according to this view, when the costs of programs are diffuse and the benefits concentrated, delegation of authority to administrative agencies can serve as a mechanism through which committees in Congress, and their associated constituencies and special interest groups, can hide many of the costs from the diffuse public, while pursuing their interests in the program at the agency implementation stage.²⁰⁸

To support this observation, some scholars have shown the informal control individual committees of Congress often have over executive administration. Because these committees frequently favor the interests of narrow interest groups, delegation has sometimes been thought to erect a veil around the general public that nevertheless allows congressional committees and special interest groups greater ability to affect the ultimate outcome through informal oversight of the agencies.²⁰⁹ The veil of ignorance implicit in delegation can thus be asymmetric, potentially exacerbating the informational advantages of special interest groups.

To the extent that this process has occurred, our ability to reach agreements on the appropriate *internal* structures of the executive

game is known, and is not distant. Tit-for-tat strategies are not successful once the end of the game is imminent. See R. HARDIN, *supra* note 14, at 145-50. Similarly, here, knowledge that the institutional position of political parties and members is relatively certain creates incentives for politicians to defect from cooperative strategies, since the opportunity for retaliation is minimized.

207. See, e.g., Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process*, 39 PUB. CHOICE 33, 53-54 (1982); Fiorina, *Legislator Uncertainty, Legislative Control and the Delegation of Legislative Power*, 2 J.L. & ECON. 33, 49 (1986) [hereinafter Fiorina, *Legislator Uncertainty*]; Weingast, *The Congressional-Bureaucratic System: A Principal Agent Perspective*, 44 Pub. Choice 147, 181-82 (1984); Weingast & Moran, *The Myth of Runaway Bureaucracy — The Case of the FTC*, REGULATION, May-June 1982, at 33, 37-38. But see Moe, *An Assessment of the Positive Theory of Congressional Dominance*, 12 LEGIS. STUD. Q. 475 (1987) (questioning the Congressional dominance theory).

208. See sources cited in note 207. See also Bruff, *supra* note 28, at 230; B. GINSBURG & M. SHEFTER, *supra* note 133, at 176-77. For an explanation of the establishment of agency procedures and information structures primarily in terms of furthering the interests of the different groups lobbying for the original legislation, see McCubbins, Noll, & Weingast, *supra* note 36. Of course, congressional oversight was originally seen as, and in some respects still is, a check on agency capture. See note 215. The evidence now is that it may facilitate some forms of capture, though the extent of congressional influence is still the subject of intensive debate. See, e.g., Moe, *supra* note 207.

209. See Aranson, Gellhorn & Robinson, *supra* note 30, at 7; Pierce, *supra* note 48, at 483.

branch may also have been affected. As time has elapsed, and the informal control has become apparent to political actors, debates over the statutory and constitutional powers of independent agencies and the bureaucracy of executive departments may have been exacerbated for the same reasons that led to the separation-of-powers confrontations described above.²¹⁰ With political control over both the presidency and Congress fairly clear, presidential authority over these agencies means, as a practical matter, greater Republican control. Agency autonomy, on the other hand, with congressional oversight, often means greater Democratic control. Like constitutional and statutory debates on the separation of powers, divisions over the control and structure of the executive branch are now clearer and more politicized.²¹¹

In light of this history, it is apparent that ignorance has advantages and that important political costs are created by the greater certainty of political position. In the past, passage of long-term statutes or acceptance of informal agreements on executive and legislative powers often created fewer divisions because there was the distinct possibility of both executive and legislative turnover. With the decline of a competitive two-party system, this greater ability to reach political agreement over legitimate institutional powers has diminished. A veil that would ideally help equalize political influence and facilitate political agreements does not exist.

3. Future Reforms

While there is no obvious solution to this complicated situation, it is important to recognize that many past and proposed reforms in the civic virtue tradition, whatever their other values, may exacerbate this

210. For a discussion of the constitutionality of independent agencies, see generally *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C. 1986) (asserting the difficulty of reconciling the holding in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), with separation of powers); Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 96-97; Scalia, *Historical Anomalies in Administrative Law*, 1985 SUP. CT. HIST. SOC'Y. 103, 106-10. The debate over executive department autonomy has occurred with respect to the regulatory orders in the Reagan administration. See Exec. Ord. 12291, 3 C.F.R. 127 (1981), reprinted in 5 U.S.C. § 601 (1982); and Executive Order 12498, 3 C.F.R. 323 (1985), reprinted in 5 U.S.C. § 601 (1982 & Supp. III 1985).

For commentary on the degree to which the White House exercises or should exercise power over rulemaking by the Office of Management and Budget, see, for example, DeMuth & Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986); Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986).

211. In light of this analysis, the value of high level government commissions as a decision-making device can be appreciated. See *supra* notes 161-63 and accompanying text. While delegation of decisionmaking to the president or an administrative agency can be suspect for the reasons outlined above, a commission can be made balanced in its membership. In effect, by combining the membership of the separate branches, it can recreate the veil of institutional position.

effect.²¹² As discussed above, civic virtue theory favors stimulating a rich and diverse dialogue about administrative issues through “proliferating points of access” to administrative decisionmaking. Courts, the president, Congress, and perhaps the public generally are all supposed to become more involved in administrative decisions.²¹³ Promoting mechanisms that facilitate legislative, presidential, and judicial participation should not only stimulate dialogue, but should also reduce the comparative advantage of special interest groups through a type of competitive oversight.²¹⁴

While there is much to be said on behalf of these changes,²¹⁵ especially given the necessity for broad delegations of authority today, as a totality they can further exacerbate the breakdown of the veil, as issues are increasingly fought out *within* the executive branch on a case-by-case basis, *ex post*. Instead of debates on institutional powers being made behind a “veil,” real decisionmaking for the most part is delayed and transformed into a bargaining process within the executive branch on an issue-by-issue basis. Moreover, in recent years, these debates have probably become increasingly protracted due to the greater political independence and security of political actors, especially members of Congress²¹⁶ — an independence that civic virtue theory would seem to applaud as the structural precondition to a diverse and rich public

212. One solution, put forward by some scholars, is to abandon the veil altogether. See Aranson, Gellhorn & Robinson, *supra* note 30; see also T. Lowi, *supra* note 35. According to this analysis, courts should reinvigorate the nondelegation doctrine and produce greater specificity in statutes. Obviously this would avoid some of the perverse effects of legislation oversight, but might throw the baby out with the bath water. See Mashaw, *supra* note 48.

213. See *supra* notes 56-59 and accompanying text. In order to ensure this dialogue, oversight from all of these institutions is supposed to be enhanced, with information about executive agencies disclosed through the Freedom of Information Act, the government in the Sunshine Act, legislative oversight, and enhanced judicial review under the hard-look doctrine.

214. These proposals are based in part on the old New Deal model of special interest group influence, where power was supposed to have been exercised behind closed doors between bureaucrats and interest group representatives. See Sunstein, *supra* note 50, at 450 (“Agency autonomy, in short, has often served not as a guarantor of neutral administration, but as a source of vulnerability to the pressure of well-organized groups.”).

215. See Bruff, *supra* note 28, at 210, 248 (concluding that the approach “acknowledge[s] political influence and concentrate[s] on ensuring that it [is] openly and fairly exercised”; “[t]he widespread access to policymaking processes that the agencies are required to provide fosters compromise, . . . ensuring that public policy will be supported by coalitions representing a set of values that is relatively widely accepted”); Fiorina, *Legislator Uncertainty*, *supra* note 207, at 49 (increasing proceduralization of administrative agencies after late 1960s consistent with “legislators trying to counter increasingly evident biases in the administrative processes”); cf. McCubbins & Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 2 AM. J. POL. SCI. 165 (1984) (discussing information proliferation as helping to solve principal/agency problems of Congress); McCubbins, Noll, & Weingast, *supra* note 36 (same).

216. There is a now voluminous literature on the congressional incumbency effect — especially in the House of Representatives. See, e.g., Ferejohn & Fiorina, *supra* note 199, at 91-117; Fiorina, *supra* note 141, at 37-39.

dialogue.²¹⁷ In this environment, however, independence and the certainty of position may undermine the ability to reach agreements on institutional powers. In short, efforts to stimulate dialogue and “virtue” under a civic virtue philosophy may be in tension with a “veil of ignorance” approach.

At the same time, there is also some question about the extent to which the civic virtue proposals will actually minimize the influence of special interest groups. The theory behind this view is that the increased spotlight of competitive checking and participation after delegation will minimize the back-door, behind-the-scenes “deals” that inspired the common criticisms of the traditional New Deal agency.²¹⁸ In many cases this is undoubtedly true, as administrative decisionmakers respond over the short run to potential exposure.²¹⁹ Overall, however, the increased complexity of the process can, for the reasons discussed above in Part III, have another effect on the public at large, especially on an electoral level: advantaging specialized constituencies that have a greater ability to untangle the complexity of administrative dialogue and inputs, while disadvantaging the diffuse public, which does not know whom to hold accountable, especially in its electoral judgments.²²⁰ The ultimate effect on systemic political accountability can be quite complicated.

The traditional political party model, on the other hand, would offer a quite different perspective on these problems. It would likely seek to deemphasize informational access to the *initial* formulation and implementation of executive programs in particular cases by erecting more informational barriers to executive agencies. As one scholar discussing this policy has observed, increases in congressional oversight can “inhibit[] democratic control of policy and administration of an idealized sort — coherent, coordinated programmatic in the responsible parties sense.”²²¹ The “very system feature (disciplined,

217. See Sunstein, *supra* note 87, at 31-38; Farber & Frickey, *supra* note 87, at 912 n.224; Tushnet, Schneider & Kovner, *Judicial Review and Congressional Tenure: An Observation*, 66 TEXAS L. REV. 967 (1988).

218. See *supra* note 187 and accompanying text.

219. See *supra* note 60 and accompanying text.

220. See W. BURNHAM, *Shifting Patterns of Congressional Voting Participation 1981*, in THE CURRENT CRISIS IN AMERICAN POLITICS 196 (1982) (observing that the mass electorate is “baffled by the complexity of our constitutional arrangements, has extremely low levels of information, and has not been educated by any social instrumentality . . . to an understanding of politics”) (emphasis omitted); cf. Bruff, *supra* note 28, at 247 (noting that with the increase in inputs to the administrative process, “[t]he very multiplicity of competing actors suggests that no one of them will attain effective control Consequently, an administrator usually has discretion in shaping policy.”).

221. J. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 212 (1990).

centralized decisionmaking) that seems to enhance the accountability of decisionmakers to the public may [be consistent with a] restrict[ed] role of legislative bodies in oversight."²²² Thus, this approach might well be more sympathetic toward increased presidential power over certain nationwide agency operations, while legislative oversight would be more limited at the initial stages. A variety of reforms such as some limitations on legislative oversight,²²³ simultaneous transmission of agency budgets and other information to Congress,²²⁴ and greater review by the Office of Management and Budget of major agency action and legislation, falls into this category.²²⁵ While there are constitutional impediments to a full implementation of any party approach, which in its extreme form runs contrary to checks and balances, the goal would be to make the president more responsible for and accountable to the public for agency decisions.

Unfortunately, this approach can succeed, even on a modest basis, only if we have an accountable president and truly strong, competitive parties to recreate the veil.²²⁶ To the extent that we continue to have weak parties, each controlling a separate branch of government, centralized executive authority creates legitimate concerns of tyranny, one-party control of executive decisions, and substantially reduced public dialogue and public participation.

Given this potential tension between legal participation and political accountability, we need to recognize that there are costs to a sin-

222. *Id.* at 211. In short, "the more centralized and coordinated that authority in government becomes, the less likely it is that the legislative body will be an active overseer of policy and administration." *Id.* at 209; see also Bruff, *supra* note 28, at 233 ("the President lacks strong incentives to intervene in regulation because he bears only attenuated political responsibility for decisions made in the agencies"). As Donald Horowitz has observed of the presidency:

Cautioning against a plural executive, Hamilton, in *The Federalist*, warned that a proliferation of personnel would make personal accountability for executive misdeeds difficult to establish. It would deprive the public of the "opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to [achieve] their removal from office, or [] their actual punishment in cases which admit of it." In public psychology and in legal conception, we have the unitary executive of the Framers; in the difficulty of tracing responsibility and in the accompanying immobilism, we have something closer to the plural executive they rejected.

Horowitz, *Is the Presidency Failing?*, 88 PUB. INT. 3, 20 (1987).

223. See generally THE FETTERED PRESIDENCY, *supra* note 202.

224. See, e.g., 6 Op. Off. Legal Counsel 632 (1982).

225. See *supra* note 210. As Aberbach has noted, "the very discipline and electoral accountability of a democratic system with effectively centralized and coordinated authority over policy and administration is more than compatible with a restricted legislative role in oversight." J. ABERBACH, *supra* note 221, at 210; see also Bruff, *supra* note 28, at 233 ("centralized review of regulations can help the President check policy that may result from agency alliances with congressional committees or interest groups, enhancing his power against those forces"); Weingast, *Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relationships*, LAW & CONTEMP. PROBS., Winter 1981, at 147, 159.

226. As discussed above, we do not at the moment. See *supra* section III.D.

gular pursuit of the civic virtue approach. Many past and future reforms in administrative law, whatever their other benefits, may also undermine our ability to reach agreements on government powers and may have a mixed value for diffuse constituencies. In this situation, attempts to limit disclosure in some narrow areas, such as the formulation of the executive branch regulatory agenda, coupled with enhanced presidential oversight, may serve to further political accountability.²²⁷ At the same time, these changes would need to be accompanied by stronger, more competitive political parties, as outlined in Part III, to ensure that the veil implicit in legislative delegation would be maintained and that centralized control would not lead to an institutional advantage for one political ideology.

CONCLUSION

The purpose of this article, which some might view as an exercise in intellectual arbitrage between law and political science, has been to explore the paradox implicit in some traditional writings on political parties: that political institutions have in some areas performed better with less information. This anomaly should be especially significant to legal scholars, since two prominent legal intellectual models — civic virtue and law and economics — often view greater information and political communications as the *solution* to current problems. These benefits include stimulating greater normative evaluation of public decisionmaking as well as promoting more responsible and efficient government.

As this article has suggested, however, less information and reduced communications have been beneficial in some contexts, both normatively and instrumentally. In the past, the shaping and narrowing of political information through the organization of political parties and party identification has in some respects improved the ability of the public to understand, make sense of, and control political events. The accountability of individual political representatives to group activities through party identification has also limited the influence of interest groups. With the breakdown of parties and party identification, on the other hand, the entrepreneurial ability of independent political actors to gain support in their districts has been one of the causes of political universalism, affecting the allocation of social resources.

In addition, as a normative matter, vagueness in legislative delegation has sometimes improved deliberative processes and furthered

227. See Strauss, *supra* note 48, at 666.

political consensus by limiting the ability of political actors to calculate the specific costs and benefits of government policy on their own interest. Indeed, in some cases, delaying the discussion of problems, in the spirit of nonideological parties, has facilitated agreement, especially in the budget and party context, thereby improving government's ability to act. In short, contrary to the usual presumption, less information can improve normative as well as instrumental objectives in some arenas, and thus should be considered as part of general policy analysis.

Despite this benefit, the resolution of current policy issues is surely not to adopt general or even major restrictions on information. As law-and-economics and civic virtue scholars have persuasively demonstrated, information is an important resource for social progress.²²⁸ Rather, I have speculated on how some institutions might be restructured to shape the dissemination of information, consistent with the insights of the political party perspective. These changes, which highlight the trade-offs raised by many current public law strategies, would seek to improve the informational capacities of centralized institutions such as parties, while implicitly diminishing those of individual political actors. The purpose is to further governmental and social consensus, innovation, and responsibility, broadly conceived.

228. Moreover, the fact that less information may have been beneficial does not suggest we should risk affirmatively empowering government officials to impose restrictions.