

RECONCILING DEMOCRACY AND BUREAUCRACY: TOWARDS A
DELIBERATIVE-DEMOCRATIC MODEL OF BUREAUCRATIC
ACCOUNTABILITY

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ABSTRACT

Beginning in the advent of the modern discipline of public administration, and in some ways considerably earlier, one of the questions most troubling political thinkers and political scientists has been: Holding both as values, how can we reconcile the tension between bureaucracy and democracy? This question, addressing what is often termed the “bureaucracy-democracy paradox,” has taken a variety of forms, varying as a result of both particular definitions of democracy and competing perspectives on the proper understanding of bureaucratic power. Rooted in the discipline of democratic theory and guided by its traditions, this dissertation intervenes in this discussion, and asks four logically interrelated questions instrumental to a satisfactory resolution of this tension.

First, given the diversity of perspectives surrounding the concept “democracy,” is there an essential definition of this concept and model of democracy we might rely on, one that informs both the norm and the reality of contemporary democracy, and if so, how does this model help guide us in identifying and resolving the tension between contemporary bureaucracy and democracy? Having identified this model and located one “most pressing” tension in processes of bureaucratic rulemaking, this dissertation proceeds to identify democratic modes of control, oversight and accountability of

bureaucracy as critical to resolving this tension, and in the process asks: how effective are extant democratic modes of accountability and oversight within contemporary democracies, and thus how well-preserved is our model of democracy? Third, having found reasons to question the effectiveness of extant modes of control, oversight and accountability, it is next asked: what alternative forms of democratic control are available that might better support our democratic institutions and traditions? Finally, turning to a normative model of democracy popularized over the last few decades – the deliberative theory of democracy – as one useful alternative, this dissertation concludes by asking: is there a case that might evidence both the empirical plausibility and the normative desirability of deliberative democracy as an alternative model of control within a bureaucratic rulemaking context, and thus support this prescription as a viable one for resolving the enduring tension between bureaucracy and democracy?

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PART ONE: SETTING THE PROBLEM

Chapter One: Introduction: Bureaucracy and Democracy

I. Introduction and Abstract

Beginning in the advent of the modern discipline of public administration, and in some ways considerably earlier, one of the questions most troubling political thinkers and political scientists has been: Holding both as values, how can we reconcile the tension between bureaucracy and democracy? This question, addressing what is often termed the “bureaucracy-democracy paradox,” has taken a variety of forms, varying as a result of both particular definitions of democracy and competing perspectives on the proper understanding of bureaucratic power. Rooted in the discipline of democratic theory and guided by its traditions, this dissertation intervenes in this discussion, and asks four logically interrelated questions instrumental to a satisfactory resolution of this tension.

First, given the diversity of perspectives surrounding the concept “democracy,” is there an essential definition of this concept and model of democracy we might rely on, one that informs both the norm and the reality of contemporary democracy, and if so, how does this model help guide us in identifying and resolving the tension between contemporary bureaucracy and democracy? Having identified this model and located one “most pressing” tension in processes of bureaucratic rulemaking, this dissertation proceeds to identify democratic modes of control, oversight and accountability of

bureaucracy as critical to resolving this tension, and in the process asks: how effective are extant democratic modes of accountability and oversight within contemporary democracies, and thus how well-preserved is our model of democracy? Third, having found reasons to question the effectiveness of extant modes of control, oversight and accountability, it is next asked: what alternative forms of democratic control are available that might better support our democratic institutions and traditions? Finally, turning to a normative model of democracy popularized over the last few decades – the deliberative theory of democracy – as one useful alternative, this dissertation concludes by asking: is there a case that might evidence both the empirical plausibility and the normative desirability of deliberative democracy as an alternative model of control within a bureaucratic rulemaking context, and thus support this prescription as a viable one for resolving the enduring tension between bureaucracy and democracy?

In the end, there are three primary contributions to the literature this dissertation claims. First, by beginning with an investigation of enduringly influential historical-theoretical models of democracy, and working to understand how these models both defend administrative discretion and reconcile its existence with democracy, this dissertation bridges the gap between democratic thought and modern bureaucracy, a bridge often missing in investigations of this kind – and a useful exercise in its own right. Second, by working to resolve the tension between bureaucracy and democracy through an application of the deliberative model of democracy to a bureaucratic context, an institutional nexus that has been largely ignored by those working with this theory, this dissertation fills a noticeable gap in both the democratic theory and public administration literatures. Lastly, by evaluating favorably one recently adopted form of bureaucratic

rulemaking – labeled electronic or “e-rulemaking” – for its deliberative-democratic character, this dissertation evidences the empirical plausibility of the normative prescriptions of deliberative theory, something often lacking in studies of this kind, and a fact often utilized as grounds for rejecting political reforms inspired by a deliberative model.

II. Background and Literature Review: On the Tension between Bureaucracy and Democracy

Writing in the early twentieth century, Max Weber is usually credited with having provided the first theoretically rich description of the “bureaucracy” as a type of institution of public administration.¹ Not coincidentally, Weber articulated his understanding of bureaucracy and bureaucratization during a period when administration was increasingly regarded as an important center of political and economic activity, and thus an increasingly important object of scholarly inquiry.² Attempting to illuminate the sociological conditions and political consequences of these emerging forms of administrative control, Weber defined bureaucracy as an hierarchical, centralized and internally differentiated administrative organization staffed by a group of specially educated elites responsible for all administrative tasks within their own jurisdictional area and tasked to implement the policies enacted by political decision-makers.

On Weber’s definition, and contrary to earlier, traditional forms of administration, the modern bureaucracy is characterized by a delineated chain-of-command, by a “firmly

¹Weber, Max. “Bureaucracy.” In *From Max Weber: Essays in Sociology*. Gerth, H.H. and C. Wright Mills (Eds.). 1946. (1922). N.Y., N.Y.: Oxford University Press.

²Woodrow Wilson provided an early academic “call-to-arms” regarding the importance of a distinct branch of political science focused on public administration. Wilson, Woodrow. “The Study of Administration.” *Political Science Quarterly*. Vol. 2, No. 2, 1887.

ordered system of super- and subordination in which there is a supervision of the lower offices by the higher ones.”³ Moreover, the modern bureaucracy is characterized by a “concentration of the means of administration,” and this concentration is achieved by the centralized control of the resources bureaucrats require to fulfill administrative tasks.⁴ The modern bureaucracy is staffed first and foremost on the basis of education and merit, with qualifying examinations replacing nepotism and political favoritism.⁵ Finally, these educated and expert elites are differentiated within the bureaucratic agency on the basis of particular technical competences, and assigned jurisdictional control over issues within their own sphere of expertise. And while Weber notes myriad reasons for the process of bureaucratization and the particular traits of modern bureaucratic administration, both essentially arise as consequences of the progression towards economic and societal rationalization and the unequivocal technical superiority of bureaucratic administration over alternative administrative types. In short, bureaucratic institutions are more effective and efficient at completing their tasks than are other administrative institutions.⁶

Viewing Weber’s definition as an archetype, it did not take long for many to identify the tension between this type of elite, expertise-driven and hierarchical administrative institution and democracy, a system of government within which values of equality, publicity and public participation (for instance) are fundamental. Indeed, it is

³Weber, “Bureaucracy.” P. 197.

⁴Weber, “Bureaucracy.” P. 223.

⁵Weber, “Bureaucracy.” P. 198.

⁶Weber has this to say on the matter: “The decisive reason for the advance of bureaucratic organization has always been its purely technical superiority over any other form of organization. The fully developed bureaucratic mechanism compares with other organizations exactly as does the machine with the non-mechanical modes of production...As compared with all collegiate, honorific, and avocational forms of administration, trained bureaucracy is superior on all these points.” Weber, “Bureaucracy.” P. 214.

not surprising that at roughly the same time Weber was offering his ideal-typical model of bureaucracy, democratic critics of these administrative institutions, recognizing these institutions' increasing relevance to governmental practice, were emerging as well.⁷

While still in its infancy, bureaucratic administration was recognized as an unavoidable by-product of democracy – embodied in the ubiquitous political party – and bureaucratization was thought to undermine democracy within these parties.⁸ During the same period critics largely hostile to the state and its tendency to mask power relations between dominant and oppressed classes focused their critical energies on the bureaucracy, and the revolutionary importance of a “democratized” bureaucracy.⁹ And far to the other end of the political spectrum, bureaucratization was quickly identified as an essential impediment to the freedom and liberty requisite a free and democratic society.¹⁰ In short, as soon as bureaucracy became an object of serious inquiry, scholars concerned with the consequences of this burgeoning administrative type to the foundations of democracy appeared as well.

From this perspective, recognition of the problems posed by bureaucracy for a democratic system and efforts to resolve the tension between bureaucracy and democracy are as old as bureaucratic administration itself. Indeed, over much of the last century, a period during which both public bureaucracy and scholarly work focused on bureaucratic

⁷It should be noted that Weber himself recognized the emerging tension bureaucracy and democracy, at least to the extent that he saw the dangers bureaucracy poses to the sanctity of formal law. Weber, “Bureaucracy.”

⁸Michels, Robert. *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy*. 1962 (1915). N.Y., N.Y.: Crowell-Collier Publishing.

⁹Lenin, Vladimir I. *The State and Revolution*. 1984 (1904). Moscow, Russia: Progress Publishers.

¹⁰Hayek, Friedrich. *The Road to Serfdom*. 1944. Chicago, IL: University of Chicago Press.

administration grew at an exponential rate, studies driven by the explicit goal of reconciling the tension between bureaucracy and democracy have been nearly as prevalent as efforts to understand and define bureaucratic processes and institutions.¹¹

This task continues to occupy many today, and as efforts at the reconciliation of this tension have grown in number, so too have the means proposed for achieving this objective grown in type.

Over the last few decades, a wide assortment of new – and sometimes not-so-new – recommendations for resolving the tensions between bureaucracy and democracy have been proffered. As a consequence of these ongoing efforts, buzzwords and catch-phrases such as “representative bureaucracy,”¹² “bureaucratic accountability,”¹³ “bureaucratic responsiveness,”¹⁴ “administrative decentralization,”¹⁵ “participatory management”¹⁶ and

¹¹For a few additional and more recent examples specifically focused on the task of reconciling these two principles, see: Burke, John P. *Bureaucratic Responsibility*. 1986. Baltimore, MD: Johns Hopkins University Press; Cook, Brian J. *Bureaucracy and Self-Government: Reconsidering the Role of Public Administration in American Politics*. 1996. Baltimore, MD: Johns Hopkins University Press; Etzioni-Halevy, Eva. *Bureaucracy and Democracy: A Political Dilemma*. 1983. Boston, MA: Routledge; Hyneman, Charles. *Bureaucracy in a Democracy*. 1950. N.Y., N.Y.: Harper and Brothers; Sunstein, Cass. *After the Rights Revolution: Reconceiving the Regulatory State*. 1990. Cambridge, MA: Harvard University Press; Yates, Douglas. *Bureaucratic Democracy: The Search for Democracy and Efficiency in American Government*. 1982. Cambridge, MA: Harvard University Press.

¹²Meier, Kenneth. “Representative Bureaucracy: An Empirical Analysis.” *American Political Science Review*. Vol. 69, No. 2, 1975; Kingsley, Donald. *Representative Bureaucracy: An Interpretation of the British Civil Service*. 1944. Yellow Springs, OH: Antioch Press; Selden, Sally Coleman. *The Promise of Representative Bureaucracy: Diversity and Responsiveness in a Government Agency*. 1997. Armonk, N.Y.: M.E. Sharpe; Selden, Sally Coleman et al. “Bureaucracy as a Representative Institution: Toward a Reconciliation of Bureaucratic Government and Democratic Theory.” *American Journal of Political Science*. Vol. 42, No. 3, 1998.

¹³Light, Paul C. *Monitoring Government: Inspectors General and the Search for Accountability*. 1993. Washington, D.C.: Brookings Institution; Mosher, Frederick. *The GAO: The Quest for Accountability in American Government*. 1979. Boulder, CO: Westview Press; Rosen, Bernard. *Holding Government Bureaucracies Accountable*. 1982. N.Y., N.Y.: Praeger Publishers.

¹⁴Cope, Glen. “Bureaucratic Reform and Issues of Political Responsiveness.” *Journal of Public Administration Research and Theory*. Vol. 7, No. 3, 1997; Hatry, Harry P. et. al. *Customer Surveys for Agency Managers: What Managers Need to Know*. 1998. Washington, D.C.: The Urban Institute Press; Rosener, Judy. “Making Bureaucrats Responsive: A Study of the Impact of Citizen Participation and Staff Recommendations on Regulatory Decision-Making.” *Public Administration Review*. Vol. 42, No. 4, 1982;

“new public management”¹⁷ have, along with a host of others, become part of the political science and public administration lexica. All of these reform strategies, each of which in its own way suggests a reconfiguration of bureaucratic institutions and processes with the goal of making these more congenial to the principles of democracy, help us envision strategies towards this end. Further, to some extent most of these reform strategies have wielded at least some influence over the actual organization and practice of public bureaucracies.¹⁸

Nevertheless, the existing literature examining the tension between bureaucracy and democracy, as well as the reform strategies identified therein, often leave something to be desired. While useful in their own right for envisioning bureaucratic practices more congenial to democracy, these studies tend to detach democracy – particularly as it relates to administrative practices and institutions – from its historical and theoretical context. Consequently, these studies fail to take advantage of the enduring lessons such a

Stivers, Camilla. “The Listening Bureaucrat: Responsiveness in Public Administration.” *Public Administration Review*. Vol. 54, No. 4, 1994; Vigoda, Eran. “From Responsiveness to Collaboration: Governance, Citizens and the Next Generation of Public Administration.” *Public Administration Review*. Vol. 62, No. 5, 2002.

¹⁵Hart, David. “Theories of Government Related to Decentralization and Citizen Participation.” *Public Administration Review*. Vol. 32, 1972; Brown-John, Lloyd C. *Centralizing and Decentralizing Trends in Federal States*. 1988. Lanham, MA: University Press of America; Kranz, Harry. *The Participatory Bureaucracy*. 1976. Lexington, MA: D.C. Heath and Co.; Schmidt, Vivian. *Democratizing France: The Political and Administrative History of Decentralization*. 1990. N.Y., N.Y.: Cambridge University Press.

¹⁶Denhardt, Robert. *The Pursuit of Significance: Strategies for Managerial Success in Public Organizations*. 1993. Belmont, CA: Wadsworth; Garvey, Gerald. *Facing the Bureaucracy: Living and Dying in a Public Agency*. 1993. San Francisco, CA: Jossey-Bass; Golembiewski, Robert T. *Managing Diversity in Organizations*. 1995. Tuscaloosa, AL: Alabama Press.

¹⁷Box, Richard, et al. “New Public Management and Substantive Democracy.” *Public Administration Review*. Vol. 61, No. 5, 2001; Jones, Lawrence R. and Fred Thompson. *Public Management: Institutional Renewal for the 21st Century*. 1999. Stamford, CT: JAI Press.

¹⁸For a nice discussion of the intersection of a host of theories of administrative reform and actual administrative change, see Peters, B. Guy. *The Future of Governance: Four Emerging Models*. 2001. Lawrence, KS: University of Kansas Press.

perspective might offer, both in identifying and in addressing the problems bureaucratic administration poses for a democratic system. Put simply, many of these studies tend to more carefully analyze what “bureaucracy” is than what “democracy” is (both now and in the past), and thus the prescriptions offered often fall short.

Taking this critique to heart, this dissertation begins with a detailed analysis of two historical-theoretical models of democracy – the representative and direct models – locates the core set of relationships guiding them both, and seeks to understand how these models (or at least two prominent defenders of these models) reconcile administrative authority within a democratic system. When understood properly, the set of relationships defining democracy, mandating a connection between the people, the law and the rule of law, leads us to identify some potentially most-damaging bureaucratic practices and processes for our model of democracy, and to reject others as benign. And through this, one source of potential conflict between bureaucracy and democracy is located within processes of bureaucratic rulemaking, and the long-prescribed means intrinsic to our received models of democracy for resolving this tension – through democratic modes of control and accountability – are examined. Finally, maintaining a footing within the traditions of normative democratic theory, we proceed to seek more robust forms of democratic control and accountability of the bureaucracy, and locate one empirical example that provides hope for realizing a deliberative-democratic model of bureaucratic accountability.

III. Research Philosophy

Unlike most studies addressing the bureaucracy-democracy paradox, this dissertation emerges in large part from outside the scholarly traditions of public administration studies (although it obviously touches on this literature), and is instead guided by a broader focus on democratic theory, and more specifically *normative democratic theory*. Moreover, the ideas in these pages rely heavily on a type of social-scientific inquiry termed critical theory, and more specifically the critical-theoretical method of an *immanent critique*. Approaching the bureaucracy-democracy paradox from within these traditions and relying on these modes of inquiry guides this dissertation significantly, impacting the assortment of questions asked and the nature of the solutions offered. Therefore, these traditions require a somewhat more detailed description.

In the broadest sense, a normative theory of democracy values popular control of and participation in government and works to articulate the social and political conditions necessary for realizing this moral good. That is, normative democratic theorists understand the realization and defense of democracy as their principle moral objective (their “ought”), although the nature of this ought and the means for realizing it can vary substantially depending on what a particular scholar takes the ever-elusive term democracy to entail. Indeed, in part this dissertation will be focused on arriving at a useful and enduringly relevant model of democracy, one that has guided and continues to guide our understanding of this concept.

Moreover, immanent critique, a mode of philosophical inquiry typically associated with the Hegelian tradition, begins in the critical analysis of extant social, philosophical and, most pertinent to this context, political relationships. The primary task

of an immanent critique is to identify the unrealized normative core of extant political relationships, and to strive towards realizing these ideals against the backdrop of an apparently inhospitable empirical reality. In the words of one scholar, an “immanent critique is first and foremost a critique of dogmatism and formalism, that is, a critique of the myth of the given and of the juxtaposition to the given of a formal principle to which the former must be subordinated. Both the content and the form, the given and the ‘ought,’ are reflected to their ground...”¹⁹ A few examples of how these guiding paradigms impact the format, logic and content of this dissertation are necessary.

In the first instance, as Chapter Two will evidence most clearly, this dissertation does not assume the tension between bureaucracy and democracy to be exclusively the product of the emergence of modern forms of public administration over (roughly) the last century. Rather, this dissertation is guided by the idea that most contemporary political problems – and even some seemingly inescapable paradoxes – can be best understood by examining essential foundations and guiding theoretical frameworks. Further, and following the logic of an immanent mode of critique, we must first identify the normative ideals and the political principles underlying our model of democracy – a model with roots stretching back well beyond our contemporary context – before understanding how these normative ideals have been interrupted, gone unrealized or been overwhelmed by the ideology and reified norms of the inescapable “is.” In this spirit, this dissertation begins the search for answers to the bureaucracy-democracy paradox with an examination of historical democratic thought, looking specifically to the ideals

¹⁹Benhabib, Seyla. *Critique, Norm and Utopia: A Study of the Foundations of Critical Theory*. 1986. N.Y., N.Y.: Columbia University Press. [P. 42].

underpinning contemporary democracy and the mechanisms suggested therein for reconciling popular government and administrative authority.

Moreover, as Chapters Three and Four will show clearly, both the method of immanent critique and a normative democratic theory demand that we look closely at existing political relationships to discover how well our normative ideals have been realized in practice. That is, within any sound work of normative democratic theory, and especially one guided by the logic of an immanent critique, the normative “ought” must be related carefully to the empirical “is.” In these chapters, therefore, both bureaucratic rulemaking and the democratic strategies designed to reconcile this practice with our model of democracy will be closely examined. And because found to be at least partially lacking, this examination justifies a search for alternative democratic modes of accountability and control.

Finally, as we will see in Chapters Five and Six, as a work of normative democratic theory this dissertation takes seriously the possibility of resolving “democratic problems” through robust forms of democratic participation. That is, by adopting a deliberative model of democracy as one means for resolving the lingering tension between bureaucracy and democracy, this dissertation indicates its commitment to broad and deep democratic public participation. Nevertheless, this commitment does not allow us to ignore the empirical plausibility of our prescriptions, to focus on our support of normative ideals to the exclusion of how we might realize these ideals in practice. Thus, we will seek an empirical example of deliberative democracy at work in the context of interest, an example that might evidence both the normative desirability and empirical plausibility of our prescriptions.

IV. Chapter Outline

This dissertation is segmented into two parts and seven chapters, including the introductory chapter and the conclusion. While these chapters cover considerable ground and address an array of topics, each in its own way contributes to our understanding of the tension between bureaucracy and democracy, and each brings us closer to reconciling these two values within contemporary democratic systems.

Focusing on the tension between bureaucracy and democracy in the United States, Chapter Two begins with an effort to understand the essential foundations of popular government and democracy through an examination of two important and representative theorists. Contemporary democracies (which often combine elements of both the representative and direct-democratic models) are founded on a model of popular government and law that demands a connection and identity between the people and the laws which govern them, the rules which infringe on their rights and liberties. Understanding the fortitude and persistence of this relationship is, in large part, to understand the vibrancy of democracy. Furthermore, an analysis of this model also allows us to best identify locations where democracy may have weakened or come under attack.

On the other hand, these models (or at least two preeminent theorists advocating these models) also defend the integration of executive and administrative discretion and prerogative as an essential means for realizing the public good, with elites not connected to the people in the same manner as elected representatives (or the people acting on their own behalf) delegated the authority to implement, interpret and even counteract the law. These practices are reconciled within these models of democracy, however, through democratic forms of control, accountability and oversight, strategies for reasserting the

connection between the people and the law. So long as these strategies prove effective, the tension between democracy and instances of administrative power remains resolved.

With this model of democracy and the lessons derived from it in hand, Chapter Three proceeds to move from essential foundations to the current context by examining modern bureaucratic administration, and in particular one form of bureaucratic power which, at least superficially, would seem to most directly interfere with our model of democracy: processes of bureaucratic rulemaking. Congressional delegations of authority to executive and administrative institutions to make rules and regulations having the force of law have been a feature of the American political system since the beginning of the republic. However, beginning in the twentieth century these grants of authority became more frequent and less circumscribed in the power delegated, leading ultimately to a “positive administrative state” capable of making policy concerning normatively contestable social and political values. Given their contemporary nature and increased prevalence, it would seem that bureaucratic rulemaking might challenge the basic relationships central to our model of democracy. Nevertheless, and contrary to some critical analyses, bureaucratic rulemaking is here argued to be unproblematic for our model of democracy so long as means for reasserting the connection between the people and these rules through democratic modes of administrative control are functioning and effective. But this, of course, begs a critical question: how effective are extant democratic modes of control and accountability, and particularly in relation to processes of bureaucratic rulemaking?

Chapter Four seeks to answer the critical question left unanswered in Chapter Three, and does so by examining the effectiveness of existing democratic modes of

control and accountability of bureaucratic rulemaking. As remnants of two institutional forms of democracy remain in the U.S. system – the direct and representative models – two democratic modes of bureaucratic control exist as well, one centered in legislative oversight, the other in public accountability. Nevertheless, in Chapter Four both forms are argued to be at least partially ineffective in protecting Congressional goals and intentions from bureaucratic discretion, a fact which provides grounds for challenging the compatibility of bureaucratic rulemaking with our model of democracy, and justifying a search for an alternative form of democratic control and accountability better supporting democracy.

Seeking a more effective means for controlling and holding bureaucracy (and particularly its rulemaking processes) democratically accountable, and thus better supporting our model of democracy in the face of these practices, Chapter Five looks to one normative model of democracy, deliberative democracy. Deliberative democratic theory, founded on a set of principles suggesting that mutually binding decisions receive greater legitimacy when rendered through processes of public deliberation and justification, has garnered considerable attention over the last two decades. What is more, this theory provides what would appear to be one ideal perspective for envisioning an alternative type of democratic control and accountability. Yet this theory has only rarely been applied to the bureaucratic context, and this is the case, I argue, because of a reflexive hesitancy (borne of modern limitations, such as social scale) to prescribe broad public participation to the expert-technocratic processes of the bureaucratic system. Chapter Five concludes by providing a more concrete understanding of deliberative-

democratic practice and suggests that, when properly understood, deliberative democracy is perfectly compatible with elite, expert-driven bureaucratic processes and institutions.

Suggesting that bureaucratic rulemaking better conform to the principles and values of a deliberative-democratic model of bureaucratic accountability requires, however, evidencing the empirical plausibility of such a suggestion. To this end, Chapter Six examines empirically a recent and innovative approach to bureaucratic rulemaking – labeled electronic or “e-rulemaking” – as a type of rulemaking process replete with potential for realizing a deliberative-democratic model of bureaucratic accountability. While a very recent innovation, arising only over the last five years with advances in information technology and the development of the Internet, e-rulemaking has the potential for integrating both deliberative and democratic public participation in promising ways. Utilizing a case study approach to provide evidence of e-rulemaking’s potential, I examine the rulemaking processes surrounding the Department of Agriculture’s National Organic Program. Lastly, I examine some possible impediments to realizing deliberative democracy through e-rulemaking, and make some suggestions for avoiding these potential pitfalls.

Finally, in Chapter Seven, and in conclusion, I begin by summarizing the primary arguments of this dissertation, both the novel and the mundane. Furthermore, Chapter Seven reiterates the primary contributions of this dissertation to both the democratic theory and public administration literatures. Lastly, a broader research agenda based on some of the ideas presented in this dissertation is offered.

V. Contributions of this Dissertation

This dissertation strives to make significant contributions to two distinct bodies of scholarship within the discipline of political science, the democratic theory and public administration literatures. In the first instance, and as mentioned above, by beginning with an historical-theoretical investigation of influential normative models of democracy and the intersection of these models with administrative practice, this dissertation adopts a more historical and theoretical perspective than most scholarship in this genre, and gleans significant and valuable lessons from this exercise. That is, while many working in public administration take democracy to be a concept, practice and system-type detached from historical roots, this dissertation takes the opposite approach, and works to learn from what our democratic forebears have to teach. As these models have guided and continue to guide our democratic norms and democratic practices, as well as our understanding of how democracy and administration ought to intersect, this approach is argued to be a valuable and necessary one.

Moreover, this dissertation contributes significantly to our understanding of deliberative democratic theory and the range of political processes and institutions to which the principles and practices of this theory might be applied. That is, throughout the life of deliberative democratic theory scholars have tended to focus first and foremost on legislative or traditionally deliberative institutions and processes, suspiciously neglecting – or intentionally rejecting – a discussion of the many problems bureaucratic governance poses to a democracy, and the ways in which the deliberative model might help us overcome these difficulties. But in this dissertation, I provide ample reasons – again, both

normative and empirical – for taking seriously the possibility of a deliberative-democratic model of bureaucratic accountability.

Lastly, by providing a case study offering empirical evidence of the possibility of a deliberative-democratic model of bureaucratic accountability in practice, this dissertation bridges norm and reality and evidences the empirical plausibility of its normative prescriptions. While studies examining “empowered” deliberative democracy (i.e. deliberative democracy in practice) have become somewhat more common over the last few years, too often this theory is presented only as an ideal, a normative model of democratic politics useful for understanding the deficiencies of existing democratic processes, but far too overwhelmed by empirical realities to be applied in modern mass societies. By showing this not to be the case, this dissertation takes us one step closer to the application of deliberative democracy to a range of democratic practices – including the processes of elite, expert bureaucratic institutions.

Chapter Two: Two Models of Popular Government, Law and Administrative Control

Introduction

Modern political systems were not created in a vacuum. On the contrary, these systems were deeply influenced by, among other forces, prominent political thinkers and the ideas they espoused. For instance, the arguments presented by American founding fathers James Madison, Alexander Hamilton and John Jay in defending the Constitution of 1787 (and especially Madison), collected today in *The Federalist*, are replete with evidence of the intersection of thought and practice; in defending the Constitution's distribution of particular powers or the relationship between institutions, it was not uncommon for these three to reference a "celebrated" thinker of the past.²⁰ Similarly, most modern democracies are patterned to some varying degree – often through direct contact with these ideas, but also through the diffusion of these ideas across thinkers, over time and between socio-cultural contexts – on influential theoretical models of government.

With this simple proposition in mind, in this chapter two models of popular government and law will be described, and traces of these two models in the

²⁰Hamilton, Alexander, John Jay and James Madison. *The Federalist*. 1787. N.Y., N.Y.: McGraw Hill. [P. 313].

constitutional foundations and current practices of the American political system will be examined. More particularly, in this chapter, relying on John Locke and Jean-Jacques Rousseau as exemplars and proxies for larger traditions, both the *representative-republican* and the *direct-participatory* models of popular government will be outlined, models which, while differing in their institutional prescriptions, project a *core and consistent set of relationships* defining popular government that has come to underpin our modern understanding of democracy. Furthermore, the justifications and strategies these two prescribe for both integrating and democratically controlling *executive and administrative discretion and prerogative* will be examined, as these too continue to inform our understanding of administration within a democratic system.

While this chapter might appear to take us away from the narrower subject of modern bureaucracy and the problems this institution poses for a democracy, these investigations are in fact essential. In this chapter we will look to both the foundations of popular government – now providing the basis for what we understand as democracy – and the means these models suggest towards checking and controlling executive and administrative power. In this sense, this chapter will allow us to get a firm grasp on the nature of the tensions between bureaucracy and democracy, and the sufficiency (or insufficiency) of the tools available for resolving this tension in practice. In the end, some lessons will be drawn from this exercise that will inform much of what follows.

I. Two Models of Popular Government and Law: Representative Republicanism and Direct Participation

In the most basic sense, a popular government is one which guarantees a connection or identity between the citizenry and the rules and laws that govern their

actions. These laws, infringements on the rights and liberties individuals might exercise (or do naturally hold) outside of government, often impose burdens on the citizenry, and thus a government is popular so long as a connection between the people and the law persists. Further, these laws, openly enacted, stable across time and superior to any arbitrary decree through the principle of the rule of law, allow the individual citizen to determine the extent to which the government either serves or rejects their particular interests, and the public good as a whole.

This is not to say, however, that diverse models of popular government have not been posited; indeed, the procedural, institutional and constitutional arrangements suggested towards realizing popular government have diverged across different thinkers, even while maintaining a central emphasis on the connection between the people, the law and the rule of law. Two such models, those provided by John Locke and Jean-Jacques Rousseau, present both generic images of the most prominent normative models of popular government, and highlight the different arrangements that have been suggested (and adopted) towards this end.

I.1. John Locke and the Representative-Republican Model

Like many Enlightenment thinkers, when constructing his theory of popular government John Locke places the legislative power at the center of the political system. For Locke, it is the legislative power that is to be the “supreme power” within government, with all other powers “derived from and subordinate to it,” and with this authority reflecting the “first and fundamental positive law” of popular government.²¹

²¹Locke, John. *John Locke's Second Treatise of Government*. MacPherson, C.B. (Ed). 1980. Indianapolis, IN: Hackett Publishing. [P. 69]. (Hereafter, *STG*)

The legislative power is awarded this preeminence in the first instance, we shall see, because this institution is to be most directly linked to the community, the citizenry being tied to the legislative authority through an act of express consent – and ultimately through *elected representatives*. These elected representatives, in turn, are empowered with the most basic task of government, and the most essential means for affecting this task: framing and delimiting the *rights* of the people through the enactment of *positive law*. And finally, it is through its supremacy over the law that the legislative authority will come to embody (or abuse) a central tenet of popular government, the *rule of law*.

In discussing the foundations of a popular government centered in a legislative authority, Locke claims that the particular form this power takes is (at least superficially) inessential. Locke considers the notion of “democracy” (where the people make the laws directly), “elective monarchy” (where a single individual is popularly elected to exercise the lawmaking power) and “hereditary monarchy” (where the lawmaking power is controlled by a single individual and transferred through family lineage) as all valid institutional alternatives that the people might select in vesting their legislative authority.²² But what is sacred, essential and constant for Locke is that this legislative power must be “derived from the people by a positive voluntary grant and institution” and the legislative power vested in legislators “whom they have chosen, and authorized to make laws for them.”²³ And it is because of this emphasis on the popular source of the

²²STG, P. 68-69.

²³STG, P. 75. Yet there is some debate on this topic, with dissenters claiming Locke only intended to allow the people to choose the *form* of government, but not necessarily the individual legislators. For this perspective, see Wood, Ellen Meikins. “Locke against Democracy.” *History of Political Thought*. Vol. XIII, 1992.

legislative authority (among other, similarly-intended comments) that Locke is typically perceived to be a defender of a *representative* legislature.²⁴

Locke gives particular attention, it is clear, to the idea of a representative legislature. Locke closely considers, for instance, two important – indeed, defining – characteristics of a representative system: the questions of *equal representation* and of *fair electoral processes*. Locke criticizes those systems which, through the “gross absurdities” of custom, have allowed representation to become “very unequal and disproportionate.”²⁵ Instead, Locke insists, the people ought “to have a fair and equal representative” with representation for “all places that have a right to be distinctly represented.”²⁶ Similarly, the process of selecting representatives ought to be fair, with the people choosing their representatives “upon just and undeniably equal measures.”²⁷ It thus seems clear that Locke has in mind, or at least finds most attractive, a legislative body elected by the people, and the legislative authority is granted preeminence at least in part because of its connection to the people through the electoral process.²⁸

Additionally, the nature of the most fundamental task delegated to the legislature, and the means through which it fulfills this task, also justify its status as the supreme institution in government. For Locke, the legislative power is the institution tasked with

²⁴For this interpretation of Locke, see Huyler, Jerome. *Locke in America: The Moral Philosophy of the Founding Era*. 1995. Lawrence, KS: University Press of Kansas; Pangle, Thomas. *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke*. 1988. Chicago, IL: University of Chicago Press.

²⁵STG, P. 82.

²⁶STG, P. 82-83.

²⁷STG, P. 83.

²⁸While it seems beyond dispute that Locke preferred a representative legislature, it is less clear that he supported a wide franchise. For some examples, see Hughes, Martin. “Locke on Taxation and Suffrage.” *History of Political Thought*. Vol. XI, 1990; Ashcraft, Richard. *Revolutionary Politics and Locke’s Two Treatise of Government*. 1986. Princeton, N.J.: Princeton University Press.

framing and delimiting the rights of the people under government, ultimately infringing on the rights of the people in guaranteeing the public good. That is, as the sole institution delegated the power to create and enact *positive law* – to make rules designed to govern the actions of all – the legislature acts as an interpreter of the immutable laws of nature. As the interpreter of the natural law, the rights of all will be impacted most directly by the legislature, and these rights will be made either less or more secure by the actions of the legislative power. The degree to which and the manner in which these rights are circumscribed will, in turn, impact the people’s interests, and reflect the legislative authority’s sympathy with and deference to the public good. The legislative power is, in short, most closely attached to and immersed in the rights, interests and good of the people through its exercise of the most essential type of political power, the making of law.

While the centrality and supremacy of the legislative authority is grounded in the first instance upon this institution’s representative nature and thus its connection to the people, and the legislature’s relationship to individual rights and the public good through its power to create and enact positive law, the salience of this institution also stems from its connection to the *rule of law* through its dominance over the lawmaking power.²⁹ For Locke, man leaves the otherwise peaceful natural state because of the “inconveniences” of this state, where the natural law is unwritten and unclear, and thus more likely to be abused. Within civil government a “known law,” openly enacted, codified in statute and dominant over arbitrary decree, prevents the government from arbitrarily or excessively

²⁹For a nice review of both contemporary and historical works on the rule of law concept, see Scheuerman, William. “The Rule of Law at Century’s End.” *Political Theory*. Vol. 25, No. 5, 1997. See also, Scheuerman, William. *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*. 1994. Cambridge, MA: MIT Press.

infringing on the people's rights. And thus within any popular government, Locke argues, the rule of law is central. In other words, it is essential that a popular government have

promulgated laws; that both the people may know their duty, and be safe and secure within the limits of the law; and the rulers too kept within their bounds, and not be tempted, by the power they have in their hands, to employ it to such purposes, and by such measures, as they would not have known, and own not willingly.³⁰

The importance of the rule of law for Locke is clear. The people understand their rights and duties through clear, stable and openly enacted law, and are able to monitor their representatives and the government as a whole, and pass informed judgment on both, in relation to the content of these laws. Therefore, other types of decisions, for instance executive discretion or prerogative exercised outside the legislature, are not identical to law.

In sum, it is the set of relationships between the people, legislative representatives, the law and the rule of law that serve as the foundation of Locke's model of popular government. Most basically, a government is a popular government so long as it affects an identity between the people and the laws governing them (through expressly chosen representatives), the stable and transparent laws which restrict their rights and mandate duties. Locke reinforces the importance of each of these features of popular government when discussing the reasons a people might employ in seeking the dissolution of a corrupt or unjust government. The alteration of the legislative authority without popular consent, ignorance of the public good in enacted laws, or government by

³⁰STG, P. 80.

arbitrary decree are all indicators that the government should no longer be deemed a popular government, and thus might be dissolved by the people.³¹

But more fundamentally, what can be gleaned from this very brief reconstruction of Locke's thought is, I think, an archetypical normative model of popular government which we might term *representative republicanism*, a system of government centered in a popularly elected legislature (i.e. representative) and founded upon law and the rule of law (i.e. republican). And as we shall see shortly, this model of representative republicanism adequately reflects the institutional foundations and normative ideals of the modern *representative democracy*, and particularly this model as it has been developed in the United States.

I.2. Jean-Jacques Rousseau and the Direct-Participatory Model

Another important normative model of popular government comes from a somewhat unlikely source, or can at least be adequately represented by this source: Jean-Jacques Rousseau. Rousseau defends a type of popular government founded in a relationship between the people, the law and the rule of law – a model of popular government quite similar in its core features to that proposed by Locke, although differing substantially in the procedural and institutional arrangements that underpin it.

The Social Contract, Rousseau's most comprehensive and complete political tract begins by posing a problem and positing a solution to this problem.³² The problem is:

³¹See *STG*, Chapter XIX, “Of the Dissolution of Government.”

³²Rousseau, Jean-Jacques. *The Social Contract*. 1967. N.Y., N.Y.: Pocket Books. (Hereafter SC).

To find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey only himself, and remain as free as before.³³

Rousseau thus identifies his primary objective as directed at unraveling a fundamental metaphysical and moral problem, a problem perennially plaguing political thought and practice: reconciling the equal pre-social freedom of the individual with the practical necessity of government. Like Locke, then, Rousseau is concerned with how individuals can enter into government but still maintain as large a portion of their individual right as possible. It is this difficult dilemma that any political system must confront, and Rousseau argues that his prescribed political system, defining a particular type of relationship between the people, the law and the rule of law, proves essential in resolving this dilemma.

Rousseau's political thought is built upon the foundation of the "general will." Functioning as the framework of a social compact against which all institutions, laws, and political decisions are measured, the general will provides a society with principles of justice balancing the interests of the individual with those of the political association, essentially defending both by demanding extensive political equality and preventing domination at the hands of particular interests.³⁴ It is at this juncture, in discussing the source of a society's general will, that Rousseau introduces and defends his principle of

³³SC, P. 17-18.

³⁴For more complete analyses of Rousseau's general will, see Kateb, George. "Aspects of Rousseau's Political Thought." *Political Science Quarterly*. Vol. 76, No. 4, 1961; Barry, Brian. "The Public Interest." In *Political Philosophy*. Anthony Quinton (Ed.). 1967. Oxford: Oxford University Press.

active sovereignty, the principle describing the role of the people in the most basic and essential act of government, the construction of law.³⁵

Rousseau is clear concerning the purpose and extent of his principle of active sovereignty. In the first instance, the people are to have the equal right to participate in the construction of the general will underlying the social compact. Indeed, the idea of the general will as a solution to the problems Rousseau confronts – reconciling equal individual liberty and political association – is a *non sequitur* if its very genesis undermines the equality of the individual contractor at the moment of political incorporation. Thus, and much like Locke, the people must in the first instance have the right to set the “basic law,” the power to choose the form of government, and to distribute their power to the political institutions of their choosing.

What is more, as the people are responsible for creating the general will, the very foundation of the political system, so too is it the people that are responsible for creating the laws, the rules governing society. In describing the production of law and its application, Rousseau writes unequivocally that “the people, being subjected to the laws, should be the authors of them.”³⁶ By way of further explanation, Rousseau writes that

On this view, we at once see that it can no longer be asked whose business it is to make laws, since they are acts of the general will; nor whether the prince is above the law, since he is a member of the State; nor whether the law can be unjust, since no one is unjust to himself; nor how we can be both free and subject to the laws, since they are but registers of our wills.³⁷

³⁵ For more on this notion of active sovereignty, see Mazrui, Ali A. “Alienable Sovereignty in Rousseau: A Further Look.” *Ethics*. Vol. 77, No. 2, 1967.

³⁶ *SC*, P. 40.

³⁷ *SC*, P. 40.

We recognize through these words two important elements of Rousseau's political thought. First, Rousseau is adamant about the people's right to participate in the processes creating law. As the people must live by the laws, so too must the people be connected to the law by creating it, if they are to remain free. Second, Rousseau, much like Locke, defends the principle of the rule of law, a general, universal law applying to all citizens equally, and applying to and restricting the actions of the government and public officials wielding governmental authority. For Rousseau, the only legitimate government is a republic, and a republican government is, on his definition, one that is "governed by laws."³⁸

Like Locke, therefore, Rousseau defines popular government as a system founded on a relationship between the people, the law, and the rule of law. How can the people be both free and subject to the laws? Or asked differently, how can both the law rule and the people rule? Rousseau's answer to this question is arrived at by giving the people active sovereignty, by making the people solely responsible for the creation and enactment of law. And as long as the law rules, the law produced by the people, the people rule and the government is popular.

This brings us, of course, to the most significant difference between the political thought of Rousseau and Locke. For Locke, representation in the production of law, so long as the people are connected to their legislators by creating the form of government and appointing and removing these legislators, is not only acceptable, but also preferable. Rousseau, on the contrary, is firmly opposed to the notion of representation in the

³⁸SC, P. 40.

production of law, and criticizes this practice forcefully when discussing the English political system:

Every law the people has not ratified in person is null and void – is, in fact, not a law. The people of England regards itself as free; but it is grossly mistaken; it is free only during the election of members of parliament.³⁹

Therefore, for Rousseau law must be ratified by the people, the people must voice their consent or dissent to law directly, must enact laws themselves, and any delegation of authority to representatives to affect this end is unacceptable.

In sum, Rousseau, much like Locke, defines popular government as a connection between the people, the law and the rule of law. Where Rousseau diverges from Locke is in his insistence on the people's inalienable right to participate directly in the processes creating law. It is for this reason that Rousseau is regularly (and perhaps somewhat too simplistically, as we will see below) recognized as the greatest modern proponent of "pure participatory democracy."⁴⁰ But it is nonetheless for this reason that Rousseau might be adopted and used as a proxy towards understanding a *direct-participatory* model of popular government, a type of popular government defined primarily by the people's active participation in the creation of law. And as we shall see shortly, this direct-participatory model adequately represents a model of *direct democracy*, traces of which can still be felt in modern systems like the United States.

³⁹SC, P. 99.

⁴⁰For one example, see Pateman, Carole. *Participation and Democratic Theory*. 1970. Cambridge, U.K.: University of Cambridge Press.

I.3. A Note on Popular Government and Democracy

When discussing theorists like Locke and Rousseau, one must be careful in assigning to their political thought the label “democracy;” I have exercised care here by employing the less loaded term “popular government” to describe the thrust of their ideas. As mentioned above, Locke gives relatively short-shrift to the idea of democracy, saying little about this form beyond its logical status as one of many potential types of legislative institution, and proceeding to advocate representative government. Rousseau talks more about democracy, but is openly hostile to the idea, recognizing it as a form of government where the administrative and executive tasks rest in the hands of the people.⁴¹ This arrangement, Rousseau thinks, is as impractical as it is unwise. In short, neither Locke nor Rousseau identify themselves as “democrats” – at least as each would define the term – and thus we must pay due respect by not attaching this label to their thought haphazardly.

Be this as it may, the generic models of popular government that the political thought of Locke and Rousseau might be adopted to illustrate have come to be recognized as “democracy.” Indeed, the connection between the people, the law (whether generated by the people directly or by their representatives) and the rule of law has proven critical to the self-understanding of modern governments, and specifically to those governments that would declare themselves to be vibrant, well-functioning democracies. And while it wasn’t until later that systems like the United States would openly adopt the

⁴¹SC, P. 69-71.

label of democracy, the discourse of democracy has become inextricably intertwined with these models of popular government.⁴²

This brief note on the relationship between the models we have investigated and democracy is necessary, for as we move forward these concepts will be used interchangeably. That is, the model of a representative-republican system generalized from Lockean political thought above has, for all intents and purposes, now taken the name “representative democracy.” Similarly, the direct, participatory model of government generalized from Rousseau’s political thought is now more typically thought of as “participatory” or “direct democracy.” It is sufficient to say, in sum, that while care must be taken in applying the label democracy to either Locke or Rousseau, we must also recognize that the models these two theorists have provided are now understood as precisely that.

Yet to be sure, this is more than an effort at semantic clarification. On the contrary, as we will see beginning below and continuing throughout the next few chapters, these models of popular government, the means these models have prescribed to connect the people to the law, and to provide for the popular control of decisions made *outside* legislative institutions, have influenced modern democratic systems and provided the framework within which these systems understand their own capacities, limitations, and normative aspirations, and thus prove critical to fully understanding modern democracy.

⁴²For a discussion of the shift from popular government (whether called republicanism, popular government, popular sovereignty, etc) to democracy (focusing on the Anglo-American context), see Saxonhouse, Arlene. *Athenian Democracy: Modern Mythmakers and Ancient Theorists*. 1996. Notre Dame, IN: Notre Dame University Press.

II. Popular Government from Political Thought to Political Practice

Neither the representative-republican nor the direct-participatory model of popular government has wielded exclusive influence over contemporary democracies. To be sure, the representative-republican or representative-democratic model described above has come to dominate, but all democracies have taken portions of this model and combined it with indigenous traditions or disparate ideals in founding their political systems, including features we might identify as more closely associated with a model of direct democracy. As we shall see below in relation to the United States, even a cursory analysis provides ample evidence of the impact these models have wielded in contemporary democratic systems.

II.1. Representative Republicanism in the United States

It seems beyond argument, and almost unnecessary to mention, that many if not most contemporary democratic governments have in fact implemented, and understand themselves through the lens of, the representative-republican model of popular government, the model of representative democracy. Furthermore, many of these systems have openly and proudly proclaimed their connection to the political thought of Locke in defending their constitutional traditions (particularly the Anglo-American countries). For instance, while these systems intentionally implemented and have over time developed distinct features, the model of parliamentary sovereignty in the United Kingdom (i.e. the Westminster model) and the Congressional-republican system outlined in the Constitution of the United States provide different but not dissimilarly structured

interpretations of the representative model, and both have been directly impacted by the political thought of Locke.⁴³

Paying particular attention to the American case, it is clear that the Founders were heavily influenced by a model of representative republicanism. The arguments employed to defend the Constitution of 1787 by the most prominent founders make this clear. Recall, for instance, the words of *Federalist 51* regarding the supremacy of the legislature in the new federal government: “It is not possible to give each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates.”⁴⁴ Recall also that Article Four, Section Four of the Constitution extends this argument to apply to the states, demanding that every state in the new union was to adopt “a republican form of government,” and by this was meant a representative government based in law and the rule of law.⁴⁵

Further advocating this model of popular government, the legislative authority was to dominate because, as *Federalist 39* instructs, republican government is defined as one “which derives all its powers directly or indirectly from the great body of the people.”⁴⁶ Of course, the institution that was to be most closely linked to the people through direct election was Congress (and more specifically, until 1913 the House of Representatives). Because of its size, mode of election and more “populist” requirements

⁴³For some works emphasizing the importance of Locke’s political philosophy to American political thought, see: Hartz, Louis. *The Liberal Tradition in America*. 1955. N.Y., N.Y.: Harcourt Brace Jovanovich; Pangle, *The Spirit of Modern Republicanism*. But for the best direct evidence of this, see Madison’s defense of a republican system outlined in “Federalist #10,” and compare the system of government highlighted therein with the Lockean model. Yet debate surely remains. Gibson, Alan. “Ancients, Moderns and Americans: The Republicanism-Liberalism Debate Revisited.” *History of Political Thought*. Vol. 21, No. 2, 2000.

⁴⁴Hamilton et. al, “Federalist #51,” P. 338.

⁴⁵*The Constitution of the United States of America*. 1787. N.Y., N.Y.: McGraw Hill. [P. 595].

⁴⁶Hamilton, et. al. “Federalist #39,” P. 243.

for eligibility, the House of Representatives was to have “an immediate dependence on, and an intimate sympathy with, the people.”⁴⁷ In short, the representative legislature is supreme in order to ensure popular government, as it is this institution that is most closely connected to the people.

Moreover, the primary means through which Congress was authorized to utilize its power, and thus to function as the predominant institution in the new federal system, was through the enactment of law. It is certainly not coincidental then, given the centrality of law and the rule of law within the guiding model, that the Constitution literally begins in Article One, Section One with the assignment of this most essential power to Congress: “All legislative powers herein granted shall be vested in a Congress of the United States,” including the power to “make all laws which shall be necessary and proper for carrying into execution the foregoing powers.”⁴⁸ Congress’ exclusive power to make law, and the rule of law’s precedence over all other modes of power, cements this institution as the centerpiece of the federal government in the United States.

It is easy to recognize, even through this very brief analysis, that representative republicanism has played a prominent role in the creation of the system of representative democracy in the U.S., at the local, state and federal levels of government.⁴⁹ Yet as is the case with most all representative democracies, the grip of this model has not been

⁴⁷Hamilton, et. al. “Federalist #52,” P. 343.

⁴⁸*The Constitution of the United States of America.* Pp. 587-588.

⁴⁹It is important to note here that if one questions the Founders’ reliance on Locke, another important influence on their thought – Montesquieu – defended a similar interpretation of republicanism, as well as a similar understanding of how this system intersected with administration (which we will discuss below). Montesquieu, Charles de Secondat. *The Spirit of the Laws.* 1989. N.Y., N.Y.: Cambridge University Press. [Book II, Chapter II].

absolute, and in the U.S. diverse traditions – including features of direct democracy – have also exercised considerable influence.

II.2. Elements of the Direct-Participatory Model

If evidence of the impact of the representative-democratic model on the political system in the United States is unequivocal, it is equally fair to say that similar evidence of the impact of a direct-democratic model of popular government, at least at the moment of founding, is unavailable. If anything, there is direct evidence that this type of political practice was *not* received favorably. James Madison, for instance, is clear in his objection to systems of “pure democracy;” this type of system, history evidenced to Madison, was least able to deal with the “deleterious” effects of faction, the tendency of particular groups to seek their own interests and abuse the rights of others in the process.⁵⁰ Yet both before and after Madison, direct democracy has had some traction in the U.S., and Madison would surely be distraught to discover that elements of direct democracy have found an enduring place within the system.

If representative democracy is and has been the dominate force in the United States, elements of a more direct form of democracy have always been a secondary one. In early colonial America, going back to the first settlements in New England, primitive conditions, real equality and mutual need resulted in a system of direct-participatory decision making, a system that has endured to the present day. The town hall meeting system at the local level of government in the northeastern part of the United States

⁵⁰Hamilton, et. al. “Federalist #10,” P. 58.

provides some of the most often cited evidence of a type of direct democracy in action.⁵¹

In these town hall meetings, a range of issues, including local initiatives, major infrastructure projects and budgetary decisions are decided directly by the citizenry.

Additionally, at both the state and local levels of government across the United States processes that can only be described as derivative of a model of direct democracy continue to exert influence. Some of these include the processes of legislative initiative, referendum and the recall of elected officials.⁵² The process of legislative initiative, where citizens vote to propose a new statute to be formally adopted either directly or by an elected legislature later, remains a ubiquitous form of direct democracy in the United States. The process of referendum, with citizens voting directly to adopt a new statute or to amend their constitution, is another example. Furthermore, in many states elected public officials accused of wrong-doing, or simply deemed unfit to maintain their positions, are subject to a recall vote of the people, as opposed to the impeachment procedures of an elected legislative body. In all of these matters, the direct voice of the citizens, and not the judgment of their elected representatives, is deemed necessary, and thus a type of direct democracy endures in these instances.

It is clear, then, that direct democracy, while not the dominant force in the U.S., still wields considerable influence, and informs part of our understanding of democracy generally.⁵³

⁵¹For a classic example, see Mansbridge, Jane. *Beyond Adversary Democracy*. 1983. Chicago, IL: University of Chicago Press. See also, Zimmerman, Joseph. *The New England Town Meeting: Democracy in Action*. 1999. Westport, CT: Praeger Publishing.

⁵²Cronin, Thomas. *Direct Democracy: The Politics of Initiative, Referendum and Recall*. 1989. Cambridge, MA: Harvard University Press.

⁵³And as we shall see shortly, there are also practices informed by a direct model of democracy guiding some of the bureaucratic rulemaking processes in the U.S. See Chapter Four.

III. Popular Government and the Control of Administrative and Executive Discretion

Above, we investigated the political thought of John Locke and Jean-Jacques Rousseau, two theorists advocating models of popular government that have wielded considerable influence over contemporary democratic systems, models that might be usefully adopted as proxies for the representative and direct models of democracy. For both Locke and Rousseau, popular government is defined as an identity and connection between the people and the laws, the rules that infringe on the people's rights and liberties. And while Locke and Rousseau differ on the institutional arrangements prescribed for realizing popular government, these models offer a consistent image of the relationships essential to such a system.

Yet while committed to the idea of popular government as a connection between the people, the law and the rule of law, both Locke and Rousseau also recognize the need for institutions to compliment the legislative authority, and at times to interfere with or even transform this relationship – *executive and administrative institutions*. These institutions, both thinkers recognize, are essential for several reasons: to execute and enforce the law, to supplement the law when it “stands silent” (i.e. discretionary authority), and to circumvent the law through “emergency powers” when the good of the community demands it (i.e. prerogative). Nevertheless, while both understand the importance and even the necessity of these institutions, both also recognize the problems inherent in delegating authority to these institutions within a popular system, and both thus introduce controls against the abuse of executive and administrative power, *democratic modes of control, accountability and oversight* capable of reasserting the link between the people and the law essential to popular government.

Just as Locke and Rousseau's models of popular government were shown to inform ideas about and usefully reflect the foundation of modern democracies, so too should these models be recognized to inform contemporary ideas about *democratically* controlling decisions and rules made by executive and administrative institutions. In this section, we will investigate the means both the representative-republican and the direct-participatory models integrate for controlling the potentially detrimental effects of executive and administrative institutions.

III.1. Representative-Republicanism and Administrative Control through Legislative Oversight

Above, we examined John Locke's model of popular government. Founded on a connection between the people, elected representatives, the law and the rule of law, the realization and integrity of these relationships was argued to be essential to realizing and maintaining popular government. Yet like any modern political theorist worth our while, Locke recognizes that alone a legislative authority may be insufficient to guarantee the safety, security and good of the community and the individuals within it. Because these values are what individuals turn to civil government to acquire, a system which insufficiently protects these goods is a *non sequitur*. For this reason, within Locke's political thought there is recognized the need for executive and administrative institutions to administer, enforce and realize the laws of the community – and at times exercise discretion and prerogative to interpret or contravene these laws.

For Locke, the basic purposes of executive and administrative institutions are straightforward, and, in an at least superficial paradox, are argued to provide important reinforcement and support for a popular government by helping to ensure the public

good. In the first instance, the executive power is needed to carry the positive laws of the legislature into effect, to act as, simply enough, the “executor” of the laws and the guarantor of their enforcement. Because Locke insists that the legislative authority need not – and practically speaking, cannot – “be always in being” (because of its plural nature and other practical considerations), it is an executive authority that should be charged with the administration and enforcement of the laws.⁵⁴ While lawmaking is not a constant task, the laws do need “perpetual execution,” and this necessitates and justifies a distinct power of this kind.⁵⁵

Furthermore, beyond responsibility for the administration of the laws, Locke concedes that several things should “be left to the discretion of him that has the executive power in his hands,” because of the likely emergence of circumstances that the legislature has not or could not have foreseen.⁵⁶ For instance, in cases where “the municipal law has given no direction,” the executive should have the authority to utilize discretion in applying the law to a particular case.⁵⁷ In short, the executive authority, seeking the good of the community, can exercise independent judgment to apply the law to a particular circumstance the legislative authority has not recognized, and in that way realize the legislature’s goals and intent – or even expand upon this intent – in applying the law.

Finally, in times of crisis or emergency, where the public good is at stake and the legislature has not acted previously or has acted in a way that (under these unforeseen

⁵⁴ STG, P. 76. While Locke has little to say about a broader administrative system, it is clear that he envisions one. It is a shame, however, that Locke did not go into greater depth about what he terms “ministerial and subordinate powers” within the executive branch.

⁵⁵ STG, P. 76.

⁵⁶ STG, P. 84.

⁵⁷ STG, P. 84.

circumstances) now actually undermines the public good, the executive power should in fact be empowered to act contrary to the law. In these special circumstances, an executive authority not empowered to exercise prerogative – to act unhampered by rules or create new rules nullifying others – would contradict the good of the community, and thus in these situations, Locke instructs, “it is fit that the laws themselves should...give way to the executive power.”⁵⁸ It is for all of these reasons that Locke finds executive and administrative institutions necessary, and finds them to be both commensurate with and complimentary to popular government.

Yet as a defender of popular government, Locke understands the validity of the arguments presented against the legislature delegating discretionary authority and prerogative to an executive power. In the hands of “good princes,” this power cannot be too expansive, and it often grows during these periods. Yet in the hands of a bad prince, one who would “make or promote an interest distinct from that of the public” by abusing discretion and prerogative and undermining the law, this power must be checked and controlled. It is for this reason that, both in administering the law and in utilizing discretion and prerogative through delegated authority, the executive authority will always remain a limited institution, an institution subservient *particularly* to the legislative authority and subject to strict legislative accountability and oversight.

In the first instance, Locke proposes a system where the executive relies on the legislative authority for her tenure in office, and where the executive “may be at pleasure

⁵⁸STG, P. 84. For some works examining Locke’s principle of executive prerogative, see Pasquino, Pasquale. “Locke on King’s Prerogative.” *Political Theory*. Vol. 26, No. 2, 1998; Fatovic, Clement. “Constitutionalism and Contingency: Locke’s Theory of Prerogative.” *History of Political Thought*. Vol. 25, No. 2, 2004.

changed and displaced” by the legislature.⁵⁹ Anticipating the modern parliamentary system, Locke thinks that so long as an executive power is selected by and therefore accountable to the legislative authority, executive prerogative and discretion can be preemptively controlled. Further, any breaches of the trust placed in the hands of the executive can be righted by the legislative authority through the removal of this executive from office (through impeachment, or a “vote of no confidence”), and the transfer of this trust to a new official.

Additionally, Locke differentiates the decisions of the executive and administrative authorities from positive laws created in the legislature. That is, these decisions, whether rendered to implement law to a previously unforeseen situation or to counteract it, do not assume the status of law within Locke’s scheme, and are effective only until “the legislative can conveniently be assembled” to either approve or reject this act of independent authority.⁶⁰ In this sense, Locke is clear that discretion and prerogative are not replacements for law, but only temporary measures serving the public good. But once rendered, these decisions must pass the scrutiny of the legislative authority, which is empowered to render a final determination. If accepted, the act of discretion or prerogative becomes law, and a process more agreeable to the connection between the people, the legislative authority and the law underpinning popular government has occurred. And through all of these mechanisms, all of which together render the executive and administrative authorities “visibly subordinate and accountable to” the

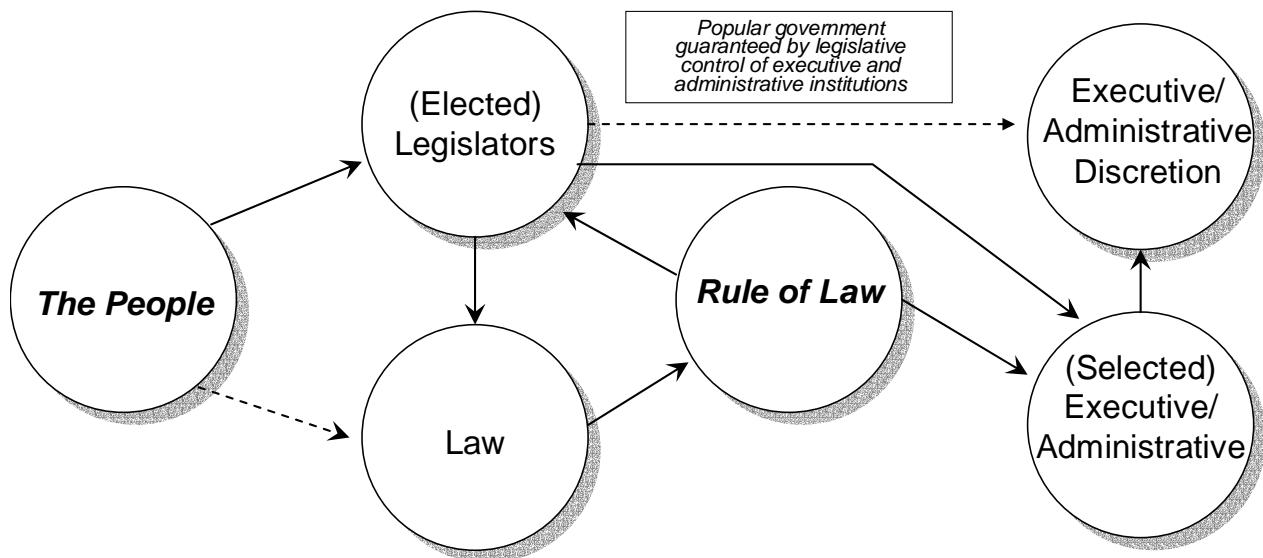
⁵⁹STG, P. 79.

⁶⁰STG, P. 90.

legislative authority, Locke thinks, instances of executive and administrative power can be controlled and rendered acceptable within his popular system.⁶¹

In the end, the flow of authority in Locke's political thought, represented graphically below in Figure One, provides for mechanisms to guarantee popular government in the face of executive and administrative authority, and instances of discretion and prerogative. Given the centrality of the law and the people's connection to the law through elected representatives in Locke's model of popular government, it is essential that any interruption of this relationship be controlled specifically by the legislative authority. That is, by giving the power to control executive and administrative institutions primarily to the legislature, the connection between the people and the law underpinning popular government is reasserted.

Figure One:
Flow of Authority: Popular Government and Executive/Administrative Authority (Locke)



⁶¹STG, P. 79.

Given the influence of this model of popular government on modern representative democracies, it is not surprising that *both* the relationships Locke suggests towards realizing popular government *and* the means for controlling executive and administrative discretion within such a system have been highly influential. Indeed, in many ways this basic Lockean scheme for controlling executive and administrative discretion – making the executive and administrative accountable to the legislature, granting the legislature primary oversight power, and ultimately making these decisions distinct from and subsidiary to laws passed within the legislature – continues to define strategies for legislative control over executive and administrative institutions. And while we will expand on this theme over the next few chapters, suffice it to say that modern representative democracies rely heavily on this model to control acts of administrative discretion, and render this practice commensurate with popular government.

III.2. Direct Control through Public Participation and Accountability

As we discussed above, and much like Locke, Rousseau's model of popular government emphasizes the relationship between the people, the law and the rule of law. Going a step beyond Locke, Rousseau finds the intensity of this relationship so essential that he advocates direct citizen participation in the construction of law as an indispensable element of popular government, rejecting any form of representation in this process. It is for this reason that Rousseau is typically understood as one of the more radical modern proponents of direct or participatory democracy.

Be this as it may, while the significance of active sovereignty in creating the general will and the law in Rousseau's political thought cannot be overstated, it would be

inaccurate to understand this procedure as representative of the universe of decision-making within his political system. For Rousseau, the production of both the general will and the laws represent situations where generality must reign, where the rights and good of the public as a whole must take precedence over particular interests. Yet not all political decisions must – nor in practice can – attain this level of generality, as Rousseau’s discussion of forms of government, and particularly his examination of democracy and administration, makes clear.

In Book Three, Chapter Four of *The Social Contract*, Rousseau proclaims his opposition to “real democracy” as a system that has never existed and “never will exist.”⁶² For Rousseau, democracy is defined as a political system where the people themselves govern – that is, act as the administrative and executive – and the many rule the few. Rousseau is clear that some form of government other than democracy, charged with putting motion behind the general will and the laws and rendering *particular* decisions, is both necessary and desirable. Rousseau examines several possible governmental forms – democracy, aristocracy and monarchy – and several possible deviations from these broader categories, and ultimately sides with “elective aristocracy” as the most desirable form.⁶³ For Rousseau, elective aristocracy as a brand of elite administration fulfills both a logical and a practical purpose within his system.

Practically speaking, elite administration is desirable both because of the condition of man (a condition of general debasement), and because of the benefits of a meritorious, full-time administrative corps governing in the interests of society. The day-

⁶²SC, P. 70.

⁶³SC, P. 73.

to-day operations of government are best undertaken by a group of elite administrators, Rousseau argues, as this group is best able to accomplish these tasks with “probity, intelligence and experience,” and because of these qualities “assemblies are more easily convoked, affairs are better discussed and are dispersed with greater order and diligence.”⁶⁴ For these reasons, Rousseau flatly rejects the inflation of active sovereignty to imply active sovereignty *in governance*: “We should not uselessly multiply means, nor do with twenty thousand men what a hundred chosen men will do still better.”⁶⁵

What is more, elite administration is logically necessary to the extent that the people as the sovereign cannot produce the particular acts necessary for governmental action without jeopardizing the universality of the general will.⁶⁶ Rousseau makes a distinction between laws as general conventions generated by the people in conformance with the general will and “decrees” as public policies with a particular object (and thus beyond the scope of the sovereign people) created by the administrative elites. In short, because laws must be immune to all sources of particularity so as to remain uninfluenced by the corrosive force of interest group preference, decrees must remain out of the hands of the people. And given that most issues involving the “day-to-day” tasks of governance will require particular judgment, such as the application of general laws to specific cases or extraordinary situations where the law stands silent and executive discretion is required, much authority will be wielded by the government through the issuance of decrees.

⁶⁴SC, P. 73.

⁶⁵SC, P. 73. For a discussion of the importance of authority in the works of Rousseau, see Shklar, Judith. “Rousseau’s Images of Authority.” *The American Political Science Review*. Vol. 58, No. 4, 1964; Shklar, Judith. *Men and Citizens*. 1969. London, England: Cambridge University Press.

⁶⁶SC, P. 59-60.

It is clear, then, that Rousseau has in mind a system of government based on – if not dominated by – the independent prerogative and discretion of administrative elites, elites assigned the task of deriving particular decrees from the general laws of the community. Yet if advocating extensive administrative power and regular acts of discretion through decree with little popular authority *within* these processes, it is fair to ask: Is there popular government within Rousseau’s political system, or for that matter, does the law truly rule?⁶⁷

There is something more to Rousseau’s political thought, however, that requires attention before dismissing its fidelity to popular government. Beyond his insistence that active sovereignty determines the general will and the law, and remains largely passive otherwise, Rousseau intends it to be a negative power preventing excess within the executive and administrative.⁶⁸ That is, Rousseau understands active sovereignty as a check on executive authority, a means for controlling the potential excesses of these elites born of usurpation or disregard for the law or the public good. Rousseau’s discussion of the “periodical assemblies” he deems essential to his popular system makes this purpose of active sovereignty clear.

Having gathered together and exercised active sovereignty in the construction of the general will and the law, Rousseau contends that it is “not sufficient that the assembled people should have once fixed the constitution of the State by giving their sanction to a body of laws;” on the contrary, the people should also be periodically

⁶⁷This interpretation of Rousseau is consistent with Shklar’s, who recognizes in Rousseau’s system that in many ways “the Sovereign [i.e. the citizenry] does very little.” Shklar, *Men and Citizens*. P. 118.

⁶⁸Fralin, Richard. “The Evolution of Rousseau’s View of Representative Government.” *Political Theory*. Vol. 6, No. 4, 1978.

assembled at “regular intervals.”⁶⁹ During these assemblies, Rousseau argues, active sovereignty in the people is reestablished, and the “whole jurisdiction of the government ceases, the executive power is suspended, and the person of the meanest citizen is as sacred as the first magistrate.”⁷⁰ These periodical assemblies, Rousseau insists, are “the shield of the body politic and the curb of government.”⁷¹

The purpose of these assemblies is to allow the people-as-legislators to hold the administrative and executive accountable, to determine whether its actions have counteracted the laws of the people or the public good. In other words, these assemblies provide an opportunity for the people to render judgment on the independent decisions of the executive, and perhaps reverse these decisions.⁷² Decrees and legislative implementation are always temporary, Rousseau insists, and do not attain the status of law; in the words of Rousseau, they are “an act, not of sovereignty, but of magistracy.”⁷³ Furthermore, the people have the power to either change the form of government or remove the administrators and replace them with new officials. Like Locke, then, Rousseau elevates the legislative power – in this instance, the people acting directly – as the last defense against executive authority, preserving the preeminence of this power and the people over the executive and administrative.

⁶⁹SC, P. 95.

⁷⁰SC, P. 97.

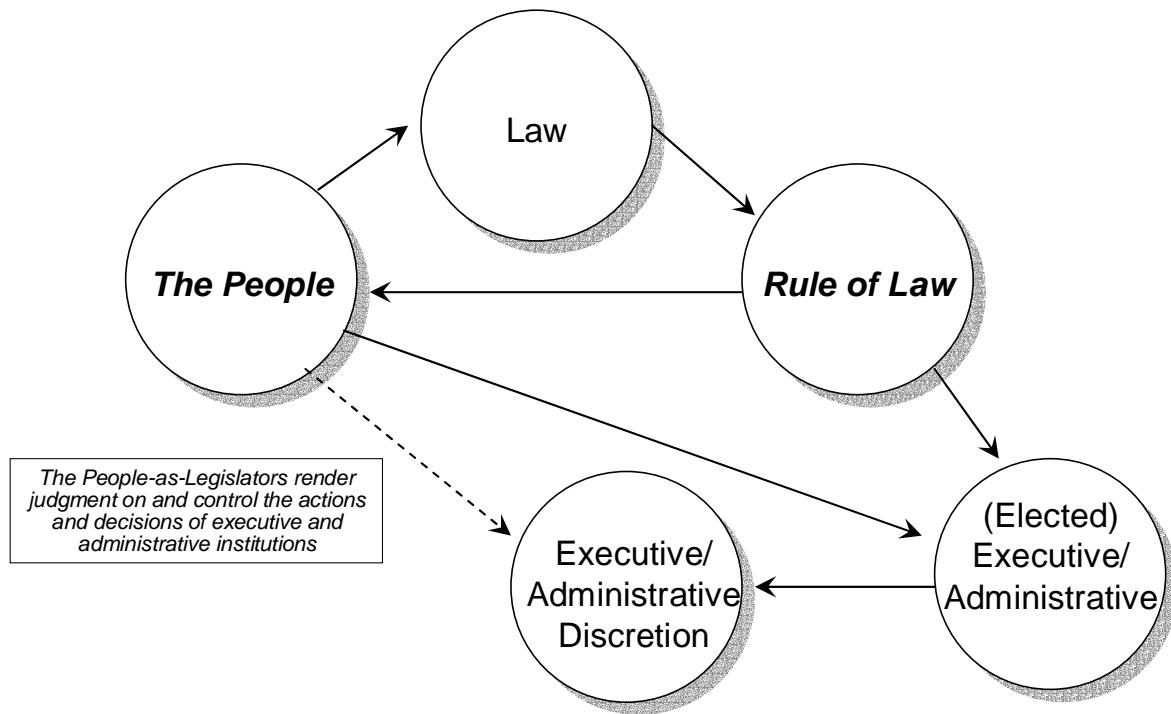
⁷¹SC, P. 97.

⁷²With this purpose in mind, Rousseau’s assemblies are to be opened with two questions voted on separately by the citizens. First, “Does it please the sovereign to preserve the present form of government?” and second, “Does it please the people to leave its administration in the hands of those who are actually in charge of it?” SC, P. 106.

⁷³SC, P. 40.

In the end, the flow of authority in Rousseau's political system, represented graphically below in Figure Two, gives preeminence to the legislative power of the people in framing popular government. Rousseau is a strong advocate of elite administration, however, both as a practical and a logical necessity within his political system, and he goes to considerable lengths to reconcile the tension between these two centers of power. This reconciliation is achieved in several ways, but ultimately reduces to the supremacy of the people to make the laws, and the power of the people – as the lawmakers – to critically examine and potentially reverse the decisions of the executive and administrative systems. The legislative authority has the right to examine administrative decrees for their fidelity to the law, remove and replace administrators if they so choose, and even change the form of government itself; all acts of the elite administrators are temporary before the citizen-legislators. In this way, the authors of the law become its defenders, the connection between the people and the law is reasserted, and popular government is preserved.

Figure Two:
Flow of Authority: Popular Government and Executive/Administrative Authority (Rousseau)



IV. Drawing Enduring Lessons from Historical Foundations

Why should we begin an investigation of the problems *contemporary* bureaucratic systems pose for *contemporary* democratic systems with a (lengthy) examination of these *historical-theoretical* models of popular government? Such an exercise, to be sure, has inherent limitations; Locke and Rousseau could not have imagined, or at least did not clearly illustrate, a massive, complex bureaucratic system, the type that now occupies a prominent place within contemporary democracies, and thus they could not have adequately accounted for the effect these institutions might have had on popular government. These theories, it would therefore seem, have only limited applicability to the problem at hand. Yet these very limitations, or so I will argue below, justify a return

to these fundamental models of popular government and democracy, particularly since these models continue to help guide *both* our understanding of democracy *and* our strategies for resolving the tensions between bureaucracy and democracy (the latter to be more carefully developed in Chapter Four).

But in a broader sense, there are several important lessons we might take away from this investigation, lessons that will serve us well as we proceed forward to address the tensions between bureaucracy and democracy.

IV.1. Popular Government, Democracy and Law

Modern democratic systems are founded upon models of popular government and law, models that might differ in how they arrange institutions and affect connections between the people and the law, but which fundamentally agree on the essence of this form: for a government to be popular, the people must be connected – whether personally or through expressly chosen representatives – to the rules that infringe on their rights and liberties. Going back in history to the Athenian constitution under Solon (circa 594 B.C.E.), when the *ekklesia of demes* (i.e. the assembled Athenian tribes) was first empowered to codify all statutes into law, an identity between the people and the law has persisted as a defining characteristic of democratic government.⁷⁴

This emphasis on lawmaking, law and the rule of law has certainly carried-over into modern democracies, and these concepts continue to provide essential standards (and perhaps the most essential standards) for measuring the “democraticness” of political

⁷⁴For a nice sourcebook on the political history of Greece, see Dillon, Matthew and Lynda Garland. *Ancient Greece: Social and Historical Documents from Archaic Times to the Death of Socrates*. 2000. N.Y., N.Y.: Routledge.

systems today. In short, these two models, features of both being visible in modern democratic systems like the United States, define both the empirical reality and the normative ideal of the modern democratic system; these models guide both what democracy is thought to be and what, all other things being equal, democracy ought to be. And it is from this, I think, that we might draw our first important lesson in addressing the nature of the relationship between contemporary bureaucracy and democracy.

An investigation of the historical-theoretical models of popular government underpinning modern democracies helps us get a firm grasp on the essence of democracy, and through this a more precise understanding of the type of tensions that might exist between it and bureaucracy. However, as one scholar has correctly noted, it is not uncommon within analyses of the tensions between bureaucracy and democracy to find democracy either undefined, or defined so broadly as to be meaningless.⁷⁵ What is more, studies of this kind rarely return to essential foundations, instead relying on one of the many diverse contemporary understandings of democracy to guide them. Thus these models, in that they inform both the norm and the reality of contemporary democracies to a large extent, and thus present a clearer understanding of the well-springs of democratic norms, provide us with a reasonably stable place to begin.

What is more, by having this concrete understanding of democracy at our disposal we might better identify the particular type of bureaucratic practice that may prove most damaging or contradictory to our democratic norms. Indeed, the relationships central to democracy defined above (although rarely stated explicitly) have led some to recognize

⁷⁵Kahan, Dan M. "Democracy Schmemocracy." *Cardoza Law Review*. Vol. 20, No. 3, 1999. While I agree with Kahan's analysis in this sense, I disagree with the implications he takes from it – that democracy, because often ill-defined or defined all-inclusively, provides a poor perspective from which to critique bureaucratic practices. Instead, one must set a firm understanding of democracy, one that proves as universally applicable as possible.

one particular form of bureaucratic power as most in tension with democracy: if democracy is defined as a connection between the people and the rules that govern them, does not the existence of bureaucratic agents authorized to *exercise discretion in interpreting the law and creating universally binding rules* undermine democracy, given that these bureaucrats (and the rules they render) cannot claim the same kind of connectedness with the people as elected representatives, or the people acting on their own behalf? With this in mind, beginning in the next chapter, and guided by this now-settled understanding of democracy, we shall investigate bureaucratic rulemaking as one bureaucratic function that would indeed seem to most directly challenge any model of democracy centered in a connection between the people and the law.

IV.2. Administration and Popular Government

The second point we might glean from this examination of historical models of popular government involves a basic idea not to be forgotten, but one often overlooked nevertheless: for theorists like Locke and Rousseau, a popular government and robust executive and administrative institutions *were not* deemed to be inherently contradictory or paradoxical. In fact, for these theorists delegating some authority to executive and administrative institutions – even if this means weakening the law or the rule of law – is essential towards guaranteeing a basic goal of any just government, popular or otherwise: realizing the public good. It was for precisely this reason that Locke employed, as have other defenders of popular government centered in law and the rule of law, the principle of *salus populi suprema lex* in defending executive and administrative discretion and

prerogative – a phrase meaning, “the good of the public is the highest law.”⁷⁶ In other words, if at times an executive or administrative institution is better suited to realizing the public good than the people or a popularly elected legislature, it should be given the power to do so, *even if* this power contradicts in principle the connection between the people, the law and the rule of law.

For Locke and Rousseau both, then, popular government and the public good were thought to *both* be served by a robust administrative system. The same is true today, and this lesson should not be forgotten. Democracy and bureaucracy *are not* inherently antithetical or paradoxical, at least to the extent that these institutions are both justified as instrumental in realizing the “public good” (admittedly a notoriously difficult concept to define). Yet this *only* holds true so long as these institutions and the decisions they render remain dependent upon and accountable to the popular controls instituted to check their authority. And this brings us to another important consideration.

IV.3. Popular Government and Administrative Control

There can be little argument that, given the emphasis on legislatively-made law and the rule of law, the models of popular government examined above tolerate administrative and executive discretion only with a caveat: executive and administrative institutions must be strictly checked and controlled, and must be accountable first and foremost to *those institutions responsible for the creation of law*. The modes of control differ between the two models we have examined, of course, just as these two models

⁷⁶STG, P. 82. For a discussion of this principle as used by Locke and the impact this principle had especially on the American Founders, see Fatovic, Clement. “Constitutionalism and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives.” *American Journal of Political Science*. Vol. 48, No. 3, 2004.

advocate alternative methods for connecting the people and the law. But the basic principle remains the same: as executive and administrative institutions present the danger of ignoring the intent of the law or the goals of the legislature in enacting the law, or even contravening the law to the detriment of the people, so too should the lawmakers be primarily responsible for standing over and controlling these institutions. And only if these particular actors are responsible for exercising this power can the connection between the people and the law be safeguarded and reaffirmed in the face of this kind of authority. In short, while executive and administrative institutions might at times better serve the public good through the delegation of authority, the law and the lawmakers are paramount, and must remain paramount if the connection between the people and the law defining democracy is to persist.

Following from this lesson, over the next two chapters we will look carefully at the means modern democracies have implemented to control delegated administrative power, and particularly the controls designed to reassert the link between the people and the law essential to democracy. And just as the two models examined above have and continue to exert influence over our contemporary understanding of democracy, so too do we find that the strategies these models prescribe for democratically controlling and holding accountable administrative power continue to prove relevant (see Chapter Four). In the end, the effectiveness of these strategies – wherein either the people directly or elected legislators check administrative discretion – is fundamental to understanding the ability of modern democratic systems to maintain the essence of democracy in the face of administration, and to resolve the apparent tension between these two values.

IV.4. Lessons and Lingering Questions

“Of the ministerial and subordinate powers in a commonwealth, we need not speak, for they being so multiplied with infinite variety, in the different customs and constitutions of distinct commonwealths, that it is impossible to give a particular account of them all. Only thus much, which is necessary to our present purpose, we may take notice of concerning them, that they have no manner of authority, any of them, beyond what is by positive grant and commission delegated to them...” Locke, *STG*, P. 79.

I began this section by asking a simple question: why return to the political thought of Locke and Rousseau, and the normative models of democracy these theorists might be adopted to represent, in addressing the problems of modern bureaucracy within a democratic system? In the first instance, I have answered this query by showing some of the ways these models can guide an investigation of the tensions between bureaucracy and democracy. Above, I have highlighted some important lessons gleaned from this examination, lessons that will guide much of the rest of this dissertation.

But nonetheless, as the above quote suggests, Locke paid only scant attention to the particularities of an administrative system within his political thought, instead relying on a general outline of “ministerial and subordinate powers” and broad strategies for how these were to be controlled and held accountable (Rousseau is similar in this way). It would seem, then, that the relevance of either of these theorists in addressing the tensions between contemporary bureaucracy and democracy is limited. Yet this fact does not belie this exercise, but instead makes it necessary.

If these chapters have shown us anything it is that, first, we have relied and continue to rely on normative models of democracy connecting the people and the law handed-down from theorists like Locke and Rousseau; and second, as will be shown more clearly over the next two chapters, we have relied and continue to rely on the

general strategies prescribed by these models for democratically controlling administrative systems. Our understanding of democracy demands that these forms of administrative control – with the people or their legislators primarily responsible for checking delegated administrative authority – take precedence, as the reassertion of a link between the people and the law depends on it.

But we are nonetheless left with some important questions, questions which bear directly on our understanding of democracy and the ability of our models to confront bureaucratic discretion through delegated administrative authority. To be sure, Locke and Rousseau advocated delegation to these institutions only so long as popular controls were in place; these popular controls resolved any internal tension between bureaucracy and democracy. But given that these two theorists *did not* fully recognize or confront a bureaucratic system as expansive as our own, would Locke and Rousseau continue to support so completely the notion of delegating authority to these institutions? Or would they, instead, find necessary *more expansive or alternative* popular controls? Moreover, have these models, given the relatively scant attention paid to the potential growth of administrative authority, *adequately prepared us* to maintain popular government in the face of these institutions through the means prescribed? It is these questions that will, at least in part, inform the remainder of this dissertation.

Chapter Three: Bureaucracy and Bureaucratic Rulemaking: Definition, Processes-and Problems for Democracy

Introduction

In this chapter, we transition from a focus on historical-theoretical models of democracy to a discussion of the modern public bureaucracy. There are a variety of vehicles through which public bureaucracies exercise power and authority. In this chapter, bureaucratic rulemaking is examined as one particularly important example of an exercise of administrative discretion through delegated authority, a type of power that has been seen to interfere with the basic relationships underpinning a democratic system – the relationship between the people, the law and the rule of law.

Towards fully understanding the significance of bureaucratic rulemaking, this chapter will begin with a brief outline of the nature and purpose of contemporary bureaucratic administration. While similar to the more generic idea of administration defended by earlier theorists, the modern bureaucracy is distinct in both its scope and organization, and thus some expanding and clarifying comments are needed. The chapter proceeds by defining bureaucratic rules, provides a broad outline of the rulemaking process, and examines rulemaking's historical growth in the United States. Bureaucratic rulemaking, as this analysis will evidence, is an essential form of bureaucratic discretion,

one that has grown in both scope and scale over the last century, and one that might and has been seen to significantly challenge authorized legislative bodies as *the* lawmaking authority in modern democracies – and in the process challenge our understanding of democracy.

This chapter concludes with some comments on the tension between the core set of relationships defining democracy outlined in the last chapter and processes of bureaucratic rulemaking. While processes of bureaucratic rulemaking are perhaps greater in scope and scale than anything our models of democracy were designed to bear, and while some have seen bureaucratic discretion through rulemaking as fundamentally changing our form of government or signaling the death of law and the rule of law, I will argue that in fact these processes *do not* fundamentally undermine or conflict with our understanding of democracy as defined in the connections between the people, the law and the rule of law. However, this claim is predicated on the idea that strategies for reasserting the link between the people and the law through democratic modes of bureaucratic control are present and effective, a claim which necessitates an analysis of these modes of control (Chapter Four).

I. Bureaucracy

In a democratic system, law is the most essential mode of political power. As discussed earlier, it is the law that infringes on the rights and liberties of the people, limits and delimits what the people can and cannot do, and thus the nature of law – who makes the law, what is the status of law within the political system, and so forth – is central to defining a government as democratic. A connection between the people and the law –

whether affected through elected representatives or by direct-democratic means – and the rule of law over all other modes of power has proven to be an enduring standard of democracy.

Yet as we learned in the last chapter, even Locke and Rousseau, two theorists concerned first and foremost with the security of the people and the maintenance of right realized through popular government and the preeminence of the law, recognize the need for robust executive and administrative authority. In a popular system centered in a supreme legislature, executive and administrative authority provide active and energetic forces ideally suited for implementing and enforcing law, institutions authorized to at times more clearly define, build upon or even contravene the law when the public good demands it – *salus populi suprema lex*. In short, Locke and Rousseau recognize and emphasize the importance of the effective administration of the laws, and also envision instances when executive or administrative discretion and prerogative might be necessary to realize the public good. And these age-old justifications for executive and administrative authority continue to largely define the rationale and purpose of the modern bureaucratic system.

Bureaucratic administration, realized with the creation of the administrative or “executive agency,” sometimes referred to as the bureaucracy or public bureaucracy, is a central feature of modern politics and government.⁷⁷ Similar to the Weberian definition of bureaucracy discussed in Chapter One, the goal of these complex, merit-based, centralized, internally differentiated and hierarchical administrative agencies within

⁷⁷For an excellent and comprehensive overview of the purposes, processes and functions of the modern bureaucracy, see Wilson, James Q. *Bureaucracy: What Government Agencies Do and Why They Do It.* 1989. N.Y., N.Y.: Basic Books, Inc.

contemporary democracies is to put motion behind the laws enacted by the legislative branch of government, to implement these laws. While legislative bodies are deliberative and reflective in their activities, the bureaucracy – much like the broader executive branch of government – is active, instrumental and purposeful. If legislative institutions are the brains of a government, bureaucracies are its eyes, ears, hands and feet, the perceptive faculties and the body that carry the brain to its objective.⁷⁸

To be certain, the significance of bureaucratic administration to modern governance cannot be overstated. While small, comparatively primitive societies might have succeeded with very little administration, and while the Founders in the United States might have failed to envision the type of vast administrative system that has developed (for instance), modern mass societies would be appreciably worse-off without the benefits of public bureaucracies.⁷⁹ For instance, Congress might pass a law designed to protect America's environment and keep our natural resources free of toxins and pollutants (or untreated human waste sludge), but without the Environmental Protection Agency (EPA), the regulatory agency responsible for protecting America's natural environment, these objectives would (and did, prior to 1970 and the creation of the EPA)

⁷⁸Some variations on this essential definition of bureaucracy: "Public administration is the action part of government, the means by which the purposes and goals of government are realized;" "Public administration as a field is mainly concerned with the means for implementing political values;" "Public administration can be best defined with the executive branch of government." For these and other definitions, see Rosenbloom, David H. *Public Administration: Understanding Management, Politics and Law in the Public Sector*. 1998. N.Y., N.Y.: McGraw Hill.

⁷⁹For two works examining the Founders' thought on administration, see: Richardson, William. *Democracy, Bureaucracy and Character: Founding Thought*. 1997. Lawrence, KS: University of Kansas Press; Rohr, John. *To Run a Constitution: The Legitimacy of the Administrative State*. 1986. Lawrence, KS: University of Kansas Press.

go unfulfilled, as the EPA is responsible for a variety of tasks critical to realizing Congressionally-enacted environmental legislation.⁸⁰

Without the EPA, who would develop and adopt specific *standards and regulations* delineating acceptable and unacceptable levels of toxic emission, basing these decisions on scientific expertise and experience? Who would investigate possible infringements in *enforcing* these standards, utilizing trained experts and established techniques to determine whether these standards had in fact been breached – a particularly demanding task in a society of nearly 300 million people with territory covering millions of square miles? Who would impose *fines and sanctions* on those believed to be guilty of having disregarded these standards? Who would effectively *present the case* to the courts if challenged, thereby both guaranteeing punishment for those infringing on the regulations and deterring others from committing the same crime? And finally, who would monitor and *research* the evolving state of the natural environment, examining it to guarantee that the broader goal of a clean environment is being realized with existing statutes and regulations? In short, without bureaucracies like the EPA law is only words, and good legislative intentions are merely that.

It is beyond argument that administrative agencies like the EPA are an essential element of good, effective government in the United States of today, and all modern political systems for that matter. While bureaucracies are often accused of being excessively large and infuriatingly complex organizations with massive budgets and huge

⁸⁰For a solid introduction to the history and purpose of the EPA, see Landy, Marc K. et. al. *The Environmental Protection Agency: Asking the Wrong Questions: From Nixon to Clinton*. 1994. N.Y., N.Y.: Oxford University Press.

cohorts of employees (bureaucrats),⁸¹ they are nevertheless the backbone of the law, carrying the law into effect – and regularly advancing the public good in the process. And as shown above in reference to the EPA, the modern administrative agency undertakes a variety of different tasks and exercises a variety of different powers which may necessitate the exercise of discretionary authority. From setting standards to investigating and enforcing these standards, from bringing rule-breakers to the courts and continuously undertaking research, the impact of the modern bureaucracy can be felt in a range of different ways by an assortment of different actors and institutions – individuals, the public at large, and both private and corporate enterprises.

Yet one particular power of the bureaucracy, its power to make *rules and regulations* defining the standards instrumental to implementing the legislative intent outlined in a statute – otherwise known as *bureaucratic rulemaking* or *administrative lawmaking* – has most often been identified as a critical area of inquiry, one that carries serious consequences for our understanding of law, the rule of law and democracy. To be sure, these processes, wherein bureaucratic agents and agencies *make law* defining rights and duties, and mandating punishments and rewards, must be seen as essential in relation to our understanding of democracy, given the centrality of legislature-made law on this model. But before going further, a more complete understanding of bureaucratic rulemaking is required.

⁸¹Indeed, there are so many federal employees or bureaucrats in the U.S. today that the government even has a “bureaucrats-bureaucracy” to manage federal employees, the Office of Personnel Management (OPM). The OPM places the number of civilian bureaucrats employed by the federal government alone at approximately 2.7 million as of 2003.

II. Bureaucratic Rulemaking: Definition and History⁸²

I.1. Rules Defined

“A rule is the skin of a living policy. It hardens an inchoate normative judgment into the temporarily frozen form of words... Its issuance marks the transformation of policy from the private wish to public expectation.”⁸³

In the most general sense, bureaucratic rulemaking in the United States begins where the legislative processes of Congress end – with the enactment of a public law or statute. However, burdened with a variety of tasks besides lawmaking – such as casework, budgeting, and reelection – limited in technical and scientific expertise, guided by a doctrinaire legal theory demanding the enactment of only general law, and often anxious to delegate controversial and politically sensitive decisions to other institutions, Congress typically passes laws pursuing only vague and general goals.⁸⁴ Sometimes called “authorizing statutes,” “enabling statutes” or “framework legislation,” these laws require additional decision-making and action before achieving their objectives.⁸⁵

Once enacted by Congress and signed into law, these general statutes are transferred to the part of the government explicitly intended to implement and enforce

⁸²In what follows, I outline processes of bureaucratic rulemaking at the federal level of government in the United States. This choice does not mean to limit the importance or ignore the distinctness of rulemaking at the state level, but only to provide a reasonable starting point for discussing the problems rulemaking might pose to democracy *writ large*.

⁸³Diver, Colin. *Administrative Law: Cases and Materials*. 1987. N.Y., N.Y.: Little, Brown & Co. [P. 199].

⁸⁴For these and other reasons justifying the necessity of bureaucratic rulemaking, see Kerwin, Cornelius. *Rulemaking: How Government Agencies Write Law and Make Policy*. 1994. Washington, D.C.: CQ Press. [Chapter One].

⁸⁵In Chapter Seven, we will examine one case of rulemaking more closely. That case, focused on the rulemaking processes of the U.S. Department of Agriculture’s rulemaking for the *Organic Food Production Act of 1990*, illustrates nicely why rules and rulemaking are a necessary adjunct to the lawmaking process. Further, this case nicely illustrates how general Congressionally-enacted statutes can often be; the *OFPA* was a law focused on “organic foods,” but left open exactly what did and did not fall into this category. It thus became the job of the USDA to define what “organic” was.

law, the bureaucracy. A particular administrative agency, named (and sometimes created) in the legislation and given jurisdiction over the implementation and enforcement of the new statute is authorized by Congress to achieve these objectives. However, implementation requires discerning particular means for achieving ends, and often clarification, specification and operationalization of the ends themselves, while enforcement requires an understanding of what specifically falls within or outside the bounds of the statute, and general statutes typically fail to provide these particular details.⁸⁶ Therefore, bureaucracies are delegated the authority from Congress to create rules – sometimes called pieces of “secondary legislation” – defining and framing these particularities through processes of bureaucratic rulemaking. Indeed, as one scholar has correctly described the matter, even in instances when Congress does spend considerable time and resources writing a law and carefully defining its particular objectives, it nevertheless requires “rulemaking to transform the promises of an ambitious new statute into the specific requirements and procedures of new programs.”⁸⁷ Thus to some extent, bureaucratic rulemaking is a *necessary adjunct* to the legislative process.

It is here, through Congressional delegation of authority to bureaucratic agencies to interpret, implement and enforce laws, and to prescribe rules and regulations towards these ends that the process of bureaucratic rulemaking begins.⁸⁸ First statutorily recognized as a legally distinct practice in the *Administrative Procedures Act of 1946*

⁸⁶See Bryner, Gary C. *Bureaucratic Discretion: Law and Policy in Federal Regulatory Agencies*. 1987. Elmsford, N.Y.: Pergamon Press. [Chapter One].

⁸⁷Kerwin, *Rulemaking*. P. 2.

⁸⁸Rules are often segmented into three types: substantive, interpretive and procedural. While all three are important, we are most interested in this context in interpretive and substantive rules – often called “legislative rules” – those that effectively prescribe law.

(*APA*), the *APA* defines rules and defines the scope and purpose of rulemaking in this way: “rule means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”⁸⁹ Therefore, processes of rulemaking as defined by the *APA* effectively transform bureaucratic agencies from a simplistic (and now thoroughly outmoded) image of a “lifeless mechanism” of policy implementation into political institutions with the power to interpret, implement, and very regularly to prescribe, policy and law.

II.2. Understanding Processes of Bureaucratic Rulemaking

It is impossible to define rulemaking in the United States as a single or universally consistent process. Processes of rulemaking differ extensively across agencies and rely considerably on the procedures mandated in the statute authorizing bureaucratic discretion.⁹⁰ In a generic sense, however, one scholar has defined rulemaking as an 11-stage process beginning with the enactment of a statute by Congress. Table One outlines (in abbreviated form) the steps in the rulemaking process according to this author.⁹¹

⁸⁹*The Administrative Procedures Act.* 5 U.S.C. 551.

⁹⁰Congress holds the authority, even outside the *APA*, to demand particular types of rulemaking processes to bureaucratic agencies. Therefore, rulemaking processes can differ considerably one from another based on the demands of Congress.

⁹¹Kerwin, *Rulemaking*. P. 76-77. The same outline is also adopted by, O'Reilly, *Administrative Lawmaking*. P. 90.

Table One: An Outline of Rulemaking Activity

Stage One: Origin of Rulemaking Activity: Rules Mandated or Authorized by Law

Stage Two: Origin of Individual Rulemaking

Stage Three: Authorization to Proceed with Rulemaking

Stage Four: Planning the Rulemaking

Stage Five: Developing the Draft Rule

Stage Six: Internal Review of the Draft Rule

Stage Seven: External Review of the Draft Rule

Stage Eight: Revision and Publication of a Draft Rule

Stage Nine: Public Participation

Stage Ten: Action on the Draft Rule

Stage Eleven: Post-Rulemaking Activities

Once authorized by an act of Congress, bureaucratic agencies proceed with the rulemaking process by deciding to adopt a new rule (or revise an existing one), and are directed either by a new statute or by internal (agency heads or Senior Executives) or external (Congress or the White House) forces pressing for action on an existing statute (Stage Two). The time lag between the creation of a statute necessitating rulemaking and actual rulemaking activities varies; at times, the gap between the Congressional enactment of a statute and the creation of rules takes years. At other times, Congress will include a “hammer” in a statute demanding bureaucratic action by a particular date. Furthermore, rulemaking is often a cyclical process, with rules created only to be altered or discarded later, replaced by new rules better realizing the purpose of the law (or the “new” purpose, should the center of power in Congress or the White House shift).

Stages Three through Seven all involve the creation of the proposed or “draft rule,” beginning with internal authorization to proceed with rulemaking, an outline of the

“flow” of the rulemaking process itself, the writing of the draft rule, review of the draft rule within the agency, and external review of the draft rule (by Congress, interest groups, the Office of Management and Budget and the White House). All of these processes involve heavy doses of both bureaucratic and legal expertise, as well as external influence. Once authorized to proceed and guided by a rulemaking framework (largely responsible for outlining the procedures to be followed), the rulemaking process is not entirely dissimilar from the legislative process. Those with particular competencies within an agency – certainly legal, and typically scientific as well – are tasked with the difficult job of discerning optimal means for realizing a broad normative goal defined in law, measures often involving the uncertain cooperation of governmental and non-governmental actors at a variety of different levels.

Stage Eight involves the *APA*-mandated publication of the draft rule in the *Federal Register*, and Stage Nine provides the first formal opportunity for *public participation* in the process (something we will examine carefully in Chapter Four), either through public comment or through official or informal hearings. Stage Ten represents formal action on the rule (which often includes integrating public comments or the results of formal hearings and starting again at Stage Five) and publishing the final rule in the *Federal Register*. Finally, Stage Eleven involves preparing to make the rule effective (typically 30 days after publication in the *Federal Register*), bracing for any legal challenges to the rule and preparing for publication of the rule in the *Code of Federal Regulations (CFR)*.

This set of activities illustrates, in brief, how a law becomes a proposed rule and then an adopted rule. Once made effective and published in the *CFR*, bureaucratic rules

have all of the force of law, and regulated industries, individuals and the government itself must, as with any law, spend considerable time and resources ensuring compliance. Further, these rules regularly limit and delimit the range of actions individuals and entities may undertake, with non-compliance being grounds for (sometimes severe) punishment. And as we will see below, the amount of rulemaking and the range of policy issues addressed through rulemaking has expanded considerably over the last few decades. In short, contrary to an antiquated understanding of the scale and scope of bureaucratic rulemaking, it is not only technical questions or matters of economic competition which are addressed through rulemaking, but often contestable normative issues with significant consequences for the rights and freedoms of ordinary Americans.

II.3. A Short-Course History of Rulemaking

Congressional delegations of authority to the executive branch of government to make rules and regulations are as old as American independence, dating back to the first days of the new republic. During the first Congressional session of 1790, legislators delegated to the president the power to make rules regulating trade with Native Americans; as early as 1813 Congress delegated similar authority to others within the executive branch of government – administrative agencies.⁹² The increased significance of Congressional delegations of authority to bureaucratic agencies as an important and distinct mode of policy, rule and lawmaking, however, can be traced to a few periods in American governmental history. During these periods, the *quantity* of rules, the *type of*

⁹²Bryner, *Bureaucratic Discretion*. Pp. 10-11; see also, O'Reilly, James. *Administrative Lawmaking*. 1983. Colorado Springs, CO.: McGraw Hill.

authority delegated and the *policy areas* addressed through bureaucratic rulemaking would all change significantly.

Scholars have previously examined in considerable detail the growth of bureaucratic discretion generally, and bureaucratic rulemaking specifically, in the United States, and thus fully reiterating the historical details surrounding these developments is unnecessary.⁹³ Nevertheless, most scholars identify the critical turning point for the emergence of bureaucratic discretion and bureaucratic rulemaking as a significant and transformative moment in the political life of the Federal government at 1887, when Congress established the Interstate Commerce Commission (ICC).⁹⁴ Given broad authority to regulate trade, commerce and competition in the United States through a delegation of Congressional authority, the ICC provided the definitive model of “administered public control.”⁹⁵

From 1887 forward, perspectives on bureaucratic discretion would change dramatically, and Congressional delegations of authority to federal agencies would increasingly be recognized as “a virtue rather than a problem.”⁹⁶ That is, after 1887 Congressional grants of authority became more regular and opportunities for bureaucratic rulemaking more common, as this was now recognized to be, if not universally a virtue, then certainly a practical necessity with potentially positive implications for rational,

⁹³For a more thorough analysis of rulemaking’s history in the United States, see Lowi, Theodore. *The End of Liberalism*. 1979. N.Y., N.Y.: W.W. Norton. [Chapter Five]; see also, Kerwin, *Rulemaking*. Chapter One.

⁹⁴Lowi, *The End of Liberalism*. P. 97. It is also interesting to note that 1887 was the year Woodrow Wilson published his seminal essay on the inevitable growing importance and, in some sense, positive role of public administration in the American political system. Wilson, Woodrow. “The Study of Administration.” *Political Science Quarterly*. Vol. 2, No. 2, 1887.

⁹⁵Lowi, *The End of Liberalism*. P. 97.

⁹⁶Lowi, *The End of Liberalism*. P. 97.

effective and efficient policymaking. Based on this shift, and two significant explosions of Congressional delegation of authority in the 1930's (necessitated by Franklin Roosevelt's "New Deal" programs) and the 1960's (necessitated by Lyndon Johnson's "Great Society" programs), rulemaking has evolved from a fairly limited and rare activity to a ubiquitous aspect of the federal political process. It is now typical for several thousand new rules to be issued every single year, a far greater number than the comparable number of laws passed by Congress, with the *Federal Register*, the running "log" of new and proposed rules and rulemakings at the Federal level of government, currently numbering roughly 80,000 pages.⁹⁷

What is more, the nature of the authority Congress has delegated to bureaucratic agencies has changed significantly since 1887. Theodore Lowi describes the changing nature of bureaucratic discretionary authority between 1887 and the 1930's as a shift from regulatory enforcement activities proper – where Congressional grants of authority to bureaucracies were concrete, specific, prescriptive and designed to enforce the law as somewhat narrowly defined – to more general and broad grants of authority, with bureaucracies being delegated abstract, universal, novel and prescriptive power.⁹⁸ It was here, and particularly during the 1930's, that the "positive administrative state" began to take root, leading to a federal bureaucracy more open to and capable of addressing a wide range of issues through largely self-directing means.⁹⁹ And it is through the rulemaking

⁹⁷Kerwin, *Rulemaking*. Pp. 193, 225. Tracking the increased volume of rulemaking activity, Kerwin counts 1,985 rules between January and June of 1991 alone, and makes the general claim that "the rules written each year number in the thousands." Kerwin points out that the number of pages in the *Federal Register* increased from about 10,000 to about 70,000 between 1961 and 1983.

⁹⁸Lowi, *The End of Liberalism*. Pp. 98-99.

⁹⁹Harris, Richard A. and Sidney Milkis. *The Politics of Regulatory Change: A Tale of Two Agencies*. 1996. N.Y., N.Y.: Oxford University Press. [See Chapter Two].

process and the power to issue binding rules and regulations that bureaucracies largely exercise this power.

Finally, along with a slew of new regulatory agencies and programs, the 1960's ushered in an important shift from largely economic regulation to broader and more expansive *social regulation*. Since at least this period, rules and rulemaking have addressed more than solely technical questions or matters of competition and trade, and instead are now utilized to prescribe policy and law over policy areas that concern essential and contestable political values and society-wide concerns, such as environmental protection, standards of consumer safety, civil rights, worker protections, pharmaceutical approval, and so forth.¹⁰⁰ To be sure, it is now widely accepted that through regulation and rulemaking bureaucracies exercise extensive policymaking authority over policy areas with clear moral and political implications; bureaucracies are no longer limited to the role of technical experts mechanically implementing statutes within which contestable normative questions have already been exhaustively discussed and resolved through the legislative process. In short, bureaucratic rulemaking is now, undeniably, a political process.

Bureaucratic rulemaking in the United States has expanded to the point that today "few aspects of American life have been left untouched by the regulations of federal administrative agencies."¹⁰¹ While once quantitatively limited, narrowly proscribed in

¹⁰⁰For some examples, see Tatalovich, Raymond and Byron Daynes (Eds). *Moral Controversies in American Politics: Cases in Social Regulatory Policy*. 1998. Armonk, N.Y.: ME Sharpe, Inc. The three most ubiquitous examples of social regulatory agencies created during the 1960's and 1970's are the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA) and the Equal Employment Opportunity Commission (EEOC).

¹⁰¹Berry, Jeffrey M. *Feeding Hungry People: Rulemaking in the Food Stamp Program*. 1984. New Brunswick, N.J.: Rutgers University Press. [P. 1].

power and geared largely towards the regulation of technical-scientific issues, competition and trade, rules and rulemaking processes now run the gamut of political action and essentially “affect the quality of life of ordinary citizens.”¹⁰² In short, through delegations of authority and processes of rulemaking, bureaucratic agencies perform many – if not most – of the activities typically perceived to be and constitutionally recognized as the exclusive domain and jurisdiction of Congress.

III. Bureaucratic Rulemaking: Critiques and Problems for Democracy

Having in the last chapter laid out an essential understanding of democracy, and now having examined bureaucracy and processes of bureaucratic rulemaking through delegated Congressional authority, some questions can be asked. Most importantly, with this much fuller understanding of modern bureaucracy and bureaucratic rulemaking in hand, what, if anything, can we proclaim to be problematic about these – and particularly bureaucratic rulemaking – guided in our thinking by the model of democracy outlined in the previous chapter? To be sure, I have certainly alluded to some problems with bureaucratic rulemaking simply by focusing on this process, identifying it *prima facie* as at least *potentially* troubling.

Over the last several decades, as rulemaking and other form of bureaucratic discretion have grown by leaps and bounds through more frequent and more expansive delegations of Congressional authority, a few criticisms and perspectives have been raised most regularly, and while each relates to one element or another of the relationship intrinsic to our model of democracy, their various focal points lead us in quite different

¹⁰²Berry, *Feeding Hungry People*. P. 2

directions. In what follows, I will examine a few of the more important perspectives on rulemaking, settling on one as the most significant challenge for our model of democracy, the challenge that deserves the greatest portion of our attention.

We can begin by identifying one often-discussed problem with bureaucratic rulemaking, a problem stemming from this processes' perceived violation of what is called the *non-delegation principle*. Guided in our thinking by the analyses from the last chapter, within our model of democracy the location of the lawmaking authority, in whose hands this power rests, is essential. As law limits the rights and liberties of individuals under government, it is the people's connection to the law and those elected representatives making law (if it is not the people personally) that defines a government as popular. In the U.S., this tenet of popular government is reflected in Article One of the Constitution; by giving Congress – the most populist institution, even before passage of the 17th Amendment – the power to make “all laws necessary and proper,” the Founders identified this institution *specifically* as the institution responsible for policy and lawmaking, and the bulwark of popular government.

However, and again taking Locke as an exemplar, while he was clear on the importance of the people's connection to the legislature, and the dominance of this institution over the lawmaking function, he also recognized the public benefit derived from some level of legislative delegation to executive and administrative bodies. Yet it is equally clear that Locke *did not* envision these types of decisions becoming *replacements* for legislature-made law. That is, while Locke saw the benefit in the legislative delegation of authority to executive and administrative institutions, he was also adamant about the prohibition against the legislature “re-delegating” its power *writ large* to

another institution not expressly chosen by the people; within the Lockean model, this type of re-delegation is strictly forbidden.¹⁰³

This brings us, of course, to the non-delegation principle as a critique of bureaucratic rulemaking: bureaucratic rulemaking, so the argument goes, represents a Congressional re-delegation of the lawmaking authority to another institution.¹⁰⁴ On this argument, by delegating to bureaucratic agencies the authority to make rules and regulations Congress has undermined its own constitutionally defined role as the lawmaking authority.¹⁰⁵ What is more, and most important for our purposes, this re-delegation of the lawmaking authority, if this *is* what bureaucratic rulemaking represents, has dire consequences for our model of democracy, a model founded on a connection between the people, elected representatives and the laws which govern them.¹⁰⁶

In the first half of the 20th century, the principle of non-delegation was regularly adopted – and often cited in the Federal courts, for instance – as an argument against Congressional delegation of its authority to other institutions. On this line of reasoning, almost any (or at least any expansive) type of re-delegation of the legislative authority

¹⁰³Locke makes this most clear when he writes: “The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, ‘We will submit to rules, and be governed by laws made by such men, and in such forms,’ no body else can say other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and authorized to make laws for them.”

¹⁰⁴This is one of the earliest critiques of the rulemaking process. For a review of this and other “first-generation” criticisms of bureaucratic rulemaking, see Sherwood, Foster. “The Federal Administrative Procedure Act.” *Modern Law Review*. Vol. 41, No. 2, 1947.

¹⁰⁵For some early examples, see Haines, Charles Grove. “Effects of the Growth of Administrative Law upon Traditional Anglo-American Legal Theories and Practices.” *APSR*. Vol. 26, No. 5. 1932; Haines, Charles Grove. “The Adaptation of Administrative Law and Procedure to Constitutional Theories and Principles.” *APSR*. Vol. 31, No. 1. 1940.

¹⁰⁶For a good argument along these lines, see Hamilton, Marcia. “Representation and Nondelegation: Back to Basics.” *Cardozo Law Review*. Vol. 20, No. 3, 1999.

was forbidden, because leading to a situation where the form of government had been changed.¹⁰⁷ Even if this re-delegation to make rules and regulations was undertaken without malice or coercion, proceeding only from a good-faith desire by legislators to realize the public good, this transfer critically challenges the idea of lawmaking as it relates to and defines our system of government.¹⁰⁸ Yet in time this principle waned, and, as we now see clearly, Congressional delegation to bureaucratic agencies became ubiquitous.¹⁰⁹

The point of the non-delegation argument, as I see it, is not that power has been delegated *at all* to bureaucratic agencies to make rules and regulations; rather, the issue is one of *scope and scale*. That is, if the scope and scale of Congressional delegation to bureaucracies were to become too expansive, it might very well fundamentally alter the foundation and form of our political system. The enduring relevance of the non-delegation argument would seem to be buttressed, then, by the increased scope and scale of bureaucratic rulemaking over the last few decades. If this re-delegation of power has over this period become so expansive as to alter the form of government, creating a new lawmaking body unburdened by a connection between the people and the law, than a shift destructive to our democratic system has occurred, one that occludes the arteries of our received (and Constitutionally grounded) legal theory. Finally, the solution proffered

¹⁰⁷ Showing the endurance of the non-delegation principle, in the 1950's, dissenting in *FTC vs. Ruberoid*, Justice Robert H. Jackson famously noted that, "The rise of administrative bodies has probably been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts... They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories."

¹⁰⁸ For a more recent critique of delegation from the perspective of democracy, see Schoenbrod, David. "Delegation and Democracy: A Reply to my Critics." *Cardozo Law Review*. Vol. 20, No. 3, 1999.

¹⁰⁹ For a solid discussion of the "waves" of Federal interpretation of the Constitutionality of delegation, see Horwitz, Robert. "Judicial Review of Regulatory Decisions: The Changing Criteria." *Political Science Quarterly*. Vol. 109, No. 1, 1994.

by defenders of non-delegation doctrine is simple: either Congressional delegations to bureaucracies should be limited and rare, or, failing this, delegation should cease altogether.

Yet refutations of the non-delegation doctrine have come from many quarters. In reality, Congress has not entirely delegated its authority to the administrative system, and it would be difficult to argue that Congress has even “tweaked” the fundamental form of government by delegating rulemaking power to bureaucratic agencies. As the discussion of the rulemaking process above makes clear, rulemaking begins if and only if “triggered” by a Congressionally-enacted statute demanding that bureaucracies strive to realize the intent of a statute through rulemaking; there is little room for totally independent initiative within the rulemaking process. Additionally, Congress has passed statutes shaping and limiting the rulemaking process, such as the *APA* discussed briefly above, evidencing and asserting its dominion over this process. Furthermore, and perhaps most importantly, Congress has the power to hold accountable and oversee how bureaucracies are utilizing their delegated authority when making rules, and can at any time rescind or change the “ground rules” regarding delegated authority. In short, Congress still “rules” in the rulemaking process, “law” (in a strict sense) is enacted only by elected representatives expressly chosen by the people, and representatives must first enact law before any subsidiary rulemaking begins.¹¹⁰ And given our analyses in Chapter Two, this type of delegation is very much amenable to our model of democracy.

From another perspective, bureaucratic rulemaking has been challenged for its lack of faithfulness to the *principles of law and the rule of law*. From this perspective,

¹¹⁰For this type of defense of rulemaking and delegation to bureaucracies generally, see Bryner, *Bureaucratic Discretion*; David, Kenneth Culp. *Discretionary Authority*.

rulemaking undermines the rule of law, an essential element of any non-arbitrary or popular government, because it grants considerable independent authority to bureaucratic agencies (and the executive branch as a whole) to render rules unencumbered by strict legal standards. In other words, by authoring broad statutes allowing bureaucratic agencies considerable room for interpretation and independent discretion in the first instance, Congress has made the rule of law impossible, given that the law itself gives very little guidance. With such extensive authority delegated to unelected bureaucrats with little guidance on how this power is to be used, the law simply cannot rule, and all of politics has become a system of arbitrary, elite-bureaucratic authority.

It is this type of analysis that has led scholars like Theodore Lowi, when considering the expanded and growing significance of bureaucratic discretion (and especially processes of “informal rulemaking,” which we will discuss more in Chapter Four), to lament the “end of the rule of law” in the United States, and to seek alternatives towards making bureaucratic discretion more amenable to received legal and constitutional doctrine.¹¹¹ This argument has found an enduring place as a criticism of bureaucratic discretion and rulemaking, with calls for Congress to author only much more specific, clearly defined legal statutes emerging occasionally.¹¹² In short, instead of focusing on the problem of delegation in its entirety or the impact it might have on our form of government, this perspective addresses an intermediate cause (i.e. broad statutes

¹¹¹Based on this analysis, Lowi focuses on the importance of more rigorous, legally framed rulemaking processes as the solution to bureaucratic discretion. In this way, the problem is identified as a problem not of *democracy*, but of *law*. See Lowi, *The End of Liberalism*.

¹¹²See Lowi, *The End of Liberalism*. For more recent arguments in this tradition, see Scheuerman, William. *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*. 1994. Cambridge, MA: MIT Press; Roberts, Paul Craig. “How the Law was Lost.” *Cardozo Law Review*. Vol. 20, No. 3, 1999.

authorizing and requiring delegation) and demands that law much more strictly define and limit the terms of any delegation.

Yet I would tend to disagree with this argument as well, at least to the extent that the proposed solution should not be the focus of our critical analysis. In the first instance, as many have pointed out, demanding very strict and specific legal statutes is to at least some extent an impractical suggestion for a political system governing over a modern mass society, one which risks creating a legislative process even slower and less responsive than the current system, and a proposal that potentially elevates one important value (the rule of law) over another (the public good).¹¹³ Moreover, bureaucratic rulemaking, as described above, remains tied to a set of procedures defined in law, procedures which frame *all* rulemaking processes, and this set of procedures delimits and frames bureaucratic discretion through rulemaking even if particular statutes do not. Finally, though at times bureaucrats are able to exercise considerable independent discretion, they are also beholden to legislative authority through control and oversight activities. In short, the law and the rule of law (and for that matter, the form of government, as discussed above) remain in the hands of the legislative authority through these mechanisms, and the faithfulness of bureaucrats to the law when employing discretion remains *within the legislature's control*. And it is precisely at this point, I would argue, that *both* a defense of bureaucratic rulemaking *and* the potential problems posed by this practice to our democratic system emerge.

Thinking back to the analyses in Chapter Two and again using these as a guide, legislative delegation of authority to executive and administrative institutions was deemed acceptable within a popular government, but *only* to the extent that these

¹¹³David, Kenneth Culp. *Discretionary Authority*.

decisions were dependent on the legislative authority through systems of accountability, oversight and control. Discretion begins with the delegation of authority to administrative institutions; the law and the rule of law are deemed essential, but are regarded as potential impediments to the public good if interpreted too strictly; while some authority is therefore to be delegated to the administrative system, this authority is to be guarded carefully by the legislative authority; and ultimately, the actions and decisions of the administrative system are to be scrutinized by the legislative, subjected to final approval or rejection, and thereby rendered commensurate with a notion of democracy centered in a popular legislative authority. *Mechanisms of legislative control, oversight and accountability are, in short, the critical elements resolving the tension between administrative discretion and democracy.*

Reflecting on the two critiques of bureaucratic rulemaking discussed above, then, the scope and scale of rulemaking and the commensurability of practices of delegation to the principle of the rule of law, while certainly important in their own right and perhaps useful as symptoms and indicators of a larger dilemma, should not provide our focus. Rather, those processes designed to control the potential misuse and abuse of delegated discretionary authority should provide both our focus in discovering potential problems a process like bureaucratic rulemaking might pose to democracy, and the solution to any such problems. The final guarantor of the supremacy of the popularly authorized legislative authority, the law and the rule of law – and thus the foundations of our democracy – is to be found in the makers of the law, the people or their legislators, and these actors' ability to control and oversee the authority they have delegated. We can conclude by stating the matter this way: *bureaucratic rulemaking is not a problem for our*

model of democracy so long as means for democratically controlling this process through the legislative power are in place and effective.

But conversely, processes of bureaucratic rulemaking, particularly given (as was argued above) that these processes have become more prevalent, more expansive in the power delegated, and focused on even contestable moral and political values, *do* prove contrary to our model of democracy *if* it can be shown that the means for holding these processes accountable to control and oversight are lacking or ineffective. That is, if it is clear that the democratic forms of control and accountability are ineffective in guaranteeing the legislative authority's dominion over the law – if bureaucratic agencies are able to render rules detached from the goals of the lawmakers, for instance, thus effectively becoming an independent legislative authority – then we can deem this process to be destructive to the foundations of our democratic system.

This argument, of course, begs a critical question: How effective are extant modes for controlling bureaucratic rulemaking and guaranteeing the intent of the law – and particularly the “democratic” modes centered in legislative institutions, or in the hands of the people themselves – given the growth and expansion of rulemaking (and bureaucratic power generally) over the last few decades? The short answer to this question is: at best, only partially. But this certainly requires closer investigation, for such an investigation will allow us to judge the integrity and strength of our model of democracy given practices of bureaucratic rulemaking. That is, if bureaucratic rulemaking is not closely and effectively controlled by the legislative authority, and if bureaucratic agencies tend to disregard the intent of the law or the objectives of lawmakers in implementing the law,

then we can reasonably assert that this practice *does* present a problem for our model of democracy. This investigation will provide the focus of the next chapter.

Conclusion

Critiques of bureaucracy from the perspective of democracy tend to run the gamut, and typically differ depending on how one defines the ever-elusive term “democracy.” In this sense, this chapter referred to a model of democracy – defined in the last chapter – that perhaps most completely informs our basic contemporary understanding. Based on this model, practices of bureaucratic rulemaking have been argued to be in and of themselves unproblematic, contrary to some important critiques. Nevertheless, this practice should be deemed problematic for our model of democracy if we find insufficient means for democratically controlling these processes and guaranteeing the goals of the legislative authority and the intent of the law. The next chapter seeks to expand on this most important issue.

Chapter Four: Democratic Modes of Bureaucratic Control: An Analysis and Critique

Introduction

There are a variety of strategies employed in most democratic systems towards controlling and holding accountable bureaucratic agents and agencies, and protecting the law from excessive bureaucratic discretion. It would be an error, for instance, to fail to recognize the judiciary as a central actor in the effort to control bureaucratic discretion. In systems where administrative law is better developed (such as the United States), and where special administrative law courts have been appended onto the “normal” court structure, these forms of control are particularly important.¹¹⁴ Furthermore, in many Western democracies the executive branch of government has itself worked diligently (particularly over the last 30 years or so) to control “runaway bureaucracy.” In the U.S., for example, the Office of Management and Budget has become an essential instrument for controlling bureaucratic power.¹¹⁵

¹¹⁴Craig, Paul P. *Public Law and Democracy in the United States and the United Kingdom*. 1990. N.Y., N.Y.: Oxford University Press; Edley, Christopher. *Administrative Law: Rethinking Judicial Control of the Bureaucracy*. 1990. New Haven, CT: Yale University Press.

¹¹⁵Tomkin, Shelley Lynne. *Inside OMB: Politics and Process in the President’s Budget Office*. 1998. Armonk, N.Y.: M.E. Sharpe.

Yet as mentioned in Chapter Two, not all methods for controlling executive and administrative institutions are created equal, particularly when our central concern is the integrity of our *democratic* institutions and traditions. Our understanding of democracy mandates that the institutions and individuals responsible for making law are also the actors that should be primarily responsible for controlling administrative institutions which implement and enforce that law, and perhaps interpret or extend it beyond its intended purpose. As the group of legislative actors is most directly responsible for defining goals when enacting law (and of course in a democracy, ought to be), so too should this group be primarily responsible for ensuring the realization of these goals and intentions. Further, as the connection between the people and the law defines democracy, so too must the authors of the law be the final defenders of it, charged with protecting it from any manner of misinterpretation or abuse, and reasserting the link between the people and the law central to democracy in the process.

With this in mind, in this chapter we will investigate broadly extant means for democratically controlling, overseeing and holding accountable bureaucratic institutions in the U.S. (focusing again on the Federal level of government), and in particular methods for controlling practices of bureaucratic rulemaking, a practice which, if insufficiently controlled, presents a direct challenge to the relationships at the center of our model of democracy. In what follows, we will investigate two general democratic forms of bureaucratic control – one centered in the elected legislature and following the model of representative democracy (i.e. legislative oversight), another centered in public participation and derivative of a direct model of democracy (i.e. public accountability). Both of these modes of control will be examined generally for their success in controlling

bureaucratic rulemaking, and through this defending the goals and intentions of the law as defined by Congress.

The purpose of this chapter is straightforward, and brings us to one important though not entirely novel conclusion: while certainly not wholly ineffective or inadequate, there are serious questions to be raised about the efficacy of existing democratic controls of bureaucratic discretion to defend the purposes and intent of Congressionally-enacted law. Based on this conclusion, some comments will be made about the capacity of these democratic modes of bureaucratic control to reassert the link between the people and the law essential to democracy. As a result, we will leave this chapter in search of an alternative model of democratic control of bureaucratic discretion, one capable of better protecting the link between the people and the law central to democracy.

I. Representative Democracy and Control by Legislative Oversight

Volumes could – and have – been written on the subject of oversight and control of the bureaucracy by elected representatives, and the effectiveness of oversight at protecting statutory intent from excessive bureaucratic discretion. Some studies have found existing forms of oversight to be relatively effective,¹¹⁶ while others have found little to no oversight at work in Congress (with a wide assortment of opinions falling somewhere in between).¹¹⁷ And there is little reason to believe that from this diversity

¹¹⁶For some examples of works generally optimistic about the effectiveness of Congressional oversight of bureaucratic discretion, see Aberbach, Joel. *Keeping a Watchful Eye: The Politics of Congressional Oversight*. 1990. Washington, D.C.: Brookings Institution; McCubbins, Mathew, et. al. “Structure and Process as Solutions to the Politician’s Principal Agency Problem.” *Virginia Law Review*. Vol. 74, 1989.

¹¹⁷For works dismayed about the lack of Congressional control of bureaucratic discretion, see Katzman, Robert. *Regulatory Bureaucracy*. 1980. Cambridge, MA: MIT Press; Lowi, Theodore. *The End of*

consensus is likely to emerge anytime soon – nor do I intend to resolve this lingering disagreement here.

Yet despite these differing conclusions, nearly every analyst agrees on at least one set of facts in relation to legislative oversight: elected representatives face significant impediments to effectively overseeing the bureaucracy, and in some ways are at a competitive disadvantage in relation to bureaucratic agents and institutions once authority has been delegated. Faced with limited time, lacking the “cognitive resources” needed to fully understand the technical aspects of bureaucratic decisions, confronted with “information asymmetries” in relation to bureaucrats, and forced to focus on electioneering – and focus on certain tasks instrumental to reelection, “high-profile” and “credit-taking” endeavors, while avoiding activities likely to create negative publicity – elected representatives are limited in their capacity to perform oversight functions. In other words, for some of the same reasons legislators have employed to justify the delegation of authority to bureaucracies in the first instance, legislators are impeded in monitoring the use of this power later along. And to be sure, these impediments to effective oversight hamper legislators’ ability to protect the law from excessive bureaucratic discretion.

The characteristics and limitations of elected representatives and the way these frame a representative’s oversight work have led to (or resulted from) a variety of explanatory theories concerning the relationship between legislatures and bureaucracies. For instance, drawing from economics, management, law, organizational psychology, and other disparate disciplines, political scientists have applied *principal-agent* theory to

Liberalism. 1979. N.Y., N.Y.: W.W. Norton; Niskanen, William. *Bureaucracy and Representative Government*. 1971. Chicago, IL: Aldine-Atherton; Ogul, Morris. *Congress Oversees the Bureaucracy*. 1975. Pittsburgh, PA: University of Pittsburgh Press.

explain the intricacies of the legislative delegation of authority to bureaucrats.¹¹⁸ From the perspective of a principal-agent framework – with the elected legislator representing the principal and the bureaucrat the agent – a variety of dynamics within the legislator-bureaucrat relationship are hypothesized, and these hypotheses have been largely borne-out by empirical testing.¹¹⁹

In the first instance, within a principal-agent framework the act of delegating authority from the political principal to the bureaucratic agent is a rational (or “utility-maximizing”) act, one designed to be advantageous to the principal through assorted benefits (such as decreased time expenditures and a lightened workload). But similarly, the principal’s subsequent monitoring of the use of this power must also be viewed from within this framework. That is, once authority is delegated to an agent, the principal is faced with a difficult dilemma: the principal can choose to carefully monitor the actions of the agent for their faithfulness to the law, but this is not a costless endeavor, and the principal is likely to pursue this strategy only if some “net return” can be expected.¹²⁰ And because appreciable returns from this sort of monitoring are not always apparent, piecemeal oversight often results in the “inevitability of control loss” of at least some authority once delegated, as one author has noted.¹²¹

¹¹⁸For a classic work in this genre, see Mitnick, Barry M. *The Political Economy of Regulation*. 1980. N.Y., N.Y.: Columbia University Press. For a good recent overview of principal-agent theory, see Waterman, Richard W. and Kenneth Meier. “Principal-Agent Models: An Expansion?” *J-PART*. Vol. 8, No. 2, 1998.

¹¹⁹For a largely critical assessment of oversight from a principal-agent perspective, see Wood, B. Dan. “Principals, Bureaucrats and Responsiveness in Clear Air Enforcements.” *American Political Science Review*. Vol. 82, No. 1, 1988.

¹²⁰Waterman and Meier, “Principal-Agent Models: An Expansion?” P. 175.

¹²¹Mitnick, *The Political Economy of Regulation*. P. 17.

Further still, even when a political principal decides it is in her best interest to carefully monitor the actions of an agent, the principal is often at a disadvantage in knowing exactly how delegated authority is being exercised, and in most instances must rely (paradoxically) on the agent to convey this information. In other words, if a statute is being misapplied by a bureaucratic agency, this information may not be available to the political principal until the effects of the policy become clear, and at this point – perhaps years in the future – it may be too late. Conversely, while a bureaucratic agent may be aware that a policy choice will have effects contrary to legislative goals, she has little incentive (and often a disincentive) to transfer this information to the principal; such an admission might result in loss of authority or reprimand. This type of “information asymmetry” between agents and principals is in some sense unavoidable; when authority is delegated to an agent to become immersed in a policy problem the principal has decided not to address personally, it is reasonable to conclude that over time an information asymmetry will emerge.

Finally, assuming that the principal has decided to carefully monitor the agent, and has uncovered the information needed to determine that the agent is acting contrary to the terms of the delegation, another problem emerges. In short, once authority has been delegated to an agent, the agent (rationally) works to maintain that authority, to struggle against having the delegated authority rescinded by the principal. While the principal may have good reasons for trying to regain authority, and have statutory authority backing her up, the task can be a difficult one nonetheless; the principal is likely to confront structural-institutional and practical barriers to a reassertion of authority. And although incentives are often used to maintain ultimate authority with the principal,

mixed success through these strategies has been found.¹²² Thus even if a principal seeks to discover and in fact discovers that a law is being misapplied, regaining control sufficient to change course can be difficult.

From a related perspective, a conceptual framework derivative of the principal-agent model has received considerable attention. Founded on the assumptions of the rational but limited elected representative, this framework divides oversight activities into two types: *police patrol* style oversight and *fire alarm* style oversight.¹²³ According to this framework, elected representatives delegate authority to bureaucrats, but instead of closely monitoring these bureaucratic agents (i.e. policing them) for their faithfulness to legislative intent – a task which requires considerable time and expertise, often with little recognition waiting at the other end – representatives instead adopt a less intensive fire alarm style of oversight. Through this approach, representatives wait for loud signals of bureaucratic overreach (i.e. “fire alarms”) – signals that might come from interest groups, special constituents, or the public at large – before springing into action to control bureaucratic discretion. While a much “less intensive form of oversight” and admittedly only “somewhat effective,” as signals sometimes emerge slowly or not at all (particularly from some certain groups), the fire alarm strategy allows the legislator to exert some control over the bureaucracy’s use of delegated authority.¹²⁴

Given the limitations of legislators when performing oversight activities, and in fact driven by these limitations, a variety of strategies have been applied over the last two

¹²²Wood, “Principals, Bureaucrats and Responsiveness in Clear Air Enforcements.”

¹²³McCubbins, Mathew and Thomas Schwartz. “Congressional Oversight Overlooked: Police Patrols vs. Fire Alarms.” *American Journal of Political Science*. Vol. 28, No. 1, 1984.

¹²⁴McCubbins and Schwartz, “Congressional Oversight Overlooked: Police Patrols vs. Fire Alarms.” P. 165; 168.

decades focused specifically on controlling bureaucratic discretion through rulemaking. While not adopted at the Federal level of government, many state governments have come to rely on special “rules committees” as means for controlling bureaucratic discretion through rulemaking. Often taking the form of joint committees involving both upper and lower state legislative houses, the purpose of these rules committees is to allow the legislative body that enacted a statute authorizing bureaucratic discretion to approve all rules before these rules become effective. In this way, a thorough check of bureaucratic faithfulness to the law has been undertaken, and bureaucratic discretion controlled.

While certainly a creative means for institutionalizing and maintaining control over rulemaking in the legislature, at least in principle, experience with these rules review committees has been mixed. One scholar has found that these committees and the rulemaking agencies under review often enter into adversarial relationships, making it difficult for these committees to function effectively (again, given unavoidable circumstances like information asymmetries).¹²⁵ Additionally, these rules review committees were found to often fall under the sway of one prominent legislator, frustrating efforts to realize the intent of a statute now interpreted through the eyes of a particular member’s political agenda. Finally, and in a bit of an irony, these rules committees were found to often be dominated by the senior staff of the committee members, creating a “quasi-bureaucracy” that itself had to be regulated – resulting in an infinite regress problem.

¹²⁵For this argument, see Bowers, James R. *Regulating the Regulators: An Introduction to the Legislative Oversight of Administrative Rulemaking*. 1990. N.Y., N.Y.: Praeger.

Similarly, but focusing now on the Federal level of government, in the late 1990's under the guidance of a Republican leadership bent on altering the oversight status quo (i.e. little oversight of the rulemaking process), Congress passed the *Congressional Review Act*, an addendum to the *Small Business Regulatory Enforcement Fairness Act*.¹²⁶ The *Congressional Review Act* gave Congress a 60-day window within which it could review any applicable regulations (determined by annual economic impact, number of consumers or businesses affected, etc.) and strike-down any rule deemed too costly, or contrary to the goals of Congress in passing the law authorizing rulemaking. Yet at least thus far, this legislation has had little impact on the quantity or quality of oversight of bureaucratic rulemaking.¹²⁷

Finally, it would seem that recent bureaucratic reform efforts might actually frustrate robust legislative oversight in the future, at least in the sense of oversight directed at guaranteeing faithfulness to statutory intent. Over the last decade or so, attitudes on bureaucratic reform have been focused more on “results” than on bureaucratic deference to the law.¹²⁸ Generically identified by the label “new public management,” approaches emphasizing “quality,” “performance” and “service delivery” have in many ways eclipsed more traditional oversight concerns. Bureaucratic agencies are now as concerned with evidencing to Congress success in service delivery – through a variety of “performance metrics,” such as satisfaction surveys, average application processing times or compliance with other prescribed standards of service quality – as

¹²⁶ *Congressional Review Act*. 5 U.S.C. 801-808.

¹²⁷ In fact, in the first 18 months after its passage only one new agency rule was brought for a vote of repeal in the House, and none in the Senate. See Schoenbrod, David. “Delegation and Democracy: A Reply to my Critics.” *Cardoza Law Review*. Vol. 20, No. 3, 1999. [P. 739].

¹²⁸ For this argument, see Aucoin, P. and R. Heintzman. “New Forms of Accountability.” In *Revitalizing the Public Service*. Peters, B.G. and D.J. Savoie (Eds.). 2000. Montreal, Canada: Queens University Press.

they are about proving their fidelity to the law.¹²⁹ Indeed, bureaucracies are now forced by law to adopt this focus, with statutes such as the *Government Performance and Results Act* having mandated as much. Thus, it would seem that a focus on “better bureaucracy” through more efficient and higher quality service delivery to citizens has in some ways eclipsed traditional concerns with the issue of statutory goals and intentions.

In sum, formal models of legislative oversight, actual experience with oversight and recent bureaucratic reforms all lead to one conclusion: while certainly not entirely ineffective, oversight activities centered in Congress are and are likely to remain at best partially effective instruments towards monitoring bureaucratic discretion and rulemaking and guaranteeing the goals and intent of the law. As one scholar nicely summarizes the matter, “although scholars differ on how adequate is the amount of oversight done by Congress, it is rarely, if ever, asserted that it approximates the standard of systematic and comprehensive oversight.”¹³⁰ And even as information costs decrease through new technologies and members of Congress become safer in their seats through redistricting (an entirely separate problem), there is little reason to believe that oversight work will become a primary concern, or that careful policing of the bureaucracy is forthcoming. Indeed, relying on elected representatives to oversee bureaucratic discretion can be identified as a questionable strategy because predicated on something of a paradox; unless monitored closely, bureaucratic agents tend to “shirk,” and it is unrealistic to

¹²⁹A review of recent reports published by the renamed Government Accountability Office, Congress’ official research and oversight group, provides sufficient evidence of this change in focus.

¹³⁰Evans, Diana. “Congress, Oversight and the Diversity of Member Goals.” *Political Science Quarterly*. Vol. 109, No. 4, 1999.

expect elected representatives to closely monitor the use of delegated authority when the very act of delegation was undertaken to lessen the workload.¹³¹

II. Direct Democracy and Control through Public Accountability

The above critique of oversight performed by elected representatives may seem excessively pessimistic in its assessment of the possibilities of robust bureaucratic control through legislative oversight. Yet it would seem that, as bureaucratic discretion through rulemaking was rapidly expanding in the mid-20th century, Congress itself realized that oversight by elected representatives would always prove an at best partially effective device. In other words, Congress seems to have foreseen its own limitations, and as evidence of this, at the height of concern over the growth of bureaucracy and delegation to bureaucratic agencies Congress passed the *Administrative Procedures Act*.¹³² The APA was designed to contend with what was becoming widely regarded as a dangerous trend towards uncontrollable delegation to bureaucratic agencies, a trend which frustrated government by democracy and law, but which could not be resolved by Congressional oversight alone. In response, the APA mandates forms of direct public accountability of bureaucratic rulemaking as an additional form of control of bureaucratic discretion.

In what follows, I will briefly examine two varieties of direct public accountability and control of rulemaking. That is, as the APA identifies two different types of bureaucratic rulemaking (formal and informal rulemaking), two different modes

¹³¹Brehm, John. *Working, Shirk and Sabotage: Bureaucratic Response to a Democratic Public*. 1997. Ann Arbor, MI: University of Michigan Press.

¹³²*The Administrative Procedure Act*. 5 U.S.C. For a discussion of the roots of the APA, see Spence, David B. "Agency Policy Making and Political Control: Modeling Away the Delegation Problem." *J-PART*. Vol. 7, No.2, 1997.

of public participation within these processes are also present.¹³³ Thus to understand these modes of direct accountability requires that we first come to understand these two types of rulemaking processes a little better. But in the end, as was the case with our investigation of oversight by elected representatives, there are solid reasons for questioning the effectiveness of these strategies; these more direct forms of control, because regularly dominated by powerful organized interests, often fail to defend the goals and intentions of the law – and in fact sometimes have the opposite effect.

II.1. Formal and Informal Rulemaking

The first type of rulemaking to note, sometimes called “formal rulemaking,” is outlined in Section 556 of the *APA*. Section 556 provides for a set of procedures to be adopted “when required by statute” (i.e. when mandated by Congress), a process to be undertaken “on the record.”¹³⁴ While informal rulemaking (to be examined next) is perhaps the more important instantiation of bureaucratic rulemaking, if for no other reason than because it is the far more regularly adopted form, formal rulemaking still occupies an important place in the universe of regulatory policymaking, particularly among agencies that have a long history of adopting this procedure, those that deal with highly complex and contestable scientific evidence (such as the Food and Drug Administration and the Nuclear Regulatory Commission), and where litigation following rulemaking is likely.

¹³³In what follows, I will examine only formal and informal rulemaking processes, leaving to one side a third type, negotiated rulemaking. But since our concern here is with forms of oversight and control, and because negotiated rulemaking proceeds similarly to formal rulemaking in how it incorporates public participation (although differing in procedure), this omission is not essential.

¹³⁴*The Administrative Procedure Act.* 5 U.S.C. 553.

Briefly, formal rulemaking is reflected in the 11-stage process outlined in the last chapter, but follows a particular set of procedures for including the public in this process. Once the decision to make a new rule has been taken (or revise an old one, etc), formal rulemaking begins and operates much like a judicial hearing, with either a member or members of the rulemaking agency or an administrative law judge selected to “preside” over the proceedings.¹³⁵ In this hearing, “interests” and “witnesses” who have been deemed sufficiently affected to merit inclusion – often including representatives of interest groups or trade associations, scientific experts, bureaucrats and members of advisory committees – are allowed to participate in the rulemaking process. An agency hearing including these participants is undertaken, complete with rules of evidence, evidence derived through examination and cross-examination, individuals forced to participate (through subpoena, with council permitted), depositions taken, a transcript of the proceedings maintained to provide a record of the decision-making process producing the final rule, and so forth.¹³⁶ The rules generated through formal rulemaking processes typically reflect the side presenting the preponderance of evidence in the hearing; that is, the rule is typically “formulated upon the basis of the evidentiary record made in the hearing.”¹³⁷ Thus, the group or groups that are able to provide the most compelling argument “wins,” and the final rule typically reflects this successful position.

The process of formal rulemaking is, on all accounts, a highly structured and exclusive one. Participants from regulated industries, interest groups and advisory

¹³⁵*The Administrative Procedure Act.* 5 U.S.C. 556.

¹³⁶*The Administrative Procedure Act.* 5 U.S.C. 556.

¹³⁷Clark, Tom C. “The Attorney General’s Manual on the *Administrative Procedure Act.*” 1947.

committee members are included in these processes, and their participation, particularly as a form of expert testimony providing relevant evidence, is highly influential in determining the outcome as the final adopted rule.¹³⁸ This being the case, in this process it is strategically rational for the witness-participants to provide the most compelling evidence for their favored outcome. Moreover, there is also a significant incentive to disprove the case of the opposition and their interpretation of the statute authorizing rulemaking, and often interest groups and regulated industries exert considerable effort to provide “defensive research,” evidence undermining the expected positions of their opponents.¹³⁹

In short, formal rulemaking processes integrate “public” participation, but do so in a particular way, allowing for the most direct participation by a specific *kind* of participant. Formal rulemaking procedures allow considerable opportunity for *interested groups* to gain representation in the rulemaking process, granting these groups the power to directly impact (and occasionally even help author) adopted rules.¹⁴⁰ As defined by a later statute, the primary participants in these processes, and therefore those that wield the greatest influence are the “interests...multiple parties which have a similar point of view or which are likely to be affected in a similar manner.”¹⁴¹

¹³⁸ Advisory committees are important contributors to rulemaking in certain agencies. The *Federal Advisory Committee Act* (FACA) prescribes (but does not require) Congress to mandate in authorizing statutes the use of “advisory committees” when these are “determined to be essential.” In Chapter Six, we will examined one rulemaking which did employ an advisory committee. *Federal Advisory Committee Act.* 5 U.S.C. 1.

¹³⁹ Harter, Phillip J. “Negotiating Regulations: A Cure for Malaise.” *Georgetown Law Journal*. Vol. 71, 1982-1983. [P. 21]

¹⁴⁰ This is not to say that these processes are exempt from the notice and comment requirements of the APA, as formal rulemakings still must publish notice and accept and consider all public comments on proposed rules. Yet it is also clear that here the participation of interest groups is given greater weight.

¹⁴¹ *Negotiated Rulemaking Act.* 5 U.S.C. 562.

On the other hand, “informal rulemaking,” sometimes also called “notice-and-comment rulemaking,” is far less structured than the formal rulemaking processes described above, but (and undoubtedly because of this) informal rulemaking is (when the option exists) the far more regularly adopted process. Generally speaking, and to reduce the process down from the 11-stages highlighted in the last chapter, an informal rulemaking is characterized by five basic steps. First, the rulemaking agency publishes a notice of the proposed rule in the *Federal Register* along with a framework of the rulemaking processes that will follow. Second, following the publication of the proposed rule the general public is given a “comment period,” a period of time (which varies, but is usually 30-60 days) to write and register a comment on the proposed rule. Third, the agency analyzes all of the comments on the proposed rule and prepares the final rule. Fourth, the agency creates the “preamble” to the final rule, the introduction to the rule that addresses and analyzes the comments received and the reasoning underpinning the adopted rule. Lastly, the final version of the rule is published in the *Federal Register* and integrated in the *Code of Federal Regulations*, and publication must by law occur at least 30 days prior to the date the rule becomes effective.

With this background in mind, there are several vehicles of public participation included in an informal rulemaking. First and certainly most importantly, the primary means of participation in informal, notice-and-*comment* rulemaking is the receipt of public comments. Any individual, and for that matter any interest group or regulated industry has the legal right under the APA to author a written comment and send this comment to the agency for analysis concerning a proposed rule, a rule already written

and published (i.e. “notice”) in the *Federal Register*.¹⁴² Comments received by agencies often range from the highly researched and professionally authored (often by legal teams representing some interest group) to much less formal comments sent by ordinary citizens interested in the rule. These comments are added to the particular rule’s “docket” – the complete file containing all comments, evidence, drafts of the rule, and so forth – by the “docket manager,” the individual responsible for managing the information flow, and are typically stored in a “docket room” within the agency.

While comments can come in any form, agencies often announce preferred styles and “comment formats,” requesting that individuals include specific evidence (such as scientific evidence or legal precedent), clearly indicate whether they favor or oppose the proposed rule, and suggesting that commenters limit the nature of their comments to “scientific evidence and logic.”¹⁴³ Again, while following this format is not required, agencies are often clear that doing so will result in the greatest possible effect for a comment. Furthermore, interest groups typically intervene in this process as well, creating and distributing “docket cards” designed to allow interested citizens to easily check one of a few boxes indicating their position on a proposed rule. In this sense, the comment process is somewhat subject to the influence of the same actors dominant in the formal rulemaking process – interested groups.

¹⁴²The *Administrative Procedure Act*. 5 U.S.C. 553.

¹⁴³For one example of a “preferred” comment format, see the FDA web page at: <http://www.fda.gov/>. Furthermore, under the APA individuals are allowed access to all information pertaining to an open rulemaking, all information included in the rule’s docket. An interested party can read the comments of other parties prior to preparing their own, can analyze all evidentiary material in the docket, and so forth. While the docket room is typically housed in Washington D.C., the APA also demands that agencies make copies for interested individuals with only “reasonable fees” attached. *The Administrative Procedure Act*. 5 U.S.C. 552. What is more, and as we will discuss considerably in a later chapter, recent laws have mandated that agencies create “e-dockets,” online files of all information relevant to particular rulemakings.

In addition, the federal government has enacted over the last few decades several statutes designed to open-up the rulemaking process – and all bureaucratic decision-making processes, for that matter – to the public. These laws, the most important of which is the *Government in the Sunshine Act*, provide both increased public access to the information surrounding various processes and increased access to bureaucratic decision-makers.¹⁴⁴ More particularly, the *Government in the Sunshine Act* demands that no agency or agency decision-makers shall “dispose of any agency business,” and more specifically shall conduct no “deliberations [which] determine or result in the joint conduct or disposition of official agency business,” unless these meetings are “open to public observation.”¹⁴⁵ Yet while this statute makes the rulemaking process and the information surrounding it more open and public, it does not demand any substantive interaction between the public and bureaucratic agents when creating rules.

Nevertheless, in the end the right of public comment defines the primary vehicle of public participation in informal rulemaking. The practices of sending, receiving and analyzing comments is therefore taken very seriously, and it is not uncommon for the number of comments for some rulemakings to reach into the thousands (and occasionally more) and to emanate from citizens only casually interested in the outcome, all the way up to interest groups engaging professional lobbyists and law firms to write the most persuasive, well-researched comments. For all rulemakings, but most essentially for informal rulemakings, the right to participate in the rulemaking process through the

¹⁴⁴ *Government in the Sunshine Act*. 5 U.S.C. 552b. *The Freedom of Information Act*. (5 U.S.C. 552.) is another important and similarly intended piece of legislation.

¹⁴⁵ *Government in the Sunshine Act*. 5 U.S.C. 552b.

contribution of a written comment provides the critical venue of public participation and accountability.

II.2. Critiquing Control by Public Accountability: Who Participates?

As discussed above, the forms of public accountability mandated by the *APA* are intended to provide an additional barrier to excessive bureaucratic discretion, an unusually direct means for reasserting the link between the people and the rules which govern them. At least in principle, these forms of accountability by public participation support popular government and democracy by guaranteeing a connection between the public and bureaucrats as they exercise discretion through rulemaking. But as was the case when we examined oversight by elected representatives, here too we must ask: how effective are these direct forms of control and accountability of bureaucratic rulemaking? Or in other words, are these strategies effective at protecting the intent of Congress as defined in law, and thus reasserting the link between the people and the law critical to democracy?

One of the most common criticisms of public participation within bureaucratic rulemaking as mandated by the *APA* – and probably the single most important criticism – focuses on the inequalities of these modes of participation. These processes, it has often and long been noted, permit and privilege the participation of certain actors over others, and more specifically privilege powerful and influential interest groups and other organized actors over ordinary citizens and those without the basic resources needed to effectively participate.¹⁴⁶ And to be sure, these inequalities borne of interest group

¹⁴⁶For some examples, see Dahl, Robert. *Dilemmas of Pluralist Democracy*. 1982. New Haven, CT: Yale University Press; Lowi, Theodore. “Two Roads to Serfdom: Liberalism,

domination in rulemaking are not without significant consequences for the general effectiveness of these forms of accountability. Some clarification is here required.

There are a variety of reasons that interest groups, trade associations, elite policy networks, and so forth, tend to dominate public participation in bureaucratic rulemaking processes. In the first instance, formal rulemaking processes, as discussed above, statutorily guarantee the most direct access to representatives of various interested groups. Indeed, the *APA* defines participants in these formal processes as “interests” or “parties,” by which is meant representatives of groups that as closely as possible mirror the different relevant or affected parties within society. While these groups sometimes do represent broad segments of the public, their privileged access to rulemaking processes comes at the price of similar access for less powerful groups or those individuals not adequately represented. In fact, more powerful interest groups will often focus on the rulemaking process more than other political venues (including the legislature), and this is the case precisely because these processes tend to permit nearly unreserved access to “the most organized interests,”¹⁴⁷ while attracting or permitting far less participation from the general public or less influential groups.¹⁴⁸

Additionally, thinking now about informal rulemaking processes and the mode of participation through public comment most significant within it, it is often claimed that there are a variety of knowledge and resource barriers standing between some segments of the public and participation as the contribution of a comment to a rulemaking, barriers

Conservatism and Administrative Power.” *American University Law Review*. Vol. 36, 1987; Schattschneider, E.E. *The Semi-Sovereign People*. 1960. N.Y., N.Y.: Holt, Rinehart and Winston.

¹⁴⁷Lowi, *The End of Liberalism*. P. 60.

¹⁴⁸Kerwin, *Rulemaking*. P. 276.

which are more easily surmounted by powerful organized groups. Indeed, it is accepted as fact that meaningful and influential participation in rulemaking “requires at least a modicum of technical expertise,”¹⁴⁹ and as the example of a comment “format” discussed above suggests, there are often built-in barriers for those who cannot or do not feel able to provide “good science and logic” in voicing their perspective on a proposed rule. Couple this with the necessary expenditure of time and other resources required to adequately research and author a comment likely to impact rulemakers, and even this seemingly more egalitarian process becomes less accessible.

On the other hand, organized interests, and particularly the more powerful interest groups, have the time, resources and expertise to undertake the task of authoritatively authoring a comment (or to hire a legal team to do so for them), and thus stand a better chance of impacting final rules. Additionally, these groups often incur considerable expense to flood rulemaking agencies with docket cards produced by the group but sent in the name of ordinary citizens as an effort to increase the perception of broad public support for their position. Given all of this, it is not surprising that empirical studies have repeatedly evidenced the dominance of some interest groups in informal rulemaking through written comment, indicating that ordinary citizens are much less likely to participate via comment in rulemakings and have their voices heard than are organized interest groups, and that some interest groups are much more successful at gaining access and influence than others.¹⁵⁰

¹⁴⁹Kerwin, *Rulemaking*. P. 276.

¹⁵⁰For a validation of the claim that participation in rulemaking does not exhibit equality based on case studies of 11 different and objectively important rulemakings, see Golden, Marissa Martino. “Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?” *Journal of Public Administration Research and Theory*. Vol. 8, No. 2, 1998. Golden finds for several important rulemakings that *only* business interest groups and trade associations issued comments, with literally zero comments

In the end, when examining the equality of modes of public participation in rulemaking, most have agreed that “the pressure system is tilted in favor of the well-off, especially business, at the expense of the representation of broad public interests and the interests of those with few political resources.”¹⁵¹ In other words, the system as it exists today tends to grant greater access and influence to some more dominant interest groups, groups which tend to represent already dominant social groups.¹⁵² Based on these characteristics of modes of public participation in bureaucratic rulemaking and the fact that powerful organized interests tend to dominate them, it should come as little surprise that these groups also tend to wield considerable influence over the final outcomes as adopted rules. In fact, some scholars have gone so far as to suggest that agencies created to seek and uphold the public good as defined in statute by regulating a particular industry or group of actors instead regularly become “captured” by the industries and interests they were tasked to regulate – to the detriment of the public at large.¹⁵³

Given that it is almost universally agreed that rulemaking processes favor the participation of organized interests – and the most effectively organized above all others – it would not be unreasonable to challenge these processes on the grounds that they

from citizen activist groups. For some countervailing evidence (with an $n=1$), see Nixon, David, et. al. “With Friends like These: Rule-Making Comment Submissions to the Securities and Exchange Commission.” *Journal of Public Administration Research and Theory*. Vol. 12, No. 1, 2002.

¹⁵¹ Schlozman, Kay. “What Accent the Heavenly Chorus? Political Equality and the American Pressure System.” *The Journal of Politics*. Vol. 46, 1984 [P. 1028]. Schlozman gets the title of her article from a famous quote by Schattschneider, who noted that “the flaw in the pluralist heaven is that the heavenly chorus sings with an upper-class accent.” Schattschneider, *The Semi-Sovereign People*. P. 35.

¹⁵² Golden, “Interest Groups in the Rule-Making Process.”

¹⁵³ For a classical outline of the “capture hypothesis,” see Bernstein, M.H. *Regulating Business by Independent Commission*. 1955. Princeton, N.J.: Princeton University Press; see also Lowi, *The End of Liberalism*. Later, many would challenge the validity of the capture hypothesis, at least in the sense that it was difficult to locate an agency that was “fully” captured. Hill, Larry B. “Who Governs the American Administrative State.” *J-PART*. Vol. 1, No. 3, 1991.

undermine a basic principle of democracy: democratic equality. Yet we need not adopt this normatively contestable and more difficult approach to effectively criticize direct public accountability as a form of oversight and control of rulemaking. Rather, by adopting the same standard employed above to investigate oversight by elected representatives – the effectiveness of these modes of control at protecting the law and the goals and intent of the legislative power enacting the law – we can also challenge these forms of control.

Given their direct access to rulemaking processes, certain dominant organized interests and actors tend to wield considerable influence over the content of adopted rules. Interest groups, trade associations and other powerful actors become interested in and work to influence rulemaking outcomes because they have some stake in the outcome, obviously enough. Yet these groups are committed to defending the intent of a statute as defined and pursued by Congress through statute *only if* this perspective suits their particular interests. If, on the other hand, these groups and actors have goals at cross-purposes with a statute as enacted, their purpose shifts and these groups work to water-down or undermine legislation as much as possible, often to the detriment of the public at large. In other words, instead of protecting law from excessive bureaucratic discretion, these groups often become dangerous and powerful opponents of the law; instead of reasserting a connection between the people and the law, these groups often strive to push the two farther apart.

In Chapter Seven, we will investigate one example of this type of “statutory distortion by public accountability.” This case illustrates how, precisely through interest group participation in the rulemaking process, a statute designed to more rigorously

monitor and enforce standards of organic farming actually had the opposite effect – once the interest groups and trade associations with a significant stake in the game entered the process. This case, one of many we could examine, provides evidence of a simple fact: instead of providing means for reconnecting the people and the law in the face of delegation to bureaucratic agencies by defending the law from bureaucratic abuse, the modes of public accountability mandated by the *APA* often further distances bureaucratic rules from the lawmakers, the law and the people.

III. Conclusion: Democratic Control of the Bureaucracy – The Need for a New Model

The analysis undertaken above, in conjunction with what has been argued over the previous chapters, has shown us several things, and offers an opportunity for us to draw some conclusions relevant to all of what we have examined to this point. These investigations also force us, I think, to begin the process of moving beyond the limitations of existing democratic means for controlling and holding accountable bureaucratic institutions and actors as they exercise discretion – and particularly over the rulemaking function – as an essential task in better protecting and defending our model of democracy.

In the first instance, I think it is now fair to conclude that the models of democracy we examined in Chapter Two, both in the basic relationships connecting the people with the laws which govern them *and* the basic strategies for reconciling the tension between democracy and administration through democratic modes of control and accountability, have found expression in modern political systems such as the United States. To be sure, it was only general forms of control offered by thinkers like Locke and

Rousseau – overarching suggestions for ensuring that the administrative or executive power did not become an excessively dominant power overwhelming popular government, but instead remained subordinate – and not finite or particular methods. Yet from a general perspective, these strategies adequately describe how contemporary democracies have attempted to democratically control bureaucratic discretion.

Borrowing from the representative-democratic model, certainly the dominant model in practice, oversight of bureaucratic discretion by elected representatives provides a central means for guaranteeing the intent of the law as enacted by the elected legislature.

However, and evidencing the traces of direct democracy lingering within the U.S., the modes of direct public accountability mandated by the *APA* provide an alternative form of democratic control over bureaucratic discretion through processes like rulemaking. In short, it is through these forms of oversight and accountability that the link between the people and the rules which govern them is fortified in the face of bureaucratic power.

Yet these strategies have proven to be at best only partially effective in protecting the goals and intentions of Congress from bureaucratic discretion, and in fact in some instances tend to undermine these goals and intentions. Again, this is not to say that instances of robust oversight and control cannot be found, or that instances of perfectly deficient oversight and control are not available for scrutiny. But these strategies are the object of fair criticism and as currently structured are likely to remain troublesome. And from the perspective of democracy, they ought to be criticized for failing to perform their most essential, fundamental purpose: reasserting the link between the people and the law essential to a democratic system.

At this point, it is appropriate to examine the landscape from a broad perspective and ask: Why have the existing and long-prescribed modes of democratic control of the bureaucracy failed to serve their basic purposes, to support democracy in the face of what was originally regarded as an instrument of the public good – the administrative system? Many reasons have been suggested to explain this reality – several were in fact examined above – but one overarching explanation has been largely overlooked. In short, we must recognize that the general strategies for reconciling the tensions between administration and popular government date back to a time before administration was as complex and expansive as it now is. To oversee a small administrative system, one including only a limited assortment of ministers capable of being almost constantly watched, might have been a relatively easy task (even this is questionable); Congressional oversight of literally millions of bureaucrats is a far different matter, and direct forms of public accountability under modern conditions are confronted with a variety of pitfalls that must be overcome. Perhaps, in short, to the extent that modern democracies are still informed by historical-theoretical models of popular government and the long-prescribed means for integrating administration within such a system, these models have proven insufficient over time, as both society and administration have expanded and grown.

Perhaps it is time, then, to look beyond the long-suggested methods for democratically controlling and holding accountable bureaucratic agencies as they exercise discretion. To this end, we might look towards an *alternative model of democracy*, a complimentary model designed and situated within the contemporary context and more sensitive to the limitations of modern society and politics, for better controlling and holding accountable the bureaucracy. About this much, we can be sure:

processes like bureaucratic rulemaking, where unelected bureaucrats effectively make policy and law unencumbered by the same connections to the people as elected representatives, or the people legislating directly, certainly challenges our understanding of democracy if not vigorously controlled and held accountable. Finding means for better controlling bureaucratic institutions as they exercise discretion is thus essential to reasserting and solidifying democracy. It is this task that the next part of this dissertation will seek to accomplish.

PART TWO: DISCOVERING A SOLUTION

Chapter Five: The Deliberative Theory of Democracy

Introduction

This chapter begins the process of seeking a more effective model of democratic control of the bureaucracy, and does so by examining the deliberative theory of democracy. The chapter begins by somewhat briefly summarizing deliberative theory, as this theory has – over the last decade or so – received such a vast quantity of attention that a more detailed exploration is no longer necessary. In an effort at theoretical clarity and parsimony, however, we will examine how deliberative democrats understand and strive towards their two preeminent goals, and the difficulties surrounding this task – realizing political processes that are *both* deliberative *and* democratic. Moreover, towards addressing a noticeable gap in the existing literature, we will discuss why bureaucratic institutions have not been systematically examined from within a deliberative framework, and why this omission is unnecessarily limiting. Finally, we will examine two models of deliberative democracy in practice, settling on one model best able to realize both the deliberative and democratic goals of this theory in an empirically and sociologically realistic fashion, given the impediments presented by modern mass societies and the technical complexity of decision making within some institutional contexts.

Ultimately, our goal in this chapter is to examine deliberative democracy, but to do so in a way that best illustrates this theory's relevance and applicability to the problems analyzed in the first part of this dissertation. In this capacity, our analysis will be in places somewhat brief, yet sufficient to begin the process of envisioning a model of democracy capable of more effectively functioning as a mode of democratic accountability and control for processes of bureaucratic rulemaking, one capable of better connecting the people to the rules which govern them, and thus capable of better reasserting our model of democracy.

I. The Deliberative Theory of Democracy

Over the course of the last two decades, an energetic discussion concerning "deliberative democracy" has been underway.¹⁵⁴ Situated within the larger tradition of radical democratic thought advocating a close link between the people, political decision-makers and the decisions they render, the debate over deliberative democracy has offered scholars the opportunity to examine anew the nature of robust public participation in governance. Deliberative democracy is typically presented as the core of an ideal procedure, an image of a political practice not yet realized and perhaps not fully

¹⁵⁴A few of the noteworthy works introducing, considering and defending deliberative democracy are: Bessette, Joseph. "Deliberative Democracy: The Majority Principle in Republican Government." In *How Democratic is the Constitution?* 1980. Goldwin, R. and W. Shambra (Eds.) Washington, D.C.: American Enterprise Institute; Bohman, James. *Public Deliberation*. 1996. Cambridge, MA: MIT Press; Bohman, James. "Survey Article: The Coming of Age of Deliberative Democracy." *The Journal of Political Philosophy*. Vol. 6, No. 4, 1998; Cohen, Joshua. "Deliberation and Democratic Legitimacy." In *Deliberative Democracy: Essays on Reason and Politics*. Bohman, James and William Rehg (Eds.). 1997. Cambridge, Massachusetts: MIT Press; Dryzek, John S. *Deliberative Democracy and Beyond: Liberals, Critics, Contests*. 2000. Oxford, UK: Oxford University Press; Fishkin, James S. *Democracy and Deliberation: New Directions for Democratic Reform*. 1991. New Haven, Connecticut: Yale University Press; Gutmann, Amy and Dennis Thompson. *Democracy and Disagreement*. 1996. Cambridge, MA: The Belknap Press of Harvard University; Habermas, Jürgen. *Between Facts and Norms*. 1996. Cambridge, MA: MIT Press; Manin, Bernard. "On Legitimacy and Political Deliberation." *Political Theory*. Vol. 15, No. 3, 1989; Young, Iris Marion. *Inclusion and Democracy*. 2000. N.Y., N.Y.: Oxford University Press.

realizable, at least against the backdrop of contemporary social scale, social heterogeneity and the technical complexity of many political decisions. In this sense, deliberative democracy represents a normative democratic theory, one that provides us a reference point from which we might critique existing but inadequate political processes.

Increasingly, however, deliberative democracy has also provided a model of *actual* political reform, with both theorists and practitioners now envisioning and encouraging practices incorporating greater deliberative and democratic public participation.

In the broadest sense, deliberative democrats recognize public deliberation – that is, citizens and public officials *communicatively reasoning* together about problems and policies – as the essence of democratic participation. On this model, citizens and public officials within a democratic society exchange proposals identifying and addressing pertinent political problems, offering reasoned arguments for or against courses of action or policy alternatives. Policy choices, rules, laws and all manner of decisions are to be determined through this process of deliberation and communicative reasoning, with the power of reason – and not solely the number of supporters of a particular position, but ideally an eventual convergence between the two – operating as the most important determinant of political outcomes.

Theories of deliberative democracy are underpinned by the proposition – traceable back to Aristotle and reflected throughout the history of political thought in the works of Jean-Jacques Rousseau, J.S. Mill, and more recently in the works of the “participatory democrats” – that only those policies, decisions and laws reflective of the free discussion of the people within a democratic society should or in fact tend to be considered legitimate. Contemporary theories of deliberative democracy are, at their core,

theories of *democratic legitimacy*, created in response to the perceived “legitimacy deficit” of existing democratic systems emerging, so it is argued, from their deficient political processes.¹⁵⁵

For the deliberative democrat, existing democratic processes have provided contemporary democratic systems with only limited capacities for generating legitimacy. Briefly, *representative models of democracy* often prove insufficient at connecting the people with elected representatives and thus the decisions they render, deliberative democrats argue, because this model of democracy often relies on a notion of representation predicated on the insulation of political elites from the intemperate or misguided opinions of the public – what is sometimes called a “trustee” model of representation.¹⁵⁶ Moreover, *liberal models of democracy* too simplistically and negatively define politics as an agonistic undertaking between essentially separate and competing citizens, citizens that when participating in politics *should not* be encouraged to publicly deliberate (for fear of destabilizing consequences), but rather whose political activity should be limited mostly to the aggregation of private, individual preferences.¹⁵⁷ Finally, *direct models of democracy* fail to creatively and adequately address the limitations of modern societies, and thus often rely – much like the liberal model – on

¹⁵⁵For one recent example of a work examining the deficient legitimacy of contemporary democracies, see Pharr, Susan and Robert Putnam (Eds.). *Disaffected Democracies: What's Troubling the Trilateral Countries?* 2000. Princeton, N.J.: Princeton University Press; for a now classic example explaining legitimacy problems in modern democracies, and one which early along recommends public discourse as a means for regaining legitimacy, see Habermas, Jürgen. *Legitimation Crisis.* 1973. Boston, MA: Beacon Press.

¹⁵⁶For this theory of representation, see Madison, James. “Federalist #10.” In *The Federalist*; for a fuller discussion of this model, see Manin, Bernard. *The Principles of Representative Government.* 1997. N.Y., N.Y.: Cambridge University Press; Pitkin, Hannah. *The Concept of Representation.* 1967. Los Angeles, CA: University of California Press. For the deliberative-democratic response, see Gutmann and Thompson, *Democracy and Disagreement*; Young, *Inclusion and Democracy*.

¹⁵⁷For this type of critique of liberal models of democracy and their tendency towards aggregation, see Young, *Inclusion and Democracy*.

thin (i.e. non-deliberative) processes, processes permitting only a limited number of participants, or processes located at only the most local levels.

Towards addressing the legitimacy problems of contemporary democratic systems that rely on these models of democracy, the theory of deliberative democracy is presented as a model of politics designed to contend with the deep cleavages characterizing pluralistic societies and justifying these “thin” models of democracy, cleavages with which contemporary democracies (both in theory and in their institutions) are either unwilling or ill equipped to contend. Deliberative democrats suggest that without a means for dealing with these disagreements – when they are suppressed or left to distant experts or closed institutions to mediate – the support of the citizenry becomes more difficult to attain, and thus certain other goods (such as compliance with the laws, recognition of the laws as legitimate, or coordinated action between state and society) more difficult to elicit. While a deliberative democracy does not and cannot guarantee consensus as an outcome, it does insist (following a theory of *discourse ethics*) that only through public deliberation will those who disagree with political outcomes have an opportunity to offer their reasons, hear the reasons of others, and thus have the resultant outcome receive adequate moral justification, increasing the possibility of public acceptance across both the “winning” and “losing” sides.

Additionally, for deliberative democrats the notion that legitimate decisions, policies, rules or laws can emanate only from the freely formed opinion and will of the citizenry entails the understanding and implementation of some basic normative principles, principles thought capable of conferring legitimacy on decisions even under conditions of deep disagreement and heterogeneity. That is, as a central feature of the

deliberative model and its claims of legitimacy, and again borrowing from discourse ethics, deliberative democrats have suggested sets of *procedural norms* governing this practice. A wide variety of principles have been offered, emanating from a diverse group of theorists and thus occasionally conflicting in their content. But borrowing selectively from several theorists, the normative principles of deliberative democracy might be summarized as follows:

1. **Reciprocity**: In the broadest sense, the word reciprocity refers to a condition of mutual interchange and exchange. For deliberative democrats, a principle of reciprocity demands that we “respect one another as moral agents, not merely as abstract objects.”¹⁵⁸ Central to this assumption in regards to political practice is the duty to give and the right to receive “justifications for mutually binding laws and public policies.”¹⁵⁹ Thus reciprocity in the first instance demands an assumption of universal moral agency in conceptualizing a theory of political and ethical justification.¹⁶⁰
2. **Reason**: While a principle of reciprocity demands processes of intersubjective justification between moral agents, reason defines the *mode* through which this justification occurs. That is, deliberative democrats recognize reason as the only legitimate means for arriving at collectively binding political outcomes.¹⁶¹ Decisions should be the product of the “force of the better argument,” and

¹⁵⁸Gutmann and Thompson, *Democracy and Disagreement*. P. 14.

¹⁵⁹Gutmann, Amy and Dennis Thompson. “Deliberative Democracy Beyond Process.” *The Journal of Political Philosophy*. Vol. 10, No. 2, 2002.

¹⁶⁰For a larger discussion of reciprocity, see Habermas, Jurgen. “Remarks on Discourse Ethics.” In *Justification and Application: Remarks on Discourse Ethics*. 1990. Cambridge, MA: MIT Press. For a critique of a pure theory of reciprocity, see Young, Iris. “Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought.” *Constellations*. Vol. 3, 1997.

¹⁶¹There has been some debate amongst deliberative democrats on this point. Suspicious of the potentially discriminatory effects of Western modes of rationality and reason, alternative forms of communication, relying on such vehicles as “storytelling” and “testimony,” and alternative conceptions of “communicative democracy” suspicious of an argumentative, juridical form of reason have been proposed to overcome the potentially discriminatory tendencies of reason. For example, see Sanders, Lynn. “Against Deliberation.” *Political Theory*. Vol. 25, No. 3, 1997; Young, Iris Marion. “Communication and the Other: Beyond Deliberative Democracy.” In *Democracy and Difference*. Benhabib, Seyla (Ed). 1996. Princeton, N.J.: Princeton University Press.

therefore decision-making processes guided by power, coercion, traditional domination or economic advantage should not be deemed normatively valid.¹⁶²

3. Publicity: In discussing reciprocity and reason as central values of deliberative democracy, assumed is the essential substance or fodder of deliberation. That is, in explicating a process of reciprocal reason giving and justification as the basis of deliberative democracy, we assume that the subject matter of discussion, the information, positions and reasons of all actors, is universally accessible – something that is not often the case. Publicity demands that all information be made available to all actors, and this principle is proposed by deliberative democrats not necessarily to provide for a set of dispositions necessary to deliberative practice (in the way reciprocity does), but rather to make deliberation more meaningful and complete.

4. Accountability: A principle of accountability demands that we all must be responsible and answerable to others for our decisions and actions. For deliberative democrats, the accountability principle begins with the principles of reason and reciprocity, and clarifies the agents to whom we owe reasons, to whom we are responsible.¹⁶³ Deliberative democrats typically demand that, in justifying norms or laws, we all must be responsible and answerable to all those possibly affected by an outcome, that this is the group which most directly deserves ethical justification, and that must therefore be included in a deliberative process.

5. Inclusion: A principle of inclusion demands “that a deliberative procedure is legitimate only if all interests, opinions and perspectives present in the polity are included in the deliberations.”¹⁶⁴ Inclusion as a principle expands the scope of deliberative theory by demanding heterogeneity of reasons and reason-givers in a deliberative process. An inclusion principle is similar in intent to accountability, but instead of guaranteeing fair participation by delimiting the group of individuals deserving reasons and thus deserving the right to participate in a deliberation, it demands that regardless of the composition of the group of all those potentially affected by a particular outcome deliberative processes must strive towards a diverse group of participants.¹⁶⁵

¹⁶²See Habermas, Jürgen. “On the Pragmatic, the Ethical and the Moral Employments of Practical Reason.” In *Justification and Application: Remarks on Discourse Ethics*. 1990. Cambridge, MA: MIT Press.

¹⁶³Gutmann and Thompson, *Democracy and Disagreement*. P. 128.

¹⁶⁴Young, Iris Marion. “Justice, Inclusion and Deliberative Democracy.” In *Deliberative Politics: Essays on Democracy and Disagreement*. 1999. Macedo, Stephen. (Ed). Oxford, UK: Oxford University Press. [P. 155].

¹⁶⁵See Young, Iris Marion. “Difference as a Resource for Democratic Communication.” In *Deliberative Democracy: Essays on Reason and Politics*; Bohman, James and William Rehg (Eds.). 1997. Cambridge, Massachusetts: MIT Press.

6. Equality: The principles of accountability and inclusion demand that all those potentially affected by a political decision, and more generally a heterogeneous public, are included in a deliberative process; a principle of equality demands that all of these participants are granted *fair* opportunities within deliberative processes. Certainly fair and equal opportunities to influence outcomes – fair opportunity to offer reasons and arguments, or to challenge the reasons of others, for instance – are demanded within a deliberative process (and for some, more extensive and substantive forms of equality¹⁶⁶).

In the end, the deliberative theory of democracy offers a principled, normative model of democratic politics, one argued to be more capable of creating legitimate outcomes by better connecting the people – guided by principled procedures – with the decisions, policies, rules and laws which govern them. Deliberative democracy emerged precisely in opposition to the perceived deficiencies of existing democratic processes, and thus is often argued to provide one ideal model for moving past these deficiencies. In the next section, a simplifying discussion of how deliberative democrats combine their two normative ideals – deliberation and democracy – into a practical means for both judging and recommending political processes is offered.

I.1. Deliberation + Democracy

Reflecting on the above discussion of deliberative democratic theory and its core principles, a few final comments, and a final effort at theoretical clarity and parsimony, are necessary. These last comments will allow us to better understand and confront two issues critical to conceiving and pursuing a practical model of deliberative democracy:

¹⁶⁶The idea of equality within deliberative processes has generated considerable debate, and both the extent of equality and its very attainability in actual deliberative processes has been called into question. For some debate about the importance of substantive equality in a deliberative democracy, see Gutmann, Amy and Dennis Thompson. “Deliberative Democracy Beyond Process.” *The Journal of Political Philosophy*. Vol. 10, No. 2, 2002; Knight, Jack and James Johnson. “What Sort of Equality does Deliberative Democracy Require?” In *Deliberative Democracy: Essays on Reason and Politics*. 1997. Cambridge, Massachusetts: MIT Press; Young, “Justice, Inclusion and Deliberative Democracy.”

first, identifying which types of political processes are and which are not indicative of deliberative democracy; and second, identifying the difficulties involved in realizing deliberative democracy in practice, given the limiting circumstances presented by modernity.

The theory of deliberative democracy is, obviously enough, constructed of two distinct but equally important concepts. These two concepts, “deliberation” and “democracy,” are what we might call cluster concepts, each comprised of a somewhat amorphous and overlapping set of underlying categories and characteristics; the characteristics of these two cluster concepts are found in the principles discussed above. While both deliberation and democracy as cluster concepts are complex and without rigid boundaries, each containing features that in some instances overlap, inhabit both clusters or enter into mutually reinforcing relationships, the principles central to deliberative democratic theory can be assigned generally to one of these two preeminent goals. In short, for deliberative democrats “democracy” defines the normative *who*, and “deliberation” the normative *how*, of political processes.

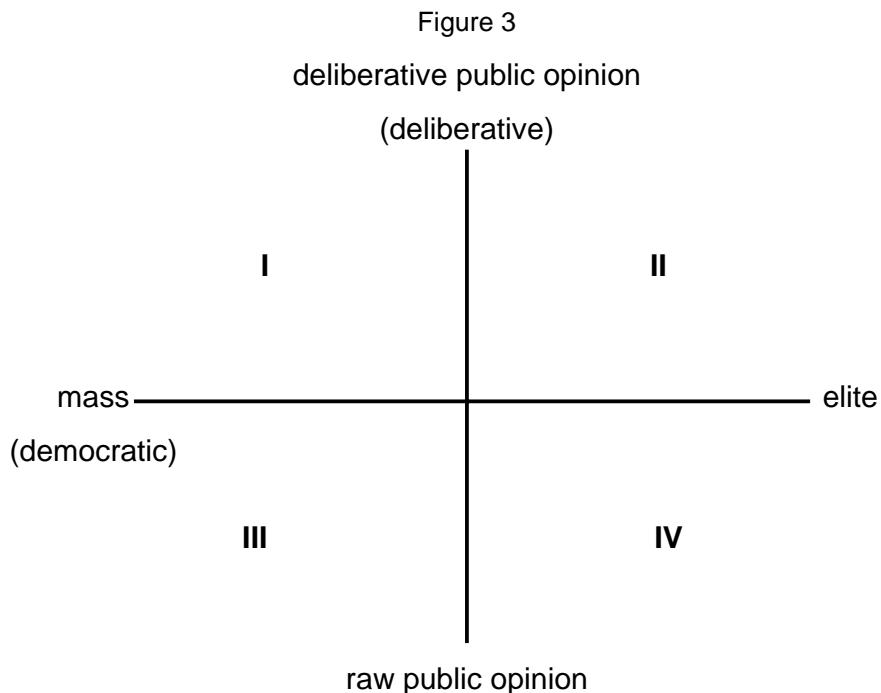
In the first instance, then, the ideal of democracy defines the *scope and breadth* of public participation in political decision-making processes. The principles of accountability, inclusion and equality define largely – but not exclusively – the composition of this “who.” In this sense, a process is democratic to the extent that it extends opportunities to a diverse group of participants for fair and roughly equal participation in a political process, the opportunity to offer reasons and criticize the reasons of others. Certainly, any truly democratic process should include all those potentially affected by an outcome, those deserving of reasons and of opportunities to

offer reasons, and ideally an inclusive, broad cross-section of the public should be included. Meeting these conditions, or at minimum striving to best approximate them in practice, provides the normative *democratic* goal of a deliberative democracy.

Deliberation, on the other hand, refers to a mode of political interaction, a means through which citizens engage one another and public officials in working to arrive at mutually binding outcomes. The principles of reciprocity, reason and publicity discussed above define largely – but again, not exclusively – the ideal of a deliberative political process. In rendering decisions, citizens and public officials ought to engage one another as extensively as possible, offer one another justifying reasons for defending a particular outcome as a basic assumption of universal moral agency, and have access to all relevant information and the reasons of others before attempting to render a decision agreeable to all participants. It is these conditions which provide the standard for judging processes as adequately *deliberative*.

So with this understanding of the twin purposes of deliberative democracy in mind, we might now ask: which existing political processes do and which do not qualify as deliberative-democratic? Recently, two authors have provided a useful analytical tool for critically examining existing political processes and striving towards alternative (deliberative-democratic) processes guided by the two distinct but interconnected goals of this theory. This heuristic allows us to think about and judge political processes on the basis of both their “deliberativeness” (the political processes undertaken towards arriving at political decisions) and their “democraticness” (reflecting the scope of public

participation in these processes), and for this reason I will reproduce and adopt this heuristic as a useful one.¹⁶⁷



By way of brief explanation, Figure 3 allows us to think about existing political processes, or processes we might hope to institute, and locate them along the continua (or within the numbered “quadrants”). The location of political processes within these quadrants reflects their adherence to the principles of deliberativeness and democraticness. The ultimate goal for the deliberative democrat is to reach as far “northwest” as possible (i.e. Quadrant I), maximizing both deliberation and democracy.

¹⁶⁷Ackerman, Bruce and James Fishkin. "Deliberation Day." *The Journal of Political Philosophy*. Ackerman and Fishkin contrast "deliberative public opinion" and "raw public opinion" because they are most interested in the *type of information* emanating from political processes, the "who" and the "what" as opposed to the "who" and the "how." Nevertheless, as Ackerman and Fishkin indicate, the "how" of participation, the type of political process undertaken, is directly responsible for the creation of these two types of opinions (their "what"), and identifying political processes amenable to deliberative public opinion is their ultimate goal. Even with these differences, I will keep their original graphic intact.

Thinking about some existing political processes, one can envision where we might locate these processes within these quadrants. By way of example, it is reasonable to locate most processes of referenda somewhere in Quadrant III. Processes of referenda tend towards democracy by (at least formally) opening-up decision-making to mass democratic participation through plebiscite – a direct vote by all qualified citizens. However, these processes often fail to be marked by meaningful public deliberation (i.e. lack reason-giving and reciprocity, in this instance), and thus tend towards a type of “raw” (i.e. aggregative and non-deliberative) public opinion. Thus only one-half of the “deliberation + democracy” equation is achieved through this particular type of process.

Similarly, we might locate the decision-making processes of the Supreme Court somewhere in Quadrant II. The processes of the Supreme Court are often lauded as exemplars of deliberative decision-making, but fail to reflect any kind of democratic process (i.e. lack accountability, inclusion and equality), given the very limited number of participants and the relative insulation of the Justices from broader public participation.¹⁶⁸

Finally, there are a few noteworthy examples of political processes that tend to fall into Quadrant I. Ackerman and Fishkin, for instance, identify those rare moments of broad and vibrant discourse concerning essential and fundamental national political issues – “constitutional moments,” they call these – when politics is both deliberative *and* democratic.¹⁶⁹ Further, some local governments engage in processes which incorporate

¹⁶⁸It is difficult to think of a process that falls in Quadrant IV. In most democratic societies processes which are limited in participation tend to emphasize intensive deliberation as the justification for not including a larger number of participants. Conversely, processes that are democratic often use this mass participation as grounds for limiting or eschewing deliberation. That is, either deliberation *or* democracy tends to be emphasized in most political processes. One example might be the Electoral College in the United States, a process that (while less significant than it once was) is neither particularly deliberative nor democratic.

¹⁶⁹Ackerman and Fishkin, “Deliberation Day.” P. 149.

both deliberative and democratic elements through council meetings, participatory advisory committees, and so forth. Nevertheless, both practices are rare and difficult to replicate on a broader scale.

In sum, when thinking about various political processes operative in many modern democratic systems, it is easy to recognize that the tendency over the years has been to *strive towards one of these two values over the other* – to make processes more deliberative, but limit eligibility for participation; or to make processes open to all, but focus less on deliberation than the aggregation of particular preferences.¹⁷⁰ That is, the “deliberation + democracy” equation is often perceived as an either/or situation; if mass participation (i.e. democracy) is prized, opportunities for deliberation must be limited, and vice versa. This choice is often justified from practical necessity, based in the limitations presented by modern societies with large populations and complex decision making processes. Finding and designing processes which incorporate *both* deliberation and democracy at all levels of politics is thus *the* key challenge for deliberative democrats.

As we proceed, therefore, we will refer to this simplified and useful heuristic device in both criticizing existing political processes and striving towards deliberative democratic processes. What is more, below we will investigate in a more detailed fashion two competing models of deliberative practice, seeking a model which adequately incorporates both the deliberative and democratic principles, and at the same time proves applicable to the limiting conditions of modern mass societies.

¹⁷⁰ Ackerman and Fishkin, “Deliberation Day.” P. 149.

II. Deliberative Democracy and Bureaucracy

Given the virus-like spread of deliberative democratic theory over the last few years, one might reasonably conclude that as deliberative theory has grown more popular and attracted greater interest, even winning the interest of politicians, practitioners, journalists and other public commentators, the full range of political processes – and particularly those thought to result in a “democratic deficit,” or that are less able to garner recognition for decisions rendered – had been analyzed from within a deliberative perspective. One might assume that, for instance, given the long-recognized tension between bureaucracy and democracy, either scholars of public administration or deliberative theorists would have looked closely at integrating deliberative-democratic and bureaucratic processes. Yet surprisingly this is not the case, and only a very small handful of works have investigated the possibility of deliberative democracy within a bureaucratic context.¹⁷¹ Why this has been the case, and why we are justified in moving past this limiting tendency, requires analysis.

To begin with but one example, in *Democracy and Disagreement*, Amy Gutmann and Dennis Thompson’s influential work on deliberative democracy, the authors provide preliminary but interesting and valuable insight into the institutional locations they think deliberative practices might and should be applied. Gutmann and Thompson rightly point out that, “in contrast to some other conceptions of democracy, deliberative democracy does not divide institutions into those in which deliberation is important and those in

¹⁷¹For a few recent counter-examples, see Forrester, John. *The Deliberative Practitioner*. 1999. Cambridge, MA: MIT Press; Fung, Archon. “Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing.” *Politics and Society*. Vol. 29, No. 1, 2001; Fung, Archon. “Deliberative Democracy and International Labor Standards.” *Governance*. Vol. 16, No. 1, 2003; Hunold, Christian. *Public Deliberation and Democracy: Low-Level Waster Disposal Facility Siting Policy in Germany, Canada and the United States*. 1998. Ph.D. Dissertation. Pittsburgh, PA: University of Pittsburgh.

which it is not.”¹⁷² In other words, they see deliberative democracy as being applicable across *all* institutions (and one would also assume, both public and private institutions), even those typically considered exclusively the domain of political elites.

Nevertheless, Gutmann and Thompson argue that some processes render decisions more clearly lacking in legitimacy or broad public support because of the particular issues under consideration, the institutional forms or political processes employed, and that these should be the focus of deliberative theorists. That is, Gutmann and Thompson suggest a “search for the most suitable institutional expression” for deliberative practices, and recognizing this they consider some specific criteria that should be considered in discerning an institutional focus for deliberative democracy. And although rejecting the notion that some institutions remain “arenas of power” as opposed to “forums for reason,” Gutmann and Thompson conclude that

In a democracy in which citizens are governed on the basis of values adopted and refined through collective deliberations, all makers of public policy – legislators as well as judges – should give reasons based on principles that reflect these values. Legislatures as well as courts, then, should be designed to encourage these reason-giving practices.¹⁷³

Of course, the institutional nexus omitted from this statement is at least somewhat curious – there is no mention of one of the more important and certainly one of the more

¹⁷²Gutmann and Thompson, *Democracy and Disagreement*. P. 358.

¹⁷³Gutmann and Thompson, *Democracy and Disagreement*. P. 358.

troubling public policymaking institutions from a democratic perspective, the bureaucracy.¹⁷⁴

The tendency that Gutmann and Thompson reveal in this passage is not isolated to their deliberative theory of democracy, nor do I intend to single-out in a damning fashion their otherwise useful theory through this critique. Rather, the tendency that these two exhibit is relatively pervasive; with all of the work focused on deliberative democracy over the last few years, comparatively few scholars have selected the bureaucratic system as an institutional focus. On the contrary, most look to deliberative theory as a means for reconsidering already somewhat deliberative processes, such as juries, legislatures, town-hall meetings, and so forth. But the idea that deliberative democracy ought to be focused in the first instance – and for some, perhaps *only* – on these legislative institutions or a few applicable judicial processes leaves open important questions for and presents potential limitations to a deliberative theory of democracy. And perhaps, this tendency challenges *prima facie* any effort – including our own – to apply the principles of deliberative democracy to a bureaucratic context.

The tendency of deliberative theorists to reflexively assume the applicability of this theory first and foremost to traditionally deliberative institutions emanates from several sources, I would suggest. In the first instance, the word “deliberation” is typically invoked to describe political situations already and unequivocally governed by discussion and debate – what one scholar has colorfully called “government by discussion,” i.e. parliamentary government – and thus it is natural to assume that deliberative democracy

¹⁷⁴In fairness to Gutmann and Thompson, they state early along that many institutions (including some bureaucratic processes) should be transformed to fit deliberative theory’s principles. By the end of the work, however, they seem to argue that deliberative democracy should be focused on these traditional deliberative institutions, perhaps to the exclusion of other institutions.

must mean extending the scope of *these particular* (i.e. legislative) arenas to include a broader range of deliberators (or perhaps creating mechanisms for better integrating public deliberation, etc.).¹⁷⁵ What is more, a standard normative model of democracy in the Western tradition – drawn from an idealized image of the Athenian *polis* – views democracy in its purest, most participatory and deliberative form as a process within which the citizens themselves make the laws through free-wheeling deliberation, driving the reflex to think of legislative processes and institutions as a natural focus for any process of deliberation. For many, a “deliberative politics” directs the mind to the *Pnyx* and the *ekklesia*, with the Athenian people legislating for themselves or sitting on a jury.

Finally, and for our purposes most importantly, the tendency to bypass bureaucratic institutions as a potential institutional location for the application of a deliberative model democracy masks a deep and persistent intellectual distinction between popular and elite competencies plaguing Western thought, or so I would argue. That is, this focus on traditionally deliberative institutions implicitly suggests a political division of labor between those institutions more conducive to inclusive discussion – i.e. “political” processes – and those requiring exclusivity and elite authority – i.e. “administrative” processes. It reflects, in other words, the ubiquitous “politics/administration dichotomy”: means for considering public participation in legislative-political processes may be acceptable, but extending similar opportunities to the expert-administrative system is ill-advised. Indeed, any suggestion that the expert, technocratic processes of the bureaucracy be infused with the participation of the

¹⁷⁵The notion of legislative-parliamentary institutions as centers of “government by discussion” is found in Carl Scmitt’s *The Crisis of Parliamentary Democracy*. 1994. Trans. Ellen Kennedy. Cambridge, MA: MIT Press.

“ordinary masses” frightens many in its potential consequences, and this has perhaps steered deliberative theorists away from this set of political institutions.

Yet the reflex to think of deliberative democracy as a process geared towards the reform or expansion of only traditionally legislative or already-deliberative processes neglects, I think, the many venues where this practice might prove both applicable and useful. But to move past these assumptions we must also move past the narrow (and unfortunately, still common) image of deliberative democracy as citizens *directly* participating in the decision making process – perhaps standing in some huge town hall, 200 million strong – with the people directly *responsible*, through a “one man, one vote” rule, for the issuance of binding laws, rules and policies. Once we have laid this misrepresentation to rest, we come to recognize the applicability of this model to a wider range of venues – including as a means for holding accountable the bureaucratic system to the democratic public. In the next section, we will get a better feel for the empirical plausibility of deliberation in practice by examining two competing models, and settling on one as the most attractive.

III. Deliberative Democracy from Theory to Practice

In what follows, I will examine two models of deliberative democracy in practice, settling on and adopting one in particular, as this model maintains the norms of deliberative democracy but does so in an empirically and sociologically realistic fashion. This model will be defended, when all is said and done, because it addresses and confronts two of the most pertinent and difficult questions for a deliberative model of democracy: First, how can we realize *both* deliberative *and* democratic public

participation, given the size and scale of modern political systems? Second, how can we support the application of deliberative democracy to an institutional context such as the administrative system, given the technical complexity of the decisions rendered? Because the model we will adopt answers both of these questions adequately, it provides the best means for conceiving of deliberative democracy within the institutional context of greatest interest to this work – the bureaucratic system.

III.1 Two Models of Deliberative Practice

In his now well-known essay on deliberative democracy, “Deliberation and Democratic Legitimacy,” Joshua Cohen defines an ideal deliberative procedure as a model of legitimate and legitimating democratic practice.¹⁷⁶ Similar in both substance and purpose to the principles of deliberative democracy outlined above, Cohen provides a set of primary principles that characterize “the conditions that should obtain if the social order is to be manifestly regulated by deliberative forms of collective choice.”¹⁷⁷ Cohen’s purposes in outlining a deliberative-democratic procedure are several, but primary among these is the goal of creating a “distinctive structure for addressing institutional questions.”¹⁷⁸ That is, Cohen’s discussion of deliberative democracy is focused in the first instance on providing an image of deliberative political practice that is “rooted in the intuitive ideal of a democratic association in which the justification of the terms and conditions of association proceeds through public argument and reasoning among equal

¹⁷⁶Cohen, Joshua. “Deliberation and Democratic Legitimacy.” In *Deliberative Democracy: Essays on Reason and Politics*. Bohman, James and William Rehg (eds.). 1997. Cambridge, Massachusetts: MIT Press. [P. 67].

¹⁷⁷Cohen, “Deliberation and Democratic Legitimacy.” P. 73.

¹⁷⁸Cohen, “Deliberation and Democratic Legitimacy.” P. 68.

citizens.”¹⁷⁹ In this way, Cohen’s conception of deliberative democracy is largely focused on the conditions for realizing this normative theory, on conceiving a model of deliberative democracy useful for transforming actual political practice.

In outlining his understanding of deliberative democracy, Cohen is admittedly guided by a Rawlsian notion of public reason and a similar emphasis on *political institutions* as the primary location for seeking social justice, and from this perspective he presents deliberative democracy as a set of principles most applicable to *formal* political decision-making processes.¹⁸⁰ That is, Cohen characterizes deliberative democracy as a *centered* process of political decision-making, where the citizenry *writ large* is to come together to engage one another in a process of public justification. “Agreement among all who are committed to free deliberation among equals” is the fundamental purpose of this centered deliberative process, and the cooperative *popular enactment* of mutually binding decisions, public policies and laws the ultimate product.¹⁸¹

Cohen admits to finding inspiration for his “ideal deliberative procedure” in earlier “republican conceptions of self-government.”¹⁸² That is, Cohen’s vision of deliberative democracy finds its roots in the classical republican tradition theorizing political participation in small, homogeneous communities where *universal physical presence* in political deliberation is the normative ideal, and *popular authority to render binding decisions* the decision-making rule. And it is this grounding in classical

¹⁷⁹Cohen, “Deliberation and Democratic Legitimacy.” P. 72.

¹⁸⁰Rawls, John. *Political Liberalism*. 1993. N.Y., N.Y.: Columbia University Press; see also, Rawl, John. *A Theory of Justice*. 1971. Cambridge, MA: The Belknap Press.

¹⁸¹Cohen, “Deliberation and Democratic Legitimacy.” P. 73.

¹⁸²Cohen, “Deliberation and Democratic Legitimacy.” P. 67.

republicanism that has given rise both to critics of this perspective on deliberative practice, and to alternative models.

One noteworthy proponent of a deliberative theory of democracy (or what he calls a “discourse theory of democracy and law”), Jürgen Habermas, has criticized Cohen’s and similar models that support a centered democratic practice, models that reduce all deliberation to formal, face-to-face decision-making processes aimed at rendering binding decisions.¹⁸³ Habermas rejects such republican conceptions of deliberative democracy, doing so primarily because these models ignore the “inescapable conditions of modernity,” the sociological reality of complex, mass societies where technically complex issues are at stake. According to this critique, a centered model posits a myopic, univocal and ultimately utopian understanding of deliberative practice that either rejects the need to conceive a role for *informal* public deliberation in the *public sphere*, or implausibly inflates the logic of formal institutions to guide both formal and informal deliberations.¹⁸⁴ In response, Habermas defends a *two-leveled* model of deliberative politics that “can find a place in the life of a complex society,”¹⁸⁵ one that differentiates analytically but incorporates both formal decision-making processes and informal

¹⁸³Habermas, Jurgen. *Between Facts and Norms: A Contribution to the Discourse Theory of Law and Democracy*. 1996. Trans. William Rehg. Cambridge, Massachusetts: MIT Press. [P. 304-308.]

¹⁸⁴For a similar critique of Cohen’s understanding of deliberative democracy, see Habermas, Jurgen. “Three Normative Models of Democracy.” In *The Inclusion of the Other*. 1998. Cambridge, MA: MIT Press.

¹⁸⁵Habermas, *Between Facts and Norms*. P. 315. Habermas’s attempt to build a normative democratic theory sensitive to the sociological reality of complex societies drives his defense of the two-leveled model. For Habermas, complexity is a multi-purpose concept, but applies most essentially to the “specialization of the technical steering knowledge used in policymaking and administration. Such specialization keeps citizens from taking advantage of politically necessary expertise in forming their own opinions.” [P. 317].

opinion formation in “weak publics.”¹⁸⁶ And because of its emphasis on conceiving a *sociologically realistic* model of deliberative practice designed against the backdrop of modern mass societies, this two-leveled model deserves greater attention.

The formal-institutional level of deliberative practice on the two-leveled model mirrors existing democratic institutions in logic and purpose. The purpose of these deliberative institutions is, in the words of Habermas, to “convene for a sitting in which an agenda is negotiated and resolutions are passed if necessary.”¹⁸⁷ The ultimate goal of these institutions is straightforward: to render binding political decisions, “with a view to the cooperative solution of practical questions.”¹⁸⁸ Where deliberative institutions differ significantly from existing democratic institutions is precisely in the nature of their guiding principles and procedures. It is through a critical examination of existing institutions and their non-deliberative practices, and not their fundamental purpose or the sources of their constitutional authority, that this two-leveled model demands the reconstruction of public institutions.

The second level of deliberative democracy refers not to formal decision-making processes within institutions, but rather to informal venues of deliberation and opinion formation, and it is this level that is most important to understanding this model as commensurate with *deliberative* and *democratic public participation*. The locus of this level of deliberative practice is the public sphere, an arena centered in civil society and

¹⁸⁶This idea of “weak publics” can be found in Fraser, Nancy. “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy.” In *Habermas and the Public Sphere*. 1992. Calhoun, Craig (Ed). Cambridge, MA: MIT Press.

¹⁸⁷Habermas, *Between Facts and Norms*. P. 307.

¹⁸⁸Habermas, *Between Facts and Norms*. P. 307.

devoted to discourse concerning pressing matters requiring political solutions.¹⁸⁹ As Habermas writes in defining the nature of discourse in the public sphere:

This “weak” public is the vehicle of “public opinion.” The opinion-formation *uncoupled from decisions* is effected in an open and inclusive network of overlapping, sub-cultural publics having fluid temporal, social, and substantive boundaries.¹⁹⁰ [my italics]

As informal realms of deliberative political practice, the importance of these weak publics, these unregulated and “anarchic” public spheres, lies in their ability to provide informal but freely-formed public opinion to constitutionally grounded institutions, and to serve as the locus for a type of democratic popular sovereignty commensurate with the sociological reality of complex, populous modern societies.¹⁹¹

For Habermas, an idealized model of the public sphere begins in the historical emergence of the “bourgeois public sphere,” an entity developed outside the grasp of the absolutist state.¹⁹² Unfettered by political regulation or formal procedural constraints, and with no *authoritative* political power, these weak publics, Habermas claims, “specialize in discovering issues relevant for all of society, contributing possible solutions to problems, interpreting values, producing good reasons, and invalidating others.”¹⁹³ However, these public discourses *do not* bind the government to act in the same manner

¹⁸⁹For a variety of comments and criticisms of the public sphere concept, see Calhoun, Craig (ed). *Habermas and the Public Sphere*. 1992. Cambridge, MA: MIT Press.

¹⁹⁰Habermas, *Between Facts and Norms*. P. 307.

¹⁹¹Habermas, *Between Facts and Norms*. P. 307-309.

¹⁹²See Habermas, Jurgen. *The Structural Transformation of the Public Sphere: An Inquiry in a Category of Bourgeois Society*. 1989. Cambridge, Massachusetts: MIT Press.

¹⁹³See Habermas, Jurgen. “Popular Sovereignty as Procedure.” In *Between Facts and Norms*. 1996. Cambridge, MA: MIT Press. [P. 485].

as the formal decisions of a constitutionally empowered institution – a “strong public.” In fact, Habermas concedes, “not every legitimate object of public discussion will in fact be politically regulated.” Instead, discourse in the public sphere represents a type of popular sovereignty detached from the notion of the people as a homogeneous and physically present body.¹⁹⁴

Adopting the language of the policy sciences, one way to better understand the importance of this informal level of deliberative practice within the public sphere is through its diverse roles as: an *agenda-setter* for political institutions, an arena for informal *policy formulation*, a *vehicle* of public opinion, a means for *compelling* public officials towards a particular decision or outcome, and an arena for the *critical evaluation* of policies enacted by formal institutions.

The public sphere is essential in the first instance in its capacity – through public discourse and reason giving between citizens – to *detect* problems confronting particular individuals, social groups or society as a whole. On this not uncommon argument, individuals and social groups are claimed to be best situated to detect their own most pressing problems. Furthermore, these same “sensors” of problems are often ideally situated to propose *solutions*, given that public officials are often poorly positioned to understand either the gravity or the appropriate means for contending with these problems.

¹⁹⁴Much of this relies on Habermas’s reconstruction of popular sovereignty under modern conditions. In this sense, Habermas writes that, “if one can still speak of “embodiment” at all, then sovereignty is found in those subjectless forms of communication that regulate the flow of discursive opinion- and will-formation....Subjectless and anonymous, an intersubjectively dissolved popular sovereignty withdraws into democratic procedures and the demanding communicative presuppositions of their implementation.” Habermas, “Popular Sovereignty as Procedure.” P. 486.

Additionally, the public sphere represents the primary vehicle through which the popular will impacts formal decision-making processes. It is from this perspective that the public sphere is defined as “the primary connector between people and power.”¹⁹⁵ However, the power of the public sphere to detect and address problems is only relevant to the extent that these opinions are *transmitted* – through the mass media, through established associations constructed to effect this transmission (i.e. interest groups), through street protests and letter-writing campaigns, etc. – to public officials. What is more, when the opinions emanating from the public sphere or diverse public spheres reach a critical mass and “trickle-up” into the realm of formal political decision-making, or result in what has been termed a “deliberative majority,” considerable *social pressure* is exerted on the democratic state to pursue actions commensurate with these opinions, or explain why it will not.¹⁹⁶

Finally, these two levels of deliberative practice – the institutions of the democratic state and the public sphere – should not be understood as always-amenable partners in the construction of public policy, with society offering agenda items and possible solutions, and then passively submitting to the decisions of the state. On the contrary, should the state refuse to act guided by the opinions of these weak publics, the public sphere is redirected as a vehicle for a *critical appeal* of decisions in opposition to the state, an entity within which a groundswell of negative sentiment can emerge and challenge the reasons guiding or the legitimacy of a political decision.

¹⁹⁵Young, Iris. *Inclusion and Democracy*. 2000. N.Y., N.Y.: Oxford University Press. [P. 173].

¹⁹⁶Bohman, James. *Public Deliberation: Pluralism, Complexity and Democracy*. 1996. Cambridge, Massachusetts: MIT Press. [P. 151-196].

In sum, Habermas's two-leveled model of deliberative democracy makes a distinction between formal-institutional decision making and informal deliberation in the public sphere, and this distinction is driven by the inescapable conditions of modernity, the complexity and scale of modern politics and society. For Habermas, these facts permit only a more limited type of public deliberation in the public sphere as a "countersteering measure," juxtaposed with the "steering" powers controlled by public officials.¹⁹⁷ Suggestions for a thicker version of public deliberation, marked by broad citizen access to formal decision-making processes – and thus participation in actual "steering" – have for Habermas an "abstract and somewhat utopian tenor."¹⁹⁸ For Habermas, the public sphere as the locus of deliberation is intended to "influence the premises of judgment and decision making in the political system without intending to conquer the system itself," and these limitations are set precisely because the technical complexity of decision-making processes and the scale of modern societies prevent a more direct exercise of popular sovereignty.¹⁹⁹

Through this brief introduction to both the centered (Cohen) and the two-leveled (Habermas) models of deliberative political practice, the distinctness of these models becomes clear. Cohen's centered model of deliberation remains firmly rooted in the classical republican tradition, reintroducing a normative image of politics first posited in reference to the small, homogeneous *polis*. It is precisely and explicitly this republican simplicity – rooted in the "Athenian dream" – that Habermas rejects in defending his

¹⁹⁷Habermas, *Between Facts and Norms*. P. 327. Habermas also calls his version of popular sovereignty "popular sovereignty set communicatively aflo w." P. 371.

¹⁹⁸Habermas, *Between Facts and Norms*. P. 317.

¹⁹⁹Habermas, "Popular Sovereignty as Procedure." P. 487.

two-leveled model. On this two-leveled model, formal institutions and public spheres enter into a symbiotic relationship of mutual need, with the public sphere sensing and addressing problems and evaluating policy choices, and formal institutions integrating this knowledge into their decision-making processes and codifying these decisions into policy and law.

Unlike Cohen's centered model, the two-leveled model of deliberative democracy provides in many ways both a normatively appealing *and* an empirically plausible model of deliberative political practice, explicitly situating the principles of deliberative theory within the "inescapable" conditions of modernity. That is, this model works to define the conditions and possibilities for a more expansive deliberative *and* democratic practice within complex mass societies ("problem one," from above). It does so by taking seriously the capabilities of a critical public acting *outside* formal structures of power within civil society and the public sphere to critically redirect formal institutional deliberations and the democratic state, a source of real political power that has been examined extensively and positively by a variety of scholars.²⁰⁰ In this way, this model provides a "thin but permeable wall" between the public and those actors with authoritative power to render decisions, recognizing that some decisions – such as *those within bureaucratic institutions* – require a considerable level of expert authority ("problem two," from above).²⁰¹ For these reasons, this model of deliberative practice has

²⁰⁰For one example, see Cohen, Jean and Andrew Arato. *Civil Society and Political Theory*. 1994. Cambridge, MA: MIT Press.

²⁰¹In fact, Habermas specifically considers the advantages of his model from the perspective of the administrative state, where decisions rendered must reflect certain technical competencies and scientific expertise. Habermas, "Popular Sovereignty as Procedure." P. 487.

been appropriated by a variety of deliberative theorists, guides many in their thinking about deliberative democracy in practice, and will largely guide us from here forward.²⁰²

Yet to be sure, Habermas's two-leveled model, particularly given its reliance on the public sphere concept, has not been immune to criticism. Indeed, some have challenged the usefulness and even the mere potential of the public sphere to realize the principles of deliberative democracy in practice. Some have challenged the inherent fairness of the public sphere as it is currently structured, for instance, suggesting that this construct tends to provide unequal opportunities across various individuals and social groups. The mass media, a critical vehicle for carrying ideas from the public sphere into formal institutions, is often argued to function unevenly in relation to diverse social groups.²⁰³ Under these circumstances, can these marginalized social groups really achieve any of the principles critical to deliberative democracy? Can these marginalized groups have their reasons and positions heard by other citizens and public officials, and if not, have the principles of inclusion, accountability, equality, reciprocity, or publicity truly been realized?

These criticisms notwithstanding, Habermas's two-leveled model provides a model of deliberative democracy in practice that both strives toward the principles of deliberative democracy, but at the same time avoids the traps set by a normative democratic theory desensitized to the constraints of modernity. In this sense, Habermas's model provides, perhaps, the greatest hope for realizing deliberative democracy within

²⁰² Several of the theorists already considered above adopt Habermas's model to some extent. For examples, see Young, *Inclusion and Democracy*; Dryzek, John S. *Deliberative Democracy and Beyond: Liberals, Critics, Contests*. 2000. Oxford, United Kingdom; Bohman, *Public Deliberation*.

²⁰³ Garnham, Nicholas. "The Media and the Public Sphere." In *Habermas and the Public Sphere*. 1992. Calhoun, Craig (Ed). Cambridge, MA: MIT Press; for a more concrete example, see Gillett, James. "The Challenges of Institutionalization for AIDS Media Activism." *Media, Culture & Society*. Vol. 25, No. 5, 2003.

modern mass societies marked by technically complex decision making processes. Nonetheless, it is incumbent on the proponent of this model to evidence how it can in fact effectively guarantee the principles of deliberative democracy while relying on the public sphere concept.

In the next chapter, we will look to an emerging form of bureaucratic rulemaking which, I will argue, approximates the ideal of a deliberative model of bureaucratic accountability undertaken in the public sphere, a model that shows the plausibility and desirability of Habermas's formulation. As we examine this form of rulemaking, both generally and through a particular case study, it will be one important task to evidence the ways this process both approximates the two-leveled model of deliberative democracy while at the same time proving sufficient for realizing the principles of deliberative democracy.

Conclusion

Deliberative democratic theory provides one alternative normative model of democracy useful for addressing the problems faced by existing models of democracy, and particularly the problems these models face when striving to enact legitimate, publicly accepted outcomes, or so I have argued. Moreover, and contrary to the noticeable gap in the literature, deliberative democracy can and should be deemed applicable to a wide range of institutions and decision making contexts, including the bureaucratic system. When conceived properly, deliberative democracy is a model of politics commensurable with the conditions of modern mass societies marked by large populations and often technically complex decision making processes. Finally, this model

would appear almost ideally suited for conceiving an alternative model of democratic control and accountability of the bureaucracy, given the deficiencies of existing forms discussed earlier.

However, this two-leveled model of deliberative practice has been criticized from several angles, including its ability to create the conditions for an equal and fair deliberation within the public sphere. Therefore, in the next chapter we will seek a model of deliberation in practice, one applied specifically to the bureaucratic context and processes of bureaucratic rulemaking which both solves the problems of existing modes of democratic accountability and control, and does so in a manner that approximates the principles of deliberative theory examined above.

Chapter Six: Discovering a Deliberative-Democratic Model of Bureaucratic Accountability Empirically: The Emergence of E-Rulemaking in Federal Agencies

Introduction

This chapter works to tie together much of what has been argued in the preceding chapters. In the first instance, this chapter, through a case study of the rulemaking processes surrounding the Department of Agriculture's National Organic Program, provides one useful example of a bureaucratic rulemaking resulting in a set of proposed rules largely contrary to Congressional intent. In fact, through a rulemaking process marked by little oversight from elected representatives and considerable public participation (but participation dominated by powerful and influential interest groups), the rules as first proposed were in many ways opposed to the intent of the legislatively-enacted statute delegating rulemaking authority. Following from our earlier analyses, therefore, these rules were conceived through a set of processes contrary to our established and received model of democracy, as democratic modes of accountability and control proved ineffective in safeguarding and reaffirming this model.

However, because this particular rulemaking proceeded through a unique emerging process, one more amenable to deliberative *and* democratic public participation and accountability, the rules as first proposed were rescinded, and a new set of rules,

better keeping with the intent of Congress, were eventually passed. For this reason, the “unique process” utilized to integrate public participation into this rulemaking process – an emerging form that has been labeled electronic or “e-rulemaking” – will be examined for its potential as a model of deliberative-democratic bureaucratic accountability.

Towards critically investigating this idea, both the potential of e-rulemaking to realize the principles of deliberative democracy, and some possible sources of weakness, will be examined. But in the end, e-rulemaking will be looked at favorably because of its potential for realizing a deliberative-democratic model of bureaucratic accountability, a model that better controls and holds accountable bureaucratic rulemaking, and thus better supports our model of democracy.

In the end, the purpose of this chapter is straightforward. This chapter seeks to evidence the desirability and empirical plausibility of deliberative democracy in relation to processes of bureaucratic rulemaking. It does not, however, hope to discover a “silver bullet,” a form of rulemaking which might “once and for all” resolve the tension between processes of rulemaking and democracy by discovering a universally applicable and infallible alternative model of control and accountability. Nevertheless, through the case study pursued below, we can begin to envision a model of deliberative-democratic bureaucratic accountability as a desirable and viable alternative to existing forms of control, one that better holds bureaucrats accountable, and thus better reinforces our democratic institutions and traditions.

I. E-Rulemaking

I.1. The Emergence of E-Rulemaking in Federal Agencies

Americans use the Internet now more than ever to seek information, purchase goods and services, pursue favorite recreation activities, and stay in contact with friends and relatives.²⁰⁴ It is therefore understandable that this medium would also effectively transform the means through which citizens interact with public officials and their government at all levels. According to a report by the Pew Foundation's "Internet & American Life Project," by 2002 68 million Americans had accessed government websites.²⁰⁵ 42 million of these citizens used the Internet to research public policy issues, and another 23 million used the Internet to send comments to public officials.²⁰⁶ Indeed, electronic access to and interface with government institutions and public officials is now extensive.

For example, the government agency most recognizable to the average American, and the one agency nearly every American has at least some contact with on an annual basis – the Internal Revenue Service – has transitioned a large portion of its citizen-clients onto the Internet. Millions of Americans now file their taxes electronically, through a process called "e-filing," and the convenience and simplicity of this process is causing this number to increase dramatically each year; in 2005, it is expected that more

²⁰⁴Indeed, the reach and potential applications of the Internet as a communications medium would seem to know no bounds. Importantly and sadly, even international terrorism has adopted IT in spreading their message to a broader audience; the year 2004 was witness to several acts of "e-terrorism," with beheadings captured on digital video, uploaded to the Internet and displayed for the world to see. Yet technology has always been both a blessing and a source of horror. For a classic discussion of this, see Adorno, Theodor and Max Horkheimer. *The Dialectic of Enlightenment*. 1944. N.Y., N.Y.: Continuum Press.

²⁰⁵Larsen, Elena and Lee Rainie. "The Rise of the E-Citizen: How People Use Government Agencies' Websites." 2002. Located on-line at: <http://www.pewinternet.org>. [P. 2].

²⁰⁶Larsen and Rainie, "The Rise of the E-Citizen: How People Use Government Agencies' Websites." P. 2.

than half of all taxpayers will file their taxes electronically.²⁰⁷ Moreover, the age-old practice of “writing one’s Congressman” has been effectively replaced by the much faster and simplified process of “e-mailing one’s Congressman.”²⁰⁸ Most Congress men and women receive tens of thousands of e-mails annually from constituents and generally concerned citizens alike. Indeed, this large and growing population using the Internet to interact with government at a variety of levels – local, state and federal – has led some to herald (probably prematurely) the rise of a new kind of citizenship, “e-citizenship.”²⁰⁹

Recognizing the growing importance of the Internet as a link between the public and government, in 2002 Congress passed and the president signed into law the *E-Government Act*.²¹⁰ Founded on the idea that “the use of computers and the Internet is rapidly transforming societal interactions and the relationships among citizens, private businesses, and Government,” the *E-Government Act* put into motion a unified Federal initiative to enhance (and in some instances, create) an electronic infrastructure capable of integrating information technology into virtually all of the activities of the federal government.²¹¹ In short, through the *E-Government Act* the Federal government has recognized and embraced the Internet as a primary medium for contact between citizens and public officials, a medium likely to grow more significant in the future.

²⁰⁷“IRS Expands Free Electronic Filing Program.” *Associated Press*. Located at: www.cnn.com.

²⁰⁸For one example, see Adler, E. Scott et. al. “The Home Style Homepage: Legislator Use of the World Wide Web for Constituency Contact.” *Legislative Studies Quarterly*. Vol. 23, No. 4, 1998.

²⁰⁹Larsen and Rainie, “The Rise of the E-Citizen: How People Use Government Agencies’ Websites.”

²¹⁰*E-Government Act*. 44 U.S.C. Ch 36.

²¹¹*E-Government Act*. 44 U.S.C. Ch 36.

Furthermore, although the *Act* is multifarious in outlook and intention, one of the essential purposes of this initiative is to “promote use of the internet and other information technologies to provide increased opportunities for *citizen participation in government.*”²¹² [my italics] Toward this end, one critical element of the *Act* mandates the creation of “a publicly accessible Federal Government website [that] contains *electronic dockets for rulemakings*” as part of an effort to move bureaucratic rulemaking onto the Internet.²¹³ [my italics] With the *E-Government Act*, Congress has recognized, authorized and set in motion a now rapidly growing trend towards *e-rulemaking* in federal bureaucratic agencies.

As defined by both the *Act* and existing practices, the process of e-rulemaking is largely similar to the processes of standard informal, notice-and-comment rulemaking. It follows the five basic steps of informal rulemaking discussed earlier: notice of a proposed rulemaking, a comment period, agency response, preamble to the final rule, and publication of the rule in the *CFR*. What differs significantly, however, is the *vehicle* through which this informal rulemaking process occurs, and how this vehicle is permitting and inspiring a growing number of Americans to learn about, discuss and comment on proposed rules and regulations.

In essence, as defined in the *Act* e-rulemaking requires Federal agencies to transition rulemaking processes onto the Internet as rapidly and extensively as possible. It calls for the creation of a central “warehouse” of all proposed rules and regulations under consideration for adoption by agencies. This portion of the *E-Government Act* has already been realized with the creation of *Regulations.gov*. *Regulations.gov*, a central Federal

²¹²*E-Government Act*. P. 3.

²¹³*E-Government Act*. P. 18.

government website (created and maintained by a consortium of technologically savvy Federal agencies), gives interested citizens the ability to easily search for all rules under consideration, find a rule of interest, review various materials in relation to the rule (including the comments of others) and comment on this rule through electronic mail. A wealth of additional information regarding rules and regulations is also available at Regulations.gov, including a daily update of the *Federal Register*, the complete *Code of Federal Regulations* (CFR), access to the dockets for rules, access to relevant information regarding rules and rulemakings, and so forth.

The importance of the *E-Government Act* and the creation of Regulations.gov in bringing the rulemaking process closer to the American citizen cannot be overstated. While once citizens outside the “inner circle” of Washington politics desperately relied on the media, interest groups and other organizations to keep them abreast of proposed rules and rulemakings, now any citizen with a computer and a modem can insert themselves into the regulatory process. The times of public hearings, the names of members of advisory committees, the content of proposed rules, even the comments of other participants are available on-line, and while once information was stored securely away from the prying eyes of ordinary citizens in docket rooms in D.C., now locating and accessing these dockets requires only a computer and the ability to use an electronic search engine.

While e-rulemaking finds its statutory basis in the *E-Government Act* and takes a huge step forward with the creation of Regulations.gov, this law is not solely responsible for the creation of this process. Certain government agencies, such as the Department of Transportation, the Department of Agriculture, the Environmental Protection Agency and

the Department of Interior had already integrated information technologies into their rulemaking processes in the fashion mandated by the *Act* prior to its passage, and in fact must be seen as partially responsible for the creation of the *Act* itself.²¹⁴ While several examples of early instantiations of e-rulemaking exist, one case perhaps best illustrates the potential of e-rulemaking, and particularly its potential as an innovation in deliberative democracy as a model of bureaucratic accountability.

I.2. Case Study: E-Rulemaking in the USDA for the Organic Food Production Act

Created in 1862 by President Abraham Lincoln, the U.S. Department of Agriculture (USDA) is primarily responsible for monitoring and regulating farming and ranching activities in the United States, primarily responsible, that is, for America's food supply. The USDA has been tasked by Congress with a variety of objectives, including setting standards for agricultural consumer goods, protecting national forests, monitoring food nutrition and safety, combating hunger through programs like Women, Infants, and Children (WIC), protecting natural resources and agricultural lands, and regulating the marketing of agricultural products to U.S. consumers.²¹⁵

As an element of its larger mission to monitor and regulate America's food supply, and faced with a rapidly growing organic foods industry, in 1990 Congress enacted the *Organic Food Production Act (OFPA)* and delegated to the USDA the authority to "establish national standards governing the marketing of certain agricultural

²¹⁴These agencies, and a few others, are credited as "partner agencies" in the federal project creating and maintaining Regulations.gov.

²¹⁵For a comprehensive list of USDA activities, see the agency's website at: <http://www.usda.gov/>.

products as organically produced products.”²¹⁶ And to be sure, the rulemaking process undertaken to set these regulations would, it is fair to say, prove at first highly controversial, but also revolutionary in setting the federal government on a path towards e-rulemaking.

Pursuant to the terms of the delegation and the demands of Congress through the *OFPA*, in 1992 the USDA selected an advisory committee of 15 individuals – the National Organic Standards Board (NOSB) – made up of organic farmers, handlers, processors, certifiers, scientists and other experts in the field. This advisory committee was authorized to come together and propose a set of national standards for the classification of organic foods, based on their experience and expert understanding of the definition of this term. Having completed its lengthy task, creating a list of products and processes acceptable under organic agriculture as understood by organic farmers and as previously delineated in various state regulations, the NOSB sent its recommendations to the USDA. On December 16, 1997 the agency handling the marketing requirements under the *OFPA* (the Agricultural Marketing Service) issued a proposed set of regulations setting the standards required of farmers and ranchers prior to labeling their products as “organic.”

Almost immediately upon publication of the draft rule, the proposed National Organic Program (NOP) and the regulations created therein caused a stir within the organic agriculture community.²¹⁷ Much to the surprise of these individuals, and more surprising still to the members of the NOSB, the NOP program and the regulations

²¹⁶*Organic Food Production Act.* 7 U.S.C. 6501 et. seq.

²¹⁷Skrzycki, Cindy. “Organic Proposal Leave a Bad Taste in Some Mouths.” *The Washington Post*. December 26, 1997.

proposed by the USDA's Agricultural Marketing Service classified as organic a range of farm products and processes explicitly excluded by the proposals submitted through the NOSB. Indeed, included in the proposed rule were a distasteful set of processes (pun intended) and ingredients deemed acceptable prior to labeling a product organic, including the use of municipal sewer system sludge, irradiated feed for livestock and genetically engineered products.²¹⁸

Initially, organic farmers were saddened by this result but unconcerned by the proposed rules, believing that they would simply have to market their products (as they had done in the past) as "true organics," and rely on an educated consumer to recognize real from false organics. Indeed, the industry had grown-up with little unified regulation, and a savvy group of consumers of organic products had learned to differentiate real from nominal organics. Yet much to their chagrin, organic farmers soon realized that under these rules not only were the use of sludge, irradiation and genetic engineering allowed, but true organic farmers were forbidden from differentiating their organics from those that were produced using the methods defined in the NOP regulations when marketing their products.

What happened after the NOSB issued its recommendations was unknown, as the actual drafting of the rule following the NOSB's issuance of its recommendations was done "behind closed-doors," but it was obvious that the proposed rules differed considerably from the NOSB's proposals.²¹⁹ Indeed, the NOSB's proposals had expressly and explicitly *excluded* sewer system sludge, irradiation and genetic engineering as

²¹⁸Skrzycki, "Organic Proposal Leave a Bad Taste in Some Mouths."

²¹⁹At the very least, it was widely perceived that the rules had been written behind closed-doors. Julian, "An Organic Roar over USDA Labeling."

outside the bounds of truly organic farming. How these methods had been included as acceptable within the proposed rules classifying organics was, therefore, unknown, but some interested observers had their suspicions.

The organic farming community, comprised largely of 1960's-generation hippies who had abandoned mainstream society and moved to communes where naturally grown foods were prized, had its suspicions about the machinations behind closed-doors at USDA. Knowing that "agribusiness" is one of the leading lobbying groups in Washington D.C., and a massive and lucrative industry unto itself, organic farmers like Stephen Gilman suspected that the USDA "caved in to pressure from large-scale agribusiness seeking to capture the good will associated with a generation of hard-working organic farmers."²²⁰ Agribusiness, which regularly used waste products like municipal sludge as fertilizer and irradiated foods as feed for livestock had a vested interest in being able to declare its products organic, even though these production methods flew in the face of widely-understood organic techniques. While never regulated nationally, informal organic standards had grown up with the industry, were supported by state regulations and were widely accepted among organic farmers, a tight-knit group.

What is more, it is clear that the rules as proposed by the USDA flew in the face of the intent of Congress in writing the *OFPA*. Indeed, the leader in getting the legislation passed through Congress, the author and key sponsor of the legislation, Senator Patrick Leahy of Vermont, was distressed enough by the rules as proposed that he was forced to again become involved in the process and publicly address these rules. He criticized the rules as proposed, declaring them to be contrary to the purpose and substance of the

²²⁰ Julian, "An Organic Roar over USDA Labeling."

OFPA, and ultimately harmful to consumers and the organics industry, a considerable portion of which is located in Leahy's state of Vermont.²²¹

The broader public outcry over the proposed NOP regulations was immediate and massive, and did not emanate simply from within the group of organic farmers or through their interest groups, groups such as Organic Watch. The USDA, part of a new generation of government agencies conducting a significant portion of their business over the Internet, had posted the proposed rule on their website on the Internet and had allowed for public comment on the proposed rule through electronic mail, along with the more traditional modes of public comment. In fact, this USDA rulemaking marked the first "fully electronic" rulemaking process.²²² As a result, by the end of April of 1998, the end of an extended public comment period allowed by the USDA concerning the NOP regulations, more than 275,000 comments had been sent by a wide swath of the public concerned with these proposed rules, with a vast majority of these comments opposing the loopholes inserted to favor agribusiness. The unusual and "unprecedented" outpouring of public comment on this rule was credited to its wider-than-usual audience through the Internet, and the subsequent increased public and media attention.²²³

Furthermore, and uniquely, during the comment period for the revised rule the USDA had set up its website not only to post the proposed rule and to allow for comment through e-mail, but the agency also allowed individuals to access the comments of others

²²¹Leahy, Patrick. "Letter to the Honorable Dan Glickman." April 30, 2004. Interestingly, Leahy got involved again in this process not through direct oversight in Congress, but rather by petitioning Glickman through correspondence, and ultimately including a comment in the rule's docket and openly encouraging others to comment on and criticize the rules as proposed.

²²²For its innovations with e-rulemaking, the USDA won the 1998 Governmental Technology Leadership Award.

²²³Julian, "An Organic Roar over USDA Labeling."

and a wealth of additional information on-line, an early instantiation of an e-docket.²²⁴

Soon, participants were not simply emailing comments to the USDA, but were also responding to “other people’s comments and interpretations.”²²⁵ The process became self-sustaining, reinforcing and conducive to multiple comments, rather than one-time contributions, and this format was central to the large number of public comments.²²⁶ Concerning this massive response, one observer writes, “no strangers to protest rallies, these 60s-generation farm workers and their allies took to their computers and bombarded the USDA.”²²⁷ Networks emerged over the Internet and communicated information to the larger public, and soon ordinary consumers were as engaged in defeating the new rules as were the organic farmers themselves. Furthermore, because of the increased attention facilitated by the Internet, the broader national media got wind of the massive public outcry and reported a story that might otherwise have gone largely unnoticed.²²⁸

Driven by the quantity and intensity of the public outcry, and directed by Secretary of Agriculture Dan Glickman – who had been drawn into the quagmire through the overwhelming and unprecedented public response – the USDA conceded to public

²²⁴Shulman, Stuart et. al. “Democracy and the Environment on the Internet: Electronic Citizen Participation in Regulatory Rulemaking.” Unpublished Manuscript. Located online at: <http://www.drake.edu/artsci/faculty/sshulman/Papers/DEI.pdf>.

²²⁵Shulman et. al. “Democracy and the Environment on the Internet: Electronic Citizen Participation in Regulatory Rulemaking.” P. 11.

²²⁶The USDA declared that they had received 275,603 public comments, including about 100,000 pieces of “regular” mail. The remaining 175,000 comments, therefore, were comprised almost exclusively of electronic mail messages.

²²⁷Julian, “An Organic Roar over USDA Labeling.”

²²⁸As evidence of this, consider that these rules regulated an extremely small segment of the larger food-producing industry, accounting for only about \$3.5 billion of a nearly \$500 billion industry. By some accounts, there are only a few thousand organic farmers in the U.S. Yet very shortly after release of the proposed rules, dozens of articles had already appeared in the mainstream media. A Lexis-Nexis search reveals more than 40 articles on the subject between December 1997 and 2000 in major newspapers, as well as several stories on “National Public Radio” and one on the “Cable News Network.”

pressure and decided to begin the process of classifying and regulating organic food and its marketing again, decided to begin the rulemaking process anew. The proposed rule of December 1997 was abandoned.

The rule-writers in the USDA went back to the drawing board, and in March of 2000 issued a revised proposed rule defining standards required before classifying, labeling and marketing foods as organic. Notably, in the revised proposed rule municipal sludge, irradiated food and genetically engineered products were no longer deemed acceptable as organic methods. Indeed, under the revised rule many existing informal and state-level standards of organic production defended by organic farmers were adopted, and the new rules tended toward “the stringent end of existing standards around the country.”²²⁹ The revised rule was again opened for a period of public comment – an extended one of 90 days again – and the USDA received another large influx of roughly 40,000 comments, most favoring the revised proposed rules. Buttressed by broad public support, the USDA adopted the NOP and regulatory standards of organic production similar to – and in some cases, more stringent than – those proposed by the NOSB. And in 2002, the first foods marketed as organic under these new rules hit the shelves.

Undoubtedly, the quantity and intensity of the comments received by the USDA on the NOP rules, much of which is attributable to this process being more open and accessible through the medium of the Internet, forced the USDA to change its position. In announcing the release of the final proposed rule, the one which would eventually be adopted, Secretary of Agriculture Dan Glickman stated that the process surrounding the final rule was a “living example of our democracy at work. The people spoke – very

²²⁹“Organic Farmers Debate Proposed Federal Standards.” *Seattle Times*. March 26, 2000.

loudly I might add.”²³⁰ Somewhat less truthfully, upon adopting the final rule in December of 2000, Glickman stated that “there is a misperception, I think, about how government rules are drawn up. Some people believe it’s done behind closed doors, without accountability or public input. The reality is that it is a transparent, fully inclusive process...They [the adopted rules] are the product of a full-throated debate.”²³¹ The reality, of course, is that the rules were drawn up behind closed doors *initially*, and only because public access to the information surrounding the rulemaking process was made easier via the Internet was the USDA forced to concede to an unprecedented public response. Held accountable to the public in this way, the USDA was forced to pursue the intent of Congress in enacting standards of organic production.

I.3. Summary Analysis of the USDA NOP Rulemaking

Before proceeding to discuss e-rulemaking in the case of the USDA NOP as a useful model of deliberative-democratic bureaucratic accountability, and the more general future potential of e-rulemaking to this end, let us first consider this case study in relation to the critical claims made about bureaucratic discretion and processes of bureaucratic rulemaking previously. For in reality, the USDA NOP example is a “tale of two rulemakings,” and one of these tales reinforces some of the critical assessments of rulemaking made earlier.

When first authoring and proposing rules and regulations intended to implement the *OPPA*, how did the USDA manage to so clearly disregard the intent of Congress? The

²³⁰Glickman, Dan. “National Organic Standards Remarks.” March 7, 2000.

²³¹Glickman, Dan. “USDA Announces National Standards for Organic Foods.” December 20, 2000.

two interconnected answers to this question seem clear. In the first instance, and as we discussed in Chapter Four, there was obviously only limited legislative oversight of the rulemaking process as it moved forward. Once the *OFPA* was passed and the NOSB was assigned the task of making recommendations to the USDA, the agency was largely allowed to write a rule based on its own internal procedures, a rule that would ultimately disregard both the intent of Congress and the recommendations of the Congressionally-mandated advisory committee, the NOSB. While it is difficult know for sure, it would seem undeniable that Senator Leahy, the “father” and strongest defender of the *OFPA* in Congress, became considerably removed from the implementation process, but was forced, only after the fact, to become deeply involved once again – only this time his purpose was fighting against the rules as proposed. In short, the proposed and flawed set of rules emerged at least in part, it seems clear, through a lack policing of the rule-writing process as it occurred.

What is more, the USDA included the participation of a range of interested groups in the rule-writing process – largely through informal channels, as this was an informal rulemaking – and these interest groups wielded considerable control over the process. Yet at this initial stage, this participation was not instrumental in helping to steer the USDA towards the realization of the intent of Congress through rulemaking. On the contrary, it seems that these groups had precisely the opposite purpose in sight. There was, in fact, one group that most benefited from the inclusion of sludge, irradiated feed and genetically engineered products in the NOP as valid organic agricultural techniques: the agribusiness industry.²³² With these methods included as organic, the agribusiness

²³²Interestingly, there was another working diligently to convince the USDA to include these methods as valid organic methods, the Environmental Protection Agency. The EPA is committed to these techniques –

industry would have been able to legitimately classify a huge portion of its products as “organic,” and in this way gain market share from a small but growing competitive industry. And even though these methods had been specifically excluded by the NOSB, and were rejected in existing state standards and in the understanding of nearly all organic farmers, they made their way into the proposed NOP regulations. In other words, “public” participation actually worked against creating rules and regulations commensurate with the intent of Congress.

It would seem undeniable, in sum, that during the initial stages of this rulemaking process, existing democratic forms of accountability and control failed to adequately protect the *OFPA* from the abuse of discretionary authority delegated to the USDA. Bureaucratic rulemaking, in at least this one case, did pose a threat to democracy as defined earlier. Understood as either a direct or indirect (through elected representatives) connection and identity between the people and the rules which govern them, it would be difficult to claim that the creation of the initially proposed set of NOP regulations was done democratically, given that existing forms of democratic accountability, oversight and control did little to defend or reassert this connection.

Yet in the end, the USDA was responsible for passing a set of regulations that would win wide approval, among a large swath of the interested general public, those most-affected individuals within the organic farming community, and the members of Congress largely responsible for authoring and championing the *OFPA*. How did the course get righted, and how did a new set of much more agreeable regulations get written and passed? In large part, I would argue, this occurred because of the e-rulemaking

and particularly the use of human waste sludge as fertilizer – and thus lobbied the USDA vigorously to have this process classified as “organic.” In short, an outside bureaucratic agency can be seen to have worked to convince the USDA to contravene the intent of Congress.

process, and the ways this process approximates a deliberative-democratic model of bureaucratic accountability. In the next section, we will more closely examine the intersection of the two.

II. Analyzing the Deliberative-Democratic Potential of E-Rulemaking

II.1. E-Rulemaking as an Innovation in Deliberative Democracy

As we mentioned in the last chapter, any proposed application of a model of deliberative democracy to actual political practice, or any analysis of an existing political practice thought to approximate or prove useful for realizing a deliberative one, must evidence how well the principles of deliberative theory have been or might be achieved therein. That is, as these principles are instrumental to the perceived benefits of a deliberative democracy, so too must we analyze the realization of these principles within particular political processes. And through such an exercise in this context, we might better understand both the potential and the limitations intrinsic to a reliance on e-rulemaking as a model of deliberative-democratic bureaucratic accountability.

In the first instance, it should be noted that e-rulemaking, a form of informal, notice-and-comment rulemaking, reflects a type of political process informed more by the two-leveled, Habermasian model of deliberative practice than by a centered model rooted in the classical republican tradition (see Chapter Five). That is, this process integrates public participation in a fashion cognizant of the limitations modern social scale and technical complexity present for any political process, and particularly one hoping to realize *both* deliberation *and* democracy. Through this process, a thin but permeable wall is erected between bureaucratic decision-makers and the public, with authoritative power

to render decisions maintained with expert bureaucrats, but with opportunities for the deliberating public to render judgment on and influence the conditions of those decisions. In this process, in other words, public participation is designed to, as Habermas suggested, “influence the premises of judgment and decision making in the political system without intending to conquer the system itself.” At the start, then, this model avoids the first-order objections from empirical plausibility that have been brought – often reasonably and fairly – against deliberative democratic theory.

Be this as it may, and as was also discussed in the last chapter, any deliberative practice guided by or following this two-leveled model must respond to the criticisms of skeptics, those who claim such a model is ill-suited for realizing the principles critical to a deliberative model of democracy because of a reliance on the public sphere. And from this perspective as well, I would argue, e-rulemaking approximates and proves capable of incorporating the principles of deliberative democracy in important ways, although certainly not perfectly. A critical examination of these principles and their attainment through e-rulemaking, thinking both generally and drawing specifically from the USDA NOP case examined above, makes this clear. In short, due in large part to the *technologically innovative medium* utilized in the e-rulemaking process – the Internet – e-rulemaking provides opportunities for a type of political process different (because both more deliberative and more democratic) than most others.

Adopting the approach suggested in the last chapter, then, in what follows we will look at the two cluster concepts “deliberation” and “democracy,” as well as the principles which underlie these two categories, for their existence or attainability through processes of e-rulemaking. Beginning with the reasons e-rulemaking might be seen to offer

optimism for realizing these principles, we continue by examining some reasons for skepticism, possible weaknesses that might require address as e-rulemaking develops and grows in the future.

Deliberation. You will recall from the last chapter, the notion of deliberation, or the deliberativeness of particular political processes, can be defined by the existence of three core underlying concepts, concepts defined in some detail earlier: reciprocity, reason and publicity. With this in mind, how well can or does e-rulemaking incorporate and realize these principles, and thus realize the goal of deliberativeness central to a deliberative model of democracy?

In the first instance, a principle of reciprocity would seem to be at least adequately approximated in a process of e-rulemaking. Reciprocity, you will recall, demands that individuals receive ethical justification from other actors (citizens and public officials) for mutually binding decisions and outcomes as central to an assumption of universal moral agency. With this in mind, in the USDA NOP example the ability of all interested and participating actors to access and read the positions and reasons of bureaucrats, other citizens and even the interest groups attempting to influence the rule through the publicly-accessible e-docket facilitated a type of inter-subjective ethical justification, it could be argued. Further, the tendency of participants to actually access and read the reasons and positions of others, and to respond directly to the ideas offered by others (a tendency undoubtedly inspired by the ease and accessibility of the Internet as a medium of interaction), would seem to enhance the reciprocal nature of this process. While in this case it seems undeniable that, at least initially, the justifications given failed to gain acceptance or achieve recognition from a large portion of the population, this was

the case only because a process of ethical justification between subjects was to some extent realized. In short, in this process both comment contributors and the bureaucratic decision-makers were forced to justify their positions.

Moreover, it could also be argued that the e-rulemaking process utilizes a mode of interaction rooted in reason-giving. In the first instance, the Internet as a vehicle through which individuals can offer their own reasons, positions and ideas through electronic comments, as well as read and analyze the comments of others (all made simpler and more accessible through the use of an e-docket), would seem to provide a solid mechanism for reason-giving. Conversely, it would be difficult to imagine, at least through this open and publicly accessible electronic comment process, that efforts at coercion or force, for instance, would prove successful in winning the favor of the public or bureaucratic agents. What is more, the vehicle of the Internet would seem an ideal one for overcoming some of the more common sources of power, traditional domination or economic advantage often infiltrating political processes, characteristics which often undermine reason as a dominant mode of interaction. In short, it has been noted that many face-to-face political processes tend to advantage already-dominant economic and social groups, because of characteristics such as race, manner of speaking, gender attributes and other characteristics *present* and apparent to all participants.²³³ Yet over the Internet, where all participants maintain a kind of *anonymity* and the written word provides the only real mechanism for convincing and persuading others, reason would seem to function as the dominant mechanism for influencing outcomes.

Finally, e-rulemaking would appear to allow for a relatively robust kind of publicity, one where both the reasons of nearly all interested participants and the reasons

²³³For this argument, see Sanders, Lynn. "Against Deliberation." *Political Theory*. Vol. 25, No. 3, 1997.

of the state (in this instance, the USDA), as well as a wealth of important and related background information, are available and easily accessible thanks in large part to the medium of the Internet. E-rulemaking, as discussed above, provides interested individuals the ability to access the information needed to effectively participate in the rulemaking process, such as the proposed rule itself, the authorizing legal statute, relevant procedural information, and so forth. This is the critical “stuff” of deliberation, the information individuals need to acquire before offering their own ideas and rendering their own critical verdict. Moreover, through the advent of e-dockets, interested individuals were also able to access the positions and reasons of various public officials, as well as the reasons of other citizen-participants and organized actors. In short, the technological innovations of the Internet allow for greater publicity, not necessarily in the sense that all actors tend to more openly or truthfully reveal information, but in the sense that available information is at least more easily or “publicly” accessible.

Democracy. You will recall from above, the concept of democracy, or the democraticness of particular political processes, is defined for deliberative democrats by the existence of three core underlying concepts: accountability, equality and inclusion. And here too it must be asked: How well can or does e-rulemaking incorporate and realize these principles, and thus realize the goal of democracy central to deliberative democracy?

The first principle to address is accountability, the demand that all participants must be responsible and answerable for their decisions and actions, and that all those potentially affected by an outcome must be included in a deliberation. In the case of the

USDA NOP, the ease and accessibility of e-rulemaking through the medium of the Internet would seem to have facilitated accountability. Indeed, as was mentioned above, because of the greater accessibility of this process many contributors tended to go beyond one-time participation as a single comment, and instead there were many instances of individuals not only offering their comments, but also offering multiple comments addressing and responding to the comments of others. There was, that is, “answerability” to other participants in this process, and instead of a unidirectional monologue, this process tended more towards a (large) dialogue. In particular, the group of those most affected would seem to have been both included and responsible to one another in this process, as both the broader food producing industry and the smaller group of organic farmers (and consumers of these products) comprised a large portion of the participant base.

What is more, the egalitarian nature of the e-rulemaking process, measured by the ability of differently situated actors to both access a process and have a fair opportunity to influence the outcome, would seem promising. Indeed, the medium of the Internet would appear (and has often been claimed) to have something of a “leveling” effect by allowing less well-off actors the opportunity to “enter” political processes that were once, because of their distant location or apparent exclusivity, for all intents and purposes off-limits. Regarding e-rulemaking specifically, any citizen can with relative ease access the process, author a comment and contribute it to the proceedings, so long as they have available a computer and a modem, and possess basic computing competencies. No pre-existing relationship with an interest group is needed, for instance, to know when a rulemaking will occur, to learn the important dates surrounding the process, and so forth,

and thus some of the advantages possessed by well-placed individuals evaporate. In short, *at least* in regards to the public comment process, e-rulemaking would appear to hold-out potential as providing an egalitarian format.²³⁴

Lastly, it is difficult to know how inclusive e-rulemaking is generally or was in the specific case of the USDA NOP examined above. That is, without drawing a representative sample of the participants and measuring their demographic characteristics, it cannot be known whether or not a diverse group of participants actually contributed comments to or became involved in the process, and thus we must leave this principle to one side for now. Yet as I will examine below, there are reasons we might be skeptical about the participation of an inclusive cross-section of the population in this or any e-rulemaking process.

Taken on the whole, therefore, it is clear that e-rulemaking offers much to like in working to realize a deliberative-democratic process, and more specifically a deliberative-democratic mode of bureaucratic accountability, a process useful for reconnecting the people and the rules which impact them (again, given the weaknesses of existing forms of oversight and accountability discussed in Chapter Four). In some ways, this conclusion represents a different angle on the well-done commentary concerning the democratic nature of the Internet as a technological innovation. The Internet, it could and has been argued, allows us to move beyond the vicious circle placing in opposition wide and deep political participation – with this new vehicle of public participation, we need

²³⁴ Yet in other ways, inequalities might certainly still emerge. While I will not engage this difficult issue here, e-rulemaking can do little to mitigate the intimate “behind-the-scenes” relationships between interest groups and agencies, and perhaps even the capture of these agencies by interested groups, at least at the “front-end” of the process. Indeed, short of criminalizing contact between agency personnel and members of the general public, there would seem to be little that can be done about this dilemma. However, one must hope that as a larger number of members of the general public are inspired to participate and keep a watchful eye over the rulemaking process, the power of these relationships might diminish as well (as the USDA NOP example might indicate).

not choose one over the other, even when dealing with the political processes of the Federal government. Perhaps, in short, information technology advances like the Internet reopens the possibility of *both* deliberative *and* democratic participation within modern mass societies.

Be this as it may, there are also reasons to approach the idea of e-rulemaking somewhat cautiously, to resist praising this practice as containing revolutionary potential prematurely. Because e-rulemaking is a decidedly new process only recently adopted by agencies, there is a possibility that this process might take any number of forms, including some decidedly non-deliberative or undemocratic forms. Indeed, many of the potential weaknesses of e-rulemaking can be gleaned from a more general critical analysis of the democratic potential of the Internet, and this sort of critique has become more prevalent over the last few years. In the next section, several potentially problematic features of e-rulemaking are noted, things that we ought to be mindful of as it develops in the future.

II.2 Deliberative Democracy and E-Rulemaking: Critiques and Enduring Questions

As described above, the Internet as a medium or vehicle through which the process of bureaucratic rulemaking occurs holds considerable potential in striving towards a deliberative-democratic model of bureaucratic accountability, one that overcomes the problems this type of bureaucratic exercise of power poses for our democratic institutions and traditions. Nevertheless, e-rulemaking is still very much in its infancy, and its future success depends in large part on the bureaucratic institutions controlling rulemaking processes; that is, it is largely incumbent on these institutions to

maintain, support and build-upon the above-mentioned positive characteristics, and without their support these processes could easily disintegrate.

Given this reality, it would be premature to declare e-rulemaking the solution to the problems of bureaucratic rulemaking given deficient forms of oversight, control and accountability based on the single case of the USDA NOP. Indeed, it is not unreasonable to suggest that the USDA had no idea transferring rulemaking to the Internet would result in such a broad, robust type of response, and agencies in the future may be more careful to limit opportunities for public participation. (The history of government is full of examples where policy processes and choices have resulted in unintended consequences such as this, consequences which were better addressed later). In short, the USDA NOP may serve as a case study for agencies for what *not to do* in the future in an effort to maintain decision-making power within the agency and among a smaller group of stakeholders.

Moreover, beyond the uncertain political forces surrounding the future of e-rulemaking, there are other considerations to be mindful of in working to insure that e-rulemaking realizes its potential as a deliberative-democratic innovation. To be sure, following a wave of unbridled optimism, there has been a similarly intense wave of criticism of the democratic potential of the Internet and other information technologies, particularly as a medium of public discourse, and many of these criticisms relate directly to the potential of e-rulemaking as a model of deliberative-democratic bureaucratic accountability. In what follows, a few more important criticisms will be examined. For some of these, correctives will be suggested; for others, only a cautionary note that these problems be recognized.

E-Rulemaking: Deliberation in Private? John Stuart Mill, one of the earlier political thinkers to systematically advocate deliberation as a central political activity for a democratic society, juxtaposed this practice with the most common expression of democratic political participation: secret-ballot voting.²³⁵ While instituted to protect the sanctity of the ballot-box and allow citizens to exercise their own independent judgment, secret ballot voting, Mill argued, also allowed citizens to exercise their political will in private with no need to justify their positions to others or consider the position of others. That is, in secret-ballot voting, citizens are allowed to make choices that reflect their own prejudices and selfishness, for instance, and are not held publicly accountable for these choices. Deliberation as a democratic procedure undermines this political privatism, Mill thought, forcing citizens to present reasons, accept the reasons of others, and possibly come to an objectively better decision as a consequence. From this perspective, our analyses of processes of e-rulemaking and the Internet as a vehicle of deliberation beg the following questions: Does e-rulemaking sufficiently support the underlying conditions of a principle of deliberation (such as principles of reason and reciprocity), taking democracy from the privacy of the ballot-booth into the *public* domain? Or from another angle, we could ask, what type of relationships and social interactions actually take place over the Internet?

The Internet is the ultimate example of a communications medium guaranteeing an individual nearly unlimited privacy. The Internet has become the preferred medium for many in seeking new relationships, for instance, in part because it bridges social space (or offers an alternative type of space, “cyberspace”), but also because it guarantees privacy so long as one desires to maintain this condition. Furthermore, consider that the

²³⁵Mill, John Stuart. *On Liberty*. 1993. London, England: Everyman.

most searched and accessed websites on the Internet (by far) are pornographic websites.²³⁶ The Internet has become the primary venue for this type of activity precisely because it guarantees a type of privacy not to be found elsewhere. Why would someone interested in pornography risk a socially awkward situation when they can avoid going “out in public” altogether and instead use the Internet?

The fact that the Internet provides the new chief source of pornographic materials speaks volumes about both the freedoms provided by and the limitations intrinsic to this medium, and should lead us to ask several basic questions. What kind of public deliberation can we expect over the Internet? Will we find a type of civil discourse founded on even minimal standards of reason and reciprocity, or will we instead find in practice a version of *deliberative pornography*, wherein participants rely on the safe anonymity provided by this medium to make propositions and defend positions that they might not defend otherwise? While some scholars have suggested that public discourse over the Internet does tend to maintain basic standards of civility and politeness,²³⁷ for instance, it is nonetheless important to remember that in a strict sense deliberation through this medium does not force the participant to “present” reasons to others, and this fact must be minded when working to guarantee reasonable and reciprocal deliberation.

E-Rulemaking: Just a More Efficient Mechanism for Aggregation? From a similar perspective, and given that the Internet does not force us to enter into the same type of

²³⁶On a similar note, for an analysis arguing that the Internet tends to reinforce oppressive gender relationships, see Heider, Don and Dustin Harp. “New Hope or Old Power: Democracy, Pornography and the Internet.” *The Howard Journal of Communications*. Vol. 13, 2002.

²³⁷Papacharissi, “Democracy Online: Civility, Politeness, and the Democratic Potential of Online Political Discussion Groups.”

relationships of interaction, there is a possibility that e-rulemaking will over time become little more than an alternative, even more efficient mechanism for aggregating large numbers of public comments without truly promoting or offering opportunities for deliberation. In other words, there is little reason to believe that simply shifting to electronic media will create the conditions for deliberation between citizens and citizens and public officials about rules, so long as the purpose of receiving comments continues to be perceived by citizens and administrators as a method of registering “votes.” On the contrary, there are reasons to believe that any existing emphasis on deliberation within e-rulemaking might wane over time; assuming that the practice of accepting public comments through the Internet proves conducive to a greater and more diverse array of comments and commenters (as the USDA NOP example would suggest), it would seem likely that this medium will in fact increase the need for bureaucrats to hunt for agreement or dissent within comments, aggregate comments into “for” and “against” groups and use this data as the basis for moving forward with a proposed rule.

A possible solution to this problem lies in appending onto the normal comment procedures of e-rulemaking additional opportunities for citizens and public officials to engage one another in a more discursive format, augmenting the already-enhanced opportunities to read the comments of others and find a wealth of information provided by the Internet. To take one example, besides pornography the Internet is currently overloaded with discussion groups, chat rooms and “blogs” designed for the exchange of political opinions and argument. In these fora citizens regularly engage one another in debate, explaining their positions and demanding answers and reasons from others. Some have even claimed that these arenas are reinvigorating public discourse and debate,

encouraging citizens to talk about politics in a more open, passionate and truthful way.²³⁸

And it is precisely this type of electronic forum for deliberation that can and should be included and emphasized as a central part of the e-rulemaking process, added to agency websites and providing an opportunity for citizens to discuss the merits of policy problems, regulatory mechanisms and outcomes prior to submitting a comment.

E-Rulemaking and the “Digital Divide”. Shortly after the Internet emerged and began to gain acceptance and popularity in the late 1980’s and early 1990’s, the group of individuals using this new communications technology was almost perfectly homogenous, comprised almost exclusively of economically well-off, highly educated white males who were, in the words of one author, “hobbyists, nerds and pioneers in forging a brave new society.”²³⁹ Over time, the universe of Internet users has become far more heterogeneous (at least, as an Internet user, I would like to believe so), but this elite group of Internet users in the first generation should lead us to ask an important question, one that bears directly on who we might expect to participate in processes of e-rulemaking over the Internet: Who *potentially* could utilize the Internet to comment on proposed rules and take part in e-rulemaking?

Following the explosion of rabid enthusiasts praising the potential of the Internet in the 1990’s was a group of more critical analysts. While many were convinced that the “information age” would radically transform information access, making information

²³⁸Papacharissi, “Democracy Online: Civility, Politeness, and the Democratic Potential of Online Political Discussion Groups.”

²³⁹Murdock, Graham. “Review Article: Debating Digital Divides.” *European Journal of Communication*. Vol. 17, No. 3, 2002.

more open and accessible to all, others wondered who precisely would be able to take advantage of this new and abundant source of information. Subsequent studies have confirmed what many intuitively feared: access to and the use of the Internet is not equal (both within societies and certainly across societies), and in fact there exists a substantial “digital divide.”²⁴⁰

A recent report by the Pew Foundation’s “Internet & American Life Project” illuminates some enduring realities about precisely who has access to the Internet, and the current state of the digital divide.²⁴¹ According to the report, and perhaps not surprisingly, as a proportion of these populations within the United States, whites are more likely to use the Internet than either Blacks or Hispanics. Similarly, as individuals move up the economic ladder their likelihood of becoming an Internet user also increases. Those with a higher level of education and those living in suburban or urban (as opposed to rural) areas are also more likely to have access to the Internet. Indeed, Internet access is not equal, and the list of those tending to be excluded is not surprising when thinking about general patterns of political exclusion in the United States.²⁴²

As discussed earlier, deliberative democracy is predicated on – and in some sense, centrally concerned with – the egalitarian nature and inclusivity of political processes. The enduring existence of the digital divide should surely, therefore, make us stop short of proclaiming e-rulemaking to be a fully realized democratic innovation, at least at this stage. Rather, without equal access to the Internet e-rulemaking remains only a

²⁴⁰For some examples, see: Norris, Pippa. *Digital Divide: Civic Engagement, Information Poverty and the Internet Worldwide*. 2001. Cambridge, UK: Cambridge University Press; Wilhelm, Anthony. *Democracy in the Digital Age: Challenges to Political Life in Cyberspace*. 2000. N.Y., N.Y.: Routledge Press.

²⁴¹Lenhart, Amanda et. al. “The Ever-Shifting Internet Population: A New Look at Internet Access and the Digital Divide.” 2003. <http://www.pewinternet.org>.

²⁴²Lenhart, “The Ever-Shifting Internet Population.” P. 6.

potentially democratic process. Yet it is likely that time alone will provide a bridge across the digital divide, that as computers and Internet access become more affordable and accessible to a diverse cross-section of the public, Internet users will become a roughly representative group (with universal access in the future being likely).

But until this time has come, e-rulemaking agencies must remain cautious that they are granting equal opportunities to a diverse, inclusive population. More specifically, in order to ensure that a representative sample of the population is participating in e-rulemaking, agencies should actively collect demographic information on those contributing comments to an e-rulemaking process, something that is not currently done. Made simpler and more cost effective by the Internet, the collection of participant demographics will allow for a check on who actually is participating, and perhaps position agencies to actively elicit greater participation from certain underrepresented groups.

E-Rulemaking and “Digital Capture”. The digital divide, while narrowing and becoming less vast over time, raises the specter of unequal and exclusive access to e-rulemaking processes. Additionally, processes of e-rulemaking are still prone to some level of unequal influence across participants, arising not only from unequal abilities to craft and defend positions and perspectives to others, but more basically the ability to utilize the medium of the Internet to full advantage. That is, just as interest groups and other organized actors tend to possess the resources to acquire the capabilities to most effectively influence traditional rulemaking processes, so too should we expect these groups to best utilize this new communications technology.

From this perspective, we ought to be wary of the possibility of “digital capture,” of organized interests undermining the more egalitarian public space of the Internet in order to again gain dominant influence over e-rulemakings. This may take the form of interest groups bombarding agencies with electronic comments (something that is, in fact, already done), a practice similar to the “docket cards” agencies now sent in on behalf of citizens. In any event, it is important to note that e-rulemaking does not fully undermine the often-intimate relationship between organized interests and rulemaking agencies, and thus we must remain mindful of these relationships.

Certainly, this list of potential problems confronting e-rulemaking, both now and in the future, is not comprehensive. Particularly as this practice will undoubtedly evolve over time, new problems are likely to arise. Nevertheless, we can look to e-rulemaking as a type of rulemaking process full of possibility for realizing deliberative-democratic bureaucratic rulemaking, while remaining mindful of these stumbling blocks.

Conclusion

This chapter has fulfilled several tasks critical to the larger goals of this dissertation. In the first instance, this chapter has provided evidence of some of the critical claims made earlier. While Chapter Three argued that a process like bureaucratic rulemaking is commensurate with our model of democracy, it was also argued that if this process fails to render rules pursuing the intent of Congressionally-enacted statute, because of inadequate forms of control, oversight and accountability, then this practice should be viewed critically. In examining the case study of the USDA NOP, or at least its “first stage,” some evidence of the disconnection between legislatively-made law and

bureaucratic rules was given. While not a systematic, “large *n*” study of bureaucratic rulemaking, few would argue that the processes surrounding the USDA NOP were an anomaly. In short, rulemaking processes often fail to realize the intent of the law, a fact which presents a challenge for our model of democracy.

But more importantly, this chapter has analyzed e-rulemaking as a form of rulemaking with considerable potential for realizing a deliberative-democratic model of bureaucratic accountability. While not a silver bullet, catch-all solution to a difficult set of circumstances, and while not without some potential problems, the fact that both deliberative *and* democratic principles were to some extent respected in the “second stage” of the USDA NOP process evidences both the desirability and empirical plausibility of deliberative democracy under modern conditions. What is more, such a process provides hope regarding the potential for making bureaucratic agents more democratically accountable, and in the process better protecting the core set of relationships between the people and the law critical to our model of democracy.

Chapter Seven: Conclusion: Democracy, Bureaucracy and a Deliberative-Democratic Model of Bureaucratic Accountability

I. Summary of the Dissertation

There have been presented an assortment of arguments and ideas in this dissertation. While all have revolved around one core theme – reconciling the tension between bureaucratic administration and our democratic institutions and traditions – the central ideas require a brief summary nonetheless. This summary will allow us to both appreciate the contributions of this dissertation to the fields of public administration and democratic theory, and to understand how this work informs and guides a broader research agenda.

This dissertation began in the belief that, because our democratic institutions and traditions remain tied to and informed by historical-theoretical models of popular government, returning to these models might prove useful in better understanding the intersection of democracy and administration. Chapter Two pursued this idea, looking to the political thought of John Locke and Jean-Jacques Rousseau as two useful and representative theorists of popular government – theorists consistent in their core understanding of popular government, while differing in their institutional prescriptions. The generic models of popular government (and later, democracy) these two theorists

defend remain relevant, as these two models continue to inform both our understanding of democracy and the means employed for reconciling democracy with instances of executive and administrative authority.

Several lessons were gleaned from this exercise, lessons which informed and helped guide the remainder of the dissertation. In the first instance, this investigation provided a reminder of a basic fact not to be ignored, but one that is often overlooked nonetheless: democracy and administrative authority are not inherently at cross purposes, in that both are instituted as instrumental to the same underlying purpose – realizing the public good. Yet, and this leads us to our second (and perhaps most important) conclusion, this argument only holds true so long as means for guaranteeing the predominance of the legislative authority (whether vested in the people or elected representatives) and the law through democratic forms of administrative control are present and effective. In short, so long as the makers of the law are empowered and capable of controlling the authority delegated through law to executive and administrative institutions, the relationships central to democracy are reasserted and protected.

Moving from historical-theoretical foundations forward, Chapters Three and Four examined bureaucracy – and particularly processes of bureaucratic rulemaking – and the effectiveness of existing democratic modes of administrative control. Processes of bureaucratic rulemaking, a central and essential form of discretionary authority within the modern bureaucratic system, are often argued to conflict with democracy because of a disregard for the democratic principle that law be made exclusively by a legislative authority connected to the people (through an act of consent, for instance), or challenged

because of an apparent conflict with the principles of the law and the rule of law. However, bureaucratic rulemaking should in fact be deemed commensurable with our model of democracy; as this type of delegation to bureaucratic agencies to make rules is both practically necessary and instrumental to the creation of effective regulations essential to the broader public good, bureaucratic rulemaking should not be seen as contradictory to democracy. Indeed, even theorists like Locke and Rousseau – both fundamentally concerned with the location of the lawmaking authority and its popular source, and committed to the law and the rule of law – envision and defend this type of delegated authority. Nevertheless, this idea only holds true, so it was argued, if democratic modes of administrative control are effectively overseeing and holding accountable bureaucratic agents and agencies, keeping these agents faithful to the law and the public good, and reaffirming the relationships central to democracy in the process.

Chapter Four investigated the effectiveness of existing democratic modes of control, oversight and accountability, and found reasons to be skeptical of their efficacy (an argument subsequently confirmed by the case study in Chapter Six). The strategy informed by a representative model of democracy – legislative oversight – relies on elected representatives to control bureaucratic agents and agencies. Yet because of certain characteristics intrinsic to and regularly exhibited by this type of principal-agent relationship, skepticism concerning the effectiveness of these forms of control has often been expressed. Similarly, forms of public accountability informed by a direct model of democracy and visible in the procedures mandated by the *APA* should be viewed critically as well; because powerful organized actors tend to dominate these processes,

the law and the public good are in fact regularly undermined by these forms of control. While not entirely ineffective, there are sufficient grounds to challenge these existing forms of control, strategies handed down by earlier theorists of popular government, but unable to foresee the dramatic growth of bureaucratic power.

With theoretical frameworks and problems identified, Chapter Five began the process of discerning an alternative democratic model of control and accountability, one useful for counteracting the problems a process like bureaucratic rulemaking poses for democracy when not sufficiently checked and controlled. To this end, the deliberative theory of democracy was explored. While the deliberative theory of democracy has been envisioned and applied to a variety of contexts, scholars have been surprisingly silent about the potential usefulness of this model in relation to bureaucratic administration, and the problems this institutional nexus is often seen to present for democracy. This has been the case, so I argued, because of a deep-seeded hesitancy to prescribe broad and deep public participation to the expert-technocratic processes of bureaucratic institutions, a critique which largely melts away if deliberative democracy is properly conceived.

Finally, Chapter Six worked to tie together many of the arguments in the dissertation, but was most centrally concerned with evidencing the empirical plausibility and normative desirability of a model of deliberative democracy applied to the context of bureaucratic rulemaking – a deliberative-democratic model of bureaucratic accountability. Looking at one particularly informative case of rulemaking – the rulemaking processes surrounding the Department of Agriculture’s National Organic Program – and the form of rulemaking employed in this case – a new form labeled e-rulemaking – several arguments were made to this end. Perhaps most importantly, this

case study evidenced the benefits of a model of deliberative democracy applied to the context of bureaucratic rulemaking, showing how such a process is both desirable and attainable within the context of mass modern societies.

II. Contributions to the Literature

There are three primary contributions to the literature this dissertation claims to offer, contributions to two distinct bodies of scholarship within the discipline of political science. While these contributions were discussed earlier, they require additional comment here.

In the first instance, scholarly works seeking to reconcile the tension between bureaucracy and democracy, or focused on relieving the tension between these two principles and institutional manifestations, tend to view democracy from outside its historical and theoretical contexts. That is, within these studies democracy is either seen as detached from an essential foundation, or worse still, left under-defined and utilized as a concept inclusive of a nearly limitless range of norms and values. By returning to essential foundations, models of democracy projecting a core notion of popular government which has and continues to inform contemporary democratic systems, this dissertation has avoided this pitfall. What is more, these fundamental models of democracy were shown to be enduringly useful in guiding and informing the nature of the tension between bureaucracy and democracy.

Such an approach is, I think, not only useful, but worthy of further development. Among political and democratic theorists, careful examination of various scholars of popular government, scholars wielding influence over modern democratic systems, and

the importance of the smallest difference across their ideas, are not uncommon. It would be worthwhile as well, I would suggest, to undertake a broad comparative study of these influential theorists' understanding of administration within popular systems. For as these scholars continue to guide our understanding of our own norms, traditions and limitations, so too do these scholars continue to guide our understanding of controlling administrative authority within a democratic system. The insights a broader study of this kind might yield would likely justify it.

Additionally, by seeking an application of deliberative democracy to a bureaucratic context, this dissertation fills a noticeable gap in both the democratic theory and public administration literatures. As mentioned earlier, deliberative democracy is often understood and treated as applicable mostly – if not exclusively – to already deliberative processes and institutions. This tendency, so I argued, is driven by the idea that the scale and scope of modern societies, coupled with the technical expertise assumed necessary to participate in bureaucratic processes in an even limited way, works against any prescription of mass public participation in these processes.

But by looking to and adopting Jurgen Habermas's model of deliberative practice, one conceived for and situated specifically within the context of modern mass societies, this work has attempted to dispel the notion that deliberative democracy is limited in potential application. Once the simplistic image of deliberative democracy as face-to-face discourse among citizens with authority to render binding decisions over even the most complex issues is dispelled, many of the critiques against deliberative democracy melt away. Indeed, Habermas's model is deeply sensitive to the difficulties and complexities

surrounding many decision-making contexts, and for this reason his model is an attractive one for thinking about deliberative democracy within a bureaucratic context.

Finally, and to some extent connected to the above, this dissertation has provided evidence of deliberative democracy in action, and in the process has attempted to reveal both the empirical plausibility and the desirability of this practice, something that is often lacking in works of this nature. That is, too often deliberative democracy is presented as a normative ideal devoid of empirical plausibility, particularly when considered outside the bounds of the most local political contexts. The tendency to look to deliberation and democracy as either/or values, essentially incompatible under modern conditions, is proliferate. Indeed, it is not uncommon to read comments like: “Deliberation is not an activity for the demos. I don’t mean that ordinary men and women don’t have the capacity to reason, only that 100 million of them, or even 1 million or 100,000 can’t plausibly ‘reason together’.”²⁴³ In other words, while deliberation may be desirable and possible, and democracy may be desirable and possible, their combination, particularly at the highest levels of government, is simply not possible.

Yet in Chapter Six, or so I would argue, we did in fact provide some evidence of a robust type of public participation at the “highest” levels of government including, though not 100 million citizens, certainly 100,000. Reasons were exchanged, some respect for the positions and ideas of others was realized, broad and relatively equal opportunities for participation were created, and so forth. It is now incumbent on all those advocating and defending deliberative democracy in practice to replicate this kind of investigation in other contexts. And to be sure, the more evidence in this area that we are

²⁴³Walzer, Michael. “Deliberation, and What Else?” In *Deliberative Politics*. Macedo, Stephen (Ed). 1999. N.Y., N.Y.: Oxford University Press.

able to unearth, the tendency to reflexively dismiss deliberation as not an activity possible for the modern demos will diminish.

III. A Future Research Agenda

There are several aspects of this dissertation which, given time and space constraints, have been left underdeveloped. In what follows, I would like to propose two separate but interconnected research programs derivative of some of the ideas offered here.

First, while left implicit as an idea in Chapters Four and Six, the two dominant modes for democratically controlling bureaucratic discretion – oversight centered in an elected legislature, and direct modes of public accountability – are not and should not be viewed (either practically or theoretically) as entirely distinct. On the contrary, the two often assume and rely on one another. For instance, as mentioned briefly in Chapter Four, because of time constraints, information deficiencies and a lack of technical competencies, elected representatives often adopt a “fire alarm” style of oversight. Assumed by this approach, of course, is that the elected representative must rely on outside forces – most typically interest groups or other “prominent” constituencies – to “pull” these fire alarms, to relay information about potential instances of bureaucratic abuse of statutory law. Here, elected representatives and the public, or at least portions of the public, enter into a symbiotic relationship in holding accountable and controlling bureaucratic discretion.²⁴⁴ In reality, then, a complicated and interconnected relationship

²⁴⁴Furthermore, some evidence of this type of relationship was revealed in Chapter Six. Senator Leahy of Vermont was in part drawn back into the rulemaking processes surrounding the USDA NOP because of the proposed set of regulations and the public reaction to these regulations, as well as the perception that these

between the public, elected representatives and bureaucratic agencies exists within the dominant fire alarm model of legislative oversight, and must be seen as central to controlling and holding accountable bureaucratic agents and agencies.

With this set of relationships in mind, it would be useful to more fully conceptualize – both theoretically and empirically – the various “points of contact” between a *deliberating public*, *elected representatives* and *bureaucratic agents*. That is, what is now needed is a more completely developed model of how a deliberating public ought to and might practically intersect with elected representatives in monitoring and controlling bureaucratic discretion. Many questions central to such a research agenda come to mind. For instance, how might we envision generically the intersection of the deliberating public and elected representatives in a manner that best respects the principles of deliberative democracy, but at the same time best holds bureaucratic agencies accountable when exercising discretion? What type of venue of deliberation and form of constituent contact allows us to realize this goal in a manner inclusive of all citizens? And, when complete, how might this model instruct us about the nature of representation itself, particularly in relation to elected representatives performing their oversight tasks?

In short, while I have treated them separately for purposes of simplicity and clarity throughout this dissertation, often the direct and representative forms of democracy active within the United States intersect and intermingle in important ways, and this includes activities central to controlling bureaucratic agencies. Thus developing a model which takes into account this fact and works to better understand and articulate the

regulations violated the intent of Congress. Indeed, he became something more like a leading member of the general public in criticizing these rules than a Congressman overseeing the bureaucracy.

various ways deliberating citizens and elected representatives come into contact is required as well.

Second, and in part connected to the above, Chapter Six has allowed us to envision a model of deliberative-democratic bureaucratic accountability through public comment and participation in e-rulemaking. Yet this example is, to be sure, limited, touching on only one possible form of deliberative-democratic bureaucratic accountability within one particular venue. This example was selected specifically to evidence the desirability and empirical plausibility of deliberative democracy, but it certainly does not encompass and describe the entirety of venues with this type of potential. Other venues – such as the “public meetings” mandated by the *Government in the Sunshine Act* – require examination as well.

In short, a broader, larger “n” study of rulemaking processes – and particularly rulemakings which, using the criterion set-out in Chapter Five, tend to approximate the principles and values of deliberative democracy – would be helpful. Through such a study, we might discover a variety of different forms of rulemaking which tend to better realize deliberative democracy and better hold bureaucratic agencies accountable as a consequence, and thus prove commensurable with our democratic institutions and traditions. Conversely, we might also discover a range of fora less or least conducive to deliberative-democratic participation, and thus to be avoided. It is in this direction as well, then, that this dissertation might lead us.

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