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Participation, Public Law, and Venue Reform

Cass R. Sunstein†

In recent years, regulatory reform has received considerable attention from all three branches of the federal government. The courts have developed a wide range of techniques to discipline and police the exercise of discretion by federal agencies.¹ Presidents Ford, Carter, and Reagan have issued executive orders asserting increasingly broad power over the regulatory process and demanding attention to the costs and benefits of agency initiatives.² Congress has considered a number of routes to regulatory reform, including the legislative veto,³ provisions for strengthened judicial

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¹ See generally Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982) (courts have the authority to create private remedies for defective administrative performance); *infra* notes 44-53 and accompanying text.

² See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981) (ordering that regulatory action not be undertaken unless social benefits outweigh potential costs); Exec. Order No. 12,044, 3 C.F.R. 152 (1978), *reprinted in* 5 U.S.C.S. § 553 at 205-09 (Law. Co-op. 1980) (requiring the opportunity for public participation at early stages of the rulemaking process), *amended by* Exec. Order No. 12,221, 3 C.F.R. 266 (1980), *reprinted in* 5 U.S.C.S. § 553 at 44 (Law. Co-op. 1982); Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (1974) (requiring Inflation Impact Statements from regulatory agencies), *amended by* Exec. Order No. 11,949, 42 Fed. Reg. 1017 (1977). See also Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979) (considering the boundaries of presidential oversight powers over agency rulemaking); Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267, 1280 (1981) (concluding that the cost-benefit determination required by Exec. Order No. 12,291, *supra*, "is applicable only to those statutes . . . that are designed to remedy 'market failure' in the economic sense or that otherwise have efficiency-promoting applications" (footnote omitted)).

³ *E.g.*, 20 U.S.C. § 1070a(a)(3)(A)(ii) (1976 & Supp. IV 1980) (legislative veto attached to educational grants); 20 U.S.C. § 1232(d)(1)-(2) (1976 & Supp. IV 1980) (legislative veto authority over most Office of Education rules). Statutes containing provisions for legislative vetoes have been held unconstitutional as violations of the doctrine of separation of powers. *E.g.*, *Consumers Union of United States v. FTC*, No. 82-1737, slip op. at 6 (D.C. Cir. Oct. 22, 1982) (en banc) (per curiam); *Chadha v. Immigration & Naturalization Serv.*, 634 F.2d 408

review,⁴ and mechanisms for increasing public participation in informal rulemaking.⁵

These reforms are rooted in a common perception that regulatory agencies are insufficiently accountable to the public as a whole, and that new mechanisms of control are necessary to ensure that agency decisions respond to public, rather than private, values.⁶ Concerns of this sort have been manifested in dramatic changes in the character of judicial review of administrative action, as courts have attempted to ensure meaningful participation by all interests affected by agency decisions.⁷ This effort to promote participation has placed considerable strains upon the traditional understanding of the nature of adjudication.⁸

Among the less noticed, but more important, of recent developments in the area of regulatory reform have been judicial and legislative initiatives designed to alter venue rules in suits against federal agency officials.⁹ Venue rules determine where suit may be

(9th Cir. 1980), *calendared to be reargued*, 50 U.S.L.W. 3998.27 (U.S. June 29, 1982). *Contra* *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

It has often been suggested that legislative veto provisions may violate the incompatibility clause, U.S. CONST. art. I, § 6, cl. 2 ("no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office"), as well as the presentation clause, U.S. CONST. art. I, § 7, cl. 3, and the doctrine of separation of powers. See, e.g., Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 293-300 (1982). For a discussion of the policy issues surrounding legislative veto provisions, see Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977).

⁴ See, e.g., S. 1080, 97th Cong., 2d Sess. § 5, 128 CONG. REC. S2713, S2718 (daily ed. Mar. 24, 1982) (providing that in "making determinations on [certain] questions of law, the court shall not accord any presumption in favor of or against agency action, but [using] . . . its independent judgment . . . shall give the agency interpretation such weight as it warrants, taking into account the discretionary authority provided to the agency by law").

⁵ *Id.* § 3, 128 CONG. REC. at S2713-14. For discussion of such procedures in administrative rulemaking, see Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345; Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978).

⁶ See *infra* notes 40-53 and accompanying text; cf. Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175 (1981) (examining the validity of the perception that poor regulatory performance is caused by excessive agency discretion).

⁷ See *infra* notes 46-53 and accompanying text.

⁸ See *infra* note 61 and accompanying text.

⁹ See *infra* notes 62-63 and accompanying text (discussing judicial initiatives). Various venue reform proposals have been introduced in the 96th and 97th Congresses. Hearings were held on the subject in 1980, *Federal Venue Statutes: Hearings on S. 739 and S. 1472 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980), and in 1982, *Hearings Before the Senate Comm. on the Judiciary on S. 2419*, 97th Cong., 2d Sess. (1982) [hereinafter cited as *1982 Hearings*].

The initial venue reform proposal was introduced by Senator Laxalt, see S. 739, 96th Cong., 1st Sess., 125 CONG. REC. S3188-89 (daily ed. Mar. 22, 1979); others were introduced by Representative Hansen, see H.R. 754, 97th Cong., 1st Sess. (1981); H.R. 294, 97th Cong.,

brought. Current law authorizes plaintiffs to sue federal officers,

1st Sess. (1981), Senator Simpson, *see* S. 1107, 97th Cong., 1st Sess., 127 CONG. REC. S4387-88 (daily ed. May 5, 1981), and Senator DeConcini, *see* S. 2419, 97th Cong., 2d Sess., 128 CONG. REC. S3790 (daily ed. Apr. 21, 1982); S. 50, 97th Cong., 1st Sess. (1981); S. 1472, 96th Cong., 1st Sess., 125 CONG. REC. S9127-28 (daily ed. July 10, 1979).

The most recent bill, S. 2419, *supra*, has been endorsed by the Reagan administration. *See* 1982 *Hearings, supra*, at 16-27 (testimony of Assistant U.S. Att'y Gen. Carol E. Dinkins). Relying on reasons similar to those set forth *infra* at notes 72-109 and accompanying text, the Administrative Conference of the United States has recommended that S. 2419 not be enacted, 47 Fed. Reg. 30,706-07 (1982) (to be codified at 1 C.F.R. § 305.82-3). In relevant part, the bill provides:

Section 1391 of title 28, United States Code, is amended—

(1) by amending subsection (e) to read as follows:

“(1) [sic] A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought only in a judicial district in which—

“(1) a defendant in the action resides;

“(2) the cause of action arose;

“(3) any real property involved in the action is situated; or

“(4) the plaintiff resides if no real property is involved in the action, except that no such action may be brought in a judicial district pursuant to paragraph (1) or (4) hereof unless the agency action or failure to act that is the subject of the lawsuit would substantially affect the residents of that judicial district. A cause of action pursuant to paragraph (2) hereof shall be deemed to arise in the judicial district or districts in which the residents would be substantially affected by the agency action or failure to act that is the subject of the lawsuit.”

S. 2419, § 3(a)(1), *supra*, 128 CONG. REC. at S3790.

In addition, new transfer provisions would state:

“(e) In any civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or the defendant is an agency of the United States, or the United States, a district court shall, upon motion of any party thereto, transfer the action to a district or division, where the action might have been brought, and in which the action would have a substantially greater impact, unless the interests of justice require the court to—

“(1) retain the action, or

“(2) transfer the action to a district or division other than one in which the impact would be substantially greater.”

Id. § 4(2), 128 CONG. REC. at S3791 (quoting terms of proposed new 28 U.S.C. § 1404(e)).

The transfer provision for the courts of appeals, 28 U.S.C. § 2112 (1976), would be amended by adding new subsections (b)(3)-(4).

“Any court in which a proceeding with respect to any agency action is pending, including any court selected pursuant to a system of random selection pursuant to paragraph (1), may, in the interests of justice, transfer such proceeding to any other court of appeals and shall, upon motion by any party thereto, transfer such proceeding to the court of appeals for a circuit in which the action under review would have a substantially greater impact, unless the interests of justice require the court to—

“(A) retain such proceedings, or

“(B) transfer the proceedings to a circuit other than one in which the impact would be substantially greater.

“(4) Notwithstanding any other provision of law, a petition for review of any agency rule reviewable directly in a circuit court of appeals may be filed in the judicial

employees, or agencies in any one of three places: where the plaintiff resides, where the defendant resides, or where the cause of action arose.¹⁰ Because many federal officers reside in Washington, D.C., a considerable amount of administrative law is made by the United States Court of Appeals for the District of Columbia Circuit. The principal effect of the venue reform proposals would be to bar institution of suit in the District of Columbia unless the agency decision under review had a substantial local impact.¹¹ These proposals are of considerable importance, because venue rules that restrict the place where suit may be brought inevitably affect the ability of those concerned to participate in the proceedings.

The purposes underlying the venue reform proposals are several. In part, they are motivated by hostility to the District of Columbia Circuit, thought by many to be a "liberal" court. More generally, they represent an effort to promote local control of, and citizen participation in, governmental decision making. In this respect, the reform proposals reveal decreasing satisfaction with the application of the private law conception of adjudication to public law disputes, and they attest to the increasing power of a largely novel conception that regards adjudication as an integral element in the process of self-governance. For these reasons, the proposals raise broad issues concerning the nature and purpose of administrative adjudication, issues whose importance goes well beyond the fates of the proposed reforms.

In this essay, I discuss two questions raised by the venue re-

circuit in which the person seeking review resides or has its principal place of business."

S. 2419, § 1(3), 128 CONG. REC. at S3790.

For a discussion of the provisions of S. 2419, see *infra* notes 65-76 and accompanying text. Analysis of the bill by its proponents and opponents appears in *VENUE AT THE CROSSROADS passim* (S. Schlesinger ed. 1982). See also *Venue Reform: Sue West, Young Man?*, REG., Jan.-Feb. 1982, at 10 (suggesting that the recent venue proposals, if enacted, would be inconvenient, impractical, and unlikely to solve administrative law's central problem of imprecise delegation of power to regulatory agencies) [hereinafter cited as *Sue West*].

¹⁰ 28 U.S.C. § 1391(e) (1976) provides in pertinent part:

A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The provision authorizing venue where real property is situated has rarely been invoked in administrative law actions.

¹¹ See *infra* notes 65-76 and accompanying text.

form proposals. The first is the relatively prosaic question whether these reforms are desirable or, put more broadly, whether and how the current venue provisions should be altered in suits brought by private persons against the federal government. The second concerns the ways in which procedural law should reflect recent changes in the nature of the adjudicative process. There is no doubt that civil adjudication, especially in the area of review of federal agency determinations, has undergone a major transformation in the past twenty-five years. The venue proposals, I suggest, are a response, albeit misdirected, to that transformation.

I. TRADITIONAL VENUE RULES AND PUBLIC LAW

The venue reform proposals depart dramatically from the traditional role of venue rules. To set the proposals in perspective, it will be useful to make some brief observations about the function and nature of venue provisions.

A. Traditional Venue Rules

Venue rules traditionally have served to ensure that proceedings are held in the most convenient forum.¹² Courts evaluate convenience primarily in terms of the interests of the parties and any relevant witnesses, but other factors may be relevant as well.¹³ The primary goal is to minimize the social costs of litigation not only by reducing the burdens on the parties, but also by considering the strains on the system as a whole.¹⁴

The interests and convenience of the plaintiff have been the central focus of venue rules. Anglo-American law has accorded the plaintiff considerable leeway in choosing among possible conve-

¹² See, e.g., *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939); C. WRIGHT, A. MILLER & E. COOPER, 15 FEDERAL PRACTICE AND PROCEDURE § 3801, at 4 (1976). Unlike jurisdiction, venue does not relate to the power of the court to hear the case, e.g., *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-68 (1939), and objections to venue are waived unless presented in timely fashion, 28 U.S.C. § 1406(b) (1976) (jurisdiction of district court not impaired by improper venue where a party "does not interpose timely and sufficient objection"); see also FED. R. CIV. P. 12(h)(1) (right to challenge improper venue waived unless timely motion filed).

¹³ For example, court congestion, choice of law, availability of compulsory process for unwilling witnesses, special knowledge of local conditions, and other practical considerations may be taken into account. See *Piper Aircraft Co. v. Reyno*, 102 S. Ct. 252, 261-68 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1947).

¹⁴ See *Piper Aircraft Co. v. Reyno*, 102 S. Ct. 252, 266 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1947).

nient forums.¹⁵ Precisely why this should be so is no simple matter. The plaintiff orientation of traditional venue rules is, at least in part, an aspect of the accepted principle that the plaintiff ought to be permitted to be master of his own lawsuit, a principle that manifests itself in other features of the procedural system.¹⁶ The core idea is that the choice of forum must be allocated to one of the parties, and that as partial compensation for compelling the plaintiff to initiate the lawsuit,¹⁷ he ought to be permitted to select the place of trial. In this respect, venue is a classical private law doctrine, developed and suited for a conception of adjudication as a mechanism for the settlement of private disputes.

The plaintiff's control, however, is not absolute. When the defendant can show that the plaintiff chose the place of the lawsuit for purposes of harassment, or that it is wholly inappropriate to try the case in the plaintiff's chosen forum, dismissal is available under the common law doctrine of *forum non conveniens*.¹⁸ But third parties, including intervenors, traditionally have not been permitted to avail themselves of that doctrine,¹⁹ a rule that is again an aspect of a conception of adjudication that is heavily focused on the interests of the plaintiff and defendant.

¹⁵ See 28 U.S.C. § 1391 (1976) (allowing plaintiff to choose among various permissible locations); see also Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307, 308-16 (1951) (listing places in which venue is permissible).

¹⁶ For example, under the common law, intervention was disfavored on the theory that the plaintiff controlled the persons involved in his suit. See J. MOORE & J. KENNEDY, 3B MOORE'S FEDERAL PRACTICE ¶ 24.03, at 24-42, 24-44 (2d ed. 1981); Moore & Levi, *Federal Intervention: The Right to Intervene and Reorganization*, 45 YALE L.J. 565, 569, 572 (1936).

¹⁷ Moore & Levi, *supra* note 16, at 569, 572.

¹⁸ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1947). See generally Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947) (discussing the constitutional limitations on the doctrine and suggesting guidelines for its practical application).

¹⁹ See *Trans World Airlines, Inc. v. Civil Aeronautics Bd.*, 339 F.2d 56, 63-64 (2d Cir. 1964), *cert. denied*, 382 U.S. 842 (1965); *St. Hilaire v. Shapiro*, 407 F. Supp. 1029, 1031 (E.D.N.Y. 1976); *Commonwealth Edison Co. v. Train*, 71 F.R.D. 391, 394 (N.D. Ill. 1976); *Seafood Imports, Inc. v. A.J. Cunningham Packing Corp.*, 405 F. Supp. 5, 7-8 (S.D.N.Y. 1975); J. MOORE & J. KENNEDY, *supra* note 16, ¶ 24.19; C. WRIGHT & A. MILLER, 7A FEDERAL PRACTICE AND PROCEDURE § 1918, at 608 (1972). *But cf.* *Daily Express, Inc. v. Northern Neck Transfer Corp.*, 483 F. Supp. 916 (M.D. Pa. 1979) (third-party defendant may move for transfer).

The traditional rule is based on the notion that by choosing to invoke the court's power through intervention, the intervenor waives any objection to venue. See *Commonwealth Edison Co. v. Train*, 71 F.R.D. 391, 394 (N.D. Ill. 1976); J. MOORE & J. KENNEDY, *supra* note 16, ¶ 24.19; C. WRIGHT & A. MILLER, *supra*, § 1918, at 608. This reasoning is wholly unpersuasive. The intervenor has no choice with respect to the original forum, and it is a fiction to suggest that he waives any objection by intervening.

B. Venue in Administrative Review

Federal provisions for venue follow the traditional principles.²⁰ More particularly, in actions against an employee, officer, or agency of the United States, the plaintiff may bring suit where he resides, where the defendant resides, or where the cause of action arose.²¹ This is an aspect of the conventional understanding that procedural rules ought to treat the government like any other litigant.²²

It is not difficult to see that if the focus is shifted from the plaintiff and the defendant, one would be required to formulate venue rules from a very different framework and might come up with very different rules. But even within the traditional framework, in which the consequences of judicial decisions for third parties are discounted, venue rules designed for ordinary civil adjudication are not in all respects well suited for judicial review of administrative proceedings. The traditional rules are primarily intended to serve the convenience of the parties and witnesses and to facilitate access to evidence. On administrative review, however, there will be no witnesses, and the court will render its decision on the basis of the evidence in a written record. The fact that parties or their employees reside in a particular place is thus less important for venue purposes, for usually there will be no need for them to appear before the court.²³ And although convenience of counsel may be an important factor,²⁴ counsel's interests usually are not given independent weight in determining the place where a suit may be litigated.²⁵

²⁰ See 28 U.S.C. § 1391 (1976). In civil actions in which jurisdiction is based on diversity of citizenship, suit may be brought "in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose." *Id.* § 1391(a). When jurisdiction is based on a federal question, an action may be brought where all defendants reside or where the claim arose. *Id.* § 1391(b).

²¹ 28 U.S.C. § 1391(e) (1976), *reprinted in part supra* note 10. In addition, a number of specific statutes allow for exclusive venue in the District of Columbia. See, e.g., Clean Air Act, 42 U.S.C. § 7607(b)(1) (Supp. IV 1980). It probably would be desirable to amend those provisions to promote decentralization, see *infra* note 110 and accompanying text; one virtue of S. 2419, *supra* note 9, is that it does precisely that.

²² See J. VINING, *LEGAL IDENTITY* 15, 17-18 (1978); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1717-18 (1975).

²³ *United Steelworkers v. Marshall*, 592 F.2d 693, 697 (3d Cir. 1979).

²⁴ See Note, *Venue for Judicial Review of Administrative Actions: A New Approach*, 93 HARV. L. REV. 1735, 1751 (1980).

²⁵ *Newsweek, Inc. v. United States Postal Serv.*, 652 F.2d 239, 243 (2d Cir. 1981); *Commonwealth Edison Co. v. Train*, 71 F.R.D. 391, 394 (N.D. Ill. 1976). This is perhaps an anachronistic view, for the client must either hire a local attorney or ultimately bear his counsel's transportation expenses. For this reason, the convenience of counsel should be

Moreover, the federal court's knowledge of state law and the public's "interest in having localized controversies decided at home,"²⁶ both pertinent factors in determining proper venue in private law cases,²⁷ will generally be less relevant on review of administrative decisions. In enacting regulatory legislation, Congress has decided that a national standard is appropriate; conflicting preferences among local communities are for the most part immaterial. Under these circumstances, the court's role is to say what the national standard is, not to act as guardian of the interests of the local community.²⁸

There are thus important differences between ordinary civil adjudication and judicial review of administrative action. Nevertheless, if the function of venue is understood to be the promotion of convenience for the parties, the traditional rules tend to work nearly as well in the administrative context as in private litigation. On review of official action, the governmental defendant is held to reside in the place where he performs his official duties, which is often the District of Columbia.²⁹ Frequently, the District will also be the place in which the cause of action arose.³⁰ As a practical matter, then, the current provisions ordinarily allow a plaintiff to bring suit where he resides or, alternatively, in the District of Columbia, subject to transfer if there is a clearly preferable forum.³¹

considered relevant. *See* *Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d 1200, 1205 (D.C. Cir. 1981); *International Union of Elec. Workers v. NLRB*, 610 F.2d 956, 964 (D.C. Cir. 1979); *United Steelworkers v. Marshall*, 592 F.2d 693, 697 (3d Cir. 1979) ("The only significant convenience factor which affects petitioners seeking review of rulemaking on an agency record is the convenience of counsel who will brief and argue the petitions."); *American Pub. Gas Ass'n v. FPC*, 555 F.2d 852, 857 (D.C. Cir. 1976).

²⁶ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

²⁷ *Id.*

²⁸ *See infra* notes 95-99 and accompanying text.

²⁹ *See, e.g., Starnes v. McGuire*, 512 F.2d 918, 925 (D.C. Cir. 1974); *Hartke v. FAA*, 369 F. Supp. 741, 746 (E.D.N.Y. 1973).

³⁰ The controlling standards in determining where the claim arose, however, are somewhat obscure. *See, e.g., Reuben H. Donnelley Corp. v. FTC*, 580 F.2d 264, 268 (7th Cir. 1978) (cause of action arises not where effects of FTC action are felt, but where FTC made decisions under review). For a discussion of the problems courts have faced in this regard, see Wood, *Federal Venue: Locating the Place Where the Claim Arose*, 54 *Tex. L. Rev.* 392 (1976).

³¹ *See* 28 U.S.C. § 1404(a) (1976) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."); *see also* 28 U.S.C. § 2112(a) (1976), applicable to direct review actions in the courts of appeals, which provides in relevant part:

If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall there-

Venue in the District of Columbia will be convenient for the government and its representatives: both the record and the government's principal lawyers³² will be there. In terms of convenience to the United States, the District of Columbia is obviously the optimal forum. At first glance, however, the case for allowing suit where the plaintiff resides appears somewhat weaker. The plaintiff will not be a witness and may not need to be present at all.³³ It is perhaps for this reason that before 1962, federal law provided for exclusive venue in the District of Columbia.³⁴

But it would be a mistake to suggest that the plaintiff's convenience is irrelevant; as experience under the pre-1962 law demonstrates, it would often be quite burdensome to require those bringing suit against federal officials to do so in the District of Columbia.³⁵ There are several reasons for this. First, sometimes the record must be supplemented,³⁶ in which case the parties and witnesses may have to be present. Second, even if the plaintiff is not required to attend the proceedings, he may wish to do so to maintain contact with his representatives and to keep abreast of the proceedings. Finally, and perhaps most importantly, plaintiff's counsel may well reside in the same area as the plaintiff; to compel the plaintiff to bring suit in the District of Columbia could increase his expenses substantially. These considerations assume special force in light of the increasing presence of the federal government in previously local activities.³⁷

upon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.

Intervenors generally are not permitted to invoke these transfer provisions. *See supra* note 19 and accompanying text. This result is not compelled by the language of the relevant statutes, which refer simply to "the convenience of parties and witnesses." 28 U.S.C. §§ 1404(a), 2112(a).

³² There are, of course, United States Attorneys throughout the country as well, but the government will often prefer to conduct the litigation in the District of Columbia. *See infra* text preceding note 72.

³³ *See supra* note 23 and preceding text.

³⁴ *See* 28 U.S.C. § 1391(b) (1958) (current version at 28 U.S.C. § 1391(e) (1976)).

³⁵ *See* Note, *Proper Venue for an Action When at Least One Defendant Is an Officer or Employee of the Federal Government*, 57 MINN. L. REV. 1005, 1007-12 (1973). For a discussion of the mandamus reform aspects of the Mandamus and Venue Act of 1962, § 1, 28 U.S.C. § 1361 (1976), see generally Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).

³⁶ *See, e.g.*, *Public Power Council v. Johnson*, 674 F.2d 791 (9th Cir. 1982).

³⁷ *See, e.g.*, *Richman v. Beck*, 257 F.2d 575 (10th Cir. 1958), in which plaintiff brought suit against local federal officials to require issuance of a permit to allow the plaintiff to trail his sheep over public land. The case was brought before passage of the Mandamus and

The failure to allow suit in the plaintiff's home state led to the controversy that eventually resulted in passage of the Mandamus and Venue Act of 1962.³⁸ That Act expanded the forums available to the plaintiff by permitting suit not merely in the District, but also where the plaintiff resides or where the cause of action arose.³⁹ That expansion appeared reasonable, and until recently, the greater choice of forums in administrative law cases seemed to work well.

II. MODERN ADMINISTRATIVE REVIEW: PARTICIPATION AND THE ADJUDICATIVE PROCESS

Thus far I have examined venue in administrative review largely from the perspective of traditional private law. In the last twenty years, however, there have been dramatic changes in the character of adjudication, particularly in the area of judicial review of administrative action. The principal motivation for these changes has been a desire to make regulatory agencies more accountable for their actions, and the principal method used to accomplish that goal has been to increase the opportunities for public participation in the regulatory process.⁴⁰

In this period, Congress has delegated considerable discretion to unelected officials who make regulatory decisions for which the governing statutes fix only vague limits.⁴¹ This development has placed considerable strains upon the original constitutional understanding that public officials would be more or less directly ac-

Venue Act of 1962, Pub. L. No. 87-748, 76 Stat. 744 (codified at 28 U.S.C. §§ 1361, 1391(e) (1976)), which permitted suit where the plaintiff resides, *id.* § 2, 28 U.S.C. § 1391(e)(1976); accordingly, the court of appeals' holding that the Secretary of the Interior was an indispensable party meant that the suit had to be litigated in the District of Columbia.

³⁸ Pub. L. No. 87-748, 76 Stat. 744 (codified at 28 U.S.C. §§ 1361, 1391(e) (1976)). See generally *Stafford v. Briggs*, 444 U.S. 527, 533-545 (1980) (analyzing the legislative history of the Mandamus and Venue Act of 1962, and construing § 1391(e) to exclude actions for damages against federal officials); *Liberation News Serv. v. Eastland*, 426 F.2d 1379, 1382-85 (2d Cir. 1970) (holding that § 1391(e) does not apply to actions against members of Congress and congressional employees). For additional discussion of the purposes of the Mandamus and Venue Act of 1962, § 2, 28 U.S.C. § 1391(e) (1976), see *infra* note 71.

³⁹ See Mandamus and Venue Act of 1962, § 2, 28 U.S.C. § 1391(e) (1976). The usual justification for permitting venue where the cause of action arose is related to the likelihood that necessary witnesses will reside in that locale. Absent a need to supplement the record with additional testimony by local witnesses, however, see *supra* note 36 and accompanying text, venue where the cause of action arose should be avoided in cases involving review of administrative proceedings.

⁴⁰ See *infra* note 46 and accompanying text; *Pierce & Shapiro*, *supra* note 6, at 1180.

⁴¹ See, e.g., 43 U.S.C. § 1201 (1976) (delegating broad authority over public lands to the Secretary of Interior).

countable to the electorate⁴² and has created a serious risk of the capture of public power by well-organized private interests.⁴³ Moreover, because agencies often combine judicial, legislative, and administrative functions, they can escape the checks imposed by the separation of those powers.

Collective goods (or bads)⁴⁴ are frequently at issue in modern agency actions, and resolution of regulatory issues thus may affect large numbers of people other than the immediate parties. With the decline of the Progressive notion that experts can discern the public interest in some neutral fashion, it has seemed critical to ensure that officials formulate public policies only after considering all relevant interests.⁴⁵

The courts have responded to these developments by creating a system of "interest representation"⁴⁶ that attempts to ensure that all interests affected by administrative decisions are represented before the agency or reviewing courts.⁴⁷ The intended func-

⁴² This is, of course, an oversimplification. For a discussion of the countermajoritarian effects of judicial review and the dilution of majority rule by the administrative agencies of the federal government, see Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982). *But see* Pierce & Shapiro, *supra* note 6, at 1180 (arguing that current restraints on agency discretion are sufficient and that further oversight of administrative decisionmaking would probably be counterproductive).

⁴³ *See generally* H. KARIEL, *THE DECLINE OF AMERICAN PLURALISM* (1961); G. MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966); Stewart, *supra* note 22, at 1684-88.

⁴⁴ For the classic work in the area, see M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965). Olson defines a "collective good" "as any good such that, if any person . . . in a group . . . consumes it, it cannot feasibly be withheld from the others in that group." *Id.* at 14 (footnote omitted). He also notes that goods conferring benefits on one group may harm another, thereby constituting "public bads" for the latter group. *Id.* at 15 n.22. *See generally* R. HARDIN, *COLLECTIVE ACTION* 17-20 (1982).

⁴⁵ *See* J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 235-51 (1980) (discussing need for participation when interests are not common, but conflicting); Stewart, *Paradoxes of Liberty, Integrity and Fraternity: The Collective Nature of Environmental Quality and Judicial Review of Administrative Action*, 7 ENVTL. L. 463 (1977) (discussing the need for public participation in agency decision making that affects environmental quality); Stewart & Sunstein, *supra* note 1, at 1278-82 (justifying participation as a means of promoting agency development of, and adherence to, public values).

⁴⁶ This development is described and evaluated in Stewart, *supra* note 22. *See generally* Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972) (suggesting a functional test based upon four factors—the nature of the contested issues, the intervenor's stake in the outcome, adequacy of representation by existing parties, and the ability of the intervenor to represent its interest—to determine whether, and to what extent, intervention by public interest groups is appropriate).

⁴⁷ The effort to increase the representation of affected parties has been most conspicuous in the area of administrative review, but to some extent it has been duplicated in non-administrative areas where many people are affected by the decisions at issue. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1289-92, 1302-13 (1976). Increased representation in private law litigation has been effected through the use of the class action device. *See generally* Rhode, *Class Conflicts in Class Actions*, 34 STAN. L.

tion of increased participation is to promote political accountability by producing policies that correspond to the will of the public as a whole, or at least to the full range of interests affected by regulatory decisions.⁴⁸ The principal concern of administrative law since the New Deal, in short, has been to develop surrogate safeguards for the original protection afforded by separation of powers and electoral accountability.⁴⁹ Expanded notions of standing⁵⁰ and intervention,⁵¹ as well as increased willingness to review the exercise of prosecutorial discretion,⁵² were key steps in this development. Because of the representation of all affected interests, judicial and administrative processes have increasingly come to resemble legislative processes; adjudication is no longer conceived of as merely dispute-settlement, but has assumed a place alongside voting as a means of influencing government policy.⁵³

Public interest groups, which have proliferated in the last two decades, have played a critical role in this process. Spurred by more liberal standing rules,⁵⁴ they have contributed substantially to interest representation in regulatory administration. Such groups have been able to pool individually small but collectively large interests to redress legal injuries.⁵⁵ These public interest

REV. 1183 (1982); *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318 (1976). Representation of affected parties is also promoted by intervention. See *infra* note 57.

⁴⁸ See, e.g., *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1046 & n.18 (D.C. Cir. 1979); *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 667 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972). In some contexts, participation also may be intrinsically desirable as a means of recognizing the dignity of those affected by agency decisions. See Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885, 902-04 (1981). On the purposes of participation, see A. GUTMANN, *LIBERAL EQUALITY* 178-83 (1980); J. MANSBRIDGE, *supra* note 45, at 235-46, 248-51.

⁴⁹ See Stewart & Sunstein, *supra* note 1, at 1199-1200.

⁵⁰ See, e.g., *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 683-90 (1973) (party must suffer "injury in fact," but injury not confined to "economic harm"); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970) (interest may reflect aesthetic, conservational, recreational, and spiritual values as well as traditional economic ones). See generally J. VINING, *supra* note 22 (discussing the standing question in the public law context).

⁵¹ See, e.g., *National Welfare Rights Org. v. Finch*, 429 F.2d 725, 732 (D.C. Cir. 1970) (right to intervene closely related to standing).

⁵² See, e.g., *Carpet, Linoleum & Resilient Tile Layers Local 419 v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981) (even in area left to agency discretion, mandamus will lie if statutory or regulatory standards constrain exercise of discretion); *WWHT, Inc. v. FCC*, 656 F.2d 807 (D.C. Cir. 1981); *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971).

⁵³ See Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights* (pt. 2), 1974 DUKE L.J. 527, 534-40.

⁵⁴ See *supra* note 50.

⁵⁵ See B. WEISBROD, *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 11-26 (1978). A public interest law firm thus can overcome free-rider problems which pre-

groups frequently make their home in the District of Columbia. There is no mystery to this phenomenon, for the District, as the center of the national government, is the most convenient place to attempt to exert influence on the legislative and executive branches and (in view of current venue rules) on the courts as well. Public interest groups bringing suit against federal agencies—to require issuance of new or stricter regulations, for example—can conveniently do so in the District of Columbia. Moreover, perceptions that the United States Court of Appeals for the District of Columbia is apt to be sympathetic to statutory beneficiaries have undoubtedly played a substantial role in their choice of forum.⁵⁶

The traditional venue principles embodied in current federal statutes permit public interest groups to initiate regulatory litigation in the District of Columbia. It is the defendant's residence, and it is often the residence of the public interest group as well. Because regulatory benefits are generally collective goods, third parties are affected by such litigation; for example, a suit brought to require stricter regulation of automobile emissions may have

vent adequate deterrence of activity that is harmful in the aggregate but negligible in individual cases. The function of the public interest law firm is similar in this respect to that of the class action device. See Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 48-49 (1975).

The traditional economic justification for special treatment of collective goods, see *supra* note 44 and accompanying text, derives from the free-rider problem. Because everyone can benefit from such goods, regardless of personal participation in obtaining them, each individual is led to withhold his contribution by the hope that others will work to obtain the goods on his behalf. Without special action, collective goods are not produced. See M. OLSON, *supra* note 44, at 1-3. However, as Professor Hirschman has recently suggested, this justification rests on the sometimes questionable premise that participation in obtaining collective goods (or removing collective harms) should be treated as a cost, rather than as a benefit. A. HIRSCHMAN, *SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION* 82-91 (1982). For many, participation of this sort is in fact a benefit—in the form of involvement in public life that is itself intrinsically desirable. R. HARDIN, *supra* note 44, at 108-12. See also J. KRIER & E. URSIN, *POLLUTION AND POLICY* 270-71 (1977) (suggesting that in crisis situations, individuals will find satisfaction in active public participation that would otherwise be viewed as dispensable, costly activity); Stewart & Sunstein, *supra* note 1, at 1242 & n.191. See generally H. ARENDT, *ON REVOLUTION* (1965). It has yet to be determined, however, precisely how this phenomenon should be taken into account in creating optimal enforcement levels.

⁵⁶ See Brecher, *Venue in Conservation Cases: A Potential Pitfall for Environmental Lawyers*, 2 *ECOLOGY L.Q.* 91, 94 (1972) ("Few circuits are as understanding of the conservationist cause . . . as the D.C. Circuit . . . A judge or jury trying a case in the local problem area is likely to be unsympathetic to the conservationist point of view."). Brecher's statements have served as ammunition for proponents of venue reform legislation who believe that local tribunals should be deciding these cases. See DeConcini, *Introduction*, in *VENUE AT THE CROSSROADS*, *supra* note 9, at 11 n.8; Laxalt & Kettlewell, *A Return to Traditional Considerations for Determining Venue*, in *VENUE AT THE CROSSROADS*, *supra* note 9, at 25 n.38.

major consequences for the automobile industry in Michigan and the steel industry in Pennsylvania. If the affected industry wishes to present its views, it will need to intervene and venture to Washington.⁵⁷ Sometimes this will not be an onerous burden, for major industries often have offices or agents in the national capital. But on occasion, the administrative decision under review will have a primary effect on people unable to intervene in Washington without substantial hardship. Perhaps the most sympathetic illustration is *Defenders of Wildlife v. Andrus*,⁵⁸ where a district court in Washington enjoined motorboating on Ruby Lake in Nevada.⁵⁹

In such cases, the application of traditional venue rules seems anachronistic. Designed for the convenience of private litigants, the traditional rules discount the interests of third parties affected by judicial decisions⁶⁰ and disregard the value of greater public participation in the judicial process. The bipolar concept of litigation embodied in the venue rules is inconsistent with the trend toward representation of numerous interests in litigation outlined above.⁶¹

⁵⁷ Regulated entities frequently do intervene. See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 312 (D.C. Cir. 1981). The Federal Rules allow intervention as of right

when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

FED. R. CIV. P. 24(a)(2). The Rules also allow a class action to be maintained where prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests

FED. R. CIV. P. 23(b)(1). See also FED. R. CIV. P. 19(a) (requiring compulsory joinder in cases in which absentee will necessarily be affected by judicial decision, or in which defendant may be subject to incompatible standards of conduct or multiple liability).

The rules reprinted above are directed at classic examples of collective goods, such as pollution or common funds. In recent years, some courts have held that the impact of stare decisis on formally unrelated suits may be the basis for intervention as of right. See, e.g., *Smith v. Pangilinan*, 651 F.2d 1320, 1325 (9th Cir. 1981); *Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilders' Ass'n*, 646 F.2d 117, 121 (4th Cir. 1981); *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 828-29 (5th Cir. 1967). Under this approach, adjudication always involves collective goods in the sense that the precedential effect of one decision will necessarily affect other persons.

⁵⁸ 455 F. Supp. 446 (D.D.C. 1978).

⁵⁹ *Id.* This case has been recounted as a horror story by the venue reform advocates in Congress. See Laxalt & Kettlewell, *supra* note 56, at 26-27.

⁶⁰ See *supra* notes 18-19 and accompanying text.

⁶¹ See *supra* notes 44-53 and accompanying text. Another example of this phenomenon

The inadequacy of the private law approach of the traditional venue rules has sparked increasing congressional and judicial interest in reformulating those rules to conform to the special characteristics of modern administrative adjudication. The judicial response has been sporadic and unremarkable, but the courts have made several inroads on traditional practices. For example, some courts have suggested that it may be desirable that cases concerning primarily local issues be tried in the affected localities;⁶² other courts have modified the traditional rule that third parties may not move to transfer a case to a forum more convenient for them.⁶³ In contrast, the congressional reform proposals have been quite dramatic. It is to those developments that I now turn.

III. VENUE REFORM PROPOSALS

Current federal statutes allow suits to be brought against federal officers or agencies where the plaintiff resides, where the defendant resides, or where the cause of action arose.⁶⁴ The most recent congressional proposal for venue reform⁶⁵ focuses primarily on two aspects of venue: venue in district court review of administrative action,⁶⁶ and transfer rules for both district and circuit courts.⁶⁷ The first provision would bar suit in the place where the

is the breakdown in the conventional distinction between rulemaking and adjudication. Compare *Londoner v. City of Denver*, 210 U.S. 373 (1908) (increase in individual's property tax assessment requires hearing to meet due process requirements) with *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (county-wide tax assessment increase without notice and a hearing does not violate due process). Recently, rulemaking has been surrounded with many of the trappings of adjudication. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); *Thompson v. Washington*, 497 F.2d 626 (D.C. Cir. 1973). *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), may be seen as an effort to reassert the distinction between rulemaking and adjudication, but the *Vermont Yankee* Court emphasized the need for an adequate record in informal rulemaking, *id.* at 545-49, and indicated that in rare circumstances, due process may require procedures beyond those enumerated in the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1976 & Supp. IV 1980), which govern rulemaking proceedings, 435 U.S. at 524.

⁶² See, e.g., *Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d 1200, 1205 (D.C. Cir. 1981).

⁶³ See, e.g., *Daily Express, Inc. v. Northern Neck Transfer Corp.*, 483 F. Supp. 916, 917 (M.D. Pa. 1979).

⁶⁴ *Supra* note 21 and accompanying text.

⁶⁵ S. 2419, reprinted in part *supra* note 9.

⁶⁶ *Id.* § 3, reprinted *supra* note 9.

⁶⁷ *Id.* §§ 1, 4, reprinted *supra* note 9. Regulatory actions by some agencies receive direct review in the courts of appeals. See 28 U.S.C. § 2342 (1976 & Supp. IV 1980) (FCC, Department of Agriculture, Federal Maritime Commission, Federal Energy Regulatory Commission, ICC, and Merit Systems Protection Board).

defendant resides or the cause of action arose “unless the agency action or failure to act that is the subject of the lawsuit would substantially affect the residents of that judicial district.”⁶⁸ This provision would prevent litigants from bringing suit in district court in the District of Columbia (or, for that matter, anywhere else) if the decision will not have a “substantial effect” there. The transfer provisions, applicable to suits in the district courts and the courts of appeals, would require transfer to the place “in which the action would have a substantially greater impact,” unless the “interests of justice” require otherwise.⁶⁹

A. Costs Imposed by the Proposed Reforms

There is no question that these provisions contain substantial ambiguities,⁷⁰ but in many cases their intended effect would be to bar the plaintiff from bringing suit in the District of Columbia—even if the plaintiff wants to do so.⁷¹ Numerous decisions now made by the District of Columbia Circuit would have to be made elsewhere. Moreover, the residences of the plaintiff and the defendant, as well as the place where the cause of action arose, would be

⁶⁸ *Id.* § 3, reprinted *supra* note 9.

⁶⁹ *Id.* §§ 1, 4, reprinted *supra* note 9.

⁷⁰ What, for example, is a “substantial effect”? Does “substantial” refer to the total effect of the rule or only to the effect on the economy of the state in which the suit is brought? And when would the “interests of justice” support a decision not to transfer? What considerations are to be taken into account in determining what the “interests of justice” require? Such questions approach the unanswerable when, as is often the case, the suit challenges agency inaction. These ambiguities argue strongly against passage of the bill. See *infra* note 75 and accompanying text.

⁷¹ Proponents of the bill suggest that it conforms to the purposes of the venue reform provisions of the Mandamus and Venue Act of 1962, § 2, 28 U.S.C. § 1391(e) (1976), see *supra* notes 34-39 and accompanying text, which broadened venue in cases against federal officials by allowing the plaintiff to sue in places other than the District of Columbia. See DeConcini, *supra* note 56, at 11; Laxalt & Kettlewell, *supra* note 56, at 23-29. In fact, the bill would undermine, rather than promote, the purposes of the 1962 statute, which were to increase the plaintiff's venue options and promote convenience. The current bill would decrease the plaintiff's options, forbidding suit in the District of Columbia even when that is the plaintiff's preference. A few examples may clarify the point. Under current law, a suit brought to challenge a decision by the Environmental Protection Agency to regulate pollution-producing activities in Colorado may be brought in the District of Columbia, see *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275 (D.C. Cir. 1981); the reform proposals would require otherwise. Suits brought to challenge NLRB actions with respect to union activities in Mississippi, see, e.g., *International Union of the United Ass'n of Journeymen Local 141 v. NLRB*, 675 F.2d 1257 (D.C. Cir. 1982), could be brought only in Mississippi. Challenges to agency action involving the Alaska pipeline (which would have effects on the price and availability of energy for the rest of the country) might well be cognizable only in Alaska. See *Metzenbaum v. Federal Energy Regulatory Comm'n*, 675 F.2d 1282 (D.C. Cir. 1982).

impermissible alternative bases for venue whenever there was no substantial local impact in those locations. In this way, the venue reform proposals, although aimed primarily at reducing suits in the District of Columbia, would have a far broader impact.

One need not analyze the statistical data with much care to recognize that this proposal could impose other significant costs. If suit in the District of Columbia is barred, representatives of the United States Government—primarily Justice Department attorneys—will be required to traverse the country to defend lawsuits. Even if litigation responsibilities are delegated to local United States Attorneys, documents and other evidence will still have to be transported. The fact that venue objections can be waived⁷² does not resolve this problem: courts transfer cases on their own motion,⁷³ and a statutory bar on venue in the District undoubtedly will discourage initiation of suit there even if the government might choose not to object.

Similar burdens will be imposed upon the plaintiff. By hypothesis, the plaintiff, as well as the government, wants these cases to be tried in the District of Columbia. Under the proposal, the plaintiff will have to venture from his preferred forum to initiate the proceeding. This result would be unprecedented in the Anglo-American law of venue and a radical intrusion upon the plaintiff's mastery of his lawsuit.⁷⁴

An additional burden, one too easily underestimated, is that imposed by enacting new and ambiguous provisions into law. Venue rules should be drawn as simply and clearly as possible in order to minimize unproductive litigation concerning their meaning,⁷⁵ but the proposed venue rules would produce considerable uncertainty. For example, they would require courts to determine where it is that "the residents would be substantially affected by the agency action or failure to act."⁷⁶ This determination may necessitate pretrial hearings and, in any event, will require definition of the vague terms "substantial" and "affect"—ambiguous standards that will prove especially vexing in the frequent cases in which agency actions have multistate effects. It is possible that the courts will eventually work out sensible and uniform solutions to

⁷² See FED. R. CIV. P. 12(h)(1) (venue objection waived if not raised before trial).

⁷³ See *Lead Indus. Ass'n v. OSHA*, 610 F.2d 70, 79 n.17 (2d Cir. 1979); *National Acceptance Co. of Am. v. Wechsler*, 489 F. Supp. 642, 649-50 (N.D. Ill. 1980).

⁷⁴ See *supra* notes 15-17 and accompanying text.

⁷⁵ See Currie, *Venue and the Sagebrush Rebellion*, in *VENUE AT THE CROSSROADS*, *supra* note 9, at 68-73.

⁷⁶ S. 2419 § 3, *reprinted supra* note 9.

such interpretive questions, but significant costs, both to the litigants and the federal courts, will result from the effort.

These, then, are the disadvantages of the proposal: the costs—in terms of time and money—to be incurred by the government in transporting its attorneys to an inconvenient forum; the costs of transporting the record and any other relevant evidence and witnesses; the costs of imposing similar burdens on the plaintiff and of denying him the traditional choice of forum; and the costs of attempting to divine precisely what the new terms of the statute mean.

B. Justifications for the Pending Proposals and the Case for Venue Reform

It might be worthwhile to suffer these various burdens and costs if the case for the venue reform proposals were persuasive. The justifications for the proposed changes, all of which derive from recent developments in the area of judicial review of agency determinations, can be broken down into three general categories. First, venue reform is believed to be necessary to protect the interests of third parties who are affected by or become parties to adjudication against the government.⁷⁷ Second, it is argued that current venue provisions tend to undermine citizen participation in and local control over governmental decision making.⁷⁸ Third, it is said that adjudication in the administrative law area ought, as a matter of principle, to be widely distributed throughout the country.⁷⁹ Each of these justifications marks a radical shift in the usual understanding of the purposes of venue rules: they depart from notions of party convenience to encompass broader considerations of social policy. In the following discussion I evaluate each of the proffered justifications in terms of how sensibly they accommodate the changing character of adjudication in light of the costs of the proposed reforms.

1. *Multiple Parties.* A principal argument in favor of the proposals is that self-selected, ideologically motivated organizations should not be permitted to force other citizens to travel to Washington to defend their interests in lawsuits.⁸⁰ This is a genuine con-

⁷⁷ See 128 CONG. REC. S755-56 (daily ed. Feb. 10, 1982) (statement of Sen. DeConcini); Laxalt & Kettlewell, *supra* note 56, at 17-18.

⁷⁸ See 128 CONG. REC. S658 (daily ed. Feb. 9, 1982) (statement of Sen. DeConcini); Laxalt & Kettlewell, *supra* note 56, at 27-28.

⁷⁹ See Laxalt & Kettlewell, *supra* note 56, at 25.

⁸⁰ See Laxalt & Kettlewell, *supra* note 56, at 23-24. Not surprisingly, public interest

cern, but the legitimate interests of third parties support a more narrowly drawn reform of current law, not the dramatic change called for by the proposals.

Procedural rules, including venue provisions, should be reformed when there have been fundamental changes in the nature of the adjudication for which they were designed. Changes in administrative law adjudication are an example: review of agency action frequently does not fit within the conventional conception of adjudication as a bipolar dispute. Some procedural reforms, such as liberalized standing rules,⁸¹ have followed the shift in the character of adjudication,⁸² and "interest representation" itself has encouraged participation by people other than the nominal parties. It seems unfair in this context to require citizens to travel to Washington to participate in a lawsuit which affects them merely because a public interest group has chosen to file it there.

For two reasons, however, the recent congressional proposals go too far in attempting to remedy this inequity. First, they are overbroad: they do not bar suit in Washington only when an intervenor wants the proceedings to be tried elsewhere; they also bar suit when there are no intervenors, and when the intervenors are content to have the question resolved in the District.⁸³ Second, even when the intervenor does seek transfer, there is no reason for him to have a blanket veto power over the desires of plaintiffs and defendants; if the latter parties want the action to be tried in the District, the action should not be forced elsewhere simply because a third party so wishes.

The interests of intervenors should instead be taken into account by allowing transfer at their behest when there is an alternative forum that is preferable.⁸⁴ It is unclear whether that device is

groups are thoroughly hostile to the proposed rules because they would require the groups to expend their limited resources on travel rather than on developing successful litigation strategies. See 1982 Hearings, *supra* note 9, at 87-89 (testimony of Robert S. Blacher, of Terris & Sunderland), 39-46 (testimony of Laurence Gold, Special Counsel to the AFL-CIO); 89-91 (testimony of Patrick Parenteau, of the National Wildlife Federation), 83-87 (testimony of Nicholas Yost, of the Center for Law in the Public Interest).

⁸¹ See *supra* note 50.

⁸² See Chayes, *supra* note 47, at 1289-92 (standing and intervention); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 17-58 (1979) (discussing reform litigation brought to alter the structure of an institution); Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 940-45 (1975) (class actions); Stewart & Sunstein, *supra* note 1 (private rights of action).

⁸³ The fact that objections to venue can be waived does not resolve this anomaly. See *supra* notes 72-73 and accompanying text.

⁸⁴ See *infra* notes 96-99 and accompanying text.

available under current law.⁸⁵ Concern for the interests of third parties, therefore, supports a change in present law to make it clear that intervenors may move for transfer and that their interests ought to be considered in determining the appropriate forum. It does not support the virtual prohibition on proceeding in the District of Columbia that would result from the proposed reform.

2. *Local Control and Citizen Participation.* Another principal justification for the proposed reforms has been that, under current law, litigation with the federal government too often has been resolved in Washington. Reformers contend that adjudication in Washington is undesirable because it works against local control of and citizen participation in governmental affairs.⁸⁶

It is important to recognize the extent to which this justification diverges from the traditional understanding of the function and nature of adjudication. Adjudication has conventionally been understood as a process in which public participation has only a small place; unlike in the administrative or legislative realms, broad involvement of affected persons traditionally has not been invited.⁸⁷ Lawsuits are not town meetings; citizen participation is all but irrelevant.

It is plain, however, that supporters of venue reform view adjudication not as a matter of resolving private disputes or of protecting private entitlements, but as an integral element in the process of self-governance and the selection of shared public ends.⁸⁸

⁸⁵ See *supra* notes 19, 63 and accompanying text.

⁸⁶ See sources cited *supra* note 78.

⁸⁷ Compare Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978) (arguing that polycentric problems—those affecting multiple parties and whose resolution will have multiple carry-over effects—are ill suited to the adjudicative process) with Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay on Lon Fuller*, 92 HARV. L. REV. 410, 427-28 (1978) (criticizing Fuller's argument and noting that in public law litigation, where affected parties are not before the court, the judge may prefer to base his decision on rules responsive to public needs, rather than simply on the issues raised by the parties to the suit) and Fiss, *supra* note 82, at 18, 26, 39-40 (rejecting Fuller's argument that polycentric problems are beyond the limits of adjudication and suggesting alternative means by which the court may construct a broader representational framework).

⁸⁸ An extensive literature has developed in recent years which examines or endorses this view—a communitarian approach to adjudication—in the context of both public and private law. See Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 752-53 (1982); Fiss, *supra* note 82, at 6-10, 38-39; Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1771-74 (1976); Michelman, *Formal and Associational Aims in Procedural Due Process*, in 18 NOMOS—DUE PROCESS 126 (J. Pennock & J. Chapman eds. 1977); Stewart & Sunstein, *supra* note 1, at 1238, 1278-84, 1294-95; cf. L. FULLER, *Mediation — Its Forms and Functions*, in THE PRINCIPLES OF SOCIAL ORDER 125-46 (1981) (suggesting that mediation, rather than adjudication, is the appropriate means for helping parties to

This characterization rejects the entire conception of adjudication on which traditional venue rules have been based,⁸⁹ yet it is a natural outgrowth of the tendency in administrative review proceedings to incorporate legislative-type mechanisms for ensuring representation of all affected interests. Proponents of venue reform thus justify the proposals on the ground that they will facilitate and encourage participation in or at least attendance at adjudicative proceedings.⁹⁰

This justification is unpersuasive. To be sure, transformations in the character of adjudication make at least some kinds of citizen participation desirable. But in the context of judicial review of administrative action, the goal does not justify this attempt at reform. First, there is no evidence that increased court attendance or third party intervention would result from litigating administrative law cases closer to affected citizens. Second, recent changes have not altered the fact that adjudication is fundamentally different from legislation and administration. Participation in lawsuits is still based on material injury; judicial proofs and justifications continue to be distinctive.⁹¹ It is not yet the case that citizen participation and attendance are necessary predicates for judicial decisions on the legality of agency action. Administrative decisions may well benefit from increased citizen participation, but any gains in participation resulting from the transfer of cases to places with a substantial local impact are too speculative to support the burden on litigants imposed by prohibiting suits in the District of Columbia.

The goal of citizen participation is frequently tied to that of local control.⁹² The underlying notions are that local judges will be more sensitive to local issues and that venue reform is desirable to assure that the local citizenry exercises some control over decisions that affect them.⁹³ Moreover, holding the case in close proximity to affected citizens may enhance their perceptions of the legitimacy of

attain shared goals). For discussion of an analogous conception of legislation, see Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. (forthcoming).

⁸⁹ See *supra* notes 12-16 and accompanying text.

⁹⁰ See 1982 *Hearings, supra* note 9, at 16 (testimony of Assistant U.S. Att'y Gen. Carol E. Dinkins); 128 CONG. REC. S658 (daily ed. Feb. 9, 1982) (statement of Sen. DeConcini) (noting benefits of affording "opportunity to observe the workings of justice that will be available to the people" of the states).

⁹¹ See Fiss, *supra* note 82, at 13.

⁹² On the relationship between the two notions, see G. McCONNELL, *supra* note 43, at 73-74.

⁹³ See *supra* text preceding note 86.

the governmental process. A special sense of hostility is reserved for decisions emanating from Washington; citizens may believe that a decision made by a local federal court is not so severe an intrusion on community self-governance.⁹⁴ In this respect, the venue reform proposals are similar to other recent reforms designed to promote decentralization of governmental policy making.

As a general rule, however, it is hard to believe that the goal of local control would be promoted by altering venue rules for suits challenging federal administrative action. In enacting the federal regulatory statute, Congress has concluded that local control is undesirable, and that a uniform, nationwide standard is appropriate.⁹⁵ In addition, the agency decision at issue will be upheld or invalidated by a federal court on the basis of federal law. If local control is preferable, the remedy lies in eliminating the nationwide rule; any attempt to increase local control over a national program through manipulation of venue rules is likely to be unsuccessful.

In some situations, the governing statutes prescribe standards that vary from state to state,⁹⁶ and, in such circumstances, litigating cases in closer proximity to affected citizens might be beneficial.⁹⁷ In resolving venue questions under current law, courts are beginning to recognize this point,⁹⁸ but the proposed sweeping statutory change, barring suit in the District of Columbia even in national controversies, is not justified. At most, considerations of citizen participation and local control justify an amendment of current venue provisions to direct courts considering transfer motions to give some weight to the value of holding the suit near affected citizens.⁹⁹

3. *Decentralized Decision Making.* Finally, venue reform has been supported on the ground that the current provisions permit undue concentration of power in one court—the United States Court of Appeals for the District of Columbia.¹⁰⁰ Rulings of the

⁹⁴ *Id.*

⁹⁵ See *Sue West*, *supra* note 9, at 13-14.

⁹⁶ See, e.g., Clean Air Act, § 108(a), 42 U.S.C. § 7410(a) (Supp. IV 1980) (each state submits its own implementation plan to agency).

⁹⁷ See *Salt River Pima-Maricopa Indian Community v. Watt*, No. 82 Civ. 145 (D.D.C. Apr. 27, 1982); see also my recommendations for amending the statute, *infra* note 110 and accompanying text.

⁹⁸ See *Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d 1200, 1205 (D.C. Cir. 1981).

⁹⁹ Courts are not directed to consider this value expressly, but neither are they prohibited from doing so under current law. See *supra* note 62 and accompanying text; *infra* note 110 and accompanying text.

¹⁰⁰ See *Laxalt & Kettlewell*, *supra* note 56, at 25.

District of Columbia Circuit currently have nationwide effect, for any litigant can file suit there and benefit from that court's own precedents. By barring suit in the District, the venue reforms would disperse administrative law adjudication throughout the country. The third party effects of much contemporary litigation underscore this justification, because concentration of power seems particularly dangerous when many people will be affected by judicial decisions.

This is a legitimate concern, for one of the primary virtues of the federal judicial system is its nonspecialized nature.¹⁰¹ The post—New Deal experience has shown that specialization carries with it a risk of partisanship, and that it is naive to believe that experts or technocrats can impartially discern the “public interest.”¹⁰² Prolonged exposure to a particular agency tends to produce bias in one direction or another and perhaps an illusion of competence in handling complex regulatory issues. To be sure, there are potential advantages to specialization as well; familiarity with a subject may aid in the resolution of cases. Moreover, centralization of cases in one forum tends to promote predictability and uniformity in the law. Nonetheless, specialization would be an undesirable departure from the conventional understanding of the proper role of the federal courts.¹⁰³ In this context at least, any gains from specialization and centralization would probably be outweighed by increasing the risk of partisanship.¹⁰⁴

This concern, however, does not justify the current venue reform proposals. If a plaintiff wants to have his case heard elsewhere, he is permitted to do so. Under existing law, administrative law decisions frequently are made by courts other than those in the District of Columbia. Statistical evidence suggests that only a small percentage of administrative law cases are heard in the

¹⁰¹ See R. Posner, Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function 18-32 (July 19, 1982 draft) (unpublished manuscript on file with *The University of Chicago Law Review*).

¹⁰² See Stewart & Sunstein, *supra* note 1, at 1238-39; see also Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 819, 821-22 (1977) (decisions made by experts do not reflect scientific choices, but value choices, which should not be made by administrative experts or courts); *supra* note 45 and accompanying text.

¹⁰³ See Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 68-70 (1975).

¹⁰⁴ There is considerable literature on the desirability of creating specialized courts for reviewing complicated questions. See Currie & Goodman, *supra* note 103, at 62-85; Jordan, *Specialized Courts: A Choice?*, 76 NW. U.L. REV. 745 (1981); see also Note, *supra* note 24, at 1750-59 (urging that venue be determined by designating certain federal circuit courts to serve as fora for resolving questions within areas of special expertise).

District.¹⁰⁵

To say this is not to deny that the D.C. Circuit hears a large number of administrative law cases, but to the extent that this is so, it is because the District is the place preferred by the parties. Administrative law has not become so concentrated in the D.C. Circuit as to justify a measure that would intrude so deeply on the convenience of the parties and dramatically increase threshold litigation concerning the meaning of the new statutory language.

This justification for the proposed reforms is sometimes coupled with the argument that the D.C. Circuit has a particular ideological color—"liberal"—and that important decisions should be removed from a court having a persistent ideological bias.¹⁰⁶ Realism requires an acknowledgement that litigants often file suit in the District of Columbia not because of convenience, but because of an expectation of receiving a sympathetic hearing.¹⁰⁷ For four reasons, however, it is undesirable to base venue rules on the short term composition of a particular court. First, it is unlikely that any particular court will, for any significant period of time, show a persistent ideological bias. Panels differ, and courts rarely maintain a consistent ideological identity. Second, checks on ideological bias are available through means other than venue reform; political perceptions often have an impact on the appointments process.¹⁰⁸ Third, Supreme Court review is available to check ideological bias,

¹⁰⁵ For the 12-month period ending June 30, 1980, only 660 of nearly 2950 (about 22%) administrative review cases filed in the courts of appeals were filed in the District of Columbia. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR 48 (1980). The figures were nearly identical for the 12-month period ending June 30, 1979. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1979 ANNUAL REPORT OF THE DIRECTOR 49 (1979). The percentage would be considerably lower if not for the fact that nearly all cases involving the FCC were brought in the Court of Appeals for the District of Columbia Circuit. See *id.*; *supra* note 67. Additional statistics show that

from June 30, 1977 to June 30, 1978, only 37 of the 519 environmental cases filed in district courts were brought in the District of Columbia and only 33 of the 155 environmental cases filed in the courts of appeals. As of September 1980, the Justice Department reported that only 37 of 339 National Environmental Policy Act cases being handled by its Lands Division were in the District of Columbia, and only 25 of 649 environmental cases being handled by its Civil Division.

Sue West, *supra* note 9, at 11.

¹⁰⁶ See Capital Legal Foundation, Environmental Litigation Study—First Phase Report 2-3, 9-10 (Sept. 17, 1981) (on file with *The University of Chicago Law Review*). But see Currie, *supra* note 75, at 66-67, 77.

¹⁰⁷ Capital Legal Foundation, *supra* note 106, at 2-3, 9-10; see also Brecher, *supra* note 56, at 91 (environmental litigants).

¹⁰⁸ For example, President Reagan has appointed two conservatives, former Professors Robert Bork and Antonin Scalia, to the D.C. Circuit, and he will probably have opportunities to appoint others.

although admittedly the Court cannot intervene in every case. Finally, shaping venue rules to correspond with shifting perceptions of which courts are "liberal" and which "conservative" has a corrosive effect on the ideal of an independent, impartial judiciary.¹⁰⁹ Undoubtedly there are differences in orientation among the various courts of appeals, but to make the permissible place of appeal turn on such considerations is to degrade the judicial process and the historic function of venue provisions.

CONCLUSION

Two lessons should be drawn from this discussion. The first is that the proposed changes in existing venue law should not be enacted. There are cases in which something is to be gained from litigating a case in close proximity to affected citizens; in other cases no such gains are likely. There are instances in which the interests of intervenors may justify transfer, but sometimes intervenors may be content to try the case in the plaintiff's chosen forum, and sometimes there will be no intervenors at all. Moreover, at present there is an insufficient basis for the conclusion that administrative law has become so concentrated in the District of Columbia as to justify the sort of inflexible barrier created by the proposed venue reforms.

Several changes in current law, however, are justified. First, the venue rules should be reformulated to give intervenors standing to request transfer and to require that the interests of intervenors be taken into account in deciding transfer motions. Second, current law might be amended to state explicitly that district judges considering transfer motions must take into account relevant local interests.¹¹⁰ In some cases, it will be desirable to hold the

¹⁰⁹ *Sue West*, *supra* note 9, at 12. The venue reforms are sometimes justified on the ground that they decrease "forum-shopping." In the Anglo-American judicial system, however, the plaintiff has been permitted to choose among possible convenient courts—subject, of course, to dismissal or transfer if the plaintiff's choice is designed to harass the defendant or if there is a clearly preferable alternative. *See supra* notes 12-19 and accompanying text. Surely any problems arising from a "race to the courthouse" should not be solved by eliminating the most convenient forum available, but by more narrowly tailored measures, such as those already contained in separate provisions of the proposed venue reform bill. *See S. 2419, supra* note 9, § 1(3), 128 CONG. REC. at S3790.

¹¹⁰ This reform may be unnecessary except as a reminder to the courts to consider such interests. *See supra* note 62 and accompanying text.

Under this approach, I would propose that the transfer provisions, 28 U.S.C. §§ 1404 (district courts), 2112 (courts of appeals) (1976), both be amended to include the following language:

(a) Any court in which a proceeding with respect to an agency action is pending,

case in proximity to affected citizens to allow readier intervention and to promote the sense of legitimacy that may derive from litigating questions in a local forum. Courts are beginning to consider such factors under existing law; legislation may be desirable to leave no doubt as to the propriety of these judicial initiatives. The inflexible approach in the current proposals, however, is unsupportable.

The second lesson is that the changing character of adjudication is beginning to have an impact on congressional as well as judicial efforts in the area of regulatory reform. That is all to the good. Venue rules for private litigation were developed at a time when the plaintiff was in charge of his own lawsuit, when citizen participation was incompatible with the prevailing understanding of adjudication, and when third party effects were discounted or ignored. This atomistic, party-centered conception of litigation never fully captured reality,¹¹¹ and it is wholly inadequate today. The difficult task for the future lies in formulating a novel conception of adjudication and accompanying procedural devices that can accommodate recent developments as well as the still distinctive traditional features of adjudication.¹¹² For the moment, however, procedural reforms that attempt to grapple with the problem of participation in the adjudicative process, and that recognize the interests of those who are affected by judicial rulings, should be welcomed as evidence of an emerging understanding of the nature of public law adjudication.

may, in the interests of justice, transfer such proceeding to any other district court or court of appeals.

(b) The "interests of justice" referred to in subsection (a) shall include: (1) the interests of the plaintiff and defendant; (2) the interests of any other persons who have become parties to the proceeding; (3) the public interest in holding the proceeding in proximity to those most directly affected by the agency action or inaction under review. Courts may already be able to undertake such action on their own, because current statutory transfer provisions refer broadly to the "interests of justice." See 28 U.S.C. § 1404(a) (1976), *reprinted supra* note 31.

The fact that it is difficult to specify what weight ought to be given to the various factors—primarily plaintiff, defendant, and local interests—is a necessary evil. Courts traditionally have decided transfer motions on the basis of case-by-case balancing of the various considerations. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1947). It is doubtful that an effort to provide firmer guidelines in this context would produce anything other than mischief.

¹¹¹ For three very different recognitions of this point, see M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 1-30 (1977); R. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 22.1-22.2 (2d ed. 1977); J. VINING, *supra* note 22, at 13-56. Cf. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1982) (discussing conditions under which common law rules have major allocational or distributional effects).

¹¹² See Fiss, *supra* note 82, at 17-44.