LEGISLATIVE ADMINISTRATION

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INTRODUCTION

Administrative law and scholarship are built upon a set of assumptions about the institutions that comprise the administrative state. Existing scholarship has focused almost exclusively on federal administrative agencies. As a result, many of the familiar arguments about the role of politics in agency decision-making or the desirability of judicial review are premised on a vision of a sprawling, expert-laden bureaucracy situated within the executive branch.[1]

As I argued in *Substance and Procedure in Local Administrative Law*, many of these assumptions start to break down at the local level,

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1. There are, of course, a number of important exceptions. *See, e.g.*, Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 568–69 (2017); Aaron Saiger, *Local Government as a Choice of Agency Form*, 77 OHIO ST. L.J. 423, 425 (2016); Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 484–85 (2017); Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 109–10 (2018); William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 147 (1991); Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the* Chevron *Doctrine*, 39 MCGEORGE L. REV. 977, 978 (2008).

where a great deal of regulatory activity takes place.[2] The local agencies responsible for determining the layout and density of various neighborhoods, or promulgating detailed regulations for local businesses, often look nothing like their federal counterparts. Outside the larger cities, for example, detailed health and land use regulations often are promulgated by all-volunteer boards with varying degrees of relevant expertise.[3] The matters they deal with also tend to be quite a bit less complex.[4] Deference doctrines premised on the inscrutability of federal regulations or on claims of agency expertise may be harder to justify where local agencies are concerned.[5]

The focus of this Essay is on still another distinct feature of local administration—the fact that at the local level, many of the entities responsible for "administering" various statutory schemes are not in fact *agencies* at all. In jurisdictions large and small, local legislative bodies, including municipal councils and county boards, engage in a great deal of "administrative" activity. They grant permits, approve zoning variances, and hear disciplinary appeals.[6] Because states often give localities considerable leeway in designing local governance processes, the exact same function might in one jurisdiction be performed by a town council and in the next town over by an administrative board.[7] In performing these functions, both entities would, at least in theory, be subject to the same procedural requirements and substantive standards of review.

The problem, as courts occasionally have recognized, is that the requirements of administrative law do not always translate neatly into the legislative sphere. Administrative law, for example, is notoriously ambivalent about the role of politics in agency decision-making.[8] Although courts cite political accountability as a basis for deference generally, they typically are unwilling to consider political justifications for individual agency decisions. The often-unstated rationale is that "politics" is simply not what agencies are designed to do. When administrative decisions are made by purely political bodies, however, one might reasonably wonder whether politics could legitimately play a greater role.

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2. *See* Maria Ponomarenko, *Substance and Procedure in Local Administrative Law*, 170 U. PA. L. REV. (forthcoming 2022) (manuscript at 7–9), https://papers.ssrn.com/sol3/papers.cfm?abstract_id =3792435 (describing the range of activities that local agencies perform).

3. *Id.* (manuscript at 25–26).

4. *Id.* (manuscript at 24–25).

5. *See id.* (manuscript at 46–49).

6. *See infra* notes 11–19 and accompanying text.

7. *See infra* notes 11–23 and accompanying text.

8. *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 18–19 (2009).

This Essay examines the phenomenon of "legislative administration" and considers the degree to which it is compatible with the requirements of administrative law. Part I provides a taxonomy of local legislative decision-making and points to a variety of local legislative actions that fall within the purview of administrative law. Part II highlights the challenges that courts have faced in applying various administrative law doctrines in the legislative context. Part III concludes with some preliminary thoughts on how courts and legislatures might go about reconciling the practical realities of legislative administration with the demands of modern administrative law.

I. THE PREVALENCE OF LEGISLATIVE ADMINISTRATION

Functionally speaking, the various tasks that local legislative bodies perform fall along a continuum, from those that are more obviously "legislative" to those that are best characterized as "administrative."[9] On the far legislative side of the spectrum are local ordinances adopted pursuant to the locality's general "police powers." When acting in this capacity, local legislative bodies may still be bound by general state requirements around public meetings, as well as a general obligation to promote the public good.[10] But they have considerable leeway in crafting legislative responses to the problems that they or their constituents perceive.[11]

Falling somewhere toward the middle are the ordinances adopted pursuant to more specific grants of legislative authority. When it comes to zoning, for example, states typically authorize local legislative bodies to enact zoning and land use ordinances—but they impose far more constraints on how that authority may be used. State law typically defines the permissible aims of local "legislative" zoning, and it sets out the often-elaborate processes that municipalities must follow in making changes to local zoning laws.[12] Some states require local legislative bodies to first

9. *See generally* Saiger, *supra* note 1, at 425 (describing local legislative activity as falling "along a spectrum that ranges from pure sovereignty to pure agency").

10. *See, e.g.*, SANDRA M. STEVENSON & WENDY VAN WIE, 2 ANTIEAU ON LOCAL GOVERNMENT LAW § 26.12 (2d ed. 2021) (describing applicability of open meeting laws to various local legislative and administrative bodies).

11. *See, e.g.*, *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 263 (Iowa 2007) ("[I]t is the City's prerogative to fashion remedies to problems affecting its residents. If the ordinance proves to be ineffective, then the elected city council may change course and amend or repeal it.").

12. *See, e.g.*, TEX. LOC. GOV'T CODE ANN. § 211.003 (West 2021). *See generally id.* § 211. Although some states impose few substantive constraints on local zoning authority, others have interpreted state zoning laws more restrictively. *See, e.g.*, *S. Burlington Cnty. NAACP v. Township of Mount Laurel*, 336 A.2d 713, 731–32 (N.J. 1975) (prohibiting municipalities from adopting exclusionary zoning policies that functionally exclude all lower income housing).

commission a study by the local planning commission or to assess the environmental or economic impacts of any changes proposed.[13] In these contexts, local "legislation" starts to look more like administrative rulemaking pursuant to a broad statutory scheme.

Other tasks are even more obviously "administrative." When it comes to zoning, for example, many states leave it up to local legislatures to decide whether to create a zoning board to handle individual disputes or simply to perform that function themselves.[14] As a result, local legislative bodies often are responsible for approving new construction projects and granting individual variances from comprehensive zoning codes. Local legislatures also grant liquor licenses.[15] They approve new nightclubs and gaming establishments.[16] And they license motels, convenience stores, car dealerships, and other businesses.[17]

Legislative bodies also routinely conduct termination hearings and adjudicate disciplinary appeals. In Kentucky, for example, police officers facing discipline or termination are entitled to a hearing before the city council.[18] The city council, like any other adjudicative body, must conduct a hearing on the record, and its decision is then subject to judicial review.[19] Similar provisions exist in a variety of other jurisdictions as well—for firemen, for department heads, and various other categories of civil service employees.[20]

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13. *See, e.g.*, MINN. STAT. § 462.355 (2020).

14. *See, e.g.*, *id.* § 462.354 ("The governing body of any municipality . . . shall provide by ordinance for a board of appeals and adjustments . . . [or] may provide alternatively . . . that the governing body . . . serve as the board of appeals and adjustments . . . .").

15. *See, e.g.*, *Taleb v. City of Tuscaloosa*, 296 So. 3d 874, 880–81 (Ala. Civ. App. 2019); *Micius v. St. Paul City Council*, 524 N.W.2d 521 (Minn. Ct. App. 1994).

16. *See, e.g.*, *Sherald v. City of Myrtle Beach*, No. 2010-UP-449, 2010 WL 10085572 (S.C. Ct. App. Oct. 19, 2010) (night club); *Nev. Rest. Serv., Inc. v. City of Las Vegas*, No.: 2:15-cv-2240-GMN-GWF, 2015 WL 7783536 (D. Nev. Dec. 3, 2015) (gaming establishment).

17. *See, e.g.*, *Amrik Singh & SBPS, Inc. v. City of Greenville*, 681 S.E.2d 921 (S.C. Ct. App. 2009) (motel); *Amina, Inc. v. City of Minneapolis*, No. A06-2172, 2008 WL 223250, at *1 (Minn. Ct. App. 2008) (convenience store); *Lindquist v. City of Pasadena*, 525 F.3d 383, 384 (5th Cir. 2008) (car dealership); *Troje v. City Council*, 245 N.W.2d 596, 600 (Minn. 1976) (garbage collection business).

18. *See, e.g.*, KY. REV. STAT. ANN. § 95.450 (West 2021).

19. *Id.* §§ 95.450–.460.

20. *See, e.g.*, NEB. REV. STAT. § 14-704 (2021) (firemen); ALA. CODE § 45-17A-82.09 (2021) (department heads); UTAH CODE ANN. § 10-3-1106 (West 2021) (all civil service personnel); 11 PA. CONS. STAT. § 14408 (2021) (all civil service personnel); *see also Holecek v. City of Hiawatha*, No. 09-CV-113-LRR, 2010 WL 3927801, at *1–4 (N.D. Iowa Oct. 4, 2010) (discussing a city council termination hearing for a parks employee in Hiawatha, Iowa); *Bravo v. City of Hubbard*, No. 07-1783-HO, 2008 WL 5046396, at *1–2 (D. Or. Nov. 19, 2008) (discussing a city council termination hearing for a police officer in Hubbard, Oregon).

Finally, legislatures are at times assigned to perform functions that, at least in theory, would seem to require a fair bit of technical expertise. For example, under environmental protection laws in four states (California, Minnesota, Washington, and New York), local governments must assess the potential environmental impacts of all proposed development projects—ranging from park trails to new housing construction.[21] In a number of other states, local governments must conduct environmental reviews in a more limited set of circumstances—for example, when approving a new landfill site.[22] The required reports can number in the tens if not hundreds of pages and involve a variety of technical assessments—such as predicted impact on local groundwater resources and wildlife populations.[23] And although local legislatures typically hire consultants or enlist the help of city staff, they ultimately are responsible for signing off on the findings and for making whatever determinations a particular statute requires.[24]

In many jurisdictions, legislative administration persists largely as a matter of necessity. In tiny hamlets with just a handful of employees, it may not be feasible to create a bevy of administrative agencies to perform the various adjudicative tasks demanded by state law. Preserving local control over certain administrative functions may mean leaving them in the hands of a town council or the county board.

Yet just as often, the decision to vest administrative authority in a legislative body is done as a matter of choice. Land use statutes, for example, often assign local legislative bodies a formal role in adjudicating individual disputes, even in jurisdictions that have more robust bureaucratic structures in place.[25] And in California, the state's environmental review statute expressly provides that if an initial report is

21. CAL. PUB. RES. CODE § 21151 (West 2021); MINN. STAT. § 116D.04 (2020); N.Y. ENV'T CONSERV. LAW § 8-0109 (McKinney 2021); WASH. REV. CODE. § 43.21C.030 (2021).

22. *See, e.g.*, 415 ILL. COMP. STAT. ANN. 5/39.2 (West 2021) (landfill siting decisions).

23. *See, e.g.*, MINN. ENV'T QUALITY BD., ENVIRONMENTAL ASSESSMENT WORKSHEET (2013), https://www.eqb.state.mn.us/sites/default/files/documents/Finalized%20EAW%20Form%20July2013.

24. Indeed, California makes this explicit: if an impact assessment is initially certified by an "unelected" entity, aggrieved parties have a right to appeal to the jurisdiction's elected body. CAL. PUB. RES. CODE § 21151 (West 2021) ("If a nonelected decisionmaking body . . . certifies an environmental impact report . . . that certification . . . may be appealed to the agency's elected decisionmaking body, if any.").

25. *See, e.g.*, 415 ILL. COMP. STAT. ANN. § 5/39.2 (providing that all siting decisions for municipal waste facilities be made by the "governing body" of the relevant county or municipality).

prepared by an appointed entity, an aggrieved party may appeal to the jurisdiction's legislative body as a matter of right.[26]

To be sure, "legislative administration" is hardly a new phenomenon.[27] In the early years of the American republic, legislative bodies at all levels of government did a great deal more "administering" than they do today.[28] For example, as Maggie (McKinley) Blackhawk and others have written, the nineteenth-century Congress maintained a robust system of petitions and private bills to provide redress to a host of private claims.[29] Petitioners requested veterans' pensions and disaster relief.[30] They sought patents for their inventions.[31] And they asked Congress to affirm their right to ownership over specific tracts of formerly public land.[32] Each year, Congress adopted hundreds—and sometimes thousands—of "private bills" acceding to these various requests.[33]

Over time, however, legislative administration at both the federal and state levels largely was supplanted by the rise of the administrative state. Faced with a crushing volume of individual claims, Congress gradually siphoned off various categories of petitioners into the administrative process.[34] As Blackhawk points out, Congress largely dismantled its petition system by the mid-1940s, around the same time that it formalized

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26. CAL. PUB. RES. CODE § 21151.

27. *See, e.g.*, Barbara Aronstein Black, *Who Judges? Who Cares? History Now and Then*, 36 OHIO N.U. L. REV. 749, 753–57 (2010) (describing widespread practice of "legislative adjudication" in colonial America); Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1435–46 (1998) (describing pervasiveness of legislative adjudication in colonial New York).

28. *See generally* Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538 (2018) (highlighting the modern shift in the administrative state); *see also* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills*, 85 N.Y.U. L. REV. 1862, 1866 (2010) (describing use of private bills to indemnify government officials from liability).

29. McKinley, *supra* note 28, at 1564. *See also* Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 YALE L.J. 1636, 1731 (2017) ("From the viewpoint of the first quarter of the nineteenth century, claims adjudication was standard legislative business . . . .").

30. McKinley, *supra* note 28, at 1589 (veteran pensions); MICHELE LANDIS DAUBER, THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE 17–19 (2012) (disaster relief).

31. McKinley, *supra* note 28, at 1565; *see also* Andrew Tutt, *Unique Copyrights*, 95 J. PAT. TRADEMARK OFF. SOC'Y 390, 393 (2013).

32. Mashaw, *supra* note 29, at 1710 (describing the large volume of "petitions or congressional actions on petitions for relief from statutory requirements, legislative confirmation of claims, grants of preemptive rights, [and] authority to withdraw erroneous locations of claims" with respect to the settlement of public lands).

33. McKinley, *supra* note 28, at 1591–92.

34. *Id.* at 1579–93 (describing the creation of the Court of Claims and the Bureau of Pensions as part of a long trajectory of shifting adjudicative responsibility for various claims from Congress to the administrative state).

judicial control over administrative procedure under the federal Administrative Procedure Act (APA).[35]

Local legislative administration persisted at the local level—but it departed from the historical tradition in one important way: unlike "private bills" in Congress, which largely escaped judicial scrutiny,[36] legislative adjudication now is subject to the familiar constraints of modern administrative law.[37] As Ann Woolhandler suggests, the judicialization of legislative administration likely had something to do with the rise of the administrative state.[38] Over time, as legislatures delegated a slew of adjudicative functions to administrative bodies, courts responded by imposing a variety of procedural and substantive constraints.[39] Having done so in the administrative context, however, exempting legislative bodies from these same requirements when they performed functionally identical tasks became increasingly untenable.[40] Thus, in *Londoner v. Denver*,[41] the Supreme Court ruled that city councils must comply with the basic requirements of procedural due process when they adjudicate individual claims.[42] Various other requirements have since followed suit.[43]

These days, when a local legislative body rules on a conditional use permit or reviews a disciplinary appeal, it typically is required to conduct a hearing on the record and to issue a written order explaining the basis for the decision made.[44] Depending on the statutory scheme at issue, a court may then be authorized to review the decision to ensure that it is supported by "substantial evidence" or that the legislative body has taken a sufficiently "hard look" at the evidence and arguments before it.[45]

As the next Part makes clear, the extension of these administrative law standards into the legislative sphere presents a variety of challenges that courts have at times struggled to resolve.

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35. *Id.* at 1548.

36. *See id.*

37. *See* Ann Woolhandler, *Delegation and Due Process: The Historical Connection*, 2008 SUP. CT. REV. 223, 226 (2008) (detailing the Supreme Court's gradual shift toward insisting that legislative bodies comply with administrative norms).

38. *See id.* at 256–64.

39. *See id.* at 262–63.

40. *See id.* at 254–64.

41. 210 U.S. 373, 378 (1908).

42. *Id.* at 385–86.

43. Woolhandler, *supra* note 37, at 266.

44. *See, e.g.*, 47 U.S.C. § 332(c)(7)(B)(ii)–(iii).

45. *See, e.g.*, *Anderson v. Lenz*, 811 N.Y.S.2d 210 (N.Y. App. Div. 2006) (considering whether the City Council of Saratoga Springs took a "hard look" at the environmental concerns generated by a proposed development).

II. POLITICS AND EXPERTISE IN LEGISLATIVE ADMINISTRATION

Courts ordinarily pay little attention to the institutional character of the decision maker in question. With some exceptions, administrative law at both the federal and state levels is both uniform and trans-substantive—which is to say that the same standards and requirements apply across different agencies and subject areas.[46]

When *legislative* bodies perform administrative functions, however, the institutional character of the decision maker in question is much harder to ignore. And as a result, both state and federal courts have at times grappled with how best to translate familiar administrative law principles into the legislative sphere. This Part describes two particular areas of contention around the respective roles of politics and expertise in agency decision-making.

A. The Place of Politics in Agency Decision-Making

Politics traditionally has had an uneasy place in administrative law. Federal courts, for example, routinely acknowledge that agencies are situated within the "political branches" and therefore are entitled to make the sorts of policy determinations that judges cannot.[47] At the same time, courts also have generally dismissed the notion that political considerations may be used to justify any particular decision that an agency might reach. In *Motor Vehicles Manufacturers Assoc. v. State Farm Mutual*,[48] for example, the Supreme Court implicitly rejected the idea that a shift from one administration to another alone could justify a change in policy in the absence of some other shift in the evidence available to the agency or the circumstances on the ground.[49] Since then, writes Kathryn Watts, "the blanket rejection of politics in administrative decision-making has been casually accepted as the status quo by courts, agencies, and scholars alike."[50]

When adjudicative decisions are made by legislative bodies, however, the impact of politics is inescapable. The entire body of law

46. The same is generally true in constitutional law as well. As I pointed out in *Administrative Rationality Review*, for example, federal courts routinely apply the same constitutional rational basis test to both legislative and administrative regulation, despite the fact that the justifications for the permissive standard are largely inapplicable to the administrative sphere. Maria Ponomarenko, *Administrative Rationality Review*, 104 VA. L. REV. 1399, 1422–36 (2018).

47. *See, e.g.*, *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (justifying deference in part based on agencies' political pedigree).

48. 463 U.S. 29 (1983).

49. *See* Watts, *supra* note 8, at 5–6 (describing the ways in which *State Farm* in particular has been read to foreclose a place for politics in federal agency decision-making).

50. *Id.* at 7.

around legislative administration is premised on the idea that legislators wear "multiple hats."[51] One minute they are politicians representing their constituents' interests—and another they are "neutral administrators" tasked with adjudicating a particular dispute. In practice, however, it is doubtful that either legislators or voters fully buy into this distinction. Voters expect legislators to represent their interests, whether in passing new legislation or in rejecting a proposed development on their quiet residential block. As one court acknowledged, "legislators will find the opinions of angry constituents compelling" whether or not they are legally relevant to the decision they are being asked to make.[52]

The tension between the legal fiction of the "neutral legislative administrator" and the practical reality of local legislative politics has created a series of doctrinal puzzles that courts have struggled to adequately resolve. This Section describes two of the ways that courts have attempted to carve out a place for local politics in both substantive and procedural review.

1. POLITICS AND SUBSTANTIAL EVIDENCE

One of the clearest examples of the potential conflict between legislative politics and the norms of administrative adjudication is in the context of new cellular tower construction, which is governed by a mix of local zoning regulations and the federal Telecommunications Act of 1996 (TCA).[53] Mobile phones depend on a vast network of antennas and transmitters to ensure stable coverage. Every time a mobile carrier wants to install a new tower, it must first obtain approval from the local zoning authority.[54] The problem is that although society as a whole would benefit from having a seamless network of cellular facilities, individual municipalities often have an incentive to insist that new towers be situated in someone else's backyard.[55]

The TCA was designed to address this classic collective action problem in a number of ways. First, although it left municipalities with

51. *See, e.g.*, *Petrovich Dev. Co. v. City of Sacramento*, 48 Cal. App. 5th 963, 973 (2020) ("City council members wear multiple hats. It is commonly understood that they function as local legislators. But sometimes they act in a quasi-adjudicatory capacity similar to judges."); *Aegerter v. City of Delafield*, 174 F.3d 886, 890 (7th Cir. 1998) ("[M]unicipal councils often wear several hats when they act. When they are passing ordinances or other laws, they are without a doubt legislators, but when they sit as an administrative body making decisions about zoning permits, they are like any other agency the state has created.")

52. *PrimeCo Pers. Commc'ns, L.P. v. Village of Fox Lake*, 26 F. Supp. 2d 1052, 1063 (N.D. Ill. 1998).

53. 47 U.S.C. § 332(c)(7)(A).

54. *See id.* § 332(c)(7).

55. *See PrimeCo*, 26 F. Supp. 2d at 1063 (describing the goals of the TCA).

considerable leeway to decide where towers may be placed—and to demand various modifications to limit their effect on the surrounding areas—it barred local actions that have the purpose or effect of "prohibiting the provision of personal wireless services."[56] It also took certain considerations off the table, most notably the environmental and health effects of radio frequency transmissions, so long as the mobile carrier complied with Federal Communications Commission regulations designed to ensure that emissions remained at safe levels.[57] Finally, and perhaps most importantly, the TCA required that any local government decision to deny a request to construct or modify a wireless facility be made "in writing and supported by substantial evidence."[58] As the Supreme Court confirmed in *T-Mobile South v. Roswell*,[59] this is the same "substantial evidence" standard used throughout federal administrative law.[60] In short, any denial would have to be based on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[61]

A key question that courts have grappled with in the context of the TCA is whether constituent opposition to the construction of new cell towers, standing alone, could constitute substantial evidence to justify a denial. Ordinarily, the federal substantial evidence standard requires something more than "a mechanical nose count" of witnesses for and against.[62] Its extension into the realm of local land use policy, however, prompted a number of federal courts to question whether the same rules should apply when decisions are made by legislative bodies. Most notably, in *AT & T Wireless PCS v. City Council of Virginia Beach*,[63] the Fourth Circuit held that when a permitting decision is made by a local legislature, constituent preferences may indeed carry decisive weight.[64] The court explained that "[t]he 'reasonable mind' of a legislator is not necessarily the same as the 'reasonable mind' of a bureaucrat" and that courts should keep these differences in mind when applying the "substantial evidence" test.[65]

The debate over AT & T's proposed cell towers in *Virginia Beach* played out in relatively predictable fashion. After contracting with a local church to install two cell towers on its property in exchange for $60,000

56. § 332(c)(7)(B)(i).
57. § 332(c)(7)(B)(iv).
58. § 332(c)(7)(B)(iii).
59. 574 U.S. 293 (2015).
60. *Id.* at 301–02.
61. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)
61. *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 782 (7th Cir. 1994).
62. 155 F.3d 423 (4th Cir. 1998).
64. *Id.* at 430.
65. *Id.*

in annual rent, the mobile carrier approached the city to secure the necessary approvals.[66] AT & T put forward a slew of experts who testified to the necessity of the towers, as well as their minimal impact on the surrounding area.[67] In hearings before the Planning Commission and the city council, however, dozens of residents testified in opposition to the tower, arguing that the 135-foot towers did not belong in their residential neighborhood.[68] Although the City Planning Department and the Planning Commission (i.e., the "bureaucrats") recommended approval, the city council voted to deny the application, relying primarily on the residents' concerns.[69]

In upholding the denial, the Fourth Circuit explained that "[i]t is not only proper but even expected that a legislature and its members will consider the views of their constituents to be particularly compelling forms of evidence."[70] Although AT & T's experts had made a strong case in favor of approval, the views of residents "will often trump those of bureaucrats or experts in the minds of reasonable legislators."[71] In this case, "the repeated and widespread opposition of a majority of the citizens of Virginia Beach who voiced their views . . . amounts to far more than a 'mere scintilla' of evidence to persuade a reasonable mind to oppose the application."[72] Indeed, the court added, "we should wonder at a legislator who ignored such opposition."[73]

As a descriptive matter, the Fourth Circuit's conception of the legislative process is undoubtedly spot on. A room full of angry constituents is often going to be quite a bit more convincing than a stack of expert reports.[74] And although the Fourth Circuit likely overstates the difference between the "bureaucrats" who serve on a local planning commission and the politicians who serve on the city council, it undoubtedly is true that, on balance, the council members are more likely to be swayed by their constituents' concerns.

Yet there are reasons to doubt whether the Fourth Circuit's solicitous approach to local politics is in fact compatible with the requirements of substantive judicial review. Ordinarily, where courts have acknowledged that certain judgments are inherently *political*, they also have foresworn

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66. *Id.* at 425.
67. *Id*.
68. *Id.* at 431 & n.6.
69. *Id.* at 425, 430.
70. *Id.* at 430.
71. *Id.*
72. *Id.* at 431.
73. *Id.*
74. *See, e.g.*, *Alltel Corp. v. City of Jackson*, 466 F. Supp. 3d 673, 681 (S.D. Miss. 2020) ("Councilman Aaron Banks felt he had 'a responsibility . . . to the people that elected [him]' and those people 'had made their voices very clear to oppose' the application.").

the possibility of meaningful judicial scrutiny. The Supreme Court's permissive "rational basis" test, for example, which governs constitutional review of ordinary economic legislation,[75] is best understood as a tacit acknowledgement of the fact that economic legislation often is the product of interest group wrangling and that courts have no way of judging whether a particular bargain is a good one.[76]

The Fourth Circuit's struggle to apply the *Virginia Beach* standard in subsequent cases illustrates why politics and substantive review ordinarily do not mix. The first problem that the Fourth Circuit quickly encountered in applying the *Virginia Beach* standard is that the TCA expressly prohibits municipalities from taking health concerns into account.[77] For residents facing the prospect of having a new cell tower go up in their neighborhood, however, health concerns often are top of mind. Thus, in a subsequent case, the Fourth Circuit clarified that although "the Act does not preclude residents from expressing such concerns to their representatives," a reasonable legislator would not take those concerns into account.[78] (To be sure, this narrow concession is not necessarily inconsistent with a desire to let politics prevail. After all, courts routinely deem certain legislative purposes, such as racial animus, to be illegitimate while otherwise deferring to the political bargains that legislators strike.[79])

The bigger problem was that once the Fourth Circuit established that constituent preferences could potentially amount to "substantial evidence," it found itself in the awkward position of having to articulate precisely how much opposition would be sufficient to justify a denial. For example, in *T-Mobile Northeast v. Newport News*,[80] the court pointed out that only three residents showed up to speak in opposition to the proposed tower and one other had sent an email—a far cry from the several hundred who had testified or signed petitions in *Virginia Beach*.[81] That same year, however, when twenty-one Fairfax County residents testified that "facilities of this type do not belong in a residential community such as ours," the Fourth Circuit deemed this sufficient to satisfy the substantial evidence test.[82] The line, it seems, was somewhere between twenty-one and four.

It is not clear, however, on what basis the Fourth Circuit concluded that a "reasonable" legislator would be swayed by testimony from twenty-

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75. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

75. Ponomarenko, *supra* note 46, at 1425–27.

77. 47 U.S.C. § 332(c)(7)(B)(iv).

78. *T-Mobile Ne. LLC v. Newport News*, 674 F.3d 380, 390 (4th Cir. 2012).

79. *See, e.g.*, *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977).

80. 674 F.3d at 380.

81. *Id*. at 389.

82. *New Cingular Wireless PCS, LLC v. Fairfax Cnty. Bd. of Supervisors*, 674 F.3d 270, 273, 275 (4th Cir. 2012).

one residents but ignore the impassioned objections of four. Presumably the city council members in *Newport News* had some reason to think that they would be better off politically in denying the cellphone company's petition. Maybe the four residents who spoke in opposition to the towers were particularly influential. Maybe the council members knew from past experience that they would eventually face blowback for approving the proposed towers, even if initial opposition was relatively muted. Certainly the city council members were in a better position to assess the strength of constituent preferences than the judges on the Fourth Circuit Court of Appeals.

Perhaps the strongest objection to the Fourth Circuit's approach is that it risks undermining the very objectives that the statute was designed to promote. As one district court explained, the Fourth Circuit "is entirely correct that legislators will find the opinions of angry constituents compelling. But validating this reasoning would nullify Congress's goals of reducing regulation, rapidly deploying new telecommunications technologies, and providing nationwide cellular services."[83] It is precisely *because* local legislators often are swayed by the whims of their constituents that Congress adopted the TCA in the first place. In this regard, *administration* is fundamentally different from ordinary legislative policymaking. Once some higher-level decision-making body—in this case Congress—has articulated a specific set of policy goals, it has in effect foreclosed the possibility of relitigating them in each individual case.

Eventually, the Fourth Circuit retreated still further from *Virginia Beach* by clarifying that in order for community opposition to amount to substantial evidence, the residents' concerns must *themselves* be reasonable. "[A] 'reasonable legislator,'" the court explained, "would not base his decision upon the irrational concerns of a few constituents."[84] Of course, if the objections to a proposed tower are reasonable, it should not matter whether they were expressed by constituents or by the legislators themselves. After all, one would think that elected officials would be perfectly capable of assessing whether a proposed tower is out of step with the character of a particular neighborhood. In a representative democracy, voters do not need to show up at every town meeting in order to see their preferences enacted in law. In short, once the reasons themselves must be sound, it no longer appears that *politics* is actually doing any work.

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83. *PrimeCo Pers. Commc'ns, L.P. v. Village of Fox Lake*, 26 F. Supp. 2d 1052, 1063 (N.D. Ill. 1998).

84. *Petersburg Cellular P'ship v. Bd. of Supervisors of Nottoway Cnty.*, 205 F.3d 688, 696 (4th Cir. 2000).

2. LEGISLATIVE "NEUTRALITY"

Legislative administration also poses a distinct set of challenges when it comes to the requirement of a hearing before a "neutral decisionmaker"—an element of procedural due process that states have since codified in a variety of administrative contexts.[85]

The contours of neutrality are variable and imprecise, but there nevertheless are a few basic principles that courts have more or less consistently applied. For example, courts generally agree that a decision maker should be disqualified as biased if they have a personal stake in the matter—which may include a pecuniary interest in the outcome or a personal grudge against one of the parties involved.[86] Courts also have held that due process sometimes precludes a decision maker from serving as both an advocate and a judge in the same case, though the degree to which this principle applies varies greatly depending on the nature of the interest at stake.[87] A decision maker also may be deemed biased if they have "prejudged" the outcome of the case[88] or if they have engaged in ex parte communications concerning a pending dispute.[89]

Although some forms of bias—such as personal animus—translate neatly into the legislative sphere, others quickly run up against the fact that local legislators typically view themselves as *legislators* first, even when they are asked to adjudicate individual disputes.

Consider, for example, the requirement that decision makers refrain from engaging in any ex parte communications related to a pending dispute and that they promptly disclose any relevant communications that they happen to receive.[90] As a number of courts have observed, "*ex parte* communications from the public to their elected representatives are perhaps inevitable given [their] perceived legislative position," even if in a particular instance they are supposed to be acting "in an adjudicative

85. *See, e.g.*, *Rodgers v. 36th Dist. Ct.*, 529 F. App'x 642, 650 (6th Cir. 2013) (requiring neutral decision maker hearing for termination of public employee).

86. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (pecuniary interest); *Valley v. Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1052 (5th Cir. 1997) (personal bias).

87. *Compare Wolff v. McDonnell*, 418 U.S. 539, 569–71 (1974) (allowing the same officials to both investigate and adjudicate disciplinary matters within a prison), *with Williams v. Pennsylvania*, 136 S. Ct. 1899, 1908–10 (2016) (finding a violation of due process where a state supreme court justice participated in a decision to vacate a stay of execution in a case that he himself had prosecuted).

88. *See, e.g.*, *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 590 (D.C. Cir. 1970).

89. *See, e.g.*, *Ward v. U.S. Postal Serv.*, 634 F.3d 1274, 1279–80 (Fed. Cir. 2011).

90. KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.7 (6th ed. 2019) (describing the need for a neutral, unbiased decision maker); *id.* § 6.4 (prohibition on ex parte contacts).

role."[91] Particularly with respect to controversial matters, such as a pending development proposal or a particularly thorny termination hearing, constituents inevitably will weigh in, not just through hearings and petitions, but by calling their representatives directly or speaking to them on the street.[92]

Courts have responded to this inevitability in a variety of ways—some by adjusting the requirements of due process to accommodate the realities of local legislative politics and others by insisting that legislators conform their behavior to a more rigid set of administrative norms.[93] The Idaho Supreme Court, for example, has held that although council members may from time to time receive unsolicited calls from their constituents about the various disputes that come before them, due process requires that they publicly disclose the names and identities of the individuals who contact them and summarize the substance of the comments made.[94] The Idaho court expressly rejected the notion that "the quasi-judicial standard 'requires some fine tuning'" when applied to a local legislative adjudication, insisting that the same rules ought to apply to legislatures and agencies alike.[95]

Courts in a number of other states, however, have taken a more permissive approach. Illinois courts, for example, appear to draw a line between "mere expressions of public sentiment," which need only to be generally acknowledged in passing, and more extensive communications that may need to be more fully disclosed.[96] As one appellate court explained, applying a more rigorous standard would be "unfair to local decisionmakers. Local elected officials are almost always asked to wear a legislative 'hat' when taking official actions. To ask elected officials to put on an adjudicatory 'hat' and act like judges . . . places an unnecessary

91. *Waste Mgmt. of Ill., Inc. v. Pollution Control Bd.*, 530 N.E.2d 682, 698 (Ill. App. Ct. 1988); *see also Fox Moraine, LLC v. United City of Yorkville*, 960 N.E.2d 1144, 1164 (Ill. App. Ct. 2011) ("Naturally, constituents will relay their concerns" to their representatives, "unaware that the officials will be acting in an adjudicatory role and that such ex parte communication is improper.").

92. *Idaho Historic Pres. Council, Inc. v. City Council of Boise*, 8 P.3d 646, 651 (Idaho 2000) (Kidwell, J., dissenting).

93. *Compare Peoria Disposal Co. v. Ill. Pollution Control Bd.*, 896 N.E.2d 460, 475 (Ill. App. Ct. 2008) (acknowledging that a more flexible standard is necessary in the legislative context), *with Idaho Historic Pres. Council*, 8 P.3d at 648–49 (holding that legislative bodies are subject to the same strict rules that bind administrative agencies).

94. *Idaho Historic Pres. Council*, 8 P.3d at 650–51.

95. *Id.* at 650.

96. *See, e.g.*, *Fox Moraine*, 960 N.E.2d at 1172 (distinguishing between undisclosed calls to which the council members had not responded and more extensive communications that would have required disclosure).

burden on both the individual decisionmaker and on the . . . process" itself.[97]

Courts have similarly split on the question of whether a city council member can be a "neutral" decision maker if they have already promised to vote a certain way. As the Supreme Court has explained, a decision maker is not biased "simply because he has taken a position, even in public, on a policy issue related to the dispute."[98] After all, government officials often approach matters with strongly held policy views that may be largely dispositive of the case at hand.[99] On the other hand, a decision maker who has prejudged the *facts* of a particular case may indeed be precluded from deciding on its outcome.[100] For example, when the chairman of the Federal Trade Commission indicated in a public speech that certain companies with cases pending before the commission had violated the law, the D.C. Circuit Court of Appeals held that due process precluded the chairman from hearing those disputes.[101]

In the context of legislative administration, however, some courts have reasonably questioned whether the same sorts of rules ought to apply. *Fox Moraine v. City of Yorkville*[102] illustrates the problem well. At issue was the Yorkville Town Council's decision to reject a proposal to establish a new landfill at the edge of town. The proposed landfill had been a point of contention in Yorkville for a number of years, as developers sought to persuade the town first to annex the unincorporated tract of land on which the landfill was to be located and then to approve the landfill permit

97. *Sw. Energy Corp. v. Ill. Pollution Control Bd.*, 655 N.E.2d 304, 309–10 (Ill. App. Ct. 1995) (quoting *Concerned Citizens for a Better Env't v. City of Havana*, No. 4-94-0759, 1994 WL 259510 (Ill. Pol. Control Bd. 1994) (Meyer, J., concurring)); *see also Tierney v. Duris*, 536 P.2d 435, 443 (Or. Ct. App. 1975) (finding no due process violation where the ex parte contacts were not with the parties but rather "with relatively disinterested persons" and council members disclosed the substance of the communications in general terms).

98. *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976).

99. Pro-labor members of the National Labor Relations Board, for example, will predictably side with the unions, except in cases in which the facts point unequivocally the other way. *See, e.g.*, *NLRB v. Pittsburgh S.S. Co.*, 337 U.S. 656, 659–60 (1949). Although the employers who appear before the Board may feel that these members are "biased" against them, courts have consistently refused to consider this a form of bias that raises due process concerns. *See, e.g.*, *Nuclear Info. & Res. Serv. v. Nuclear Regul. Comm'n*, 509 F.3d 562, 571 (D.C. Cir. 2007) ("A party cannot overcome [the] presumption [of impartiality] with a mere showing that an official has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute.") (quoting *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1981)).

100. *See, e.g.*, *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 590 (D.C. Cir. 1970).

101. *Id.* at 591–92.

102. 960 N.E.2d 1144 (Ill. App. Ct. 2011).

itself.[103] City officials initially seemed poised to approve the project, but a local election shifted the tide decisively against it.[104] Three new council members and a new mayor were elected in part on a promise to reject the landfill site, and shortly after the election they voted to do just that.[105]

The facts of *Fox Moraine* are hardly unique. Major development projects often generate a great deal of community interest and not infrequently become the subject of political campaigns. So long as these decisions are left in the hands of local elected officials, voters inevitably will seek to influence the outcomes through the political process. And although many of the legislative biases come up in the context of local land use disputes, similar patterns prevail in other contexts as well. School board candidates run on promises to replace school leadership.[106] City council candidates vow to appoint a new chief of police.[107] Once elected, these same officials may find themselves presiding over formal termination proceedings—raising questions about the degree to which they can provide the sort of "impartial" tribunal called for as a matter of due process or state employment law.[108]

Perhaps unsurprisingly, when presented with facts analogous to *Fox Moraine*, courts have splintered on whether the norms of adjudication or local politics ought to prevail. The California Supreme Court, for example, has made clear that "[c]ampaign statements . . . do not disqualify [a] candidate from voting on matters which come before him after his election," even when those statements indicate how a candidate will vote in a specific dispute.[109] "A councilman," the court explained, "has not only a right but an obligation to discuss issues of vital concern with his constituents and to state his views on matters of public importance."[110] To hold otherwise would fundamentally transform the character of local elections. One North Carolina judge predicted that "the prudent candidate [would] hide behind the phrase, 'I am sorry, but I am not permitted to discuss my position on the issues or matters [that] may come before me in

103. *Id.* at 1149.

104. *Id.* at 1154.

105. *Id.* at 1150.

106. *Staton v. Mayes*, 552 F.2d 908, 913–14 (10th Cir. 1977) (school board candidate declaring that "no progress could be made . . . until there was a new superintendent" and promising to make a change once elected).

107. *Clisham v. Bd. of Police Comm'rs*, 613 A.2d 254 (Conn. 1992) (mayor promising to fire chief and then appointing police commissioners who in fact fired him).

108. *Staton*, 552 F.2d at 911; *see also Siteman v. City of Allentown*, 695 A.2d 888, 890 (Pa. Commw. Ct. 1997) (concerning legislative recusal in the context of a police disciplinary appeal).

109. *City of Fairfield v. Superior Ct.*, 537 P.2d 375, 383 (Cal. 1975).

110. *Id.* at 382.

a quasi-judicial setting.'"[111] City council races, he quipped, "w[ould] become as boring as judicial races."[112]

At the same time, there is something deeply uncomfortable in the notion that an individual's right to a fair hearing ought to simply give way to a realist account of how local politics works. And perhaps in view of this, a number of courts have insisted that when legislatures act "in a quasi-judicial capacity," they must be held to the same "high standard" that binds the rest of the administrative state—and as a result may be precluded from participating in deciding a case on which they previously have opined.[113] As another court explained, although candidates for office are free to speak on whatever topics they wish, "a due process principle is bent too far when such persons are then called on to sit as fact finders" in a case that they appear to have prejudged.[114]

The problem is that in practice, this latter approach may not accomplish all that much. Because legislators and candidates are always free to express their *policy* views, savvy officials can still signal precisely how they intend to vote. And they can quietly assure their supporters in still more explicit terms. Indeed, one might reasonably wonder whether the greater threats to legitimacy and impartiality come from the sort of public pronouncements that some courts have condemned—or from the private assurances to donors and supporters that almost never see the light of day.

* * *

A common theme that runs through all these cases is the recognition that council members and commissioners do not in fact take off their "legislator hats" when asked to rule on individual disputes. Although some courts have tried to simply paper over that reality, others have tried to accommodate it in various ways—either by adjusting the procedural demands on legislative adjudication or by fine-tuning the substantive standards of review.

The Fourth Circuit in *Virginia Beach* sought to make room for local politics by allowing legislators to rely on constituent preferences as a substantive justification for their decisions.[115] But that approach, if applied literally, would have amounted essentially to no review at all. It is therefore unsurprising that the Fourth Circuit ultimately settled on a standard that placed very little weight on politics at all.

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111. *Dellinger v. Lincoln County*, 832 S.E.2d 172, 182 (N.C. Ct. App. 2019) (Berger, J., concurring).

112. *Id.* (Berger, J., concurring).

113. *Id.* at 178.

114. *Staton v. Mayes*, 552 F.2d 908, 915 (10th Cir. 1977).

115. *AT & T Wireless PCS, Inc. v. Virginia Beach*, 155 F.3d 423, 430 (4th Cir. 1998).

On the other hand, there may indeed be value in letting up on the requirement that legislators be completely "neutral" with respect to the issues that come before them. The decision to vest decision-making authority in a legislative body all but guarantees that voters will try to influence the decisions that their elected officials make. Attempts on the part of some courts to police the relationship between legislators and their constituents under the guise of "impartiality" entail a fairly significant intrusion into the legislative process without necessarily making legislative hearings fairer. Courts may be better off ensuring that legislative decisions conform to whatever substantive standards a particular statute prescribes while otherwise allowing the legislative process to play out as it does.

B. Reasoned Decision-Making and Legislative "Expertise"

In other contexts, legislative administration instead raises questions about how courts can (or should) go about assessing the quality of agency decision-making or the depth of agency expertise. Although courts are not always willing to acknowledge the role of politics in agency decision-making, they typically are quick to recognize claims of expertise. Indeed, courts often do so reflexively—without actually considering whether the agency has any expertise to bring to bear. As I argued in *Substance and Procedure*, when it comes to local agencies generally, there may be greater reasons to doubt that the agency officials have the sort of expertise to which courts must automatically defer.[116] But the role of expertise becomes still more perplexing when the "agency" making the decision is in fact a local city council or a county board.

One context in which the question of expertise looms particularly large is around environmental impact review. Under the Minnesota Environmental Protection Act (MEPA), for example, the government unit responsible for approving a new development project must first determine whether to prepare an "Environmental Assessment Worksheet" (EAW) to evaluate the likelihood that the project may cause environmental harm.[117] A government unit's determinations of whether an EAW is necessary under the statute and the substance of the EAW itself are subject to judicial review to determine whether they are supported by substantial evidence and are not otherwise arbitrary or capricious.[118]

At the state level, the EAW process is typically carried out by one of the state's two environmental agencies—the Pollution Control Agency or

116. Ponomarenko, *supra* note 2.

117. MINN. STAT. § 116D.04(1)(a)(c) (2020).

118. *Watab Twp. Citizen All. v. Benton Cnty. Bd. of Comm'rs*, 728 N.W.2d 82, 89 (Minn. Ct. App. 2007).

the Department of Natural Resources.[119] At the local level, however, the responsible government unit is, more often than not, a local city council or a county board. Although courts have little trouble applying the familiar administrative law standards to state agency decisions, they have at times struggled with how best to apply them when local legislatures are involved.

Consider, for example, a case involving the proposed construction of new biking trails in a local park. In *Protect Our Minnetonka Parks (POMP) v. City of Minnetonka*,[120] a local environmental group petitioned the city of Minnetonka to conduct an EAW to determine whether the new trails had the potential to harm the surrounding wildlife preserve.[121] Under the MEPA, the city was required to conduct the EAW if "material evidence" accompanying the petition showed that "there may be potential for significant environmental effects."[122] The statute specifically outlined the factors that the city was to consider, including the types and extent of the environmental impacts and the degree to which these impacts might be mitigated under the city's plans.[123] In short, the decision of whether to prepare an EAW in the first place was itself supposed to be based on a technical (albeit somewhat more general) assessment of environmental harm.

Although the resolution denying POMP's petitions ostensibly complied with the requirements of the statute, the discussion at the city council meeting at which the resolution was adopted strongly suggested that the decision was not in fact the product of "reasoned decisionmaking" or "agency expertise."[124] The resolution itself, which likely was prepared by city staff, explained why the city believed that the various environmental harms that POMP identified were either too minimal to count as "significant" under the statute or were simply unlikely to occur.[125] The discussion at the city council meeting, however, focused on an entirely different set of concerns.[126] All four of the city council members who voted to reject POMP's petition described the EAW process as something that was just not worth doing at the time.[127] One council member expressed concerns about the potential harm to the local bumblebee population but

119. *See, e.g.*, *Pope Cnty. Mothers v. Minnesota Pollution Control Agency*, 594 N.W.2d 233, 235 (Minn. Ct. App. 1999).

120. No. A18-1503, 2019 WL 2495648 (Minn. Ct. App. June 17, 2019).

121. *Id.* at *1.

122. *Id*. at *2.

123. *Id.*

124. Reply Brief of Relator at *11–13, *Protect Our Minnetonka Parks v. City of Minnetonka*, No. A18-1503, 2019 WL 1756594 (Minn. Ct. App. Feb. 14, 2019).

125. *Protect Our Minnetonka Parks*, 2019 WL 2495648, at *3–4.

126. Reply Brief of Relator, *supra* note 124, at *11–13.

127. Brief and Addendum of Relator at *22, *Protect Our Minnetonka Parks v. City of Minnetonka*, No. A18-1503, 2019 WL 1756592 (Minn. Ct. App. Jan. 3, 2019).

felt that the results of an EAW "would not be particularly satisfying in the end."[128] Another did not think the EAW would "give us any further information."[129] Still another said she opposed the EAW because it was promoted by "people who are looking for that as a reason to prevent the project."[130] The staff members who worked on the resolution also voiced a number of concerns that the city was not supposed to be taking into account. The city's Natural Resources Manager, for example, expressed concern that the EAW would cost between $25,000 and $50,000 and that approving POMP's petition would be "setting a new precedent" for undertaking EAWs in the future as well.[131]

Under Minnesota law, courts are instructed to afford "substantial deference" to agency decisions based largely on grounds of agency expertise.[132] And for highly technical determinations, this deferential posture is entirely warranted when the decision in question is made by a state agency whose staff members have decades of experience on which to draw.

It is much less clear, however, why this same level of deference was warranted in *POMP*. The city council almost certainly lacked the requisite expertise to assess the environmental impacts of the proposed development. Indeed, based on the hearing transcript, it does not appear that they even fully grasped the nature of the judgment that they were being asked to make.

The court, for its part, was untroubled by the council members' comments. The court explained that what mattered was the substance of the resolution adopted by the city council, not the various comments made by individual council members and staff.[133] And because there was indeed some evidence in the record to support the resolution, the court was bound to defer.

The council members in *POMP* may have been particularly forthright in their discussions, but their decision-making process was likely altogether typical of how legislative officials approach environmental review. Even when there are "experts" involved in the process—either municipal staff members or hired consultants—the decision-making authority ultimately rests with the local legislative body itself. The MEPA's statutory language suggests that the decision of whether to conduct an EAW is meant to be fact-based and non-discretionary. It states

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128. *Id*. at *36–37.

129. *Id*. at *12.

130. *Id*.

131. *Id.* at *8–10.

132. *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006).

133. *Protect Our Minnetonka Parks, Inc. v. City of Minnetonka*, No. A18-1503, 2019 WL 2495648 at *5–6 (Minn. Ct. App. June 17, 2019).

that the government unit "*shall* order the preparation of an EAW if the *evidence* . . . demonstrates that . . . the project may have the potential for significant environmental effects."[134] But unless the evidence points unequivocally in one direction or another, the local legislative body retains considerable discretion in deciding whether review is warranted. It is hard to imagine that in exercising that discretion, legislators are doing anything other than what the Minnetonka City Council had done in *POMP*—namely, considering the costs of preparing an EAW, the possibility of delay, and the overall likelihood that a more thorough review would support whatever outcome the legislators prefer.

* * *

Although there undoubtedly is room to quibble with the *POMP* court's deferential posture, the real problem that it highlights may be with legislative administration itself. The *POMP* court might, for example, have concluded on the basis of the record that the city council had not in fact engaged in "reasoned decisionmaking" as required by the statute. And this would perhaps have been a more honest assessment of what in fact occurred. But in practice, it may not have had much of an effect on council decisions going forward. Future legislators might be more circumspect in their assessments. But it seems doubtful that their decision-making processes would necessarily change as a result. In the absence of actual expertise with which to judge the evidence before them, the sorts of considerations that weighed heavily on the Minnetonka council members would undoubtedly continue to hold sway.

III. LESSONS AND IMPLICATIONS

As the examples in the preceding pages make clear, legislative administration has not always conformed perfectly to the demands of administrative law. Some courts have responded to this by insisting that legislatures must behave differently, others by suggesting that administrative law itself must adapt. This Part concludes with some preliminary thoughts on reconciling the practical reality of legislative administration with the norms of administrative procedure. It then suggests some possible directions for future study, including the ways in which local administrative practice could help inform debates in federal administrative law.

A. Assessing the Need for Legislative Administration

If there is one theme that runs through all of the preceding cases, it is the fact that legislators invariably see themselves as *legislators* first—even

134. MINN. R. 4410.1100, Subp. 6 (2018) (emphasis added).

when they are asked to adjudicate individual disputes. At least in some contexts, it may be worth considering whether a different decision maker may be better suited to perform the task.

The environmental review cases discussed above are a case in point. As discussed above, the MEPA imposes a series of non-discretionary obligations on local governments.[135] The factors that localities must consider are highly technical, and they require little in the way of local knowledge of the sort that legislators are more likely to possess.[136] At the same time, as *POMP* makes clear, involving legislators in the decision-making process invariably results in their considering a variety of factors that the statute ostensibly precludes—most notably the costs and delays associated with conducting the required reviews.[137] Judicial review can perhaps ferret out the more egregious cases, but it can only do so much. Courts, after all, are also not particularly adept at scrutinizing environmental harms.

A state-level agency, on the other hand, may be in a much better position to produce an unbiased impact review. A state agency could be tasked with conducting a review from start to finish or simply evaluating the evidence compiled by a local government unit to determine whether various statutory criteria have been met. The Illinois Environmental Pollution Control Act, which governs local approval of waste disposal facilities, offers a possible model along these lines.[138] Although it vests local siting authorities with the responsibility for gathering the required information and making a preliminary determination, it permits aggrieved parties to appeal to the state's Pollution Control Board, which then conducts a de novo review applying its own "technical expertise."[139]

A similar approach could work in a variety of other contexts as well. Where there is genuine concern about the possibility of bias, for example, state-appointed hearing officers could preside over administrative proceedings—and at the very least be responsible for developing the

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135. A local government unit "*shall*" prepare an Environmental Assessment Worksheet (EAW) if it determines that a proposed project "may have the potential for significant environmental effects," and it "*shall*" conduct a still more thorough assessment if the preliminary worksheet demonstrates that these impacts are in fact likely to occur. MINN. R. 4410.0200, Subps. 24, 26 (2018); MINN. R. 4410.1100, Subp. 6 (2018) (emphasis added).

136. MINN. R. 4410.1700, Subp. 7 (2018) (describing the relevant criteria, including the likely environmental impacts, cumulative impacts, and opportunities for mitigation).

137. *See supra* notes 120–28 and accompanying text. *See also* Peder Larson & Julie Perrus, *Reforming Environmental Review*, BENCH&BAR MINN., Jan. 2010, at 34, 37 (noting that "units of government might also be biased by economic considerations or not informed enough of the science underlying environmental concerns").

138. *See Town & Country Utils., Inc. v. Ill. Pollution Control Bd.*, 866 N.E.2d 227, 229–30, 238 (Ill. 2007) (describing the statute and the role of state experts).

139. *Id.* at 238.

records on which decisions must be made. In short, it may be worth exploring whether all of the administrative functions discussed in the preceding pages should in fact be left in legislative hands.

B. Tailoring the Standards of Judicial Review

In other contexts, the political character of legislative bodies may be more a feature than a bug. When it comes to zoning and land use policy, for example, the decision to involve legislative bodies in the administrative process may reflect the fact that these judgments are not fully *administrative* to begin with. The question of whether to grant a conditional use permit to build a new retail center, for example, or to rezone a specific parcel to permit a non-conforming use involves an individualized determination and may therefore be an "adjudication" in the traditional parlance of administrative law.[140] But it also is a political judgment about the development of a particular neighborhood or the needs of its residents.[141] It should not be surprising that these sorts of decisions have often been left in legislative hands.

Recognizing the political character of local land use decision-making does not require courts to completely abdicate their responsibility for reviewing adjudicative judgments—but it does perhaps say something about the forms that this review might take. If certain functions are vested in local legislative bodies on account of their democratic pedigree, courts should perhaps be wary of interfering with the democratic process by holding local legislative bodies to a strict set of administrative norms. When it comes to the administrative requirement of "impartiality"—and the related prohibition on ex parte contacts—there may be value in adopting a more flexible approach.

On the other hand, there may be less of a reason to adopt a separate "legislative" standard of substantive judicial review because the necessary flexibility may already be built into the underlying statutory scheme. For example, in determining whether to grant a conditional use permit, legislators typically are permitted to consider a variety of factors, including whether a proposed use would be "compatible with the character and development in the vicinity" or whether it would be "detrimental to

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140. *See* Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 844–46 (1983) (noting that in some jurisdictions these sorts of decisions are deemed "legislative," whereas in others they are characterized as "adjudicative").

141. It is precisely for this reason that some state courts have deemed at least some individualized determinations to still be "legislative" in character, even if they affect a single parcel of land. *Id.* (noting that a number of states characterize all amendments to zoning ordinances—including those that affect just one parcel of land—as "legislative" judgments).

the continued use, value, or development" of neighboring properties.[142] These vague standards already give legislators plenty of leeway to consider the needs of their constituents without courts having to make any special accommodations to the standard of review. Of course, where the statutory criteria are more specific, legislators may be bound to follow the evidence where it leads. But the very specificity of the criteria implies that the decision is meant to be an objective one that is relatively free of political influence. Indeed, this is precisely where the Fourth Circuit went awry in *Virginia Beach*. The TCPA had *already* settled on the optimal balance between local land use preferences and the demands of a national mobile network. The court's attempts to create still more room for local preferences threatened to upend the balance that Congress itself had struck.

C. Learning from Local Administrative Law

Finally, although there are many reasons to study local administrative practice for its own sake, it also has the potential to inform debates in *federal* administrative law.

One of the striking features of local administrative practice is the degree to which it forces courts to grapple with questions that rarely bubble up in federal court. The scholars who have debated the proper place of politics in federal agency decision-making, for example, have focused primarily on a handful of cases in which federal courts have confronted the question directly.[143] At the local level, however, these sorts of cases number in the hundreds. Local officials, it seems, are far less adept at obscuring the messy reality of administrative decision-making behind a veneer of objectivity and expertise. Because there are fifty state supreme courts, which regularly split on various administrative doctrines, it may be possible to see how different formulations have played out over time. Kathryn Watts has argued, for example, that federal courts should allow agencies to rely more explicitly on political considerations to justify their regulatory choices and has suggested that courts over time could learn to distinguish between "permissible" political influence and "crass political horse trading."[144] It seems altogether likely that a closer look at local administrative caselaw could help shed light on the degree to which that is likely to prove correct.

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142. *See, e.g.*, *Check into Cash of Miss., Inc. v. City of Jackson*, 158 So. 3d 1252, 1254 (Miss. Ct. App. 2015).

143. *See, e.g.*, Watts, *supra* note 8; Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision-Making*, 108 MICH. L. REV. 1127 (2010); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

144. Watts, *supra* note 8, at 54–55.

The same is true in a variety of other contexts as well. Some state supreme courts, for example, have adopted a much more robust version of the nondelegation doctrine—and as a number of scholars have argued, the states' experience with nondelegation offers important lessons for federal courts as they grapple with the question of whether to revive the doctrine at the federal level as well.[145] Similarly, in the wake of the Supreme Court's decision in *Department of Commerce v. New York*,[146] a number of scholars have considered the degree to which courts should try to ferret out pretextual justifications for agency decisions.[147] This, too, is an area on which local administrative law could potentially shed some light.[148]

CONCLUSION

The goal of this Essay was to provide a preliminary account of legislative administration. It is necessarily a first cut—one that barely scratches the surface in capturing either the breadth of legislative administration or the many ways in which it challenges familiar administrative norms. What it makes clear, however, is that legislative administration is a distinct form of administrative practice that undoubtedly warrants a closer look.

145. *See, e.g.*, Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3758233; Daniel E. Walters, *Decoding Nondelegation After* Gundy*: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, EMORY L.J. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3809905.

146. 139 S. Ct. 2551 (2019).

147. *Id.* at 2558–59 (striking down the Department of Commerce's decision to add a citizenship question to the census as pretextual).

148. *See, e.g.*, *Or. Ent. Corp. v. City of Beaverton,* 19 P.3d 918, 922–23 (Or. Ct. App. 2001) (considering whether there was sufficient evidence to show that the city council's reasons for denying a conditional use permit to an adult business were pretextual and that the real reason for the denial was the council's opposition to the adult nature of the business).