Abstract
Between Public Law and Public Sphere:
Reconstructing the American Progressive Theory of the Administrative State
Blake Edward Broaddus Emerson
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This dissertation develops a normative theory of the American administrative state on the basis of Hegelian and American Progressive political thought. I reconstruct the substantive and procedural commitments of the American state from its intellectual history and institutional development. The basic principle I recover from this history is that the state must make the public sphere politically efficacious.

I begin by tracing German understandings of the state which heavily influenced certain American Progressives. G.W.F. Hegel, and the German public law scholars who followed in his footsteps, understood the modern state to have an emancipatory function. The public bureaucracy would institute the requirements of freedom through market regulation and social welfare provision. This German Hegelian theory of the state was not, however, democratic. Reflecting the failures of the Revolution of 1848 and the subsequent entrenchment of constitutional monarchy in the German states, Hegelian public law scholars sought only to free individuals from conditions of domination within civil society, not to enable the people as a whole to author the laws that bind them. This amalgam of liberal social aims and authoritarian state structure gave way to a crisis-prone, president-centered regime during the Weimar Republic.

American Progressives were deeply influenced by the Hegelian political thought, but they radically revised this German conception of statehood by democratizing it. W.E.B. Du Bois, Woodrow Wilson, John Dewey, Mary Parker Follett, and Frank Goodnow each engaged with German Hegelian thinkers in their efforts to imagine and

legitimate bureaucratic institutions that would be appropriate for the American democratic context. Like Hegel, they defended administrative efforts to promote individual freedom. But they departed from the German tradition in emphasizing that administration must be rooted in popular sovereignty. The Hegelian Progressive theory that emerges from these writers has two normative requirements: The state must furnish the material and social requisites for individual and collective autonomy, and it must use participatory forms of administration to deliver these requisites.

This Progressive conception of democratic statehood provides a coherent perspective from which to assess and critique the legitimacy of our contemporary political order. The state's substantive aim should be to protect individual and collective autonomy against the unequal circulation of information and power in civil society. The state should carry out this aim procedurally through the "discursive separation of powers," which treats each branch of the federal government as an approximate institutionalization of the public. The political branches—the executive and the legislature—have only a qualified claim to represent the popular sovereign, because they lack complete information about the problems members of the public perceive. Their qualified authority must therefore be augmented through deliberative forms of administration, which bring the people back into the policy-making process when laws are implemented. The judicial branch must police this process to ensure that administrative agencies recognize the "public rights" which are established by statutory law and rooted in public discourse.

To demonstrate how this Progressive conception of the state functions in practice, I turn to the New Deal and the Civil Rights Revolution. New Deal agricultural agencies

partially realized Progressive ideals through subsidies for marginal farmers and participatory forms of land-use planning. These reforms wrought social changes which contributed to the formation of the civil rights movement. I then show how administrative agencies in the War on Poverty furthered radical forms of participatory governance, while civil rights agencies operationalized the discursive separation of powers in combatting segregation.

Our contemporary state continues to follow this Progressive vision in many respects, but serious problems remain: affected parties do not participate equally in the administrative process; the president sometimes supplants broad public discourse with unilateral executive action; courts and agencies often deploy a technocratic mode of analysis that fails to foster ethical judgment by administrators and value-based argument with the affected public. Despite these institutional failures, the Progressive theory continues to provide a normatively attractive vision for administrative legitimacy. It avoids the narrow economistic reasoning of cost-benefits analysis and the unstable politics of plebiscitary democracy. This theory helps us to separate illegitimate from legitimate exercises of state power in the present, on topics ranging from climate change to immigration reform. By recovering the ethical content of the institutions that have evolved from Progressive political thought, we may better realize the democratic forms and functions of our state.

Between Public Law and Public Sphere: Reconstructing the American Progressive Theory of the Administrative State

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Blake Edward Broaddus Emerson

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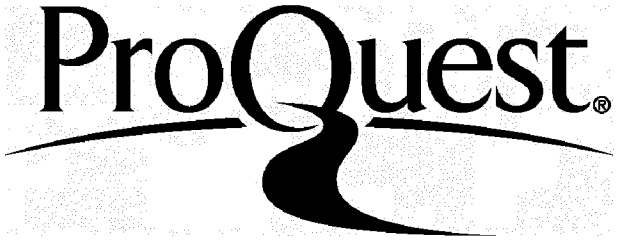

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Acknowledgments

This dissertation began with the first work academic scholarship I ever read: Richard J. Bernstein's *Praxis & Action*. That work sparked my lasting fascination with the connections between German idealism and American pragmatism. In this study I draw on these affinities in an attempt to make sense of, and improve, the modern American state we now inhabit.

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OED and *Fowlers* always handy, she has taught me the beauty of language; she has showed me how to live life with grace, compassion, and liberal sentiments. My partner, my love, Laura, has lifted me up in my moments, or months, of doubt, and always been by my side even when we are far apart. She is the only one I want to be with when the writing is put aside, and there are new cities to see, parks to explore, and homes to make.

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For Beatrice and Blanchard,
Edward and Elizabeth

Introduction

The modern democratic state is an administrative state. Democracy requires administration to apply the people's will to a social context that exceeds the grasp of judicial adjudication. The public identifies ethical and practical problems which cannot be reduced to the wrongful or unreasonable acts of individuals, but are rather the product of aggregate activity. We confront vast inequalities of income, wealth and opportunity, which prevent citizens from participating equally as members of the political community; monopolistic firms, asymmetries of information, and transaction costs, which prevent fair exchange; industrial practices that degrade our environment and threaten our survival; systems of education, employment, policing, and residency which entrench racial hierarchies even in the absence of intentional discrimination; cultures of gender domination in the school and the workplace that keep people from flourishing in their institutions. Because these problems arise from complex systems of social organization, they must be addressed through a complex system of political organization, namely: bureaucracy. The application of public power in these domains must flow through institutions which gather and analyze information, make long range plans, and handle a mass of individual cases in a consistent fashion. Administrative agencies can deploy resources, personnel, and regulatory power in a way calculated to achieve democratically determined goals.

The administrative state, at the same time, appears not to be democratic. When we grant power to unelected officials to make decisions, we remove the state from direct public oversight. When we delegate authority from the legislature to the executive, governance may lose that predictable, transparent, and discursive quality which is thought to attend liberal lawmaking. When we treat some members of our society as passive beneficiaries, who are subject to public benevolence, discipline, and manipulation, we deprive them of their status as authors of the laws that bind them. When we supplant deeply embedded and intimate forms of social order with institutionally alienated administrative power, we may undermine the wellsprings of communal association which make collective action possible. When we replace communicative reason, persuasive rhetoric, and good-faith argument over common ends with instrumental reasoning over the efficient application of power, we may enervate the public sphere in which democratic opinion is formed. Administration thus seems to threaten the very foundations for democracy, even as democracy requires administration.[1]

The apparent conflict between democratic politics and administrative organization is a tension internal to democratic order itself: between generally applicable laws and policies sensitive to individuality; between the value of political accountability and the need to insulate decision-making from opaque tactics of political opportunism; between the requisites for democratic life and the practice of democratic politics. These constitutive tensions do not render the modern democratic state untenable. They motivate its normative development. They furnish opportunities for creative institutional and

[1] James Morone, *The Democratic Wish: Popular Participation and the Limits of American Government* (New York: Basic Books, 1990), 29.

ideational adaptations which mediate the dialogue between public law and public sphere. By analyzing these tensions, we can stake out the conditions under which the administrative state can lay a claim to democratic legitimacy. While these conditions are as complex as the tensions I have outlined, they can be summarized in a single maxim: *structure the state so that the democratic public may be politically efficacious.*

I develop this norm from the intellectual history of the administrative state, as it was first developed by German Hegelian public law scholars in the nineteenth century, and then adapted by American Progressives at the dawn of the twentieth. This intellectual trajectory will reveal the emancipatory tasks that motivated and legitimated administrative power on the European continent, and show the great danger posed by bureaucracy without the participation of the public in administration. It will then show how democratic forms of administration were imagined and implemented in the American context. The path of American legal and institutional development has thus partially realized the Progressive vision I reconstruct. I will argue for reforms in American public law and for alterations in public consciousness which would advance this project of Progressive statehood.

Before I explain my methods, I situate my claims in the broader tradition of administrative critique in modern political theory. This wider survey will show how my claims relate to the treatments of bureaucracy in neighboring traditions of thought. By analyzing the most trenchant critiques, we can discern the challenges my defense of administration must answer, and the dangers administration must avoid.

I. The Specter of Bureaucratic Domination in Modern Political Theory

Few have expressed the virtues of American democracy and the vices of European bureaucracy with greater eloquence than Alexis de Tocqueville. He observed that Jacksonian democracy was constituted by local forms of participatory government, economic equality, a dense network of civil associations, and the high esteem placed on law, courts, and attorneys. These together produced "the slow and quiet action of society upon itself," and a "state of things really founded upon the enlightened will of the people."[2] With limited powers delegated to the Federal government, and most authority held in local deliberative assemblies, he observed an "absence of what we term the government, or administration."[3] The exercise of administrative power was transitory, and illegible: "The authority which public men possess in America is so brief . . . . that the acts of a community frequently leave fewer traces than the events in a private family. . . . But little is committed to writing, and that little is soon wafted away forever, like the leaves of Sybil, by the smallest breeze."[4]

While Tocqueville is frequently read as embracing America's administrative decentralization as a check to its democratic constitution,[5] his view is more complex. He argues that the American mixture of majority rule and impermanent administration could thwart the responsible exercise of democratic power. These institutions create a disparity

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[2] Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeves, ed. Francis Bowen (Cambridge, MA: Sever and Francis, 1863 [1835]), 536.

[3] Ibid., 87.

[4] Ibid., 268.

[5] See, e.g. Daniel Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900-1940* (New York: Oxford University Press, 2014), 1.

between the strength of democratic aspirations and the durable institutional framework to set those aspirations at work: "by changing their administrative forms as often as they do, the inhabitants of the United States compromise the stability of their government. It may be apprehended that men, perpetually thwarted in their designs by the mutability of legislation, will learn to look upon the republic as an inconvenient form of society."[6] Here, Tocqueville compared the United States *un*-favorably to the European democracies, with their permanent administrative machinery. In America,

> as the majority is the only power which it is important to court, all its projects are taken up with the greatest ardor, but no sooner is its attention distracted, than all this ardor ceases; whilst in the free states of Europe, where the administration is at once independent and secure, the projects of the legislature continue to be executed, even when its attention is directed to other objects.[7]

Permanent, bureaucratic officialdom alone was capable of amplifying democratic voice, extending law in time, and etching public purposes into the social fabric.

Tocqueville's assessment of the continuities between the monarchical and the post-Revolutionary state in France in his later work, *The Old Regime and the Revolution,* helps to clarify what he thinks is indispensible and what is pernicious about bureaucracy. There, Tocqueville argues that the Revolution radicalized political and social trends which were already underway under the monarchical regime. He describes how the monarchy developed a centralized administration, unified in the *Conseil du Roi*, which exercised wide-ranging advisory, legislative, judicial, and administrative powers. The Council exercised its power through a system of public officials who administered the

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[6] Ibid., 540.

[7] Ibid., 329.

national laws and policies at the local level. Such an emerging central power, which enhanced the crown against the aristocracy, paved the way for the revolution by creating new centers of power outside the traditional feudal system, and by placing all persons on an equal footing as the subjects of administrative authority. The Royal Council would be reconstituted after Revolution and persist into the present day as the *Conseil d'Etat.*

By unsettling the patchwork of feudal authority, the system of absolutist administrative power thus facilitated "the most fundamental, the most durable, the truest portion" of the work of the revolution: "the natural equality of man, and the consequent abolition of all caste, class, or professional privileges, popular sovereignty, the paramount authority of the social body, the uniformity of rules."[8] Once administrative centralization treated all persons as equivalent, taxable objects, it was possible to reconstitute them as equal subjects; once administrative power vested sovereignty firmly with the king, his person could be replaced with the body of the people; once the monarch had the bureaucratic capacity to realize his will across his territory, the public interest could do the same; once uniform laws and principles of administration were instituted, equality before the law could become a political reality.

The despotic legacy of administrative power, however, was that it had not cultivated a capacity for political liberty. The feudal institutions it worked against had only wrought a hatred of inequality, and provided no experience with peaceful political participation. Absolutist bureaucracy likewise did not promote sentiments, skills, and institutions of public reason that would enable broad based political engagement. The

[8] Alexis de Tocqueville, *The Old Regime and the Revolution*, trans. John Bonner (New York: Harper & Brothers, 1856), 19.

temporary fervor of the revolution for active, democratic political life therefore gave way to submission to centralized, imperial power under Napoleon Bonaparte:

> when . . . the love of liberty had been discouraged and grown languid in the midst of anarchy and popular despotism, and the bewildered nation began to grope around for a master, immense facilities were offered for the restoration of absolute government; and it was easy for the genius of him who was destined both to continue and to destroy the revolution to discover them.[9]

Tocqueville's indictment of post-Revolutionary administration cannot be understood to reject bureaucratic institutions as a whole. In the case of America, he saw a democracy which lacked the institutional stability to realize democratic purposes, though the public was well versed in the practice of deliberative democratic politics. In France, he saw a democracy with substantial administrative power, which lacked customs and institutions of sustained political participation. The challenge Tocqueville's studies together pose is to marry administrative capacity with political liberty. While liberty without administration will result in frustration and disillusion with republican government, administration without liberty will descend into despotism. For "nothing but liberty can draw men forth from the isolation into which their independence naturally drives them—can compel them to associate together, in order to come to a common understanding, to debate, and to compromise together on their joint concerns."[10]

It was precisely this spirit of joint venture which distinguished the American political project. As Hannah Arendt argues, the pilgrims who established the first colonies had "confidence that they had their own power . . . to combine themselves together into a 'civil body politick', which, held together solely by the strength of mutual

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[9] Ibid., 252.

[10] Ibid., x.

promise 'in the presence of God and one another', supposedly was enough to 'enact, constitute and frame' all necessary laws and institutions of government."[11] America has from the outset constituted itself by deliberative democratic practices that relied upon the cohesive force of rational political engagement and procedurally fair and inclusive decision-making. Tocqueville's insight into the weakness of American administrative power suggests, however, that such practices of mutual promise and self-government are a necessary but not sufficient condition for republican institutions. Modern democratic rule requires that mutual promise be born out and institutionalized by lasting bureaucratic performance, which gives those promises reality amidst a complex, resistant, and ever changing social landscape.

What Tocqueville and Arendt failed to imagine, and what only American thought and practice could conceive, were forms of administration which cultivated, rather than undermined, political liberty. For Arendt, bureaucracy was a stultifying "rule by nobody," which, as "the most social form of government" eliminates the space for politics by "imposing innumerable and various rules, all of which tend to 'normalize' its members, to make them behave, and to exclude spontaneous action or outstanding achievement."[12] In its most extreme form, such a bureaucratic state becomes totalitarian: all space for the generation of common but contestable experience, discourse, and purpose is eliminated; moral judgment is reduced to meaningless clichés; the worst crimes are perpetrated by thoughtless officials who focus on problems of efficient

[11] Hannah Arendt, *On Revolution*, 167 (New York, Penguin, 1990 [1963]).

[12] Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), 40.

management, become alienated from the consequences of their action, and cannot think from the perspectives of the persons they violate.[13]

To avoid these extremes we must, as Arendt and Tocqueville suggest, maintain forms of rule which exercise power in a deliberative fashion; which enhance, rather than diminish, public space in and through their operation. But the problem we confront with bureaucracy is not, as Tocqueville thought, an over-emphasis on equality, at the expense of liberty, or as Arendt thought, a reduction of politics to social questions which are properly left to the private sphere. The problem is that we have not adequately realized the capacity of administrative institutions to bring the people into the state as partners in the interpretation and implementation of social freedom. The solution I reconstruct from the American Progressives is to rethink administrative structures so that they are capable of efficient bureaucratic action, and yet remain open to the participation of the public in the formation of policy. If the public realm, where "men are together in the manner of speech and action," can extend into the interior practices of the state, then the expansion of the state into society can avoid the pitfalls of Tocqueville's democratic despotism or Arendt's anonymous, totalitarian rule.[14]

Recovering a sense of the emancipatory potential of administration requires attention to its location within the category of public law. It is typical to see administration as a departure from law, as a modern form of extra-legal prerogative,

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[13] Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, 1968), 185-221; Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 2006 [1963]), 286-94.

[14] Ibid., 199.

which is foreign to the deliberative spirit of liberal democracy.[15] Michel Foucault raises the problem of administration's legal status acutely which his concept of "governmentality." He describes the development of an "art of government" in the eighteenth century, coeval with "the whole development of the administrative apparatus of the territorial monarchies, the emergence of governmental apparatuses."[16] This new political art, understood as a "right manner of disposing of things," sought to manage the "population" through the use of economics and statistics.[17] Because of this new emphasis on empirical knowledge, and a social scientific turn in the practice of rule, the juridical frame of sovereignty receded into the background: "whereas the end of sovereignty is internal to itself and possesses its own intrinsic instrument in the shape of laws, the finality of government resides in the things it manages and in the pursuit of the perfection and intensification of the processes which it directs; and the instruments of government, instead of being laws, now come to be a range of multiform tactics."[18]

Though he is at pains to distinguish juristic sovereignty from administrative government, Foucault does not claim that governmentality somehow replaced sovereignty and law. The persistence of juridical concepts and institutions well beyond the eighteenth century and into the present is plain. Rather, he means that

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[15] Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2011); Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014).

[16] Michel Foucault, "Governmentality," in *The Foucault Effect: Studies in Governmentality* ed. Graham Burchell et al. (Chicago: University of Chicago Press, 1991), 87-104, 96.

[17] 95-6.

[18] Ibid., 95.

governmentality consists in "using laws themselves as tactics."[19] Laws are no longer merely related circularly to sovereignty as their source and as its reality. Rather, the laws are instruments for the purposive disposition of persons and things, and for the discipline of thought and action:

> we need to see things not in terms of the replacement of a society of sovereignty by a disciplinary society and the subsequent replacement of a disciplinary society by a society of government; in reality, one has a triangle, sovereignty, discipline, government, which has as its primary target the population and as its essential mechanism the apparatus of security.[20]

Foucault thus acknowledges that government is not a fully comprehensive political concept, but rather one that stands in relation both to juristic sovereignty and disciplinary institutions.

Once it is conceded that tactical government does not replace law, but instead uses laws as tactics, a space for critique and for public engagement opens up at the interstices between these political forms. The administrative apparatus has arisen hand in hand with "administrative law," which affords affected persons with the opportunity to contest the legality of state action.[21] Administrative law does not reduce administration to the juridical discourse of sovereignty and legal authorization; nor does it fully instrumentalize law so that it can be shaped to fulfill whatever disposition of persons and things government seeks. Rather, it is a heavily contested domain where the logic of

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[19] Ibid.

[20] Ibid., 100.

[21] Bernardo Sordi, "*Révolution, Rechtsstaat* and the Rule of Law: historical reflections on the emergence of administrative law in Europe," in *Comparative Administrative Law*, Susan Rose-Ackerman and Peter L. Lindseth, eds. (Cheltenham, UK: Northhampton, MA: Edward Elgar, 2010), 23-37.

governmentality, disciplinarity, and law struggle with one another and interpenetrate. Because of the multiple claims raised by these analytic frames within administration, public law affords opportunities for the affected public to reshape their combined interaction through litigation and other forms of participation.

At issue in such disputes is often precisely what is the "*right* manner of disposing of things." Foucault's use of the term "right" (*droite*) is significant, with its ambivalence between ethical judgment, legal entitlement, and factual correctness. Precisely these ambivalences make a deliberative, rather than a purely technocratic form of administration possible and necessary. There are often administrative problems which are susceptible to more than one factually correct answer, depending on what ethical values we apply, and what statutory rules are interpreted to authorize, foreclose, or require. Administrative law is therefore at the heart of public law, not only in the weak sense that it concerns vertical relationships between the state and its subjects, but in the stronger sense that it situates such vertical relationships within a web of discursive contestation. As Martin Loughlin observes, "the 'public space' of public law is that which is needed for communication over matters of common existence. . . . Public law expresses a grammar of political conflict that flows through a system of shared understanding."[22]

To realize the practical force of this public legal discourse, we cannot think of government in the purely instrumental, economistic terms by which Foucault defines it, or of law in the circular terms by which he analyzes sovereignty. Rather, government must be understood as fulfilling certain purposes, intended by the popular sovereign, which are identifiable in the first instance in law, and are implemented by administrative

[22] Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), 156.

authorities. Administrative law, properly understood, is the interpretation of these public purposes. It is therefore not quite the case, as Foucault suggests, that "the techniques of government have become the only political issue, the only real space for political struggle and contestation."[23] Rather, administrative law, as a liminal space between technique, ethics, and sovereignty, has become a (though not "the only") real space for political action.

The failure to recognize the truly public character of public law is a symptom of the prevailing belief that administration is a concealed and opaque form of rule—whereas publicity is something we encounter in constitutionalism, legislation, scholarship, journalism, political speeches, and conversations in venues like coffee houses and weblogs.[24] We must resist this sharp, categorical boundary between administration and the public sphere. Political freedom consists in the interrogation of such conceptual and social boundaries. Foucault himself, in one of his few explicit articulations of his political values, turns to Immanuel Kant's famous "What is Enlightenment?" essay to argue that we must take up the "undefined work of freedom" by "grasping the points where change is possible and desirable, and to determine the precise form which this change should take."[25] The continuing requirement of enlightenment, for Foucault, is to "work on our limits, that is, a patient labor giving form to our impatience for liberty."[26]

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[23] Ibid., 103.

[24] See Jürgen Habermas, *Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (Cambridge, MA: MIT Press, 1991), 30-88.

[25] Michel Foucault, "What is Enlightenment?" in *The Foucault Reader*, Paul Rabinow, ed. (New York: Randomhouse, 1984), 32-50, 46.

[26] Ibid., 50.

If we apply this "limit-attitude" to Kant's original essay, it becomes clear that administration itself is a threshold where such changes are conceivable. Kant's central claim is that for enlightenment "nothing is required but *freedom*, and indeed the least harmful of anything that could be called freedom: freedom to make *public use* of one's reason in all matters."[27] But Kant makes two important provisos to this unrestricted use of reason. The first is Frederick the Great's command: "Argue as much as you will and about whatever you will, *but obey*!" The second bears more directly on our administrative subject matter:

> the private use of reason may . . . often be very narrowly restricted without this particular hindering the progress of enlightenment. But by 'public use of one's reason' I understand that use which someone makes of it *as a scholar* before the entire public of the *world of readers*. What I call the private use of reason is that which one may make of it in a certain civil post or office with which he is entrusted.[28]

Kant's claim that bureaucratic reason is "private" reveals the limits of enlightenment in the context of Prussian absolutism. Though it is true that we too, in democratic states, expect public officials to obey the commands given to them by law and by their ministerial superiors, we do not think of such reasoning as "private." For in carrying out a public purpose the public official necessarily exercises a public form of reason. This means that she cannot "behave[] merely passively."[29] She must state her reasons for her actions publicly, she must use her judgment to resolve any ambiguities in

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[27] Immanuel Kant, "An Answer to the Question: 'What is Enlightenment?'" in Immanuel Kant, *Practical Philosophy*, trans., ed., Mary J. Gregor (Cambridge, UK: Cambridge University Press, 1996), 11-22, 18.

[28] Ibid.

[29] Ibid.

her commands. When she relates the universal commands of law to the particular facts she confronts in her administrative capacity, she must consult the sense of the community in exercising her own judgment. Only in this way does the performance of a public duty remain a truly public thing, such that we can claim to live under republican government. By questioning the boundary between public law and public sphere, we engage in the patient labor of giving administrative form to our impatience for liberty.

Kant takes us to the doorstep of the intellectual development this dissertation will trace. G.W.F. Hegel follows in Kant's footsteps in articulating the political requirements of individual freedom. He will sketch a much more ambitious conception of administration, not as a machine of the state, but instead as an official class, and an institution, which stands at the center of an organic constitutional order. He will relate this bureaucratic class to a specific political project, namely, the establishment and maintenance of a free and egalitarian social order. This vision would redound through German public law, and eventually inspire the novel, democratic administrative theory of the American Progressives. But before we turn to this development, I wish to outline my methodological approach.

II. The Method and Motivation of Reconstructive Political Theory

I take a reconstructive approach to the problem of democratic statehood. I attempt to reassemble a coherent, normative vision of the administrative state from theoretical, institutional, and historical fragments.[30] I do not claim that we have fully achieved the

[30] My reconstructive method is similar to those of Jürgen Habermas and Axel Honneth. In Habermas' concept of "rational reconstruction," "the concept of practical reason . . . offers a guidee for reconstructing the network of discourses that, aimed at forming opinions and preparing decisions, provides the matrix from which democratic authority emerges. . . [S]uch a

ideal that I describe. I simply want to establish that the resources exist within our philosophical tradition, political history, and institutional repertoire to better realize the Progressive conception of the state.

The first step in this reconstructive project is intellectual history. I single out a particular line of intellectual development, beginning with Hegel, and culminating with the American Progressives. I aim to show what is cosmopolitan and what is specifically American about the Progressive conception of the state. This reconstruction roots a major aspect of our political tradition within a broader set of ideas and thinkers, thus rejecting the notion that American thought and practice can be understood apart from its transnational context. At the same time, I show how the appropriation and transformation of German ideas resulted in distinctively American innovations that were in fact superior to the ideas that influenced them.

The second step in this reconstruction is to develop a normative political theory from this intellectual history. It is possible, in principle, to develop normative theories of

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reconstruction would provide a critical standard, against which actual practices—the opaque and perplexing reality of the constitutional state—could be evaluated." Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. Williams Rehg (Cambridge, MA: MIT Press, 1996), 3, 5. Honneth's Idea of "normative reconstruction" is comparable but begins from institutional material rather than principles of practical judgment. This procedure "throws into relief the essential features and particularities of . . . society by demonstrating the contribution that each respective social sphere makes to securing and realizing the values that have already been institutionalized in society. . . . In the course of normative reconstruction, the criterion of 'rationality' applied to those elements of social reality that contribute to the implementation of universal values not only asserts itself in the uncovering of already existing practices, but also in the critique of existing practices or in the attempt to anticipate other paths of development that have not yet been exhausted." Axel Honneth, *Freedom's Right: The Social Foundations of Democratic Life* (New York: Columbia University Press, 2014), 7-8. My method is to begin with a "conceptual reconstruction" of political norms through an exegesis of the Hegelian Progressive tradition, and then proceed to an "institutional reconstruction" of the American state, which demonstrates the extent to which it conforms or departs from the normative ideals identified in the conceptual reconstruction.

the administrative state without grounding them first in a single philosophical tradition. Henry S. Richardson has offered such an account, synthesizing contemporary liberal, republican, and democratic theory to explain under what circumstances bureaucratic power is legitimate.[31] His basic argument, with which I agree, is that administrators must use practical judgment, and deliberate with affected persons, when they exercise authority. Because of his focus contemporary political theory, however, he does not engage with a set of essential questions which are disclosed and made tractable by the Hegelian Progressive tradition in which I ground my analysis: What is the proper regulative relationship between the state, civil society, and the public sphere? In what ways might we think of administration as generative of democratic authority, rather than as a mere technical necessity which must be appropriately constrained? How should the practice of administration alter our conception of constitutional rights and structures, rather than merely operate within their fixed ambit? These are the questions my normative theory sets out to answer.

The normative theory I offer does not suppose that the American Progressives' ideas can simply be transplanted, without modification, into contemporary political life. Nor do I endorse all aspects of Progressive thought. Rather, I selectively appropriate Progressive ideas to provide a compelling public philosophy for the present. The norms therefore arise by reflecting on the relationship between the intellectual-historical sources and contemporary problems.

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[31] Henry S. Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (New York: Oxford University Press, 2002).

First and foremost amongst such problems is the legitimacy of the administrative state itself. Though administrative law is prone to perpetual crises,[32] the presidency of Barack Obama has seen particularly acute confrontations between latter-day Progressive efforts to deploy the state to improve social welfare, and conservative reaction against this trend on the supposed basis of constitutional principle. A significant strand of this reaction has targeted the Hegelian Progressives in particular, arguing that they imported dangerous, proto-totalitarian ideas into the American state.[33] At the same time, scholars more sympathetic to the Progressive project continue to be deeply anxious about its prospects, in large part because of its German roots. Anne Kornhauser, for example, repairs to the liberal theory of John Rawls to avoid perceived threats of Germanic authoritarianism in the American administrative state.[34] Such a theory, much like its more conservative cousins, privileges the classical individual rights of private property and contract above

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[32] James O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (Cambridge, UK: Cambridge University Press, 1978).

[33] This critique of Progressive Hegelianism ranges from the popular to the scholarly. See e.g. Charles R. Kesler, *I Am the Change: Barack Obama and the Crisis of Liberalism* (New York: Broadside, 2012), 57; Jonah Goldberg, *Liberal Fascism: The Secret History of the American Left from Mussolini to the Politics of Meaning* (New York: Doubleday, 2007), 218; Ronald J. Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism* (Lanham, MD: Rowman & Littlefield, 2005), 16-7; Ronald J. Pestritto, "The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis," *Social Philosophy and Policy* 24, no. 1 (2007), 16-54; Tiffany Jones Miller, "Freedom, History, and Race in Progressive Thought," *in Natural Rights, Individualism and Progressivism in American Political Philosophy*, Ellen Frankel Paul et al., eds. (Cambridge: Cambridge University Press, 2012), 220, 254; Philip Hamburger, *Is Administrative Law Unlawful?* (New York: Columbia University Press, 2014), 447-478; Jean M. Yarbrough, *Theodore Roosevelt and American Political Thought* (Lawrence, KS: University of Kansas Press, 2012), 19-24, 44-6.

[34] Anne M. Kornhauser, *Debating the American State: Liberal Anxieties and the New Leviathan, 1930-1970* (Philadelphia: University of Pennsylvania Press, 2015), 175-220.

and beyond the requirements of social welfare.[35] The normative theory I reconstruct rejects any such serial ordering of rights and welfare. The Progressive theory reveals how relatively egalitarian scholars like Rawls and Kornhauser have conceded the premises of discourse to a libertarian philosophy which treats individuals as prior to society, and privileges their private interests above the political community of which they form a part. I follow the Hegelian Progressives in arguing, by contrast, that the value of individual rights can only be fully understood by reference to their role in securing collective self-government. As a consequence, the rights of the individual cannot claim absolute priority over the rights of the democratic public.

Such theoretical claims are difficult to grasp in the abstract, apart from the concrete settings in which they operate. The final step in the reconstructive procedure is therefore to apply the normative theory to the architecture of American public law. I do not evaluate institutions according to purely external criteria derived from moral theory. Rather, the intellectual-historical background established in the first step serves to give these ideas some purchase within the institutional material. Because of the influence of the Progressive vision on the modern American state in general, and because of specific strands of influence which I document, the norms are already there within the institutional matrix. But they remain obscured and partial, on account of our failure to

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[35] Rawls articulates his "basic structure" into two principles: "First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage and (b) attached to positions and offices open to all. . . . These principles are to be arranged in a serial order with the first principle prior to the second. This ordering means that *infringements of the basic equal liberties protected by the first principle cannot be justified, or compensated for, by greater social and economic advantages*." John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 2nd ed. 1999), 53-4 (emphasis added).

recognize their continuing vitality and their normative appeal. I therefore assess the extent to which our current and past practices reflect, or depart from, the normative theory I reconstruct. I conclude that essential aspects of the American state and its history realize the Progressive vision, but that other aspects of it diverge from this ideal. By recovering a coherent theory, I hope that we can reform the state to better reflect the Progressive conception. In the next section, I will explain this argument in greater detail by outlining the chapters.

III. Plan of the Dissertation

The structure of the dissertation mirrors the reconstructive method described above. It begins with intellectual history, turns to normative reconstruction, and concludes with institutional applications. Chapter 1 critiques German thinking about the administrative state that began with Hegel, blossomed in the public law scholarship of the nineteenth century, and eventually collapsed during the Weimar Republic. I show how Hegel inaugurated an essential line of inquiry into administration by grasping the dialectical relationship between state and society, and the social and material requisites for individual freedom. Hegel argued that the state must not only protect the "abstract" liberal rights of property and contract, but must provide comprehensive "police" services which would afford individuals with basic goods through price regulation and public provision, and reduce the inequalities and antagonisms created by capitalist systems of economic production. I then show how this theory influenced the major administrative law scholars of the nineteenth century: Robert von Mohl, Lorenz von Stein, and Rudolf von Gneist.

These Hegelian jurists developed a robust defense of administrative intervention in the name of individual freedom. However, given the failure of the Revolution of 1848, they did not consider how administrative institutions could be guided by democratic will, rather than the authority of the monarch and his expert advisors. This anti-democratic thrust had disastrous consequences with the fall of the German Empire and the founding of the Weimar Republic. Public law scholars of all political stripes remained committed to a bureaucratic state hermetically sealed from society, and insensitive to deliberative democratic input. The social and political theory of Weber, which dominates today's legal and political thinking about bureaucracy, does not reflect a sociologically pure "ideal-type" of the modern state, but this historically particularistic amalgam of liberal-democratic constitutionalism and authoritarian administrative structure. The constitutional theory of Carl Schmitt and administrative theory of Ernst Forsthoff point to the extraordinary dangers of cabining administrative structure from public participation, and identifying the authority of the state with the decisive will of the chief executive. Though democratic ideals have reemerged with renewed vigor from the ruins of the Nazi regime, German public law and theory remain committed to Weber's sharp, hierarchical distinctions between deliberative democratic will formation and instrumental bureaucratic performance.

Chapter 2 argues that the American Progressives painted a sharp contrast to this German development by appropriating but democratizing Hegelian state theory. W.E.B. Du Bois, Woodrow Wilson, John Dewey, Frank Goodnow, and Mary Parker Follett were all directly influenced by Hegelian concepts of the state. But they saw administration as a democratic institutions, in two interconnected respects. First of all, they argued that

efficient administration was required to realize public purposes, such as social welfare provision and the regulation of monopolistic industries. Democratic control of society required giving authority to professionals who could grasp and manage complex problems through administrative, rather than judicial, techniques of conflict resolution. At the same time however, the Progressives stressed that administration required the participation of the democratic public to function effectively. In the absence of such public consultation, administrators would not properly understand the tasks they confronted, and would lose the confidence of the regulated public.

In Chapter 3, I connect this Progressive theory of the state to contemporary traditions such as deliberative democratic theory and the legal process school, arguing that it foregrounds these approaches with a robust concept of the appropriate regulative relation between the democratic state, civil society, and the public sphere. I claim that we must understand the fundamental task of the modern American state as the regulation of civil society in the interests of individual and collective autonomy. This requires rethinking of American constitutionalism: we must understand the three branches not as antagonistic institutions with categorically distinct tasks, but as partners in the deliberative elaboration of public purposes. Under the influence of political and judicial control, administrative agencies help to flesh out the meaning of public commitments expressed in statute. When they do so, they must complement the democratic authority of the constitutional branches with renewed opportunities for public participation within the administrative process itself.

This concept of the "discursive separation of powers" informs a more detailed analysis of political and judicial control of administration in Chapters 4 and 5. I argue

that Congress should set broad substantive goals for agencies and design administrative procedures to solicit the opinions of affected parties. The president should exercise broad managerial control of administration, adjusting agencies' regulatory focus and intensity according to his or her policy priorities. These partial and limited forms of political control are justified by the attenuated democratic authority of elected representatives: because of asymmetries of power and information in civil society, Congress and the President have neither complete knowledge of the problems they seek to address, nor complete legitimacy by deliberative democratic standards. America's current governing institutions realize this progressive vision to a substantial degree. But procedures for public participation are neither strong nor egalitarian enough, and thus Presidential control threatens to overturn into a dangerous form of plebiscitary and arbitrary executive rule.

In turning to judicial review of administration in Chapter 5, I argue that courts must ensure that agencies remain within the framework of their statutory authorization, and exercise their discretion in a discursively rational manner. When individuals can show that they have been injured by an administrative action in an acute and distinguishable way, they have a right to judicial review of the agency's determination. In this way, courts can ensure that the autonomy of the individuals who compose the democratic public is respected in the implementation of public purposes. Courts thus mediate between individual and collective autonomy. When administrative actions are challenged in court, agencies must demonstrate the legality and intelligibility of their policy. They must show that they have been responsive to all relevant arguments offered

by affected parties, and have forthrightly stated any value judgments which have guided their decision-making.

To ground this conception in judicial doctrine, I recover the notion "public rights." Public rights are rights of the popular sovereign to govern the conditions of its collective existence. Public rights are defined and delimited by the reasoning of the sovereign public, as expressed in statutory law and informal discourse. Administrative agencies articulate public rights when they administer statutory law. Courts should therefore assess whether agencies' articulation of public rights remains rationally responsive to values and interests expressed by affected parties. I then evaluate landmark cases of administrative law to assess their compatibility with this notion of public rights. While standards of judicial review correspond to these deliberative democratic standards in some respects, the courts remain bound to a technocratic model of analysis that fails to recognize and respect value-based reasoning in agency decision-making.

In Chapter 6, I provide historical examples of the forms of Progressive administration I have advocated. This historical exploration clarifies the tension between the progressive commitment to deliberative forms of administration and the efficient provision of the requisites for the existence of a democratic public. I first show how administrative agencies in the New Deal, under the direct influence of Dewey, created participatory forms of administration, and sought to provide the material requisites for democratic citizenship. While participatory forms of administration successfully realized the deliberative ideals of Progressivism, they tended to exclude the poor and minority groups from decision-making processes. Those programs that benefited the poor, by

contrast, were not deliberative in structure. The history of the New Deal thus shows the pitfalls of failing to provide for truly inclusive deliberation in the administrative process.

I then show how administrative agencies in the Civil Rights Era sought to combine deliberation and administrative social provision in new ways. I show that the agencies that administered the Civil Rights Act of 1964 contributed ethical arguments to political and legal discourse over the meaning of the nation's commitment to equality. The Office of Economic Opportunity sought to incorporate the poor into the administration of the War on Poverty. These examples of democratic administration show that agencies are capable of participating in value-based deliberation over the content of public policy. But they caution that deliberative administration must remain sensitive to issues of programmatic efficiency. The history of the Second Reconstruction also cautions that the discursive separation of powers requires each of the branches of government to respect the ethical reasoning of administrative agencies.

In the Conclusion, I criticize alternative conceptions of administrative legitimacy through an analysis of some current public policy issues. I argue that cost-benefit analysis fails to fully justify administrative activity, and reduces the legitimate scope of state action, because it is often insensitive to non-market values. I show the limits of cost-benefit analysis through examples from civil rights law and financial regulation. I argue that presidential theories of administrative legitimacy lead to a dangerously unstable form of politics reminiscent of the Weimar Republic. I contrast the Obama Administration's immigration policy, as an example of decisionistic presidential administration, with its climate change policy, which institutionalizes some of the best features of the Progressive conception of American statehood.

Chapter 1

German Theories of the Administrative State from Hegel to Habermas

I. Introduction

American legal and political science scholarship remain deeply influenced by German conceptions of the state. In particular, the German institution and theory of the *administrative* state informs the way Americans think about and critique the functions of government, the independent civil service, bureaucratic forms of rule, and the concentration of policymaking authority in the executive branch. Much of this literature proceeds from Max Weber's concepts of bureaucracy and legal rational authority.[1] This Weberian view stresses that bureaucracy is, and ought to be, a technically superior, efficient, and value-neutral means for implementing statutory requirements. Another strand of scholarship focuses on the American reception of the German idea of a *Rechtsstaat*, which would grant policy-making power to bureaucrats, but constrain their

[1] Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven: Yale University Press, 1983), 26; Gregory Huber, *The Craft of Bureaucratic Neutrality: Interests and Influence in Governmental Regulation of Occupational Safety* (Cambridge, UK: Cambridge University Press, 2007), 37-8; Peter D. Evans, Dietrich Rueschemeyer, and Theda Skocpol, eds. *Bringing the State Back In* (Cambridge UK: Cambridge University Press, 1985), 8, 50-9; James T. Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870-1920* (New York: Oxford University Press, 1986), 384-94; Edward L. Rubin, "Law and Legislation in the Administrative State," *Columbia Law Review* 89 no. 3 (1989), 369-429, 377-80.

discretion through statutory and judicial control.[2] Some scholars locate the source of relevant German ideas not in Weber, but in Hegel, who shared his analysis of administrative power, but emphasized the ethical content of the state above its monopoly over the instruments of violence.[3] For these critics, the Hegelian origins of the American administrative state reveal the great dangers such a state poses to individual liberty, the rule of law, and the constitutional separation of powers.

The specter of the *Staat* therefore looms large over the American intellectual landscape. But the shape of this idea, and its institutional referents, remain so obscure, diffuse and variously conceived that descriptive and normative accounts rest on tenuous foundations. This chapter will clear the way for a more accurate assessment of the links between German and American state theory with a critical analysis of the evolution of German public legal theory from Hegel to Habermas. My goal here is to distinguish different phases in the theoretical and institutional development of the German state, so that the relevance of these configurations to the American context becomes definite.

I shall argue that Hegel set out an influential and normatively compelling vision of the state as an institution which embodies and institutes the requirements for individual freedom. For Hegel, the administrative state had an essentially *emancipatory* function in relation to the society it regulated: it sets out to uproot feudal privilege, instituting rights of property and contract, providing for the public welfare through police functions, and resolving antagonisms between social groups by reference to general principles of law

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[2] Ernst, *Tocqueville's Nightmare*, 9-15; Hamburger, *Is Administrative Law Unlawful*, 447-78.

[3] Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism*, 16-17; Miller, "Freedom, History, and Race in Progressive Thought," 254; Yarbrough, *Theodore Roosevelt and American Political Thought*, 19-24, 44-46.

and policy. Public officials therefore had an ethical vocation as they attempted to implement the universal interest in individual freedom. In articulating this normative vision, Hegel laid out a set of dynamic institutional relationships which would become definitive both for German public law scholarship and for its reception in American progressivism: the regulation of civil society by the state; the supplementation of private law with public law; and the interpretation and application of legislation by executive authorities. I will show in chapter 2 that these aspects of Hegel's thought were indeed carried over into American Progressivism, where they provided crucial elements for Progressives' novel, democratic theory of the state.

The democratic elements which the American Progressives would introduce were, however, totally foreign to Hegel and the German public law scholars who followed in his steps. German constitutionalism in the nineteenth century, which was reflected in Hegel's critique of popular sovereignty, yielded a normatively and institutionally fractured constitutional architecture: administrative power was organized under the monarchical executive, and was constrained by the legislature, which represented the interests of bourgeois civil society. Because of this unresolved bifurcation between social and sovereign interests within the state, Hegel's idea that administration was an ethical practice with universal interests at its heart gave way to an alignment of bureaucracy with the conservative social paternalism, as against the economic liberalism of the legislative branch. When Germany suddenly adopted democratic constitutional arrangements in the Weimar Republic, administration nonetheless remained totally insulated from society, reactionary in its orientation, and subject to democratic control primarily through the decisive will of the elected president. The political failure of Germany to develop a non-

authoritarian form of administration was reflected in scholarship, such as Weber's, which saw democracy either as a matter of legislative control or of executive decision, and viewed bureaucracy as an alienated power which was as pernicious as it was necessary.

The collapse of the Weimar Republic, and its descent into national socialism, show the extraordinary dangers of an administrative state which hinges its legitimation structure on charismatic executive authority or the merely technocratic competence of the bureaucracy. The recent turn to Carl Schmitt's critique of liberalism, and the embrace of the unitary executive, in American administrative law scholarship is deeply troubling when seen in the context of German theory and history.[4] The source of the danger is not, as some commentators have suggested, the idea of an administrative *Rechtsstaat*, which the American Progressives indeed adopted from Hegelian legal theory. Rather, it arises from the *loss* of Hegelian theory's orientation towards individual freedom, the sundering of the connection between legal rationality and the exercise of bureaucratic power, and the rise of a plebiscitary-presidential form of administrative legitimacy. German legal theory therefore reveals both promising models and vivid warnings concerning crosscurrents in contemporary American administrative law and our broader theory of the administrative state.

II. Administration in Hegel's Philosophy of Law

Hegel is a suitable starting point for understanding the tradition of German state theory both because of his particular influence within this tradition and the more

[4] Adrian Vermeule, "Our Schmittian Administrative Law," *Harvard Law Review* 122 no. 4 (2009), 1095-1149; Posner and Vermeule, *The Executive Unbound: After the Madisonian Republic*, 3-18.

universal purchase of his philosophical insights. As Heinrich Triepel points out, "Hegel unquestionably exercised a great influence on the lawyers of the first half of the last century, and to some extent even beyond. Public law . . . and the law of the state . . . bear his mark."[5] Beyond this, Hegel's *Philosophy of Right* sets out the basic normative commitments of modern law and politics. In the Introduction, he states: "the basis of right [*Recht*] is the realm of spirit in general and its precise location and point of departure is the will; the will is free . . . and the system of right is the realm of actualized freedom."[6] Hegel understands freedom as a form of self-determination, of the will "giving itself content."[7] By saying "right" is based upon freedom in this sense, Hegel means to argue that law and other obligatory social institutions facilitate the purposive rational activity of individual subjects.[8] "The system of right is the realm of actualized freedom" in the sense that legal order can provide a social context in which freedom is not merely a mental hope, or an individual striving, but a way of life which is institutionally secured. Thus, whereas in the *Phenomenology of Spirit* the life-and-death struggle between master and slave for mutual recognition fails to produce freedom for either, in the modern state a

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[5] Heinrich Triepel, "Law of the State and Politics" (1927), in *Weimar: A Jurisprudence of Crisis*, Arthur J. Jacobson & Bernard Schlink, eds. (Berkeley: University of California Press), 176-188, 183.

[6] G.W.F Hegel, *Elements of the Philosophy of Right*, trans. H.B. Nisbet, ed. Allen W. Wood (Cambridge, UK: Cambridge University Press, 1991), §4.

[7] G.W.F Hegel, *Enzyklopädie der philosophischen Wissenschaften im Grundrisse* (1830): Dritter Teil: Die Philosophie des Geistes (Frankfurt-am-Main: Suhrkamp, 1970), §469 (author's translation). See also G.W.F. Hegel, *Philosophy of Right*, §21.

[8] Herbert Marcuse, *Reason and Revolution: Hegel and the Rise of Social Theory* (Oxford: Oxford University Press: 1941), 206. As he says in the *Encyclopedia*, "right is to be taken comprehensively not only as limited juridical right, but as the being of all determinations of freedom." Hegel, *Enzyklopädie*, §469 (author's translation).

framework of generally applicable legal norms enables such forms of reciprocity.[9] Laws enable subjective freedom because they provide a normative background through which individuals can determine the content of their action by reasoning about it and justifying it to one another. The core of this legal order is the classical liberal position of "abstract right" (*abstraktes Recht*), which includes the foundational rights to property and contract. Hegel ascribes foundational importance to these rights, which enable each person to recognize every other as formally equal rational agents.[10] As we shall see in chapter 2, W.E.B. Du Bois draws on this connection between mutual recognition and law in his reconstruction of the emancipatory efforts of the Freedmen's Bureau after the Civil War.

Hegel describes the civil law as a statutorily codified system, in which the principles of abstract right become empirically actual and enforceable through the administration of justice: "What is right *in itself* is *posited* in its objective existence, that is, it is determined through thought for consciousness and *known* as what right is and what is in force as right—it is *statute*; and right through this determination is *positive*

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[9] G.W.F. Hegel, *Phenomenology of Spirit*, trans. A.V. Miller (New York: Oxford University Press, 1977 [1807]), 111-19. In the *Philosophy of Right*, Hegel writes, "The point of view of the free will . . . is already beyond that false point of view whereby the human being exists as a natural being and as a concept which has being only in itself, and is therefore capable of enslavement. This earlier and false appearance is associated with the spirit that has not yet gone beyond the point of view of consciousness; the dialectic of the concept and of the as yet only immediately consciousness of freedom gives rise at this stage to the struggle for recognition and the relationship of lordship and servitude (see *Phenomenology*, pp. 115ff. and *Encyclopedia of the Philosophical Sciences*, §§325ff.). But that objective spirit, the content of right, should no longer be apprehended merely in its subjective concept, and consequently that the ineligibility of the human being in and for himself for slavery should no longer be apprehended merely as something which *ought* to be as, is an insight which comes only when we recognize that the idea of freedom is truly present only as *the state*." Hegel, *Philosophy of Right*, § 57A.

[10] Seyla Benhabib, "Obligation, Contract, and Exchange: On the Significance of Hegel's Abstract Right," in *The State and Civil Society: Studies in Hegel's Political Philosophy*, ed. Z. A. Pelcynski (Cambridge: Cambridge University Press, 1984), 163.

right in general."[11] Positive law brings the principles of abstract right into public consciousness by making them known and enforceable. By giving this intersubjectively accessible vocabulary binding force, statutes provide an institutional setting which reflects the universalizing structure of rational thought.[12] With shared universal legal norms to guide their reasoning, Hegel argues, individuals recognize one another as participants in a common social practice. As a consequence, individuals become able individually and collectively to reason about their actions, and thus to take ownership of their actions in a way they could not otherwise.

Liberal rights and their codification in private law form the normative background for the social sphere of civil society (*bürgerliche Gesellschaft*) in which individuals are able to satisfy one another's wants and thus achieve their freedom through the "system of needs" of the market place. Though civil society therefore partially realizes the requirements of individual freedom, it also undermines it. Civil society and its private law produces vast inequalities which prevent some individuals and classes from attaining the preconditions for self-determining activity, and creates divisions between individuals which make it impossible for each to recognize every other as a free and equal subjects.

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[11] G.W.F. Hegel, *Grundlinien der Philosophie des Rechts* (Hamburg: Felix Meiner, 1955), §211. I have used my own translation in this case because Nisbet's translation does not capture the specifically statutory meaning of "*Gesetz*," translating it instead as "law." He also uses the verb "to become" whereas Hegel uses the verb "to be" [*sein*], and gives the sentence a conditional form it lacks in the original. Further, his translation of *gelten* as "valid," seems to miss the thrust of the passage. Hegel is referring to the fact that, in positive law, right is in effect, or in force. Right, for Hegel, is always "valid" in a purely normative sense, whether it is posited in statute or not.

[12] As Armin von Bogdandy points out, "Hegel does not let every form of universality suffice; rather, he demands statutes with a *sufficiently determinate, intersubjectively comprehensible field of application.*" Armin von Bogdandy, *Hegels Theorie des Gesetzes* (Freiburg: Munich: Karl Aber, 1986), 78 (author's translation).

"When the activity of civil society is unrestricted . . . the specialization and limitation of work also increase, as do likewise the dependence and want of the class which is tied to such work; this in turn leads to the inability to feel and enjoy the wider freedoms, and particularly the spiritual advantages, of civil society."[13] At the same time, economic development creates an implicit social interdependency that makes collective social consciousness possible. Civil society is therefore not merely a realm of contractual exchange and economic antagonism. It is also the space in which individuals form bonds of solidarity on the basis of their common interests.[14] John Dewey would later draw on this Hegelian account of civil society to understand how the democratic "public" emerged from the externalities of market exchange.

Hegel argues that without some overarching normative perspective from which to assess the validity of social relations, this social interconnectedness is more likely to devolve into antagonism between opposed interests, rather than coalesce into cooperative endeavor. The state provides this structural and normative unity. The state, for Hegel, is "actuality of concrete freedom," which is "both the law which permeates all relations within it and also the customs and consciousness of the individuals who belong to it."[15] It frames common social life with institutions that set out the laws and provide social services. The state furnishes a political unity through its constitution, which provides for a separation of powers: The legislative branch determines the statutory laws, the executive implements them, and the sovereign monarch represents the state's unitary will

[13] Ibid., §243.

[14] Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge: M.I.T. Press, 1992), 100.

[15] Hegel, *Philosophy of Right*, §274.

and ultimate decision. Hegel describes the political constitution of the state as "organic," in the sense that the legislative and executive institutions within the state are not totally separate powers, but rather interdependent elements of a whole. This understanding of the political organism is rooted in his concept of institutional rationality: "when we are dealing with the *constitution*, we are concerned solely with objective guarantees or institutions, i.e., with organically linked and mutually conditioning moments."[16] The political institutions of the state are organically linked because the normative import of each is based on the common principle of the free will, and the function of each can only be carried out in conjunction with the functions of the others. Woodrow Wilson would adapt this Hegelian understanding of political organism to the American context, arguing that American constitutionalism needed to be understood by reference to the social organism it institutionalized.

Hegel's understanding of organicism goes farther, however, in arguing that the state itself is a meta-subject, a personality in which the free will of the individual finds ultimate expression. This second, stronger conception of political organicism leads Hegel into the highly dubious argument that the state requires a sovereign monarch who represents the unified personality of the state.[17] Hegel argues that because the principle of the free will is the normative foundation of the state, the state itself must take the form of

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[16] Ibid., §286. He describes organism in terms of institutional rationality elsewhere: "In the development of civil society, the ethical substance takes on its infinite form . . . the form of *universality* which is present in education, the form of *thought* whereby the spirit is objective to itself as an *organic* totality in laws and institutions, i.e. in its own will as *thought*." Ibid. §256.

[17] Contemporary commentators are right to find Hegel's defense of hereditary monarchy wanting (§279A). See, e.g. Robert B. Pippin, *Hegel's Practical Philosophy* (Cambridge, UK: Cambridge University Press, 2008), 261. His justification of the monarchy on the basis of its immediate connection with nature is particularly perplexing, given that Hegel's account of freedom always involves the mediation and transformation of natural endowments (§280).

a free will. This commitment to the personality of the state leads him to reject the idea of popular sovereignty: "popular sovereignty is one of those confused thought which are based on a *garbled* notion of the people. *Without* its monarch and that *articulation* of the whole which is necessarily and immediately associated with monarchy, *the* people is a formless mass."[18]

Hegel's skepticism of popular sovereignty is of a piece with his critique of public opinion, which he says "deserves to be *respected* as well as *despised.*"[19] For Hegel, public opinions that arise from life experience within civil society are an accidental form of knowledge, as likely to lead into error as to truth. He thus assigns to the legislature the role of "permitting *public opinion* to arrive for the first time at *true thoughts* and *insight*," through rational deliberation.[20] The purpose of political representation is not to give voice to public opinion, but to educate members of the public about their common interests. Practices of legislative discussion and the framing of laws lead to universality in a way that mere private experience and discussion supposedly cannot. Hegel gives no indication that the state itself might be educated by the views of the public. Deliberative cultivation is a one way street from the chambers of the legislature to the public. There is no acknowledgement that the public sphere might be constituted in interaction between citizens and the state; nor that popular sovereignty might consist in the coherent, institutional articulation of this process. The subjective opinions of only one person carry

[18] Hegel, §279A.

[19] Ibid., §§ 317-18.

[20] Ibid., § 315. See also Habermas *Structural Transformation of the Public Sphere*, 117-123.

any constitutional weight: those of the monarch.[21] It is in this respect that American Progressives such as John Dewey and Woodrow Wilson would defer from Hegel most radically, insisting upon the reciprocal, rather than hierarchical, relationship between the exercise of state power and the content of public opinion.

Hegel nonetheless minimizes the significance of such arbitrary monarchical decisions within the constitutional state, and upholds the centrality of the legislative power. He therefore assigns to the legislature the task with framing "the laws as such," and addressing "those internal concerns of the state whose content is wholly universal."[22] Though the monarch retains a formal power of decision over legislation, and the power to appoint and dismiss executive ministers, Hegel stresses that, in a "fully organized" constitutional state, the monarch is only

> the highest instance of formal decision, and all that is required in a monarch is someone to say 'yes' and to dot the 'i'; for the supreme office should be such that the particular character of its occupant is of no significance. . . . There may indeed be circumstances in which this particularity plays an exclusive part, but in that case the state is either not yet fully developed, or it is poorly constructed. In a well-ordered monarchy, the objective aspect is solely the concern of the law, to which the monarch merely has to add his subjective 'I will'.[23]

While the legislature frames the laws and the monarch symbolizes the unity and agency of the state, the executive power "subsumes" particular cases under the legislative

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[21] It is noteworthy that Hegel at one point compares the monarchical principle to public opinion: "We have considered subjectivity once already in connection with the monarch at the apex of the state. Its other aspect is its arbitrary appearance in public opinion as the most external manifestation." Hegel, *Philosophy of Right*, §320A.

[22] Hegel, *Philosophy of Right*, §299.

[23] Ibid., 280A.

universal.[24] Hegel therefore subordinates executive power to legislative power, as the general rule governs the treatment of the particular case. But he diagnoses an important, and open question for the distinction between legislation and administration:

> It is possible to distinguish in general terms between what is the object of universal legislation and what should be left to the direction of administrative bodies or to any kind of government regulation, in that the former includes only what is universal in content – i.e. legal determinations – whereas the latter includes the particular ways and means by which the measures are *implemented.* The distinction is not entirely determinate, however, if only because a law, in order to be a law, must be more than just commandment in general . . . , i.e. it must be determinate in itself; but the more determinate it is, the more nearly capable its content will be of being implemented as it stands. At the same time, however, so far reaching a determination as this would give laws an empirical aspect which would necessarily be subject to alteration when they were actually implemented, and this would detract from their character as general laws.[25]

Legislation therefore must have some determinacy in order to retain its status as a norm which guides action; but it must leave sufficient room for administration adaptation in order to retain its generality and uniformity over time and across realms of application. The crucial question Hegel account of legislation and administration implementation is: to what extent is the action of the executive pre-determined by legal norms, and to what extent is it free to interpret the meaning of open-ended statutory commitments? Upon this question depends the balance between legislation and execution in controlling the administrative functions of the state. Though Hegel stresses that the executive, and its administrative ministries, must be subordinate to the legislature, as the universal to the

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[24] As Carl Schmitt recognized in his *Verfassungslehre*, Hegel was an early exponent of the theory of the *Rechtsstaat*, though he did not use the term: "For Hegel, the law is the current truth in a general form. The legislative power expresses the general, the executive the particular." Carl Schmitt, *Constitutional Theory*, trans. Jeffrey Seitzer (Durham: London: Duke University Press, 2008 [1928]), 183.

[25] Hegel, *Philosophy of Right*, § 299.

particular, he is unable to specify more precisely how much legal content should be determined in statute, and how much should be left to administrative discretion and judgment. The matter is complicated by the fact that Hegel positions the hereditary monarch at the apex of the executive power.[26] If the monarch holds the sovereign power, and this power is aligned with the executive branch, than the subservience of this branch to the commands of the legislature is highly insecure.

The relationship between the legislative and executive dimensions of the state, and their interaction with civil society, becomes more determinate when Hegel turns to the administrative content of the executive branch. Hegel uses the term "police" (*Polizei*) and "public authority" (*öffentliche Macht*) rather than "administration" (*Verwaltung*) to describe the portion of the executive which implements statutes and executive orders providing for security, utilities and social welfare services.[27] What distinguishes

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[26] Hegel gives to the monarch the authority to appoint and dismiss the highest public officials and to make final decisions on law and policy. The monarch's power to appoint and dismiss high officials according to his "unrestricted arbitrary will" (§283) constitutes a rather substantive influence over policy which is very hard to justify, especially given Hegel's own expressed doubts about monarchs' intellectual powers (§281A).

[27] *Polizei* was a general term for the regulatory authority of the state in early modernity, beginning with the *Reichspolizeiordnungen* of 1530, 1548, and 1577. *Polizei* included numerous regulatory activities including provision for the poor, price regulation, rent control, supervision of forests and agriculture, cultural and educational provisions, and criminal law. This encompassing regulatory authority of the early state was the fore-runner of modern administration (*Verwaltung*), but it was not situated within modern constitutional distinction between the legislative creation of legal norms and the executive-administrative implementation of norms. Nor did it presuppose the idea of a state standing above a society composed of independent and equal subjects. Norm creation and norm implementation, and state and society, stood in a more complex and fluid interrelationship in the early *Policeyrecht*. "Since the middle of the 18th century, with the critique of the absolute '*Polizeistaat*,' authoritarian '*Policey*' fell into discredit. The endeavor to establish a '*Polizeirecht*' (*ius politae*) was at first not successful, but in the terms of the constitutional movement after the Vienna Congress led to a cleavage: '*Polizeirecht*' transformed into '*Administrativrecht*,' which corresponded to early liberal principles, the '*Wohlfahrtspolizei*' lived on in *Polizeiwissenschaft*, which in the middle of the nineteenth was either totally abandoned or partially survived as '*Verwaltungslehre*.'" Michael Stolleis, "*Was bedeutet 'Normdurchsetzung' bei Policeyordnungen der Frühen Neuzeit?*" in Michael Stolleis, *Ausgewählte Aufsätze und*

administration from the judicial system, which is also grouped under the executive heading, is that courts decide cases of conflict between individual parties in accordance with legal rules. By contrast, the police power of the executive, which we would label administrative, is to resolve conflict between the social groups through regulation. The administration has the purpose of "upholding legality and the universal interests of the state" within the particular rights of the corporations and "bringing these rights back into the universal."[28] It arbitrates "the conflict between private interests and particular concerns of the community, and between both of these together and the higher viewpoints and ordinances of the state."[29] The inequalities and antagonisms of civil society are therefore to be redressed and ameliorated through legally authorized administrative action, such as provision for public utilities, health, and education, as well as security.

Hegel's understanding of administration builds upon a strong notion of the public, not only as the target of regulation, but as an entity which is entitled to the state's protection against the inequalities and injustices of civil society. Hegel thus defends market regulation, not as a utilitarian measure to maximize wealth and efficiency, but rather as a *right*, held by the public, to transparent and thus freedom-preserving contractual relations. He thus ascribes to the administration a "right to regulate" the market when goods "are offered not so much to a particular individual as such, as to the

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Beiträge vol. 1, ed. Stefan Ruppert und Milos Vec (Frankfurt-am-Main: Vittorio Klostermann, 2011), 219-239, 221-222 (author's translation).

[28] Ibid., §289.

[29] Ibid., §289.

individual in a universal sense, i.e. to the public [*Publikum*]".[30] The administration's right to regulate flows from the "public's right" to fair commercial dealing as a "common concern."[31] Regulation further serves to address complex forms of economic organization that cannot be properly understood by private persons: "The main reason why some universal provision and direction are necessary is that large branches of industry are dependent upon external circumstances and remote combinations whose full implications cannot be grasped by the individuals who are tied to these spheres by occupation."[32] When individuals are subjected to powerful and antagonistic social forces that cannot be understood, engaged, or countered by means of property and contract, their self-determination requires a public authority which implements their shared interests and redresses their collective harms as an affected community of individuals. This concept of administration as an articulation of public rights is analogous to the common law concept of "public rights," understood as rights pertaining to common purposes, which I explore in chapter 5.

Hegel's critique of public opinion is therefore not to be confused with a more profound rejection of the concept of the public in general. He understands the public as a realm of common concern, which can only be adequately defended through the use of public law and administrative management, as opposed to private law and judicial adjudication. The public arises from the externalities of market relations and the inadequacy of the form of freedom embodied in classical liberal rights. The economic

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[30] §236.

[31] Ibid.

[32] Ibid.

and ethical costs of market externalities can be critiqued according to the concept of right, which identifies the impediments civil society pose to individuals' rational agency. The remedies for such impediments to individual freedom must then be institutionalized in statutory norms, which are interpreted and realized by the administrative arm of the state. We will see a similar, but democratized, understanding of publicity in Dewey's concept of "the public and its problems," to which I turn in Chapter 2. For now, the essential feature of Hegel's concept of the public to keep in mind is that its interests are not, and cannot be, adequately known by private individuals themselves, but can only be grasped by a state which transcends their limited perceptions of the problem. Without a state, the dimensions of the public sphere and the rights of the public cannot be known.

Hegel describes the members of the public authority that administers public rights as a "universal estate," which has the "universal interests of society as its business."[33] The bureaucracy is universal, first in the sense that it applies the general laws passed by the legislature. Second, it is universal because it attempts to mediate those general interests that are shared by members of social groups in making sound regulatory determinations. In this way, it seeks to overcome and transcend conflicts between narrow social interests. Third, dealing with matters of common concern has the effect of educating public officials to think from the perspective of the community as a whole, rather from the self-interested perspective of market actors. As Hegel put it in his essay on the Estates Assembly of Württemberg:

[33] Ibid., §205.

> The sense of the state is acquired above all in habitual occupation with universal concerns, which gives occasion not only to discover and acknowledge the infinite worth which the universal has in itself, but also to experience the intransigence, hostility, and disingenuousness of private interest and to struggle with its obstinacy in cases where it is posited in the form of right.[34]

Administration is thus not merely a matter reducing conflict between opposing interests, but of struggling against particularistic interests which falsely clothe themselves with an absolute right. This struggle requires an intellectual habit of solving problems based in light of a comprehensive view of the public interest. The fourth and strongest sense in which Hegel ascribes universality to the bureaucracy is its institutional orientation towards "public freedom," "the self-determining universality of the will."[35] The bureaucracy brings to life the general norms that individuals need in order to think and act rationally. Insofar as bureaucracy makes the concept of freedom actual in the social field, "the universal is the end of its essential activity."[36]

Administrative officials therefore require "direct *education in ethics and in thought*, for this provides a spiritual counterweight to the mechanical exercise and the like which are inherent in learning the so-called sciences appropriate to these [administrative] spheres."[37] The ability to fashion rules of application to decide conflicts between opposed rights and interests within civil society requires a form of practical reason that can affectively grapple with the values at stake. "Hegel indicates that

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[34] G.W.F. Hegel, "Proceedings of the Estates Assembly of the Kingdom of Württemberg," in *Heidelberg Writings*, trans. Brady Bowman and Allen Speight (Cambridge UK: Cambridge University Press, 2009[1815-16]), 43.

[35] Hegel, *Philosophy of Right*, §21.

[36] Ibid., 303.

[37] Ibid., §296.

bureaucratic activity is *phronesis*, not *techne*," as Carl K. Shaw observes; it is "a dialectical process in which the universal and the particular encounter each other and become related by means of human deliberation. It requires a hermeneutics of the concrete, an ability to absorb sufficient contextual knowledge and relevant legal norms."[38]

Administration is in this sense the contact point between the normative unity of the constitutional order and the empirical diversity of the social order to which it applies. The question of the relationship between legislation and administration thus ties into the further question of the relationship between state and society. The purpose of Hegel's state is at once to preserve civil society and transcend it by bringing citizens alienated from one another as economic actors into a common political life. Through the state, the principles of classical liberalism are in one sense realized, and in another sense transformed. They are realized insofar as the state remains bound and committed to the recognition, codification, and protection of the rights of property, contract, and individual conscience. Classical liberalism is transformed through the state, however, to the extent that the administrative functions of the state complement these liberal rights with *public* rights, or, more radically, alter the scope of liberal rights relative to the claims of the rights of the public. The normative ideal is to preserve, but somehow rationalize, the tension between private and public rights in a coherent political order: "The idea of the state is precisely that in it the contradiction between rights as abstract freedom and the

[38] Carl K. Shaw, "Hegel's Theory of Modern Bureaucracy," *American Political Science Review* 86, no. 2 (1992), 383.

fulfilled particular content of welfare are negated but preserved [*sei aufgehoben*]."[39] The ambiguity of this speculative claim sets out the terms for the conflictual but interdependent relationship between civil society and state, and law and its administration.

In Chapter 2, I will describe how the American Progressives embraced Hegel's understanding of the administrative state as a guarantor of freedom. The Progressives would turn of away from Hegel, however, in contemplating an active role for public opinion in the administrative process, and emphasizing that the modern state must be democratically legitimate. Hegel's vision of constitutional monarchy, by contrast, reflected a non-democratic constitutional order, in which liberalizing bureaucrats would attempt to emancipate civil society within an authoritarian political structure. German thought and practice would remain bound by this tension between social and political freedom until the sudden, and ultimately cataclysmic, introduction of democracy in the Weimar Republic.

III. Hegel and German Administrative History: From Prussian Social Reform to the 1848 Revolution

While Hegel's *Philosophy of Right* provides certain context-transcendent conceptual tools for thinking through the administrative state—the centrality of individual freedom, the relationship between state and society, and the distinction between legislative universality and administrative particularity—his work also reflects and engages with a particular moment in German political history. Far from

[39] Hegel, *Philosophy of Right*, §336 (author's translation).

provincializing or particularizing Hegel, exploring this context illuminates the normative thrust of Hegel's project and the institutional constraints it confronted. As Gertrude Lübbe-Wolf has shown, Hegel's work can be understood as his proposed "constitutional plan" in the first Prussian constitutional struggle.[40] Hegel offered a proposal for national representation, in which the various estates of the Prussian social order would be represented in a bi-cameral legislature. While Hegel's proposal for a corporate form of representative constitutional monarchy remains of little direct relevance today, given the decisive turn towards modern representative democracy, his attempt to develop a form of representation which would move Prussia from monarchical absolutism to a constitutional state underscores the central importance he placed upon legislation. Hegel sought a form of representation through which legislation could truly reflect the universal interests of society, and thus work against the dominance of particularistic interest which impeded the exercise of individual freedom. At the same time, however, he remained committed to a monarchical executive, which would trade on the symbolic authority of the head of state to implement the political judgments of the highest public officials.

Hegel's historical context underscores that he understood bureaucracy to have *emancipatory* function. His account of the universal class was an idealization of the efforts of the Prussian civil service to thwart feudal authority, assert liberal private law, and provide for social welfare in the years following the establishment of the Prussian General Code.[41] Hegel incorporated into his political thought the thrust of the reforms of

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[40] Gertrude Lübbe-Wolf, "Hegels Staatsrecht als Stellungsnahme im ersten preußischen Verfassungskampf," *Zeitschrift für philosophische Forschung* vol. 35 (1981): 476-501.

[41] The *Preussisches Allgemeines Landrecht* combined both liberal rights protecting the individual against state interference, as well as provisions for social welfare to be provided by the state. This

Prussian Chancellors Baron Karl vom Stein and Karl August von Hardenberg, who sought to rationalize the Prussian legal order, increase central state control, reform local arms of government, and undermine the prevalent feudal order of public authority.[42] The goal of this administrative reform, as Paul Nolte recounts, was the

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combination was criticized by classical liberal commentators. "In Prussia, the General Land Law of 1794 united public and private law in a comprehensive codification. But with it there appeared Schlosser's criticism, which held that the two were so different that they could not be summarized in a single legal code. The goal of private law consisted in justice alone. Public law, by contrast, pursued political goals. If the possibility could not be foreclosed that the statute would be used as a means for politics, then one must at least neatly separate private from public law, so that the reflection of absolute justice would not idealize and strengthen political law." Dieter Grimm, *Das Öffentliches Recht vor der Frage nach seiner Identität* (Tübingen: Mohr Siebeck, 2012), 14-15. Hegel would not have countenanced such a distinction between "absolute justice" and "political laws." The idea of an absolute justice, standing apart from the laws implemented by the state, was a reflection on an unhistorical moral consciousness, and the errors of the philosophy of natural law. Law protecting the rights of individuals, as well as those "political" laws regarding the structure of the state, and its provision for the material betterment of individuals, were reflections of an underlying ideal of individual self-determination within the context of a common social, political, and economic life. For this reason, Hegel was famously in disagreement with Savigny over the need to codify private law in statutory form. Civil law, no less than public law, was an expression of the state's function as the ultimate guarantor of freedom. All legal rules required the rationality, clarity, and universality provided by the statutory form.

[42] See Hegel, *Philosophy of Right*, p. 19, fn. 18 (editors note on Hegel and Stein); Daniel Lee, "The Legacy of Medieval Constitutionalism in the *Philosophy of Right*: Hegel and the Prussian Reform Movement," *History of Political Thought* 29 no. 4 (2008), 601-34. As Lee observes, Hegel departed from some strands of the reform movement in attempting to preserve a role for guilds or "corporations" within the modern state. However, these institutional differences do not put in doubt Hegel's deeper commitment to the uprooting of feudal conceptions of political authority, in which public power is seen as the personal property of aristocrats and monarchs. For the same reason, he rejected the model of the social contract, which he thought wrongfully transplanted conceptions of private law into the public realm. See Hegel, *Philosophy of Right*, § 75. It was not the corporate forms of social organization in feudal society which Hegel objected to, but rather forms of political rule founded upon the personal authority of individuals and the exclusionary practices of guild membership, which deprived individuals of the freedom to choose their vocation.

> implementation of the state's monopoly on violence against the self-sufficient, corporative bearers of political rights, which in Prussia meant the aristocracy above all. The communities had to become a part of the state. At the same time they should not be the mere enforcement arms of the will of the bureaucratic state, but rather afford their citizens the possibility of participation on the most egalitarian foundations, without estate-based or guild-based gradation.[43]

Hegel's idea of the bureaucratic universal class—an "estate of generalizers"—thus embraced the reformers' project of comprehending and rationalizing German civil society, and incorporating without eliminating the insular, autonomous political orders of local government.[44] Such an increase in centralized bureaucratic power, which originally grew out of the fiscal-military needs of the state, fostered a certain unified, egalitarian national consciousness amongst members of the German states.[45] Administrative reform thus went hand in hand with the forging of a modern liberal social order.

This socially transformative orientation, however, was fragile because it remained ensconced within an authoritarian, unresponsive, and undemocratic political structure. The *Philosophy of Right* expressed the spiritual and constitutional dilemmas of Prussian bureaucratic reformers who attempted to liberalize Prussian society. Hegel's idea of the administration as a "universal class" having "the universal interests of society as its business" sketched, in Reinhart Koselleck's analysis, "not merely the idea that the

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[43] Paul Nolte, *Staatsbildung als Gesellschaftsreform: Politische Reformen in Preußen und den süddeutschen Staaten 1800-1820* (Frankfurt: Campus, 1990), 55 (author's translation).

[44] Mack Walker, *German Home Towns: Community, State, and General Estate, 1648-1871* (Ithaca, NY: Cornell University Press, 1971), 147-216, 197.

[45] Otto Hintze, "The Formation of States and Constitutional Development: A Study in History and Politics," in *The Historical Essays of Otto Hintze*, ed. Felix Gilbert (Oxford: Oxford University Press, 1975), 157-177, 175.

Prussian officials had of themselves, but of the actual situation itself."[46] In the absence of a constitutional state, and in face of a judiciary which only half-heartedly implemented the egalitarian general clauses of the General Code, the bureaucratic reformers took on this socially transformative task themselves: "protected by internal state law the administration won a monopoly to create, guarantee, and enforce general statutes: city ordinances, commercial regulations, agrarian reform and taxation were all in the department of the central administration. . . . The unity-building power went over from the General Code and the judiciary to the administration."[47]

The consequence of this concentration of reform energies on the administration was to create a tension between the administrative means of liberal reform and the constitutional structure in which it operated.[48] The bourgeois political class was increasingly suspicious of the wide discretion given to administrative reformers, as they, like the land barons the administration sought to undermine, developed vested interests in their property rights: "in order to implement urgent general laws – such as the corporation law, the railway law or the law for the protection of works – the ministries avoided prescribed procedural forms – for all laws concerned personal and property rights – and hid behind the sovereign claim of the monarch. If the bureaucracy wanted to be effective, it bred the suspicion of illegality."[49] Thus, at the same time that the reformist bureaucrats

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[46] Reinhart Koselleck, *Preußen zwischen Reform und Revolution: Allgemeines Landrecht, Verwaltung und soziale Bewegung von 1791 bis 1848* (Munich: Deutscher Taschenbuch Verlag, 1989 [1967]), 263.

[47] Ibid., 51.

[48] Hintze, 175-6.

[49] Koselleck, *Preußen*, 384.

unleashed a liberal society, they created bourgeois-revolutionary energies hostile to their monarchically legitimated power. Bourgeois bureaucrats were placed in the paradoxical situation of relying upon the power of the monarchical state to advance their agenda, at the same time as they were forced to acknowledge the failure of this state to recognize liberal constitutional norms.[50] According to Koselleck, this development was one source of the revolution of 1848, which, though it failed to establish a democratic constitutional state, did advance the economic position of the bourgeois middle class, without robbing the bureaucracy of its prominent role in the state.

The Revolution attempted to achieve German unification, fundamental rights, a nationally representative and politically potent legislative authority, and an administrative body bound by its commands. But despite the politically liberal thrust of the bourgeois revolutionary forces, the revolution was not an attempt to deprive the state of its administrative capacity to provide for social welfare. As Michael Stolleis observes, "The liberal demands of the *Vormärz* were primarily oriented towards the limitation of the monarchical principle, basic rights, separation of powers, and parliamentary representation of the property owning and educated classes, not however against welfare-state intervention."[51] This could be seen in the work of the theorists who participated in the revolution of 1848 and developed the field of administrative law and administrative theory. Ernst Forsthoff thus emphasizes that "the significant theorists of the state of the middle of the last century such as v. Mohl, v. Stein, and v. Gneist . . . saw no

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[50] James J. Sheehan, *German History, 1770-1866* (Oxford: Clarendon Press, 1989), 620.

[51] Michael Stolleis, *Konstitution und Intervention: Studien zur Geschichte des öffentliches Rechts im 19. Jahrhundert* (Frankfurt-am-Main: Suhrkamp, 2001), 259.

contradiction between support for remedies through state intervention in social processes and remaining committed to the dualism between state and society."[52]

It was in this period that the theory of the *Rechtsstaat* came into ascendancy. The norm *Rechtsstaatlichkeit* entailed the binding of executive power to statutorily codified, generally applicable rights and duties. It emphasized both a sphere of individual independence against state power, but also the legitimacy of legislatively authorized welfare and regulatory interventions. Thus Robert von Mohl (1799-1875), who like Hegel insisted that "the freedom of the citizen is the foundation of the whole *Rechtsstaat*,"[53] understood this to mean not only that the state must ensure that individuals "will not be forcefully disturbed in the pursuit of the rational and permitted use and development of their powers," but also "must complement the insufficiency of individual powers to achieve rational life-goals through the use of the comprehensive authority entrusted to it. It must guarantee protection and support."[54] The revolutionary claim, which placed them beyond the ambit of Hegel's philosophy, was the emphasis on constraining the exercise of public power by constitutionally defined rights. Though Hegel's political philosophy might be read to create such actionable guarantees against public power, he is less clear about the entitlements individuals hold against the state than the entitlements they hold against one another.

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[52] Ernst Forsthoff, *Der Staat der Industriegesellschaft* (Munich: C.H. Beck, 1971), 23 (author's translation).

[53] Robert von Mohl, *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates*, vol. 1, 3rd. ed., (Tübingen: Verlag H. Laupp'schen, 1866), 19 (author's translation).

[54] Ibid., 5-6.

The Revolution would founder in part on the question of the degree of monarchical power, and hence on the relative autonomy of executive administration from legislative control. Alongside the great power of the forces of the restoration, the failure of the revolution stemmed in part from the opposition between liberals and democrats over the question of monarchical power, and thus of the independence of the executive. Dieter Langerwiesche observes that

> The liberals of the revolutionary years strove for a national *Rechtsstaat* as a bourgeois class-state, secured by the monarchical power against social-revolutionary dangers. The bourgeois democrats, by contrast, saw in the protection of legal and political equality, realized through the republican state-form, or at least through 'democratic-monarchy', the possibility to legitimate social inequality and at the same time to reduce this inequality in an evolutionary, republican future.[55]

To the extent that the conflicting political models of the revolution placed varying emphasis upon the monarchical principle versus the legislative power of popular representatives, they reflected also differing conceptions of the role of administration in the modern state. Greater power for the monarch would come along with greater discretion for his executive functionaries and lesser subjection to legislative command. Without a powerful independent monarch, the executive administration would be strictly subjected to legislative control.

Marx had been the most radical philosophical proponent of this democratic vision. In his critique of Hegel's *Philosophy of Right* in 1843, he interpreted the Hegelian state as a mere reflection of the pre-revolutionary Prussian state. He saw this as a principally

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[55] Dieter Langewiesche, "Republik, konstitutionelle Monarchie und 'soziale Frage.' Grundprobleme der deutschen Revolution 1848/49," *Historische Zeitschrift*, vol. 230 (1980), 529-548, 547 (author's translation).

"bureaucratic" organization, separated from the real social existence of individuals, and committed to a false bifurcation between social and political emancipation.[56] The legislature served as a passive instrument which simply recapitulated and protected the current shape of civil society through the production and refinement of civil law. The alternative Marx posited was that "the democratic state should be . . . the actual element that acquires its rational form in in the whole organism of the state."[57] Such a legislative democracy would mean the abandonment of the separation of state from society, and the use of the state to transform it according to democratic purposes: "The drive of civil society to transform itself into political society, or to make political society into the actual society, shows itself as the drive for the most fully possible universal participation in legislative power."[58] In this early period, Marx believed that the transition to legislative democracy would lead to the overcoming of class domination in civil society, for "civil society would abandon itself if all its members were legislators."[59]

As Marx's invocation of Hegel in the years proceeding the revolution suggests, the alternatives at hand at the time could be understood through varying interpretations of Hegelian political theory. For Hegel had recognized that the relationship between universal legislation and particular administration application was unstable. An arrangement which gave greater power to the monarchical executive would increase the particularism of state action and reduce its subjection to general norms. An arrangement

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[56] Karl Marx, *Critique of Hegel's 'Philosophy of Right'*, trans. Annette Jolin and Joseph O'Malley (Cambridge UK: Cambridge University Press, 1970), 77.

[57] Ibid., 116.

[58] Ibid., 119.

[59] Ibid., 119.

which diminished monarchical power and its administrative subordinates would strengthen the universal element of the legislature. Hegel himself understood that, in a fully developed state, the monarch himself should have little power, and serve a purely symbolic role, representing the unified personality of the state.[60] But this does not fully resolve the question of the relationship between legislation and administration, for in Hegel's view, the highest-ranking administrators, rather than the monarch, take on the tasks of execution. For reformist bureaucrats, many of whom could be counted among the representatives of the revolutionary national assembly,[61] the appeal of such a Hegelian constitutional monarchy was clear: it would support their position in the state, and enable them to use their discretion to address social problems not adequately foreseen or normatively addressed by the legislature. The monarch would symbolically give them independence from society, and the legislative organ, and thus enable them guide and steer the social order according to their conception of the necessary pre-requisites for rational personal development. At the same time, the existence of a bona fide elected

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[60] Hegel, *Philosophy of Right*, §280A (emphasis added).

[61] "In the Frankfurt Parliament of 1848, 68 percent of all deputies were civil servants or other officials." Eric Hobsbawm, *The Age of Revolution: 1789-1848* (New York: Vintage, 1962), 192. Koselleck argues that "The great number of leading public officials in the Prussian National Assembly was . . . the last sign of an estate-state form of rule, which had reached its end, but remained deeply rooted in the social constitution. . . . The last President of the Prussian National Assembly, von Unruh, and the last Ministerial President in Frankfurt, Grävel, had both been Prussian government advisors, who in the *Vormärz* had quit their positions because of their liberal attitudes. They were not able to obtain in the revolution what they had striven for as administrators. Neither the attempt to remove all exemptions succeeded, nor did they succeed in their effort to disempower the aristocracy by expanding the state or the civil self-administration beyond the county and community level. Even the most modest demands, on which all delegates agreed despite the disputed questions concerning the new constitutional forms, were choked off by the counter-revolution. The administrative organization outlived the revolution, but since 1848 became more 'party-politically controlled,' and indeed not by liberals, but rather by conservatives, because of whom types such as Unruh or Grävel had abandoned the administrative class." Koselleck, *Preußen*, 396-7.

legislature would situate administration within constitutional constraints and provide it with the political legitimacy which it had lacked, at least in Prussia, in the period leading up to the Revolution.

IV. The Survival of Hegelian Public Law in the Wake of Revolutionary Failure: The Theories of Lorenz von Stein and Rudolf von Gneist

Hegel's concept of the state, and the institutional tensions between legislation and execution which he had identified, would persist after the failure of the 1848 Revolution. In this section, I will focus on two public law theorists, Rudolf von Gneist (1816-95) and Lorenz von Stein (1815-90), who were both influenced by Hegelian ideas, and who expressed the public philosophy of the non-democratic but constitutional system of administration which developed in Germany in the latter half of the nineteenth century. As I discuss in Chapter 2, these thinkers would be studied and cited by Woodrow Wilson and Frank Goodnow, who developed some of the earliest American conceptions of the administrative state. Though Gneist and Stein did not share these American scholars' emphasis on democracy, they imparted to the Progressives the Hegelian ideal of welfare-promoting, legally-accountable administrative action.

Despite the immediate failure of the Revolution, the order of constitutional monarchy which had existed in the southern German states prior to the revolution continued and expanded to Prussia once the hopes for liberal-democratic unification had been vanquished. This "constitutional monarchy was based upon the monarchical principle, but bound the exercise of monarchical authority to a greater or lesser degree to the constitution and the constitutionally established participation rights of parliamentary popular representation. The government was accountable to the monarch and only to a

limited extent to the parliament."[62] German constitutionalism therefore continued to insulate executive administration from encompassing legislative sovereignty, though the parliamentary bodies could control administration negatively, by restraining the ways and means of administrative execution by statute. Administrative courts, which could protect individual rights against unlawful administrative action, developed in the German states from 1863 onwards.[63]

Under the Reich Constitution of 1871, this constitutional order was largely replicated at the national level, as the King of Prussia and his chosen Reich chancellor controlled the imperial administration.[64] Executive administration was principally restricted by legislative and judicial control in matters where the state intruded (*eingreifen*) upon property or personal freedom;[65] administration had a free hand where it supplied some kind of service or public good. Thus, "constitutional questions had their focus in the now popularly elected legislature, whereas the administration belonged to the constitutionally bound monarch."[66] Independent administrative courts served to bind executive administration to statutory law, developing a principle of "proportionality,"

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[62] Peter Badura, *Staatsrecht: Systematische Erläuterung des Grundgesetz für die Bundesrepublik Deutschland*, §24, p. 23 (Munich: C.H. Beck, 1986).

[63] Michael Stolleis, *Entwicklungsstufen der Verwaltungsrechtswissenschaft,*" in *Grundlagen des Verwaltungsrechts,* Wolgang Hoffman-Riem, Eberhardt Schmidt-Aßmann, and Andreas Voßkuhle, eds. *(Munich: C.H. Beck, 2006),* par. 38.

[64] Badura, *Staatsrecht*, §26, p. 25.

[65] "*Eingriffsverwaltung*" was the classical form of administrative action, which would form the focus of Otto Mayer's account of German administrative law, to be discussed below. *Eingriff* refers to a state command to an individual to do or to forebear doing something which would otherwise be his rightful choice under the existing laws. "*Eingriffsverwaltung* is concerned with individual administrative measure which intrude into the rights of the citizen." H. Hoffman and J. Gerke, *Allgemeines Verwaltungsrechts* (Stuttgart: Kohlhammer, 2010), 17 (author's translation).

[66] Stolleis, *Entwicklungsstufen* par. 46, p. 82 (author's translation).

which required that administration use the least intrusive means to achieve statutory ends where private rights were infringed.[67]

Under the control of the Prussian monarch, the administration increasingly developed a conservative political orientation which was hostile to the liberal and social democratic forces in the legislature. Beginning with a purge of liberals following the failure of the revolution, the bureaucracy evolved from an institution of egalitarian social reform into a bulwark against it.[68] The liberal ideology of early nineteenth century bureaucratic reform was thus pushed aside after the quest for democratic constitutionalism had been definitively squelched. This late-nineteenth-century public officialdom was not conservative in the American sense that it was opposed to state intervention, or privileged private forms of authority. On the contrary, administrative conservatism sought to deploy state power to reduce the attraction of socialism, promote political stability, and foster nationalistic solidarity. It provided social goods, such as the first workplace compensation law, to bolster the legitimacy of the crown and the newly unified nation, but it sought to minimize political participation and dissent.[69]

This unique German blend of non-democratic, liberal constitutional consolidation, and politically conservative, socially progressive administrative intervention, would find theoretical reflection in the theory of the state. Lorenz von Stein and Rudolph von Gneist both participated in the 1848 revolution and in the development of German administrative

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[67] Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence," *University of Toronto Law Journal* 57 (2007), 383-97, 384-5.

[68] Hajo Holborn, *A History of Modern Germany, 1840-1945* (Princeton, NJ: Princeton University Press, 1969), 108.

[69] Fritz Stern, *Gold and Iron: Bismarck, Bleichröder, and the Building of the German Empire* (New York: Random House, 1977), 217-220.

law and theory in the mid-to-late nineteenth century.[70] Hegelian themes of the relationship between state and society, and the embedding of the administration in the separation of powers would be elaborated in their thought. For both of these theorists, the necessity of an active state administration which would address the insufficiencies and injustices of antagonistic civil society would be a dominant concern. The relationship between legislation and administration would remain a fraught question, reflecting not only the struggles of German constitutional history, but the difficult conceptual distinction between legislative generality and administrative particularity. The absence of any practical possibility for democratic constitutionalism continued to lead to a sharp contrast between the quasi-democratic legislature and a powerful, unelected monarch at the head of the bureaucratic organization.

The Hegelian idea that administrators could further social progress would be a dominant theme in the thought of Lorenz von Stein. Stein developed a thoroughly Hegelian theory of a monarchical administration which would guarantee social freedom.[71] As Schmitt notes, "Lorenz von Stein is the foundation of nineteenth-century

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[70] Michael Stolleis, *Public Law in Germany, 1800–1914* (New York: Berghahn Books, 2001), 380.

[71] The connections and differences between Hegel and Stein's conception of the state are explored in Stephan Koslowski, *Die Geburt des Sozialstaats aus dem Geist des deutschen Idealismus: Person und Gemeinschaft bei Lorenz von Stein* (Weinheim: VCH, Acta Humaniora, 1989). Koslowski argues that "Lorenz von Stein's apparently very Hegelian concept of the state takes up without much modification the fundamental concerns of Hegel's philosophy of law—to mediate the freedom of the individual with the substantial reason of the Ideal of universal ethical life which appears in the state—so that one can easily overlook the independent foundations on the personal state Idea of Lorenz von Stein. . . . In the place of Hegel's idea of the self-realizing absolute freedom or the freedom of the absolute in the state, personal freedom according to Stein refers to finite subjects, whose "final end" does not lie in their sublation (*Aufhebung*) into the state, but rather the realization of the self-determination of the individual, which cannot be further determined" (88-9) (author's translation).

German thinking on constitutional theory (and, simultaneously, the conduit through which Hegel's philosophy of the state remains vital). Stein's thought is recognizable everywhere, in Robert Mohl, in the *Rechtsstaat* theory of Rudolf Gneist, in Albert Haenel."[72] The key Hegelian features of Stein's view of administration are his conception of the dialectical relationship between state and society; his understanding of the unstable distinction between legislation and executive administration; his vision of administrative social reform; and his understanding of freedom as a foundational value that the state was bound to foster. Like Hegel, Stein saw the state as an organic unity which could mediate the antagonisms of civil society:

> Between these two great factors—the particularity of actual existence, which pervades the state, and the unity of the will of the state, which rules over such particularity—there takes place a continual, never ceasing struggle, in which the two elements reciprocally fulfill one another in the service of the highest idea of personal development, with or without consciousness.[73]

Stein emphasized that state action at once reflected and transformed the interest of social movements and civil society, by turning them into statutory commands which would guide administrative action. Stein, like Mohl, posited a distinction between the "statute" (*Gesetz*) and the "decree" (*Verordnung*), with the one having precedence over the latter: "according to its higher essence, the statute always stems from the entire consciousness of state life and, therefore, also always intends to achieve its goals," whereas the decree

[72] Schmitt, *Constitutional Theory*, 62.

[73] Lorenz von Stein, *Handbuch der Verwaltungslehre und des Verwaltungsrechts*, ed. Utz Schliesky (Tübingen: Mohr Siebeck , 2010 [1870], 6 (author's translation).

derives from the "distinctiveness and . . . changing character" of the factual condition the decree regulates.[74]

Stein described the "administration of social progress" as a primary task of the administration, in an effort to ease the tension between capital and labor, and provide the working classes with all the "*pre-requisites* of development, which they cannot create on their own, due to their lack of capital as well as physical and intellectual earning capacity, while leaving the actual acquisition of capital to the workers themselves."[75] In Stein, many of the classical aspects of the *Rechtsstaat* are thus combined with an early sense of the significance of the "social question"—namely the extent to which the institutions of bourgeois civil law created social inequalities and perceptions of injustice.

Stein offers a socially reformist and yet institutionally conservative defense of a constitutional monarchy. The administration served to implement both the commands of statute and the elevated unity provided by the person of the monarch. Despite this monarchical emphasis, Ernst-Wolfgang Böckenförde would observe in 1972 that Stein had accurately prognosticated the "actuality of the modern state," in so far as he anticipated the "legitimation of the state not so much from the constitution, as from the active, social-guaranteeing administration; the determination of the content of politics by the social; welfare assistance and appropriate participation in the social product as a

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[74] Lorenz von Stein, *Verwaltungslehre*, 1st ed. (1865), 78, quoted in Carl Schmitt, *Constitutional Theory*, 183.

[75] Ibid., 379.

means to the real securing of freedom; progressive dissolution of traditional political structure and their mediatization in favor of socialization."[76]

Stein resolved the ambiguous issue of the relation between legislation and administration by arguing that administration, while bound to respect statutory limits, has an active role to play even without clear statutory authorization: "[F]or the executive power, the simple execution of existing law does not suffice, rather . . . at almost all points it goes beyond the law, and thus has a law-fulfilling and in part law-substituting function." [77] As Peter Badura has observed, this active role meant that "The administration could not content itself with the knowledge of positive administrative law. It required a scientifically developed administrative theory in contrast to the mere service of administrative statutes. This, however, meant, that the administration must itself take on all those powers and statutes which dominate social life; 'it must constitute administration from the essence of that which is to be administered.'"[78] As I will show in Chapter, 2 Woodrow Wilson would draw on this idea as he described the relationship between legislation and execution in the American context, arguing that administrative authorities must go beyond the strict terms of the law to implement the public interest. For Stein, however, this invocation of administrative values autonomous from legislation was bound up with the role of the monarch as a neutral power standing above the antagonism of civil society. The administration acts as the agent of this neutral power,

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[76] Ernst-Wolfgang Böckenförde, "Lorenz von Stein als Theoretiker der Bewegung von Staat und Gesellschaft zum Sozialstaat," in *Lorenz von Stein: Gesellschaft-Staat-Recht*, ed. Ernst Forsthoff (Frankfurt-am-Main: Propyläen, 1972), 513-548, 514 (author's translation).

[77] Stein, *Handbuch der Verwaltungslehre und des Verwaltungsrechts*, 16.

[78] Peter Badura, *Das Verwaltungsrecht des liberalen Rechtsstaates* (Göttingen: Otto Schwarz, 1967), 13 (author's translation).

attempting to realize the common social good while respecting the limitations established by statute.

This vision of "social kingship" became a second-best alternative for social democrats, such as Gustav Schmoller, who lacked significant power in the legislature, but nonetheless believed the king would protect their interests. They hoped that "just as liberalism and the German administrative- and military-monarch once together accomplished reforms, so too will it be with socialism. . . . The Prussian state, because it has the strongest monarchical constitution and administration, is also able to most wisely carry out social reform."[79] The palliative social reforms of Bismarck could satisfy the socialists as to the "reformist" capacity of the state, without however realizing their deeper concern for political emancipation and the structural inequality between labor and capital. W.E.B. Du Bois' defense of the Freedmen's Bureau's role in defending the rights of African Americans after the American Civil War would draw on this idea of Progressive administration.

Gneist adopted Stein's Hegelian conception of the relationship between state and society in his work on the *The* Rechtsstaat *and the Administrative Courts in Germany*. He maintained that the "the 'state' is independently posited in the ethical nature of humanity, whereas society is grounded in the system of his needs."[80] Like Hegel and Stein, Gneist emphasized that the state provided a normative unity capable of regulating and reducing the economic inequalities and antagonisms of society. He did not seek the total control of

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[79] Gustav Schmoller, *Die Soziale Frage: Klassenbildung, Arbeiterfrage, Klassenkampf* (Munich: Leipzig: Duncker & Humblot, 1918), 648.

[80] Rudolf Gneist, *Der Rechtsstaat und die Verwaltungsgerichte in Deutschland,* (Berlin: Springer, 1879), 28.

society by the state, but rather recognized that freedom required individual independence as well as the public provision of social needs. Gneist therefore described the basic tasks of the state as the "the protection of rights and at the same time the uplifting of the weaker classes."[81] This conception of the *Rechtsstaat* gave a double significance to law: "law should not only regulate the external life of the subjects under its commands; it also protects the sphere of rights of the individual against authority."[82]

Administrative law therefore had to mediate between the claims of the individual and the claims of the community to pursue social policy. The individual would not be granted absolute protection from state intrusion, but could rather hold administrative authorities to account by appeal to special administrative courts:

> Administrative law concerns an objective order, which is independent of the petition of parties, in order to handle public law and welfare. Consequently all controls of the state administration are determined for the protection of the collective as well as the individual. When in contested questions this order grants subjects a legal hearing, or the right to adversary argument, or negotiation, and evidence is taken up, this happens (as in the criminal process) to secure a corresponding implementation of the law. One recognizes the interests of the parties concerned as a legal claim, but in another way than when the legal protection of individual rights is the first aim and object of official actions.[83]

Individuals whose legal rights had been infringed would have standing to contest official action in special courts, but so long as the administrative action remained within the bounds of legal authority, the action would stand. Individual rights were to be granted by legislation, and had no independent constitutional foundation. Administrative courts would have statutorily determined jurisdiction to review administrative action on certain

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[81] Ibid., 34.

[82] Ibid., 31.

[83] Ibid., , 271.

enumerated issues to ensure its conformity to law.[84] Gneist's understanding of administrative legal claims would be instrumental in the development of a separate administrative jurisdiction in Prussia.[85] They would also inform Frank Goodnow's suggestion for reforming the American administrative process, as I will describe in Chapter 2.

Whereas Stein sought to insulate bureaucratic action from social pressure by shielding administration under the authority of the crown, Gneist emphasized the need to partially integrate the state with civil society at the local level. He argued that Germany should adapt a form of the English system local self-government by justices of the peace.[86] Elected "honorary officials" (*Ehrenämter*) would implement state laws on such municipal issues as roads, hospitals, and common lands.[87] His hope was that the combination of administrative courts and local self-administration would establish "a new foundation for the relationship between state and society, in which the social interest is not merely represented in the legislative body, but in which society can itself perform the obligations of the state in administration and in judicial judgments."[88]

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[84] Stolleis, *Public Law in Germany*, 378-9.

[85] Mahendra P. Singh, *German Administrative Law in Common Law Perspective* (Berlin: Springer, 2001), 23.

[86] Ernst-Wolfgang Böckenförde, "The Origin and Development of the Concept of the *Rechtsstaat*," in *State, Law and Liberty: Studies in Political Theory and Constitutional Law* (New York: Oxford, St. Martins, 1991), 55-6.

[87] Gneist, *Der Rechtsstaat*, 286; Bernd Wunder, "Verwaltung, Amt, Beamter" in *Geschichtliche Grundbegriffe: Historische Lexikon zur politisch-sozialen Sprache in Deutschland*, vol. 7, Otto Brünner et al, eds. (Stuttgart: Klett-Cotta, 1992), 84.

[88] Gneist, *Der Rechtsstaat*, 317.

Gneist therefore sought to retain at least a shadow of the spirit of 1848 through administrative courts that would protect individual rights, social welfare provision that would reduce social antagonism, and local self-administration that would give the propertied and the educated a limited role in the performance of state functions. His conception of local self-government came the closest amongst the German Hegelians to the Progressives' democratic reconstruction of administration, which I consider in the next chapter. His proposals did not, however, contemplate a deep engagement of the broader public in the formulation of administrative rules at the national level. Gneist only sought to give local notables some discretion over the administration of their communities.

Though their institutional emphasis deferred, both Gneist and Stein envisioned a *Rechtsstaat* which was defined not only by legal rationality, but by a concrete ethical commitment to preserving freedom in modern civil society. This political content of the *Rechtsstaat* would fade with the turn to legal positivism.

V. From the Substantive to the Formal *Rechtsstaat*: The Legal Positivism of Otto Mayer

As Mohl, Gneist and Stein would follow Hegel in describing a social welfare administration within the context of a *Rechtsstaat*, the positivist jurisprudence at the dawn of the twentieth century would systematize these developments in describing an administrative state authorized and constrained by legislative power. But with the turn to positivism, we will see the gradual emptying out of the ethical content of the Hegelian concept of the state. This positivist approach set the sage for the purely instrumental conception of bureaucracy espoused by Max Weber.

The fullest expression of administrative legal positivism was provided by Otto Mayer (1864-1924) in his *German Administrative Law*, which had a dominant position in its time, and to a great extent long after.[89] His approach was positivist, in the sense that he described the logical structure of administrative law, in relation to other elements of the broader German legal system, while claiming not to rely upon any ethical or political judgments to compose this order. In Mayer, the concept of the rule of the statute over executive administration action was the fundament of both the *Rechtsstaat* in general and administration in particular.

Mayer remained under the influence of Hegel, but in a far more formal and removed sense that Gneist and Stein.[90] The general commonality between Mayer and Hegel was the belief in the formal-rational nature of legal concepts. As Mayer wrote in the preface to his second edition of *German Administrative Law*, he held a "belief in the power of universal legal ideas, which appear and unfold in the diversity of actual law, but at the same time change and progress through history. In my view, it hangs together with Hegelian philosophy of law . . . that I might venture to pursue such ideas in the disjointed and unfinished German administrative law, in order to uplift and exhibit them."[91]

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[89] Otto Mayer, *Deutsches Verwaltungsrechts*, vol. 1, 1st ed. (Leipzig: Duncker & Humblot, 1896) See Dieter Grimm, *Recht und Staat der Bürgerlichen Gesellschaft* (Frankfurt-am-Main: Suhrkamp, 1987), 336; and Armin von Bogdandy and Peter Huber, "Staat, Verwaltung, Verwaltungsrecht: Deutschland," in *Handbuch Ius Publicum Europaeum Band III, Verwaltungsrecht in Europa*, Grundlagen, Armin von Bogdandy, Sabino Cassese, Peter M. Huber, eds. (Heidelberg: C.F. Müller, 2010), 33-81, fn. 116.

[90] Triepel lists Otto Mayer alongside Romeo Maurenbrecher, Johann Stephan Pütter, August Wilhelm Heffer, Carl Viktor Fricker as public law scholars influenced by Hegel. Triepel, "Law of the State and Politics," 183.

[91] Otto Mayer, *Deutsches Verwaltungsrecht*, Band. I, 2d. ed., (Munich: Leipzig, 1914), viii, quoted in Erk Volkmar Heyen, "*Positivistische Staatsrechtlehre und politische Philosophie. Zur philosophische Bildung Otto Mayers*," *Quaderni Fiorentini* 8 (1979): 280 (author's translation).

Mayer's attempt to construct a system out of German administrative law thus derived its inspiration from Hegel's idea about the inherently rational, universal structure of law. Mayer would develop this Hegelian belief into a legislation-centered concept of administration. This variety of Hegelianism was distinct from Stein's in describing administration through a purely legal, rather than social and ethical lens. With the emptying out of the substantive, emancipatory thrust of Hegel's conception of the state, only Hegel's emphasis on the rational coherence and intelligibility of state action remained.

The state is therefore no longer understood, as for Hegel, as the "actuality of concrete freedom." Rather, "the state," Mayer writes, "is a commonwealth (*Gemeinwesen*), capable of action, in which the people is bound together under a sovereign authority (*oberste Gewalt*). Administration is the capacity of the state to realize its ends. As such, it stands in contrast to the constitution, which completes the state, so that it can become operative." [92] This presupposes a separation between the "administering state" and the "mass of individuals" who are its subject: "across from the administrative state stand the mass of individuals, the subjects. Administrative law is only conceivable when a relationship of the subjects to the state is put in question."[93] Thus administration is situated in the same intermediate position as for Hegel between law and society, while the commitment of the state to bringing about a certain kind of society has receded from view. Administration is merely the application of political ends to society

[92] Mayer, *Deutsches Verwaltungsrechts*, vol. 1, 1st ed. (Leipzig: Duncker & Humblot, 1896), 1 (author's translation).

[93] Mayer, *Deutsches Verwaltungsrecht*, vol. 1, 1st ed. 14.

through law. Whereas civil law concerns the relationship between subjects within civil society, administrative law concerns the relationship between this society and its members to the state.

Mayer's positivism did not prevent him from claiming a "requirement" or "demand" (*Forderung*) to subject administration to the legal form, above and beyond the current provisions of law under the constitution:

> If we should summarize the essence of the *Rechtsstaat* once more, then we may at least say of it that it determines activity towards subjects through law, that it recognizes and honestly preserves a legal order and the rights of subjects also in administration. . . . [The state] should as much as possible use its laws to create legal norms for the administration, and as much as possible use administrative acts to determine individual cases in a legally binding way.[94]

Mayer implies a deficit of statutory control of administrative action in existing German law, and an absence of legal formality in administrative judgments, in the current administrative practice. In the 1923 edition, this discreet suggestion for improvement was removed from the text, suggesting perhaps his greater satisfaction with the further development of statutory norms guiding administration, and the legal formality of administrative decision-making in the intervening years.

Mayer's systematic account of German administrative law succeeded by limiting the scope of its analysis to a concept of *Polizeibefehl* (police command) rooted in the principles of economic liberalism. Whereas *Polizei*, for Hegel as well as for Mohl, had designated a relatively encompassing state capacity to provide positive, material support for individual development, Mayer limited *Polizei* to state acts that intervened into private legal relationships in order to preserve the coordinate freedom of individual social

[94] Ibid., 66-67.

actors. As Mayer wrote, "because force belongs to the essence of police, all state capacity for the increase of welfare is generally not police. . . . The police is only determined to avoid dangers posed to individual citizens and to the common good."[95] As Peter Badura has observed, "The orientation of administrative legal theory to *rechtstaatlichen* police-concepts and thus to the authoritarian [*obrigkeitlich*] legal form of administration . . . left the activities of administration which realized the state's goal of welfare-facilitation, the guarantee of advantages and performance for the common good, and for the social-forming activities, without administrative-legal significance."[96] This omission did not reflect an absence of welfare-state activities from German state practices of Mayer's time. Federal and municipal government provided various forms of social insurance—provision of public utilities, and operation of forests and iron-works through public administration—none of which could be grasped through the liberal concept of police intervention.[97] But the economic-liberal blinders on Mayer's positivism made it impossible for him to adequately systematize these far-ranging welfare and other commercial interventions.[98]

[95] Ibid., 247.

[96] Badura, *Das Verwaltungsrecht des liberalen Rechtsstaates*, 38.

[97] Ibid.,19-20.

[98] Ibid., 25.

VI. Max Weber's Instrumental Conception of Bureaucracy in the Context of German Constitutional History

The sociological counterpart to this positivist conception of administrative law was the sociology of Max Weber. As I noted in the introduction to this Chapter, the Weberian view has exercised disproportionate influence over today's political science and administrative law scholars. But as I emphasize in Chapter 2, Weber's thought was unknown to the American Progressives who provided the intellectual groundwork for our own administrative state. Hegel and the mid-nineteenth-century public law scholars who followed in his footsteps were their point of reference within the German tradition. The next Chapter will show how their American adaptation of Hegelianism led to a distinctive understanding of the state, with a greater stress on democratic procedure and the substantive requisites for democratic participation. Here, however, I describe how Weber's understanding of the administrative state represented a historically particular, and institutionally unstable, constellation of political structures, rather than a universally applicable ideal type. This should caution against embracing Weberian understandings of bureaucracy in the American context.

Weber's legal sociology took as his starting point for analysis the "two-sided" state theory of Georg Jellinek, in which the state was on the one hand a legal entity, which could be presented as a coherent system of norms, and on the other hand a sociological entity whose historical emergence, institutional durability, and psychological acceptability were not legally meaningful or cognizable quantities.[99] The legal quality of the state arose from the "self-obligation" (*Selbstverpflichtung*) of the monarchical

[99] See Georg Jellinek, *System der subjektiven öffentlichen Rechte* (Tübingen: J.C.B. Mohr [Paul Siebeck], 1905), 12-18.

administration to legal norms.[100] Weber focused on the sociological aspect of the Jellinek's theory of the state, showing how the formal system of legal norms he described functioned as a system of domination.[101] Weber thus distinguished a particular kind of rule, "legal authority," which is grounded not upon the transcendent aura of an individual or the reassuring embrace of communal heritage, but rather proceeded through the enactment "by imposition or agreement" of a "consistent system of abstract rules" which provides for the "continuous rule bound conduct of official business."[102] Legal authority is based on "rational grounds," in the sense that it articulates and systematizes commands into a coherent structure of domination through a formal logical system of abstract rules.[103] This requires, as Talcott Parsons puts it, that "a system of legal norms itself must become relatively *universalistic*. It must be organized in terms of general principles so that to some significant degree particular decisions come to be derivable from these general principles when related to more particular facts."[104] Such applications of general principles to facts then requires a technical treatment of regulated persons and things,

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[100] While this understanding was positivist, in the sense that it sought to reconstruct an internally consistent system of legal norms, it betrayed a constitutional prioritization of the monarchical executive against the legislature, and of the state against any external criteria of morality or justice. As Christoph Möllers notes, "in fact the theory enabled a historical and systematic priority of the monarchical bureaucracy against popular representation. . . . It is the monarchical administration, as the acting organ of the power state, which undertakes the act of self-obligation of the state and thus enables its juridification." Christoph Möllers, *Staat als Argument* (Munich: C.H. Beck, 2000), 19 (author's translation.).

[101] On the personal and scholarly relationship between Weber and Jellinek, see Guenther Roth, Introduction to Max Weber, *Economy and Society*, eds. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978 [1968]), lxxxix.

[102] Ibid., 217-8.

[103] Weber, *Economy and Society*, 215.

[104] Talcott Parsons, *Sociological Theory and Modern Society* (New York: Free Press, 1967), 94.

such that they fit into formal legal categorizations.[105] The positivist system of formal law was thus treated by Weber, sociologically, as a peculiarly modern, rationalist system of authority. It corresponded to a world disenchanted of fixed religious values, instead facilitating the efficient, instrumental-rational behavior of individuals.

Within this formal rational system, the bureaucracy functions as the concrete social-political organization which makes commands efficacious. The bureaucratic staff provides the most efficient, purposive-rational means to carry out the implementation of formal law. Several particular features contribute to bureaucracy's instrumental rationality: officials are employed according to their technical merit, and paid in fixed salaries, both of which make the bureaucrat's employment dependent upon his efficient performance of his tasks. Bureaucratic officials are "organized in a clearly defined hierarchy of office" and each is "subject to strict and systematic discipline and control in the conduct of his office."[106] A system of hierarchical control ensures that the implementation of law has a formal rational structure which reflects the formal rational structure of the legal order. The decision-making power of each official is clearly delimited, and subject to the control of a superior, in a chain of command that enforces the commands of legal statute.

As an agent within this formal hierarchy the bureaucratic official himself exhibits "a spirit of formalistic impersonality. . . . The dominant norms are concepts of straightforward duty without regard to personal considerations. Everyone is subject to

[105] Ibid., 657, 85.

[106] Ibid., 221.

formal equality of treatment; that is, everyone in the same empirical situation."[107] The continuous functioning of the system of rules requires that the logical structure of legal rules and the bureaucratic hierarchy together determine outcomes, to the exclusion of autonomous value judgments of the bureaucrat himself. In order to subsume empirical situations to the abstract commands of law, bureaucratic officials apply technical skill and empirical experience. In this sense, "[b]ureaucratic administration means fundamentally domination through knowledge. This is the feature of it which makes it specifically rational."[108] Thus for Weber, Wolfgang Mommsen observes, "bureaucracy is the vehicle of the rationalizing process. . . . Its universal pressure needs no additional idealistic impulsion, but follows inevitably from an ever more compulsive adjustment to this form of social organization, once recognized as useful."[109] The incentives created by the bureaucratic implementation of law induce social action that mirrors the formal rational structure of the system of legal norms and the purposive-rational activity of the bureaucratic system that implements them. For this reason, purely bureaucratic administration is "capable of attaining the highest degree of efficiency and is in this sense formally the most rational known means of exercising authority over human beings."[110] The success of the bureaucratic implementation of legal authority is so great, in Weber's view, that it strongly tends towards "bureaucratic perpetuity." "Once fully established,

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[107] Ibid., 225.

[108] Ibid., 225. In this respect, Weber anticipates Foucault's conception of "power-knowledge"—of the way in which modern administrative institutions such as the prison exercise power over and thus refashion subjectivity through the surveillance, education, and technical expertise.

[109] Wolfgang Mommsen, "Max Weber's political sociology and his philosophy of world history," *International Social Science Journal* 17, no. 1 (1965): 23-45.

[110] Ibid., 223.

bureaucracy is among those social structure which are the hardest to destroy. Bureaucracy is *the* means of transforming social action into rationally-organized action."[111]

The disparity between this Weberian vision of bureaucracy and the Hegelian account is remarkable. Hegel and Weber describe the same general kind of institutional phenomena—a merit-based public officialdom carrying out the laws, organized in a hierarchical, functionally differentiated system. But for Hegel this administrative staff was permeated with substantive normative commitments. Its purpose was to advance social freedom through public welfare provision, a contextually sensitive implementation of law, and a careful adjudication of social antagonisms and conflicts. Public law for Hegel was a means by which individuals were able to recognize one another as members of a common political project and community. The officials who implemented this law were therefore engaged in the production and maintenance of the public rights held by this community. For Weber, by contrast, administration has become a purely instrumental form of rule. The law it implements is distinguished by its formal generality, which is open to any substantive content. The ethic of the bureaucratic staff and the structure of bureaucratic organization both aim to facilitate the efficient application of these statutory commands, whatever they may be. The bureaucrat does not think, so much as calculate and obey.

In the mirror of these contrasting visions of the administrative state, we can see the historical path from the dashed hopes for administrative social reform in the early nineteenth century to eventual acquiescence in paternalistic and authoritarian forms of

[111] Ibid., 987.

rule. Unwilling to embrace in theory and unable to achieve in practice robust forms of democratic constitutionalism, Germany's early experience with state-led emancipation gave way to a state legitimated by shrewd executive politics, efficient administrative performance, and the legislative codification of formal liberal law.

This convergence of legal positivism and legal sociology in the waning years of the German Empire upon a legal-rational conception of bureaucratic authority, however, pointed to a structural tension within the German state: though administration was in sociological and legal theory bound to the legislative command, it remained aligned with an executive which was bound to the law for the most part only negatively. The law erected a sphere of negative rights around the individual with which he could protect himself from state intervention. But the action of bureaucratic officials was guided by formal legal principles only as general authorities behind and boundaries upon their discretion. Within this zone of discretion, they were guided not by formal law but by their exigencies of reason of state: the need for the preservation of the existing order of political domination. The non-legal determinants of executive-bureaucratic action, and those forms of administrative action which could not neatly be described as intervention into the private sphere of the individual, thus fell outside of the cognizance of legal doctrine, as a supplement which had as yet escaped categorization and control. The structural conflict in German history between legislative control and executive power would become explosive when this uneasy constitutional settlement became destabilized by the Great War, and was thrust suddenly into the new context of constitutional democracy.

VII. The *Rechtsstaat* in Crisis: Weimar-era Theories of the Administrative State

In the Preface to his third edition of his *Deutsches Verwaltungsrecht*, which appeared in 1923, Otto Mayer claimed that while "constitutional law passes away, administrative law persists."[112] Mayer maintained that the constitutional change from the *Kaiserreich* to the Weimar Republic did not entail a shift in the basic norms of administrative law, as a system in which administrative action was authorized and bound by statute, and citizens had rights to contest the legal foundations of administrative action in court. But because Mayer had excluded forms of state intervention which did not fit the model of forceful *Eingriffsverwaltung* from his systematic approach, significant changes in the content and extent of administrative intervention and in the constitutional allocation of regulatory powers were beyond his grasp.

The political turbulence of the Weimar period threw into sharper relief the tension in the formal *Rechtsstaat* ideal of the legality of administration. The Republic would simultaneously see a sudden growth in democratic political competition, expansion and nationalization of social welfare administration, and increasing economic pressures. The First World War had both expanded administrative intervention in public welfare and the employment market, and created new demands for social support for veterans. The rise in unemployment over the course of the Republic would create new demands for public welfare, not only for the poor, but for increasingly large segments of the population without work. The Weimar constitution opened the way for broad scale social legislation not only through the general equality clause but through specific authorizations for

[112] Mayer, *Deutsches Verwaltungsrechts*, 3rd ed. (1923), forward.

parliamentary action on labor and social law.[113] In its early and middle years, the parliamentary coalition was politically attuned to such "social questions," and hence passed several laws codifying the social insurance system, notably the Reich Law on the Responsibility to Provide Social Welfare Assistance (1924). The establishment of Reich Labor Ministry, the institution of special Labor Courts to settle disputes between employers and employees, administrative mediation of labor conflicts, and the extension of youth and housing administration, exemplified the growing egalitarian intervention into the economic sphere of civil society.[114]

While state action expanded, the *Rechtsstaat* ideal of parliamentary supremacy did not keep pace with the expanding demands. As Franz Neumann observed, in the Weimar Republic "the modern mass-democratic state changed into an intervention state, which led to a transformation of the legislative state into an administrative state. At the same time the bureaucracy made itself independent from the control of the parliament."[115] As the economic circumstances became more dire, while political conflict immobilized parliament, the apparatus of the administrative state was increasingly governed not by legislation but by presidential and cabinet-level decrees, and by the administrative civil service. The civil service, which was largely retained from the Empire, was largely hostile to the social-democratic thrust of the early Republic, and sought instead to reduce political problems to problems of technical management. The

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[113] The Constitution of the German Empire of 1919, Art. 7, 9, 109.

[114] See generally Michael Stolleis, *History of Social Law in Germany*, trans. Thomas Dunlap (Berlin and Heidelberg: Springer, 2013), 95-134.

[115] Franz L. Neumann, "*Rechtsstaat, Gewaltenteilung, und Demokratie*," in Franz L. Neumann, *Wirtschaft, Staat, Demokratie, Aufsätze, 1930-1954*, ed. Alfons Söllner (Frankfurt-am-Main: Suhrkamp, 1978), 124-33, 130.

legislature's extensive use of enabling laws, which granted discretionary governing power to the president and the cabinet, served to diminish traditional rule-of-law guarantees and increase the preponderance of administrative power.[116] As Karl Dietrich Bracher observes, "A steadily expanding bureaucracy, with its pre-democratic traditions, thus persisted in the modern administrative state in a latent opposition to parliamentary democracy, to parliament, to the parties and to their direct organs. . . . Their tendency and their objective essentially was to reduce political problems to technical administrative tasks."[117] The Republic thus settled upon a form of rule whose legitimacy was grounded upon the plebiscitary democratic mandate of the President, and the technical competence of the administration. The legal rationality of state action became of secondary importance.

Weber's political writings on the eve of the Weimar Republic anticipated this state of affairs, attempting to make a virtue of the sharp cleavage between decisive presidential political authority and bureaucratic instrumentality. Weber thus advocated a strict separation of the proper role of the political leader from the bureaucratic official. "The difference" between the two lies "in the kind of *responsibility*" which attaches to each role. "An official who receives a directive which he considers wrong can and is supposed to object to it. If his superior insists on its execution, it is his duty and even his honor to carry it out as if it corresponded to his innermost conviction, and to demonstrate

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[116] Peter L. Lindseth, "The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s," *Yale Law Journal* 113 (2004), 1361-72; Franz L. Neumann, "Der Niedergang der deutschen Demokratie," in Franz L. Neumann, *Wirtschaft, Staat, Demokratie, Aufsätze, 1930-1954*, ed. Alfons Söllner (Frankfurt-am-Main: Suhrkamp, 1978), 103-23, 112-3.

[117] Karl Dietrich Bracher, *Die Auflösung der Weimarer Republik* (Düsseldorf: Droste Verlag, 1984), 165-6 (author's translation).

in this fashion that his sense of duty stands above his personal preference."[118] The hierarchical structure of bureaucracy depends upon such obedience as a primary principle of organization, and such official obedience is at the core of the state's formal rational legitimation. The subservient attitude which makes bureaucracy function renders bureaucrats unsuited to decide upon the ultimate ends which the legal system is meant to enforce. Whereas the bureaucrat is bound to obey, "A political leader who behaved in this way would deserve contempt. . . . 'To be above parties'—in truth, to remain outside the realm of the struggle for power—is the official's role, while this struggle for personal power, and the resulting personal responsibility, is the lifeblood of the politician as well as of the entrepreneur."[119]

The political leader and the bureaucrat thus related to one another as master and servant. For such a scheme to succeed, the bureaucrat must be apolitical: "he should engage in impartial administration."[120] The formal-rational legitimation of the state, which is felt most strongly within the officialdom and the class of legal professionals, combines with the charismatic legitimation of the leader, which harnesses the support of the ethical convictions of the people at large. Legal statutes then embody the substantive values advanced by politicians, which the bureaucracy carries out through formal rational processes. In this way, the tension that Weber notes in legal history between formal

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[118] Max Weber, "Parliament and Government in a Reconstructed Germany," (1918), in *Economy and Society*, 1381-1462, 1404.

[119] Ibid.

[120] Max Weber, "Politics as a Vocation," in *Max Weber: Essays in Sociology*, trans. and eds. H.H. Girth and C. Wright Mills (New York: Oxford University Press, 1946), 77-128, 95.

procedures and substantive ethical commitments is fully rationalized in a separation of functions between politics and administration.[121]

Weber sought to subordinate bureaucracy to a democratic politics conducted by charismatic champions of ideology not only because of his assessment of the needs of the time, but because of his philosophic ethic. For Weber, in a modern disenchanted world without overarching religious or metaphysical commitments, "the ultimately possible attitudes toward life are irreconcilable, and hence their struggle can never be brought to a final conclusion. Thus it is necessary to make a decisive choice."[122] Given this irreconcilable conflict, various conceptions of value could only struggle against one another for dominance. Following Nietzsche, Weber believed that human life was ultimately given meaning through existential struggle between exceptional individuals to advance world views and interests between which no rational arbitration was possible.[123] His conception of the political ethic of responsibility therefore adopted Nietzsche's conception of the "autonomous 'supermoral' individual, in short, the man of the personal,

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[121] Weber's concern to imbue the formal rational state with charismatic authority informed his influential proposals for the Weimar Constitution, published in the *Frankfurter Zeitung* in 1918. Weber called for a bi-cameral parliament led by a chancellor, the primary functions of which would be legislation, bureaucratic oversight, and the cultivation of political leadership for the post of President. This President would be popularly elected, with the power to appoint head ministers, to dissolve the lower house, to issue suspensive vetoes of legislative, and to intervene in legislative affairs through popular referenda. Parliamentary and Presidential control of the bureaucracy could, he thought, prevent the stultifying effects of bureaucratic rule. See Wolfgang Mommsen, *Max Weber and German Politics, 1890-1920*, trans. Michael S. Steinberg (Chicago: University of Chicago Press, 1984 [1959]), 332-346.

[122] Weber, "Politics as a Vocation," 152.

[123] While deeply influenced by Nietzsche in his commitment to a form of aristocratic individualism, Weber departed from him in believing that the will to power worked with, and not against the masses, via charismatic authority. See Mommsen (1965), 37 and Robert Eden, *Political Leadership & Nihilism: A Study of Weber and Nietzsche* (Tampa, FL: University Presses of Florida, 1983), 51, 53.

long, and independent will, *competent to promise*" with "a proud consciousness (vibrating in every fibre), of *what* has been at last achieved and become vivified in him, a genuine consciousness of power and freedom, a feeling of human perfection in general."[124] For Weber, such a person was admirable for the courage he displayed in his convictions and his ownership of the consequences of his actions. His ethic of responsibility would ensure that political charisma translated into consistent policy, according to clearly defined values. Democratic politics, then, married the emotional attachment of the people to the statesmen with his own irrational, but steadfast, choice of values. Politics translated passion, belief, and courage into power. While Weber thus sought to undermine the implicit political conservatism of the public officialdom Weimar inherited from the Empire, he sought to retain its technocratic emphasis, and ensconce it firmly under the leadership of a democratically elected chief executive.

Weber thus proposed that politics become a realm of existential choice, and bureaucracy a realm of steadfast subservience. He considered such an arrangement to be preferable to the specter of enlightened bureaucratic rule because he thought that if material welfare became the "sole and ultimate value," humanity would lose those qualities that make life valuable: the will to make ultimate choices between competing world-views, to stick to them, and to struggle for them. Bureaucratic formal rationality, he thought, must be controlled by leadership democracy if humanity is to grapple

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[124] Friedrich Nietzsche, T*he Genealogy of Morals*, trans. Horace B. Samuel (New York: Boni and Liveright, 1918), 43. As Mark E. Warren argues in his analysis of this citation, "In 'Politics as a Vocation,' Weber politicizes Nietzsche's emphasis on responsibility by arguing for an 'ethics of responsibility,' an ethic that describes the rationality of an ideal political actor." Mark E. Warren, "Nietzsche and Weber: When Does Reason Become Power?" in *The Barbarism of Reason: Max Weber and the Twilight of Enlightenment*, eds. Asher Horowitz and Terry Maley (Toronto: University of Toronto Press, 1994), 68-90, 74.

honestly with the irreducible ethical pluralism of the modern world and preserve some trace of individuality within it.

Though Weber's proposal to combine plebiscitary democratic authority with legal-bureaucratic rationality was a heroic effort to compartmentalize the severe political pressures facing the nascent German Republic, it was also inherently contradictory. For plebiscitary rule depended not upon reason but upon charismatic aura. The alignment of bureaucracy under the decisive will of the executive, rather than under determinate statutory norms, would undermine the predictable and calculable quality which Weber prized in bureaucratic rule. It would succeed only at the expense of the rationality codified in statute and concretized by a law-bound bureaucratic officialdom. If bureaucracy remained bound to legal duty, as opposed to the hierarchical duty within the ministry, this would undermine the capacity of a plebiscitary president to implement his democratic mandate.

Carl Schmitt, who Jürgen Habermas once called a " 'legitimate pupil' of Weber's," would eventually resolve this contradiction in favor of totalitarian, executive-oriented rule.[125] Whereas in *Constitutional Theory* (1928), Schmitt had expounded a vision of the Weimar constitution as a "decision for the bourgeois *Rechtsstaat*,"[126] in *Legality and Legitimacy* (1932) he argues that the structural exceptions to this ideal in the constitution would, and should, lead to the dissolution of the *Rechtsstaat* in favor of a new "substantive" order, centered around the authoritarian rule of the executive

[125] Jürgen Habermas, "Discussion of Talcott Parsons' 'Value Freedom and Objectivity'," in *Max Weber and Sociology Today*, ed. Otto Stammer, trans. Kathleen Morris (Oxford: Blackwell, 1971), 66.

[126] Schmitt, *Constitutional Theory*, 77.

administration, authorized by the popular acclamation of the chief executive. The content of this substantive order was not, as for Hegel, a matter of normative elaboration, but of an existential choice to recognize "the substantive characteristics and capacities of the German people."[127]

Schmitt correctly understood the liberal *Rechtsstaat* to be a legislative state in which administrative interventions into individual freedom and society at large had to be authorized by statutes passed by a parliament. On this model, which could be seen in the positivist administrative legal theory of Mayer, the executive administration was made subservient to the legislative authority, and derived its legitimacy from its mandates. Schmitt observed, however, that the positivist transformation of the ideal of the *Rechtsstaat* from a substantive commitment to individual freedom into a merely formal principle of statutory authorization already paved the way for a transition from the legislative state to the "governmental" or "administrative" state:

> when it is transformed into an empty functionalism of momentary majority decisions, the normative legality of a parliamentary legislative state can be linked with the impersonal functionalism of bureaucratic, regulatory necessities. In this peculiar, though practical alliance of legality and technical functionalism, the bureaucracy in the long run remains the superior partner and transforms the law of the parliamentary legislative state into the measures of the administrative state. The word '*Rechtsstaat*' should not be used here."[128]

What distinguished the administrative state from the *Rechtsstaat*, for Schmitt, was the collapse of the distinction between universal and long-lasting legal norms, with a substantive commitment to bourgeois values, on the one hand, and temporary,

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[127] Carl Schmitt, *Legality and Legitimacy*, trans. Jeffrey Seitzer (Durham, N.C.: Duke University Press, 2004), 93.

[128] Ibid., 14.

administrative measures undertaken pursuant to those norms, on the other: "When the concept of law is deprived of every substantive relation to reason and justice, while simultaneously the legislative state is retained with its specific concept of legality concentrating all the majesty and dignity of the state on the statute, then any type of administrative directive, each command and measure . . . can be made legal and given the form of law."[129] Of particular interest to Schmitt were the President's decree powers under Article 48 of the Constitution, which united legislation and execution in one person. With this provision, which was activated to address political and economic emergencies, the always unstable distinction between legislation and administration falls away, and with it, the structure of the classical *Rechtsstaat.*[130]

Schmitt thus paved the way for Ernst Forsthoff's national socialist administrative theory in *The Total State.* Forsthoff observed that "the system of rule of the national socialist state is distinguished by the connection between the national socialist order of leadership (*Führungsordnung*) and the bureaucratic administration."[131] In this total state, the dialectical relationship between state and society which Hegel had diagnosed has vanished, as society becomes totally permeated with and dominated by a party-administrative apparatus claiming to act in the name of and for the advancement of the unified national order (*Volksordnung*). The connection between legislation and

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[129] Ibid., 21.

[130] "While the ordinary legislature of the parliamentary legislative state is only permitted to pass statutes and, according to the nature of the legislative state, is separated from the apparatus of applying the law, the extraordinary lawmaker of article 48 is able to confer on every individual measure he issues the character of a statute, with the entire priority that the statute unquestionably has in the parliamentary legislative state." Ibid., 70.

[131] Ernst Forsthoff, *Der totale Staat*, 2nd ed. (Hamburg: Hanseatische Verlagsanstalt, 1935), 35 (author's translation).

administration has also been lost, as the total state fulfills the transformations Schmitt had diagnosed in *Legality and Legitimacy*. With ultimate authority resting in the dictator's will, the *Rechtsstaat* distinction between legislative statute and administrative measure vanishes. Indeed, in Forsthoff's description of the total state, the word statute (*Gesetz*) has no place. In this context of the collapse of legislation and administration, and state and society, "freedom is today politically discredited, in as much as one identifies it with individual freedom, with the security of the individual against the grasp of the state. This freedom, a postulate of human thought, has been overcome."[132]

It is no coincidence that Forsthoff's national socialist administrative theory dispensed with freedom at the same time as it dispensed with the separation of powers and the idea of statutory authority. Since Hegel, German administrative theory had recognized that freedom could only be guaranteed if state actions took on a predictable, transparent, and hence rational form. The rational form of legislation makes possible rational behavior for individuals: their ability determine their own ends, and the best means to achieve them. An administrative theory relying upon the will of the leader to express the substantive characteristics of the German people (whatever those might be) could not have this rational, predictable quality. The German state thus devolved from one of constitutional reason to dictatorial will.

The national socialist dictatorship was therefore in no sense the realization of the Hegelian state. Rather, it was categorically opposed to Hegel's basic normative commitments and institutional structures. As Franz Neumann observes in *Behemoth*, his pathbreaking account of national socialist rule,

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[132] Ibid., 45.

> Hegel cannot be held responsible for the political theory of National Socialism. . . For no one can doubt that Hegel's idea of the state is basically incompatible with the German racial myth. . . . Hegel's theory is rational; it stands for the free individual. His state is predicated upon a bureaucracy that guarantees the freedom of the citizens because its acts on the basis of rational and calculable norms. This emphasis on the rational conduct of the bureaucracy, which is, according to Hegel, a prerequisite of proper government, makes his doctrine unpalatable to national socialist 'dynamism.'[133]

In Neumann's view, the Nazi regime could not be called a state at all, precisely because it had jettisoned the Hegelian commitment to law-based administrative action in service of the underlying ideal of individual self-determination. The form of bureaucratic rule ushered in by the collapse of Weimar constitutionalism was devoid not only of the formal strictures *Rechtsstaatlichkeit*, but also diametrically opposed to the emancipatory spirit of Prussian social reform which Hegel held up as exemplary.

While it is therefore plainly false to associate Hegelian ideas with Nazi rule, it would also be erroneous to attribute the rise of National socialism to the decline of Hegelian thought and institutions. The origins and motivations for totalitarianism stretch far beyond this aspect of German legal history.[134] The legacies of anti-semitism, racism, and imperialism were secular trends, which, when combined with a bureaucratic power divorced from the guarantees of the rule of law, lay the basis for totalitarianism.[135] The worst forms of bureaucratic domination were thus permitted by a constellation of

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[133] Franz Neumann, *Behemoth: The Structure and Practice of National Socialism* (New York: Oxford University Press, 1942), 78.

[134] For the leading intellectual history on the origins of national socialist ideology, see Fritz Stern, *The Politics of Cultural Despair: a Study in the Rise of the Germanic Ideology* (Berkeley: University of California Press, 1974).

[135] See Hannah Arendt, *The Origins of Totalitarianism* (Boston: Houghton Mifflin Harcourt, 1973).

institutional and ideological developments: the decline of legislative control; the rise of plebiscitary presidential legitimacy; the hollowing out of administrative reason from practical judgment to purely technical calculation. As I will argue in the chapters 4 and 5, these pathologies remain dangers in the American context as well. But they are symptomatic not of Hegelian statism, but rather of a political order which has lost touch with the immanent connection between practical reason, individual freedom, and public law which Hegel identified.

The most significant failure of the Hegelian tradition of German state theory, with its emphasis on a welfare state bound by the rule of law, was that it had failed to appreciate the need the democratize the state as a whole and the administrative process in particular. It did not recognize that individual freedom would require active popular involvement in the exercise of administrative power if the principle of self-determination were to have real purchase. When the state was finally democratized under Weimar, this occurred only at the level of the parliament and the president. With the decline in parliamentary control, the "democratic" nature of administration was thus identified with the plebiscitarian mandate of the president, rather than with deliberation in the public sphere, in parliament, or within administrative bodies themselves. The history of Weimar should thus give us pause about hinging state legitimacy solely on presidential power and technocratic competence. Those in America who adhere today to the presidentialist conception of the state hope to reduce the complexities of modern political life by the application of decisive political choices through an obedient bureaucratic apparatus. They reject the more circuitous but less treacherous alternative: to recognize the administrative

core of the modern state as a forum for public deliberation and democratic will-formation.

VIII. The Administrative State in the Federal Republic: The Reconstruction of Democratic Constitutionalism and the Persistence of Weberian Administration

In post-war German political theory and law, the democratic ideal of rational will-formation has indeed been institutionalized in constitutional law. But it remained mostly external to the administrative apparatus itself.

The Basic Law states that Germany is "democratic and social federal state."[136] In the early years of the Federal Republic, the meaning of the "social state" provision of the Basic Law was a subject of sharp dispute among constitutional and administrative law scholars.[137] Forsthoff, who abandoned Nazi ideology and became one of the most famous administrative law scholars of the Federal Republic, argued that the idea of the social state and the *Rechtsstaat* were compatible only if they were placed at different levels of constitutional order. The *Rechtsstaat* referred to the basic tri-partite constitutional structure and its defense of individual rights. The social state would refer to the administrative implementation of the welfare state, which could not be grasped by the classical requirements of the rule of law: "The guarantees of the *rechtsstaatliche* constitution have their own logic, specified by the logic of the statutory concept: they are in the first instance exclusions."[138] The social state, by contrast, "has the structure of a

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[136] Basic Law for the Federal Republic of Germany, Art. 20, Par. 1.

[137] "The discussion regarding social law was *the* constitutional debate in the 1950s." Thursten Kingreen, "Rule of Law versus Welfare State," in *Debates in German Public Law*, Hermann Pünder and Christian Waldhoff, eds. (Oxford: Hart, 2014), 95-115, 101.

[138] Ernst Forsthoff, "Begriff und Wesen des sozialen Rechtsstaates," *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer*, vol. 12 (1954): 18.

positive intervention: social legal guarantees go in the first instance not towards exclusions but rather towards positive performance, not to freedom, but rather to participation." These positive interventions must, according to the principle of the *Rechtsstaat*, have legal authorization and respect statutorily established limitations and formal subjective rights. But the social state's emphasis on planning and distribution must permit great administrative discretion to interpret the broad welfare requirements identified by the legislature: "it is a characteristic of administrative-legal norms as distinguished from judicial law, that they use concepts that are capable of many interpretations and which only gain concrete content through their connection to political value-ideas. Public order, public security, public interest, the common good, public ends are such concepts, which refer back to political value ideas, and which change as those political ideals shift."[139] The social state was thus primarily an open-ended political concept, rather than one of strict constitutional law and judicial enforcement. Administration is here again conceived as an instrument of democratic political choices, rather than as part and parcel of the process by which such political choices are made and elaborated.

The Marxist constitutional law scholar Wolfgang Abendroth argued against Forsthoff that the idea of the social state was indeed an essential constitutional principle, supporting the thorough reconstruction of society along egalitarian lines. But, like Forsthoff, he was not anxious to give the judiciary much authority in interpreting and implementing the social state. Both sought to shift the weight of constitutional power to the political branches. They deferred in how they ordered political accountability.

[139] Ibid., 17.

Whereas Forsthoff stressed that the social state meant a privileging of the executive, Abendroth stressed that the legislature must assume the primary role in defining the nature of the state's welfare commitments: "the determinate functional independence of administration and the executive remains protected in the context of their principal subservience under the democratic will formation represented by the democratically chosen organ of the state. Therefore leadership falls to statutorily-framed directions of state capacity made by the parliament, to whose will the formative capacities of administration and the judiciary are adapted."[140] For both Forsthoff and Abendroth therefore, the democratic and social state is formed at the level of the political branches of government. Both administration and the judiciary remain subservient to the choices of the political branches.

Fritz Werner offered a noteworthy alternative, suggesting that administrative law be understood as "concretized constitutional law."[141] Whereas Forsthoff and Abendroth did not see the principle of democracy as operating at the level of public administration itself, but only through the election of its political principals, Werner argued that the idea of a social and democratic state should be operationalized in the administrative process. He describes a pluralistic kind of democracy in Germany, in which "the nation is not understood as an unstructured mass, but rather as a number of structured bodies."[142] In this context, "the administration comes more and more into the role of mediator. It is called to find and maintain social equilibrium, so that the individual is not ground to dust

[140] Ibid., 142.

[141] Fritz Werner, "Verwaltungsrecht als konkretisiertes Verfassungsrecht," *Deutsches Verwaltungsblatt*, 74 (1959): 527-33.

[142] Ibid., 531.

by the associations or struggles between associations. One such consideration is that there be no discrimination between interest groups."[143] Werner thus argued that administrative law and process itself could and should concretize the constitutional ideal of democracy, not merely by acting as an arm of democratically elected branches, but rather as a forum for mediating conflicts between the social groups and interests into which society had become articulated. The approach of the Progressives I examine in the next chapter is very much in consonance with Werner's proposal.

The development of German public law, however, has not fully embraced the visions put forward by Forsthoff, Abendroth, and Werner. Neither Abendroth's vision of legislative supremacy in administration, nor Forsthoff's vision of executive supremacy in administration, nor Werner's effort to internalize democracy within administration, gained traction in the ensuing doctrinal development of German administrative law. From roughly 1958 to 1990, German Administrative law underwent a thorough constitutionalization, which confirmed the direct applicability of fundamental rights to administrative action, and developed the principle of proportionality to assess the constitutionality of administrative actions that interfere with such rights.[144] In order to inure the new Republic from the dangers of totalitarian dictatorship, German public law put fundamental rights, and thus the judiciary, at the core of the legal order.[145] On this vision, the constitutional foundation of the administrative *Rechtsstaat* is not simply that

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[143] Ibid., 532.

[144] Rainer Wahl, *Herausforderungen und Antworten: Das Öffentliche Recht der letzten fünf Jahrzehnte* (Berlin: De Gruyter Recht, 2006), 37.

[145] Christoph Möllers, "Scope and Legitimacy of Judicial Review in German Constitutional Law—The Court versus the Political Process," in *Debates in German Public Law*, Hermann Pünder and Christian Waldhoff, eds. (Oxford: Hart, 2014), 3-27, 5.

administrative acts are bound by statute, but that individuals are protected, even from legislatively-authorized action, by the judicially enforceable fundamental rights. In addition, the constitutional principle of equality constrains the discretion of administrative agencies.[146]

Judicial supremacy was complemented by the subordination of the executive to the legislature. At Maunz and Zippelius remark, "The principle of the separation of powers is not strictly implemented" in the Basic Law; "the executive is in no way secure from the interference of the legislative organ. Indeed, the principle of parliamentarism, according to which the government requires the trust of parliament and remains accountable to it, secures the interference of the legislative body in the affairs of the executive."[147] Thus, the German constitution provides that when the legislature delegates rulemaking power to administrative bodies, "the content, purpose and scope of the authority conferred shall be specified in the law," thus limiting the discretionary interpretive power of administrative bodies and reserving the "essential" decisions to the

[146] "In the area of administrative discretion the equality principle constitutes a limit upon discretion. It applies for the intervention-administration as well as for the performance-administration, in particular for beneficial administrative acts, whose enactment rests within the discretion of administration, for example for exceptional authorizations, tax moderation and assistance grants. If a number of benefits or benefit compensations are in question, the administration can only differentiate upon appropriate grounds, and thus must observe the principle of equality. Questions arise with regard to the allocation of public procurement and construction contracts to private corporations. Here the agency must often chosen from a number of applicants. One cannot fundamentally free the administration from the equality principle in these cases. But it must nonetheless be accorded considerable latitude in the evaluation of relevant criteria." Theodor Maunz and Reinhold Zippelius, *Deutsches Staatsrecht*, 30th ed. (Munich: C.H. Beck, 1998) II, §25, p. 217.

[147] Maunz and Zippelius, *Deutsches Staatsrecht*, I, §13.1, p. 93.

legislature.[148] On the whole, these developments submit administration to extensive judicial and parliamentary control.

The principle and practice of democratic will-formation in German public law therefore fully abstracted from, and was prior to, the process of administrative implementation. The constitutional principle that "all state authority derives from the people," does not require, and in some cases limits, direct popular participation in the administrative institutions of the state. As Eberhardt Schmidt-Aßmann notes,

> the people, in the sense of Art. 20, Par. 2 of the Basic Law, does not mean an always identifiable group affected by state authority. Rather, what is meant is the constituted aggregate of persons [*Personengesamtheit*]. . . . Forms of participation, which are often found in administrative decisions, may facilitate the acceptance of decisions . . . but they do not mediate democratic legitimation, rather they can impair the elements of legitimation required by Art. 20, Par. 2.[149]

Understood as a "indeterminate generality," the people's control over state authority may be imperiled by the participation of specific affected persons in administrative implementation, for this may distort or dilute the application of the abstract popular will upon its members. To be sure, certain forms of local administration and functional self-administration (such as local utilities or vocational associations) can, and, in some cases, must, afford popular participation, but this contributes only to the democratic legitimacy of this limited territorial or personal jurisdiction, and nothing to the overall democratic legitimation of the state authority as a whole.

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[148] Basic Law, Art. 80, par. 1; Claus Dieter Classen, "*Gesetzvorbehalt und dritte Gewalt*," *Juristen Zeitung* 58, no. 14 (2003): 695.

[149] Eberhardt Schmidt-Aßmann, "*Verwaltungslegitimation als Rechtsbegriff*," *Archiv des öffentlichen Rechts* 116 (1991): 349 (author's translation) citing The Basic Law for the Federal Republic of Germany Art. 20, Par. 2 ("All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.").

German administrative law thus identifies democracy with an "unbroken chain of legitimation" which stretches from the people, to their elected representatives, to the public officials who have been authorized to perform public tasks.[150] There are relatively few "independent" agencies, lying outside the ministerial bureaucracy.[151] The strongly instrumental, Weberian conception of bureaucracy thus remains deeply entrenched in German administrative law, despite some recent efforts in scholarship, and arguably some recent constitutional courts decision, which adopt a more disaggregated and pluralistic concept of popular sovereignty.[152] Werner's early argument that the constitutional principle of democracy must be concretized through participatory administrative procedures thus remains marginal to the doctrinal mainstream, as it is in tension with an undifferentiated concept of a unified and abstract *Volk* as the source of all state authority.

Jürgen Habermas, who has been called the "Hegel of the Federal Republic,"[153] has largely embraced contemporary German public law's separation of the process of democratic will-formation from the administrative means by which it is implemented. His

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[150] Ernst-Wolfgang Böckenförde, "*Demokratie als Verfassungsprinzip*," in *Staat, Verfassung, Demokratie* (Frankfurt-am-Main: Suhrkamp, 1992), 315.

[151] Daniel Halberstam, "The Promise of Comparative Administrative Law; A Constitutional Perspective on Administrative Agencies," in *Comparative Administrative Law*, eds. Susan Rose Ackerman and Peter L. Lindseth (Cheltenham, UK: Edward Elgar, 2010), 185-205.

[152] BVerfGE 107, 59 (2014); Hans-Heinrich Trute, "*Die demokratische Legitimation der Verwaltung*," in *Grundlagen der Verwaltungsrechts*, vol. I, (Munich: C.H. Beck, 2nd ed. 2012), 341-435. For summary and criticism of the these scholarly innovations, see Matthias Jestaedt, "Democratic Legitimization of the Administrative Power—Exclusive versus Inclusive Democracy," in *Debates in German Public Law*, Herman Pünder and Christian Waldhoff, eds. (Oxford: Hart, 2014), 181-203.

[153] Jan Ross, "Hegel der Bundesrepublik," *Die Zeit* (October 11, 2001), http://www.zeit.de/2001/42/Hegel_der_Bundesrepublik.

habilitation, published as *Structural Transformation of the Public Sphere*, sought to recover the tradition of rational discourse from nineteenth century bourgeois liberalism in order to ground the democratic constitutionalism of the Federal Republic. Drawing explicitly on Forsthoff's critique of the interpenetration state and civil society, and his advisor Abendroth's defense of the egalitarian reconstruction of society as a constitutional command, Habermas argues forcefully that social democracy must be grounded upon rational and critical public discourse, rather than mere mass manipulation, administrative welfare provision, and corporatist policy-making.[154]

Habermas' ensuing philosophical career repeatedly puzzles through the problem of preserving the integrity of forms of public deliberation in the face of necessary, but potentially corrosive, forms administrative power. In *Legitimation Crisis*, he argues that the great expansion of the welfare state's crisis management functions must be grounded in "rationally motivated agreement,"[155] which provides reasons for the exercise of governmental authority which could be accepted by all affected persons. Adopting Weber's critique of the alienated forms of consciousness and reason produced by purely bureaucratic rule, Habermas insists in *Legitimation Crisis* that "*there can be no administrative production of meaning.*"[156] Though he departs from Weber in insisting that politics can and must be based on public reason, rather than existential struggle and irrational choice, he adheres closely to Weber's separation of bureaucratic authority from such forms of communicative reason.

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[154] Habermas, *Structural Transformation*, 222-235.

[155] Jürgen Habermas, *Legitimation Crisis*, trans. Thomas McCarthy (Boston: Beacon Press, 1975), 105.

[156] Ibid., 70.

In *A Theory of Communicative Action*, Habermas similarly distinguishes between those aspects of law which are aligned with the semantically permeated "lifeworld" from those which merely serve the reproduction of the economic "system." Constitutional and criminal law fall under the former realm, as legal institutions which "need substantive justification, because they belong to the legitimate orders of the lifeworld itself and, together with informal norms of conduct, form the background of communicative action."[157] Commercial law and administrative law, by contrast are only formally rational, and are justified only by their role as a "medium" for the circulation of economic and political power. It is worth noting that Habermas has here introduced a schism into the classical German category of public law, placing constitutional law and criminal law on the side of the lifeworld, and administrative law together with private law on the side of the system.

In *Between Facts and Norms*, Habermas' systematic exposition of his political theory, he continues to insist that "legitimate law is generated from communicative power and the latter in turn is converted into administrative power via legitimately enacted law."[158] In his most famous formulation of this discourse principle, political legitimacy must ultimately be rooted in "the unforced force of the better argument."[159] As I shall show in chapter 2 and 3, and as Habermas himself acknowledges, John Dewey's concept of the public in many ways anticipated this concept of democratic legitimacy.[160]

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[157] Jürgen Habermas, *A Theory of Communicative Action: Volume 2, A Critique of Functionalist Reason,* trans. Thomas McCarthy (Boston: Beacon Press, 1982), 365.

[158] Habermas, *Between Facts and Norms*, 168.

[159] Ibid., 306.

[160] Ibid., 171-304

But for Habermas, unlike Dewey, the deliberative process takes place only in the public sphere and its relationship to the legislative branch. Administration, by contrast, is merely an instrument for the purposes identified by the legislature. Thus, the basic divide in Habermas' social theory between system and lifeworld unfolds again in a sharp distinction between communicative and administrative power: "the administration is not permitted to deal with normative reasons in either a constructive or reconstructive manner. The norms fed into the administration bind the pursuit of collective goals to pre-given premises and keep administrative activity within the horizon of purposive rationality." [161] His concern is that administrative agencies may become "self-programming," thus sundering the chain of legitimation which leads from collective will-formation inthe public sphere to the administrative act.

Though Habermas continues to adhere to this strict separation between constitutional and administrative law, and instrumental and deliberative reason, he admits that these categorical demarcations may not be tenable as a practical matter. With the expansion of the welfare state, it is pragmatically impossible to deprive administrative agencies of some access to normative reasons. Given that agencies must have recourse to normative reasons and argumentation as they interpret open-textured statutes, and given that such norms must ultimately arise from the communicative processes of the public sphere, Habermas suggests a " 'democratization' of the administration that, going beyond special obligations to provide information, would supplement parliamentary and judicial controls on administration from within." [162] He thus endorses experimenting with

[161] Ibid., 192.

[162] Ibid., 440.

different forms of "participatory administrative practices," echoing Werner's earlier call for concretizing the constitutional norm of democracy within the administrative process.[163] In describing such practices, he turns to the *American* example of procedures of public participation in administration, as summarized by Jerry Mashaw.[164]

Habermas' late recognition of the possibility that the administrative state itself might form a part of the process of democratic will-formation remains under-theorized and is not developed at length. His communicative addendum to Weberian bureaucratic theory raises a host of unanswered questions: Who should be included in participatory procedures for bureaucratic decision-making, and in what way should they participate? What is the proper relationship between the opinions expressed in legislative acts and those given voice in administrative regulation? What role, if any, ought the elected executive play in guiding administration? If bureaucrats ought to be participants in a process of deliberation, how ought we to characterize their role in this process?

IX. Conclusion

In the next chapter, I will introduce a set of American thinkers who developed this deliberative understanding of administration much earlier on, and provided the insights necessary to answer these questions in a systematic and coherent fashion. In the late nineteenth and early twentieth century, they introduced an understanding of administration that embraced the *Rechtsstaat* ideals they learned from the study of Hegelian public law scholars. But they sought to reform the administrative state they had

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[163] Ibid.

[164] Ibid., 191, quoting Jerry Mashaw, *Due Process in the Administrative State* (New Haven: Yale, 185), 26.

discovered in Germany by increasing the scope of democratic input and participation. They set out not from Weber's idea of bureaucracy as a technical instrument for fulfilling any desired substantive purposes, but rather from Hegel's idea of a state in which administrative agencies and their officials are deeply engaged in ethical reasoning over the requirements of individual freedom.

The great obstacle for these thinkers would be Hegel's opposition to democracy. As we have seen, Hegel was hostile to democratic theories of the state and suspicious of the influence of public opinion on lawmaking and the state as a whole. Not only his disenchantment with democratic revolution in the wake of the reign of terror, but also his understanding of the proper role of philosophy, foreclosed him from imagining a constitutional *and* democratic state. Political philosophy, for him, was a historically limited endeavor. It was "its own time apprehended in thought."[165] In his historical context, democracy meant the unmediated, undifferentiated will of the masses; thus it could make no happy partner for the institutional rationality of the state. But Hegel also realized that freedom was an unfinished project. The political repertoire of his present could be remade as history unfolded. "America," Hegel thought, "is the land of the future."[166] It is to this future that we now turn.

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[165] Hegel, *Philosophy of Right*, 21.

[166] G.W.F. Hegel, *Introduction to the Philosophy of History*, trans. Leo Rauch (Indianapolis and Cambridge: Hackett, 1988), 90.

Chapter 2

Progressive Hegelian Political Thought:

The Democratic Spirit of the New American State

I. Introduction

The age of administration came relatively late to the United States. After the resolution of the Civil War and the definitive establishment of Federal sovereignty over the states, Northern economic nationalism reshaped American civil society.[1] The growth of a unified national market, improvements in communication and transportation, and the stringent judicial defense of the rights of limited liability corporations, contributed to a public perception that powerful social forces were at work, far beyond the grasp of most individuals to shape and control.[2] Economic crises, class conflict, and social complexity generated the need for a more centralized administrative state, which could regulate and address the social consequences of wide scale industrialization.[3] Beginning as an effort to

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[1] Richard Franklin Benthel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (Cambridge: Cambridge University Press, 1990), 10-17.

[2] Richard Hoftadter, *The Age of Reform: From Bryan to F.D.R.* (New York: Alfred A. Knopf, 1956), 213-53; Arnold M. Paul, "Legal Progressivism, The Courts, and the Crisis of the 1890s" *Business History Review* 33, no. 4 (1959), 495-509.

[3] Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities*, 1877-1920 (Cambridge: Cambridge University Press, 1982), 10-11.

render administration more efficient, reformer ideology coalesced by the end of the nineteenth century into a commitment to a form of administrative governance capable of grappling with novel forms of economic organization, inequality, and conflict.[4]

Though there were indeed examples of federal administrative governance prior to the Civil War,[5] not only were these instances quantitatively less significant than those introduced in the Progressive Era, they were qualitatively distinct. In these early forms of administration, there was no national concept of "the state"—of an overarching political structure that embodied and expressed the sovereignty of the American people. The creation of such a state would face both institutional and philosophical obstacles. In the years after the end Reconstruction, the Constitution was interpreted to grant limited powers to the Federal government to intrude upon the police power reserved to the states, and to foreclose legislative interference with the private realm of property and contract.[6] The dominant public philosophy understood the atomistic individual as normatively and constitutively prior to society and the government, and endowed with certain permanent and inviolable natural rights.[7]

As American progressive thinkers sought to upend such philosophical and institutional assumptions, they found abundant intellectual resources in European

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[4] Nancy Cohen, *The Reconstruction of American Liberalism, 1895-1914* (Charlotte, NC: London: University of North Carolina Press, 2002).

[5] Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven: London: Yale University Press, 2012), 29-78.

[6] James Moreno, *The American State from the Civil War to the New Deal* (Cambridge: Cambridge University Press, 2013); Richard A. Epstein, *How The Progressives Rewrote the Constitution* (Washington, D.C.: Cato, 2006).

[7] Louis Hartz, *The Liberal Tradition in American: An Interpretation of American Political Thought Since the Revolution* (New York: Harcourt, 1955), 3-34, 228-58.

political thought. With the growth of major cities and industrial capitalism, Americans now found themselves sharing with Europeans what Daniel Rodgers has called "new landscapes of fact and intertwined landscapes of mind."[8] Hegel's political thought would prove to be a powerful stream in this second nature, part of a vast watershed in which German social thought flowed into the American political imagination.[9] Hegelianism, and its descendant variants in German public law, offered the progressives a social conception of individuality, in which individual entitlements were understood to be a product of interpersonal interaction and institutional context, rather than given by God or derived from nature. It provided an organic rather than purely legalistic theory of state and society, in which political institutions adapted to the evolving needs of the public.

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[8] Daniel T. Rogers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, MA: Harvard University Press, 1998), 33.

[9] Sylvia Fries, "*Staatstheorie* and the New American Science of Politics," *Journal of the History of Ideas* 34, no. 3 (1973): 391 (describing W.W. Willoughby and John Burgess's adoption of nineteenth century German public law's "postulates of organicism and process essential to Hegelian metaphysics, as well as the fundamental tenet of transcendentalism—that reality is ultimately spiritual"); Thomas I. Cook and Arnaud B. Leavelle, "German Idealism and American Theories of Democratic Community," *Journal of Politics* 5, no. 3 (1943): 222 (showing that "German Idealism is . . . a recessive in American political and social thought, yet the traces of its influence in this country are many and significant," including on Francis Lieber, Walt Whitman, W.T. Harris, Dewey, Dwight Woolsey, Burgess, and Willoughby); Morton G. White, "The Revolt Against Formalism in the Social Thought of the Twentieth Century" *Journal of The History of Ideas* 8, no. 2 (1947): 139 (noting how "Hegel provided [John Dewey] with the concept of a universal consciousness which embraced everything and which provided the link between individual consciousness and the objects of knowledge. . . . The *objective mind* of idealism was made central."); Axel A. Schäfer, *American Progressives and German Social Reform*, 1875-1920 (Stuttgart: Franz Steiner, 2000), 37-77 (arguing that American progressives such as Richard Ely, Simon Patten, W.E.B. Du Bois, Florence Kelley, and John Dewey were influenced by Gustav Schmoller and the German historical school's "romanticism, Hegelian Idealism, and nineteenth century faith in progress"); Eldon Eisenach, "Progressivism as a National Narrative in Biblical Hegelian Time," *Social Philosophy and Policy* 24, no. 1 (2007): 55-83 (arguing that Lyman Abbot, Albion Small, and Simon Patten attempted to develop a national narrative "grounded in Protestant evangelical theology and Hegelian philosophy, seeing the structural changes in American social and economic life as signs of an emerging morality and spirit that would lead in the reconstruction of American society.").

And it provided a progressive understanding of history in which the meaning of human freedom emerged over time through social conflict, ultimately becoming represented in the institutions of states. This constellation of ideas facilitated the Progressives effort to overcome constitutional limitations on state power, to critique the contemporary relevance of the individualistic philosophy of the Founding, and to rethink the relationship the individual and society. The basic shape of this Hegelian vision was eloquently expressed by Richard T. Ely in his proposed mission statement for the American Economic Association in 1886: "We regard the state as an educational and ethical agency whose positive aid is an indispensable condition of human progress. While we recognize the necessity of individual initiative in industrial life, we hold that the doctrine of laissez faire is unsafe in politics and unsound in morals; and that it suggests an inadequate explanation of the relations between the state and its citizens."[10]

This Hegelian inheritance has drawn the ire of those who remain committed to classical liberal constitutionalism. Scholars such as Frederick Hayek, Philip Hamburger, Ronald Pestritto, and Jean Yarbrough have sought to discredit the American administrative state and its advocates by associating them with Hegel's supposedly odious, un-American ideas of history, government, and freedom.[11] They suggest that

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[10] Richard T. Ely, "Report of the Organization of the American Economic Association," *American Economic Review* 1 (1886): 5-46, quoted in Cohen, *Reconstruction*, 165.

[11] Friedrich A. Hayek, *The Road to Serfdom* (University of Chicago Press, 2007 [1944]), 74 (After 1870, "Germany became the center from which ideas destined to govern the world in the twentieth century spread east and west. Whether it was Hegel or Marx, List or Schmoller, Sombart or Mannheim, whether it was socialism in its more radical form or merely "organization" or "planning" of a less radical kind, German ideas were everywhere readily imported and German institutions imitated."); Tiffany Jones Miller, "Freedom, History, and Race in Progressive Thought," *in Natural Rights, Individualism, and Progressivism in American Political Philosophy*, Ellen Frankel Paul et al., eds. (Cambridge: Cambridge University Press, 2012), 221 (arguing that "the Progressives rejected the Founders' understanding of equality in

Hegel and his American disciples sought to undermine individual liberty, the separation of powers, and limited government with their expansive concept of the state and a positive conception of freedom.

Serious engagement with the Hegelian content of progressivism must avoid the tendency towards caricature from which many conservative polemics suffer.[12] As the last chapter has shown, Hegel's concept of the state did not reject, but rather reformulated, liberal constitutional ideals. While he abandoned the form of argumentation of natural right, he nonetheless recognized that private rights were indispensable for individual agency.[13] Though he rejected the absolute separation of powers as an untenable fiction, he was clear that the state's functions needed to be differentiated to guarantee rational

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favor of a new conception of freedom inspired by German idealism," which went hand-in-hand with ideologies of racial hierarchy and state paternalism); Ronald J. Pestritto, "The Progressive Origins of the Administrative State," 54 (attributing to the Progressive adaptation of Hegelian ideas "the two pillars of today's liberal state: unelected judges who make law through constitutional interpretation, and unelected bureaucrats to whom significant policymaking power is delegated on the basis of their expertise"); Charles Kesler, *I am the Change*, 57, 236 (arguing that Hegel "laid the deepest underpinnings for modern American liberalism," which Kesler understands to have betrayed America's core constitutional values in favor of a fiscally and morally irresponsible "cult of the State."); Jean M. Yarbrough, *Theodore Roosevelt and American Political Thought* (Lawrence: University Press of Kansas, 2012), 19–24, 44–46; Philip Hamburger, *Is Administrative Law Unlawful* (University of Chicago Press, 2014), 447-78.

[12] Conservative scholars often exaggerate and distort Hegelian doctrines, and then hoist progressive Hegelians to the grotesque portrait they themselves have created. For example, Hegel's statement that the "the rational is the actual and the actual is the actual," does not mean, as Pestritto claims, that "the most rational government is the one that history has currently provided." Actuality, for Hegel, does not mean everything that exists, rather it refers to the essential normative content within what exists. Nor is true that, for Hegel, "there can be no principled universal notion of liberty or rights." Ronald J. Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism* (Lanham, MD: Rowman & Littlefield, 2005), 16-7. The *Philosophy of Right* deduces liberal rights from the universal premise that "the will is free," and explicitly rejects an historically relativist approach to understanding the meaning of law. Hegel, *Philosophy of Right*, §§ 3-4.

[13] Stephen B. Smith, *Hegel's Critique of Liberalism: Rights in Context* (Chicago: University of Chicago Press, 1989), 65–85, 103–14.

state action and public freedom. Nor did Hegel's concept of institutional organicism entail a disrespect for individuality. On the contrary, the common underlying principle which made the state an organism was precisely the freedom of the individual subject. And though Hegel believed that history expressed philosophical truths in the logic of social conflict and coordination, he was not a historical relativist. He believed that freedom was an absolute value, the meaning of which could be reconstructed philosophically, using the institutional repertoire of the past and present to give concrete content to the abstract idea. Hegel's administrative and broader political thought does not deny the importance of legal rights and subjective freedom within society. He rather argues that freedom is only possible within a state which enables all persons to become the authors of their own deeds. It was this conception of the state that the American Progressives would embrace.

While conservatives indict Progressivism for its association with Hegelian statism, scholars more sympathetic to Progressive political thought, such as Richard Hofstadter, James T. Kloppenberg and Marc Stears, nonetheless show some embarrassment at Hegel's influence. At the mid-twentieth century, Hofstadter sought to rebut Hayek and other conservatives' association between Hegelian ideas and American statism by insisting upon the thoroughly American character of Progressive reform.[14] More recently, Kloppenberg has suggested that Progressivism's true insights shone forth

[14] "Since it has been common in recent years for ideologists of the extreme right to portray the growth of statism as the result of a sinister conspiracy of collectivists inspired by foreign ideologies, it is perhaps worth emphasizing that the first important steps toward the modern organization of society were taken by arch-individualists—the tycoons of the Gilded Age—and that the primitive beginning of modern statism was largely the work of men who were trying to save what they could of the eminently native Yankee values of individualism and enterprise." Hofstadter, *The Age of Reform*, 233.

from "beneath a layer of Hegelian jargon," and Stears has sought to penetrate into the pragmatic core of Progressive political theory through the "haze of quasi-Hegelian metaphysical philosophy."[15] Kloppenberg and Stears do acknowledge that Hegel's ideas about history and the social constitution of individual freedom were important for Progressive thinkers. They have not, however, paid sufficient attention to the institutional dimensions of Hegel's concept of freedom, and the ways these informed certain strands of Progressive thought. In these works, Hegel's vision of a creative, ethical, and deliberative administration falls away. His thought is seen as at best obscure and, at worst, inimical to the individualist spirit of American thought.

The last chapter has shown that Hegel's thought can be understood without any turn to metaphysics; that it is centrally concerned with the requirements of individual freedom; and that it provides a distinctive way of thinking about administrative activity not captured in the conventional Weberian understanding. Weber's thought largely post-dates the origins of the American state and had no direct influence on the progressives. Moreover, as the last chapter has shown, Weber's conception of bureaucracy and political authority is deeply permeated by the sharp cleavages and crisis-tendencies of the late German Empire and Weimar Republic. In that era, the substantive commitment of the German state to individual freedom had receded from intellectual consciousness; administration lost its connection to legality, and increasingly fell under the plebiscitary will of the executive. Hegel's thought, by contrast, *did* have an influence on the progenitors of the American state, and it provides a more stable foundation for

[15] James T. Kloppenberg, *Uncertain Victory*, 51; Marc Stears, *Progressives, Pluralists, and the Problems of the State: Ideologies of Reform in the United States and Britain, 1906-1926* (Oxford: Oxford University Press, 2002), 35.

conceptualizing the institutional dynamics of an activist administrative state. He places individual freedom at the very core of the modern political project, describing how the rational structures of the state elaborate and implement its entailments.

The Progressives sought to integrate this institutional émigré into the American political project. Progressive Hegelianism was not merely a recapitulation of his idea of the *Rechtsstaat*, but rather a thoroughgoing, democratic transformation of the original concept. While both Hegel and the Progressives stressed the commitment of the state to the underlying norm of individual freedom, Hegel did not draw a connection between individual and collective self-determination. He rejected the idea of popular sovereignty and derided public opinion's contingency and one-sidedness. The Progressives, by contrast, were fully committed to popular sovereignty and sought to enshrine public opinion at the center of the state. Their emphasis on public opinion reflected the contemporaneous expansion of national political journalism and the growing influence of broad based reform movements on national legislation.[16] The coalescing mass public experienced a perilous civil society in which individuals had lost their capacity to recognize themselves in the laws and patterns of social organization that governed them. In response, the Hegelian Progressives envisioned an administrative state in which the bureaucratic class would engage in ethical reasoning, not as a cloistered group of enlightened experts, but rather as partners with the democratic public in the elaboration of legal norms. That is to say, *they advocated a state that would implement the requirements*

[16] Robert Harrison, *Congress, Progressive Reform, the New American State* (Cambridge, UK: Cambridge University Press, 2004), 44.

of individual autonomy as these requirements were understood by informed and rational public opinion.

This chapter develops this concept of the "Progressive state" through the thought of five prominent American Hegelians: W.E.B. Du Bois, Woodrow Wilson, John Dewey, Mary Parker Follett, and Frank Goodnow. What unites these thinkers is an understanding of the state as an agent for democratically determined social progress. But they each emphasize different aspects of this project, sometimes in ways that are in tension with one another. Du Bois develops an account of the Reconstruction period that stressed the role of the state in guaranteeing the freedom of African Americans. His account centers around the administrative provision of requisites for social recognition and democratic social order. Wilson, by contrast, stresses the need for democratic contexts within the administrative state that would render it sensitive to public opinion. Dewey, like Wilson, underscores the need for democratic participation in the administrative process. But his approach synthesizes Wilson's emphasis on democratic contexts with Du Bois' emphasis on democratic requisites. That is to say, he argues that a rational public opinion can only be formed on the basis of extensive social provision by the state, but that the state's welfare functions must be guided by the articulate voice of the democratic public. Follett buttresses Dewey's concept of the democratic public with a Hegelian social theory of individuality, in which persons are constituted through their corporate relationships, and ultimately through their participation in the deliberations of the democratic state. Goodnow outlines how individual rights can be respected within an administrative process that is geared towards the efficient implementation of public purposes. Together,

these Hegelian Progressives lay the foundations for an administrative state that realizes individual and collective autonomy.

II. W.E.B. Du Bois' Hegelian Reading of the Freedmen's Bureau

Du Bois is a challenging but essential starting point for the Progressive Hegelian tradition—challenging, because unlike the thinkers to follow, he does not offer direct statements of his concept of the state in general or administration in particular; essential, because he draws the link between bureaucratic forms of governance and the task of emancipation. From Du Bois we can see the emergence of the administrative state as an institutional solution to the struggle for equal recognition, while in other Progressives we will see how the requirements of this state unfold conceptually and institutionally. Beginning with Du Bois in this way frames the Progressive project differently than does the usual narrative. It traces Progressive aspirations not merely to the civil service reforms of the Pendleton Act and the regulatory interventions of the Interstate Commerce Commission, but further back, to the effort of the Federal government to protect the rights of freed African Americans in the southern states.

The ethical stakes of the Progressive Hegelianism I reconstruct become clearer when the problem of social domination and the requirements of social freedom are thus placed at its foundation. The Progressive movement, as a whole, had a poor record on questions of racial equality, with economically progressive policies often advancing side

by side with the perpetuation and deepening of racial domination.[17] Wilson, as we shall see, was particularly prone to coupling Hegelian political conceptions to theories of racial essentialism and hierarchy. Du Bois' thought acts as an antidote to this pathology of the broader Progressive project, to which the Hegelian Progressives was not immune. My aim here is to present the Progressive Hegelians in such a way that we can draw from them an attractive and coherent vision of what the American state is and ought to be. For this purpose, Du Bois' understanding of the Freedmen's Bureau is a crucial opening into the phenomenology of American freedom.

Scholars have noted that Du Bois' groundbreaking concept of black "double consciousness" has its roots in Hegel's idea of the struggle for recognition.[18] But none have recognized that Du Bois' institutional solution for the problem of double consciousness is also Hegelian: When Du Bois turns to the role of the Federal government in attempting to secure black equality, this move from the perspective of individual consciousness to the institutional requirements of freedom also has a Hegelian impulse. As Hegel observed, "the ineligibility of the human being in and for himself for slavery . . . is an insight which comes only when we recognize that the idea of freedom is truly present only as *the state*."[19] Du Bois' description of the work of the Freedmen's Bureau in the wake of the Civil War was an adaptation of Hegelian accounts of the

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[17] See Eileen L. McDonagh, "The 'Welfare Rights State' and the 'Civil Rights State': Policy Paradox and State Building in the Progressive Era," *Studies in American Political Development* 7 (1993), 225-74.

[18] Robert Gooding-Williams, "Philosophy of History and Social Critique in *The Souls of Black Folk*," *Social Science Information* 26 (1987): 105; Shamoon Zamir, *Dark Voices: W.E.B. Du Bois and American Thought, 1888-1903.* (Chicago: The University of Chicago Press, 1995), 114.

[19] Hegel, *Philosophy of Right*, § 57A.

liberalizing Prussian civil service, which undermined forms of feudal authority, established rights of property and contract, and provided welfare services. That Du Bois would have been familiar with these ideas is clear from his study at the University of Berlin in 1893, where he took courses on "Prussian constitutional history" with Gustav Schmoller, the preeminent scholar of the "social question" and of the historical school of economics, and on "Prussian reforms" with Rudolf von Gneist, one of the most prominent theorists of the administrative *Rechtsstaat*, who followed Hegel in emphasizing the modern state's dual commitment to individual rights and social welfare.[20]

In *The Souls of Black Foul*, Du Bois' famously describes certain general features of Black consciousness at the dawn of twentieth century:

> It is a peculiar sensation, this double consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness—An American, A Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.[21]

Double-consciousness is a form of self-alienation, which arises from the experience of living within a racist society. As Robert Gooding-Williams puts it, "double consciousness

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[20] Herbert Aptheker, ed., *The Correspondence of W.E.B. Du Bois*, vol. 1 (Amherst, MA: University of Massachusetts Press, 1973), 21. On the influence of Schmoller on Du Bois, see Robert Gooding-Williams, *In the Shadow of Du Bois: Afro-Modern Political Thought in America* (Harvard University Press, 2009), 19-66. As Paul Gottfried notes, Schmoller himself was influenced by Hegel in seeing an ethically-oriented state bureaucracy as a means to address the antagonisms produced by conflict in civil society. Paul Gottfried, "Adam Smith and German Political Thought," *Modern Age* (Spring 1977): 151.

[21] W.E.B. Du Bois, *The Souls of Black Folk* (New York: Penguin, 1989 [1903]), 5.

is the false self-consciousness that obtains among African Americans when they observe and judge themselves from the perspective of a white, Jim Crow American world."[22]

The common social cause of this shared spiritual state is a system of racial domination, which impinges on the self-consciousness of racially-identified individuals in broadly comparable ways. Du Bois contends that there is a socially structured array of negative experiences that in one way or another debase African Americans. He understands Jim Crow as a form "social degradation" and "systematic humiliation," embracing a litany of harms such as "personal disrespect" and "nameless prejudice," which are direct manifestations of racist sentiment in the present, as well as conditions of "poverty" and "ignorance," which attend a population of former slaves.[23] These harms compose the social background around which black double-consciousness forms.

Du Bois' analysis relies upon Hegel's dialectic of master and slave, in the sense that Hegel diagnoses a condition of fractured consciousness that results from relationships of domination. Hegel says that, between master and slave, "for recognition proper the moment is lacking, that what the lord does to the other he also does to himself, and what the bondsman does to himself he should also do to the other. The outcome is a recognition that is one-sided and unequal."[24] Because the lord makes himself the essential moment in the relationship, and reduces the slave to a mere instrument, both his and the slave's self-consciousness are impoverished, for they are not truly reflected by one another. The slave's experience of laboring for his master gives him an abstract

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[22] Gooding-Williams, *In the Shadow of Du Bois*, 81.

[23] Du Bois, *Souls of Black Folk*, 6-10.

[24] Ibid., 116.

understanding of the possibility of freedom, because it reveals to him his capacity to transform the natural world in accordance with human purposes. But this understanding is a "freedom which is still enmeshed in servitude," because the purposes for which the slave labors are his master's, and not his own.[25]

Du Bois offers various concrete solutions to the problem of double consciousness that would create the conditions for mutual recognition and actualized freedom. In Chapter 2 of *Souls*, Du Bois narrates a philosophical history of the Freedmen's Bureau, which was established at the conclusion of the Civil War. His reinterpretation was intended as a rebuke to the predominant interpretation of the Freedmen's Bureau at the time, which saw it as an outrageous usurpation of the rights of white southerners, and an impediment to national reunification.[26] Du Bois immediately draws a connection between the Freedmen's Bureau and the norm of freedom: "[T]his tale of the dawn of Freedom is an account of that government of men called the Freedmen's Bureau,—one of the most singular and interesting attempts made by a great nation to grapple with vast problems of race and social condition."[27] Du Bois describes the Bureau's attempt to address these problems, quoting from Bureau circulars:

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[25] Ibid., 119.

[26] See William Archibald Dunning, *Reconstruction: Political and Economic*, 1865-1877 (New York: London: Harpers, 1907), 30-4. On Dunning and Du Bois, see David Levering Lewis, *W.E.B. Du Bois: The Fight For Equality in the American Century,1919-1963* (New York: Henry Holt, 2000), 354.

[27] Du Bois, *Souls of Black Folk*, 14.

> 'It will be the object of all commissioners to introduce practicable systems of *compensated labor*' and to establish *schools*. Forthwith nine assistant commissioners were appointed. They were to hasten their fields of work; seek gradually to close relief establishments, and *make the destitute self-supporting*; act as *courts of law* where there were no courts, or negroes were not *recognized in them as free*, establish the *institution of marriage* among ex-slaves, and keep records; see that freedmen were *free to choose their employers*, and help in making fair *contracts* for them.[28]

Du Bois thus identifies education, poverty relief, the administration of justice, the institution of marriage, and free labor and contract enforcement as the key activities of the Freedmen's Bureau. The requirements of freedom that Du Bois identifies in the work of the Freedmen's Bureau parallel those outlined in Hegel's *Philosophy of Right*. As in Hegel's account of objective spirit, the purpose of these institutions is to enable circuits of mutual recognition by enabling each person to see every other as a free and equal being.

Du Bois' ultimate assessment of the Bureau is mixed.[29] He observes neglect and favoritism amongst Bureau personnel—often, according to Du Bois, in favor of blacks. But mostly he finds that the context of severe racial domination along with the extreme resistance of Southern States and President Johnson, made the Bureau's work next to impossible. Despite the Bureau's failure, Du Bois draws from its history an institutional ideal:

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[28] Ibid., 21 (emphasis added_.

[29] As a historical matter, Du Bois' description of the Freedmen's Bureau is neither the most pessimistic nor the most optimistic. For a more optimistic assessment, see, for example, John Cox and LaWanda Cox, "General O. O. Howard and the 'Misrepresented Bureau," *The Journal of Southern History* 19, no. 4 (1953): 427-456; a more pessimistic, William S. McFeely, *Yankee Stepfather: General O.O. Howard and the Freedmen* (New York: London: W.W. Norton, 1994 [1968]).

> Had political exigencies been less pressing, the opposition to government guardianship of Negroes less bitter, and the attachment to the slave system less strong, the social seer can well imagine a far better policy—a permanent Freedmen's Bureau, with a national system of Negro schools; a carefully supervised employment and labor office; a system of impartial protection before the regular courts; and such institutions for social betterment as savings-banks, land and building associations, and social settlements. All this vast expenditure of money and brains might have formed a great school of prospective citizenship, and solved in a way we have not yet the most perplexing and persistent of the Negro problems.[30]

Such a permanent Bureau would have helped to provide true self-consciousness by creating certain institutional preconditions for mutual recognition; it would equip the freedmen with the social and material capacity to contribute as equals to American democracy.

Du Bois' discussion of the Freedmen's Bureau highlights the ways in which bureaucracy might be deployed for emancipatory purposes. For the Freedmen's Bureau was concerned explicitly with civic freedom and its institutional requirements. It set about to establish certain necessary but insufficient conditions for the legal and social freedom of African Americans:

> Such was the dawn of Freedom; such was the work of the Freedmen's Bureau, which, summed up in brief, may be epitomized thus: . . . this bureau set going a system of free labor, established a beginning of peasant proprietorship, secured the recognition of black freedmen before courts of law, and founded the free common school in the South.[31]

For Du Bois, the Bureau was truly concerned to assert what Hegel calls the state's "universal interest" in freedom. Its intervention into the labor market, the judicial system, and public education were systematically related to one another as so many attempts to furnish forms of interpersonal, social, and legal recognition that make free activity

[30] Du Bois, *Souls of Black Folk*, 31.

[31] Ibid.

possible. Du Bois, like Hegel, emphasizes the comprehensiveness of the Bureau's functions as a virtue: only such a multi-institutional approach could hope to address the deep problem of double-consciousness, as it had its roots across all strata of social organization. Having developed an understanding of the problem of double consciousness, and an ideal of mutual recognition, Du Bois lifted up the impartial and imperfect work of the Bureau as a political solution.

The concept of democracy, which would be of such moment to the other Hegelian Progressives, has a precarious place in Du Bois' thought. His reinterpretation of Reconstruction was intended as an intervention in the public sphere, to draw on white persons' sympathy to enlarge their conception of the American popular sovereign to include African Americans.[32] But the democratic credentials of the Bureau itself were impoverished. The Freedmen's Bureau, as Du Bois acknowledges, was created by an act of Congress without the participation of representatives of the southern States, which remained under the rule of the Union Army. The Bureau thus operated as an arm of military government, attempting—with mixed success—to protect the rights and interests of the freedmen against the wishes of white southerners.[33] The prerequisites for black political freedom were thus achieved through the temporary deprivation of the political freedom of whites. Moreover, black persons were often treated as wards of the Bureau,

[32] Melvin Rogers, "The People, Rhetoric, and Affect: On the Political Force of Du Bois' The Souls of Black Folk," *American Political Science Review* 106, no. 1 (2012): 188-203.

[33] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper & Row 1988), 69-71, 153-70.

rather than as citizens who had an equal stake in self-government.[34] The Bureau thus figured as a democratically impoverished effort to pave the way for democracy, providing the requisites for self-government in a time to come.

Du Bois' analysis points to a real tension within the Progressive Hegelian political theory developed in greater depth by the thinkers to follow. On the one hand the Progressive state must provide the *requisites* for democratic governance: it must provide the legal protections and the material goods that make equal and rational contribution to public opinion possible. On the other hand, the state must provide *contexts* for democratic governance within the state: it must enable public opinion to be efficacious, not only in framing the laws, but in the administrative implementation of the laws. But where public opinion is not yet rational or egalitarian, because of forms of social domination at work in civil society, such forms of public participation in the state threaten to undermine the bureaucratic provision of democratic requisites. It may work to reproduce, rather than disrupt, the forms of inequality which administrative intervention seeks to remedy. The case of the Freedmen's Bureau raises this issue most starkly because of the strength of racial domination, racist public opinion, and the many institutional requisites of which black people had been deprived. As I shall argue in Chapters 3 and 6, the tension between democratic requisites and democratic contexts is ineluctable, but not fatal. The challenge is to identify forms of administrative governance that are autonomous enough from the existing constellation of social power to remedy its injustices while sufficiently informed

[34] Chad Alan Goldberg, *Citizens and Paupers: Relief, Rights, and Race from the Freedmen's Bureau to Workfare* (Chicago: London: University of Chicago Press, 2007), 31-75.

by public opinion to enable a productive dialogue between public and private actors, thus enhancing the perceived and actual legitimacy of state action.

III. Woodrow Wilson's Democratization of the Hegelian Administrative State

If Du Bois sought to introduce an American state that would enable the formation of a free and democratic public, Wilson sought one that would reflect the will the people. With his landmark 1887 essay, "The Study of Administration," Wilson suggested that administration in the democratic context must maintain a democratic ethos throughout, remaining open to public opinion not only by way of legislative commands but also through direct contact with the public. Wilson therefore offers an administrative theory in which democracy takes pre-eminence of place as a supreme value, subordinating the rule of law and an equitable administrative ethic to democratic ends.[35]

Wilson's essay was inspired by the movement for civil service reform, which sought to supplant the system of party patronage with a professional civil service. The first significant victory for this movement was the Pendleton Act of 1883, which established a Civil Service Commission under the control of the President to supervise competitive examinations for ten percent of the Federal civil service.[36] Civil service reform was a halting and lengthy process, in which Wilson himself would later play an

[35] As Fritz Sager and Christian Rosser note, despite some similarities between Weber and Wilson's understanding of bureaucracy, Wilson is much closer to Hegel: "Wilson . . . agreed with Hegel, who believed that thoroughly educated and thus morally upright public servants would best serve the common will. For Hegel as well as for Wilson, a strict distinction between the political and the administrative sphere was less important than for Weber. For Wilson, creation not control was the central issue." Fritz Sager and Christian Rosser, "Weber, Wilson, and Hegel: Theories of Modern Bureaucracy," *Public Administration Review* 69, no. 6 (2009): 1143.

[36] Pendelton Civil Service Reform Act, 22 Stat. 403 (1883).

ambivalent role as President, as progressive reformers sought to supplant the old state model of party rule with an administrative one.[37] In the 1887 essay, Wilson emphasized that this movement for civil service reform could not be merely a matter of "personnel" but had to reach to the "organization and methods of administration" as well: "it is the object of administrative study to discover, first, what government can properly and successfully do, and, secondly, how it can do these proper things with the utmost possible efficiency . . . ."[38] Wilson thus begins with a seemingly objective statement: there are things which government can properly and successfully do, and there is a most efficient way to do them. Quickly, however, this initial question of objectively proper ends and efficient means gives way to a much subtler inquiry into the kind of ends and means suitable to administration in a democratic constitutional state.

Wilson delves further into his assessment of administrative means and ends with Hegel's conception of historicity and Lorenz von Stein's Hegelian conception of the role of administration.[39] He cites Hegel's *Philosophy of Right* for the proposition that

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[37] As Patricia Wallace Ingraham notes, "The provisions of the Pendleton Act, intending to separate politics and merit, nearly totally depended on the will of the President. Merit would proceed only if politics permitted it to do so. This ensured that development would not be orderly or necessarily coherent. In the American policy tradition, it would be incremental and gradual, addressing one limited policy issue or problem at a time." Patricia Wallace Ingraham, *The Foundation of Merit: Public Service in American Democracy* (Baltimore: London: The Johns Hopkins University Press, 1995), 28.

[38] Woodrow Wilson, "The Study of Administration," *Political Science Quarterly* 2, no. 2 (1887): 197.

[39] Robert D. Miewald argues: "If Wilson or Frank Goodnow are to be called the 'father' of American public administration, Stein . . . deserves recognition as at least a grandfather. . . . Stein accentuated the basic inconsistencies of Hegelian theory. For him, the state remains the only sure protector of individual welfare and human progress. As an organic personality, the state, including administration, was independent of the larger society." Miewald's article is seminal for pointing out the links in intellectual history between Hegel, Stein, and Wilson. But Miewald exaggerates the "inconsistencies" of Hegel's theory, since Hegel did not have a naïve belief that

philosophy is "nothing but the spirit of that time expressed in abstract thought," to explain why administrative science has come so late on the scene: "The question was always: Who shall make the law, and what shall the law be? The other question, how the law should be administered with enlightenment, with equity, with speed, and without friction, was put aside as 'practical detail' which clerks could arrange after doctors had agreed on principle."[40]

These questions of the "Who," "What," and "How" of law have interconnected answers. Democratic constitutionalism settled the question of the "who," placing sovereign authority in the people themselves. But the democratization of lawmaking meant that "where government once might follow the whims of a court, it must now follow the view of a nation. And those views are steadily widening to new conceptions of state duty."[41] Democratization opened up the possible content of legislation to the wide array of concerns of the democratic public. The increasing economic complexity of industrialization raised issues of labor unrest, financial speculation, and monopoly to which the empowered people now demanded legislative response. While such issues may have demanded a response from any legislator—popular, aristocratic, or monarchical—Wilson implies that the democratization of constitutionalism impacts the character of

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bureaucrats were "heroic figures . . . untouched by human frailty." Nor does he do justice to the complexities of Stein's theory, which I described in Chapter 1. While for Stein the state is indeed separated from society, it is also integrated with it in and through administration. Society and state stand in a dialectical relationship. Robert D. Miewald, "The German Tradition and the Organic State" in *Politics and administration: Woodrow Wilson and American Public Administration*, eds. Jack Rabin and James S. Bown (New York: Basel: Marcel Dekker, 1984): 19-20.

[40] Wilson, "The Study of Administration," 199, 198.

[41] Ibid., 200.

legislation beyond the evolving functional requirements of the economy. In the hands of the people, "state duty" takes on a new meaning, as the people's interest is more extensive than that of a clique or a single ruler. Wilson does not further clarify the nature of this democratic conception of state duty, but issues such as corporate power and unfair competition all gesture towards issues of equity and questions of fairness raised by the ever-growing inequalities in economic power.[42]

Democratization does not just change the ends for which law is deployed, it also changes the way that law should be implemented. "The idea of the state and the consequent ideal of its duty are undergoing a noteworthy change; and 'the idea of the state is the conscience of administration.' Seeing every day new things which the state ought to do, the next thing is to see clearly how it ought to do them."[43] The unattributed quotation is from Lorenz von Stein.[44] As discussed in chapter one, Stein argued that the "idea of the state" provided the administration with "a free view into the future" amidst the ambiguities of social conflicts in the present.[45] Wilson endorses this ethically robust Hegelian view, rather than the Weberian conception of bureaucratic instrumental reason, when he says that administration "is raised very far above the level of mere technical

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[42] Wilson uses the language of equity in this way in *The State*, noting that, in modern democratic states, "By forbidding child labor, by supervising sanitary conditions of factories, by limit the employment of women in occupations hurtful to their health, by instituting official tests of the purity or quality of goods sold, by limiting hours of labor in certain trades, by a hundred and one limitations of the power of unscrupulous and heartless men to out-do the scrupulous and merciful in trade or industry, government has assisted *equity*." Woodrow Wilson, *The State: Elements of Historical and Practical Politics* (Boston: D.C. Heath, 1901 [1898]), 636 (emphasis added).

[43] Wilson, *The Study of Administration*, 201.

[44] Sager and Rosser, "Weber, Wilson, and Hegel," 1145, fn. 8.

[45] Lorenz von Stein, *Die Verwaltungslehre. Zweiter Theil. Die Lehre von Innern Verwaltung* (Stuttgart: J.G. Cotta'schen, 1866), 10 (author's translation).

detail by the fact that through its greater principles it is directly connected with the lasting maxims of political wisdom, the permanent truths of political progress."[46]

Wilson, however, democratizes this Hegelian conception of the ethical orientation of bureaucracy. Because the scope of state duty is ultimately determined by the popular sovereign, the idea of the state that provides administration with its conscience must be shaped by public opinion. In other words, the administrative *implementation* of law—and not merely its enactment—must somehow be democratic in character. While administrative technique ensures the efficient implementation of law that originates from the needs and interests of the people, the democratic ethic must ensure that administration does not lose touch with the popular roots of the law in its quest for efficient implementation. In order to imbibe this popular spirit, "administration in the United States must remain sensitive at all points to public opinion. . . . The ideal for us is a civil service cultured and self-sufficient enough to act with sense and vigor, and yet so intimately connected with popular thought, by means of election and constant public counsel, as to find arbitrariness or class spirit out of the question."[47]

Wilson does not mean to equate administration with politics or to elevate it to the realm of constitutionalism. On the one hand, "administration lies outside *politics*. Administrative questions are not political questions."[48] Wilson wishes to distinguish administration from politics on the grounds that politics makes the greater policy decisions, and administration concerns the details of their implementation. Wilson then

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[46] Wilson, *The Study of Administration*, 210.

[47] Ibid., 217.

[48] Ibid., 210.

differentiates between constitutional and administrative law on the grounds that "public administration is detailed and systematic execution of law. Every particular application of general law is an act of administration. . . . The broad plans of government are not administrative; the detailed execution of such plans is administrative."[49] Wilson therefore places constitutionalism, politics, and administration on a descending scale of generality, as constitutional structures frame political deliberations about the law, and the laws established by political deliberation and electoral contestation set the terms for administration.

Despite the initial categorical appearance of the separation of administration from politics and administration, these institutional realms shade into one another. Wilson acknowledges that "no lines of demarcation, separating administrative from non-administrative functions can be run between this and that department of government."[50] It is therefore a mistake to treat Wilson's distinction between politics and administration as absolute, as many scholars do.[51]

To understand this rather nuanced conception of the relationship between constitutionalism, politics, and administration, it is helpful to consider Wilson's broader political theory as expressed in his other writings and lectures. Like Hegel, Wilson has an organic political theory, meaning that he emphasized the ways in which various elements of political decision-making must cohere with one another in service of a common purpose. But unlike Hegel, Wilson locates the organic principle in society itself, rather

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[49] Ibid., 213.

[50] Ibid., 212.

[51] See, e.g. Ingraham, *The Foundation of Merit*, 8.

than in the institutions of the political state. As he puts it succinctly in a heading in *The State*, "*Society an Organism, Government an Organ*— Government is merely the executive organ of society, the organ through which its habit acts, through which its will becomes operative, through which it adapts itself to its environment and works out for itself a more effective life."[52]

Wilson's understanding of "social organism" is rather inchoate, rooted in both ascriptive and communicative commonality. In an unpublished 1885 essay on "The Modern Democratic State" he at one point relies on racial identity to delimit the social organism, arguing that "democratic institutions depend upon homogeneity of race and community of thought," even if he acknowledges that "[a] nation once come to maturity and habituated to self-government can absorb alien elements, as our own nation has done and is still doing." [53] Though Wilson gives credence here to racial essentialism, he relies more heavily on "community of thought" in this essay than he does on racial commonality: "the influences which make all sources of information common to all men alike, which scatter broadcast the world's thought and the world's news, are sure to put

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[52] Woodrow Wilson, *The State*, 576.

[53] Woodrow Wilson, "The Modern Democratic State," in *The Papers of Woodrow Wilson: Vol. 5 – 1885-1888*, Arthur S. Link, ed. (Princeton: Princeton University Press, 1968), 74-5. Wilson's racist ideology was not unique amongst Progressives, and this aspect of the tradition should not be denied or glossed over. At the same time, there is no necessary logical link between racism and historicism or organicism, much less the administrative state. Thus, Tiffany Miller's association of Progressive ideas of positive freedom and social development with social Darwinist racism makes the mistake of equating the coexistence of two sets of ideas with the entailment or implication of the one by the other. See Miller, "Freedom, History, and Race in Progressive Thought," 254. The fact that progressives like Wilson, John Burgess, and Richard T. Ely were racist does not mean that their Hegelian conceptions of freedom, society, the state, and the historical development of values are also racist. The conceptual distinctness of Hegelian political thought and racist ideology explains why other Progressives who were opposed to racism, such as John Dewey and W.E.B. Du Bois, could draw on Hegelian ideas without adopting racist dogma.

an end to the conditions under which the many will receive without question the thought of a ruling few . . . . They multiply infinitely the number of voices which must be heeded in legislation or in executive policy."[54] In his unpublished "Notes on Administration" (1885), he likewise suggests that, "Liberty consists in enlightened *authoritative* public opinion—consists in the realization of the purposes of active, directive popular thought. Liberty lives and moves and has its being in self-government."[55] While a conception of public identity based upon racial commonality is an obvious non-starter for a contemporary political theory, the idea that society might coalesce around public discourse provides a promising basis for a less exclusionary conception of the democratic state. As we shall see in the next section, Dewey transforms the social organism into a fully communicative concept, emptied of racist notions.

Public opinion is central to Wilson notion of constitutional structure, as well as its administrative implementation. As he writes in *Constitutional Government in the United States,*

> if a constitutional government is a government conducted on the basis of a definite understanding between those who administer it and those who obey it, there can be no constitutional government unless there be a community to sustain and develop it,—unless the nation, whose instrument it is, is conscious of common interests and can form common purposes.[56]

Offering a democratized version of Hegel's concept of constitutionalism, Wilson argues that the rationality of political institutions has its source in the shared habits, thoughts,

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[54] Wilson, "The Modern Democratic State," 74.

[55] Woodrow Wilson, "Notes on Administration," in *The Papers of Woodrow Wilson: Vol. 5 – 1885-1888*, ed. Arthur S. Link (Princeton: Princeton University Press, 1968), 50.

[56] Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1921 [1908]), 25.

and purposes of the people. The source of law in modern democracy must therefore primarily be legislation, in order to give voice to the demands of the democratic public. Through legislation, "the deliberate formulation of new law," the public can reshape the content of social obligation to address the concerns that have arisen through public deliberation.[57] Legislation is the instrument the public can use as it gradually reshapes institutions according to its broad "and broadening" interests.[58]

Democratic governance, though expressed in legislation, is not limited to it. Wilson's location of normative motivation in the organism of society, rather than its government or its laws, requires regulatory techniques that are continually responsive to the present needs—rather than the past pronouncements—of the sovereign public. Administration thus plays a crucial role in mediating between legislative stability and social evolution. In his notes for his 1891 lectures on administration at Johns Hopkins University, he writes: "The scope of administration is . . . largely defined and limited . . . to the laws, to which it is of course subject; *but serving the State, not the law-making body in the State,* and *possessing a life not resident in statutes.*"[59] Wilson here uses the concept of "state" in the broad Hegelian sense to mean not just the government, but the public-regarding habits, consciousness, and purposes of all citizens and state agents. Administration is therefore beholden not only to law, but to the public opinions which originally motivated legislation. Administration thus serves to mediate between the

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[57] Wilson, *The State*, 591.

[58] Ibid.

[59] Woodrow Wilson, "Notes for Lectures on Administration at the Johns Hopkins," *The Papers of Woodrow Wilson*, vol. 7 1890-1892, ed. Arthur S. Link (Princeton, NJ: Princeton University Press, 1969), 128-129.

necessary rigidity and generality of statutory law and the fluidity and specificity of the social content it regulates. When administrative agents interpret the commands of a statute, they are in effect translating between the opinions and needs of a reified past public and the inchoate opinions and needs of a present public. Whereas "*Law is always a summing up of the past*: its result, the conclusion from its experience . . . . *Administration* . . . is *always in contact with the present*: it is the state's experiencing organ. It is thus that is becomes a *source of law: directly*, by the growth o[f] administrative practice and tradition . . . *or indirectly*, by way of suggestion and initiative."[60]

Despite his ascendancy to the highest office, Wilson never gave much substance to Presidential control of administration, which might have provided a certain kind of plebiscitary democratic control from above.[61] Instead Wilson observes in *Constitutional Government* that the President must play a greater political and legislative role as leader of his party than as executive.[62] He therefore suggests that most executive authority be delegated to cabinet positions, which the President should fill with "eminent representative citizens, selecting them rather for their special fitness for the great business posts to which he has assigned them than for their political experience, and looking to

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[60] Ibid., 138.

[61] As President, Wilson failed to consolidate Presidential control of the bureaucracy through the extension of civil service reform, bargaining the issue away to gain support for his legislative program. In Skowronek's judgment, he thus "failed to place relations between party and bureaucracy on a new plane. His personal achievements remained personal and circumstantial and left the basic structural tension between party power and administrative modernization unresolved." Skowronek, *Building a New American State*, 196.

[62] As President, Wilson carried out this "theory of devolution" and "consciously avoided discussing the affairs of other agencies when dealing with a single department head." Arthur W. McMahon, "Woodrow Wilson: Political Leader and Administrator" in *The Philosophy and Policies of Woodrow Wilson*, ed. Earl Latham (Chicago: University of Chicago Press, 1958), 114.

them for advice in the actual conduct of the government rather than in the shaping of political policy."[63] This notion of a cabinet of "representative citizens" to control administration is suggestive, pointing to the idea of functionally-specific expert citizens who could mediate between the public at large and the administrative apparatus. But Wilson's proposal seems perilously close to representing the President's friends and connections rather than the citizenry itself. This reflects a problem with Wilson's nebulous concept of public authority. It is altogether unclear how broad and inclusive it is or can be. To the extent it is narrow, elite, or racially exclusive, administrative alignment with "the public" may not reflect democratic principles at all, but rather some form of factional interests. Developing a legitimate democratic conception of administration will therefore turn upon a communicative nexus between administrators, on the one hand, sufficiently inclusive, popular, and coherent public opinion, on the other.[64]

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[63] Wilson, *Constitutional Government*, 77.

[64] As Bernard Silberman points out, America has adopted a "professional" model of administration, consisting of an ethic of public service, the possession of specialized knowledge, professional monopolies over the service based on such knowledge, and codes of behavior that allow for self-regulation. Bernard S. Silberman, *Cages of Reason: The Rise of the Rational State in France, Japan, The United States and Great Britain* (Chicago: University of Chicago Press, 1993), 72. This model provides for a more horizontal and flexible variety of administration, more permeable to civil society at large and more sensitive to constituent interests within it. This openness to civil society provides the basis for a more democratic form of administration. But the danger of this model is that democratic legislative will becomes stifled or distorted by the influence of mobilized professional interests on the legal implementation. Ibid., 229. See also, Hugh Heclo, "In Search of a Role: America's Higher Civil Service, in *Bureaucrats and Policymaking*, ed. Ezra N. Suleiman (New York: Holmes and Meier, 1984), 8-34.

IV. John's Dewey Communicative Constitution of the Administrative State

Though Dewey never directly engaged with Wilson on questions of administration, their theories have remarkable affinities. Like Wilson's, Dewey's political theory began with an organic theory of the society, though he moved away from this towards a purely communicative model. He thus enables us to build some of Wilson's fragmentary statements about "directive popular thought" into a more sophisticated understanding of the relationship between the democratic public and the state.

Dewey insists, as does Wilson, that administration in a democratic state must draw upon and be regulated by the concerns of the public in a more direct sense than through legislative mandates. Dewey differs from Wilson in more strongly emphasizing that there are certain legal and material requisites for democratic life, which the administrative state must furnish. Whereas Wilson had emphasized above all a process of giving voice to public opinion, Dewey combines this procedure with a substantive commitment to social equality. For Dewey, democracy requires broad governmental support in order to ensure that the democratic public is constituted by free individuals who have realized their personal capacities to the fullest.

For many of these ideas, Dewey, like Wilson, was deeply indebted to Hegel, though he gave them a democratic, American gloss that radically altered their content.[65] Even though he progressively moved away from Hegelian metaphysics around the end of the nineteenth century as he embraced experimentalism and the pragmatic philosophy of

[65] On the enduring Hegelian themes in Dewey, even after his turn to pragmatism, see James A. Good, *The Search for Unity in Diversity: The 'Permanent Hegelian Deposit' in the Philosophy of John Dewey* (New York: Rowman & Littlefield, 2006).

William James, Dewey acknowledged as late as 1930 that Hegel had "left a permanent deposit in my thinking."[66] Dewey's concept of the relationship between individual and community, between moral judgment and laws and institutions, and ultimately his conceptions of the relationship between the public and the administrative state each bear the marks of a democratized Hegelian state theory.

In his 1897 lecture at The University of Chicago on "Hegel's Philosophy of Spirit," Dewey gave his interpretation of Hegel's concept of the state. Government "constitutes the State where the individual identifies himself with the will manifested in the community in which he lives and thus gets beyond his mere individuality and becomes a member and organ of the whole. The state is then completed objective spirit; the externalized reason of man."[67] This concept of the state as "externalized reason" provided a foundation for Dewey's later concept of the state as an institutional articulation of the public. In this mostly introductory rather than critical examination, Dewey says that Hegel's account of the details of the constitution is the "most artificial and the least satisfactory portion of his political philosophy."[68] He seems to object most strongly to Hegel's claim that constitutional monarchy is the completed form of the state.

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[66] John Dewey, "From Absolutism to Experimentalism," in *John Dewey, The Later Works: 1925-1953. Vol. 5, 1929-1930*, ed. Jon Ann Boydson (Carbondale, IL: Southern Illinois University Press, 1984), 154. "Hegel's thought . . . supplied a demand for unification. . . . Hegel's synthesis of subject and object, matter and spirit, the divine and human, was however, no mere intellectual formula; it operated as an immense release, a liberation. Hegel's treatment of human culture, of institutions and the arts, involved the same dissolution of hard-and-fast dividing walls, and had a special attraction for me" (153).

[67] John Dewey, "Hegel's Philosophy of Spirit" in *John Dewey's Philosophy of Spirit, With the 1897 Lecture on Hegel,* eds. John R. Shook and James A. Good (New York: Fordham University Press, 2010), 159.

[68] Dewey, "Hegel's Philosophy of Spirit," 159.

Though his reasons for this are not spelled out in any detail, the implication, born out by Dewey's later work, is that Hegel had not realized the superiority of the democratic principle. Importantly, Dewey does not subject to the same criticism Hegel's description of the civil service, treating this as part of Hegel's account of civil society rather than the state: "The class having charge of the general interests of civil society, the educators, the priests, and the civil authorities . . . devote themselves more specially to the higher spiritual interests and to the control of society."[69]

The influence of Hegel's practical philosophy on Dewey's own political thought can be seen most clearly in two of Dewey's early writings. In the *Ethics of Democracy*, Dewey embraced a conception of the democratic community as a "social organism," in which "the citizen is a member of the organism, and, just in proportion to the perfection of the organism, has concentrated within himself its intelligence and will."[70] Dewey here followed Hegel in seeing the individual as a socially formed being. But whereas for Hegel the organism of the state centered around political institutions and citizens' relationship to those institutions, Dewey like Wilson rooted the organism in society, and understood the government to derive its legitimacy from extra-institutional unity. Dewey's organic concept of society did not entail submersion of the individual within the democratic whole. Rather, he argued for the "sovereignty of the citizen," since each citizen embodied in microcosm the whole of the democratic sovereign.[71]

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[69] Ibid., 158.

[70] John Dewey, "The Ethics of Democracy," in *John Dewey, The Early Works 1882-1898, vol. 1 1882-1888*, eds. Georg E. Axtelle et al. (Carbondale: Southern Illinois Univeristy Press, 1969), 235.

[71] Ibid.

In *Outlines of a Critical Theory of Ethics*, which is explicitly indebted to Hegel's *Philosophy of Right*,[72] Dewey gave a more elaborate explanation of the relationship between the individual and society with the following "ethical postulate": "In the realization of individuality there is found also the needed realization of some community of persons of which the individual is a member; and, conversely, the agent who duly satisfies the community in which he shares, by that same conduct satisfies himself."[73] This co-realization of the individual and the community took place in part through institutions, such as family, church and "the city, state, and nation."[74] Because such institutions "are expressions of common purposes and ideas, they are not merely private will and intelligence, but public will and reason."[75] Individual realization thus meant the expression and interpretation of subjective needs and desires through social and political institutions expressing common purposes and public reason. This did not mean that Dewey thought individuality merely had to reflect given social ends. He stressed the need for individuals to take a critical attitude towards social institutions, to use moral judgment to locate and remedy injustices within the social order. "A moral law then, is a principle of action, which . . . expresses the *movement* of the ethical world."[76]

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[72] Dewey cites Hegel discussion on subjective freedom in *Philosophy of Right* §124 in a section on "reflective conscience and the ethical world." In a footnote, he explains "I need hardly say how I am indebted in the treatment of this topic, and indeed, in the whole top of the 'ethical world,' to Hegel." John Dewey, "Outlines of a Critical Theory of Ethics," in *John Dewey, The Early Works, 1882-1892, vol. 3 1889-1892*, ed. Jo Ann Boyston (Carbondale: Southern Illinois University Press 1969), 357, fn. 2.

[73] Ibid., 322 (emphasis omitted).

[74] Ibid., 347.

[75] Ibid.

[76] Ibid., 351.

This Hegelian conception of individuality, institutional rationality, and social critique would motivate Dewey's conception of public administration. Administration would function as an institutional embodiment of the "movement of the ethical world," by creating the conditions for the exercise of individual freedom and democratic life. This was clear even in his first specific treatment of the question of administration, in his 1908 treatise *Ethics*, written with James Tufts. *Ethics* exemplified the Progressive effort to identify what Kloppenberg calls a "via media" between subjectivism and objectivism, and empiricism and idealism. It accepted the importance of utilitarian and deontological considerations in ethical judgment, but rooted both considerations in the Hegelian notion of the self-realization of the individual.[77] In linking moral judgment with a project of self-realization, Dewey presented social context as constitutive of ethics itself. Drawing on Hegel's conception of "ethical life", Dewey sought to describe "how social institutions and tendencies supply value to the activities of individuals, impose conditions of the formation and exercise of their desires and aims."[78] Dewey thus came to the question of administration first and foremost by way of a fundamental ethical motivation: to determine how individuals can effectively exercise practical reason, and so participate in the democratic life of their community.

A consideration of the social preconditions of individual ethics leads Dewey to a series of social and political reform proposals. Like Wilson, he begins with the technical

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[77] Kloppenberg, *Uncertain Victory*, 15-63

[78] John Dewey and James H. Tufts, *Ethics* (New York: Henry Holt, 1908), 427. Dewey and Tufts cite Hegel's *Philosophy of Right*, as a source for part III of the book "The World of Action." Ibid., 426. Throughout I refer to Dewey as the author of these claims because, as the preface states, he was the principal author of the particular sections of the book in which administration is discussed. Ibid., vi.

need to "increase administrative efficiency," but quickly turns to the substantive areas that require administrative regulation, such as health, poverty and unemployment.[79] Dewey acknowledged that American political ideology was resistant to such forms of state activity. But he argued that the country needed to grapple with the new realities by changing its understanding of individualism rather than abandoning it.

> American cities and states find themselves confronted with the same problems of public health, poverty and unemployment, congested population, traffic and transportation, charitable relief, tramps and vagabondage, and so forth, that have troubled older countries. We face these problems, moreover, with traditions which are averse to 'bureaucratic' administration and public 'interference.' Public regulation is regarded as a 'paternalistic' survival, quite unsuited to a free and independent people. It would be foolish, indeed, to over- look or deny the great gains that have come from our American individualistic convictions . . . . But it is certain that the country has reached a state of development, in which these individual achievements and possibilities require new civic and political agencies if they are to be maintained as realities. Individualism means inequity, harshness, and retrogression to barbarism (no matter under what veneer of display and luxury), unless it is a *generalized* individualism: an individualism which takes into account the real good and effective--not merely formal-freedom of *every* social member.[80]

Formal freedom thus needs to be complemented by a principle of social freedom, or equity, which ensures that a broad range of individuals can in fact exercise their capacities. This is a more expansive, Hegelian conception of individual freedom than the contractual, juridical freedom of classical liberalism. For Dewey, this understanding of individuality is at the core of democracy itself, which is the "embodiment of the moral ideal of a good which consists in the development of all the social capacities of every individual."[81]

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[79] Ibid., 471.

[80] Ibid., 472.

[81] Ibid., 474. Dewey describes the relationship between individualism and democracy in similar terms in *Philosophy and Democracy* (1918), "To say that what is specific and unique can be

Dewey therefore argues for "constructive social legislation," which would secure a "*generalized* versus a *partial* individualism," thus "making individual liberty a more extensive and equitable matter."[82] Such social legislation would require new "public agencies of inspection, supervision, and publicity" to address the social problems and inequalities created by an increasingly complex society.[83] Dewey's repeated emphasis on administration as a means of "publicity" arises from a notion similar to Wilson's that administration is government's "experiencing organ." Dewey suggests that administration can be a means of bringing to light problems of which citizens were unaware. This means that the proper role of administration is not merely to execute clearly described and circumscribed functions on which the public has already agreed but rather to inquire about and raise into public consciousness previously unrecognized problems that require legislative attention. Administration becomes more than a matter of science and technical efficiency. It requires a practical ability to determine what questions are of moral significance to the public among the mass of potential topics of administrative inquiry. "The problems which fall to the lot of the proper organs of administrative inspection and supervision are *scientific* problems, questions for expert intelligence conjoined with wide sympathy. In the true sense of the word, they are

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exalted and become forceful or actual only in relationship with other beings is merely, I take it, to give a metaphysical version to the fact that democracy is concerned not with freaks or geniuses or heroes or divine leaders but with associated individuals in which each by intercourse with others somehow makes the life of each more distinctive." John Dewey, "Philosophy and Democracy," in *The Middle Works, 1899-1924, vol. 11: 1918-1919*, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1982), 53.

[82] Ibid., 482.

[83] Ibid., 471.

political questions: that is, they relate to the welfare of society as an organized community of attainment and endeavor."[84]

Such social planning was necessary, Dewey thought, because of contradictions in the ideological and institutional structure of advanced capitalist American society. As he argued in *Individualism Old and New* (1930), the coherent classical liberal model combining small scale capitalism, individualism, natural rights, and common law legalism had given way to an incoherent model combining a new large scale corporate capitalism with the old individualist law and ethic. Beholden to anachronistic ideals, "we glorify the past, and legalize and idealize the *status quo*, instead of seriously asking how we are to employ the means at our disposal so as to form an equitable and stable society. . . ."[85] Dewey thus argued that the "old" individualist philosophy needed to be replaced with a "new" one, grounded upon the reciprocal relationship between individual freedom and social institutions he had elaborated in his earlier writings. Americans would have to "cease opposing the socially corporate to the individual" and "develop a constructively imaginative observation of the role of science and technology in actual society."[86] By bringing science and technology under the purview of the democratic public (instead of private industry and academic elites) individuals could exercise greater control over their institutional context, and so better realize their needs, interests, and capacities.

Dewey saw a positive indication of such developments in the expansion of public administration. Noting such agencies as the Interstate Commerce Commission, Federal

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[84] Ibid., 473.

[85] John Dewey, *Individualism Old and New* (New York: Prometheus, 1999 [1930]), 8-9.

[86] Ibid., 59.

Reserve Board, and Farm Relief Board, Dewey suggested that "the probabilities seem to favor the creation of more such boards in the future, in spite of all concomitant denunciations of bureaucracy and proclamations that individualism is the source of our national prosperity. . . . The problem of social control of industry and the use of governmental agencies for constructive social ends will become the avowed center of political struggle."[87] If democratically constituted, such governmental agencies could help to realize the new individualism by serving as institutional settings for the identification of public problems, the elaboration of public purposes, and greater public consciousness of the interconnectedness of individual fates.

Democratic administration did not merely mean control of civil society by an elected government, but a more thoroughly participatory form of administrative practice. To understand how Dewey imagined reformulating administrative agencies along democratic lines, we must turn to a work focused on the state's primary interlocutor: the public. Dewey's *The Public and Its Problems*, much like Hegel's *Philosophy of Right*, seeks to diagnose and to try to resolve problems stemming from the ideal and material configurations of modern political life. Dewey shares Hegel's concern that a civil society motivated only by rights of property and contract tends to undermine the normative foundations of social organization. He goes beyond Hegel, however, in arguing that democracy is the core political value of a society that places moral value on individual freedom. Dewey argues that the classical liberalism of laissez-faire and individual rights gave rise to the legitimate demand that the officers of the state should be controlled by the people. However, the legal implementation of property rights and free markets in fact

[87] Ibid., 54-6.

set forces in motion which make democracy impossible, because society became determined by unplanned forces and large scale industrial concerns over which the public has no conscious control. As a consequence,

> the same forces which have brought about the forms of democratic government, general suffrage, executives and legislators chosen by minority vote, have also brought about conditions which halt the social and humane ideals that *demand the utilization of government as the genuine instrumentality of an inclusive and fraternally associated public*. The new age of human relationships has no political agencies worthy of it. The democratic public is still largely inchoate and unorganized.[88]

Dewey thus identifies the need for an activist state, which will bring about social equity by consciously addressing the practical problems and injustices created by new forms of economic organization. He proposes "political agencies" to serve the needs of a fraternally associated public. Dewey will argue for forms of public authority which invigorate and make use of social intelligence, channeling the great energies produced by modern economics into the local communities in which the communicative foundations of democratic public life have their roots.

The theory of the democratic public that Dewey advances here is significantly evolved from his earlier social organic theory.[89] In this later phase, Dewey retains but reworks the Hegelian notion of institutional rationality. Whereas Hegel had understood

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[88] John Dewey, *The Public and its Problems* (Athens, OH: Ohio University Press, 2006 [1927]), 109 (emphasis added).

[89] As Axel Honneth argues, Dewey "did not leave his theory of democracy in the embryonic form he gave it in his early Hegelian period. Though the idea that individual freedom depends primarily on self-realization in a division of labor understood as cooperation is retained in the later phase, this notion is now pursued on the basis of a theory of action such that an independent concept of the public sphere begins to become apparent." Axel Honneth, "Democracy as Reflexive Cooperation: John Dewey and the Theory of Democracy Today," *Political Theory* 26, no. 6 (1998): 771.

institutional rationality to consist in the political constitution's coherent embodiment of the principle of free subjectivity, Dewey now understands institutional rationality as a more pragmatic capacity to understand and resolve "problems" that arise through social interaction. Dewey follows Hegel's analysis of civil society when he grounds his theory of the public in the externalities of private exchange. But he departs from Hegel in arguing against what he sees as a "magnified idealization of the State," and instead understands the state as concrete expression of the inchoate public. As he puts it: "The lasting, extensive consequences of associated activity bring into existence a public. In itself it is unorganized and formless. By means of officials and their special powers it becomes a state. A public articulated and operating through representative officers is the state . . . ."[90]

Dewey's notion of the state as a "public articulated" succinctly encapsulates the Progressives reformulation of Hegelian state theory. Dewey retains Hegel's understanding that a public requires institutional embodiment. The problems and needs of the public must be expressed in agencies that pursue public purposes and officers who use practical reason to work out the details of public commitments. (Notably, Dewey nowhere sharply distinguishes between elected and unelected officers). Where Dewey's Progressive state theory departs from Hegel is that, for Dewey, the political public sphere remains normatively prior to the state administration and other political bodies. For Hegel, by contrast, the institutions of the state have ultimate ethical significance and foreground the valid claims of the public. In Dewey view, administrative labor must remain always provisional and secondary to the critical evaluation of public

[90] Dewey, *The Public and its Problems*, 67.

constituencies who influence its particular pronouncements and policies. Whereas Hegel's legislators and administrators educated the public, and made public opinion more rational than it had been, for Dewey the process of political education is a two-way street. Administration provides an initial moment of education by clarifying and implementing public needs perceived legislatively. Administration is then educated by a public which, with the help of such clarification, can now contribute to administrative practice a more granular understanding of the concrete social context in which state action takes place.

Dewey's state is thus comes into being when problems arising from social interaction become an explicit matter of social discourse.[91] Such a communicatively constituted public then exercises control over the officers who institutionalize and "articulate" its interest in binding rules. Administrators subsequently trade in symbolic communication to reflect back to the public an institutional image of itself, to enable further iterations of the public's self-discovery. As Elizabeth Anderson explains, "Dewey took democratic decision-making to be the joint exercise of practical intelligence by citizens at large, in interaction with their representatives and other state officials. It is cooperative social experimentation."[92]

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[91] Dewey's communicative transformation of Hegelian notions of collectivity is evident when he says that "[f]or beings who observe and think, and whose ideas are absorbed by impulses and become sentiments and interest, 'we' is as inevitable as 'I.' But 'we' and 'our' exist only when the consequences of combined action are perceived and become an object of desire and effort, just as 'I' and 'mine' appear on the scene only when a distinctive share in mutual action is consciously asserted or claimed. Dewey, *The Public and its Problems*, 151. Compare with Hegel, *Phenomenology of Spirit*, where Hegel defines spirit as "that absolute substance which is the unity of the different self-consciousnesses which, in their opposition, enjoy perfect freedom and independence: 'I' that is 'We' and 'We' that is 'I.'" Hegel, *Phenomenology of Spirit,* 110.

[92] Elizabeth Anderson, "The Epistemology of Democracy," *Episteme: A Journal of Social Epistemology* 3, no. 1 (2006): 13.

The *Public and Its Problems* stresses the dangers of an administration that is geared only towards technical competence. This is in part because Dewey's main target in this work is Walter Lippman's critique of public opinion and argument for government based upon elite expertise.[93] Dewey therefore emphasizes that expert management alone cannot solve the public's problems: "[I]n the absence of an articulate voice on the part of the masses . . . the wise cease to be wise," for it is impossible for administrative experts "to secure a monopoly of such knowledge as must be used for the regulation of common affairs."[94] Thus, "[n]o government by experts in which the masses do not have a chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few. And the enlightenment must proceed in a way which forces the administrative specialist to take account of the needs."[95] Dewey does not here deny the role of expertise but rather stresses the importance of guiding administration with democratic input. Such administrative institutions can then serve several communicative functions: they can help the public recognize itself by ventilating problems of common concern, thus giving formal expression to problems that may have been dimly perceived but not fully grasped; they can provide institutional settings for citizens to inform public officials and influence policy; and they can represent, symbolize, and concretize the public, embodying the shared commitments that have arisen through communicative processes.

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[93] Robert B. Westbrook, *John Dewey and American Democracy* (Ithaca: London: Cornell University Press, 1991), 294-306; Walter Lippman, *Public Opinion* (New York: Harcourt, Brace, 1922).

[94] Dewey, *The Public and its Problems*, 206.

[95] Ibid., 208.

Such democratic administration tries to balance the need for free flowing public opinion to influence public agencies with the need for scientific "social control." Social control does not mean authoritarian rule but rather a form of routine, institutionalized, and deliberatively-justified democratic governance. As Dewey wrote in "Social Science and Social Control" (1932): "When we deliberately employ whatever skill we possess in order to serve the ends which we desire, we shall begin to attain a measure of at least intellectual order and understanding. And if past history teaches anything, it is that with intellectual order we have the surest possible promise of advancement to practical order."[96] Dewey thus understands administration as a form of practical intelligence, which could achieve social control, not by diktat, but through a dynamic relationship with the democratic public, which would serve both the education of the people and its administrators. In "The Economic Basis of a New Society" (1939) he similarly argued in the context of the Great Depression that, "[s]ocial control effected through [the] organized application of social intelligence is the sole form of social control that can and will get rid of existing evils without landing us finally in some form of coercive control from above and the outside. . . ."[97] Social control did not mean top-down administrative planning without public input.[98] Rather, he distinguished the "planned society" from the

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[96] John Dewey, "Social Science and Social Control," in *John Dewey, Later Works, 1925-1953, vol. 6 1931-2*, ed. Jo Ann Boydston (Carbondale IL: Southern Illinois University Press, 1985), 68.

[97] John Dewey, "The Economic Basis of the New Society," in *John Dewey, Later Works: 1925-1953, vol. 13, 1938-9*, ed. Jo Ann Boydston (Carbondale IL: Southern Illinois University Press, 1988), 320.

[98] As Westbrook notes, "Although Dewey spoke of the need for 'social control', he, like many progressives, meant by the term a generic 'capacity of a society to regulate itself according to desired principles and values' and he distinguished democratic control from other forms of control." Westbrook, 188.

"*continuously* plann*ing* society," which would involve "the freest possible play of intelligence."[99] A continuously planning society must involve an iterative relationship between administrative plans and public comment and criticism of these plans. Such feedback addresses not only practical failures of implementation, but administrative misperception or ignorance of relevant interests at play.

Dewey thus offers a vision of administration as a concrete articulation of public purposes, as a means by which social intelligence is operationalized and brought to bear upon social reality. Administration is not merely an instrument of public opinion, but might serve as a context for the formation and elaboration of public opinion, as citizens who engage with the administrative process develop more articulate and sophisticated views of public policy. This account of administration gives a doubled importance to democratic values. First, democratic values create the need for administration: Dewey argues that democracy requires equitable social conditions, which must often be furnished through administrative measures. And second, democratic principles structure administrative processes: Dewey argues for significant interaction between civil society and the state in the performance of administration. At the root of this democratic state remains Dewey's commitment to maximizing individual self-realization in and through the life of the democratic community.

Dewey's account's deficiency is his rather impoverished concept of law, and his related tendency to reduce questions of principle to questions of empirical fact. In a remarkable 1926 essay in the *Yale Law Journal* on "The Historical Background of

[99] John Dewey, "The Economic Basis of the New Society," 321.

Corporate Legal Personality,"[100] for example, Dewey offers a classic legal realist argument that the idea of corporate personality must be divorced from all philosophical notions of personality and made to depend only on a "matter of analysis of facts, not of search for an inhering essence. The facts in question are whatever specific consequences flow from being right-and-duty-bearing units."[101] The various theoretical underpinnings of corporate personality, whether biological, psychological, or metaphysical, are but expressions of social, political, and economic, conflict:

> [T]he underlying controversies and their introduction into legal theory and actual legal relations, express struggles and movements of immense social import, economic and political. . . . Discussions and concepts may have been in form intellectual, using a full arsenal of dialectical weapons; they have been in fact, where they have been of importance, 'rationalizations' of the position and claims of some party to a struggle.[102]

Thus Dewey, after deploying his philosophical acumen to show how different corporate theories have served various social causes, writes theory out of the legal enterprise altogether. Instead, he proposes that we draw a straight line between legal rights and the social reality they express. His axe to grind here is the "old individualism," as expressed in the jurisprudence of the *Lochner* era, which he had attacked elsewhere. "[T]he doctrine of the 'fictitious' personality," he notes, "has been employed, under the influence of 'individualistic' philosophy already referred to, in order to deny that there is any social reality at all back of or in corporate action."[103] Dewey suggests that we eliminate the

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[100] John Dewey, "The Historic Background of the Corporate Legal Personality," *Yale Law Journal* 35, no. 6 (1926): 655-673.

[101] Ibid., 661.

[102] Ibid., 664-5.

[103] Ibid., 673.

"idea of personality until the concrete facts and relations involved have been faced or stated on their own account."[104]

The problem with this empirical analysis is that is unclear from what standpoint we are to understand, critique, and evaluate the social reality of corporate power we confront. Dewey's philosophy elsewhere provides the norms of individual freedom and a communicatively constituted public, which might guide our analysis. But these political-theoretic principles are now divorced from any analysis of legal rights and duties. The latter are a matter of simple fact and a product of social struggle. This legal realist impulse prevents Dewey from seeing law as anything else than an instrument of politics. He therefore radically departs at this point from the Hegelian view, according to which certain kinds of law, such as the private law of property and contract and the public law of administrative regulation and welfare provision, serve as contexts in which individual and collective freedom are produced and reproduced through doctrinal and statutory development. In his enthusiasm to defang the normative claims of law, Dewey misses Du Bois' insight that democratic life has certain legal requisites, which judicial and administrative bodies must provide. Our challenge is to develop an understanding of law that embraces Dewey's notion of the state as an articulation of the democratic public while providing certain normative criteria by which to assess the validity of the ways that law is formed and practiced.

[104] Ibid., 673.

V. Mary Parker Follett's Theory of Creative Administration: Egalitarian Power, Cooperative Law, and Experiential Deliberation

Mary Parker Follett developed a novel theory of the democratic state that complements Dewey's deliberative conception of the state with a normatively grounded theory of justifiable public power. Her account is essential to the Progressive Hegelian theory because of her critique of interest-group pluralism. She insists that democratic administration must retain the normative unity of the state, as a context in which disputes between social interests can be rationally resolved.

Though Follett is less well-known today than the other thinkers I consider in this Chapter, she was a major figure in the Progressive movement and has had lasting impact on theories of public administration and business organization.[105] Political theorists and legal scholars are also beginning to reawaken to her significance.[106] Deeply influenced by the British neo-Hegelians Bernard Bosanquet and T.H. Green, she adapted Hegel's concept of the state and his social conception of individuality to the problem of

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[105] Theodore Roosevelt, Review of *The Speaker of the House of Representatives* by M.P. Follett, *American Historical Review* 2, no. 1 (1896): 176-8; Stears, *Progressives, Pluralists, and the Problems of the State,* 146; Joan C. Tonn, *Mary P. Follett: Creating Democracy, Transforming Management* (New Haven: Yale University Press, 2003), 1; Bryan R. Fry and Thomas R. Lotte, "Mary Parker Follett: Assessing the Contribution and Impact of Her Writings," *Journal of Management History* 2, no. 2 (1996): 11-19; Ricardo S. Morse, "Prophet of Participation: Mary Parker Follett and Public Participation in Public Administration," *Administrative Theory & Praxis* 1 28, no. 1 (2006): 1-32; Keith Snider, "Living Pragmatism: The Case of Mary Parker Follett," *Administrative Theory & Praxis* 20, no. 3 (1998): 274-86; James F. Wolf, *Refounding Democratic Public Administration: Modern Paradoxes, Postmodern Challenges* (Thousand Oaks, CA: Sage, 1997), 280-4.

[106] Jane Mansbridge et al., "The Place of Self-Interest and the Role of Power in Deliberative Democracy," *The Journal of Political Philosophy* 18 no. 1 (2010), 64-100, 71; Benjamin Barber, "Mary Parker Follett: A Democratic Hero," Preface to *The New State* by Mary Parker Follett (University Park, PA: Pennsylvania State University Press, 1998), xiii-xvi; Robert C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (Cambridge: Harvard University Press, 2014), 37.

democratic governance in organized industrial society.[107] Follett gave elegant expression to the American Progressives' democratization of Hegel's political theory, arguing that the state could gain "spiritual authority" only through "its citizens in their growing understanding of the widening promise of freedom."[108] For her, such freedom would be a matter of both public power and of law, since true freedom could only be achieved in social relationships with enabled individuals to realize their capacities.

Follett's theory of the democratic state grew out of a sympathetic critique of British pluralism. Pluralists, like Harold Laski, sought to re-understand social and political organization as composed of various associations, which struggled with one another for political power.[109] Follett wholly accepted the importance of groups as forms of public identity, through which individuals could become conscious of their constitutive relations to others, and thus learn to participate in democratic life. Her concept of politics was based upon what she called the "group principle," the notion that "individuals are created by reciprocal interplay."[110] Democracy was the political correlate of this psychological and philosophical truth because it was the institutional embodiment of the

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[107] Dwight Waldo, "Development of the Theory of Democracy Administration," *American Political Science Review* 46 no. 1 (1952): 94-7. Waldo reports that Lord Haldane once remarked that "had Hegel lived in Boston in 1920, 'he would probably . . . have said something not very different from what Miss Follett says.' " Ibid., 94-5, fn. 31. See also James A. Stever, "Mary Parker Follett and the Quest for Pragmatic Administration," *Administration & Society* 18, no. 2 (1986): 159–77.

[108] Mary Parker Follett, *The New State: Group Organization The Solution of Popular Government* (New York: London: Longmans, Green & Co.: 1918), 333.

[109] See, e.g. Harold Laski, "Foundations of Sovereignty," *Foundations of Sovereignty and Other Essays* (New York: Harcourt, Brace, 1921), 1-29; Harold Laski, *Authority in the Modern State* (New Haven: Yale University Press, 1919).

[110] Follett, *The New State*, 19.

group principle: "To be a democrat is not to decide on a certain form of human association, it is to learn how to live with other men."[111]

While emphasizing the importance of the group in the formation of individual identity, Follet rejected the anarchic consequences of group pluralism as an ultimate political value. On the vision of British pluralists like Laski, the state became only one form of association among others, of equal value to those others, such as neighborhoods, unions, and religious denominations. Follett argued that such pluralism led to an ultimately untenable condition where each association battled with the other, and no higher form of cooperation could emerge.[112] As she explained: "The outcome of group particularism is the balance of power theory, perhaps the most pernicious part of the pluralists' doctrine. The pluralist state is to be composed of sovereign groups. What is their life to be? They are to be left to fight, to compete, or, word most favored by this school, to balance."[113] "The practical outcome of the balance theory will be first antagonistic interests, then jealous interest, then competing interests, then dominating interests—a fatal climax."[114] Follett's concern for the possibility of a "dominating interest" shows her sensitivity with the norm of equality, and her interest in a democratic

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[111] Ibid., 22.

[112] For a comparison between American progressive nationalists like Follett and British pluralists, see Stears, *Progressives, Pluralists, and the Problems of the State,* 156-66. Follett also followed other progressives such as Dewey, Croly, Lippman, and Walter Weyl in believing that "a thoroughgoing commitment to absolute association independence appeared unable to tackle the problems of expertise." Ibid., 157.

[113] Follett, *The New State*, 306.

[114] Ibid., 308.

theory that would make it more difficult for groups with greater resources to have control over the others.

Despite her critique of pluralism, social groupings were nevertheless essential to Follett's democratic theory. This was in large part because she understood freedom in the Hegelian sense as a form of self-relation achieved through social interaction and participation in social life. "That we are free only through the social order, only as fast we identify ourselves with the whole, implies practically that to gain our freedom we must take part in all the life around us: join groups, enter into may social relations, and begin to win freedom for ourselves."[115] Follett, like Hegel, did not mean to say that freedom meant giving up individual particularity to social wholes. Rather, the formation of any whole had to preserve the dynamic interplay of personal difference, never stifling the creative growth of individual personalities. At the same time, the quest for personal freedom could only be achieved through interpersonal recognition: "there is only self-in-and-through-others."[116] This meant that group membership and participation in the political state were essential for individuals to understand themselves as free and to act as such.

Follett developed this Hegelian conception of social freedom into a unique, proto-Arendtian conception of power.[117] In *Creative Experience*, Follett argued that "genuine

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[115] Ibid., 70.

[116] Ibid., 9.

[117] Arendt distinguishes power, on the one hand, and force and violence on the other, in a way that mirrors Follett's distinction between "power-with" and "power-over": Whereas "power springs up between men when they act together and vanishes the moment they disperse," "under the conditions of human life, the only alternative to power is . . . force, which indeed one man alone can exert against his fellow men and of which one or a few can possess a monopoly by

power is power-with, pseudo-power, power-over."[118] Legitimate power only existed where two or more individuals agree on and enact a common purpose. Illegitimate power existed where one group imposes the genuine power they had created among themselves upon another person or group. Thus, she rejected pluralism in part out of a concern that the balance between groups could not be sustained—that one group would achieve illegitimate "power-over" vis-à-vis others. Moreover, even if the balance between groups could be struck, she saw a better path: to achieve a genuine "power-with" amongst the groups that composed the state.

Follett thus sought to use groups in a constructive, rather than antagonistic way. Like Hegel, she argued that various form of local, vocational, and political association served to mediate between individual identities and the state as a whole. But whereas Hegel had ultimately located state sovereignty in the identity of the monarch, Follett adopted the American constitutional principle of popular sovereignty. She thus synthesized Hegelian associationalism with American democratic constitutionalism. She answered the fundamental question of democratic theory—"how can the people be the sovereign power of the state?"—by arguing that "there must be two changes in our state: first the state must be the actual integration of living, local groups, thereby finding ways of dealing directly with its members. Secondly, other groups than neighborhood groups

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acquiring the means of violence. But while violence can destroy power, it can never become a substitute for it." Arendt, *The Human Condition*, 200, 202.

[118] Mary Parker Follett, *Creative Experience* (New York: London: Longmans, Green & Co., 1924), 187.

must be represented in the state: the ever-increasingly multiple group life of today must be recognized and given a responsible place in politics." [119]

The democratic state Follett envisioned was also rooted in the American constitutional tradition of federalism. Like Wilson, she would argue that administrators needed to be attuned to local forms of identity and association, as well as the broader national concerns they were charged with implementing. Interestingly, Follett argued that federalism, properly understood, was an Hegelian principle.[120] She argued that a pluralist form of federalism, in which the states were separate entities with stable rights free from outside interference, was a false federalism: "The political pluralist whom we are now considering, believing that a collective and distributing sovereignty cannot exist together, throw overboard collective sovereignty. . . . The true Hegelianism finds its actual form in federalism."[121] The "true Hegelian" federalism, for Follett, meant that the partiality of state groupings had to be respected as a basis on which individuals developed their free social personalities. States were thus to function as a spatial version of Hegel's corporation. Individuals would develop common purposes—and thus power—on the basis of their shared regional interests and desires. But Follett, like Hegel, did not believe the differentiation of interests at the level of plural social groups could be a stopping

[119] Mary Parker Follett, *The New State*, 245.

[120] As Joan C. Tonn points out, Follett contrasts true Hegelianism with the right-wing Hegelian ideology of the German state in World War I, and argues that "the pluralists had responded to this distorted Hegelianism not only by rejecting the state as currently constituted but also by denying the possibility of collective sovereignty. Follett demurs, being firmly convinced that collective and distributive sovereignty can exist together." Tonn, *Mary P. Follett*, 294.

[121] Follett, *The New State*, 267.

point. The differentiation paved the way for states to find ways of developing "power-with" one another at the national level.

It is clear, however, that Follett did not think the existing federal structure of elected representation was sufficient to realize the constitutive importance of social groups. In part this was because Follett recognized that there were many other forms of association—particularly economic—which transcended and were not captured by geographic representation. Following Hegel, she recognized that individuals develop group affiliations on the basis of their work and material interests, which were accorded no direct political representation. In addition, Follett was skeptical that majority voting really satisfied the democratic impulse towards developing collective power, for "all pure majority power is getting power over. Genuine power is activity between, not influence over."[122] Of course, to the extent that political representation could become a deliberative process of developing new common interests, above and beyond local, state, economic, and other loyalties, it could help to constitute legitimate power. But the "A or B" structure of elections and "yes/no" structure of congressional voting could not fully satisfy Follett's wish for a politics of "both/and." Methods other than election and decision by vote in Congress would therefore be required to achieve a national level constitution of democratic power.

Administrative practices of attempting to discern, evolve, and thus satisfy originally antagonistic interests provided a fruitful alternative. Follett therefore did not believe that administration and democracy were at all opposed principles. She observed that

[122] Follett, *Creative Experience*, 186.

> "the tendency to transfer power to the American citizenship, and the tendency towards efficient government by the employment of experts and the concentration of administrative authority are working side by side in American political life to-day. These two tendencies are not opposed. . . . [A]dministrative responsibility and expert service are as necessary a part of genuine democracy as popular control is a necessary accompaniment of administrative responsibility."[123]

Like most Progressives, Follett had great faith in scientific expertise. The complex problems of modern society could not be solved without empirical insights, which took great training and intelligence to generate. But Follett insisted that such expertise needed to be subject to popular control. And popular control did not mean mere consent, which was merely the illusion of popular sovereignty. As she forcefully warned: "The problem of democracy is how to develop power from experience, from the interplay of our daily concrete activities. The expert cannot dictate and the people consent. This is the voice of the wax doll; it has no reality."[124] Given Follett's understanding that legitimate power could only be generated through shared understandings, administrative expertise could not be deployed paternalistically and by fiat upon a passive public. It would have to arise from a deliberative interchange between the people—disaggregated into groups of already constituted legitimate power—and the administration. Administrative processes that managed to bring about new understandings and conceptions of self-interest among conflicting groups would serve to create an ever-greater democratic power between and amongst the more particular groupings that constituted society.

Follett's concrete suggestion for achieving this administrative generation of democratic power was the "experience meeting" between experts and the public. "The

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[123] Follett, *The New State*, 174.

[124] Follett, *Creative Experience*, 197.

first step in these would be to present the subject under consideration in such a way as to show clearly its relation to our daily lives. . . . The second step would be for each one of us to try to find something in our own experience anything that would throw light on the question."[125] The point of this exercise would be to give administrators a better grasp on the problem at hand by seeing how it was lived and understood by those affected by it. At the same time, for citizens, the process of learning about the problem and thinking about one's own life in relation to it would help them to "begin to observe and analyze our experience much more carefully than we do at present."[126] Experience meetings would be educative for the administrative expert and the citizen alike, thus serving to create public power, not solely within a group of citizens outside of the official institutions of the state, but between those institutions and the people together.

The proposal of experience meetings sheds light on Follett's democratized Hegelian conception of the role and constitution of public opinion. Follett agreed with Hegel that public opinion was often mistaken, and in need of education, but she nonetheless thought that it had much to contribute to the formulation of administrative policy-making: "We no longer declare a mystic faith in a native rightness of public opinion; we want nothing from the people but their experience, but emphatically we want that. Reason, wisdom, emerge from our daily activities. . . . Public opinion must be built from concrete existence."[127] Thus "experience meetings as an experiment in democracy I am urgently advocating. We are not now the master of our own experience. We need an

[125] Ibid., 212-13.

[126] Ibid., 213.

[127] Ibid., 216.

articulate experience."[128] Just as Dewey understood the state as a "public articulated," Follett understood deliberative forms of administration as a means for articulating and rendering coherent individual and collective experience. The method of making experience articulate was to bring it into direct contact with administrative decision-making, by creating occasions for deliberation between citizens and public officials. Through such meetings, individuals would come to think of their personal experience as a matter of public concern, and the activity of the state would become motivated by the reflectively-understood activity of its citizens. In this way,

> [w]hen the process of cooperation between expert and people is given its legitimate chance, the experience of the people may change the conclusions of the expert while the conclusions of the expert are changing the experience of the people; further than that, the people's activity is a response to the relating of their own activity to that of the expert. Here we have the compound interest of all genuine cooperation. Industrial and political organization will take different forms when we understand cooperation not as addition, but as *progressive* interweaving.[129]

Administrative expertise, mediated by the communicated experience of citizens, would stitch together a democratic social fabric out of the discordant but tenacious threads of collective power within society.

Because Follett understood administrative processes as potential sites for the generation of democratic power, she also understood that administrative agencies had an important role to play in the development of democratic law. Follett was deeply influenced by the legal realism of Roscoe Pound in seeing law sociologically, as the

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[128] Ibid., emphasis added.

[129] Ibid., 218.

embodiment of particular constellations of interest and social purposes.[130] However, Follett went beyond this description to put the law at the service of her project of generating public power, as clashing groups found forms of dynamic interaction that could produce power-with. Indeed, she saw in such legal forms as contract rudimentary forms of legitimate power, which distinguished the relationship between employee and employer from slave and master. Follett thus adopted the Hegelian insight that there is a certain kind of limited freedom to be gained from contractual promise, as it establishes a common will between two parties, through which they understand their individual purposes through a shared legal form that makes them socially significant. Following both Hegel and the realists, she realized that such arrangements were often shot-through with illegitimate forms of power-over, or domination. In pervasive circumstances of unequal bargaining power, for example, the creation of a common will through contract might create only the illusion of genuine power, since the will of the one party dictated the terms of the arrangement. Follett followed Pound in arguing that "[t]he key-word for jurisprudence and politics as for psychology is desire." "But," she pointed out, "this

[130] See Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review* 25 (1911): 140-168. Pound himself had an ambivalent relationship to the status of administration in relation to law. Though he initially was skeptical that administration was a proper subject for legal scholarship, given his immersion in the Langdellian case-method at Harvard, by 1919 Pound had acknowledged that the then-growing strength of executive administration in the administration of justice was a functional evolution of the "widening of the circle of interests to be secured through law" and a "condition in which the exigencies of economic life call for a swift moving preventive justice." He saw administration as a setting in which flexible standards, rather than fixed logical rules, guide decision-making. He nevertheless remained anxious of the possibility that administration would stray into ever-more particularistic decision-making, failing to create a stable body of precedent. For this reason he sought to retain and strengthen judicial supervision of administrative action. Roscoe Pound, "Administrative Application of Legal Standards," *Reports of the American Bar Association* 44 (1919): 445-65. Pound would later in life become an ardent critic of "administrative absolutism." Walter Gelhorn, "The Administrative Procedure Act: The Beginnings," *Virginia Law Review* 72, no. 2 (1986): 222.

desire can be the desire of a dominant class or the unifying desires of all classes, all men. It is for us to choose."[131]

For Follett, the choice was clear: a pluralist system ending in anarchy or the dominance of powerful interests would be a society of false, illegitimate power-over. Only a form of law which succeeded in "unifying the desires of all classes, all men" could fairly claim the labels of democracy, freedom, and power. Follett thus proposed that law be reformulated so that it was not a matter of reactively deciding between the claims of one party or the other, but of actively reconceiving the legal interest of parties so as to create the potential for their interests to become harmonious: "Law is to find the way of uniting interests. It is to seek to limit the area of mutually exclusive interests, but it is to do this not by arbitrary declaration, but by suggesting and encouraging those activities which will produce interest that are capable of uniting. Law should seek far more than mere reconciliation; it should be one of the great creative forces of our social life."[132] This did not mean that all legal disputes ought to end in some kind of settlement, rather than a victory for one party or the other. It meant rather a creative jurisprudence, which, by resolving a particular dispute in a forward-looking fashion, would set the stage for future adjudication in which disputes would take on a new, more constructive form.

Follett recognized that administrative agencies were a new and promising setting for this creative, progressive legal development to unfold. She understood administrative agencies to have a certain situational flexibility, which would create manifold opportunities for rethinking and reconstructing social conflict so as to produce the

[131] Follett, *Creative Experience*, 265.

[132] Ibid., 271.

possibility of new, broader forms of public power. Like Hegel and Wilson, she realized that the need for and promise of administration lay in the necessary generality and retrospective origin of legislative enactment:

> When the Interstate Commerce, the Federal Trade or Tariff Act came to be administered, it was found that those laws were made for such varying factors that wide discretion must be used in their administration; that is, as law cannot vary we have administrative commissions which can. Here we see clearly what we have called the evolving situation: the interweaving of varying activity and what is practically, through the possibility of different interpretations by the administrative commissions, a varying law. We have found the basis of creative experience is circular response. Nowhere do we see this more steadily than in the history of law, and here in our administrative commissions is a very striking instance of circular response; between legislative enactment as administered by these commissions and the activity in question.[133]

Administrative agencies apply given rules to varying fields of activity, with different groups at play. They have to find a way to reconcile the statutory universal with different particular facts. As such, they develop contextually sensitive judgments, through which the law develops, becomes more concrete, and goes through periods of creative differentiation and regeneration. There is a process of "circular response" between the administration of law and social activity, in which the law responds to the social facts it regulates, adjusting them at the same time that it adjusts itself. The "facts" it regulates are not, however, mere empirical circumstances or hard-and-fast, transparent interests. Rather, the facts consist in normatively significant conflicts between groups—groups which are often on unequal footing.

Administrators must consult the communicated experience of regulated groups, in order to understand their divergent understandings of the problem at hand. They must,

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[133] Ibid., 292.

through administrative processes, find ways of bringing these differences into a more creative interaction, which would produce greater legitimate power between them. To do so, however, the threat of power-over must always be kept in mind, to ensure that forms of collaboration are not mere domination in disguise. Thus, administrators must be sensitive to questions of social equity, and bring to bear the power of law to facilitate interaction on equal terms, and mitigate inequalities of resources and voice that prevent the creation of genuine democratic power.

This democratic theory of administrative law, however, remains at a high level of abstraction. The last of the Hegelian Progressive thinkers I will consider gives this idealism more definite institutional shape.

VI. Frank Goodnow and the Ideal of the American *Rechtsstaat*

Frank Goodnow brought to bear a specifically legal perspective to the Progressive theory of administration, which helps both to concretize and to delimit the expansive vision of the democratic administrative state advanced by Du Bois, Wilson, Dewey, and Follett. Alongside Ernst Freund,[134] Goodnow was one of the fathers of American

[134] Freund and Goodnow both studied in Berlin under Rudolf von Gneist. Goodnow was Freund's teacher when he earned his PhD in political science at Columbia University, where he would later serve on the law faculty. See Oliver Lepsius, *Verwaltungsrecht unter dem Common Law* (Tübingen: J.C.B. Mohr [Paul Siebeck], 1997), 10-12. Freund took an approach to administrative law, much like Goodnow's, which emphasized the structure of the internal administrative process as a means for regulating the relation between the powers of government and the rights of citizens. More so than Goodnow, Freund was concerned with the dangers of administrative discretion and sought to limit it by more precise legislative guidance that could enable courts to review the substantive content of agency decisions. See Ernst Freund, "The Law of Administration in the United States," *Political Science Quarterly* 9 (1894): 403-425, 419. The question of the substantive and procedural limitation of agency discretion will be treated in more detail in Chapters 4 and 5.

administrative law, whose contributions were nonetheless largely ignored at the time by the legal academy.[135] Law professors trained in the case method, such as Bruce Wyman, treated administrative law as a zone of delegated authority, legitimated by agency expertise, with courts ensuring that agencies did not step beyond their jurisdiction.[136] By contrast, Goodnow learned from his studies with Rudolf von Gneist to focus on the balance between individual rights and the efficient furtherance of social welfare in administrative proceedings. He went beyond his German tutor, however, in emphasizing the administration must be democratically legitimate. By recovering Goodnow's attention to the administrative state as an institution guided by the rule of law, we can find theoretical foundations for developments in administrative law after the Progressive Era, and in the wake of the New Deal. Such foundations provide the basis for better understanding and deepening our institutional and ideal commitment to an administrative state ruled by law.

Goodnow's understanding of administration, like Du Bois, Wilson, Dewey, and Follett's, was grounded in Hegelian understandings of the individual, society and the state. As Christian Rosser argues, through intellectual intermediaries such as John Burgess, Lorenz von Stein, and Gneist, "Goodnow partly anchored his writings in the Hegelian intellectual tradition, sharing its organic notion of the state and its emphasis on an influential administrative apparatus. Goodnow was positive that a body of well-

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[135] Daniel R. Ernst, "Ernst Freund, Felix Frankfurter, and the American *Rechtsstaat*: A Transatlantic Shipwreck," *Studies in American Political Development* 23 (2009): 171-188.

[136] William C. Chase, *The American Law School and the Rise of Administrative Government* (Madison: The University of Wisconsin Press, 1982).

educated public servants would promote individual and collective welfare . . . ."[137] Notions of organicism are important for—but by no means exhaustive of—either the content of Hegel's political theory, or its influence on German and American state theory. No less important is his contribution to the concept of the *Rechtsstaat.* Hegel had emphasized that administration must relate to legislation as particular to the universal; legislation must always authorize, frame and constrain administrative action, while affording public officials discretion to interpret and apply open-textured statutory norms

Following Stein's organic conception of the state, Goodnow distinguished between politics as the expression of the "will" of the state and administration as its "deed."[138] In democratic states, the elected legislative will must control the deed: "Popular government requires that it is the executing authority which shall be subordinated to the expressing authority, since the latter in the nature of things can be made much more representative of the people than can executive authority."[139] This meant that executing authorities must always be constrained by law, and that individuals must have recourse to the judicial process for the violation of their rights as prescribed by

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[137] Christian Rosser, "Examining Frank Goodnow's Hegelian Heritage: A Contribution to Understanding Progressive Administrative Theory," *Administration & Society* 45, no. 9 (2012): 1063-94, 1088.

[138] Frank Johnson Goodnow, *Politics and Administration: A Study in Government* (New York: MacMillan, 1900), 24. Goodnow's debt to Stein is clear not only from his adoption of the distinction between the "will" and the 'deed" but also from this statement in his Preface to *Comparative Administrative Law*, which is nearly identical to the introductory sentences of Stein's *Handbuch des Verwaltungsrechts*: "While the age that has passed was one of constitutional, the present age is one of administrative reform." Iv. Compare to Stein: "we have essentially overcome the epoch of constitution formation, and the focus of further development lies in the administration—not because the constitution has lost significance, but because we have, through the constitution, arrived at administration." Stein, *Handbuch der Verwaltungslehre und des Verwaltungsrechts*, 3 (author's translation).

[139] Goodnow, *Politics and Administration*, 24.

law and the Constitution. Modern administrative law thus recognized the authority of the Executive to interfere with individual liberty and property in order to advance the public interest, but sought to constrain this power under law. Administrative law, then, meant for Goodnow the system of law which "fixes the organization and determines the competence of authorities which execute the law, and indicates to the individual remedies for the violation of his rights."[140]

But administrative law also embodied the broader public purposes of the democratic constitutional state. The aims of administrative law were "governmental efficiency, individual liberty, and social well-being, as interpreted by the body representative of public opinion."[141] Goodnow's interest in administrative law was prompted by the fact that, in America, the question of "social well-being," and the role of the government in its promotion had increased so profoundly in importance with increasing industrialization and rapid urbanization. He thus sought to examine the legal feasibility of administrative efforts regarding commercial regulation and public welfare provision. This survey of administrative law touched on constitutional questions, for the Constitution set boundaries upon the capacity of the Federal government and the states to legislate in the interests of the social welfare. Anticipating the struggles of the 1930s, Goodnow wrote: "[T]he Supreme Court of the United states has really become a political body of the supremest importance. For upon its determination depends the ability of the

[140] Frank J. Goodnow, *The Principles of the Administrative Law of the United States* (New York: Putnam, 1905), 17.

[141] Ibid., 371.

national legislature to exercise powers whose exercise is believed by many to be absolutely necessary to our existence as a democratic republic."[142]

Goodnow argued for an approach to constitutional interpretation which would make it adaptable to the political and social needs of the present, rather than beholden to the political philosophy of the eighteenth century. "What we need more than anything else at the present time is a consistent theory of constitutional interpretation, which will permit our orderly development as a nation in accordance with our economic and social needs, and is not confined within the political and legal conceptions of a century or more ago."[143] Goodnow thus sought to separate the philosophy of classical liberalism—especially, the doctrine of natural rights, the social contract, and the separation of powers—from the project of constitutional interpretation. Like Hegel, he found the doctrine of natural rights to be based upon an implausible, static concept of law and the state. The social contract, from this perspective, was in fact a feudal vestige which had little bearing upon the principles underlying democratic republics. And the strict separation of powers turned an analytically plausible distinction between legislative, executive, and judicial functions into the untenable notion that these functions could be neatly assigned to three separate departments of government.

In each of these Hegelian arguments, Goodnow was not arguing against individual rights or against the rule of law or the Constitution. On his interpretation of the Constitution and early Supreme Court precedents, "the [C]onstitution did, as a matter of fact, give to the [F]ederal government a sphere of action whose limits are to be laid down,

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[142] Frank J. Goodnow, *Social Reform and the Constitution* (New York: MacMillan, 1911), 16.

[143] Ibid., 16.

not as a result of an acceptance of the historical tradition of constitutional power of the last sixty or seventy years, but rather as a result of consideration of the present needs of the country."[144] The generality of certain clauses, particularly regarding the Federal government's power to regulate commerce,[145] enabled the abstract commands of the Constitution to be adapted towards present understanding and circumstances. Goodnow also found flexibility in the constitutional scheme of the separation of powers, insofar as Congress might delegate legislative powers to executive agencies, so long as it, "lays down the general principles which will control the subject and question"—principles which a court could use to review the legality of administrative action in the case of infringement of private rights.[146]

Goodnow likewise argued that the individual rights of the Constitution could and should be adapted to the increased administrative needs of the present, through the increased use of administrative procedural rights rather than substantive review of agency decision-making. Here was perhaps Goodnow's most far-sighted reform proposal—one which has been strangely overlooked in the scholarship.[147] Goodnow began, again, by

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[144] Ibid., 209.

[145] U.S. Const. Art. I, sec. 8, clause 3.

[146] Ibid., 216.

[147] Jerry Mashaw quotes at length from Goodnow to describe the domain of administrative law "from the perspective of nineteenth century experience." He argues that "Goodnow . . . got it almost right" in describing the three interests advanced by administrative law: governmental efficiency, individual rights, and democracy. But Mashaw says that, amongst other problems, Goodnow failed to understand "the degree to which any one of these three purposes can be served by techniques that he assigns to alternative forms of control." Jerry L. Mashaw, "Recovering American Administrative Law: Federalist Foundations, 1787-1801," *Yale Law Journal* 115 (2006), 1256-1344, 1264-65. Goodnow's proposal about administrative notice and hearing procedures as a partial substitute for judicial process seems to me an important recognition of overlaps between institutional purposes and methods of control. Moreover, his criticism of too

attempting to separate constitutional rights from classical liberal political philosophy and its institutional ideals. He observed that the judicial interpretation of the principle of due process was too bound up with a no-longer-existing society: "The conception of the due process of law required by the fifth and fourteenth amendments in order that any person may be deprived of his life, liberty, or property, is based more than it should be on the simple conditions which existed when the country was established."[148] Goodnow complained that the immediate availability of judicial review of the determinations of administration officers made administrative more cumbersome and inefficient. But he acknowledged that judicial review was motivated and justified by the "informality of existing administrative procedure."[149]

> When we develop an administrative procedure which is reasonably regardful of rights, e.g. notice and a hearing to the person affected by the administrative determination, it may well be that the courts will change their attitude and come to the conclusion that the changed and complex conditions of modern life . . . should have an effect both on the constitutional rights of individuals and on the powers and procedures of administrative authorities.[150]

Goodnow thus argued that the proper resolution of the conflict between administrative efficiency and judicial control was to create administrative hearings that would protect the rights of individuals. The immediate focus of the passage is on administrative adjudications that would satisfy the requirements of due process in cases where administrative action infringed on a liberty or property interest. But Goodnow's reference

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rigid a separation of powers indicates that he did not see these three principles as mapping cleanly onto three departments of government, even if he speaks that way at one point in the text.

[148] Goodnow, *Social Reform and the Constitution*, 230.

[149] Ibid.

[150] Ibid., 231.

to "persons *affected* by the administrative determination" suggests a broader application, since it would cover not only those who have not suffered harm to their property rights, but the wider class of persons who have a stake in administrative outcomes. This more inclusive understanding of affectedness aligns with the participatory administrative practices advocated by Wilson, Dewey, and Follett. Combined with Follett's insistence on the importance of the group principle as a form of social organization, Goodnow's proposal would require that affected groups have legally-enforceable opportunities to challenge and shape administrative action.

Goodnow thus offers a picture of the American *Rechtsstaat* that complements the democratized administrative theories of Du Bois, Wilson, Dewey, and Follett. He lays out with greater clarity the legal restraints that need to be placed upon administrative action on behalf of the democratic community. Administrative action must be authorized by a constitutional provision and by a statute that empowers the agency. Individuals and groups whose legal rights or interests have been infringed by agency action need to have access to administrative procedures where they claim voice their complaint. The turn to internal administrative processes, including notice and a hearing, also has the potential to specify the ways in which administration should be sensitive to public opinion. If affected individuals and groups have the opportunity to contribute their perspective to the formulation of agency regulations, and if the courts have some capacity to ensure that these perspectives are duly taken into account in administrative decision-making, then administrative procedure can become a central avenue for the elaboration and specification of democratic will. The notion of the public therefore becomes concretized

in those affected groups that contribute to the administrative formulation of policy. In and through administrative procedure, the inchoate public can become articulate.

VII. Conclusion

Without the background of Hegelian political theory which they shared, the thought of Du Bois, Wilson, Dewey, Follett, and Goodnow might appear only loosely associated by a set of common concerns. But when we consider this set of thinkers through the lens of Hegelian political thought, it becomes possible to reconstruct a coherent picture of the Progressive state. For they each drew from Hegel the basic notion that the state could provide the conditions for modern liberty, and they each sought to apply and adapt Hegel's ideas to a democratic context. Du Bois teaches us that the American state has an emancipatory task, providing the requisites for free and equal citizenship through the administrative provision of legal and social rights. He adapted Hegel's interpretation of liberalizing administrative reform in Prussia to the context of the Reconstruction South, showing how the Freedmen's Bureau set about to construct an egalitarian civil society in the wake of slavery. Wilson, though totally opposed to Du Bois' racial politics, nonetheless shared with him a commitment to the administrative construction of a democratic society. Concerned not with problems of racial domination, but rather with monopoly, unfair competition, and degrading working conditions, he argued that civil service reform would equip the American state to grapple with the social condition of industrial society. Whereas Du Bois had emphasized the administrative provision of democratic prerequisites, Wilson underscored the need for administrative structures that were permeated with popular thought. For Wilson, administration mediates

between the formality, retrospectivity, and stability of law, and the evolution, progress, and transformation of an organic American people.

Dewey translated Wilson's language of organicism into the concept of the democratic public. The public is formed through discussion and debate, and articulated in the institutions of the state. The state must therefore provide the resources necessary for the rational and equal formation of public opinion, and also open up administrative decision-making processes to the influence of such opinion. Follett clarified the norms of public participation in the Progressive state and explained the way that law ought to be understood within it. She argued that individual freedom can only be achieved in and through group membership; that the groups who compose the democratic public must engage with one another on equal terms, so that they together exercise "power-with" rather than wield or suffer under "power-over." She saw administrative law as a means of working out egalitarian forms of cooperation and social development. Goodnow then concretized this suggestion by adapting the ideal of the *Rechtsstaat* to the American context: he argued that the administrative "deed" must remain subject to the political "will" of legislation, and must afford the opportunity for affected individuals to participate in the administrative process where legislative norms are interpreted and applied.

Together, these thinkers outline a vision of a state in which the public sphere becomes politically efficacious in and through administrative governance. The state does not serve merely as a neutral channel for the application of public opinion to society. Rather, it structures the formation of public opinion through the provision of institutional

requisites, and through rational deliberation between private citizens and the administrative officials who act in their name.

This concept of the Progressive state is not without its tensions. As I noted in relation to Du Bois and Wilson, administrative establishment of democratic requisites may be undermined by administrative decision processes that empower the voice of inegalitarian, uninformed, and distorted public opinion. On the other hand, the more firm and lasting the equalizing commitments of public law, the less responsive they can be to alterations in public opinion. It is nonetheless impossible to conceive of the requisites for democracy and the contexts for democracy apart from one another. Administrators can only fully grasp what individuals require to participate in democratic life by consulting the public's self-understandings. And we can only expect the public to participate rationally in the state if individuals enjoy the institutional and material background conditions to do so. The impoverished conditions for democratic life and the lack of public control over administrative government must therefore be remedied through creative institutional solutions.

The remainder of this dissertation will work out this conception in detail. In the next chapter, I will flesh out the idea of the Progressive state outlined here in connection to deliberative democratic theory and the legal process school. In Chapter 4, I will describe the proper extent and limits of presidential and legislative control over administration. In Chapter 5, I will explain the functions and note the deficiencies of judicial review of administrative action. In Chapter 6, I will trace the development of Progressive forms of administration from the New Deal to the Civil Rights Era.

Chapter 3

From Hegelian Progressivism to the Deliberative Administrative Process:

Normative Foundations of the American Administrative State

I. Introduction

In Chapter 1, I traced the development of German concepts of administration from the ethically motivated vision of Hegel to the various instrumental conceptions developed by Weber, Schmitt, and Habermas. In Chapter 2, I showed how the American progressives took up Hegelian ideas which would soon lose their purchase in their country of origin. Like Hegel they embraced an active role for the state as an emancipatory institution; they understood administration as a process of addressing social inequality and antagonism through the elaboration of legal norms and the exercise of practical judgment. Unlike Hegel, however, they explicitly engaged with the problem of democratic legitimation in relation to administrative government. For the progressives, the goal was to conceive of an administrative state which would engage the people in specifying and implementing the requirements of freedom. In this chapter, I connect this tradition of American Hegelian administrative thought to the developments in legal and political theory that followed. The Hegelian progressive theory augments the procedural emphasis of such theories with a substantive concern: to dismantle the social barriers that thwart individual agency, and impair the deliberative integrity of the democratic public.

I begin with the fundamental dichotomy between state and civil society to frame the context for administration. The modern American state is defined by its critical, activist posture in relation to society. Administration is the form of rule functionally required by a state which actively shapes society rather than reactively securing its existing form. I show how this activist state must draw its democratic legitimacy from the deliberation of free and equal citizens. The state is legitimate to the extent that it provides fora in which individuals participate in the specification of legal norms, such that they can recognize the policy of the state as their own. This criterion of democratically legitimate state action has key institutional consequences. It requires conceiving of the separation of powers not fundamentally as a constraint on state power, but as an institutional prism through which the exercise of state power takes on rational form. And it requires conceiving of administration itself as a potential site for public deliberation and the state's recognition of social needs and values.

II. Activist State and Civil Society

Perhaps Hegel's greatest contribution to social theory was his distinction between the political state and civil society. Civil society primarily designates the realm of the economic market. This system serves individuals' freedom by creating a social space in which they can satisfy one another's needs and thus recognize their own economic liberty in contractual interactions with others. But while property and contract serve as the foundation for a basic, negative form of liberty, they are also the source of deep social inequality, antagonism, and domination. The operation of the marketplace serves to separate individuals into economic classes and interest groups, and to create vast

disparities of wealth, at the same time as it fails to uplift many individuals from a condition of relative poverty. While individuals find a degree of positive freedom in the associational life which attends the economic organization of civil society, their capacity for self-determination remains imperiled by the failure of market relations to supply the material requisites for personal development, and to enable individuals fully to recognize one another as free and equal subjects.

The state stands in contrast to civil society as an embodiment of common ethical values. Hegel understands the state as the "actuality of concrete freedom."[1] Whereas the economic liberty of persons in civil society makes them materially unequal in relation to one another, and thus partially un-free, in the state they are free and equal as members of the political community. The Hegelian view does not seek to supplant the private orderings of civil society with the collective will of the political community; rather it insists that civil society requires, as its counterpart, a political order where public claims about the justifiability of the prevailing social order can be expressed, and given binding force. As Robert Pippin notes, in Hegel's theory of the state, "the private relations among civil society members are not being absorbed or denied in favor of state-organism but . . . the possibility of such self-interested interactions will have to appeal ultimately to a domain of over-arching law and justification wherein participants count as equal rational agents."[2] Though persons' social and economic status binds them to conditions not of their choosing, and prevents them from perceiving their deeds as truly their own, their political freedom in the state recognizes and institutes their foundational human equality.

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[1] Hegel, *Philosophy of Right*, § 260.

[2] Pippin, *Hegel's Practical Philosophy*, 251.

Hegel's concept of the dualism of state and society has had such purchase not because of some accident of intellectual history, but because of its adequacy to the shape of modern social life. As Forsthoff put it,

> Hegel . . . posited society as the system of needs against the state as the realization of the ethical idea. But the distinction between state and society is not bound to the philosophy of Hegel. It designates the fundamental structural elements of statehood, as it arose and had to arise under conditions set by the French Revolution. Insofar as the Revolution eliminated birth and vocation as the basis for cultivation and the existence of a privileged class, the possibility arose for the development of a social order in which inequality and freedom could be appropriately combined. The inequality which distinguishes life in society finds its dialectical correspondence in political equality. Freedom has its protection in the state.[3]

In the American case, the touchstone for modern political conditions is not, however, the French Revolution itself, but rather the Enlightenment ideals of liberty, equality, and rational political order which our revolution shared with theirs. Though the Declaration of Independence etched these universal values into American political identity, American civil society long remained bound to pre-modern and feudal vestiges, from slavery to the law of master and servant at common law. American political development has increasingly subjected these forms of private domination to scrutiny, control, and transformation by the public and its government.[4] Since the Civil War, more and more domains of life which were once considered private elements of social order, such as marriage, labor, and housing have become a matter of common concern, and the proper subject matter for questions of justice. Our free and equal political status within the state

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[3] Ernst Forsthoff, *Der Staat der Industriegesellschaft*, 21-22 (my translation).

[4] See, e.g. Karren Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (Cambridge, UK: Cambridge University Press, 1991).

progressively places greater requirements on the life we experience as members of civil society.

Understanding this reality of modern political life requires grappling with the state itself as an object of analysis, as an active force, and as an agent of social transformation. The state that progressives thrust into public consciousness in the early twentieth century became submerged in American public and intellectual consciousness in the pluralist public philosophy of the mid-twentieth century. But political science research has in the last decades again recognized it as a discernible object for theoretical and empirical analysis, with qualities that distinguish it from other forms of social order.[5] To date, however, research on the state typically relies upon a Weberian conception, which emphasizes its monopoly on the means of violence, its bureaucratic organization, and its institution of a legal order perceived by its subject population as legitimate.[6] Normative political theory, as a distinct intellectual enterprise from empirical political science, then posits certain standards which ought to regulate the behavior of this morally neutral leviathan. A Hegelian approach, by contrast, sees the state as an

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[5] See, e.g. Peter B. Evans, et al., *Bringing the State Back In*; Eric A. Nordlinger, *On the Autonomy of the Democratic State* (Cambridge, MA: Harvard University Press, 1981); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities*, 1877-1920 (Cambridge, UK: Cambridge University Press, 1982); Karen Orren and Stephen Skowronek, *The Search for American Political Development* (Cambridge, UK: Cambridge University Press, 2004), 78-119; *Daniel Carpenter, The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation* 1862-1928 (Princeton, NJ: Princeton University Press, 2001); James C. Scott, *Seeing Like A State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: London: Yale University Press, 1998); Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal* (Cambridge, UK: Cambridge University Press, 2012).

[6] For an excellent example of such a Weberian approach in legal scholarship, see Nicholas Parrillo, "Leviathan and Interpretive Revolution: The Administrative State, The Judiciary, and the Rise of Legislative History, 1890-1950," *Yale Law Journal* 123 (2013), 267-411.

institutionalization of ethical commitments. The political and legal equality individuals experience as members of the state affords a perspective distinct from their unequal positions within civil society, such that the pathologies of the social order can the understood, critiqued, and remedied.[7]

The first key question posed by Hegel's concept of the dualism of state and society is to what extent political freedom demands the transformation of civil society so as to reduce or eliminate the elements of inequality and domination which reside there. Hegel himself recognized that the political freedom individuals enjoy through the state meant that the public authorities must address certain inequalities of civil society through the provision of public goods, social welfare, and the amelioration of poverty.[8] Marx nonetheless saw such palliatives as insufficient, arguing that "political emancipation" was

[7] Hegel's claim is not that civil society is only a context of domination, and the state always and only a source of freedom. As a historical matter, the state, as well as the civil society it regulates, can be and has been a source of violence, domination, inequality, and injustice. Rather, the claim is that a fully developed state is one which recognizes and institutes the preconditions for individual self-determination. Whether Hegel's approach affords a perspective from which to critique and reform extant political circumstances nonetheless remains a contested question. For an answer in the negative see, e.g. Pippin, *Hegel's Practical Philosophy*, 272. I, however, follow the Axel Honneth, answering in the affirmative: "if we take a closer look at Hegel's procedure, we will see that he did not merely wish to affirm and reinforce current practices and institutions, but also to correct and transform them. In the course of normative reconstruction, the criterion of 'rationality' applied to those elements of social reality that contribute to the implementation of universal values not only asserts itself in the uncovering of already existing practices, but also in the critique of existing practices or in the attempt to anticipate other paths of development that have not yet been exhausted." Axel Honneth, *Freedom's Right*, 8. This approach is similar to Habermas' idea of rational reconstruction: "A reconstructive sociology of democracy must therefore choose its basic concepts in such a way that it can identify particles and fragments of an 'existing reason' already incorporated in political practices, however distorted they may be." Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* trans. William Rehg (Cambridge, MA: MIT Press, 1996), 287.

[8] Jeff Jackson, "The Resolution of Poverty in Hegel's 'Actual' State," *Polity* 46, no. 3 (2014).

but a one-sided and false form of freedom next to true, "human emancipation."[9] We need not follow Marx's claim that political freedom is illusory without full material equality, and the dissolution of the separation between society and state, in order to recognize that political freedom, however defined, has social pre-requisites. To what extent, then, does political freedom require social freedom in order to be a reality? How much social inequality can political equality tolerate before our political emancipation becomes purely chimerical?

If the purpose, structure, and functions of the state are so aligned as to preserve existing regimes of property and contract, or other deeply embedded elements of the existing social order, then the state is precluded from the outset from interventions which abrogate these entitlements. The United States has shifted over the course of the last century from a political structure designed and functioning to preserve an existing order civil society, to one which intervened in and transformed civil society in pursuit of publicly sanctioned purposes. As progressive social legislation began to crop up the in early twentieth century, the courts at first reacted by attempting to preserve the local

[9] Karl Marx, "On the Jewish Question," in *The Marx-Engels Reader*, ed. Robert Tucker (New York: W.W. Nortion, 1978), 26-52; The distinction he draws there in critiquing the call for Jewish emancipation is anticipated in his critique of Hegel's theory of the state: "Hegel has declared the class differences of civil society to be non-political differences and civil and political life to be heterogeneous in character, even antitheses. . . . The individual must undertake an essential schism within himself. As an actual citizen he finds himself in a two-fold organization: (a) the bureaucratic, which is an external formal determination of the otherworldly state, of the executive power, which does not touch him and his independent actuality; (b) the social, the organization of civil society, within which he stands outside the state as a private man, for civil society does not touch upon the political state as such." Karl Marx, *Critique of Hegel's 'Philosophy of Right'*, trans. Annette Jolin and Joseph O'Malley (Cambridge, UK: Cambridge University Press, 1970), 77.

lifeworld from bureaucratic management and interference.[10] But we no longer recognize the categorical boundary between private and public spheres on which the *Lochner* court relied. As Jerry Mashaw observers, the "ratification of state social legislation and of the New Deal signaled the jurisprudential rejection of the classical liberal idea of a private domain of 'property' and 'liberty.'"[11] These constitutional developments enabled further interventions into civil society to redress racial and sex discrimination.[12] In describing this now entrenched "activist state," Bruce Ackerman highlights a "special feature of our self-consciousness: an awareness that the very structure of our society depends upon a continuing flow of self-consciousness decisions made by politically accountable state officials."[13] We have progressed from a state which merely perceived, understood, and enforced existing social realities, to a state which transforms such realities in recognition of the values and needs of a self-conscious public.

III. The Activist State as the Administrative State

The activist state is not distinguished merely by its transformative role in society, but by certain institutional features. In short, the activist state is a necessarily

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[10] Robert C. Post, "Defending the Lifeworld: Substantive Due Process in the Taft Era," 78 Boston Law Review 1489 (1988).

[11] Jerry Mashaw, "'Rights' in the Federal Administrative State," *Yale Law Journal* 92 no. 7 (1983): 1129.

[12] Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964).

[13] Bruce A. Ackerman, *Reconstructing American Law* (Cambridge, MA: Harvard University Press, 1984), 1.

administrative state. As Mirjan Damaska has argued,[14] the activist state contrasts with reactive state, which attempts to restore and preserve an existing social order. Whereas the reactive state is functionally aligned with a coordinate model of state authority, the activist state is functionally aligned with a bureaucratic form. This is because a coordinate model, exemplified in the common law system of judicial control, overlapping authorities, and analogical reasoning, is not well suited for the institution of programmatic changes in the existing social order. A hierarchical, bureaucratic model enables policy-makers, such as legislators, executives, and agency chiefs to determine desirable social goals at a high level of abstraction, and command their subordinates to shape the outcomes in particular cases to achieve the desired results. The activist state therefore relies upon administrative agencies which implement policy goals in a unified and centralized manner, so that political goals are not frustrated by decisions of various and conflicting jurisdictional authorities.

As we shall see, Damaska may draw this contrast a bit too sharply. Some forms of coordinate authority, in particular a certain conception of the separation of powers, and deliberative democratic participation in administration, can improve the functionality and normative legitimacy of the activist state. It remains the case, however, that bureaucratic organization is an indispensable feature of social transformation. Thus the common law of property and contract was constrained by regulatory regimes such as the Interstate Commerce Commission, the National Labor Relations Board, and the Security and

[14] Mirjan A. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986).

Exchange Commission.[15] Jim Crow fell at the hands not only of the Federal courts, but of the Equal Employment Opportunity Commission, the Department of Justice, and the Department of Health, Education and Welfare.[16] Such profound, purposeful reorderings of society usually require the consistent, intelligent application of public power through administrative agencies if they are to succeed.

The functional alignment between administrative institutions and the activist state can be understood in relation to the kinds of problems it solves. As Lon Fuller has argued, adjudication is a technique of social regulation most suited to a regime of reciprocity, meaning one of contractual agreements between individuals over the disposition of property.[17] Disputes concerning simple, binary exchanges can be resolved through the reasoned elaboration of legal principles on the basis of arguments offered by the parties to the judge. The judge can resort to settled rules and analogous cases to determine how entitlements should be allocated between the parties. This kind of reasoning functions best when it relies upon the intrinsic, intelligible structure of an existing pattern of social life, which it then attempts to re-establish when actors violate that status quo. Ernest Weinrib has thus observed that common law reasoning,

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[15] See Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, MA: Harvard University Press, 1990), 18-24.

[16] See Bruce Ackerman, *We the People, Volume 3: The Civil Rights Revolution* (Cambridge, MA: Harvard University Press, 2014), 154-200.

[17] Lon Fuller, "The Forms and Limits of Adjudication," *Harvard Law Review* 92 (1978): 353-409.

preoccupied with problems of corrective justice, "renders concrete and explicit an order which is already there."[18]

When, however, the democratic public, acting through the state, seeks to implement a common aim, the implementation of this aim cannot function as well through argumentation before a court. This is because the problems with which the activist project grapples tend to be polycentric, meaning that a change in one element of the issue will affect all the others. The problem must be managed as a whole, so that all the parts cohere to produce the desired effect. The kind of analogical, individually based, and oppositional reasoning of the adjudicative process is usually ill-suited to the holistic, systematic thinking required by activist intervention. This does not mean that administration is devoid of any form of reasoned elaboration, but rather that the form of reasoning is more structural than analogical, socially aggregate rather than case-oriented. It is a form of reasoning which requires what Fuller calls "managerial intuition":

> The suggestion that polycentric problems are often solved by a kind of 'managerial intuition' should not be taken to imply that it is an invariable characteristic of polycentric problems that they resist rational solution. There are rational principles for building bridges of structural steel. But there is no rational principle which states, for example, that the angle between girder A and girder B must always be 45 degrees. This depends on the bridge as a whole. One cannot construct a bridge by conducting successive separate arguments concerning the proper angle for every pair of intersecting girders. One must deal with the whole structure.[19]

The managerial structure of the administrative state also corresponds to the managerial structure of the economic civil society it regulates, namely, its corporate

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[18] Ernest J. Weinrib, "The IntelligIlity of the Rule of Law," in *The Rule of Law: Ideal or Ideology,* eds. Allan C. Hutchinson and Patrick Moynihan (Toronto: Carswell, 1987), 72.

[19] Fuller, "Forms and Limits," 403.

form. As Ronald Coase has argued, where transaction costs prevent economic actors from internalizing all of the social costs imposed by productive activity, two initial solutions present themselves. The first is to bring the relevant actors under the umbrella of a single firm, such that managers can exercise greater discretion in coordinating activities and avoid the costs of organizing all activity through the contractual allocation of entitlements.[20] The second solution is for the government to act as a "super firm": "instead of instituting a legal system of rights which can be modified on the market, the government may impose regulations which state what people must or must not do."[21] The government may then externally assess and attempt to mitigate costs which are imposed by market activity. Transaction costs, as Coase recognized, are always present, and over time, society has availed itself of both solutions to the externalities they create. Economic actors, often through the corporate charters granted by government, have sought to internalize costs in large firms, and the state itself has undertaken regulation to reduce and compensate for social costs created by market transactions. While the administrative state takes on many functions, one of its most important has been to address those "market failures" where transaction costs prevent the internalization of social costs, and administrative action is required to address the problem, either by reducing transaction costs or by redressing the externalities they create.[22]

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[20] Ronald Coase, "The Nature of the Firm," *Economica* 4, no. 16 (1937): 386-405.

[21] Ronald Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 no. 1 (1960): 17.

[22] Susan Rose-Ackerman, *Rethinking the Progressive Agenda: The Reform of the American Regulatory State* (New York: The Free Press, 1992), 6-7.

The analogy between the economic firm and the public administrative agency is that both rest in part upon forms of managerial reason. The administrative manager, like the business manager, looks to a set of interrelated activities and attempts to organize and regulate them according to a certain end. The distinction between these two entities is that, whereas the firm pursues profit, and is disciplined by the market, the administrative agency pursues political aims and is disciplined by the political process. The determination of administrative aims and the political discipline of administration are central themes which will be explored at greater length in chapter 4. But for now, the important point is that the managerial orientation of private firms and state agencies makes the former suited to regulation by the latter. Both the agency and the firm are characterized by aggregate, supra-individual forms of social organization, and thus are functionally aligned with one another in receiving and issuing rules, standards, and plans.

As a historical matter, then, it is not a coincidence that the administrative state arose with the growth of corporate power.[23] John Dewey and Mary Parker Follett were keenly aware of this aspect of modern state-society relationships, arguing that a new individualism of group membership had supplanted the old individualism of contractual liberty between natural persons.[24] Public and private action in the twentieth century became increasingly oriented around supra-individual entities and sectors of economic activity. Hegel had already offered an early formulation of this development with his

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[23] Theodore Lowi, *The End of Liberalism: The Second Republic of the United States*, 2nd edition (New York: W.W. Norton, 1979), 22-31; R. Jeffrey Lustig, *Corporate Liberalism: The Origins of Modern American Political Theory*, 1890-1920 (University of California Press, 1986), 78-195; Skowronek, *Building a New American State*, 137-8, 248-84; Kornhauser, *Debating the American State*, 37-8.

[24] John Dewey, *Individualism Old and New*, 8-9; Mary Parker Follett, *The New State*, 19.

argument that civil society was composed not only of individual economic actors, but of "corporations," or trade associations.[25] While Marx criticized this aspect of Hegel's theory as a medieval relic,[26] it is more accurate to say that Hegel anticipated how certain feudal elements would be reintroduced in modified form as capitalism developed.[27] Thus, pluralists in England and America would draw on the medieval legal histories of Otto von Gierke to describe a society organized not along the dualism between state and society, but around relatively autonomous and competing interest groups, among which the state was only one. Pluralists, however, were often explicitly opposed to Hegelian conceptions of the state, seeing the elevation of the state to a privileged normative position as threatening to democratic life.[28] Follett and Dewey, while agreeing with the pluralists that society is composed not only of individuals but of conflicting social groups, would insists with Hegel upon the integrity of the state as a unifying actor standing in a superior normative position to the interest groups that compose civil society.[29]

Mancur Olson's pioneering work in *The Logic of Collective Action* offers positive theoretical support for the Hegelian view of state activism advanced by these progressives. The pluralist theory of group balancing assumes that the members of groups will as a rule act to defend the interests of their own groups. But Olson shows that certain

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[25] Hegel, *Philosophy of Right* §§250-55.

[26] Marx, *Critique of Hegel's 'Philosophy of Right,'* 114.

[27] On the links and discontinuities between medieval and modern corporate theory, see David Ciepley, "Beyond Public and Private: Toward a Political Theory of the Corporation," *American Political Science Review*, 107, no. 1 (2013), 139-158.

[28] See, e.g. Harold J. Laski, *The State in Theory and Practice* (New York: The Viking Press, 1935), 52.

[29] See Stears, *Progressives, Pluralists, and the Problems of the State:* 155-66.

kinds of organized interests, such as industrial interest groups, are better able to advance their collective interest than large, diffuse, and latent interest groups, such as consumers. If the collective action problems of certain social interests are to be overcome in the interest of social equality, then the state must occupy a superior position above and beyond the competition of interest. It compensate with its coercive authority and deliberation-reinforcing capacities for the collective action problems confronted by more diffuse social interests.[30]

The pluralist theories which dominated mid-century American political science and jurisprudence lost sight of the state as a distinctive sort of social actor whose general, public-regarding obligations distinguished it from the social groups that operated within its jurisdiction. As Theodore Lowi has argued, "American pluralists had no explicit and systematic view of the state. They simply assumed it away."[31] The pluralists' blindness to the important sociological and normative distinction between state and civil society has threatened the legitimacy of the activist state while at the same time preserving the

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[30] Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* (New York: Schocken, 1971). Mancur Olson briefly engages with Hegel in the text, arguing that the state is much like a large union in using coercion to provide public goods: "Some have supposed, with Hegel, that the state must be different in all of the more important aspects from every other type of organization. But normally both the union and the state provide most common or collective benefits to large groups. Accordingly, the individual union member, like the tax payer, has no incentive to sacrifice any more than he is forced to sacrifice" Ibid., 91. The important difference, from a Hegelian perspective, between the labor union and the state is that the state is the social and political condition of possibility of lower level forms of association. Not only through the provision of public goods, but through the establishment of a common legal and constitutional culture, the state creates an institutional context where other forms of association can flourish. Moreover, the state can induce sentiments of mutual regard and recognition between individuals as citizens, rather than merely as economic actors, which can complicate and counterbalance the logic of self-interest which otherwise would pervade a society organized purely around market incentives.

[31] Lowi, *The End of Liberalism*, 40.

impression that modern society is a self-correcting regulatory system. By concealing the state's existence behind a process of pluralistic bargaining, pluralism failed to identify what sort of values, structures and procedures are necessary to ensure that the activist state may justifiably exercise its coercive power over civil society. The increasing interest in the state as an object of analysis in political science since the 1980s puts the anti-statist pluralist tradition in question. But such research has not directly grappled with the question of how the state might legitimately exercise coercive power. The first step in retrieving an adequate theory of the state is therefore to identify the agent who vests it with authority. If, as Fuller suggested, the administrative state is akin to a bridge builder, who determines that the bridge must be built? What agent determines which chasms, inequalities, and antagonisms in civil society must be spanned through the intelligent application of political power?

IV. The Progressives' Democratization of the Administrative State

Hegel's vision of the administrative state was not a democratic one. He disparaged popular sovereignty as a "garbled notion," which, if its kernel of truth was correctly apprehended, resulted in his preferred vision of constitutional monarchy.[32] He likewise had a deeply ambivalent attitude towards public opinion, which he thought to contain both substantial truth and much falsity. For Hegel then, the normative superiority of the state to civil society arose from its institutional rationality, which refined and educated public opinion. The state reconstituted civil society in the interest of freedom by

[32] Hegel, *Philosophy of Right*, §279.

virtue of the universalizing characteristics of law and the superior judgment of public officials. Political freedom for Hegel was not principally a participatory kind of freedom, but rather a passive, customary and habitual experience of equality, independence, and constitutional patriotism in the context of the universal laws and just administration of the state.

The American context would never be hospitable to this anti-democratic aspect of Hegelian state theory. The Preamble to the Constitution affirmatively established that the origin of political authority lay in "We the People."[33] The genius of the Federalists' constitutional theory was to deny that the consent of the several States was the foundation of national authority. Instead, "the Federal and State governments are but different agents and trustees of the people, instituted with different powers, and designated for different purposes."[34] American government at all levels found its legitimate source in the consent of the people, in their affirmative authorization of the constitutional order, and on their attachment to its institutions. On James Madison's vision, neither historical continuity, nor shared national culture, nor the prior legitimacy of local sovereign governments could be the source of constitutional authority, for "the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived."[35] Shifts in the extent, location, and

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[33] U.S. Const. Preamble.

[34] James Madison, "The Federalist no. 46," in Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961), 315.

[35] Ibid., no. 49.

proper subject-matter of political power, then, could only emerge from deliberate shifts in the democratic public's perception of its problems, needs, and values.

The evolution in public ideas that brought on the definitive constitutional moment of the New Deal began in earnest in the Progressive Era.[36] The ideas of thinkers like Wilson, Dewey, Follett, and Goodnow were theoretical reflections of a society experimenting with the extension of administrative power deeply into the reaches of social life.[37] Here, Hegel's ideas proved indispensable. These progressives drew on his social conception of freedom as a process personal development which was only possible on the basis of certain legal institutions, civil associations, and material goods. They found that Hegel's critique of civil society presaged the socially destructive tendencies, as well as emancipatory possibilities, of industrial capitalism. Finally, they found in Hegel's idea of the state the possibility for a thoroughgoing regulation of society in the interest of the ethical value of individual freedom.

The audacious innovation of progressivism, however, was to attempt to meld Hegel's critique of civil society, conception of freedom, and robust concept of state authority, with the American constitutional ideal of popular sovereignty. This synthesis

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[36] As Stephen Skowronek notes, "progressivism was the irresistible source of reform ideas for the New Deal. It was the voice of the people against the interests, the gospel of social improvement through government action, the democratic response to corporate capitalism, the authority of experts, the promise of economy and efficiency. Roosevelt's personal history beckoned him to realize the progressive reordering that had eluded both his cousin Theodore Roosevelt and his mentor Woodrow Wilson." Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton*, (Cambridge, MA: Harvard University Press, 1997 [1993]), 303.

[37] As Martin Shapiro remarks in explaining the origins of the Administrative Procedure Act, "One basic element of the New Deal Ideology was a dedication to that most American cluster of political Ideas—the pragmatism of James and Dewey that engendered and became combined with the notion that powerful central political authorities guided by technical expertise could develop good working solutions to major social and economic problems." Martin Shapiro, "APA: Past, Present, and Future," *Virginia Law Review* 72, no. 2 (1986): 449.

would seek to found the activist state's legitimacy upon a deliberatively constituted public sphere. The state would then be an institutional articulation of the public. The influence of this progressive concept of the democratic state on New Deal policymaking can be seen in the National Resource Committee's 1939 *Report on the Structure of the American Economy*, which informed administrative efforts to combat the great depression. Though filled with statistical analysis of the economy, the report was not purely technocratic in its outlook, but also referenced the fundamental values at stake:

> "The basic problem facing economic statesmanship is as follows: How can we get effective use of our resources, yet, at the same time, preserve the underlying values in our tradition of liberty and democracy? How can we employ our unemployed, how can we use our plant equipment to the full, how can we take advantage of the best of modern technology, yet in all this make the individual the source of value and individual fulfillment in society its basic objective?"[38]

How in other words, can an interventionist administrative state also be a democratic one? How can individual freedom, in the positive Hegelian sense of rational agency, be socially secured? How can a state with the transformative authority Hegel envisioned for it be reconciled with one of government by the people?

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[38] National Resources Committee, *Structure of the American Economy. Part I: Basic Characteristics* (Washington, D.C.: U.S. Government Printing Office, 1939), 3. The Report was influential for the critical social theory of the Frankfurt School. Friedrich Pollock cited it in developing his concept of "state capitalism," and his assessment of the prospects for a democratic, rather than totalitarian activist state: "It is of vital importance for everybody who believes in the values of democracy that an investigation be made as to whether state capitalism can be brought under democratic control. . . . Totalitarian state capitalism offers the solution of economic problems as the price of totalitarian oppression. What measures are necessary to guarantee control of the state by the majority of the people instead of by a small minority? . . . How will the roots from which insurmountable social antagonisms develop be eliminated so that there will not arise a political alliance between dissenting partial interests and the bureaucracy aiming to dominate the majority?" Friedrich Pollock, "State Capitalism: Its Possibilities and Limitations" in *The Essential Frankfurt School Reader*, ed. Andrew Arato and Eike Gebhardt (New York; Continuum, 1998), 71-94, 93.

The synthesis would be challenging but not ultimately impossible. For there was a certain underlying affinity between an expanded role for the state and the principle of democratic governance. As Charles Merriam, a member of the National Resources Committee, recognized elsewhere "the development of the doctrine of democracy was aided on the ideological side by concurrent theories that were not primarily concerned with democracy, but that when brought together contributed to the strengthening of the mass position. Among these were the philosophies of Hegel, who lifted the state out of artificiality by declaring it to be the highest form of human association. . . ."[39] A powerful administrative state could strengthen democracy by giving the people institutional form. Though Hegel's theory was not itself democratic, Merriam recognized his influence on the Progressive effort to develop an administrative state with the capacity and legitimacy to intervene into society in the interests of individual freedom and equality. The generality of the state, as a community of free and equal as citizens, would enable it to rise above and thus reform the spatially and functionally divided sectors of social life.

The key theoretical problem for this democratic-Hegelian synthesis is to discover how "the people" might have any critical distance from the "civil society" that they sought to transform. If, in other words, the people, rather than the political unity of the state, is the seat of sovereignty, then how can the state distinguish itself from, and exercise power over, the social body in which its authority is ultimately rooted?

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[39] Charles Edward Merriam, *The New Democracy and the New Despotism* (New York: McGraw Hill, 1939), Merriam also cited Follett's ideas on administration and organization in his work. See, e.g. Charles Edward Merriam, *Public and Private Government* (New Haven: Yale University Press, 1944), 46.

The analytical solution was to distinguish the material problems of society from the public deliberations concerning those problems—to distinguish civil society from the public sphere.[40] Civil Society then becomes the object of critique and of potential governmental regulation. The public becomes the critical and regulatory collective subject, the democratic constituent power. In the lived conditions of society, individuals are un-free by virtue of material and social inequality. But considered as members of the popular sovereign, individuals are inherently free and equal. Popular sovereignty consists in the ability of the democratic public to identify its shared values, goals, and needs and realize them through the institutional apparatus of the state.

Woodrow Wilson first hinted at this idea with his suggestion that the organic unity of society could be grounded in the formation of a unified public opinion which would guide, authorize, and constrain the activities of the political state. But amongst the American progressives, John Dewey was the most innovative and influential theorist of concept of the public. Dewey drew on Hegel's insight that economic interactions create

[40] I distinguish between civil society and public sphere in a somewhat unconventional way. Civil society is often used today to refer to the set of semi-private organizations outside the state which are legally institutionalized and mediate between individuals and the government. See, e.g. Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge, MA: MIT Press, 1994), . My understanding of civil society, instead, is grounded in the way Hegel, Marx, and the early Habermas use it—to refer to the social structures built up around "realm of commodity exchange and social labor." Habermas, *Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society* (Cambridge MA: MIT Press, 1991), 30. I take civil society to refer to all those patterns of social behavior which an individual must take into account when she acts strategically in pursuit of her self-interest. Economics plays the central role here, as well as other social structures, such as gender and race, which shape individuals life chances, and on which individuals rely as heuristics in guiding their instrumental reason. The public sphere, by contrast, refers to the communicative dimensions of society, in which individuals engage with one another as partners to conversation, debate, and development of common identities and causes, rather than as means to one another's ends. Understood this way, civil society and the public sphere are not ontologically distinct entities, but rather different aspects of social organization. The former is organized primarily by principles of instrumental rationality, the latter primarily by principles of communicative rationality.

effects beyond the original parties which disadvantage, advantage, or otherwise affect others. In the economic literature, these effects would be labeled "externalities."[41] The public arose from the perception of these effects, and the deliberative effort to arrive at shared convictions as to their existence and general policies that would resolve them. The state was the institutional articulation of this public. The democratic state was defined not merely by political representation and majority rule, but rather by the more fundamental processes of communication, contestation, and deliberation which occurred within the public, and which foregrounded the formal political process. Mary Parker Follett would agree with Dewey in characterizing popular sovereignty not primarily through the adversary process of voting, but through the more fundamental mutual recognition and collective identity formation which occurred in public communication.

V. The Influence of Progressivism on Contemporary Legal and Political Theory

The Progressives' democratization of the Hegelian concept of the state is not merely a relic of political theories gone by. On the contrary, the progressive vision of the democratic state continues to have a significant influence on scholarship in both law and political theory. Jürgen Habermas explicitly draws on Dewey to develop his discourse theory of democracy, which presupposes that the "political public sphere has been differentiated as an arena for the perception, identification, and treatment of problems affecting the whole of society."[42] Conceived in this discursive fashion, popular

[41] James Buchanan and Wm. Greg Stubblebine, "Externality," *Economica* 29, no. 116 (1962): 371-84.

[42] Habermas, *Between Facts and Norms,* 301.

sovereignty requires establishing a procedural connection between an informal process of opinion formation in the political public sphere and a formalized process of legislative will-formation in the state. Dewey's concept of democratic politics is here interpreted to mean that rational argumentation must ground the activity of the government; that, as James Bohman puts it, "the legitimacy of decisions must be determined by the critical judgment of free and equal citizens."[43] Whereas Hegel had rejected the notion that all persons should participate in the rational determination of state action, the Progressives insisted that such participation was a precondition for state action which is genuinely rooted in the will the people. More recent specifications of deliberative democratic theory, which make room for self-interest, deep disagreement, and the role of power, have returned to progressive ideas to flesh out this vision. For example, Mary Parker Follett's idea of "integrated" solutions, in which contradictory interests can be accommodated through the exploration of creative alternatives, serves to highlight the ways in which deliberative theory can grapple with social conflict, and need not rely upon consensus.[44]

Recent legal scholarship has likewise drawn on the progressive strands of deliberative democratic thought to rethink the normative foundations of contemporary constitutionalism. Robert Post, for example, turns to Dewey and Follett, as well as Hebert Croly, to argue that the normative core of twentieth century First Amendment Jurisprudence is rooted in the progressives' conception of public opinion. In this

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[43] James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (Cambridge: MIT Press, 1996), 2.

[44] Jane Mansbridge et al., "The Place of Self-Interest and the Role of Power in Deliberative Democracy," 71.

conception, democratic legitimacy rests upon an open and equal process of public political debate, rather than formal political representation itself: "If participation in the ongoing formation of public opinion is to serve as a foundation for democratic self-government, all must have a right to participate in the communicative processes by which public opinion is formed."[45] He concludes from this that the regulation of campaign finance is compatible with the First Amendment because the restrictions it imposes upon speech are concerned with the "governmental function" of "transform[ing] public opinion into legitimate political will."[46] Post's analysis thus relies on the Hegelian Progressive notion that the state must derive its authority from public opinion, but must give opinion an institutional shape so that public speech can issue in public acts.

William Eskridge and John Ferejohn also make use of Dewey's idea of the state as an articulation of the public in their reinterpretation of constitutionalism as a polycentric process of political will-formation: "we suggest that deliberation about fundamental structures reflects a kind of 'commonsense' reasoning whose legitimacy is

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[45] Post, *Citizens Divided*, 37. Post draws on this progressive vision of public opinion to argue that, contrary to the ruling in *Citizens United*, the state has the managerial authority to impose regulations on speech to insure the integrity of the electoral process. He nevertheless falls into the common trap of claiming that Woodrow Wilson and the "progressives conceived of regulation as a form of administration answerable to expertise rather than to public opinion." Ibid. 28. While certain strands of progressive thought understood administration as a purely technical and elite aspect of government, Wilson, Dewey, and Follett all conceived of an administrative state which was sensitive to public opinion not merely through the formal means of political representation, but through more direct contacts with the public, and by virtue of a democratic disposition and sensitivity on the part of administrators themselves. This opens up the possibility that pathologies of power in the electoral process might be remedied through a more egalitarian form of administrative process. As we shall see, the challenge would be to separate administration from electoral politics without separating it from the democratic public, and how to retain the benefits of expertise without turning the work of policy implementation into a purely technocratic matter divorced from the public's normative commitments.

[46] Ibid. 81, 86.

established when it is both institutionally based and democratically responsive."[47] Eskridge and Ferejohn see democratic legitimacy as arising through an institutionally disaggregated process of deliberation where legislatures, courts, administrative agencies, and social movements together elaborate the content of public values.

Something has been lost, however, in contemporary instantiations of progressivism in legal and political theory: a clear sense of the normative status of the state as institution of democratic social criticism. Hegel saw civil society as riven with inequalities, complexities, and antagonisms, which prevented the exercise of individual freedom. The progressives embraced Hegel's critique of civil society and aimed to erect a genuine state in America, which would assert the rights of the public against the private rights institutionalized in the market place. But, unlike Hegel, they sought to empower democratic public opinion to assert its will through the use of bureaucratic forms of governance. The democratic state would enable the members of the popular sovereign to participate in reformulating the laws of civil society. It would provide a political structure in which popular criticism of social life could not only be expressed, but could be made efficacious through legislative and administrative action.

This evaluative sense of the state has retreated so distantly into the background of political and legal theory that the normative impulse of Progressive ideals lose much of their force. In deliberative democratic theory, the decline of statehood can be seen in attempts to solve questions of inequality by empowering discourse outside the confines of

[47] William N. Eskridge, Jr. and John Ferejohn, *A Republic of Statutes: The New American Constitution* (New Haven: London: Yale University Press, 2010), 114.

the state.[48] At the same time, the main line of contemporary legal theory attempts to found the legitimacy of administrative law upon "transsubstantive" procedures that ensure that decision-making is non-arbitrary.[49] Having lost confidence in the state as a site for genuinely democratic politics, law scholars aim for a public law which neutrally channels a conversation that is going on elsewhere. These procedural moves are one-sided. The state is not merely an instrument for an extra-mural public sphere, but is rather part and parcel of the public sphere itself. Without attention to the state's capacity to foster the people's criticism of unfair patterns of social organization, administrative intervention appears only as a troublesome necessity. Political and judicial bodies must restrain it, so as to prevent unjustified interference in the lives and property of its citizens. The emphasis then shifts to discourses of limitation rather than on the constitutive role the state can play—and has played—in giving us some measure of authorship over the conditions of our common existence.

The Progressive theory does not deny the dangers of arbitrary public power, but it is more keenly attuned to the ways in which non-governmental forms of hierarchy, authority, and control subvert individual liberty. We cannot be blind to the pathologies of state power when corrupted by the influence of social power. But we should not let this concern cast indiscriminate doubt on the state's basic regulatory function: to articulate

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[48] See, e.g. John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, and Contestations* (Oxford: Oxford University Press, 2002), 8-30.

[49] As Mashaw writes, "The structure and process aspects of administrative law tend to further all of the constitutional ideals instinct in our fundamental constitutional commitments to political responsiveness, and the protection of individual rights. . . The implicit and widely understood message of the post World War II reforms in administrative structures and procedures is that control and reform of the administrative state demands general transsubstantive regulatory requirements often backed by judicial review at the behest of affected private interest" Jerry L. Mashaw, *Creating the Administrative Constitution*, 228-9.

democratically determined conceptions of freedom amidst social conditions that foreclose or impair their exercise. A focus on the state as a structure that institutionalizes social criticism would revive the full spirit of the progressive impulse. Democratic legitimacy would then stem not only from an informal process of opinion-formation outside the state, but from the elaboration and implementation of such opinion in the state. Deliberative democracy must therefore be concerned not merely with political conversation or discourse, but with the institutionalization—or in Dewey's words, "articulation"—of this discourse in and by the state itself.

VI. The Dialectic of Rules and Reasons

Deliberative democratic theory sometimes focuses so intently on the discursive and communicative elements of the political process that the institutional dimensions of democratic order fall from view. Hegel, by contrast, provides us with a model of practical reason which is grounded not only in the reflective capacity of individual subjects, nor merely in arguments between persons, but in the social and political structures we share with one another and contribute to together. Combining this institutional emphasis with deliberative democracy's focus on discourse is essential for understanding the purposes and structures of the Progressive state.

Hegel's concept of freedom depends upon what Robert Pippin calls "institutional rationality," or the notion that the reasons individuals maintain and offer for their own actions necessarily draw upon a shared background of rules and values: "what one has a justified reason to do cannot be made out without attention to the forms of institutional life that concretely determine what counts as adequate self-understanding and successful

justification."[50] The "objective rationality of the social order" exists to the extent that "that order embodies a claim to normative authority in a way consistent with the only possible origin of such authority," namely, "free, rationally self-determining agents in unavoidable recognitive relations with each other."[51]

Filtered in this way through the lens of American pragmatist philosophy, Hegel's concept of political authority already seems ideally suited to the democratic claim that laws are only legitimate if self-legislated by free and equal members of the public. But Pippin's reconstruction soft-pedals the fact that the original Hegelian vision of institutional rationality ultimately relied upon a problematic understanding of the state as a meta-subjective personality, in which individual persons find their wills represented.[52] The democratic transformations captured in progressive political thought rejected this reification of popular sovereignty. For the progressives understood the state not as an embodiment or reflection of an individual will but as a setting for an intersubjective process of developing common intentions and interests. Progressive democratic theory renders explicit an intersubjectivity which was repressed in Hegel's political

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[50] Pippin, *Hegel's Practical Philosophy*, 262. See generally, 239-272.

[51] Ibid., 272

[52] As Patrick Riley observes, Hegel "was able to see the state as something willed, even without any alliance for social contract theory, consent theory, or even approval of elections or opinion, because reason (or freedom-as-reason) connects the real will and the state. More precisely, it provides a content for both: rational freedom, which is seen as the substance in the state and as accident in individuals." Patrick Riley, *Will and Political Legitimacy: A Critical Exposition of Social Contract Theory in Hobbes, Locke, Rousseau, Kant and Hegel*, (Cambridge, MA: Harvard University Press, 1982), 167.

philosophy,[53] and draws forth the political consequences of institutionalizing this communicative background. Seyla Benhabib has suggested how this discursive reconstruction of Hegelian state theory might proceed:

> When one thinks through the form of practical rationality at the core of democratic rule, Hegel's concept of 'objective spirit,' appears to me particularly appropriate. To make this concept useful today . . . we have to desubstantialize the model of a thinking and acting super-subject that still governs Hegelian philosophy. Without this metaphor of the subject, the term 'objective spirit' would refer to those *anonymous* yet *intelligible* collective rules, procedures, and practices that form a way of life.[54]

Democratic objective spirit finds the intelligibility of rules to be rooted not only in their rational form, but in our individual and collective engagement with them. Such engagement is most obvious in the case of explicit political participation—in voting, signing petitions, contacting representatives, contributing funds to advocacy groups, or attending demonstrations. These public expressions have their origins in our day-to-day inhabitance of a set of enforced norms—from street signs to rental contracts to forbidden criminal acts—which meet with our approval or provoke our disapproval. But only if members of the public are able to and do in fact act upon their assent to or dissent from their institutional context, and exercise significant influence over their progressive modification, can we say that the spirit of the people has been objectified or articulated in reality. Rules therefore must not only be intelligible in the weak sense that we know what

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[53] Michael Theunissen, "The Repressed Intersubjectivity in Hegel's Philosophy of Right," in *Hegel and Legal Theory*, eds. Drucilla Cornell and Michel Rosenfeld (New York: Routledge, 1991), 3-64.

[54] Seyla Benhabib, "Toward A Deliberative Model of Democratic Legitimacy" in Seyla Benhabib, ed., *Deliberative Democracy: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1996), 69.

they are and can act in light of them. More than this, they must be intelligible as expression of a form of life which we take to be fair, valuable, and hospitable to our individual and collective needs.

The democratization of objective spirit on this account involves a reinterpretation of the Hegelian idea of mutual recognition which underlies his social and political philosophy. Hegel argues that individuals can only be free when they recognize others, and are recognized by others, as free. His claim is that individuals only have consciousness of their own autonomy when they witness a complementary autonomy in others. Subjects thus serve as mirrors for one another, reflecting back to each other through their labor and interaction an image of their own status as beings capable of rational agency. Mutual recognition requires equality between subjects, in order for each subject to be able to serve as the foil for the other. Hegel's political philosophy deduces the value of certain social institutions, such as property and contract, the family, the rule of law, and the state itself from their ability to provide objective contexts in which such equal and reciprocal recognition between subjects can take place. In his *Philosophy of Right*, however, Hegel treats our relationship as subjects to such institutions as primarily passive and habitual. We learn to treat one another as equal through existing rules, customs, and ways of life that place persons on an equal footing. While Hegel emphasizes that such rules have emerged through a historically progressive struggle for recognition, he presents the modern liberal state as the institutional completion of this process, in which the struggle for recognition is *aufgehoben*—negated but preserved in the reciprocal relationships within the state.

Democratic ideals place the notion that freedom could consist principally in habituation to recognition-guaranteeing rules into question. To be free, it is not enough that we inherit rules from historical development which enable us to treat one another as equal. Rather, we must see the rules that grant mutual recognition as "our own," as the products of our political action and the results of our reflection, if we are to recognize ourselves not only in one another, but in the rules themselves. Our objective environment can only be "spiritual," in other words, if we can lay some claim to authorship of this objectivity. This democratic reconstruction of Hegel requires a collaborative activity which Axel Honneth has called "social freedom," in which citizens "can clarify and realize their own political intentions in an unforced manner and by reciprocally taking up the role of speaker and listener."[55] The formation of a plural democratic subject, a "We," in which individual ends are shaped and reshaped through interaction with others, affords the only chance that objective institutions can be experienced as willed by each of those for whom they purport to be obligatory.

This deliberative reconstruction of Hegelian institutional rationality is not a forced theoretical adaptation, but is rather immanent to the logic of mutual recognition itself. As Robert Brandom has shown in a brilliant pragmatic reconstruction of Hegel's practical philosophy, mutual recognition implies a theory of socially generated normativity.[56] The recognition that other agents are free and equal attributes to them a certain authority to interpret and enforce the content of the commitments each undertakes. When we take on

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[55] Axel Honneth, *Freedom's Right,* 269.

[56] Robert B. Brandom, "Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms," *European Journal of Philosophy* 7 no. 2 (1999), 164-189.

such commitments, their content is socially explicated through the use, application, and semantic practice of other persons. This gradual process of content determination is necessary if individuals are to be autonomous. For if individuals could always fully determine the content of the rules they bound themselves to, then the rules themselves would not constrain action. The willing agent could always arbitrarily reshape the rule through its interpretation, and thus the rule would have no capacity to bind. By sharing authority with a community of equals to determine the content of their own normative commitments, individuals can understand themselves as the authors of the rules that bind them, while at the same time preserving the rules' externally constraining quality, as norms interpretable and enforceable by others. Semantic power must therefore be widely dispersed across a community of equals who generate a morally obligatory social order through their disaggregated linguistic practice.

This democratization of the process of mutual recognition does not obviate the need for firm institutionalization of discursively generated norms. Hegel's concept of institutional rationality—the notion that practical reason relies upon existing rules—remains valid, even once we recognize that we must participate in the construction of these rules. The intersubjective emphasis of deliberative democracy must therefore engage more deeply with its politically and socially objective environment: we are concerned not merely with the ways in which subjects develop common normative commitments through the medium of language, but with the way subjects engage with one another through the medium of institutions. Intersubjectivity becomes objectively mediated by rules which already make the claim to bind. In relation to these institutions, affected subjects have what Rainer Forst calls a "right to justification," which provides

that they have procedural means to assess, critique, and transform the normative order they inhabit.[57] Subjects therefore enter into dialogue not only with each other, but in a sense engage in dialogue with the institutions themselves. The institutions embody implicit and explicit claims to justification as they implement the purposes of the past publics who brought them into being.

Institutions therefore become not merely a context for the development of a public sphere, but become part of the conceptual repertoire subjects draw upon within that sphere to make political arguments to one another. When individuals reconstruct the purpose of existing laws to argue for the amendment of their provisions or for enacting new laws which match their spirit, the institution speaks through them and they speak through the institution. We can see such dynamics in Frederick Douglass' reinterpretation of the Constitution as document of liberty which precludes slavery,[58] or more recently in

[57] Rainer Forst, *Justification and Critique*, trans. Ciaran Cronin (Malden, MA: Polity Press, 2014), 39, 2. Like Rawls, Forst at times seems to restrict the right of justification to the "basic structure" of the social order. Ibid., 36, but see 96. While changes in the basic structure may have great impact upon the order of society, the very fundamental nature of such changes means both that they are less likely to actually come pass, and that, if they do, their meaning will be so ambiguous that their concrete consequences will only be understandable when constitutional provisions are judicially and administratively applied. I therefore suggest a broader right to justification, in which individuals are engaged in the definition, critique, and alteration of the concrete policy issues of the state. Liberal democratic theory often suffers from an overweening concern for constitutional structure without examining the particular institutions and policies of the state, where questions of distribution and recognition take on specificity. Since conflicts between values such as equality, independence, economic efficiency, and diversity cannot always be resolved at a purely abstract level, more attention should be paid to the "secondary structure" of the administrative state, where these issues can become the subject of a less philosophically pure but more socially engaged form of practical reason.

[58] Frederick Douglas, "What To the Slave is the Fourth of July?" in The Oxford Frederick Douglass Reader, ed. William L. Andrew (Oxford: Oxford University Press, 1996), 108-130.

the gay rights movement's reappropriation of the heteronormative institution of marriage as a valuable means for recognizing the intimate bonds between same-sex couples.[59]

These examples show how public deliberation over the meaning of freedom and equality is not merely an argument with a moral premise and an institutional conclusion. Interpretations of the meaning of extant institutions can also serve as premises to the argument. Thus, while institutions draw their meaning from the communicative contexts from which they arise and to which they apply, these communicative contexts at the same time draw their meaning from the institutional contexts from which they arise and to which they apply. The mutual influence between rules and reasons constitutes the life of the democratic public, as reasons become embodied in rules that bind all on equal terms, and such rules are then subject to justification and critique by the reasoning of all on equal terms. We are not then concerned with a kind of political practical reason which is primarily communicative, as Habermas would have it, nor with one that is primarily institutional, as the mature Hegel would have it, but rather with one which recognizes the reciprocal force of discourses and rules upon one another, and upon us. This form of reason can lay genuine claim to the title "objective spirit," because it is constituted by the dialectic between a purposefully constructed objective environment and our intellectual response to this environment.

When we re-anchor deliberative democratic theory in its Hegelian progressive origins in this way, we can no longer think with Habermas of political legitimation as a

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[59] William N. Eskridge, *The Case for Same sex Marriage: From Sexual Liberty to Civilized Commitment* (New York: The Free Press, 1996); Andrew Sullivan, *Virtually Normal: An Argument About Homosexuality* (New York: Vintage Books, 1995).

linear chain that begins with with public debate and ends in binding law.[60] This is because each individuals' aims, beliefs, and needs, emerge in light of their previous experience with others against the background of institutional rules. They are always already engaged in a process of normative elaboration, in explicit debate with other another, in formal procedurals of participation, in informal demonstrations of protest and dissent, and in more implicit reactions to and interactions with rules that form their identities and interests. We cannot therefore see "the public" as an institutional realm sealed off from and normatively prior to the state, for the institutions of the state form an essential part of the intersubjective landscape in which opinions form and are exchanged.[61] The common identity of the democratic public emerges through an iterative

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[60] "Public influence is transformed into communicative power only after it passes through the filters of institutionalized *procedures* of democratic opinion- and will-formation and enters through parliamentary debates into legitimate lawmaking." Habermas, *Between Facts and Norms*, 371.

[61] As Fred Dallymar has pointed out, Habermas' early accounts of discursive democracy at times seems to retreat back from Hegel's important insight that the state cannot be reduced to a mere instrument of civil society. Rather, "from Hegel's perspective . . . individuals removed from public-ethical life are precisely unfree since freedom is a genuinely public category. By presenting the public sphere as deriving from cooperative 'will formation' and consensus reached between 'free and equal' individuals, Habermas' proposal harkens back to the contractarian tradition—a tradition strongly rejected in the *Philosophy of Right.*" Fred Dallymar, "The Discourse of Modernity: Hegel and Habermas," *The Journal of Philosophy* 84, no. 11 (1987), 682-92, 691. Habermas has since adopted a more flexible understanding of popular sovereignty in which the state can be penetrated and occupied by the public sphere, though this seems to only be an occasional, quasi-revolutary occurrence. See Jürgen Habermas, "Popular Sovereignty as Procedure," in Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* trans. William Rehg (Cambridge, MA: MIT Press, 1996), 463-490. My approach departs from his in seeing the interpenetration of public sphere and state as typical, rather than exceptional—part of the fabric of administrative rather than merely constitutional public law. The adminisistrative institutions of the state are an element of the lifeworld; they are bound up with the generation of social meaning, deliberative reason, and common interest. Thus, political legitimation cannot proceed from completely outside the state, but is a reciprocal process between public contestation and legislative enactment; between rule-proposal, rule-making, and rule-response. Legitimation accrues to the state to the extent that its institutions help to sustain a process of opinion-formation that is genuinely, open, inclusive, and guided by reasoned argument.

process in which individuals determine the content of a shared set of legal obligations in concert over time, through a set of distinct but interrelated political institutions.[62]

Reconceiving deliberative democracy in this way should open our eyes to the possibility that public administration helps to formulate, rather than merely results from, the exercise of democratic will. The dialectic between rules and reasons proceeds not in a smooth line from the people, to the legislature, to administration agencies, but rather in more diverse institutional settings which engage groups within the public at varying levels of norm specification. Administrative agencies can then become contexts for engaging and enlivening a public sphere which remains distorted and inchoate.

VII. The Corruption of the Public Sphere by Civil Society

The major descriptive challenge to deliberative democracy's account of political legitimacy is that the social condition of individuals may distort and diminish the public discourse between equals which provides the activist state with its democratic authority. Because individuals within civil society are not equally situated, materially or socially, the ideal speech situation upon which deliberative democratic theory relies does not exist in reality. It can only serve as a regulative ideal. In actuality, individuals often cannot participate as equals in public dialogue over shared concerns because the demands of the

[62] As Benhabib puts it, "Every act of iteration might be assumed to refer to an antecedent that is taken to be authoritative. The iteration and interpretation of norms, and of every aspect of the universe of value, is never merely an act of repetition. Every iteration involves making sense of an authoritative original in a new and different context. . . . Democratic iterations are linguistic, legal, cultural, and political repetitions-in-transformation, invocations that are also revocations. They not only change established understandings but also transform what passes as the valid. or established view of an authoritative precedent." Seyla Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006), 48.

market place always unequal and sometimes severe constraints upon their time and reasoning capacities. While in the hey-day of classical liberalism, the bourgeois reading public may have had the leisure to discuss salient issues face-to-face in coffee shops and salons,[63] today most of the democratic public does not have such luxuries. In addition, as Habermas himself recognizes, public opinion formation is often manipulated through the exercise of corporate power in the mass media.[64] Instead of individuals deliberating, interest groups compete for public sympathy and for desired policy outcomes. In this context, public deliberation is sporadic and abstract.

To be sure, the American public sphere still benefits from a dense network of educational institutions, non-profits, think tanks, community organizations, and news media. Improved literacy rates since the nineteenth century have undoubtedly enhanced our capacity to engage in public discourse. But the historical trend has been the displacement of the kind of smaller scale, "face-to-face" interactions Dewey and Habermas locate at the core of discursive democracy with more remote organizations which represent stable patterns of interest rather than engage divergent views in conversation.[65] In addition, the non-governmental organizations that compose the public sphere often speak in an elite accent with one another—not necessarily out of any explicit form of economic exclusion, but rather because they are professionalized organizations, whose staffs share with one another common cultural, educational, and economic

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[63] Habermas, *Structural Transformation of the Public Sphere*, 27-56.

[64] Ibid., 141-180.

[65] Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000).

backgrounds.[66] Moreover, there is the risk that public sphere organizations—particularly universities, other non-profits, and the news media—may serve the financial interests that back them rather than the public interest to which they are nominally accountable. Beyond these public sphere institutions, the broader public may be engaged when the protests of social movements capture enough mass media attention to influence the public's broader consciousness and thus exercise significant influence on the political process.[67] But social movements by their nature go through cycles of growth and decay; even when they do succeed in mobilizing a broader process of public deliberation, their ability to enliven a generalized public discourse over questions of justice is almost always temporally limited.

Our public sphere is thus partial and fragmented. Deliberative democrats such as Habermas and Ackerman therefore describe popular sovereignty, in the reality of liberal democratic states, as an only occasional occurrence, when public mobilization is sufficiently great to overtake the usual business of politics, and dictate the policy of the state according to the rational discourse of the people as a whole.[68] These momentary exercises of popular sovereignty do not approach the kind of thoroughgoing and continual subjection of power to reason which democratized Hegelianism must demand. As Christopher Zurn puts it, "democratic legitimacy cannot be severed from the ongoing

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[66] As E.E. Schattsneider put it, "The flaw in pluralist heaven is that the heavenly chorus sings with a strong upper class accent." E.E. Schattscheider, *The Semisovereign People* (New York: Holt, Reinhard, Winston, 1960).

[67] Sidney Tarrow, *Power in Movement: Social Movements, Collective Action and Politics* (New York: Cambridge University Press, 1994).

[68] Compare Bruce Ackerman, *We The People 1: Foundations* (Cambridge, MA: Harvard University Press, 1991), 6-10 with Habermas, *Between Facts and Norms*, 373-380.

existence of robust democratic processes of opinion-formation and decision making. For if we restrict democracy only to the level of constitutional choice, it will be impossible to fulfill the Rousseauian condition for democratic autonomy: namely, that I am only free to the extent to which I can understand the laws binding me as, in some sense, self-given laws."[69] It is not enough for the people to awake periodically from political slumber to reshape basic constitutional commitments. Much too much is left indeterminate in the meaning of such moments for such occasional participation alone to merit the claim that "the people" genuinely governs in a meaningful sense. The people may deliberately determine that slavery is abolished or all that those born in the territory of the United States are citizens; or they may determine that the state has a role to play in pervasively regulating contractual relations and society in general. But if they have little influence on what life after slavery shall mean, or what citizenship shall consists in, or what the ends and nature of market regulation are to be, then such moments of popular sovereignty are far too tenuous to maintain the people's grip on the laws that bind them.

If we take popular sovereignty to require the active participation of the people in ordinary politics, and not merely in moments when the political order is abstractly constituted and reconstituted, then we must turn our attention to other institutions of the state that can provide additional contexts for the identification and specification of public purposes. If we turn our gaze down from the heavens of constitutional politics to the earthly activities of administration, we will find that historical and institutional precedents exist for the recognition of the public sphere through its public law. The goal

[69] Christopher Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge: Cambridge University Press, 2007), 139.

in this reconstructive effort is to conceive of administrative institutions as potential settings for discursive democracy, and hence to build up the rational competencies of the public sphere from within the state itself. In this way, we can recognize and further design an administrative state in which the public discovers itself as the agent of social transformation.

VIII. The Administrative Recognition of the Public

I have argued that the contemporary American state is best understood as an activist state, which derives its authority from the discourse of free and equal citizens over, about, and through the institutional rules that bind them. The activist state is an administrative state, in the sense that it must deploy systematic rather than analogical reasoning in order to bring the purposes of the democratic public to bear in the regulation of civil society. Systematic reasoning is required because the activist state does not merely abstract from things as they are and attempt to produce legal rules that reflect that state of affairs. Rather it attempts to introduce new values or interests expressed by the democratic public. It therefore cannot rely upon the embedded private ordering of civil society to provide its rational backbone, but must rather anticipate how this order will react to the imposition of new burdens and incentives. Administrative agencies must think in terms of the multiple, interrelated effects of their policies, and how these are to be coherently managed, so as to further the public interest.

Since Weber, it has been typical to assume that this kind of systematic, administrative reasoning is, and ought to be, a form of purely instrumental, or purposive rationality. In this view, a purpose has been identified by the legislature, and the

administration finds the most efficient means to implement this end. But the Hegelian Progressive conception rejects such a restriction of administration to instrumental reason. This is because it understands administration as a means for engaging, deepening, and refining the deliberative forms of rationality that are at work in the legislature and in the public sphere.

Recall that the structure of recognition that Hegel and Brandom described requires a disaggregated process of norm specification, wherein no one actor (whether individual or collective) fully determines the scope of our rights and obligations. When we distribute interpretive authority to multiple actors, we enhance the credibility of the laws by widening public engagement with their terms, such that the norms become both widely shared and independent from the will of any one actor. Full legislative specification of administrative norms would deprive other actors, including the executive, the courts, administrative agencies, and the broader public of the opportunity to contribute their interpretive authority to the policymaking process. This institutionally disaggregated model of reason precludes a purely instrumental form of administrative rationality. It insists that the purpose a law is meant to advance remains only partially determinate before it is implemented. Administration is then understood an element of a broader process of norm specification.[70]

Administrative reasoning thus cannot be equated with the most efficient means for achieving a clearly understood end. Agencies must rather determine the meaning of abstract public interests in dialogue with persons who have some knowledge of, or stake in, the problem at hand. This requires what Pierre Rosanvallon calls "interactive

[70] Henry S. Richardson, *Democratic* Autonomy, 104-5.

democracy," in which administration claims legitimacy, not primarily by legislative mandate, but in more fine-grained forms of participation with the affected public:

> independent authorities will contribute to the development of democracy only if they can be socially appropriated. . . . These institutions cannot really accomplish what they are supposed to do if they are seen as committees of wise men or experts meeting on Olympus, as is all too often the case. Their democratic character must be subject to permanent and open debate if they are really to be seen as public goods.[71]

If we rethink and rework administrative power in this way, the public sphere can come to be constituted not only in social and parliamentary debate, but in the administrative processes which make these conversations and legislative histories politically efficacious. When this process functions properly, the public sphere recognizes itself in the public administration which acts in its name.

To adequately recognize the public, administration must be sensitive to the inequalities of civil society that have prevented a fully inclusive and rational public opinion from coalescing. This requires not merely the collection of neutral facts, but a sensitivity to the imbalance of information and power that produced the need for administrative action in the first place. As John Forester has observed in regards to local land use planning, "where severe inequalities exist, treating the strong and the weak alike ensures only that the strong remain strong and the weak remain weak. The planner who pretends to act as a neutral regulator may sound egalitarian but is nevertheless acting, ironically, to perpetuate and ignore existing inequalities."[72]

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[71] Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity*, trans. Arthur Goldhammer (Princeton: Princeton University Press, 2011), 210-16, 103.

[72] John Forester, *Planning in the Face of Power* (Berkeley: University of California Press, 1989), 101.

Administrators should respond to such power-imbalances in two ways. First, public officials must have a public-regarding consciousness that *aims* at the regulative ideal of a community of free and equal citizens, rather than assuming that such a community has already been achieved. When they consider particular regulatory problems, such as pollution, labor market discrimination, or financial regulation, they must use their discretion to rectify asymmetrical social relationships that leave certain social groups with arbitrary and unaccountable authority over others. It is in this sense that Hegel's description of public servants as a "universal class" can retain its vitality for present day political theory. The officialdom should actively institute the general interest by remedying the partiality of power in the existing pattern of organization. Administrative policies that reduce inequalities of resources, information and access to the political process are therefore to be favored over those that worsen such inequalities or merely perpetuate the status quo. Chapter 6 will provide historical examples from the New Deal and the Civil Rights Revolution that will show what this kind of egalitarian administrative practice looks like, and how it can catalyze long-term social change.

Second, administrative procedures must also provide for public participation by all affected parties, in order to ensure that decision-making remains sensitive to those elements of public reason which are not adequately expressed within the workings of civil society or other elements of the political process. It is not enough simply to open up the administrative process to all comers, for this approach will tend privilege the better organized and equipped segments of society.[73] The organizational advantages of the more

[73] Jason Webb Yackee and Susan Webb Yackee, "A Bias Toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy," *The Journal of Politics* 68 no. 1 (2006), 128-39.

powerful must be kept in view, and efforts made to solicit and foster the participation of those groups who are equally affected, but are prevented by their social condition from full participation in administrative procedures. This Progressive form of statehood stresses the need for, and capacity of, administrative agencies to conduct a policy discourse which realizes the principles of equal regard and voice which animate democratic authority. Chapters 4 and 5 will explain how the political and judicial branches can facilitate such procedural equality.

Incorporating deliberative democratic elements within administrative agencies, it might be argued, would impair their ability to provide effective technical expertise in addressing complex problems. The very purpose of delegating authority to administrative agencies would be undermined, so the argument goes, if their decision-making were somehow re-anchored in an only half-informed public opinion. Both the Progressive tradition and recent democratic theory suggest, however, that democratic procedures are valid not merely because they are fair, but because they produce epistemically sound results. David Estlund argues that

> democratically produced laws are legitimate and authoritative because they are produced by procedures with a tendency to make correct decisions. It is not an infallible procedure, and there might even be more accurate procedures. But democracy is better than random and is epistemically the best among those that are generally acceptable in the way that political legitimacy requires."[74]

Helene Landemore details positive and empirical research on deliberation and voting procedures to argue, even more strongly, that "under conditions conducive to proper deliberation and proper use of majority rule, a democratic decision procedure is likely a

[74] David. M. Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, NJ: Princeton University Press, 2008), 8.

better procedure than any nondemocratic decision procedures, such as a council of experts or a benevolent dictator."[75] The general intuition behind the research they rely upon is that groups of individuals are repositories of vast and particularized knowledge which is often inaccessible to a narrow group of rulers. When properly engaged through deliberation and aggregated through voting procedures, such knowledge produces epistemically sounder results than dictatorial or purely expert driven procedures.

On the crucial question of administration, however, Estlund and Landemore are silent and ambiguous, respectively. Landemore acknowledges that decisions in which experts are readily identifiable and recognized can be left to administration, rather than democratic politics.[76] But she goes on to suggest that we should nonetheless maximize democratic participation on expert matters, even in such complex questions as nuclear power regulation. This ambivalence betrays a failure to adequately theorize the relationship between politics and administration. The burden of the epistemic argument decreases vastly when it can rely upon a realm of technical administrative knowledge insulated from the democratic process. But then the claim to democratic rule is more chimerical than real. If democracy consists only in the identification of general policies, capable of vast and varying interpretation by those who implement them, then the epistemic success (or failure) of democracy relies chiefly upon the quality of administration, rather than on the knowledge-producing capacity of democracy itself. Government's epistemic credentials would trade upon the decisions of public officials

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[75] Helene Landemore, *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many* (Princeton, NJ: Princeton University Press, 2013), 3.

[76] Ibid., 13-14.

whose knowledge stems not from the democratic public, but rather from their professional training and intelligence. In this case we no longer enjoy "democracy" in the sense Estlund defines it: "the *actual* collective authorization of laws and *policies* by the people subject to them."[77] A popular authorization of administrative discretion that is not itself exercised in reliance upon public knowledge is at best virtual and hypothetical, rather than actual.

Democratic theory must therefore engage with the capacity of the administrative process itself to include participatory elements which enhance not only the legitimacy but the quality of administrative policies. To be sure, one of the core virtues of administrative agencies is their access to the technical expertise of administrators, who bring their professional training and experience to bear in understanding difficult social and scientific problems. But these credentialed forms of knowledge are only necessary but not sufficient for the competent administration. The full effects of regulatory programs cannot be assessed without asking those affected by them what outcomes they value and how much. In addition, members of the public may themselves have skills and technical knowledge that officials lack.[78] They may be aware of practical problems and innovative solutions that do not occur to even the most competent public official, whose knowledge may nonetheless remain siloed within the confines of her disciplinary focus. As Dewey

[77] Estlund, *Democratic Authority*, 38 (emphasis added).

[78] Beth Simone Noveck, *Smart Citizens, Smarter State: The Technologies of Expertise and the Future of Governing* (Cambridge, MA: Harvard University Press, 2015).

recognized, "in the absence of an articulate voice on the part of the masses . . . the wise cease to be wise."[79]

IX. The Democratic Substance of Administrative Procedure

Public participation in administration will not take the conventional democratic form of deliberation followed by voting. The usual procedure is for the agency to propose a policy, receive comments from the public, and then issue their final rule. As I shall explore in depth in chapter 4 and 5, these "notice-and-comment" procedures are codified in the Administrative Procedure Act of 1946 (APA),[80] and have been elaborated by other statutes, the federal courts, and agencies on their own initiative. At its best, this process combines technical expertise with the values and knowledge of the public. The overall success of this system depends on the quality of administrative judgment, the nature of public participation, and the way courts police agency receptivity to public arguments. Only an administrative and judicial process which respects the regulative ideals of freedom, equality, and rationality amongst the affected parties can meet the demands of democratic legitimation.

These participatory procedures within American administrative practice have long been upheld for their democracy-reinforcing role by administrative-law scholars and those few contemporary political theorists who have tackled questions of bureaucratic

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[79] John Dewey, *The Public and its Problems*, 206.

[80] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in 5 U.S.C. §§ 500–706 (2012)

legitimacy.[81] But political history places a serious roadblock in front of this interpretation. The Administrative Procedure Act was motivated in large part by conservative reaction against the administrative state, and represented an attempt to slow down administrative action by giving affected business interests opportunities to contest adverse action.[82] Politically liberal constructions of the APA therefore seem to fly in the face of the actual origins and purported functions of the Act. At the same time, it is widely acknowledged that the APA only marginally changed actual agency practice.[83] Agencies had as early as 1902 involved external experts and affected parties in rulemaking, in areas from finance and banking to agriculture, forestry and labor.[84] If we want to understand what kind of functions participation was thought to serve, we might therefore repair to thinkers in the Progressive Era who first advocated such forms of administration. The American Hegelian tradition I have traced in this study was an important strand of this original Progressive vision and its institutional practice. The Progressives hoped to further individual freedom not through a sphere of rights immune from the state, but rather through public participation in it. As Jeremy Kessler has argued

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[81] Richard B. Stewart, "The Reformation of Administrative Law," *Harvard Law Review* 88, no. 8 (1975), 1667-1813; Mark Seidenfeld, "A Civic Republican Justification for the Bureaucratic State," *Harvard Law Review* 105, no. 7 (1992): 1511-1576. William N. Eskridge, Jr. and John Ferejohn, *A Republic of Statutes: The New American Constitution* (New Haven: Yale University Press, 2010), 24, 31-2, 287-90; Henry S. Richardson, *Democratic* Autonomy, 1-16, 215-230; Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Oxford: Portland, OR: Bloomsbury, 2007), 27-31.

[82] Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal* (Cambridge, UK: Cambridge University Press, 2012), 59-60.

[83] Reginald Parker, "The Administrative Procedure Act: A Study in Overestimation," *Yale Law Journal* 60 no. 4 (1951), 581-99.

[84] Attorney General's Committee on Administrative Procedure, *Final Report of the Attorney General's Committee on Administrative Procedure* (Washington: GPO, 1941), 103-5.

in his study of the administrative origins of civil liberties law, "What progressive administrators meant by 'self-determination' was individualized involvement in the administrative state, not the protection of private individuals, local communities, or civil society from the state's grasp."[85]

This Progressive conception provides sounder bedrock for the democratic interpretation of participation that administrative law scholars have advanced. It roots their approach in a robust and consequential tradition of American political thought, the content of which has over time been distorted. The Progressive tradition was not merely about technocracy, as most scholars have maintained, but also about instituting the requirements for democratic life through deliberative forms of administration. This intellectual background, at the very advent of our administrative state, should shed new light on the original public purposes that motivated its development. The concern was not with the restraint of state power, but with the restraint of arbitrary *social* power, and the production of legitimate political authority to challenge it. If we read the APA, and the administrative practices it codified, against this deeper political purpose of the American state, its emancipatory potential can be born out. It can serve as an instrument for bringing public opinion to bear in a concrete way in the formulation of policy. To the extent that rulemaking merely puts a roadblock in front of effective administrative performance, or privileges the voices of organized interests, rather than gleaning from all affected parties the relevant values at play, it departs from the conception the Hegelian progressives entertained of democratic administration.

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[85] Jeremy Kessler, "The Administrative Origins of Modern Civil Liberties Law," *Columbia Law Review* 114, no. 5 (2014): 1090-1.

The Progressive theory also amends deliberative democratic theories of administration in stressing that public participation is not is the sole value to maximize within the administrative process. As Dewey and Du Bois emphasized, the administrative state must provide the institutional requisites for democratic life. We should therefore evaluate the state's democratic credentials not merely by the state's procedural legitimacy, but by whether it produces a social context hospitable to individuals' rational agency.

Recall that, for Hegel, the freedom-guaranteeing value of the rule of law is that it creates a predictable social context in which individuals can craft their own plans in reliance upon a settled norm. By reducing the range of behaviors we can rationally expect from others, individuals are better able to comprehend and act in light of one another's agency. This means that the considerations that push in the direction of legal responsiveness must be constrained by considerations which favor stability and reliability. Such constraint does not mean a kind of ideological moderation between conservative pressures that privilege the status quo and liberalizing pressures which serve to give voice to new interests. As left legal theorists like Franz Neumann and E.P. Thompson have recognized, the stable rule of law is an indispensible element for protecting the interests of the less powerful, for, where the rule truly governs, they may rely upon it to defend their interests against the more powerful.[86] The trade off between

[86] Thompson writes that the rule of law is an "unqualified human good" because it "imposes effective inhibitions upon power and the defense of the citizen from power's all intrusive claims." E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (New York: Pantheon Books, 1975), quoted in Morton J. Horwitz, "The Rule of Law: An Unqualifed Human Good?" *Yale Law Journal* 86, no. 3 (1977): 561-66. Neumann similarly argues that the "limited, formal, and negative generality of law under liberalism not only makes possible capitalistic calculability but also guarantees a minimum of liberty, since formal liberty has two sides and makes available at

predictability and malleability is therefore not a placeholder for contests between left and right, but rather between two essential preconditions for individual autonomy.

One way of reducing the tension between responsiveness and predictability is to make the outright change of legal norms relatively difficult and costly, but to create multiple venues for determination and specification of such norms. The general rules can remain in place, but their particular requirements change in relation to public input and the shifting needs of society. Legislative delegation to administrative agencies can thus preserve legal stability at an abstract level while permitting responsiveness at the level of implementation. However, this valid approach only eases without eliminating the tension between considerations of stability and flexibility. For the more administrative determinations shift, and the less real purchase statutory norms have to bind official behavior, the less it matters whether law formally remains the same. Even if the laws on the books persist, their reality on the ground may shift so widely that we have only the illusion of permanence, rather than an objectively secured institutional continuity. At the stage of administration, it will be necessary to combine mechanisms which permit public participation and deliberation with those that cabin it in the interest of preserving a degree of regularity to our social world.

Administration is therefore a crucial element of a broader dialectic between reasons and institutions, and between social stability and creative adaptation. The deliberative democratic reconstruction of the Hegelian state enshrines the public sphere

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least legal chances for the weak." Franz Neumann, "The Changing Function of Law in Modern Society," in Franz Neumann, *The Democratic and Authoritarian State*, ed. Herbert Marcuse (Glencoe, IL: The Free Press, 1957), 22-68, 66.

as the essential mediator between the private lives individuals lead as members of civil society and the political lives they lead as members of the democratic state. It does not designate a hermetically sealed realm, but is rather a permeable space of rules and reasons which overlaps with the spheres of state and society, as affected persons and groups make use of and criticize existing institutions to develop programs for political action. The public law of the state links up with the public sphere, creating at their intersection a space of public rights to participate in and shape the administrative process.

X. The Normative Force of the Separation of Powers in the Administrative State: The Rational Determination of State Activism

To grasp the deliberative competencies of administrative agencies, it is necessary to understand their place within the constitutional scheme of the separation powers. American administrative agencies are subject to various forms of legislative, executive, and judicial oversight. The legislature creates agencies through statutes and exercises control over them through budgeting, oversight, and informal contacts. The President appoints agency heads and subjects the rulemaking power of agencies to centralized clearance. The courts review agency's legislative interpretations, rulemaking, and adjudications, and provide a forum where individuals and organizations can challenge administrative procedures for failure to provide due process of law. Despite the numerous ways in which the three constitutional powers authorize, influence, and constrain administrative power, there is persistent concern that the administrative state eludes and undermines the structures of the separation of powers in a way that threatens our

constitutional order.[87] This concern is not unique to this moment in American history nor to the American context in particular. Since the New Deal, critics of administrative governance have alleged that it is an inherently despotic power, which tends towards authoritarianism and communism.[88] The growth of the administrative state persistently raises the worry that principles of democracy, the rule of law, and individual rights are becoming eclipsed by powers which are unaccountable, arbitrary, and unconstrained.

In part, this worry is simply one occasioned by the very fact of life within an activist rather than a reactive state. Where the state consistently intervenes in the order of civil society, administrative agencies are the most visible and potent aspects of this transformation. Those who reject the very premise of state activism, in favor of the reactive model of classical liberal constitutionalism, therefore aim their fury at the administrative symptom of the constitutional cause.[89] But even if the reality and

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[87] The concern was recently expressed succinctly by Chief Justice Roberts in his dissenting opinion in *City of Arlington v. FCC*, which affirmed the wide discretion accorded to agencies in determining the scope of their statutory authority: "One of the principal authors of the Constitution [Madison] famously wrote that the 'accumulation of all powers, legislative, executive, and judiciary, in the same hands, ... may justly be pronounced the very definition of tyranny.' Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules. . . . It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed." City of Arlington, Tex. v. F.C.C., 133 S. Ct. 1863, 1878 (2013).

[88] On the American Bar Association's Special Committee on Administrative Law's critique of the administrative state, see Gelhorn, "The Administrative Procedure Act: The Beginnings," 219-221. Roscoe Pound, who became the Committee's chair in 1938, suggested that New Dealers "would turn the administration of justice over to administrative absolutism. . . . They expect the law in this sense to disappear. This is a Marxian idea very much in vogue just now among a type of American writers." Ibid. 222.

[89] See, e.g. Gary Lawson, "The Rise and Rise of Administrative Law," *Harvard Law Review* 107, no. 6 (1994): 1231-1254; Phillip Hamburger, *Is Administrative Law Unlawful?* (New York:

normative desirability of state activism are accepted, worries about the institutional structure of the administrative state are not entirely misplaced. The state carries with it a set of institutional shifts—such as delegation of legislative and interpretive power to agencies, the adjudication of legal entitlements through the administrative process, and the accrual of discretionary power to the president—which undermine the foundational constitutional ideal of popular sovereignty if they are not properly conceived, delimited, and supplemented by institutional innovations. As the story of German constitutional development described in chapter 1 showed, accruals in power to the executive branch without a more extensive binding of administrative agencies to public input and control can have truly disastrous consequences. As we shall see however, the American administrative state which Progressives envisioned, and which has consequently emerged in fragmented form over time, has mitigated these risks, precisely by making administration itself a more deliberative rather than purely instrumental institution.

The internal process of administration is situated within a broader constitutional framework of separated power, the justification for which has shifted in the reorientation to the activist state. The shape of administration cannot itself be understood apart from this broader structure of control. This section therefore proposes a general framework for thinking about the structural purpose of the separation of powers in the administrative state, which provides the basis for more detailed prescriptions in the two chapters that follow. In short, the argument is that the purpose of the separation of powers in the administrative state is to allow the partial deliberative democratic authority of each

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Columbia University Press, 1994); Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* (Cambridge, MA: Harvard University Press, 2014).

branch to contribute to the rational articulation of state action. The function of the separation of powers is to tether state action to the public sphere, to ensure that the conditions of the possibility for public discourse are respected and maintained in state action, and to structure state action in a way that makes it intelligible to public discourse.

The Framers' view of the separation of powers did not focus on its connection to rational public discourse in the way I propose it should be construed today. As described by Madison, the function of the separation of powers was to restrain power by distributing it to different sources: "the power of government should be so divided and balanced among the several bodies of magistracy as that no one could transcend their legal limits, without being effectually checked and restrained by the others."[90] The separation of powers thus had as its counterpart the principle of checks and balances, which would give each power some grasp upon the other so as to restrain them from overextending its reach.[91] The combination of checks and balances and separated powers limited the reach of government in the interest of preserving the life, liberty, and property of citizens against the tyrannical exercise of public power. This was a model built for a quite stable separation of state from society.

The constitutional confirmation of the activist state in the New Deal wrought a new concept in the separation of powers. With a fixed barrier between a purportedly autonomous civil society and a categorically limited state removed, the goal was no

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[90] James Madison, "The Federalist No. 48," in Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961), 335.

[91] M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Indianapolis, IN: Liberty Fund, 1998), 168-176.

longer primarily to restrain power, but to channel it in a way that rendered it rational and preserved the preconditions for democratic control over its exercise. Henry Hart and Albert Sacks expressed the pervading jurisprudential ethos of the New Deal republic, and one which would shape the future path of legal scholarship,[92] when they wrote in their famous 1958 textbook on *The Legal Process* that

> The Constitution of the United States and the various state constitutions commit American society, as a formal matter, to the goal of the general welfare, judged on the basis that every human being counts as one—which seems only another way of expressing the objective of maximizing the total satisfaction of valid human wants, and its corollary of a presently fair division. But these constitutions do more than this. *They distribute power in such a way as to insure a steady pressure for the continued exercise and acceptance and active pursuit of these objectives.*[93]

Reacting to conflict between natural law theorists and legal realists in the 1930s and 40s,[94] Hart and Sacks endorsed a sophisticated, consequentialist form of jurisprudence. They argued that the basic democratic norm of realizing compatible human capacities should be fleshed out by the legislature, administrative agencies, and courts, according to their respective institutional competencies.[95] The separation of powers would thus function as an energizing, rather than restrictive, system for the rational application of

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[92] See William N. Eskridge, Jr. and Philip P. Frickey, Henry M. Hart, Jr. and Albert M. Sacks, "A Historical and Critical Introduction to The Legal Process," in *The Legal Process: Basic Problems in the Making and Application of Law*, ed. William N. Eskridge, Jr. and Philip P. Frickey, (Westbury NY: Foundation Press, 1994).

[93] Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed. William N. Eskridge, Jr. and Philip P. Frickey, (Westbury NY: Foundation Press, 1994 [1958])., 103-4 (emphasis added).

[94] Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington: University of Kentucky Press, 1973), 159-178.

[95] Charles L. Barzun, "The Forgotten Foundations of Hart and Sacks," *Virginia Law Review* 99 no. 1 (2013), 1-61.

state power to society. Public power, as Arendt observes, "can be divided without decreasing it, and the interplay of powers with their checks and balances is even liable to generate more power, so long, at least, as the interplay is alive and has not resulted in stalemate."[96]

This affirmative rather than constraining vision of constitutionalism implied a reinterpretation of the rule of law in terms of the discursive elaboration of public purposes, rather than mere restraint on public power and preservation of a sphere of private liberty. As Judith Shklar has shown, the idea of the rule of law in political theory has two main variants: one, going back to Aristotle, understands law as the "rule of reason," the application of rational judgment to the ordering of human affairs; the other, expressed by Montesquieu, is to fence off an area of personal human conduct which is "entirely out of public control."[97] The latter model corresponds to the strict separation of civil society from the state. The post-New-Deal reading of the constitutional separation of powers would to be to privilege the former, Aristotelian version of the ideal over the latter, classical liberal idea, and thus reinterpret the notion of governmental separation as an element of discursive rationality itself. As soon-to-be Justice Felix Frankfurter put it at the very dawn of the New Deal, "democracy is the reign of reason on the most extensive scale."[98] Thus, "the great judges are those to whom the Constitution is not primarily a text for interpretation but the means of ordering the life of a progressive people."[99] The

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[96] Arendt, *The Human Condition*, 201.

[97] Judith Shklar, "Political Theory and the Rule of Law," in *The Rule of Law: Ideal or Ideology,* eds. Allan C. Hutchinson, Patrick Moynihan (Toronto: Carswell, 1987), 2.

[98] Felix Frankfurther, *The Public and Its Government* (Boston: Beacon Press, 1964 [1930]), 127.

[99] Ibid., 76.

overarching goal became to have an ordered, rational, and on this account lawful application of democratic power to society. Law came to be understood not as the reflection of an existing, permanent social order but rather as the expression of collectively determined and gradually shifting public *purposes*.

Here we see how Progressive Hegelian ideals foreshadowed the path of American public philosophy and jurisprudential thinking: the state must have a form conducive to rational policy development, so that it can articulate the rational discourse of the public and institutionalize it in a determinate, transparent, and intelligible fashion. The separation of powers then has to be qualified so as to command not a simple opposition between hermetically sealed branches, but rather a collaborative process to determine the content of public purposes. Justice Jackson expressed this prevailing functional understanding of the separation of powers in his concurrence in *Youngstown Sheet & Tube* (1952): "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[100] Just as Hegel had cautioned against an "abstract" understanding of the separation of powers that attributes to it "the false determination of the *absolute self-sufficiency* of each power in relation to the others," the Supreme Court increasingly interpreted the separation of powers as a flexible scheme for ordering state power.[101]

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[100] *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (concurring opinion).

[101] Hegel, *Philosophy of Right*, §272.

One institutional implication of this turn to the rationalization rather than limitation of public power was that Congress earned a wide legislative scope to regulate society under the Commerce Clause, but legislation which infringed upon constitutional rights would remain subject to stringent judicial review.[102] John Hart Ely's famous resolution of Alexander Bickel's "counter-majoritarian difficulty" shows the shift in thought which the New Deal legislation and constitutional jurisprudence brought about. According to Ely, the function of judicial enforcement of constitutional rights was to preserve the integrity of the democratic process itself. Legislation which discriminated against minorities, which violated the right to freedom of speech and assembly or religious liberty, for example, prevented individuals from participating in the process of democratic will-formation that legitimated the authority of the activist state. Judicial review is then understood as "representation-reinforcing," ensuring that "in the making of substantive choices the decision process will be open to all on something approaching an equal basis, with the decision-maker held to a duty to take into account the interests of all those their decision affect."[103] If we query the kinds of democratic deficits Ely highlights, they concern not only formal inadequacies of political representation, but also impediments to the egalitarian social discourse which political representation expresses. Laws that prevent individuals from expressing their religious beliefs, or which segregate schools, for instance, do not detract from formal political representation in a recognizable way. They do, however, prevent individuals from participating in a public sphere in

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[102] *United States v. Carolene Products*, 304 U.S. 144 (1934).

[103] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press 1980), 88, 100.

which all are able to contribute on free and equal terms.[104] The judicial branch's autonomy and authority within the constitutional separation of powers thus transforms in the activist state from policing the boundary between state and society to ensuring that the state's interventions into society are procedurally legitimate according to deliberative democratic standards.

The post-New-Deal norm of the separation of powers as a whole can be seen in the same light: ensuring the integrity of the discursive democratic process which authorizes the state's interventions into civil society. The separation of powers frames a process institutional reasoning which is legible in statutory text, judicial decision, and executive rulemaking.[105] Each branch issues distillations of public reason which, through their sequential interaction, determine democratically legitimate law. The legislative branch articulates the concerns of the public sphere through statutes, which, amongst other things, create administrative agencies for the implementation of statutory provisions. The executive branch articulates the concerns of the public sphere by ordering and implementing policy priorities embodied in statute according to his electorally sanctioned policy preferences. The judiciary provides members of the public with a forum to challenge one another's activity, and the activity of the state, on the basis of the legal rules the public has legislatively articulated. This vision of the separation of powers

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[104] Cf. Habermas, *Between Facts and Norms*, 264-66.

[105] As Maxwell Cameron has argued, "Constitutional states have always been more powerful precisely because their deliberative institutions solve a series of political problems rooted in the necessity of using language and text to communicate and coordinate intentions and actions. . . . The advantage of the separation of powers is that it enables patterns of collective action involving adaptation and deliberate improvement that would otherwise be unfeasible." Maxwell A. Cameron, *Strong Constitutions: Social-cognitive Origins of the Separation of Powers* (Oxford: Oxford University Press, 2013), 7-8.

does not rely upon any ontological distinction between the kind of power exercised by the branches, nor an epistemic distinction, based upon the kinds of reasons available to each institution. It relies instead upon the more flexible, functional requirement that a discursive democratic state must open multiple venues for public participation, which enable affected parties to influence and shape state policy in different ways in different fora.

The notion that the separation of powers should be understood as a way of "articulating" the democratic public has its roots Dewey, but has recently been revived by Edward Rubin in his effort to offer a more descriptive accurate, rather than "socially nostalgic," characterization of the administrative state. The administrative state, in Rubin's analysis, is the result of a historical process of the "articulation of structure and purpose."[106] The structure is articulated into a network of institutions and offices, and purpose has been articulated in terms of the needs of the public, rather than in terms of some permanent religious or social order. I am less eager than Rubin, however, to jettison the separation of powers as a descriptive element of the administrative state, since the tri-partite model continues to capture the articulated structure of American government at a high level of abstraction. The challenge remains to explain how it does function, how it ought to, and what its limitations are as a descriptive and normative model.

The normative logic of the discursive separation of powers is based around two claims. The first is that no single process of political representation or legislative deliberation can fully capture sovereignty of the people. This is an idea that goes back to

[106] Edward Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton: Princeton University Press, 2005), 25.

the original Federalist conception of popular sovereignty,[107] but which was given a new, activist rather than reactive shape in the progressive concept of public opinion.[108] By multiplying the institutions which express public discourse, different distillations of public views can be refined, institutionalized and brought into dialogue in the formulation of activist state policy.[109] This means that the articulation of the public in the democratic state is necessarily approximate. Multiplying avenues of participation can increase the alignment between public discourse and the state, but they will not be identical. The state incorporates elements of publicity into the structure of political power, without fully dissolving the institutional framework into fluid discourse.

The second claim that underlies the discursive separation of powers relates to the issue of conceptual normativity explored by Dewey, Hegel, and Brandom. If the maker of a legal rule were also its interpreter and implementer, the rule would lose its rule-like quality. Instituting a norm requires separating the abstract specification of the norm from its full determination and application to concrete cases. In the absence of this separation, the norm itself does not rule, but rather the agent who makes the norm. If, for example, Congress had the total power to interpret the meaning of statutes it authored and to implement them, then we would be ruled by Congress, not by the laws passed by Congress. In parceling out elements of interpretive and implementing authority to other

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[107] Ackerman, *We the People 1: Foundations*, 183-4.

[108] Robert C. Post, *Citizens Divided*, 33-5.

[109] As Rosanvallon argues, the claim to "social generality" that legitimates democratic government can be achieved through "the multiplication of the expressions of social sovereignty. Here the goal is to realize the objectives of democracy by making the democratic subject more complex or by adopting more complex democratic forms. In this respect, an important aim is to compensate for the failure of electoral majorities to embody this general will." Rosanvallon, *Democratic Legitimacy*, 6.

actors, statutory norms are disentangled from their legislative source, and thus law becomes autonomous from the agents who directly generate them.[110] So long as the meaning of law remains firmly linked to a process of reasoned elaboration of common needs and beliefs, rather than the needs and beliefs of any one actor or institution, those who are bound by it can lay a claim to authorize it. By giving interpretive power to more than one agent, the determination of legal norms can evolve discursively through the exchange of reasons between institutional actors and the public at large. If properly structured, dialogue and contestation between the branches of government can be constructive rather than paralytic, and thus render public power intelligible rather than merely hinder its exercise.

XI. Conclusion

In chapters 4 and 5, I apply this general notion of the separation of powers to the issue of controlling administration: to what extent and in what way should the legislature, the executive, and the judiciary, control, influence, and limit administration action? The question turns on the peculiar democratic credentials of each branch and the kind of institutional tools each has at hand. I will argue, in each case, that there are practical and normative limits to extensive control by any one branch. Instead, statutes, executive orders, and judicial judgments can open up the administrative process to normative contestation by the affected public.

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[110] William Eskridge, *Dynamic Statutory Interpretation* (Cambridge, MA: Harvard University Press, 1994), 210-11.

Chapter 4

Political Control of Administration:

The Qualified Democratic Authority of Congress and the President

I. Introduction

The activist state distributes the authority to articulate national public purposes between three constitutional branches: the executive, the legislature, and the judiciary. Administrative agencies are constituted by these powers, which frame, direct, and constrain their activity. To understand the special competencies of our administrative state, then, we must understand the way in which constitutional structures permeate it. This chapter begins this task by offering an institutional description and normative evaluation of congressional and presidential control over administrative action. The question that motivates the analysis is: what degree and what kind of political control of administrative action is required by the deliberative democratic principles that underlie the Progressive conception of American constitutionalism?

Against scholars who decry the decline of legislative control,[1] and against those who aim to enhance the directive authority of the presidency over administration,[2] I argue

[1] See, e.g. Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States*, 2nd ed. (New York: W.W. Norton, 1979), 92-126; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980, 131-4; Gary

that each of these branches lack sufficient democratic authority to determine fully the content of administrative action. Instead of attempting to strengthen the slipping grasp of legislative control over administration, we should enhance public deliberation within administrative agencies as they implement statutes. Rather than freeing the hand of the President to intervene arbitrarily into administrative proceedings when it suits his political needs, we should attempt to rationalize White House regulatory review, so that the public is fully aware of the value judgments the President brings to bear as the Chief Executive.

The constitutional powers are identical with respect to the source of their authority, but they are divergent in how they draw on and apply this authority. Under our constitutional system, all governmental power derives from "We the people."[3] Each branch, therefore, can only lay claim to political legitimacy to the extent that it remains somehow linked with the popular sovereign in whose name it acts. The nature of this connection varies between the branches. For the political branches—the legislature and the executive—identification with the popular sovereign has two dimensions: (1) external *representative competency*, which holds elected officials accountable to the considered views of the voting public; and (2) internal *deliberative competency*, which links binding

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Lawson, "The Rise and Rise of the Administrative State," *Harvard Law Review* 107 no. 6 (1994): 1237-41; Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: London: University of Chicago Press, 2014), 377-402.

[2] See, e.g. Lawrence Lessig and Cass R. Sunstein, "The President and the Administration," *Columbia Law Review* 4 no. 1 (1994): 85-118; Richard J. Pierce, Jr., "The Role of Constitutional and Political Theory in Administrative Law," *Texas Law Review* 64, no. 3 (1985): 507-23; Elena Kagan, "Presidential Administration," *Harvard Law Review* 114 no. 8 (2001), 2245-2385.

[3] U.S. Const., Preamble.

decisions with open, egalitarian, transparent, and reasoned debate. While the first dimension emphasizes the majoritarian features of democratic rule, and the latter emphasizes the discursive features, both dimensions in fact have popular and deliberative aspects. Representative competency depends not only upon participation rates and the proportionality of representative units, but also upon the process of discussion and debate that precedes elections. The deliberative competency of each branch depends upon the extent to which the cameral debate is not only rational but inclusive of all relevant information and values held by the public. The degree of democratic authority possessed by each branch is proportional to these related competencies of representation and deliberation.

By these standards, the democratic authority of the legislative and executive branches is qualified, rather than absolute. I argued in the last chapter that the *information deficits* of market-oriented civil society bring about a related *legitimation deficit* in the state. The activist state arises from a public perception that civil society does not deliver the requisite goods, institutions, practices, and opportunities for the realization of individual freedom. But the very scarcity of such requisites tends to undermine the process of discussion and debate that leads up to elections. Voters therefore elect individuals based on highly imperfect information about the problems they seek to remedy, the best means to do so, and the capacity of representatives to answer these questions. Individuals' disparate circumstances within civil society make them unequally situated within public debate, such that the information conveyed by elections often weights the views of some persons more than others. Because of this impaired public knowledge, representatives do not have an unimpeachable claim to claim a popular

mandate. They represent only an uncertain and incomplete determination of public purposes. The public, in Dewey's phrase, remains inchoate, and so its articulation in the state may be both muted and distorted. This epistemic infirmity can be partially redressed by the deliberative competency of each branch, however. An open and inclusive process of debate leading to legislation or executive action might compensate for the failures of this process within the public sphere. But, here too, there is reason to expect that the same informational asymmetries, transaction costs, and power imbalances that afflict civil society will also influence the internal deliberations of elected representatives and their professional staffs.

The related information and legitimation deficits of the legislature and the executive qualify the claim of each to speak authoritatively on behalf of the people. Because of their qualified claim to democratic authority, the legitimacy of administrative action cannot be fully secured by binding administrative decisions either to the commands of the Legislature or the Chief Executive. Democratic legitimacy must be drawn from other sources than the four corners of the statute, or the directives of the President. By the same token, however, the partial separation of administrative action from political control does not necessarily detract from the democratic legitimacy of such action. If Congress or the President possessed full democratic authority, administrative acts without explicit congressional or presidential directive would be democratically suspect. But since democratic authority of the political branches is qualified, slack in their control over administrative decision-making does not entail a diminution in the democratic legitimacy of the activist state. Thus, political phenomena such as legislative delegation to administrative agencies and insulation of administrative decisions from

presidential direction are not necessarily anti-democratic. To the contrary, more pervasive political control of administrative action might squelch out other sources of democratic accountability within administrative agencies themselves.

Once we recognize the political branches' attenuated democratic authority, administrative agencies can be seen to have democracy-reinforcing potential. Over time, both Congress and the President have developed forms of procedural control over administrative agencies, which police the way in which agencies make decisions, rather than mandating a substantive result. These forms of control impose deliberative requirements upon agencies that can help to compensate for the limited authority of the political branches, and thus augment the legitimacy of the activist state. The most important examples of procedural control are the Administrative Procedure Act of 1946,[4] which provides default rules for administrative adjudication and rulemaking, and Executive Orders 12,291,[5] and 12,866,[6] and 13,563,[7] which have established a centralized executive review process for significant regulations. These directives have created an administrative rulemaking process which is disciplined by public participation, and which requires agencies to provide sound reasons for their regulatory decisions. As a consequence, the democratic infirmities of the political process are supplemented by a

[4] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in 5 U.S.C. §§ 500–706 (2012).

[5] Executive Order 12,291, Federal Regulation, 46 Fed. Reg. 13193 (Feb. 17, 1981).

[6] Executive Order 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Sept. 30, 1993).

[7] Executive Order 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 18, 2011).

relatively inclusive and rational process of decision-making within administrative agencies. Democratic authority is thus generated through a process that is forward looking and cumulative, rather than backward looking and static. It arises not from a single moment of legislative expression but from a process of institutional articulation which brings discrete deliberative elements into the specification of policy.

The deliberative democratic competency of agencies remains infirm, however. The unequal participation and influence amongst groups in the regulatory process distorts the deliberative process within them. The form of reasoning White House review imposes upon agencies is impoverished and may serve merely to conceal assertions of presidential will. I will offer some institutional remedies for these deficiencies, such as statutory mechanisms to equalize participation in the administrative process and to further rationalize and constrain presidential control over administrative action. My primary objective is not to provide an elaborate program for administrative reform, however. Rather, it is to show the deliberative democratic limits of rule by the political branches, and to disclose the ways in which administrative agencies already do, and might further, augment the qualified democratic authority of our activist state.

II. Legislative Determination of Administrative Action: Substantive Delegation and Procedural Control

The legislative branch has a strong *prima facie* claim to deliberative democratic legitimacy, and hence to control of administrative agencies. Seen in their best light, elected representatives communicate the opinion of their respective, discursively engaged constituencies, and then undertake a rational deliberative process to produce binding law. Constrained by the need to create general rules controlling an indefinite number of future

cases, legislation tends against arbitrariness, and hence preserves a baseline of democratic equality. All of these factors would seem to point in favor of instituting the greatest possible degree of legislative control of administration.[8] Administrative agencies in this view should serve as mere "transmission belts" for democratically legitimate legislative norms.[9]

This idealized vision of legislative democracy faces many obstacles, however. First, the necessary generality and abstractness of legislative norms often requires that other agents fill in the details, and determine how legal rules apply to social facts. Second, even in cases where Congress could prescribe detailed rules for administrative action, it might be unwise to do so. Given the technical questions frequently involved in administrative decision making, the diverse situations to which regulatory laws apply, and the changing shape of social problems, Congress may not be best suited to reach these determinations. Third, the process by which public opinion is formed and communicated through elections remains unequal and distorted by the pathologies of civil society. Fourth, the legislative process itself is often less one of rational deliberation than of bargaining between unequally situated representatives. Finally, highly determinate statutory constraint of administrative action can frustrate the underlying purposes of congressional policy. All of these provisos, to be explored below, suggest that maximizing congressional control of administration is neither possible nor normatively desirable by deliberative democratic standards. Instead, Congress should

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[8] See, e.g. William Scheuerman, "The Rule of Law and the Welfare State: Towards a New Synthesis," *Politics & Society* 22 no. 2 (1994), 195-213.

[9]Richard B. Stewart, "The Reformation of Administrative Law," *Harvard Law Review* 88, no. 8 (1975): 1675.

codify general substantive goals and procedures for administrative agencies which ensure that they will interpret and apply the law in a rational and inclusive fashion.

For political theorists of wide-ranging ideological stripes, legislative delegation to administrative agencies has long posed a serious legitimation problem.[10] Given the great weight which liberal norms place upon legislative control, any significant increase in administrative discretion is widely thought to undermine deliberative values and the rationalizing and constraining functions of the rule of law. Against this chorus of critics, I will argue that delegation is not only necessary but may be democratically legitimate. Delegation is both permissible and required because of the related information and legitimation deficits of the legislature. Because of the pathologies of civil society and of the legislative process, Congress often does not know, and therefore does not have authority to declare, the precise solutions to the problems society calls upon it to address.

1. Deliberative Democratic Virtues of Legislation

The constitutional requirement that "[a]ll legislative powers . . . shall be vested in a Congress of the United States" institutionalizes the connection between law, electoral representation, and deliberation which has circulated in liberal democratic theory for centuries.[11] Liberal and democratic political theory have long fastened upon the unique ability of legislation and legislative bodies to render power accountable, transparent,

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[10] Neumann, "The Change in the Function of Law in Modern Society," 22-68; Lowi, *The End of Liberalism* 92-126; Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge, MA: MIT Press, 1994) 1-3, 211-217; Kornhauser, *Debating the American State*, 1-19, 90-129; Hamburger, *Is Administrative Law Unlawful?*, 377-402.

[11] U.S. Const., Art. I, Sec. 1.

predictable, and rational. Locke emphasized not only that the legislature is the forum for popular consent to government, but also that published, standing laws preserve liberty by preventing arbitrary government action and giving persons notice of the rules to which they are subject. For these reasons, "the legislature is not only the supreme power of the commonwealth, but is sacred and unalterable in the hands in which the community has placed it; and no other person or organization . . . can make edicts that have the force of law and create obligations as a law does unless they have been permitted to do this by the legislature that the public has chosen and appointed."[12] Rousseau complemented Locke's analysis by arguing that the very generality of legislation is conducive to the freedom and equality of subjects: "When I say that the object of the laws is always general, I mean that the law considers subjects collectively, and actions in the abstract, never a man as an individual nor a particular action."[13] The generality of law corresponds to the collective democratic identity of the general will, instituting a formal equality between all of the subjects who compose it.

This emphasis on the generality of law leads to a principled distinction between legislation and execution, and the implied normative superiority of the former over the latter. Hegel maintains that it is "possible to distinguish in general terms between what is the object of universal legislation and what should be left to the direction of administrative bodies or to any kind of government regulation, in that the former includes only what is wholly universal in content – i.e. legal determinations – whereas the latter

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[12] John Locke, *Of Civil Government: Second Treatise*, ed. Russel Kirk (Chicago: Henry Regnery Company, 1955), 109.

[13] Jean-Jacques Rousseau, "The Social Contract," in Rousseau, *The Social Contract and the First and Second Discourses*, ed. Susan Dunn (New Haven: Yale University Press, 2002), 179.

includes the particular ways and means whereby measures are *implemented.*"[14] Frank Goodnow follows in this tradition, and draws on the ideas of Lorenz von Stein, to argue that the legislature is the primary organ for the expression of the "will of the state," whereas the executive administration carried out its "deed."[15] For Goodnow, however, the subordination of the administrative particular to the legislative universal is not simply a matter of giving state action rational form. It is also a requirement of democracy: "popular government requires that it is the executing authority which shall be subordinate to the expressing authority, since the latter in the nature of things can be much more representative of the people than can the executive authority."[16] While Goodnow does not spell out this insight in detail, the suggestion is that the combination of electoral control and the multiplicity of views represented in the legislature give it a greater claim to democratic legitimacy than the presidency, courts, or administrative bodies.

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[14] Hegel, *Philosophy of Right*, § 299A.

[15] Goodnow, *Politics and Administration*, 14-15. Goodnow recognized, as did Hegel, that the distinction between legislation and execution was not absolute, and that legislative and executive functions could not be strictly separated into different institutions: "the organ of government whose main function is the execution of the will of the state is often, and indeed usually entrusted with the expression in its details. These details, however, when expressed, must conform with the general principles laid down by the organ whose main duty is that of expression. That is, the authority called executive has, in almost all cases, considerable ordinance or legislative power. On the other hand, the organ whose main duty it is to express the will of the state, i.e. the legislature, has usually the power to control in one way or another the execution of the state will by that organ to which such execution is in the main entrusted. . . . [T]he will of the state as to different matters may be expressed by different state organs. This is a characteristic feature of the American political system, in which the constitution-making authority, that is, the people, expresses the will of the state as to the form of governmental organization and the fundamental rights of the individual; while the legislature, another governmental organ, expresses the will of the state in most cases where it has not been expressed in the constitution. Again, as a result, either of the provisions of the constitution or of the delegation of power by the legislature, the chief executive or subordinate executive authorities may, through the issue of ordinances, express the will of the state as to the details where it is inconvenient for the legislature to act." Ibid., 15-17.

[16] Goodnow, *Politics and Administration*, 24.

The legislature is thought not only to channel public consent, and to rationalize state action, but also to improve the quality of political deliberation. Madison thus argued that legislative representation would "refine and enlarge public views by passing them through the medium of a chosen body of citizens."[17] Madison's claim relies in part on a theory of natural aristocracy, in which representatives are thought to be more knowledgeable, broad minded, and politically virtuous than their constituencies. Even without these assumptions, however, the argument has force: bringing together diverse representatives into a common body vested with law-making power sets the stage for a process of argument, bargaining, and coalition building. Legislators must find ways to develop common cause and overlapping interests in order to have something to show to their constituents for their political labors. Joseph Bessette, who coined the term "deliberative democracy," drew on Madison to argue that representation was "essential to the formation, expression, and effective political rule of reasoned majority judgments."[18] The regulative ideal for this process is the liberal principle of government by discussion, where laws are passed because a majority of members have been convinced of their merits, either for their particular constituency, or for the nation as a whole. Because of their unique combination of representative and deliberative capacity, Habermas concludes that "political legislatures *alone* enjoy unlimited possibilities for access to

[17] James Madison, "The Federalist No. 10," in Alexander Hamilton, James Madison, and John Jay, The Federalist, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961), 56-65, 62.

[18] Joseph M. Bessette, "Deliberative Democracy: The Majority Principle in Republican Government" in *How Democratic is the Constitution?*, Robert A. Goldwin and William A. Schambra, eds. (Washington, D.C.: American Enterprise Institute, 1980).

normative, pragmatic, and empirical reasons . . . though they have this access only within the framework of a democratic procedure designed for the justification of norms."[19]

2. Legislative Delegation to Administrative Agencies as a Response to Uncertainty

Nineteenth-century American government generally reflected this liberal democratic commitment to legislative supremacy over the executive branch and its administrative bodies. Even the early forays into the expansion of administrative powers in the Progressive Era continued to privilege statutory control over administration, and intensive judicial review of administrative determinations of questions of law and fact.[20] But with the gradual expansion of state power during the Progressive Era, and its massive extension during the New Deal, a paradoxical development would follow. Congress earned and exercised broadened lawmaking powers; but precisely because of this vast expansion in legislative activity, its control over the exercise of these powers would, in fact, diminish. Congress would give significant authority to administrative agencies to interpret, apply, and even write the law.

The career of the "non-delegation doctrine" in constitutional law shows the strength of the congressional impulse to assign functions to administrative agencies which are closely akin to legislative powers. The non-delegation doctrine stands for the proposition that Congress may not delegate its legislative power to other branches of

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[19] Habermas, *Between Facts and Norms*, 192 (emphasis added).

[20] Stewart, 1671-1676; Reuel Schiller, "The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law," *Michigan Law Review* 106 (2007): 399-442, 407-412.

government. But, over time, Congress has tested the elasticity of this constitutional constraint to the point that one might ask whether it has any proscriptive force whatever.

Prior to the New Deal, the Court enunciated the standard by which to judge whether legislative delegations to the executive branch were constitutionally permissible: "if Congress shall lay down by legislative act an intelligible principle to which the person or body . . . is directed to conform, such legislative action is not a forbidden exercise of legislative power."[21] The "intelligible principle" standard requires Congress to establish statutory criteria "sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the administrator . . . has conformed to those standards."[22] Nevertheless, the courts have since held very abstract statutory commands sufficiently intelligible to permit the delegation of power to administrative agencies. For example, the Communications Act of 1934 empowered the Federal Communications Commission to exercise various regulatory and licensing powers over radio and wire communications "as the public convenience, interest or necessity requires."[23] The Economic Stabilization Act of 1970 authorized the President or officers or agencies he designated to "issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970."[24] The Clean Air Act empowers the Environmental Protection Agency to promulgate national ambient air quality standards "the attainment and maintenance of which . . . are requisite to protect

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[21] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

[22] Yakus v. U.S., 321 U.S. 414 (1944).

[23] Communications Act of 1934, Pub. L. 63-416, § 303, 48 Stat. 1064, 1082 (1934), codified as amended at 47 U.S.C. § 303 (2012).

[24] P.L. 91-379 84. Stat. 799 (1970).

the public health" with "an adequate margin of safety."[25] In each of these cases, the courts have held the delegations to be constitutional, despite the seemingly broad scope of their instructions.[26] This line of cases shows both the strength of the legislative tendency to delegate broad authority to agencies outside of their immediate control, and the solicitude of the other branches towards such delegations.

Why *does* Congress delegate? Why are the interests of the members not "connected with the constitutional rights of the place,"[27] so as to preserve an extensive control over the content of the laws and thus their administration? The general answer is that Congress lacks complete information about the problems on its legislative agenda, and the opportunity cost of gathering such information is high.[28] The sphere of constitutionally valid legislative power has expanded with the Court's broad construction of the Commerce Clause, and public attitudes have demanded action on new and wide-ranging spheres of social life. But the precise causes and available solutions to social problems are rarely known in all their specificity at the outset of the policy process. Indeed, the need for state intervention arises in large part from informational failures of

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[25] Clean Air Act §109(b), codified as amended at 42 U.S.C. § 7409(b) (2012).

[26] National Broadcasting Co. v. U.S., 319 U.S. 190 (1943); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.C. Cir. 1971); Whitman v. American Trucking Associations, Inc., 531 U.S. 427 (2001). The non-delegation doctrine has only been used to strike down a statutory provision twice, and each time it concerned a provision of the National Industrial Recovery Act, which delegated authority to private associations to set codes of fair competition. See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[27] James Madison, "The Federalist No. 51" in Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961), 347-353, 349.

[28] "The total time spent on details must be at the sacrifice of time spent on matters of broad public policy." Attorney General's Committee on Administrative Procedure, *Final Report*, 14.

the market, which does not always accurately convey through price the full costs and benefits of social activity.[29] Demands for social action are thus usually accompanied by substantial uncertainty over what is wrong and what must be done to fix it. Policymakers must struggle to understand and articulate problems which the existing institutional resources are under-equipped to address. These struggles are costly, with time spent on information gathering from constituents, staffers, and other representatives. Since there are usually several issues on its legislative agenda, Congress pays for the time it spends fully understanding and addressing one problem with its failure to understand and address another.[30] Delegation allows Congress to authorize efforts to address a problem which is only abstractly perceived, without expending all of the resources necessary to understand it concretely. Concreteness in understanding is left to the implementing agency.

Congress also faces information costs associated with coalition building. Even if members of legislative committees expend the energy necessary to understand and prescribe precise solutions for social problems, informing and convincing other members that precisely these measures should be taken is time consuming and is paid for by inattention to other issues. Broad statutory language makes it possible to build coalitions without reaching agreement on such fine points. If we conceive congressional policy

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[29] Rose-Ackerman, *Rethinking the Progressive Agenda, 6-7.*

[30] As Stewart notes, "In many government endeavors it may be impossible in the nature of subject matter to specify with particularity the course to be followed. This is most obvious when a new field of regulation is undertaken. Administration is an exercise in experiment. . . . In addition, there appear to be serious institutional constraints on Congress' ability to specify regulatory policy in meaningful detail. Individual politicians find more to be lost than gained in taking a readily identifiable stand on a controversial issue of social and economic policy. Detailed legislative specification of policy would require intensive and continuous investigation, decision, and revision of specialized complex issues." Stewart, "Reformation," 1695.

preferences in two-dimensional space,[31] then a statutorily specific legislative proposal will map onto the policy space more like a dot, or a small circle. Statutorily broad language will expand the circle of the proposal, such that it encompasses or approaches the preferences of more members. It should therefore be easier to pass statutes with broad language.

Members of Congress also face uncertainty about the future. Available scientific knowledge and technologies may shift over time, such that the best solution to a social problem at time t(1), even if discernible by Congress when it legislates, is not the best solution at time t(2). Policy problems such as environmental pollution, racial or gender discrimination, or immigration, may also change in their specific form over time, such that they resist any solution by the application of an initial set of clearly defined criteria. When Congress is compelled by public sentiment to address such problems, it therefore has good reason to legislate abstractly, so that shifting policy instruments can be adapted to an evolving social reality. Congress also does not know how the public will react in the future to its own investigation of and solution to the problem identified. In cases where the public mood demands that "something must be done!" in a given area of policy, Congress has strong institutional incentives to set out general substantive legislative intentions, but to punt detailed policy definition to another actor, whom it can blame if outrage at the problem is exceeded by outrage at the response.

These various information deficits lead Congress to delegate quasi-legislative, rule-making power to administrative agencies. The reality and extent of Congressional

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[31] See, e.g. George Tsebelis, "Decisionmaking in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism," *British Journal of Political Science* 25, no. 3 (1995): 296.

control then depends upon the constraining power of its procedural, oversight, and budgetary powers. As Matthew McCubbins, Roger Noll, and Barry Weingast have shown, procedural controls are more robust than sanctioning through legislative reversal, oversight, or budget constraint.[32] Legislatively mandated procedures can afford robust participation rights to the public constituencies who initially supported the legislation. They can also delay agency action so that administrators cannot introduce a new policy status quo without giving legislators and their constituencies time to mobilize opposition. As we shall see, passive procedural control is an essential mechanism for curing the related information and legitimation deficits Congress faces.

3. Conflicting Values of Accountability and Responsiveness in the Crafting of Legislative Norms

Critics of delegation to administrative agencies often treat legislative specificity as an unqualified good. They argue that only detailed legislative rules can ensure that real deliberation occurs regarding the ends of policy, and that representatives can be held publicly to account for their decisions. Richard T. Ely, for example, argues that delegation is "wrong because it is undemocratic, in the quite obvious sense that by refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic." [33] But such criticism of legislative delegation often ignore this tension between accountability and

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[32] Matthew D. Cubbins, Roger G. Noll and Barry R. Weingast, "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies," *Virginia Law Review* 75, no. 2 (1989): 431-482.

[33] Ely, *Democracy and Distrust*, 132.

responsiveness. The non-delegation approach they endorse has serious costs, for the more determinate legal rules are, the more likely they are to depart from legislative purpose in concrete cases.

The problem with legislative specificity can be better understood if we look to those cases where Congress chooses not to delegate discretionary powers to administrative agencies, but rather provides quite detailed rules on its own. The fact that Congress has incentives to, and often does, delegate substantial rulemaking authority to agencies, does not mean that Congress always refrains from laying out determinate rules to govern the administrative state. Tax collection, to take only one example, is governed by a detailed Internal Revenue Code. The Treasury Department still must issue regulations to clarify interstitial questions of law not plainly resolved by Code provisions. But in this area, and many others, Congress goes far beyond general statements about "public interest" or "public health."

When Congress does provide such specific substantive rules, however, it confronts the problem that such rules are sometimes a poor fit for the general policies sought. The Earned Income Tax Credit (EITC), for example, aims to encourage work, reduce welfare rolls, and provide income support for the poor, by subsidizing earnings for low-income workers and their families.[34] As Anne Alstott has shown, however, the narrow definition of "income" in the tax code and its annual accounting of income make

[34] V. Joseph Hotz and Karl Schotz, "The Earned Income Tax Credit," in *Means-Tested Transfer Programs in the United States*, ed. Robert A. Moffitt (Chicago: The University of Chicago Press), 141-197, 143-52.

the EITC highly unresponsive to actual financial need.[35] The determinate legal norms which make the tax code work for revenue collection and other policy purposes makes it a highly imperfect fit for the EITC's goals of income support and work promotion.

Nor are such problems limited to income-tax-based transfers. When Congress was concerned about the abuse of the food stamp program by well-off young adults, for example, it provided that if a household includes a member who is over eighteen and is claimed as a dependent by a taxpayer who is not eligible for food stamps, that household shall be ineligible for food stamps for the year in which dependency is claimed and the following year.[36] The Court reckoned with this statutory provision in *U.S. Department of Agriculture v. Murry*,[37] as it applied to a household with only $57 in monthly income, deprived of food stamps because the head of household's ex-husband had claimed tax dependency for her nineteen-year-old son in the previous year. The Court found that the statute violated due process because it established an "irrebuttable presumption" that households falling under the statutory exemption were not in need of food stamps.[38] This irrebuttable presumption doctrine has been harshly criticized because, if widely applied, it would seem to invalidate a vast number of statutory rules.[39] It is in the nature of a determinate legal rule that it will include some particular cases which do not fall under

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[35] Anne Alstott, "The Earned Income Tax Credit and the Limitations of Tax Based Welfare Reform," *Harvard Law Review* 108 (1995): 570-85.

[36] An Act to amend the Food Stamp Act of 1964, as amended, Pub. L. 61-671, §5(b), 84 Stat. 2048, 2049-50 (1971).

[37] 413 U.S. 508 (1983).

[38] Ibid., 513.

[39] Jerry L. Mashaw, "Constitutional Deregulation: Notes Toward a Public, Public Law," *Tulane Law Review* (1980): 863.

the purpose of the rule and exclude some that do. The courts therefore have not applied this principle broadly, and it has emerged only occasionally in American jurisprudence.

The problem of the irrebuttable presumption discloses the normative tensions underlying statutory control over the administrative state: the more determinate the statutory rules, the greater the risk that the general purposes of legislation will be frustrated by the rigid constraints on administrative action. This was a problem Hegel foresaw. While recognizing that one could distinguish in general between legislation and administration in terms of universal and particular, he argued that the distinction was not

> wholly determinate, however, if only because a law, in order to be a law, must be more than just a commandment in general (such as 'Thou shalt not kill' . . .), i.e. it must be *determinate* in itself; but the more determinate it is, the more nearly capable its content will be of being implemented as it stands. At the same time, however, so far reaching a determination as this would give laws an empirical aspect which would necessarily be subject to alteration when they were actually implemented, and this would detract from their character as general laws.[40]

This observation reveals an ineluctable dialectic between legislative generality and determinacy. A universal norm, to have binding effect, must have some determinate quality; but the more determinate it is, the more general principles may become obscured and even undermined in its application. Philippe Nonet describes this problem as a conflict between the values of legal accountability and responsiveness: "Either authority is given to proximate goals that ensure accountability but prevent flexible response or the source of authority is located in more general ends which calls for adaptive problem solving but undermines the steady and accountable implementation of policy."[41] We do

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[40] Hegel, *Philosophy of Right*, § 299.

[41] Philippe Nonet, "The Legitimation of Purposive Decisions," *California Law Review* 68, no. 2 (1980): 274.

not, however, face a binary choice between either accountability or responsiveness. These are not absolute and fully contradictory values, but rather extremes on a continuum. The question is how we ought to manage the tension between accountability and responsiveness, and how we ought to weigh one against the other in the specific case of legislative delegation.

4. The Relative Value of Accountability and Responsiveness in a Context of Limited Legislative Legitimacy

The value of accountability relative to responsiveness depends upon the democratic authority of the body to whom administrative authorities are thought to be accountable—namely, the legislature. If the democratic authority of the legislature is complete, then this speaks in favor of privileging accountability over responsiveness. In that case, the political process retains its legitimacy until the point where the public demands an alteration in policy. When public will demands adjustment, the legislature can make up for deficits in responsiveness at the level of administrative implementation by changing the laws. If the legislature's democratic credentials are compromised or partial, however, then this diminishes the value of accountability to that body, and increases consideration in favor of administrative responsiveness. Where we do not believe the legislature has complete democratic authority, we should instead foster public responsiveness amongst the administrative bodies that implement the laws.

Democratic authority, as I have used it here, rests upon reasoned discourse between free and equal citizens. By this standard, Congress' democratic authority is only partial. I argued above that Congress delegates rulemaking authority to administrative agencies because it lacks perfect information about social problems and their solutions.

This legislative information deficit corresponds to a legitimation deficit: the formation and communication of public opinion suffers from asymmetries of knowledge and power between members of the public, which prevents the formation of fully accurate impressions about social reality. The public discourse that precedes elections is not perfectly rational and egalitarian: citizens are often ill-informed or do not have the time to engage in thorough debate of the issues at hand;[42] elites may manipulate public opinion formation through media framing.[43] To put these findings in terms of Hegelian social theory, the pathologies of unequal power in civil society stymie the formation of a robust, egalitarian, participatory, and reasoned public opinion. Thus, even if public opinion were perfectly communicated to Congress, it is not perfectly constituted beforehand. Congress therefore could not claim an absolute right to speak on behalf of the democratic public, even if congressional preferences perfectly tracked and codified the content of public opinion.

On top of these dysfunctions of deliberation at the social level are dysfunctions at the level of political institutions. Electoral mechanisms only convey indistinct impressions of public preferences into the political process. Election turnout and political engagement is often low, especially in circumstances of economic inequality.[44] In a two

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[42] Bryan Caplan, *The Myth of the Rational Voter* (Princeton: Princeton University Press, 2007); Michael X. Delli Carpini and Scott Keeter. *What Americans Know about Politics and Why it Matters* (New Haven: Yale University Press, 1996); Jeffrey Friedman, "Public Ignorance and Democratic Theory," *Critical Review* 12, no. 4 (1998), 397-411.

[43] Lawrence R. Jacobs and Robert Y. Shapiro, *Politicians Don't Pander* (Chicago: Chicago University Press, 2000).

[44] Arend Lijphart, "Unequal Participation: Democracy's Unresolved Dilemma," *American Political Science Review* 91, no. 1 (1997): 1-14; Frederick Solt, "Economic Inequality and Democratic Political Engagement," *American Journal of Political Science* 52, no. 1 (2008): 48-60.

party system, with each party offering a basket of policy goods, it is difficult to apply accurate information about voters' preferences and interests to legislation. Unlike the economic market place, there is insufficient competition between political "firms" and disaggregation of political "products" to ascribe to electoral results reliable preferential value.[45] In addition, Congress itself often does not legislate on the basis of reasoned deliberation between its members. Much congressional time is spent on constituent service rather the lawmaking; legislative action is more often driven by expressive position-taking, lobbying by powerful interest groups, and sheer bargaining between members than by rational policy making through argument and persuasion.[46] Finally, some research suggests that Congress is more responsive to the opinions of high-income than low-income individuals.[47]

Despite the real and sobering insights of these lines of research on public opinion formation, political influence, and congressional process, however, Congress' democratic infirmities should not be overstated. In the formation of public opinion, the framing effects of media elites may be reduced when individuals with divergent opinion engage in

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[45] Samuel DeCanio, "Democracy, The Market, and the Logic of Social Choice," *American Journal of Political Science* 58, no. 3 (2014): 637-52.

[46] See, e.g. David Mayhew, *Congress: The Electoral Connection* (New Haven: Yale University Press, 1974), 110-35; and Morris P. Fiorina, *Congress: Keystone of the Washington Establishment* (New Haven: Yale University Press, 1977), 39-49.

[47] Larry M. Bartels, *Unequal Democracy: The Political Economic of a New Guilded Age* (Princeton: Princeton University Press, 2008); Kay Lehman Schlozman, Sidney Verba and Henry E. Brady *The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy* (Princeton: Princeton University press, 2012). See also Sidney Verba, "The Citizen As Respondent: Sample Surveys and American Democracy," *American Political Science Review* 90, no. 1 (1996): 1-7.

conversation.[48] Despite the fact that individual voters may be ignorant about the finer points of policy, in the aggregate they are often able to use heuristics in order to make sound choices despite imperfect information.[49] Congress is indeed influenced by public opinion in its legislation, however distorted and unequal the formation of public opinion may be.[50] And even if it is true that representatives are more responsive to the opinion of wealthier constituents, some research suggests that opinion moves in the same direction over time across income groups, such that wealthy opinion may serve as a rough proxy for less wealthy opinion.[51] Finally, rational deliberation is an important aspect of the Congressional process, even if it does not always determine the contents of its legislative products. [52] The fact that Congress' committee system is organized to induce specialization and information-gathering suggests that Congress does seek out reasoned

[48] James N. Druckman and Kjersten R. Nelson, "Framing and Deliberation: How Citizens' Conversations Limit Elite Influence," *American Journal of Political Science* 4, no. 4 (2003): 729-945.

[49] Jeffrey J. Mondak, "Public Opinion and Heuristic Processing of Source Cues," *Political Behavior* 15, no. 2 (1993): 167-92; Michael M. Gant and Dwight F. Davis, "Mental Economy and Voter Rationality: The Informed Citizen Problem in Voter Research," *The Journal of Politics* 46, No. 1 (Feb., 1984): 132-153; Robert Erikson, Michael MacKuen and James Stimson, *The Macro Polity (*Cambridge: Cambridge University Press, 2002), 5-7, 193-236,; Benjamin Page and Robert Shapiro, *The Rational Public: Fifty years of Trends in Americans' Policy Preferences (*Chicago: University of Chicago Press, 1992): 1-36.

[50] Mayhew, *Congress*, 138-40; Erikson et al., *The Macro Polity*, 304-9; W.E. Miller and D.E. Stokes "Constituent Influence in Congress," *American Political Science Review* vol. 57 (1963): 45-56; Robert B. Erikson, "Relationship between Public Opinion and State Policy: A New Look on Some Forgotten Data," *American Journal of Political Science* 20, no. 1 (1976), 25-36; Benjamin I. Page and Robert Y. Shapiro, "Effects of Public Opinion on Policy," *American Political Science Review*, 77, no. 1 (1983): 175-190.

[51] Stuart N. Soroka and Christopher Wlezien, "On the Limits of Inequality in Representation." *PS: Political Science and Politics* 41, no. 2 (2008), 319-27; Joseph Daniel Ura and Christopher R. Ellis, "Income, Preferences, and the Dynamics of Policy Responsiveness." *PS: Political Science and Politics* 41, no. 4 (2008): 785-94.

[52] Joseph M. Bessette, *The Mild Voice of Reason: Deliberative Democracy and American National Government* (Chicago: London: University of Chicago Press, 1994), 40-105.

policy analysis in the legislative process.[53] Finally, with the Government Accountability Office, Congressional Budget Office, and Congressional Research Service, Congress has developed its own internal administrative capacity, which improves its ability to rationally deliberate over matters of policy and understand technical issues.

This mixed deliberative record of Congress suggests that legislative control has a legitimate but only partial claim to democratic authority. The level of democratic authority doubtless varies from time to time and by policy area, and is not always easily discernible. As a consequence, the norm of democratic authority does not provide a standard for judicial review of congressional statutes, nor some bright line distinction between acceptable and unacceptable levels of statutory specificity. The norm functions, rather, to qualify Congress' claim to determine fully the substantive rules for the administrative state. There is therefore a symmetry between the real incentives Congress has to delegate lawmaking power to agencies and the normative limits of its democratic authority. Constraints on Congress' time and expertise, the attractiveness of statutory ambiguity in building coalitions, as well as Congress' efforts to insulate itself from negative public responses to policy implementation, often prevent it from exceeding its democratic authority by laying down with great specificity the contents of its policies.

This qualified democratic authority of the American legislature has several normative and institutional consequences. First, it suggests that an effort to ground the legitimacy of the administrative state solely in the democratic credentials of Congress is sure to disappoint. Second, it suggests that if the administrative state's democratic ability

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[53] Keith Krehbiel, *Information and Legislative Organization* (Ann Arbor, MI: University of Michigan Press, 1991).

is to be enhanced, the coordinate branches must have something to contribute to democratic legitimation. (The extent of deliberative contribution of the presidency is the concern of section III of this chapter. The following chapter considers judicial review). Finally, it suggests that ample room be made for responsive administrative rulemaking, rather than privileging rigid administrative accountability to statutory rules. For in the balance between legal accountability and responsiveness, the democratic infirmities of Congress shift the calculus in favor of greater responsiveness at the administrative level. The increased normative pull towards administrative responsiveness does not excuse the administrative process from additional safeguards of democratic accountability. Rather, it directs us to institutionalize democracy within the administrative process, rather than through the extension of legislative control.

One might argue that the limits on Congress' democratic credentials entail that its power should be constrained in definite ways, by preventing it from legislating on certain topics, or intruding upon the organization of society without super-majoritarian, or even consensual authorization.[54] Congress, after all, cannot delegate a function to agencies which is beyond its own powers. But it would be a mistake to interpret Congress' democratic infirmities as a reason to delimit *ex ante* the extent of its legislative power. This is because, first, as a matter of constitutional development, the democratic public has generally authorized an activist regulatory state through a deliberative process of heightened debate and institutional confrontation.[55] This means that Congress can, as a

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[54] See, e.g. James Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Government* (Ann Arbor: University of Michigan Press, 1962).

[55] Bruce Ackerman, *We the People 1: Foundations*, 105-130.

matter of constitutional law, pervasively regulate civil society even if the deliberative democratic qualifications of Congress are limited. Second, as a matter of social and political theory, the central source of Congress' democratic infirmities are the inequalities, antagonisms, and informational deficits of civil society, which undermine public deliberation and its hold on policymaking. If a deliberative public sphere is to serve as a regulative ideal for the American state, then the state must have the power to restructure civil society so as to create circumstances of equality and mutual recognition. Therefore to prevent legislative action which would reduce the anti-deliberative qualities of contemporary civil society would be a cure worse than the disease. Instead, we must provide mechanisms which enable Congress to exercise its limited democratic authority, and buttress this authority with other sources of public input.

5. The Administrative Augmentation of Democratic Authority

How should the qualified democratic authority of the legislature be institutionalized? I argue that Congress should in all cases specify the *general ends* of policy and the *procedures* by which the more concrete means of policy will be determined. Congress must first attempt to establish a basic congruence between the identified needs, preferences, and problems of the democratic public, on the one hand, and legislative goals, on the other.[56] The generality of these goals corresponds to the abstract but not determinate information Congress holds. Though the deliberative deficits of civil society and the political process make it difficult for Congress to fully perceive and implement the precise rules that a hypothetical, fully deliberative democratic public would want, it has enough meaningful information to form indistinct impressions as to public needs and preferences. This is not to say that Congress should in all cases only go so far as to set out general goals for agencies to explicate through rulemaking and apply in adjudication. The democratic authority of Congress to elaborate more detailed substantive provisions increases as the quality of public argument and rational deliberation in Congress itself increases. No strict rule can be drawn. Rather, the limitations of Congress' democratic legitimacy, and the perils of too much legislative precision, caution against an effort to push statutory control of administration as far as possible.

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[56] Colin S. Diver offers three criteria to describe the "optimal precision of administrative rules:" "transparency," meaning that the rules have clear meanings, "accessIlity," meaning that their application to particular cases is clear, and "congruence," meaning the extent to which they further the purpose underlying the rule. Colin S. Diver, "The Optimal Precision of Administrative Rules," *Yale Law Journal* 93 no. 1 (1983): 65-109. Diver analyzes these dimensions of precision in terms of their efficiency properties. While efficiency is an important consideration, it is doubtful, as Diver claims, that this criterion is really any more precise and ready for application

Substantive statutory rules are not, however, Congress' only tools for structuring administrative action. Congress can craft procedural rules which shape the way administrative agencies make substantive rules and adjudicate cases. Procedural control, like the articulation of general goals, is well-suited to Congress' partial claim to democratic authority. This is because procedural rules do not predetermine the outcome of administrative implementation. Instead, they make provisions for an ongoing process in which the content of legal norms can be contested and shaped by other actors. Procedural rules can therefore frame the debate without dictating a result. This means that procedural rules are less likely than detailed substantive rules to reproduce the current constellation of unequal interests and bargaining power, as they exist in civil society and in congressional representation.. Even if procedures initially serve to stack the deck in favor of certain privileged constituencies, they cannot be harnessed to the interests of these constituencies in a highly-reliable fashion.[57] Such attempts must rely upon a

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than considerations such as fairness, equality, or democratic accountability: what kinds of costs matter and how they are valued require prior judgments about the relative value of autonomy, participation, and economic growth. The approach I take here is to consider dimensions of rule precision by the underlying value of deliberative democracy. The question at this point, then, is: what degree of rule precision matches the deliberative democratic credentials and competencies of a legislature with partial democratic authority? At the legislative, rather than administrative level, congruence should have precedence over transparency and accessibility, because the goal is to provide the public with a general, if not totally determinate and readily applicable, sense of the goals to be pursued by administration. At the administrative level, the value of accessibility and transparency increases, such that the general policy announced has known and predictable consequences for social actors.

[57] Stephen J. Balla analyzes decision making at the Health Care Financing Administration to argue that notice-and-comment rulemaking "does not necessarily promote agency policy choices that serve the interests of legislators' favored constituents." Stephen J. Balla, "Administrative Procedures and Political Control of Bureaucracy," *American Political Science Review* 92, no. 3 (1998): 671. This qualifies the claim of McCubbins, Noll and Weingast that administrative procedures serve to "stack the deck" in favor of legislator's favored constituencies. See Mathew D. McCubbins, Robert G. Noll and Barry R. Weingast, "Administrative Procedures as

contingent alignment between a process and a substantive outcome, which can fail if the assumptions are faulty, unstable, or if agents use the procedure in unforeseen ways.

Procedures, like rational arguments themselves, retain certain autonomy from the actors who make them. An argument derives its capacity to convince not from the motives of the arguer, but from the shared currency of rationality the arguer must expend to convince listeners. An argument once made may then be put to other uses than the initial arguer's purposes. Similarly, a procedure derives its capacity to order behavior from the fact that individuals with different interests and goals are able to operate through it. We can use a procedure, just as we can use an argument, even if we do not fully trust the motives, values, or ethical judgment of those who made it. Thus, when we only qualifiedly accept the authority of an actor to legislate, procedures for post-legislative participation provide a means of recognizing that authority without letting it exceed the bounds of our confidence. Legislated procedures can then enable the state to redress its information deficits through more thoroughgoing consultation with knowledgeable members of the public.

The combination of general substantive rules and procedural rules serves to capture the connection between democratic authority and discursive process which Congress initiates within the state through legislation. As Carl Friedrich put it, "authority rests upon the ability to issue communications which are capable of reasoned

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Instruments of Political Control," *Journal of Law, Economics, and Organization* 3 (1987): 243-77.

elaboration."[58] The lasting significance of the "intelligible principle" standard of the non-delegation doctrine lies not in its ability to provide justiciable criteria for limiting the abstractness of statutory commands, but rather in the notion that statutory delegations must be accompanied by procedures which enable the rational articulation of statutory norms in the rest of the political, judicial, and administrative process. This is why general substantive rules must be accompanied by procedural rules for administrative implementation, such that a process of reasoned elaboration can proceed outside the four corners of the statute and the pronouncements of its robed interpreters. From the notion of the "intelligible principle," we arrive at what might be called an "intelligibility principle"—that state policy should arise and develop in a manner that is susceptible to rational explanation, discourse, and argument between public officials amongst themselves and between public officials and the public sphere.

[58] Carl J. Friedrich, "Authority, Reason, and Discretion," *Nomos* I, ed. Carl J. Friedrich (Cambridge, MA: Harvard University Press, 1958), 29. This is to be contrasted with the classical view of authority provided by Hannah Arendt in the same volume, according to which "authority is incompatible with persuasion, which presupposed equality and works through a process of argumentation. Where arguments are used, authority is left in abeyance." Hannah Arendt, "What was Authority?" *Nomos* I, ed. Carl J. Friedrich (Cambridge, MA: Harvard University Press, 1958), 82. Authority as used by Friedrich and as I use it here shares more with Arendt's concept of power, as acting together on the basis of speech, and Habermas' notion of the "unforced force of the better argument." See Hannah Arendt, *The Human Condition*, 199-201; Habermas, *Between Facts and Norms*, 306. Authority remains, however, distinct from persuasion in that it does not rest upon the fact that all those bound by authority have been persuaded, but only that those affected have had meaningful opportunity to participate in the formulation of policies which, once in effect, are binding upon them irrespective of their ultimate agreement or consent.

6. Congress' Procedural Structuring of Administrative Action

The most significant statute through which Congress provides for the intelligibility of administrative action is the Administrative Procedure Act of 1946 (APA).[59] The APA establishes default procedures for agencies in promulgating rules and in adjudicating cases within their statutory jurisdiction. When the APA was enacted, the major administrative agencies of the time, such as the Federal Trade Commission, the Federal Communications Commission, and the National Labor Relations Board, generally used adjudication procedures.[60] Informal rulemaking, however, subsequently took on a greater role as agencies sought to avoid the cumbersome trial-like procedures of adjudication and formal rulemaking. Rulemaking has the advantage over adjudication of laying down rules of general applicability, thus giving state action a broadly intelligible form and enabling social actors to plan in light of predictable legal consequences.

The "informal" rulemaking procedure also has a deliberative democratic capacity to augment the otherwise attenuated democratic authority which Congress is capable of itself bestowing upon administrative action. Informal rulemaking requires that agencies publish a "notice of proposed rulemaking" in the Federal Register, which describes the "legal authority under which the rule is proposed" and "the terms or substance of the proposed rule."[61] The agency must then "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments. After consideration of the relevant matter presented, the agency shall incorporate into the

[59] 5 U.S.C. §§ 500–706.

[60] Mashaw et al., *Administrative Law: The American Public Law System*, (St. Paul: West, 6th ed. 2009), 514.

[61] 5 U.S.C. § 553(b).

rules adopted a concise general statement of their basis and purpose."[62] Persons who suffer a legal wrong or who are adversely affected or aggrieved by an agency rule can challenge the rule in federal court, where the reviewing court must set aside agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [63] I will describe and evaluate procedures of judicial review in the next chapter.

These default procedures for informal rulemaking make for a participatory process in which the public can shape the way that administrative agencies interpret and apply the law. Kenneth Culp Davis thus describes the rulemaking procedure as

> one of the greatest inventions of modern government. . . . Affected parties who know facts that the agency may not know or who have ideas or understandings that the agency may not share have opportunity by quick and easy means to transmit the facts, ideas, or understandings to the agency at the crucial time when the agency's positions are still fluid. The procedure is both democratic and efficient.[64]

By allowing all interested parties to participate, rather than only those parties who are directly subjected to an adjudicatory determination, rulemaking enables the democratic process to persist beyond legislative chambers.

Rulemaking is not democratic in the majoritarian sense that affected parties can vote to confirm or deny administrative proposals. It is democratic in the deliberative sense that agencies are required by law to consider comments from any affected persons. The requirement that agencies actually explain the basis and purpose of their rule gives

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[62] Ibid., § 553(c).

[63] Ibid., 706(2)(A).

[64] Kenneth Culp Davis, *Administrative Law Text* (St. Paul: West, 3rd ed. 1972), 142.

this deliberative process an explicitly rational cast, as agencies must be able to articulate sound reasons for their regulations that will survive a reviewing court's scrutiny. The procedural sequence of agency proposal, public comment, agency consideration of comments, promulgation of rule, and the availability of judicial review creates a hybrid procedure of political decision-making. It combines elements of the legislative process' publicity and openness with the judicial process' emphasis on sound logical reasoning. By providing for these procedures, Congress exerts a passive, procedural control over administration, providing the public with renewed opportunities to shape and affect the further development of law through reasoned argument. Empirical research suggests that agencies are indeed responsive to comments from members of the public, even when these comments come from ordinary citizens rather than technically savvy interest groups and public interest organizations.[65]

7. Legislative Reforms to Further Democratize the Administrative State

The most obvious deliberative democratic deficit of notice-and-comment rulemaking is the unequal capacities of social actors to contribute to the process.[66] Such disparities threaten to replicate the inequalities of information and power within civil society within the administrative state itself. Where agencies receive vastly more input from certain groups, such as the industry they regulate, they are likely to be more

[65] Mariano-Florentino Cuéllar, "Rethinking Regulatory Democracy," *Administrative Law Review* 57 (2005): 411-499.

[66] Jason Webb Yackee and Susan Webb Yackee, "A Bias Toward Business?" 128-39.

sensitive to their concerns than those of the wider public, even if they are not "captured" by the industry in the strong sense of the term.

Congress has, in the past, attempted to remedy this problem by providing explicitly that certain agencies may fund the participation of underrepresented groups. In the 1970s, Congress provided that the Federal Trade Commission (FTC) could provide

> compensation for . . . costs of participating in a rulemaking proceeding . . . to any person (A) who has, or represents an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as whole, and (B) who is unable to effectively participate in such proceedings because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceedings.[67]

This provision was open to two, potentially conflicting, interpretations. The first was that it was meant to provide the agency with the expert, technical views of professionals and public interest organizations which lacked sufficient resources to participate in a relatively onerous formal rulemaking proceeding. The second possible interpretation was that the statute was meant to achieve a balance of interest-group representation, so that grassroots organizations could participate, which otherwise would have been kept out of the process for reasons of cost. These two desiderata were in conflict, because usually the most technically expert organizations, such as national consumer interest organizations, were not the same as those groups whose interests were not adequately represented in rulemaking proceedings. The FTC was thus torn between a technocratic model of

[67] Magnusson-Moss Act, 15 U.S.C. § 57a(h)(1)(1976).

participation and a pluralist, interest-group bargaining model, ultimately privileging the former over the latter.[68]

The case of the FTC is unusual, not only because Congress explicitly provided for the subsidy of under-represented interests; but also because it concerned a particularly involved and costly rulemaking proceeding. In informal rulemaking the costs of participation are significantly lower—today, all a person or organization need do to participate is compose and submit a comment electronically to the agency. And yet, disparities in participation between industry, on the one hand, and public interest groups and citizens, on the other, remain.[69] The problem lies not in the explicit costs of participation, but in the background information and opportunity costs faced by members of the public and all but the best funded and most well-connected public interest groups. Though members of the public are often deeply affected by the regulatory decisions of administrative agencies, they are rarely versed in the forms of technological and economic discourse in which agencies frame, consider, and ultimately respond to regulatory problems.[70] The people often do not speak in the same register as the agency,

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[68] Barry B. Boyer, "Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience," *Georgetown Law Journal* 70 (1981-1982), 51-172.

[69] Marissa Martino Golden, "Interest Groups in the Rulemaking Process: Who Participates? Whose Voices Get Heard?" *Journal of Public Administration Research and Theory* 8 (1998): 245-270.

[70] Thomas McGarity notes that agency reasoning is dominated by two models: "comprehensive analytical rationality" and "technocratic-bureaucratic rationality." The first is an essentially economistic form of reasoning, which attempts to quantify the dollar costs and benefits of proposed regulations. The latter attempts to find the best technological means to achieve regulatory goals. Neither of these models are hospitable to the practical judgments of members of the public who lack training in economics, engineering, or other relevant professional disciplines. Thomas O. McGarity, *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy* (Cambridge: New York: Cambridge University Press, 1991), 5-13.

and so they remain alienated from the state that is meant to articulate their common purposes.

The function of public participation in administrative proceedings is misunderstood if is portrayed as a binary choice between technocratic competence and democratic participation, as information and legitimacy are interlinked. The kinds of knowledge that administrative agencies require to make good decisions is not merely technical, but practical. Agencies must understand the various values that are implicated in their regulatory practice in order to determine the content of public purposes. If agencies recognize values held by the public, then in so doing they create normative congruence between the public sphere and the state's public power. The state becomes legitimate by becoming informed of the normative commitments of the public it is meant to articulate.

This process of gathering ethical input cannot be reduced to mere interest-group bargaining. This is where the deliberative democratic concept of administration differs from that of interest-group pluralism.[71] Administrative agencies must articulate reasons for their actions which constructively build upon and respond to the factual and normative inputs they receive. This rational articulation will fail if relevant values held by the public are not contributed to the administrative process. Congress must attempt to make administrative processes as open and egalitarian as possible. But it must do so not in order to create an equal playing-field for the clash of irreconcilable interest and the production of arbitrary compromise. Rather, public participation should serve to ventilate

[71] For the classic statement of the interest-group pluralism model of administrative legitimacy, see Stewart, "Reformation," 1760-1789.

the normative considerations relevant to administrative activity, so that agencies acknowledge them and explain how they have been addressed when they take action. The ideological framing of administration as a purely instrumental, technical, and neutral task often frustrates this deliberative democratic agenda. As I will argue in the next chapter, the technocratic terms under which courts typically review agency action bears much responsibility for the alienation of the people from their state.

Broad and substantive public engagement with administrative rulemaking becomes plausible when the agency makes the political values at issue visible. Witness, for example, the Federal Communication Commission (FCC)'s recent "net neutrality" rulemaking, which resulted in a rule to regulate internet service providers as public utilities and prevent them from discriminating amongst end users.[72] The notice of proposed rulemaking explained that "The Internet is America's most important platform for economic growth, innovation, competition, free expression, and broadband investment and deployment. . . . As an open platform, it fosters diversity and enables people to build communities."[73] The FCC asked for public comments to help determine "the right public policy to ensure that the internet remains open," asking in particular about "impacts on political speech, on the ability of consumers to use the Internet to express themselves, or on the Internet's role as a 'marketplace of ideas' that serves the interests of democracy in general, serving even the interests of those Americans who

[72] Federal Communications Commission, *Protecting and Promoting the Open Internet*, 47 C.F.R. §§8.1-8.19 (2015).

[73] Federal Communications Commission, *Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking*, 79 Fed. Reg. 37448 (July 1, 2014).

listen even if they do not actively speak."[74] The role of the internet as an infrastructure of the public sphere was thus front and center in the FCC's deliberations.

In response to their proposal, the FCC received input from over 3.7 million comments, a majority of which supported the Commission's proposed actions.[75] In its publication of the Open Internet Order, the FCC not only noted the vast quantity of comments, but relied on commenters who argued that preserving net neutrality would "stimulate local economies and enrich cultural and civic discourse" and would facilitate "free speech, civic participation and democratic engagement.[76] The rule also adopted a proposal from a commenting public policy organization to bar providers from

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[74] Ibid., 37448, 37452.

[75] Federal Communications Commission, *Protecting and Promoting the Open Internet, Final Rule*, 80 Fed. Reg. 19738, 19746 (April 13, 2015) ("The public seized on these opportunities to comment, submitting an unprecedented 3.7 million comments by the close of the reply comment period on September 15, 2014, with more submissions arriving after that date. This record-setting level of public engagement reflects the vital nature of Internet openness and the importance of our getting the answer right in this proceeding. Quantitative analysis of the comment pool reveals a number of key insights. For example, by some estimates, nearly half of all comments received by the Commission were unique. While there has been some public dispute as to the percentage of comments taking one position or another, it is clear that the majority of comments support Commission action to protect the open Internet. Comments regarding the continuing need for open Internet rules, their legal basis, and their substance formed the core of the overall body of comments. In particular, support for the reclassification of broadband Internet access under Title II [of the Communications Act of 1934, as amended, public utility provisions], opposition to fast lanes and paid prioritization, and unease regarding the market power of broadband Internet access service providers were themes frequently addressed by commenters. In offering this summary, we do not mean to overlook the diversity of views reflected in the impressively large record in this proceeding. Most of all, we are grateful to the public for using the power of the open Internet to guide us in determining how best to protect it.").

[76] Federal Communications Commission, *In the Matter of Protecting and Promoting the Open Internet. Report and Order on Remand, Declaratory Ruling, and Order* GN Docket No. 14-28, (Feb. 26, 2015), 4, fn. 1; 27, fn. 118, https://apps.fcc.gov/edocs_public/Query.do?numberFld=&numberFld2=&docket=14-28&dateFld=03%2F12%2F2015&docTitleDesc=.

unreasonably interfering with or disadvantaging users' access to service.[77] On the whole, the Commission noted that

> Congress could not have imagined when it enacted the APA almost seventy years ago that the day would come when nearly 4 million Americans would exercise their right to comment on a proposed rulemaking. But that is what has happened in this proceeding and it is a good thing. The Commission has listened and it has learned. Its expertise has been strengthened. Public input has improve[d] the quality of agency rulemaking by ensuring that agency regulations will be 'tested by exposure to diverse public comment. There is general consensus in the record on the need for Commission to provide certainty with clear, enforceable rules. There is also general consensus on the need to have such rules. Today the Commission, informed by all of those views, makes a decision grounded in the record.[78]

Reading the notice of proposed rulemaking, the Commission's response to public comments, and the final rule, one sees a genuine, if virtual, deliberative democratic public at work in the state. This remarkable rulemaking goes to show how participatory the administrative process can become when regulatory issues become visible in the public sphere. Much of the deficit in participation might therefore be cured if agencies followed the lead of the FCC, and did more to make the questions of political value underlying technical policy decisions explicit. Citizens might more routinely engage in notice-and-comment procedures if agency proposals raised the deeper questions of public interest involved in their rulemaking, and thus signaled that the policy views of all affected persons would be heard, rather than only the input of lobbyists, technical experts, and economists.

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[77] 80 Fed. Reg. 19738, 19756 (2015).

[78] Ibid., 19738-40 (internal citations omitted).

What can the legislature do to help bridge the interpretive gap between the activity of administrative agencies and the public at large? First, Congress should amend the Administrative Procedure Act to specify the content of the "notice of proposed rulemaking." This notice should forthrightly state the value choices agencies must grapple with, alongside the questions of statutory authorization, technological feasibility, and economic efficiency with which they typically engage. Thus to take the example of the FTC, if the agency is considering issuing new regulations to remedy certain deceptive trade practices, the agency could break down the relevant values into (1) the value of consumer health and safety; (2) the value of contractual autonomy; (3) the value of a competitive marketplace. The agency would then explain how its proposed rule advanced (or detracted from) these values, and how and why, if at all, it prioritized one over the other in light of its statutory mandate. Public comments could then explicitly engage with these questions of social value, and could endorse or challenge either the value framing itself, the way in which the agency ordered the values, or the way in which it applied the values to the fact pattern at issue.

Congress should also follow the example it set with the FTC and provide more robust and general support for public participation in the administrative process. The subsidy of underrepresented groups should be made a universal obligation of the administrative process, and should be supported by additional appropriations. The purpose of such subsidies would be to identify, cultivate, and support organizations competent to represent in rulemaking the values that the agency has identified as relevant to the regulatory question at issue, but which are not adequately represented by the repeat-players who often dominate the process. Agencies should be required to take

special steps to ensure that groups with less aggregate social power, such as low-income individuals and racial and ethnic minorities, are included at some point in the policymaking process. The Environmental Protection Agency has recently instituted such a requirement at the rule implementation level, requiring that States "meaningfully engaging all stakeholders, including workers and low-income communities, communities of color, and indigenous populations" when they develop their plans to reduce carbon emissions.[79] Such a requirement could reasonably be placed on all major administrative rules, if Congress were willing to fund the venture.

Another promising solution would be to provide for some kind of administrative jury. Mariano-Florentino Cuéllar has thus proposed the creation of an independent agency which would randomly select members of the public to consult on regulatory questions, and would then employ "regulatory public defenders" to articulate and submit their views to the agency.[80] Unlike a trial jury, the judgments of administrative juries would not decide the case, but would be incorporated into the rulemaking record, and therefore require the serious, judicially contestable evaluation of agency officials. The internet, which has already lowered costs of participation through electronic rulemaking,[81] could make this process easier, as citizens from across the country could virtually come together to learn about and discuss regulatory problems. Such innovative uses of the internet are already underway. The Consumer Financial Protection Bureau, for

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[79] Environmental Protection Agency, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662, 64667 (Oct. 23, 2015).

[80] Cuéllar, "Rethinking Regulatory Democracy," 490-7.

[81] Cary Coglianese, "Enhancing Public Access to Online Rulemaking Information," *Michigan Journal of Environmental & Administrative Law* 2 (2012), 1-66.

example, has harnessed the power of virtual participation to solicit and analyze massive public feedback on proposed mortgage credit forms.[82]

Such institutional experiments harken back to the American Progressives' vision of democratic administration, which I reconstructed in Chapter 2. These innovations have been anticipated by Mary Parker Follett's proposal for "experience meetings," in which "the first step . . . would be to present the subject under consideration in such a way as to show clearly its relation to our daily lives. . . . The second step would be for each one of us to try to find something in our own experience that would throw light on the question."[83] They affirm Dewey's judgment that "in the absence of an informed voice on the part of the masses . . . the wise cease to be wise."[84] Charles Sabel has recently fastened upon this Deweyan insight into deliberative administration to identify forms "democratic experimentalism," in which the meaning of statutes is fleshed out and revised through administrative participation and feedback between the local, state, and federal governments.[85] Drawing on examples from the health care and education policy, he argues that more needs to be done to make national administration responsive to lessons learned from implementation at the local level.[86]

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[82] Patricia McCoy, "Public Participation at the Consumer Financial Protection Bureau," *Brooklyn Journal of Corporate, Financial & Communications Law* 7, no. 1 (2012): 1-24.

[83] Follett, *Creative Experience*, 212-13.

[84] Dewey, *The Public and its Problems*, 206.

[85] Charles Sabel, "Dewey, Democracy, and Democratic Experimentalism," *Contemporary Pragmatism* 9, no. 9 (2012): 35-55.

[86] Ibid., 48-9.

It is not my purpose here to offer an exhaustive list of potential legislative reforms that would deepen the congruence between public law and public sphere. I mention these examples to suggest the general shape that Progressive forms of administration should take. The underlying goal is to articulate public purposes through institutions in which the people themselves have a clear and distinct voice. In a context where Congress must delegate substantive norm-setting authority to unelected, administrative officials, the people must be brought back into the administrative process in order to maintain their status as the authors of the laws that bind them. Administrative agencies themselves, and not simply our elected bodies, must therefore be venues for the expression and formulation of an informed public opinion.

Political control of administration does not, however, end with legislative control. The American constitutional system gives our Chief Executive independent, democratic authority to articulate public purposes. We must therefore turn to consider the proper forms and limits of Presidential control of administrative agencies.

III. Democratic Advantages and Authoritarian Dangers of Presidential Control of Administration

The President stands in a unique position with respect to administrative agencies. Because he is ultimately responsible for the execution of the laws, agencies that implement statutory provisions usually fall under his supervision. The accrual of administrative power to the state is, in this sense, an accrual of power to the President. To the extent that he is able to influence, direct, and control the decisions of administrative authorities, powers delegated to them are powers delegated to him. The key normative question is to what extent presidential power ought to advance in lock-step with

administrative power. Should the president directly and pervasively determine the content of administrative action, or should administration retain some autonomy from presidential control, remaining instead subject to its own expert judgment, the control of the other coordinate branches, or to the public directly?

In answering this question, I turn again to the regulative ideal of the deliberative democratic public as the source of legitimacy for the activist state. The President's authority to bind administration depends upon the democratic credentials of his office, and his ability to inflect the administrative process with a greater degree of discursive rationality than would exist absent his supervision. Though the President has special democratic claims owing to his national constituency and the heightened level of publicity that attends presidential elections, presidential elections remain impaired by many of the same asymmetries of power and information that afflict congressional elections. And, once elected, the President does not have the same deliberative qualities as the legislature. Presidential power operates by the decision of one person, rather than by the agreement of a body of persons with equal political rights and duties. The President's ability to bring deliberative democratic values to administration therefore depends upon the extent to which subordinate elements of the Office of the President facilitate rational argumentation over the merits of policy. In this section, I will reconstruct the Progressive vision of presidential control, and use it as a lens to assess the current extent and nature of presidential control. I will argue that, while certain deliberative elements do exist at the apex of the executive, further institutional safeguards must be instituted to avert the danger of plebiscitary presidentialism.

1. Two Faces of Executive Power: Political Prerogative and Legal Implementation

The executive branch is at once instrumental to the purposes of Congress, and an independent articulator of public purposes. For Locke, the executive power "involves the enforcement of society's laws upon all of its members," and is thus subordinate to the legislative power. It was not distinguished from judicial power. However for Locke the executive power also includes "prerogative," a discretionary power to act where the laws have not given him explicit authority do so, but where he deems it necessary for "the good of society."[87] The question of the nature and extent of this prerogative power is of central importance for understanding the problem of presidential control of administrative power. To the extent the prerogative power expands, the agencies who execute the laws are more strongly subjected to the will of the chief executive than to the law which authorizes their actions. When Montesquieu introduced the separation of the judicial from the executive power, he at the same time concealed this distinction between the immediate execution of a clearly defined legal command, and the exercise of prerogative discretion to act without clear guidance from legislative authorization. As M.J.C. Vile observes, to collapse these two aspects of execution into one another "obscures the fact

[87] "Where the legislative and executive power are in distinct hands, as they are in all moderated monarchies and well-framed governments, there the good of society requires that several things be left to the discretion of him that has the executive power. For the legislators not being able to foresee and provide by laws for all that may be useful to the community, the executor of the laws, having the power in his hands, has by the common law of Nature a right to make use of it for the good of society, in many cases where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it; nay, many things there are which the law can by no means provide for, and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require. . . . This power to act in accord to discretion for the public good, without the prescription of the law and sometimes even against it, is that which is called prerogative." John Locke, *Of Civil Government, Two Treatises*, ed. W.F. Carpenter (London: J.M. Dent; New York: E.P. Dutton, 1924), 199.

that in large areas of government decisions will not be 'executing the law,' but exercising a very wide discretion." [88] Executive power thus comes to encompass both an instrumental power to implement laws others have passed, and a relatively autonomous power to act in the interests of the common good as the Chief Executive perceives it.[89] The Constitution of the United States followed Montesquieu's scheme, and vested the President with both an ill-defined "executive power" and a responsibility to "take Care that the Laws be faithfully executed."[90] The tension between these instrumental and independent aspects of presidential power can be traced from the ratification debates, to the Progressive reconstruction of the American constitutional order, to our now entrenched institutional presidency.

Hamilton defended the constitutional scheme of a singular and vigorous chief executive as a necessary element of republican government, which would complement the deliberative qualities of the legislature with necessary energy and decisiveness. He argued that while deliberate consideration amongst a group of political peers is a virtue in the formation of the laws, a plural executive would undermine the efficient and even application of the laws, and dilute the institutional accountability of the executive to the people. "The circumstances which may have led to a national miscarriage or misfortune are sometimes so complicated, that where there are a number of actors, though we may clearly see upon the whole that there has been mismanagement, yet it may be

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[88] Vile, *Constitutionalism and the Separation of Powers*, 96.

[89] Cf. Harvey C. Mansfield, Jr. "The Ambivalence of Executive Power," in *The PresIdency in the Constitutional Order*, eds. Joseph M. Bessette and Jeffrey Tulis (Baton Rouge: London: Louisiana University Press, 1981), 314-335, 315-316.

[90] U.S. Const. Art. II, sec. 1; sec. 3.

impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable."[91]

Hamilton's argument for a unitary executive does not, however, entail that the President ought to have full control over the action of any subordinate executive officials without legislative limitation. To the contrary, as Madison acknowledged in *Federalist* 47, the constitutional scheme does not contemplate an executive power which is hermetically sealed from the influence of the others. To give philosophical credence to the overlapping assignment of functions to the coordinate branches, he argued that Montesquieu "did not mean that these departments ought to have no *partial agency* in, or no *controul* over the acts of the others. . . ."[92] The Constitution implements this "partial agency" by conditioning the President's constitutional power to appoint "officers of the United States" on the "advice and consent of the Senate," and empowering Congress to vest appointment authority for "inferior officers . . . in the President alone."[93] But beyond these spare commands, the Constitution provides relatively little guidance about the nature and extent of presidential control over subordinate executive officials.[94]

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[91] Alexander Hamilton, "The Federalist No. 70," in Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961), 476-7.

[92] James Madison, "The Federalist No. 47," in Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961), 325.

[93] U.S. Const. Art. II, sec. 2.

[94] The Constitution also gives the President power to "require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." U.S. Const. Art. II, sec. 2.

The extent of overlap between the executive and the coordinate branches has proven to be a major ground of constitutional confrontation. There are those who argue for a strong form of unitary executive, asserting that the Constitution commands a thoroughgoing hierarchical control of administrative agencies and their officers by the president, in order to ensure maximal uniformity and public accountability in the execution of the laws.[95] This view favors extensive presidential involvement in administrative policymaking through review of agency regulations at the upper levels of the administration, and extensive presidential control over administrative staff through appointment and removal powers. On the other hand, there are those who maintain that the Constitution limits the President's control over administration, as officials charged by Congress with administering statutes are not properly his agents, but rather agents of Congress.[96] This view speaks in favor of insulating many administrative bodies from presidential control through the establishment of a tenured, merit-based civil service, the creation of independent regulatory agencies with appointment structures designed to constrain presidential influence, and relatively stronger judicial review of agency action to ensure the conformity of implementation with legislative purpose. Both visions can be seen at work in constitutional jurisprudence, with some reasoning emphasizing the

[95] See, e.g. Steven G. Calabresi and Saikrishna B. Prakash, "The President's Power to Execute the Laws," *Yale Law Journal* 104 (1994): 541-655; see also Lessig and Sunstein, "The President and the Administration," 12-85.

[96] See, e.g. W.W. Willoughby, *The Constitutional Law of the United States,* vol. 2 (New York: Baker, Voorhis, 1910), 1156; Morton Rosenberg, "Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking under Executive Order 12,291," *Michigan Law Review* 80 no. 2 (1981): 193-247; Cynthia Farina, "Statutory Control and the Balance of Power in the Administrative State," *Columbia Law Review* 89 (1989): 452-528.

unitary theory,[97] and others giving scope to Congress to constrain the power of the President in his control over administrative agencies and their personnel.[98]

[97] Myers v. United States, 272 U.S. 52 (1926) (holding that the President has the power to remove a postmaster of the first class without the advice and consent of the Senate, despite contrary statutory provisions); Bowsher v. Synar 478 U.S. 714 (1986) (holding that Congress may not give to the Comptroller General—a congressionally appointed and removable official—power to implement automatic spending reductions on the grounds that "the constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts. . . ."); Buckley v. Valeo, 424 U.S. 1 (1976) (holding unconstitutional the enforcement powers of the Federal Election Commission because it was composed in part of members chosen by Congress, rather than through the constitutionally prescribed appointment process).

[98] Marbury v. Madison, 5 U.S. 1 U.S. (Cranch) 137 (1803) (distinguishing in dicta between "political," discretionary powers, vested in the President and his officers by the Constitution, and "ministerial" powers, which are given to executive officers by statute, and hence can be constrained by statutory terms); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838) (stating that "there are certain political duties upon many officers in the executive department, the discharge of which is under the direction of the President. . . . But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution"); Humphrey's Executor v. United States, 296 U.S. 602 (1935) (allowing limitations on removal of officers exercising quasi-judicial or quasi-legislative, rather than executive power); Morrison v. Olson 487 U.S. 654 (1988) (holding that the legislative establishment of an investigatory an "independent counsel," removable by the attorney general for cause, did not impermissibly interfere with the exercise of executive power).

2. The Progressive Vision of the Presidency: Rhetorical and Managerial

The Progressive conception of the President embraces neither a unitary theory nor the full subordination of the executive to the legislature. It rather treats the President as an active and independent spokesman for public opinion, but not as a deeply engaged director of administrative affairs. As the Progressives sought to rethink the institutions of the American state in order to give it a more activist posture, they were pulled between the appeal of both stronger and weaker conceptions of presidential control. The appeal of executive control over administration was greater in the American democratic context than it was in the German constitutional monarchy from whom the American Progressives adapted their views of administration. Monarchical executive were vestiges of feudal forms of rule, which had only symbolic value for modern states. They drew no strength from a popular, electoral mandate. Hegel thus famously argued that "in a fully organized state . . . all that is required in a monarch is someone to say 'yes' and to dot the 'i'; for the supreme office should be such that the particular character of its occupant is of no significance."[99] For Hegel, the monarch passively represented through his person the unified will of the state, in much the same way as today's Queen of England represents the sovereignty of the United Kingdom. The real seats of political power were therefore the legislature and the "highest advisory offices" of the state's administration, which would be responsible for setting the universal principles and the particular applications of the law, respectively.[100]

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[99] Hegel, *Philosophy of Right*, §280A.

[100] Ibid., §284.

The Progressives would never assent to the minimalist Hegelian view that the chief executive ought merely "say 'yes' and dot the 'i,' because the American presidency was no mere symbolic, inherited office. He was an elected official; indeed, the only elected official with a national constituency. His office was a fount of democratic legitimacy for the activist administrative state, and thus had to be mobilized to authorize and direct the burgeoning bureaucratic apparatus which would articulate and institute the needs of the public. As Stephen Skowronek notes,

> the progressives seized upon the possibility of constructing a *presidential* democracy: they singled out the chief executive as the instrument around which to build their new polity. . . . Only the presidency had the national vision to articulate the public's evolving interests, the political incentives to represent those interests in action, and the wherewithal to act upon them with dispatch."[101]

At the same time, however, the Progressives' interest in competent administrative judgment and their desire to shape state action by deliberative public opinion constrained their enthusiasm for an administrative state which was simply subservient to the dictates of presidential policy preference. Thus, Goodnow would caution that "while . . . in the interest of securing the execution of state will, politics should have a control over administration, in the interest of both popular government and efficient administration, that should not be permitted to extend beyond the limits necessary in order that the legitimate purpose of its existence be fulfilled."[102] Wilson, in a complementary fashion, would develop a conception of the presidency which emphasized not his role as executive administrator, but rather his ability to interpret, distill, and give political shape to public

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[101] Stephen Skowronek, "Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive," *Harvard Law Review* 122 (2009): 2070-2103, 2087.

[102] Goodnow, *Politics and Administration*, 38.

opinion. In his role as party leader, the President served to facilitate and mediate deliberative democratic discourse:

> the President represents not so much the party's governing efficiency as its controlling ideals and principles. He is not so much part of its organization as its vital link of connection with the thinking nation. He can dominate his party by being a spokesman for the real sentiment and purpose of the country, by giving direction to opinion, by giving the country at once the information and the statements of policy which will enable it to form judgments alike of party and of men.[103]

The President, through the use of argument, persuasion, and rhetoric during and between elections, would inspire and enliven the deliberative democratic foundations of the state.[104] He would be a policymaker more than an administrator, militating popular opinion in favor of his party's legislative program.

Wilson argued that the President's administrative role was necessarily more limited. With the expansion of administrative tasks that attended the early growth of the state, important decisions of policy implementation would be delegated to his cabinet members and their departments. The President would rely upon the secretaries' "sagacity as representative citizens of more than usual observation and discretion."[105] The President's appointees and staff would then serve as the politically responsive but professionally competent intermediary between him and the rank and file of the administrative civil service.

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[103] Wilson, *Constitutional Government in the United States*, 68.

[104] Jeffrey K. Tulis, *The Rhetorical PresIdency* (Princeton, NJ: Princeton University Press, 1987), 125.

[105] Wilson, *Constitutional Government in the United States*, 76.

3. Institutional Development of the Presidency: The Convergence of Politics and Administration

Though Wilson's thought has been trendsetting in establishing the communicative and rhetorical aspects of the Presidency,[106] his division of labor between political and administrative functions within the executive has proved unavailing. The early twentieth century saw the simultaneous elevation of the President as a national democratic representative and the growth of the Office of the President as an instrument of administrative control. Since then, modern presidents have recognized that they cannot possibly personally supervise the swelling bureaucracy of the executive branch. But they nevertheless attempt to retain the capacity as Chief Executive to implement the laws in a way consonant with their visions of public values. The solution has been a shift in executive functions downward to a central administrative organization at the President's disposal—not just to the cabinet, as Wilson imagined, but to an ever-growing administrative staff with budgetary and policy-making authority. The twentieth century has thus seen a periodic but steady progress of executive reorganizations, authorized by Congress at intervals, which have more and more shifted the locus of state energy from statutory to executive control over administrative activity.[107] The developmental dynamic has been defined by a continual effort of the White House to get a grip on the expansive administrative apparatus, and Congress rather feebly attempting to restrict this effort, resulting in the consolidation of substantive policy control in the higher echelons of the

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[106] As Tulis notes, "Woodrow Wilson settled modern practice for all Presidents that were to follow him, uniting the inspirational form of Teddy Roosevelt with the policy specificity of Taft." Tulis, 118.

[107] See Barry D. Karl, "Executive Reorganization and Presidential Power," *Supreme Court Review* (1977): 1-37.

executive.[108] As a result, administrative control has become centered in the White House without giving the President himself the impossible responsibility of managing all of the details of implementation and management. Over time, once clear conceptual divisions between the executive's managerial soundness and the President's degree of political control; and between the institutional interests of the presidency and the political program of presidents; have become more and more difficult to disentangle in the halls of the White House.[109]

The Budget and Accounting Act of 1921 inaugurated this development with the creation of a Bureau of the Budget within the Treasury Department with the responsibility to prepare an estimated federal budget for submission to Congress.[110]

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[108] Though Congress has formally authorized executive reorganizations legislatively, the President has deployed the use of executive orders to interpret and stretch legislative authorizations. The use of the legislative veto to strike down proposed authorizations, some forms of which have now been ruled unconstitutional, was never a very effective tool in any case, as Congress had the burden of reversing a status quo and overcoming significant collective action problems to do. Kenneth Mayer aptly describes the dynamic: "societal and political pressures serve as the impetus for a new government capability; Congress and the President compete over the question of control; the President prevails and uses the new capability in anticipated ways to develop even more power, and Congress can do little to stop him. Over time, the new powers—once so controversial—become institutionalized as a routine and accepted part of the presidency." Kenneth Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton, NJ: Princeton University Press, 2001), 121.

[109] See Peri E. Arnold, *The Managerial Presidency: Comprehensive Reorganization Planning, 1905-1996* 2nd ed. (Lawrence, KS: University Press of Kansas, 1998 [1986]) 351-361.

[110] Budget and Accounting Act of 1921, Pub. L. 67-13, 42 Stat. 20 (1921). The Act simultaneously created the General Accounting Office as a congressional agency with the power to investigate and review budgetary matters and recommend legislative improvements. Sec. 312. Stephen Skowronek argues that this created a "parallel set of controls pitted against each other. . . It was a design that promised to keep control over the new realm of civil administration at the center of political contention in the operations of the new American state." Skowronek, *Building a New American State*, 208. Skowronek thus argues that the grafting of the administrative state onto the constitutional separation of powers created a system in which lines of accountability were unclear, owing to the overlapping authority of Congress and the President over administration. While this critique has force if the primary goal of the political system is to enable the public to locate easily the source of government action and to assign responsibility to political

Franklin Delano Roosevelt would carry this project forward when he urged the need for the creation of an Executive Office of the President. Roosevelt, like Wilson, understood his role as "preeminently a place of moral leadership."[111] This public-oriented role was imperiled by the great demands the administrative elements of modern government placed on his time. The President could not possibly infuse the administrative state with his articulation of the public when he was mired in the details of administrative management and policy. The President's Committee on Administrative Management proposed to address the problem by centralizing and expanding administrative control in the White House, with an enlarged presidential staff, the creation of a planning office, and the placement of the Bureau of the Budget directly at the service of the President.[112]

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representatives, the deliberative democratic approach discloses a more positive side to these parallel institutional constructions. The creation of competing oversight institutions in the legislative and executive branch creates the opportunity for a more thorough process of political deliberation over the structure and operation of the administrative state. To the extent that these institutions improve both the President and Congress' understanding of the problems confronting the administrative state, this ought to improve the quality of their shared role in policy development and administrative control. It is not necessarily a vice that administration remains a subject of political contestation, so long as the contestation remains a source of constructive criticism and development rather than debilitating and dysfunctional blows. The key question is whether the institutional arrangements facilitate reasoned exchange or mere political bullying. The difficulty of removing the Comptroller General prevents the GAO from becoming a mere instrument of partisan politics and gives it a high degree of neutrality. The Bureau of the Budget, which would morph into the Office of Management and Budget, is more susceptible to politicization by the President. The normative question for future development is how rational deliberation can be maximized within and between the multiple institutions of political control over administration.

[111] Quoted in Clinton Rossiter, "The Constitutional Significance of the Executive Office of the President," *American Political Science Review* 43 no. 6 (1949): 1206-1217, 1213.

[112] The President's Committee on Administrative Management, *Report of the Committee with Studies of Administrative Management in the Federal Government* (Washington, D.C.: Government Printing Office, 1937), 1-53.

With the subsequent concentration of administrative power in the Executive Office of the President, the conceptual distinction between the political and managerial functions of the executive would slowly lose institutional purchase. Under the Johnson Administration, the Bureau of the Budget would shift from a paragon of neutral competence, policy analysis, and information gathering into another political arm of the President, such that it became "hard to distinguish personal from institutional staff responsibility."[113] The Nixon White House would ratchet up the decades-long trend to bring the administrative state under the direct control of the President and his political advisors.[114] Faced with a bureaucracy he saw as recalcitrant to his political agenda, Nixon used the executive reorganization authority Congress had granted him to create the Office of Management and Budget (OMB). The OMB increasingly became involved in the policy-forming activities at the same time as it assumed the Bureau of the Budget's responsibility for approving agency budgets.[115] Ford and Carter would marginally expand on Nixon's foray into direct White House control over the regulatory process, the former requiring agencies to submit inflationary impact statements and the latter requiring agencies to prepare cost-benefit analyses for major regulations.[116]

The *coup de grace* in breaking the wall within the presidency between politics and administration came with President Reagan's use of OMB to review, reject, or

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[113] Larry Berman, *The Office of Management and Budget* (Princeton, NJ: Princeton University Press, 1979), 74.

[114] Karl, "Executive Reorganization, 8-9.

[115] Hugh Heclo, "OMB and Neutral Competence," in *The Managerial PresIdency*, 2nd ed., ed. James P. Pfiffner (College Station, TX: Texas A&M University Press, 1999), 134-37.

[116] Mayer, *With the Stroke of a Penn*, 124-6.

approve agency rulemaking. Executive Order 12,291 provided that "regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs," and empowered the Director of OMB to delay the implementation of the proposed rule until his office had completed review and the agency had responded to and incorporated the Director's views.[117] Together with Executive Order 12,498, which required agencies to submit to OMB and obtain approval of their broader regulatory plans, this Order essentially gave the President and his political appointees a veto on agency regulations, and thus enabled him to delay or prevent agency rulemaking or significantly alter agency policy.

The Justice Department memorandum assessing the legality of Executive Order 12,291 showed the lasting influence of the Progressives' conception of the democratic authority of the President, even for a reactionary presidency. "Because the President is the only elected official who has a national constituency, he is uniquely situated to design and execute a uniform method for undertaking regulatory initiatives that *responds to the will of the public as a whole.*"[118] Cost-benefit analysis could thus serve as a neutral place-holder for an effort to subject administrative decision-making to public will as the President and his political staff conceived it. These developments continued after Reagan, as Clinton combined regulatory review with public efforts to direct agency action and

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[117] Executive Order 12,291, Sec. 2 (b).

[118] United States Department of Justice Memorandum for Honorable David Stockman, Director, Office of Management and Budget, Re: Proposed Executive Order on Federal Regulation (Feb. 12, 1981) (emphasis added), quoted in Mashaw et al., *Administrative Law: The American Public Law System*, 269-274, 270.

take ownership of regulatory outcomes.[119] In Clinton's variation on the theme, the Wilsonian vision of the presidency as an interpreter and spokesman for public opinion coalesced with and buttressed administrative-control functions. In this way the distinction between administrative and political dimensions of the Presidency, which Goodnow and Wilson had originally sought to preserve, has thus yielded to the interpenetration of the political and administrative aspects of Presidential power. As Terry Moe observes, presidents "readily embrace politicization and centralization because they have no attractive alternatives" to realize their political vision and meet the expectations of their constituency and the broader electorate.[120] Through the appointment power and the use of their Executive Office, they are able to exercise a significant degree of power even over agencies that are nominally "independent" of the executive branch.[121]

4. Structural and Normative Limits of Presidential Administration

The institutional innovations which have increased the overlap between administrative and political dimensions of the executive have been complemented by jurisprudential and scholarly efforts to legitimate presidential power over administration by reference to democratic norms. In *Chevron U.S.A. v. National Resources Defense Council*—the most important contemporary case in administrative law—the Court

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[119] Kagan, "Presidential Administration," 2281-2303.

[120] Terry M. Moe, "The Politicized Presidency," in *The New Direction in American Politics*, John E. Chubb and Paul E. Patterson, eds. (Washington, D.C.: The Brookings Institution, 1985), 246.

[121] Terry M. Moe, "Regulatory Performance and Presidential Administration," *American Journal of Political Science* 26, no. 2 (1982): 197-424; Peter L. Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch," *Columbia Law Review* 84, no. 3 (1984): 573-669.

concluded that where statutory language is ambiguous, courts must defer to the interpretation of the agencies charged with administering the statute so long as these interpretations are "reasonable."[122] In justifying this permissive standard of review, the Court emphasized that "while agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the government to make such policy choices." [123] This democratic justification for presidential control of administration has found significant support in the scholarly literature. Elena Kagan, for example, prior to her appointment to the Supreme Court, argued "the new presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism."[124] More provocatively, Eric Posner and Adrian Vermeule have argued that American administrative law is necessarily "Schmittian," in the sense that the administrative state is controlled not by legal rules but rather by the political accountability of the Chief Executive, who fills in abstract and ambiguous statutory authority with his democratically legitimate policy program.[125]

But the attempt to anchor the legitimacy of the administrative state fully in the democratic authority of the President founders upon the inability of presidents, despite a century's worth of institutional innovations, to achieve full and pervasive control over administrative decisionmaking and behavior. The institutional incentives to attempt

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[122] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[123] Ibid., 865.

[124] Kagan, "Presidential Administration," 2252.

[125] Posner and Adrian Vermeule, *The Executive Unbound,* 113-127.

politicization do not guarantee, and have not yet resulted in, the thoroughgoing and consistent presidential control of administrative agencies. Presidential control remains to a large extent "sporadic and fortuitous," if only because the time and knowledge of the President and his staff are finite, and the regulatory terrain of the administrative state is vast.[126] The accretion of institutional heft within the executive branch has made it difficult even for presidents with democratic warrants for major reform to reconstruct the American political order to accomplish anything truly transformative in the face of stiff administrative, congressional, judicial or public resistance. For example, while Reagan benefited from the resources of OMB to control administrative decisions and reduce government outlays, regulatory output, and enforcement, he was not able to undo the apparatus of the welfare state developed since the New Deal.[127] Nor was the Obama administration, even in the midst of economic crisis and a democratic warrant for political reconstruction, able to fundamentally shift the Federal government's financial regulatory posture.[128]

For those who favor presidential administration, either on the grounds of democratic legitimacy or constitutional originalism, this attenuated presidential control of administration should be deeply troubling. It militates in favor of further institutional

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[126] Cynthia Farina, "The 'Chief Executive' and the Quiet Constitutional Revolution," *Administrative Law Review* 49, no. 1 (1997): 185.

[127] Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Cambridge, MA: Harvard University Press, 1993), 414-429. "By bringing permanent pressure to bear against programs that maintained formidable political and institutional support, Reagan's assault threatened to keep the government suspended in the crisis of legitimacy it was meant to solve." Ibid., 429.

[128] Daniel Carpenter, "Institutional Strangulation: Bureaucratic Politics and Financial Reform in the Obama Administration," *Perspectives on Politics* 8 no. 3 (2010) 825-839.

innovations which strengthen the hand of the President, deprive administrative officials of their autonomy, and ward off Congress and the courts from interfering in the President's interpretation of how the laws ought to be executed.[129]

The Progressive approach offered here strenuously rejects such proposals to extend presidential control over administration beyond its current capacities. The quality of public discourse is not such that the president can claim full democratic authority even if he wins a strong majority of votes in a presidential election. Voters are often uninformed about key policy issues and the positions of presidential candidates, and this lack of information may lead people to vote differently than if they were perfectly informed.[130] There is insufficient opportunity for reasoned debate between opposing viewpoints and insufficient diversity of political options to express the range of considered popular thought. Indeed, over time the very power of the presidency has eroded the sources of legitimation that would give the Office complete democratic authority. As Robert Dahl has argued, decline of political parties, local associationalism, and civic participation have short-circuited those processes of public discussion which would give the President far-reaching deliberative democratic legitimacy. "The modern presidency all too often impairs not only deliberation but also other means to a more enlightened understanding by citizens and the Congress. . . . [N]ot only are deliberative processes weak in the general public's consideration of candidates and presidents, but

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[129] See Pierce "The Role of Constitutional and Political Theory in Administrative Law," 469-525,; see also Lessig and Sunstein, 106-116.

[130] Larry M. Bartels, "Uninformed Votes: Information Effects in Presidential Elections," *American Journal of Political Science* 40, no. 1 (1996): 194-230.

they are also insufficiently subject to extensive review and appraisal by their peers."[131] Because our civil society does not produce the requisite institutional framework for a fully mobilized and politically active public sphere, the President cannot rely upon a complete deliberative democratic mandate to legitimate his full control over the activities of administrative agencies.

The public is not, however, mute. The victor in presidential races can (usually) lay claim to a majority of votes after a lengthy election process in which multiple viewpoints are expressed, candidacies put forward, and arguments exchanged.[132] Public opinion concerning the performance of incumbent presidents significantly influences the outcome of presidential elections and presidential policy changes within election cycles.[133] When citizens watch presidential candidate debates,[134] discuss candidates with one another, watch the news or read the paper,[135] they do indeed participate in a process of democratic

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[131] Robert Dahl, "Myth of the Presidential Mandate," *Political Science Quarterly* 105, no. 3 (1990): 371.

[132] See, e.g., Lonna Rae Atkeson and Cherie D. Maestas, "Meaningful Participation and the Evolution of the Reformed Presidential Nominating System," *PS: Political Science* 42, no. (2009): 59-64.

[133] Erikson et al., *The Macro Polity*, 309-11. Richard Brody and Lee Siegelman, "Presidential Popularity and Presidential Elections: An Update and Extension," *Public Opinion Quarterly* 47, no. 3 (1983): 325-328; James E. Campbell, "Introduction—The 2004 Election Forecasts" *PS: Political Science and Politics* 37, no. 4 (2004): 733-35; James E. Campbell, "The Fundamentals in U.S. Presidential Elections: Public Opinion, the Economy, and Incumbency in the 2004 Presidential Election," *Journal of Elections, Public Opinion, and Parties* 15, no. 1 (2005): 74-83.

[134] Thomas M. Holbrook, "Presidential Campaigns and the Knowledge Gap," *Political Communication* 19 (2002):437-454 (arguing that, while elections convey information unequally to different segments of the population, Presidential debates tend to reduce these disparities).

[135] Russell J. Dalton et al. "A Test of Media-centered Agenda Setting: Newspaper Content and Public Interests in Presidential Election," *Political Communication* 15 no. 4 (1998), 463-481 ("Collectively, the press is drawn to report on the set of policy issues that the candidates, the public, and the press jointly define as the themes of the campaign.") Ibid., 477.

will-formation, however skewed and fragmentary. Given the high visibility and public salience of presidential contests, and the increasingly direct, popular methods of presidential selection, presidents can lay a genuine claim to represent and give voice to the majoritarian strands of public opinion at the time of election. Wilson's idea of the President as an interpreter of popular thought has thus partially come to fruition, displacing selection practices which situated the president within strong party institutions which discipline presidents according to coalitional interests.[136] The election of the President, therefore, represents today a qualified expression of deliberative democratic will, constrained as it is by the insufficiencies of our society to convey information to voters and to allow full and inclusive public debate in the run-up to elections.

The qualified representative competency of the President is augmented by the qualified deliberative competency of the managerial presidency. The early presidential forays into political control of the Office of Management and Budget during the Johnson, Nixon, and Reagan presidencies suffered from a lack of transparency and the displacement of long-term institutional capacity with short-term political considerations. Over time, however, the institution has adjusted to its expanded political role, as publicity

[136] See James Caeser, "Presidential Selection," in *The PresIdency in the Constitutional Order*, eds. Joseph Bessette and Jeffrey Tulis (Baton Rouge LA: London: Louisiana State University Press, 1981), 234-88. Caeser is not enthusiastic about this development: "The President now stands directly before the bar of public opinion, and it therefore should not be surprising if Presidents become more assertive in their claims to authority and more 'popular' or demagogic in their methods of appeal, if only to compensate for their loss of partisan support." Ibid., 272. Though it is true that a popular presidency has increased tendencies towards demogaguery, and claims to authority based on personal appeal, the fact that the President principally exercises executive power through an articulated administrative apparatus means that the outward passions the President may display must be cooled and rationalized in order to translate into any programmatic action. The many failures and resistances Reagan encountered in attempting to institute a de-regulatory philosophy based upon the strength of his popular appeal show the limits of charisma as a viable technique of administrative management. Where charisma does not soon translate into significant results, it has more bark than bite.

of its contacts and procedures, and public participation in its decision-making have significantly improved.[137] The development of the anti-regulatory cost-benefit standard under Reagan into the more flexible, social-justice oriented cost-benefit standard under Clinton and Obama shows an internal rationalization process at work as presidents translate their political vision into administrative directives. As Cass Sunstein argues, today's review process in the OMB's Office of Information and Regulatory Affairs (OIRA) is exemplary of the deliberative democratic idea of "government by discussion," in that the regulatory products of agencies are subject to comment and scrutiny by other agencies within the government, by the President's political staff, and by the public at large.[138] The qualities that have traditionally been associated with parliamentary democracy—its inclusiveness, transparency, and deliberative rationality—have thus been partially transplanted into the executive branch as its managerial institutions have evolved.

White House review of agency regulations has also become more subtle and sensitive to a multiplicity of social values. For example, one significant change the Obama administration made to OIRA review was to change the terms of cost-benefit analysis, such that "each agency may consider (and discuss qualitatively) values that are difficult to quantify, including equity, human dignity, fairness, and distributive impacts."[139] This change in standard shows a shift in political philosophy, from one

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[137] Cass R. Sunstein, *Valuing Life: Humanizing the Regulatory State* (Chicago: University of Chicago Press, 2014), 11-46.

[138] Sunstein, 14.

[139] Executive Order 13,563, "Improving Regulation and Regulatory Review," Fed. Reg. 76 no. 14 (2011), 3821-3823, 3821.

which emphasizes economic efficiency to one which takes seriously questions of fairness and distribution. The consequences can be significant. For example, under this new standard the Department of Justice proposed a rule to reduce prison rape, which would cost hundreds of millions of dollars, but would have unquantifiable benefits to human dignity.[140] By adjusting the conceptual and normative frame through which agencies are obliged to develop and evaluate their programs, the President is able to infuse the administrative state with his view of the public and its problems. As presidents have taken public ownership of administrative work product, the activist state has become more visible in the public sphere, and thus more open to public evaluation and criticism. When presidents speak publicly in defense of their administrative programs, they re-establish the link between a communicatively generated public reason and the activities of the unelected administrative officialdom. To this extent, the President can make a genuine, if only qualified, claim to express and implement the "will of the people" in his capacity as Chief Executive.

These considerations suggest that the President's substantial but not unlimited directory power over administration is suited to his attenuated democratic credentials. Like Congress, he has democratic authority to influence but not to dictate the shape of government policy in the administration of laws. The President and Congress each contribute a limited degree of democratic legitimation to the activities of the democratic state. They each represent different and incomplete distillations of the democratic public and bring this to bear in shaping administrative action. Congress' special competency is to hash out the conflicting interests and values of a geographically disaggregated polity in

[140] Sunstein, *Valuing Life*, 37-8.

the form of legislated substantive goals and administrative procedures for further policy development. The difficulty of reaching agreement on the goals and particular requirements of policy means that its commands will be abstract, and that it will have to pass on to other actors the authority to articulate the concrete meaning of legislative commitments. The President's special competency, then, is to bring to bear a set of more temporally constrained and socially salient policy concerns, and apply these to fill in the abstract commands of statutes which Congress has passed.

5. Guarding Against Executive Aggrandizement: Institutional Reforms and Ideational Shifts

The fact that the President's control of administration remains limited by legislative control and administrative independence does not mean that we have reached a stable equilibrium between the Office's institutional power and its democratic legitimacy. The persistent calls to bolster presidential control, and the strong proclivity of presidents to do so, continue to represent a real threat to the deliberative integrity of the American administrative state. Whereas the legislature has strong incentives to delegate control to other actors, the President has strong incentives to overcome the institutional obstacles I have outlined and to attempt to turn administration into his personal policy instrument. Nor does he face the same costs of reaching binding decisions as does the legislature—he alone exercises executive power.

As the discussion of German political development in Chapter 1 goes to show, the modern state evinces a troubling tendency to concentrate power in the executive to the exclusion of the other branches and the public at large. If the state comes to draw all of its authority from the plebiscitary claims of the presidency, then the public will become

subject to the will of the chief executive, and identify its own power with his or hers. The descent of the Weimar Republic into national socialist dictatorship shows the dangers of attempting to compensate for the decline in legislative control over administration with ever-greater presidential control.

The great innovation of the American Progressive vision of the state was to introduce new forms of deliberative democratic control within administration itself, rather than to hang all hopes upon the democratic warrant of the presidency. But this vision has lost its purchase on the public imagination. We remain captivated by the aura of presidential authority. As Lowi has argued, today's "personal presidency" is "an office of tremendous personal power drawn from the people . . . based on the new democratic theory that the presidency with all powers is the necessary condition for governing a large nation."[141] When the President's policies reflect our own, we are exhilarated by the way in which our will seemingly has been transposed into and identified with the highest office in the land. When we vehemently oppose the President's policies, we are terrified by the great powers he has at his disposal to implement his vision, our deeply held objections notwithstanding. Politics in such a situation becomes a winner-take-all phenomenon. It becomes clash of ideologies, represented by heroic figures, rather than a considered and constructive debate between representatives in whom we invest provisional confidence. We then begin to esteem presidential virtues of resolute conviction and decisiveness, rather than those of thoughtful consideration and self-limitation on the basis of constitutional principle.

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[141] Theodore Lowi, *The Personal PresIdency: Power Invested, Promise Unfulfilled* (Ithaca: London: Cornell University Press, 1985), 20.

The increasing investment of institutional competencies and plebiscitarian authority in the Office thus threatens to supplant deliberative democratic government and the separation of powers with a plebiscitary administrative state. The growth of the managerial presidency, alongside the relative incapacity of Congress to detail substantive rules for administration, may facilitate a shift to Carl Schmitt's "governmental state," where the popular, rhetorical appeals of the President rather than the legal rationality of statute become the ground of the government's authority.[142] The danger in these developments is that the executive may become the sole unifying element within the constitutional and administrative structure. The rational elaboration of policy between multiple actors may then be displaced by assertions of personal will.

The magnification of the presidency on plebiscitary principles undermines the functioning of deliberative democracy, not only because the presidential election process is insufficiently deliberative, but because the managerial techniques of the White House sometimes undermine sound, long-term deliberation over policy with the transient political concerns of the President. This tendency can be self-defeating even for the President's own political legacy. In his zeal to use bureaucratic knowledge for the sake of personal political power, he may deprive himself of important information and feedback from bureaucratic agencies about practical obstacles and limitations to his agenda.[143] Bureaucratic officials may, under the threat of professional repercussions for dissent, fail

[142] "At the other end of the spectrum from the legislative state stands the governmental state, which finds its characteristic expression in the exalted personal will and authoritative command of a ruling head of state." Carl Schmitt, *Legality and Legitimacy*, 5.

[143] Heclo, "OMB and Neutral Competence," 140-142.

to express differences of opinion on effective implementation strategies.[144] Where presidential power dominates administrative knowledge, rather than being constrained and guided by it, the link between information and legitimacy has been sundered.

To allay such dangers, Congress should take greater steps to channel the exercise of presidential power through procedures that open it up for discursive elaboration. It would be advisable, for example, for Congress to require the director of OMB to promulgate a ranked list of the President's policy priorities, and to make such priorities binding upon the regulatory review process in OIRA. This approach would be vastly preferable to our current one, which submits regulation to a more-or-less elaborate cost-benefit standard and often dresses up contestable political values as the neutral application of principles of efficiency. As Thomas McGarity observes,

> when analysts gloss over uncertainties, hide assumptions, and purport to 'find' facts that cannot be found, the public never sees the policy considerations that motivate the analysis. Policy-laden prescriptions appear to be driven by facts accessible only to the experts, and the experts remain unaccountable for the policies that they adopt *sub silentio*. Democratic oversight of important social decisions thereby suffers."[145]

Given its malleability, cost-benefit analysis can simply serve as a neutral smokescreen for the imposition of judgments of political expediency.

If, by contrast, presidents were required to list and rank in importance their regulatory principles, and if these principles were binding upon the regulatory review process in OIRA, it would be more difficult for presidents to direct regulatory policy surreptitiously in order to mete out political pay-offs or to respond to some transitory

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[144] Marissa Martino Golden, *What Motivates Bureaucrats? Politics and Administration During the Reagan Years* (New York: Columbia University Press, 2000), 109-172.

[145] McGarity, *Reinventing Rationality*, 298.

partisan consideration. For example, the President might list his domestic political priorities as follows, from highest to lowest: (5) income equality (4) economic growth (3) environmental protection (2) gender equality (1) public health. Agencies could assess the impacts of regulatory proposals along each of these dimensions, and then weight them according to their rank. This could be done either quantitatively or qualitatively. A quantitative approach would be to give each policy dimension a "score" from -1 to 1, multiply the score of each dimension by its rank, and then sum the scores to determine whether weighted net benefits exceeded weighted net costs. A more qualitative approach would discuss the various effects along each dimension, and give an overall assessment of whether the effects of the regulation would be positive, negative or neutral along that dimension, and then informally sum the weighted values. Which approach would be preferable depends upon the degree of quantitative certainty over the effects of regulation, and the feasibility of comparing units of value across policy dimensions. Regardless of whether a quantitative or qualitative approach is taken, the major benefit of this reform would be to disaggregate, articulate, and order the values implicated in policy choices.

The current style of regulatory analysis, by contrast, is oriented around monetary values. It therefore enshrines the perfectly competitive market as the normative standard to which regulations are bound, while leaving all other "social purposes" and "non-monetary" values in a residual category which may qualify the primary focus on economic effects.[146] This kind of procedure unduly privileges economic consequences in

[146] White House, Office of Management and Budget, *Circular A-4: Regulatory Analysis*, http://www.whitehouse.gov/sites/default/files/omb/assets/OMB/circulars/ao04/a-4_FAQ.pdf. I will discuss cost benefit analysis at greater length in the Conclusion to the Dissertation.

the analytic framework without providing a clear procedure for thinking through other values, like, human dignity, equal opportunity and distributive fairness.[147] The weighted ranking approach would allow economic efficiency to be one dimension of regulatory analysis—perhaps even the most important one, if that were the President's regulatory philosophy. But it would not make dollar values the master concept for regulatory analysis. To do so tends to conceal and distort political value judgments as mere matters of accounting and sound household management.

Another statutory guard against plebiscitary presidentialism would be to make the administrator of the Office of Information and Regulatory Affairs at OMB removable only by the director of OMB for cause, appointed for 4-year terms coterminous with the President's. The OIRA Administrator would then be required to review regulations according to the President's expressed policy rankings. Such a provision would most likely be found constitutional because it would mirror the Office of the Independent Counsel confirmed in *Morrison v. Olson*.[148] The case is in fact stronger for placing removal constraints on the OIRA Administrator, because unlike the prosecutorial function exercised by the Independent Counsel, which has traditionally been an executive function, the Administrator exercises quasi-legislative power through regulatory review. Thus, Congress, in whom legislative power is vested, has a strong claim to qualify the subordination of this official to the President. Making the OIRA administrator removable only for cause would help give some law-like regularity and obligation to the regulatory

[147] Elizabeth Anderson, *Value in Ethics and Economics* (Cambridge, MA: Harvard University Press, 1993), 190-210.

[148] 487 U.S. 654 (1988).

review process. It would distance the executive function of unified management from the immediate grasp of presidential politics, and reestablish and entrench the legitimate claims to competent expertise and institutional knowledge within the executive.

This approach respects and adapts the constitutional vision of the separation of powers to a modern context in which legislative and executive functions interpenetrate, and the President has certain institutional advantages over Congress with respect to control over administrative rulemaking. The guiding spirit of these innovations is to ensure that the discursive separation of powers remains in place, such that different institutional actors codetermine and elaborate the content of legal norms and the regulatory posture of the activist state. In the place of a vision of state action which cleanly separates the determination of political ends from the means to secure those ends, we would have one in which ends are reinterpreted and renegotiated in the process of their implementation.

Above and beyond these legislative solutions, a more profound ideational shift is required. We must begin to think differently about the structure of the state; to understand administrative agencies not as instruments of presidential or legislative will, but as agents of the people. An acknowledgement of the democratic authority of administrative agencies themselves would serve to ballast against the growth of presidential power. If social movements more often made use of administrative agencies directly to forward their agendas, we would not so readily identify democracy solely with the majoritarian will expressed in presidential elections. As I argued earlier in this chapter, the procedures Congress has set forth in the Administrative Procedure Act provide a framework for an administrative state that draws its legitimacy from direct public participation, rather than

merely from the majoritarian mandate of the President, or from the democratically enacted laws of Congress. On its own, notice-and-comment rulemaking provides only the potential, not the necessity, that administrative agencies can lay some independent claim to democratic authority. In Chapter 6, I will give some more examples of how democratic participation in rulemaking and other agency activities can be sufficiently robust to contribute to the legitimacy of their actions, above and beyond the qualified authority that the President and Congress lend to administrative action. But for now, I only wish to note the possibility that the troubling tilt towards presidential power might be addressed by binding administrative agencies more closely to the public, thus depriving executive prerogative of too great a scope in the determination of state action.

IV. Conclusion

Once we abandon a sharp, categorical dichotomy between politics and administration as neither possible nor normatively desirable, what remains of Wilson and Goodnow's vision of administrative autonomy is the claim that administration should not be dominated by either of the political institutions created by the constitutional order. For these institutions have only an imperfect claim to democratic authority, which grants to neither of them the right to determine fully the actions of the administrative officials who act in the name of the popular sovereign. The fact that Congress and the President share the authority to articulate public purposes does not mean that there is a complete lack of hierarchy to normative elaboration in the constitutional order of our activist state. Legislative commands enjoy priority over presidential discretion, such that the President

cannot act in contravention of constitutionally valid legislative commands.[149] The President is able to fill out certain lacuna of legislative terms through his directory power. Where legislative commands leave interpretive space, the President and his staff may bring political judgments to bear on its construction. In this way, Congress and the President add degrees of determinacy to state action, drawing on their limited democratic authority to fill out and give definition to the binding commitments of the public.

The separation between politics and administration, on this reconstructed vision, becomes a separation between the imperfect democratic politics of representative government and the imperfect democratic procedure of administrative agencies themselves. Just as the President may make use of interpretive freedom in faithfully executing the laws, so too can agencies make use of presidential and congressional silences and ambiguities to more fully determine legal rules. The parceling out of articulatory powers amongst legislators, presidents, and administrators thus serves to anchor the norms of public policy in multiple sources, such that their meaning is separable from the narrow beliefs, intentions, preferences, and knowledge of any one actor. As each interpretive agent adds a new layer of democratic authority to the policymaking process, the democratic legitimacy of the activist state is proportionally augmented.

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[149] See Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet. 524) (1838); Youngstown Sheet & Tube 343 U.S. 579 (1952). "Taken together, these early cases are generally read to stand for two propositions: (1) If Congress, within its constitutional powers, directs the executive to implement a particular action, the President has no lawful right to suspend the law; (2) If Congress, within its constitutional powers, prohibits the executive from implementing a particular action, the President has no lawful right to authorize the action." Mashaw et al., 261.

Chapter 5

Judicial Review of Administrative Action:

The Discursive Competency of the Courts

I. Introduction

In Chapter 4, I assessed the practical and normative limitations of presidential and congressional control of administration. I argued that neither of the political branches ought to control administrative action fully because the inequalities of civil society deprive them of complete practical knowledge and political legitimacy. Rather than dictating substantive results, Congress and the President should, first, set general policies, and, second, establish procedural controls that shape the way agencies carry out these policies. In this Chapter, I consider the third constitutional branch in relation to administration, asking: what degree and what kind of review should the judiciary exercise over administrative agencies? I argue that courts should ensure that agencies engage with the rational arguments of interested persons when they interpret and implement the rights the public has asserted in statute. Judges should not arrogate to themselves the tasks which the people has assigned to agencies. Rather they must maintain the integrity of the dialogue between public law and public sphere that takes place when agencies enforce the rights of the popular sovereign.

The appropriate scope of judicial review of administrative action is determined again by the underlying norm of democratic legitimacy: courts should only exercise control over administrative agencies to the extent that judicial judgment facilitates the rational discourse of the democratic public. In the last chapter, I assessed the democratic legitimacy of the political branches in terms of the strength of their representative and deliberative competency—the degree to which they are capable of reflecting public views and enabling the rational elaboration of these views in institutional settings. If we assess judicial review by the same criteria, an obvious difference from the political branches is readily apparent: because federal judges are appointed for life terms by elected representatives, their representative competency is necessarily lower than that of the members of the political branches. Though judges vicariously glean some representative competency from the elected officials who appoint them, they are not disciplined by elections to conform to the views of the voting public at regular intervals.

The high premium which the judiciary places on *reason*, however, allows it to institutionalize a higher degree of discursive competency than the political branches. As Lon Fuller observes, adjudication "is a device which gives institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by other forms of social ordering."[1] Judicial judgments determine the reasonableness of private and public conduct, the logical implications of statutory commands, and the applicability of rules and standards to particular facts and practices. Judges often not only render judgment but also publish written opinions which explain the basis for their decisions. They sometimes register dissents from judgments to which

[1] Fuller, "The Forms and Limits of Adjudication," 366.

other judges and the people at large can return in future cases. Such opinions compose an ongoing discourse within judicial practice and in the public sphere concerning the meaning of the laws, as past precedents are interpreted in light of the new questions posed by current cases.[2] All of these institutional practices equip courts with a high degree of discursive competency. But how should this discursive competency be exercised? In particular, what standards should the courts bring to bear when they evaluate agency action?

I argue that the concept of *public rights* should frame the enterprise of administrative law. Though the concept of public rights has multiple meanings in judicial doctrine, each of these meanings these concern entitlements which secure the interests of the political community as a whole, rather than the interests of individual persons or the mere aggregate of individual persons. Individuals and institutions may exercise public rights, either as trustees of public tasks or as litigants representing the public interest, but only when they remain linked with the persons in whose name they act. The *publicity* of these rights requires that they be administered in and through rational discourse, because discourse is the defining characteristic of the public.

Administrative agencies must therefore articulate statutory purposes in a way that is rational, inclusive of all relevant viewpoints, and responsive to all relevant arguments.

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[2] On the special role of the judiciary as a forum of "public reason," see John Rawls, "The Idea of Public Reason," in *Deliberative Democracy: Essays on Reason in Politics*, eds. James Bohman and William Rehg (Cambridge, MA: M.I.T. Press, 1997), 95; On the "dialectic" between popular sovereignty and judicial reasoning about constitutional rights, see Robert Post and Reva Siegel, "Popular Constitutionalism, Departmentalism, and Judicial Supremacy," *California Law Review* 92 (2009): 1029. For a Hegelian reading of common-law reasoning as a system of "rational reconstruction" and "mutual recognition," see Robert B. Brandon, "Some Pragmatist Themes in Hegel's Idealism," 180.

This means that affected parties must have not only a "right to justification" of administrative actions,[3] but that they also have the opportunity to contribute their own arguments to the process by which such justifications are produced, and to have pertinent aspects of their argument recognized and responded to by public officials when they finalize their decisions. Administrative agencies must, in other words, engage elements of the public in the process of policy reasoning that leads to binding decisions.

The onerousness of this demand must be tempered by the intensity of the substantive review of agency reasoning that courts perform. It is not the function of courts to determine whether agency reasoning was right or wrong, but rather whether the administrative decision was reasoned and whether such reasoning was responsive to pertinent arguments made by affected parties. This relatively relaxed review of administrative decision-making allows us to counterbalance the conflicting demands for discursive sensitivity and institutional efficacy which democratic objective spirit requires. If the courts could simply supplant the reasoning of agencies with their own, this would eviscerate the capacity of administrative bodies to act expeditiously in the implementation of their legislative mandates. More importantly, it would short-circuit the currents of deliberative democratic energy which would otherwise animate the administrative process. The courts would then replace agencies as contexts of normative elaboration, rather than recognizing the special competencies of public administration to engage social groups in the specification of the rights they collective hold. By subjecting

[3] The term is from Rainer Forst, who argues that recognizing human dignity requires "seeing persons as beings who are endowed with a *right of justification* of all actions or norms that affect them in morally relevant ways – and acknowledging that every moral person has a duty to provide such justification." Forst, *Justification and Critique*, 114.

agencies to the broad requirements of communicative reason, courts can bolster the rationality of the administrative process, and reduce the influence of un-justified power.

The significant but restrained form of judicial review I endorse is neither a utopian invention wholly removed from our actual practices, nor merely a reflection of current doctrine. Rather, I reconstruct current judicial administrative law in order to preserve its valid core, but also to identify and discard certain pathologies that continue to plague judicial evaluations of agency decision-making. The approach to judicial review I offer departs from those that stress the priority of technocratic competence,[4] interest-group bargaining,[5] or political policy preferences.[6] My approach aligns broadly with the deliberative democratic theories of Mark Seidenfeld, Cass Sunstein, William Eskridge and John Ferejohn, Henry Richardson, and Elizabeth Fisher.[7] But these deliberative democrats often understate the divergence between the deliberative model they propose and the way courts in fact evaluate administrative action. Sunstein, for example, says that in judicial review of administrative action, "reviewing courts are attempting to ensure that the agency has not merely responded to political pressure but that it is instead deliberating to identify the public values that should control the controversy."[8] But whereas Sunstein supposes that courts already consider agencies' deliberation about

[4] See, e.g. Thomas McGarity, "Professor Sunstein's Fuzzy Math," *The Georgetown Law Journal* 90 (2002) 2341-2377, 2375.

[5] See, e.g. Stewart, "The Reformation of Administrative Law," 1667-1813.

[6] See, e.g. Kagan, "Presidential Administration," 2245-2385.

[7] SeIdenfeld, "A Civic Republican Justification for the Bureaucratic State," 1511-1576; Cass R. Suntein, "Interest Groups in American Public Law," *Stanford Law Review* 38, no. 1 (1985): 29-87. Eskridge and Ferejohn, *A Republic of Statutes,* 24, 31-2, 287-90; Richardson, *Democratic Autonomy*, 1-16, 215-230; Fisher, *Risk Regulation and Administrative Constitutionalism*, 27-31.

[8] Sunstein, "Interest Groups," 63.

"public values," I show instead that courts usually remain bound to a legitimating discourse and reviewing practice focused on political accountability and technical expertise. To the extent they are concerned with "deliberation," it is usually a kind of purely instrumental *calculation* of the most efficient means to achieve a given end, rather than a more profoundly discursive effort to interpret ambiguous public purposes. Administrative law scholarship thus has an unfortunate tendency to trade on the ambiguity of the term "deliberation" to make the judicial doctrine seem more respectful of democratic reasoning in administration than it actually is.

I clarify the current limitations, and proper content, of judicial review through a critique of the paradigm cases of modern administrative law: *Citizens to Preserve Overton Park v. Volpe*,[9] *Motor Vehicle Association v. State Farm Mutual Auto Insurance*,[10] and *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*[11] These cases show that while the fragments of a deliberative democratic theory are available within administrative law doctrine, judicial analysis of agency decision-making often betrays a technocratic ideology of administration that obscures the fundamental contests over political value that often lie beneath the surface of regulatory policy. To the extent that courts admit political considerations as legitimate aspects of administrative decisions, they treat them as impervious to rational analysis; their legitimacy derives from the morally arbitrary policy preferences of the President. There is thus a sharp conflict within current doctrine between a technocratic model of administration and a

[9] 401 U.S. 402 (1971).

[10] 463 U.S. 29 (1983).

[11] 467 U.S. 837 (1984).

political model, such that each mode of analysis undercuts the functioning of the other. By contrast, I insist that political values can and should be introduced into agency decision-making, but that such values must be rationally specified so that they do not undermine, but rather complement, sound technocratic analysis. In addition, I argue that the legitimacy of political values in administration should not be associated solely with the democratic authority of the President, or Congress, but may also be rooted in the values of the broader public, to whom these bodies are ultimately responsible. I argue that administrative law should serve to ventilate the questions of ethical and political value that are implicated in agency decision-making, and to ensure that these questions are addressed in a rational, inclusive, and transparent fashion. In this way, administrative law can realize the public's right to state action consonant with the public's considered ethical judgments.

II. Mediating Individual and Collective Autonomy in the Judicial Forum

The judicial forum gives individuals the opportunity to challenge administrative conduct on the grounds that it is unconstitutional, unlawful, or arbitrary. Individuals thus safeguard their independence from coercive administrative authority by asserting that administrative action in some way contradicts democratic will. But what entitles an individual to a judicial hearing? In what circumstances are her interests not adequately protected by her political rights to express her opinion in the public sphere and to vote for elected representatives, who enact the laws that authorize administrative action?[12] In this

[12] Mashaw et al., *Administrative Law*, 797.

section, I reconstruct the democratic rationale behind the conventional rule that judicial review should be confined to cases in which an individual, or association of individuals, is acutely injured by an administrative action in a way that differentiates him, her, or them from the broader democratic community. In offering a democratic justification for judicial review of agency action, I argue against those, such as the late Justice Antonin Scalia, who maintain that the courts' role is an "anti-democratic one," which "protects individuals and minorities against impositions of the majority."[13] I insist instead that judicial review of administrative action puts individual interests at the service of democratic principles, by allowing affected persons to argue that administrative action contravenes the democratic will expressed in statute. By giving such affected persons an opportunity for a hearing, judicial review also ensures that administration remains sensitive to relevant arguments offered and interests held by distinct members of the democratic community. It thus prevents the democratic public from condensing into an undifferentiated collective subject.

1. Popular Sovereignty and Judicial Review

The Framers' understanding of the role of the federal judiciary emphasized the courts' unique relationship to reason, and their function as guardians of popular sovereignty. For Hamilton, whereas the legislature was the "will" of the government, and

[13] Antonin Scalia, "The Doctrine of Standing as an Essential Element of the Separation of Powers," *Suffolk University Law Review* 17 (1983): 894.

the executive its "force," the courts represented the "judgment" of the state.[14] Legal interpretation was a rational exercise, as "law and reason conspire" to instruct courts on how to interpret the laws and the Constitution.[15] As agents of rational judgment, the courts had a unique democratic function. They served as an "intermediate body between the people and the legislature."[16] Hamilton took this "intermediate" position to mean primarily the restriction of the federal legislature to enumerated powers vested in it by the Constitution. Where the Congress exceeded its powers, it was the function of the courts to negate its action, so as to preserve the priority of the Constitution to the legislature, and so of the sovereign people to the representative institutions that express their will.

But the intermediary role of the courts would not solely consist its guardianship of the Constitution, but also in its policing "the meaning of any particular act proceeding from the legislative body."[17] In this role, courts do not determine whether laws conform with the Constitution, but rather whether public and private actions conform with the powers granted to them by statute. The courts then mediate between the people and the legislature by providing a forum in which the meaning of the laws can be elaborated through reasoned judgment. The courts have this capacity not only because they articulate the political rights of the people—as the interpreter of the laws enacted in their name—but because the courts' interpretive judgment is activated by "Cases" and

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[14] Alexander Hamilton, "The Federalist No. 78," in Alexander Hamilton et al. *The Federalist*, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1960), 521-30, 523 (emphasis omitted).

[15] Ibid.

[16] Ibid., 525.

[17] Ibid., 525.

"Controversies" brought by members of the popular sovereign.[18] The people thus have political agency not only by virtue of their founding of the political order and their election of representatives, but also by virtue of the suits of individual persons who claim to have suffered legal wrongs. By adjudicating the rights and duties of citizens and other persons within the jurisdiction of the United States, the courts provide an additional institutional setting in which popular sovereignty can become an active force rather than a mere constitutional postulate. Judicial review of agency action in this way mediates not only between the people, as a sovereign whole, and the legislature, as their instrumentality, but between the people as a whole and its constituent persons.

2. Individual Rights as Enabling Conditions for Public Autonomy

To understand the form and function of judicial adjudication, we must engage with a basic question of liberal democratic theory: what is the appropriate relationship between individual and collective autonomy? For Progressives like Wilson, individual rights and democratic self-determination were fundamentally distinct political norms. He described the judiciary as "the balance-wheel of our entire system: it is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty."[19] Dewey and Follett took a more radically democratic view of individual rights, seeing them not as an autonomous source of political value, but as products of social activity and struggle, which could and should evolve relative to common purposes. Dewey thus would state that "law is through and through a social

[18] U.S. Const., Art. III, sec. 2.

[19] Wilson, *Constitutional Government in the United States*, 143.

phenomenon; social in origin, in purpose or end, and in application."[20] Follett likewise concluded that "law is authoritative because it is the outcome of those activities involved in the confronting desires of men which give us at the same time our ethical ideas, our political institutions, our legal organs."[21] Dewey and Follett in this way saw a thoroughgoing continuity between the ethical significance of individual rights and the social processes which brought them into being. Progressivism thus began with an opposed relationship between the individual and the democratic community, and moved towards a holistic vision where the meaning of individual rights was indistinguishable from the social and historical process by which individual entitlements emerged and evolved.

Neither of these extremes captures the mutually constitutive relationship that ought to obtain between individual and collective self-determination. Of the progressives, Goodnow came the closest to articulating the interdependence of individual and collective autonomy. Though he thought that the primary function of courts was the protection of individual rights, he hoped that, "When we develop an administrative procedure which is reasonably regardful of private rights, e.g. notice and a hearing to the persons affected by the administration determination, it may well be that the courts will change their attitude and come to the conclusion that the changed and complex conditions of modern life . . . should have an effect both on the constitutional rights of individuals

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[20] John Dewey, "My Philosophy of Law," in *My Philosophy of Law: Credos of Sixteen American Scholars* (Boston: Boston Law Book Co., 1941), 76.

[21] Follett, *Creative Experience*, 274.

and on the powers and procedures of administrative authorities."[22] He thus presaged a transformation in both the meaning of democratic political power and of individual rights in light of the requirements of modern administrative regulation. He urged that courts recognize the internal resources agencies might develop to protect individual autonomy and public participation. Nonetheless, Goodnow like Wilson saw individual autonomy and democratic will as separate political values, which were in competition rather than partnership.

Whereas Goodnow and Wilson understood individual and collective autonomy as separate political ends, and Dewey and Follett understood them as identical, I argue that individual rights are enabling conditions for democratic life. Individual claims of right are necessary to establish the freedom and equality between persons which is a requisite to genuinely democratic discourse. As Hegel emphasized, liberal rights of property and contract provide individuals with a sphere of independence, so that they can form their own identities and intentions as autonomous agents. More than this, they allow each person to recognize ever other as free, to "be a person and respect others as persons."[23] Hegel, however, failed to draw the appropriate political conclusion from this requirement of equal legal recognition.[24] He denied that freedom required the active and reflective engagement of all persons in determining the laws that bind them. The American Progressives redressed this anti-democratic aspect of Hegel's thought, without, however,

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[22] Ibid., 231.

[23] Hegel, *Philosophy of Right*, § 36.

[24] "Hegel proceeds in his reconstruction of modern ethical life . . . without, however, following his own precept that such spheres must represent institutions of unforced reciprocity in the satisfaction of needs, interests and aims." Honneth, *Freedom's Right*, 254.

retaining Hegel's insight that individual rights foreground the collective, social life of a people.

The reconstructed progressive theory I defend therefore understands the mutual recognition provided by liberal rights as constitutive for the kind of discursive democracy the Progressives envisioned. As Habermas puts it, the "system of rights . . . should contain precisely the rights citizens must confer on one another if they want to legitimately regulate their interactions and life contexts by means of positive law."[25] We must retain a basic framework of formal legal equality between persons as rights bearers to underwrite an ongoing discourse over common aims. For only if each person respects every other as a purposive, rational agent is it possible to conduct a public dialogue where the arguments of each person deserve equal treatment. This does not mean that individual rights should be thought of as "lexically" prior to any considerations of material equality or social welfare, such that rights must always "trump" social policy, as Rawls and Dworkin would have it.[26] They should be thought of functionally, as abstract entitlements whose specific contours are delimited by reference to the role they play in facilitating free, equal, and rational public discourse.

Determining the precise contents of individual rights must therefore be as much a matter of statutory provision and judicial construction as it is a matter of constitutional text. In these complementary institutional settings, the people can express their understandings of the requisites for individual autonomy, in their capacity as constituents

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[25] Habermas, *Between Facts and Norms*, 122.

[26] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, revised ed. 1999), 55; Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), xi.

and as litigants. Because the legislature and the judiciary share the role of articulating the requirements of individual autonomy above and beyond abstract constitutional requirements, the authority to articulate individual entitlements is not the exclusive prerogative of either majoritarian will or of jurisprudential understandings. They rather emerge from a process of institutional elaboration, where courts and legislatures adapt and respond to one another's articulations of the basic requirements for individual agency. In this process, the judiciary and the legislature afford different forms of public participation in determining the scope and import of individual entitlements and obligations. As I argued in chapter 4, legislation attempts to capture broadly shared understandings of rights and duties, which are generated through public discourse, electoral results, and legislative deliberation. Adjudication disciplines these general legislated understandings by the circumstances and arguments of individuals affected by them. It thus ensures that the public does not congeal into a majoritarian monolith, but rather remains responsive to the diverse social positions and understandings of its constituent members.

3. The Availability of Judicial Review: Acute and Distinguishable Injuries

The distinct institutional competencies of adjudicative and legislative procedures has been outlined in two landmark, early twentieth-century cases concerning the constitutional requirement that no person may be deprived of "life, liberty, or property without due process of law."[27] In *Londoner v. City of Denver*,[28] the court ruled that a

[27] U.S. Const. Amendment V, XIV.

[28] Londoner v. City & Cty. of Denver, 210 U.S. 373 (1908).

local tax equalization board had violated due process requirements by assessing and levying a tax for street paving on a subset of residents without a prior hearing. In *Bi-Metallic Investment Co. v. Board of Equalization*,[29] by contrast, the court found that a tax levied on all residents of a city without a prior hearing did not violate due process. These cases together map a fundamental distinction: where the state would infringe upon an individual's entitlements in a particularized way that distinguishes her circumstance from that of the community at large, the appropriate mode of participation is an adjudicative forum, where the individual can challenge the legal and factual determinations upon which the infringement relies. In such cases, individuals hold a due process right to an adjudicative hearing before they are deprived of any entitlements.[30] Though the hearing need not be judicial, ordinary courts' adversarial procedures set the reference point for other forms of administrative due process and public hearings.[31] But where the state would infringe upon individual entitlements through rules of general applicability, the appropriate mode for affected persons to participate is through the exercise of political rights, namely to express their opinion in the public sphere and to vote for elected representatives. As Justice Holmes observed in *Bi-Metallic*, "General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the

[29] Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).

[30] See also Goldberg v. Kelly, 397 U.S. 254 (1970) and Mathews v. Eldridge, 424 U.S. 319 (1976).

[31] Henry J. Friendly, "'Some Kind of Hearing,'" *University of Pennsylvania Law Review* 123, no. 6 (1975): 1267-1317.

only way they can be in a complex society, by their power, immediate or remote, over those who make the rule."[32]

The distinction between these cases does not turn simply upon the number of people who would be affected by the state's action; more fundamentally, it turns on whether the claimants are "exceptionally affected," meaning that the infringement upon their spheres of independence is both acute and turns upon facts which distinguish their case from others.[33] In such cases, the potential threat that the application of democratic power poses to its own foundations is at its height. If the legislature could simply pass laws that deprived particular persons of their liberty and property, without recourse to some kind of hearing, then it would be impossible to expect an open and rational public discourse over common aims. Dissenters would quake in fear of majoritarian power. When, however, the public speaks in the language of rules of general applicability, then it is at least partially constrained from this form of self-destruction. Individuals are more likely to reason in terms of common aims, and majorities are less able to target dissenters, when laws make general commands that apply to all persons within the relevant jurisdiction. To be sure, there is a continuum between truly individualized and wholly general infringements upon individual liberties. But the more state action narrows to the point of a distinguishable and concrete infringement upon a single person or a minority

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[32] 239 U.S. at 445 (1915).

[33] Ibid., 446 ("In *Londoner*, a local board had to determine 'whether, in what amount, and upon whom' a tax for paving a street should be levied for special benefits. A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid.").

subset of persons, the higher the procedural burdens should be to authorize such infringement.

The broader function of judicial review of agency action can be understood by reference to the due-process norm that particularized infringements upon individual liberties by the state must be preceded by some kind of adjudicative hearing. For the availability of judicial review of administrative action likewise turns on the existence of particular and distinguishable injury that is fairly traceable to an administrative act. As Louis Jaffe has noted in his survey of the common law roots of judicial review of agency action, "an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity."[34] In a prime example of the process of inter-branch articulation of individual rights, the Administrative Procedure Act of 1946 (APA) codified provisions for judicial review of agency action which reflected norms generated by judicial precedent: "a person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof."[35] Subsequent judicial precedent has confirmed that final administrative actions are presumptively reviewable, unless there is a clear congressional intent to preclude such review.[36] The federal courts afford individuals

[34] Louis Jaffe, *Judicial Control of Administrative Action* (Boston: Toronto: Little and Brown, 1965), 336.

[35] 5 U.S.C. § 702 (emphasis omitted).

[36] Abbot Laboratories v. Gardner, 387 U.S. 136 (1967).

standing to appeal outside of the agency where administrative action has caused them some "concrete and particularized" injury.[37]

Judicial review thus serves to bring pressure from private parties to bear on agencies to ensure that they fulfill their public duties. It serves a dual function of protecting individual and collective autonomy. As the Attorney General's Committee on Administrative Procedure put it in 1941, "from the point of view of public policy and public interest, it is important not only that the administrator should not improperly encroach on private rights but also that he should effectively discharge his statutory obligations."[38] When parties claim that they have been injured by an administrative

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[37] Lujan v. Defenders of Wildlife, 504 U.S. 555, 556 (1992). Scalia emphasized the constitutional import of the "requirement that the plaintiff's alleged injury be a particularized one, which sets him apart from the citizenry at large." Scalia, "The Doctrine of Standing" 881-99.881-2. I do not follow Scalia, however, in bemoaning the broadening of standing beyond injury to a right recognized at common law or explicitly accorded by statute. The real constitutional problem of judicial usurpation of legislation and executive power can be dealt with by rigorous inquiry into whether the plaintiff has suffered an actual and distinguishable detriment—including "aesthetic, conservational, recreational, as well as economic values"—which is caused by an administrative act. Association of Data Processing Service Organizations, Inc. v. CAMP, 397 U.S. 150, 154 (1970). Thus, claims which rely upon a highly speculative chain of causal links between an administrative act and an injury should not be sufficient to confer standing to challenge administrative action in court. Nor should claims of injury which are identical or very similar to those suffered by all or most other persons within the relevant jurisdiction confer standing. It is neither necessary nor prudent for the legal status of an injury to be interrogated as a matter of standing. Once courts inquire whether the injury suffered by a plaintiff is indeed an injury to a legally protected interest, or one "arguably within the zone of interest to be protected or regulated by the statute," they are then "arguably" addressing the merits of the controversy, rather than determining whether the judicial forum is the proper one in which to resolve it. Ibid., 153. See also Mashaw et al., *Administrative Law*, 1028, 1037. The APA grants standing for individuals to have suffered a "legal wrong" or who are "adversely affected *or* aggrieved within the meaning of the relevant statute," 5 U.S. §702(1)(emphasis added). "Adversely affected" need not be read as modified by "within the meaning of the relevant statute." Thus, if one is "adversely affected" by an administrative action, one is entitled to judicial review thereof, whether or not one is within the "zone of interest arguably protected by the statute." This reading of the text comports with the legislative history of the APA. See Kenneth Culp Davis, "The Liberalized Law of Standing," *University of Chicago Law Review* 37 (1970): 466-7.

[38] Attorney General's Committee, *Final Report*, 76.

action that was in some way unlawful, their goal may be only to remedy the wrong and thus protect their private interests. But the effect of the suit, if our standards are properly conceived and applied, should be to bring administrative action into conformity with public purposes. By challenging the agency to justify its actions, in the face of contrary arguments, private suits orient administrative reasoning out of the confines of the agency and into a broader legal discourse. Lawyers for the government must convince judges who are laymen with respect to the technical aspects of administrative questions. Review of agency action thus serves to mediate between the esoteric forms of reasoning that are comprehensible to administrative practitioners, and the exoteric reasoning of public discourse. We therefore are in search of judicial norms which are responsive to the technical needs of administrative agencies, but which urge them to speak in a language that affected parties, judges, and the public at large, can understand, evaluate, and criticize.

American administrative law holds that where individuals can show an infringement of their entitlements or a particularized injury to their interests by the action of the state, they have a right to challenge the *legality* and *rationality* of the official action in a judicial forum.[39] Unless the agency can show that its action was within the scope of

[39] As noted above, Administrative Procedure Act of 1946 codifies this principle. 5 U.S.C. § 702 states that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. §706(2) then states that in reviewing agency action, "the reviewing court shall . . . hold unlawful and set aside agency action found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

its statutory authority, and was taken pursuant to a rational decision-making process, the state must be enjoined from the intervention. Much will turn, of course, on the contents of this criterion of rationality. I will argue in Sections III.3 and 4 that the proper form of rationality is discursive, in that it provides reasons which are responsive to the expressed views, values, and interests of affected parties. But for now, I wish only to sketch the kind of individual autonomy this form of judicial review protects. It does not grant to individuals an absolute and hermetically sealed realm of independence, where they are immune from all political duties and demands. Rather, it entitles individuals to be subject to state power only where that power has been legislatively authorized, and further confined by the demand of rational explanation within the sphere of discretion left free by indeterminate legal norms. It entitles individuals to offer arguments in court challenging the agency's interpretation of the meaning of the laws under which they act, and the compatibility of their decision-making with deliberative democratic principles of rational policy-making. Thus, individuals can participate as litigants in the elaboration of legal meaning that occurs within administrative contexts. Individuals can then distinguish themselves from the broader democratic public, as affected persons to whom public officials owe sound explanations for their intrusions into their autonomous spheres. In this way, Progressive democracy avoids confusion which a purely collectivist form of rule, in which the identity, entitlements, and interests of individual persons would be indistinguishable from one another, and from "the people" as a whole.

III. Judicial Deference to Public Rights: Policing the Discursive Rationality of Administrative Action

In the last section I argued that judicial review can help to lessen the tension between individual and collective autonomy by providing a setting where those injured by public power can challenge the legal and factual determinations upon which such application relies. Private interest in such situations is not antithetical to public authority, but is rather integral to its formation. Private interest defends itself by asserting a divergence between public purpose and the official action which caused the injury. I argued that courts can best assess this divergence by determining whether the administrative action was lawful and rational. But I have not yet specified the inquiry courts should perform in assessing the legality and rationality of administration action.

In this section I elaborate the functions of judicial review through the concept of "public rights." Public rights refer to entitlements held by the popular sovereign to intervene into and regulate civil society in accordance with common aims. Such rights may be exercised by particular institutions and persons, but only on behalf of the universal rights of the community as a whole. Administrative agencies articulate public rights by interpreting statutory provisions, adjudicating cases, and promulgating rules. Judicial review of these actions should ensure, first, that agencies conform to the often abstract statutory definitions of public rights; and second, that agencies engage with the values, interests, and arguments of affected parties when agencies exercise the discretionary judgment left open by statutory ambiguity or silence. The greater the degree of deliberative engagement agencies can demonstrate on the record, the greater the deference they should be accorded in articulating public rights.

The concept of public rights has deep roots in American constitutional and administrative law, but is today a fairly marginal doctrinal category.[40] I nonetheless emphasize public rights because American jurists too often think in terms of a distinction between public interests and private rights, or between governmental powers and individual rights.[41] This way of thinking tips the scales in favor of the protection of private interests, for it elevates such interests to the status of an entitlement, while the public remains equipped with a comparative weak "interest," and its government with ethically neutral, non-obligatory "powers."[42] The renowned administrative law scholar Louis Jaffe likewise dismissed the public as a "bloodless abstraction," and treated individual rights-bearer is the sole source of moral and political obligation.[43] In Dworkin's terms, the dignity of individual persons is elevated to the status of "principle," whereas the regulatory authority of the state is mere "policy."[44]

This is not the appropriate way to think about legality and legitimacy in the administrative context. When we consider the authority of the state to intervene in and to

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[40] See Harry N. Scheiber, "Public Rights and the Rule of Law in American Legal History," *California Law Review* 72, no. 2 (1984): 217-251.

[41] See, e.g. Hugo Black, "The Bill of Rights," *New York University Law Review* 35 (1960): 865-881; Charles A. Reich, "Individual Rights and Social Welfare, The Emerging Legal Issues," *Yale Law Journal* 74 (1964): 1245-58; Richard B. Stewart and Cass Sunstein, "Public Programs and Private Rights," *Harvard Law Review* 95, no. 6 (1982): 1193-1322; David. L. Faigman, "Reconciling Individual Rights and Government Interest," *Virginia Law Review* 78, no. 7 (1992): 1521-1580.

[42] For a critique of the jurisprudential emphasis on individual rights and governmental powers, see Robin West, "Unenumerated Duties," *University of Pennsylvania Journal of Constitutional Law* 9 no. 1(2006) 221-261.

[43] Louis Jaffe, "The Public Rights Dogma in Labor Law," *Harvard Law Review* 59, no. 5 (1946): 725.

[44] Ronald Dworkin, *Taking Rights Seriously* 90-2.

regulate civil society through administrative action, we are concerned above all with the *right* of the national democratic community to determine the conditions of its collective life, above and beyond the reciprocal arrangements that its members undertake to satisfy their private ends. The concept of public rights vividly captures the people's entitlement to self-government in a way that mere governmental powers or public interests cannot. It legitimates administrative power by linking its exercise to rights held by the popular sovereign. This is why scholars who reject as "unlawful" the adjudicatory and rulemaking powers of administrative agencies seek to purge the concept of public rights from the American legal canon.[45] Public rights express the people's power to ensure that we are governed by conditions of our own choosing, rather than solely by the caprice of markets and the arbitrary wills of powerful private persons and organizations. Because "agencies are . . . the primarily official interpreters of federal statutes,"[46] the normative elaboration of public rights is necessarily an administrative process. The role of courts in reviewing this process should be to ensure that administrative activity does not exceed the rights which the administrative agency exercises on behalf of the public, and conforms with the discursive process by which that public emerges and evolves.

1. Public Rights in the Reactive State

In Chapter 3, I borrowed Bruce Ackerman and Mirjan Damaška's distinction between the "reactive state" and the "activist state" to elucidate the need for

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[45] Hamburger, *Is Administrative Law Unlawful*? 246-8.

[46] Jerry Mashaw, "Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation," *Administrative Law Review* 57, no. 2 (2005): 502-3.

administrative institutions to achieve programmatic social goals.[47] Administrative institutions have a much less salient role to play in a reactive state, which attempts to reflect and preserve the existing social order. The classical American concept of public rights reflected such a static relationship between the state and civil society. Public rights were fixed by constitutional and common law, and were arrayed against one another so as to restrict their expansion. In "the whole system of human affairs, public as well as private" Madison argued in *Federalist 51*, "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check upon the other; that the private interest of every individual, may be a centinel over the public rights."[48] Within the "distribution of the supreme powers of the state,"[49] public rights referred to the constitutional rights of political bodies, namely the right of Congress to legislate within its enumerated powers, of the courts to hear cases and controversies arising under the laws of the United States, and of the president to exercise executive power. Such rights checked and balanced one another, so that the sphere of governmental power could only expand with great difficulty and a high level of political consensus.

In the "subordinate distributions of power"[50] at common law, public rights likewise designated a delimited sphere of sovereign authority to regulate the use of

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[47] Bruce Ackerman, *Reconstructing American Law*, 1, 24-37; Mirjan Damaška, *The Faces of Justice and State Authority*, 73-88.

[48] James Madison, "The Federalist No. 51," in Hamilton et al., *The Federalist*, 349.

[49] Ibid.

[50] Ibid.

private property rights "affected with a public interest."[51] The public held a right to regulate common carriers, inns, ferries, wharves, bakers, and millers.[52] The public also held a "riparian right" to the use of navigable rivers for travel or fishing, even if title to the land under the river was privately held.[53] Public rights were likewise invoked where the government had granted a monopoly to a private concern, and thus the private property became "clothed with a public right."[54] The doctrinal category was thus tethered firmly to certain discrete governmental interests and particular categories of property. These limits on public rights at common law served to stabilize the relationship between state and society. It complemented the mutual constraint of the jurisdictional rights held by the branches of federal and state governments with a clear demarcation of the governmental authority to regulate the use of private property. Prior to the American Revolution, such rights were held in trust by the king "for the common benefit of all his subjects."[55] With the passage from monarchical to popular sovereignty, the trusteeship of the King passed to the state and federal governments.

In the context of administrative law, public rights originally referred to rights held by the government against private property interests in the exercise of sovereign powers, which could be adjudicated outside of the judicial process. In nineteenth of administrative

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[51] Sir Matthew Hale, *De Portibus Maris*, 1 Harg. Law Tracts, 78 (1670), quoted in Munn v. People of the State of Illinois 94 U.S. 113, 126 (1876).

[52] *Munn*, 94 U.S. at 126 (1876).

[53] Shivley v. Bowlby, 152 U.S. 1, 12 (1894).

[54] Allnutt v. Inglis, 12 East, 527, 542 (1810) (Le Blanc, J.), quoted in Munn, 94 U.S. at 128 (1876).

[55] 152 U.S. 1, 17.

law, judicial review of administrative action relied upon common law actions for damages against public officials, as well as the limited use of prerogative writs to compel or enjoin administrative action.[56] The public rights concept, however, was an exceptional departure from the common law power of courts and juries to review de novo the legal and factual bases of administrative action. The public rights capable of adjudication by administrative bodies arose not from common law, but from the jurisdictional rights accorded to the legislative and executive branches by the Constitution.

The power to tax was the most fundamental of legislative rights, because the collection of revenue was requisite to any and all government activity. Public rights were thus at issue in *Murray's Lessee v. Hoboken Land and Improvement Co.*,[57] where plaintiffs challenged the constitutionality of a warrant issued by the Treasury Department, under power vested in it by an Act of Congress, to seize land in recovery of a debt owed by a customs collector to the government. The Court rejected the argument that the issuing of the warrant by the Treasury was a deprivation of property without due process of law. Finding no traditional right to a judicial hearing in such cases in English and American law, it explained that the right at issue was not a private, common law right which necessarily fell within the jurisdiction of the courts, but rather a public, statutory right: "[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them . . . but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem

[56] Mashaw, *Creating the Administrative Constitution,* 66, 76, 139.

[57] Den ex dem. Murray v. Hoboken Land & Imp. Co., 59 U.S. 272 (1855).

proper."[58] The government held a right to the recovery of money owed to it, which issued from the constitutional right of Congress to lay and collect taxes. The warrant issued by the Treasury Department, therefore, was a means to "redress of a particular kind of public wrong, by the act of the public through its authonized agents."[59]

In redressing such public wrongs, Congress might elect to withdraw from the courts the jurisdiction to determine the factual basis upon which the administrative intervention relied:

> Though a private person may retake his property, or abate a nuisance, he is directly responsible for his acts to the proper judicial tribunals. His authority to do these acts depends not merely on the law, but upon the existence of such facts as are, in point of law, sufficient to constitute that authority; . . . but *a public agent, who acts pursuant to the command of a legal precept, can justify his act by the production of such precept.*[60]

The question for the Court was then only whether the administrative order—in this case the distress warrant—was within the scope of the agency's statutory jurisdiction. *Murray's Lessee* therefore recognized a sovereign power to intrude upon private rights without ordinary judicial process where constitutionally allocated public rights were at stake. It limited the reviewing function of courts to the determination of questions of law, rather than facts, in matters involving statutorily granted public rights. But the scope of social activity susceptible to federal administrative action was narrow, delimited by the enumerated powers of the Constitution, and constrained by the hedges erected around private property by the common law.

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[58] Ibid., 284.

[59] Ibid., 283.

[60] Ibid., 283 (emphasis added).

2. Public Rights in the Activist State

By the time of the next landmark case in which a "public right" is invoked, the scope of regulatory activity had been greatly enlarged through legislative implementations of common aims. The stable and narrow sphere of the public was no longer primarily the province of settled common law and judicially circumscribed constitutional jurisdiction, but of the collectively determined purposes of the people. This historical transformation—beginning after the Civil War, gaining steam in the Progressive Era, and coming to fruition in New Deal—began to displace certain elements of the reactive model of political authority which predominated in the early Republic.[61]

Alongside side the common law system of private rights adjudicated in court, federal statutes framed an increasingly broad public law system implemented by administrative bodies. The courts, accustomed to their the long-held primacy of place under reactive governance, resisted this transformation, severely limiting the independent decision-making powers of administrative agencies.[62] *Crowell v. Benson*,[63] decided in 1932, was one of the last throws of this reactionary effort. The case concerned an award made by the United States Employees' Compensation Commission for a workplace injury payable by the employer, Benson. The Commission had been given jurisdiction by Congress to adjudicate and determine awards to be provided by employers to employees

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[61] See generally Lowi, *The End of Liberalism*; Skowronek, *Building a New American State*; Orren, *Belated Feudalism*; Robert Harrison, *Congress, Progressive Reform, the New American State*; Hofstadter, *The Age of Reform*.

[62] Reuel E. Schiller, "The Era of Deference," 399-442, 407-413.

[63] 285 U.S. 22 (1932).

for workplace injuries occurring upon the navigable waters of the United States. As in *Murray's Lessee*, Benson complained that the administrative procedures for determining the awards he was to give to the injured worker violated both his due process rights and the constitutional jurisdiction of the federal courts to adjudicate cases and controversies arising under the laws of the United States. While the Court found that the Commission's determination of fact should be final with regard to workplace injuries sustained, it found that questions of "jurisdictional fact" must be reviewed de novo by the courts. Jurisdictional facts referred to facts which would determine whether or not it was within the power of the Commission to adjudicate the award—namely, whether there existed a master-servant relationship between the injured worker and the employer, and whether the injury occurred on the navigable waters of the United States. The Court distinguished the case from *Murray's Lessee* on the grounds that the case before it concerned a "private right," or "the liability of one individual to another," rather than a "public right," which arises "between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[64] In the case of private rights arising between persons, Congress could not strip from the courts their constitutional power to adjudicate jurisdictional facts.

The decision in *Crowell* continued to rely upon a reactive understanding of the state, despite the evolution of legislation and the growth of administration in the direction of more pervasive social regulation. It continued to treat public matters as those only arising within the government, or those between the government and its citizens, whereas relations between persons within civil society were treated as private matters, which must

[64] Ibid., 292.

be adjudicated by courts. The thrust of the activist transformation, however, was to press upon this boundary between public and private, and subject certain nominally private relations between persons to public regulatory schemes. The regulatory program at issue in *Crowell* was a prime example of a public purpose intervening into the private realm. Congress sought to provide compensation for a class of workplace injuries which state contract law, principles of tort law, and maritime law had not afforded to employees. The goal was to mediate a private relationship—between employees and employers—through the lens of a public purpose. As such, the compensation rights arising between Crowell and Benson should have been seen as public rights, because their relationship to one another had become conditioned by an administratively implemented public purpose.

The constitutional moment of the New Deal would see a contemporaneous shift in administrative law which enshrined this altered understanding of the relationship between private and public, and the related boundaries between judicial and administrative adjudication.[65] The departure from *Crowell* can be seen in In *NLRB v. Hearst*,[66] where the Court held that the National Labor Relations Board determination that "newsboys" were employees was to be accepted, irrespective of the common law meaning of employee, "if it has 'warrant in the record' and a reasonable basis in law."[67] The *Crowell* court would likely have seen this as a jurisdictional fact entitled to judicial determination, without deference to administrative findings. But in the wake of erosion of public and private boundaries in the New Deal, the Court was willing to cede far greater latitude to

[65] Schiller, "The Era of Deference," 413-430.

[66] 322 U.S. 111 (1944).

[67] Ibid., 130.

administrative determination of private legal terms in relation to public purposes. No longer was the court willing to review de novo questions of "jurisdictional fact," if congress had given adjudicative authority to an administrative agency in pursuit of a valid public purpose, such as a regulation of the labor market.

The Court acknowledged that common law terms could take on new meaning in relation to broader programs of federal regulation, which sought not to preserve the social order as it was, but to transform it. Administrative agencies could specify new public rights through a continual engagement with the factual circumstances of civil society in light of their statutory mandate:

> "Everyday experience in the administration of a statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with employers."[68]

Administration thus became a context for the legal institutionalization of a self-conscious public, arising from the administrative recognition of current social conditions. Though the Court in *Hearst* did not use the language of public rights, seen in relation to *Crowell* it represents an adaptation of the concept: a public right may arise in the relationships between private persons where their private, contractual relationship to one another has been subjected to statutory regulation in light of public purposes. Thus the adjudicatory powers of the National Labor Relations Board were seen as a paradigmatic instance of

[68] Ibid., 129.

public rights, despite the fact that they primarily governed the relationships between private parties, rather than the relationship between government and private parties.[69]

Because administrative agencies came to be understood as forums of public right, entitled to judicial deference as to their factual determinations, courts began to rethink the function of judicial review of agency action. Instead of merely serving the defense of private entitlements against administrative illegality, the judiciary was enlisted into the service of articulating statutorily codified public rights. Up to the 1940s, judicial review of agency action was available to one who had suffered a legal wrong as a consequence of such action.[70] Thus, if a plaintiff could show that an administrative act had infringed upon their property, or some other statutorily provided entitlement, he could challenge the agency in court to explain the legal authority under which it had acted, and the factual determination that underpinned the order. If, however, a plaintiff could not claim injury

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[69] The Court described N.L.R.B. hearings on unfair labor practices as "restricted to the protection and enforcement of public rights." National Licorice Co. v. N.L.R.B., 309 U.S. 350 (1940). "The Board asserts a *public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices*. The public right and the duty extend not only to the prevention of unfair labor practices by the employer in the future, but to the prevention of his enjoyment of any advantage which he has gained by violation of the Act, whether it be a company union or an unlawful contract with employees, as the means of defeating the statutory policy and purpose." Ibid. at 364 (emphasis added); "The instant reimbursement order is not a redress for a private wrong. Like a back pay order it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are *remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private rights*." Virginia Elec. & Power Co. v. N.L.R.B., 319 U.S. 533, 543 (1943) (internal citations omitted) (emphasis added).

[70] Alexander Sprunt & Sons v. United States, 281 U.S. 249 (1930); St. Joseph Stockyard Co. v. United States, 298 U.S. 38 (1936); Norman v. Baltimore & O.R. Co., 294 U.S. 258 (1924); Tennesse Electric Power Co. v. TVA, 306 U.S. 118 (1939); Acheson et al., *Report of the Attorney General's Committee*, 84-5; Mashaw et al., *Administrative Law*, 1025-9.

to a legally protected interest, but only some kind of economic harm arguably caused by an administrative act, he would not have standing to challenge the agency in court.

But in two landmark cases, *F.C.C. v. Sanders Bros. Radio Station*[71] and *Scripps-Howard Radio v. F.C.C.*,[72] the Supreme Court developed an alternative model of standing, which turned not on a claim of legal wrong, but upon the claim of parties to represent the public interest. The Communications Act of 1934 provided for a right of judicial appeal to "an applicant for a license or permit" or "any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing such application."[73] The Court in *Sanders Bros.* concluded that this provision gave standing to a broadcaster who claimed to have been economically injured by an order of the Commission granting a license to his competitor, even though economic injury was not legally protected by the Act: "Congress . . . may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having sufficient interest to bring to the attention of appellate courts errors of law."[74] The function of judicial review here was not then primarily to vindicate private interests, but to bring private interests to bear in ensuring that administrative action conforms with the requirements of the statutory public rights they implement. Thus in *Scripps-Howard Radio* the Court explained that

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[71] 309 U.S. 470 (1940).

[72] 316 U.S. 4 (1942).

[73] Communications Act of 1934, § 402(b).

[74] *Sanders Bros.*, 309 U.S. at 477 (1940).

> The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. Congress gave the right of appeal to persons 'aggrieved or whose interests have been adversely affected' by Commission action. But these private litigants have standing only as representatives of the public interest. . . . Courts and public agencies are not be regarded as competitors in the task of safeguarding the public interest. Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes.[75]

Judicial review's primary function in these cases was not primarily to protect the private individual from the state, but to insure that the agency had not erred in its interpretation of statutory law. The public right held in trust by private litigants is a right to lawful administrative action. Though the law of standing has subsequently evolved from the language of private and public rights, it continues to recognize that the function of judicial review is not merely to protect private interests, but to bring the interest of affected parties to bear in judicial proceedings to hold administrative action to public account.[76]

Public rights remain an active doctrinal category in cases where statutes allow agencies to adjudicate the entitlements of private parties in furtherance of a statutory purpose. In *Thomas v. Union Carbide Agricultural Products Co.*[77] the Court upheld a statute which enabled the Environmental Protection Agency to evaluate an application for the manufacture of a pesticide based on data from a previously approved manufacturer. It

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[75] *Scripps-Howard Radio*, 316 U.S. 4, 15 (1942).

[76] Association of Data Processing Service Organizations, Inc. v. Camp, 387 U.S. 150 (1970) ("He who is likely to be financially injured may be a reliable private attorney general to litigate the issues of public interest in the present case."); Massachusetts v. EPA 549 U.S. 497 (2007) ("Given . . . Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.")

[77] 473 U.S. 568 (1985).

provided for binding arbitration between the approved manufacturer and the applicant to determine compensation for the use of the data, with only limited judicial review. The Court found that this scheme did not unconstitutionally deprive the Article III courts of their judicial power to adjudicate claims of private right, even though an exchange of data between manufacturers did not involve the government directly as a party: "the right created by [the statute] is not a purely 'private' right, but bears many of the characteristics of a 'public' right. Use of a registrant's data to support a follow-on registration serves a public purpose as an integral part of a program safeguarding the public health."[78] Though the compensatory rights did not involve the government as a party, they were public in the sense that they were "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution."[79]

What makes a right "public" then, is not the identity of the parties between whom it arises, but the purposes the right serves. Private rights, most clearly identifiable in state common law of property and contract, serve the interest of individuals in their capacity as self-interested actors within civil society. Public rights, by contrast, serve the interests of the democratic community as a whole in the pursuit of its collectively-determined ends. Though a public right might incidentally advance a private interest, the right arises from and is delimited by its capacity to articulate and advance common interests identified in statutory law.

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[78] *Union Carbide*, 473 U.S. at 589.

[79] Ibid., 593-94.

3. Public Rights and Public Sphere: Deliberative Rationality as an Administrative Duty

Though the concept of public rights emerged to describe the discrete and delimited powers of government to intervene into civil society and to supplant governance by judicial common law with statutory norms, it has evolved to describe a dynamic relationship between political authority and the social order. The relationships between private persons are today pervasively regulated by administrative agencies in order to reshape society in the interests of public purposes identified in statute. It is symptomatic of the all-encompassing role of public purposes in our contemporary legal culture that even the private law of property and contract is often analyzed from the perspective of efficiency rather than the natural rights or moral claims of individuals.[80] When crafting, analyzing, and critiquing legal rules, we usually look towards the social consequences of their operation, towards the kinds of social order they produce, and towards their social meaning, rather than beginning from pre-political assumptions about individual autonomy.

This does not mean we no longer consider the dignity of the individual or the legitimate claims she can make against the exercise of political power. But the scope of individual autonomy is primarily the product of self-conscious political activity and deliberation, rather than of the doctrinal developments at common law. In the context of the reactive state, public rights were not so much a matter of public deliberation as a matter of constitutional and judicial prescription. In the context of the activist state, however, public rights refer to the claims of the democratic community as a whole to

[80] See, e.g. Guido Calebresi and A. Douglas Melamed, "Property Rights, Liabilities Rules, and Inalienability: One View of the Cathedral," *Harvard Law Review* 85, no. 6 (1972):1089-1128.

determine the conditions of its own existence and flourishing. Public rights are therefore the product of deliberative democratic discourse over common aims. The publicity of such rights tethers them to an ongoing, collective process of rational discussion over what our common purposes are, and how we should specify or modify them in light of new arguments, values, and circumstances.

Administrative agencies articulate public rights. They do so by adjudicating cases, promulgating binding rules, and issuing interpretative guidelines and regulatory plans. The task of articulating public rights is not the exclusive prerogative of agencies, but is one they share with the constitutional branches and with the public at large. Common concerns are first articulated in the speech and writings of social actors and the discourses that evolve through them. These concerns are then articulated in the institutions of the state. Problems, needs, and values are particularized, specified, and made distinct in legislative form and administrative practice. As I argued in the last chapter, the claims of Congress and the President to articulate public rights are constrained by the asymmetries of power and lack of information that pervades both public discourse and the political process. The function of administrative agencies is to cure the deficits in information and legitimation that prevent the democratic public from fully perceiving and articulating their common interests.

Agencies, like the political branches, must be judged by their deliberative democratic credentials. They glean a degree of democratic authority from the laws and from the direction of the President. But, unless agencies themselves can claim some additional democratic warrant, above and beyond that bequeathed by democratically

compromised political principals, a democratic deficit remains. Administrative agencies must therefore be deliberatively democratic in their procedures and practices.

A public rights perspective on judicial review therefore emphasizes that courts' role is not only to safeguard individual autonomy, but to ensure that administrative action remains guided by the public purposes for which the agency in question was instituted. The proper function of courts is therefore to ensure that agencies remain bound by the usually abstract commands of law, and, within the zones of discretion left by statutory norms, draw on the reasoned input of affected parties to specify the broad command of legislated public rights. The greater the degree of deliberative democratic input an agency draws upon to justify its exercise of discretion, the more courts should defer to the agencies determinations.

This notion is partially reflected in the standards of judicial review that courts apply to administrative activity. Non-binding, interpretative rules may be issued without any public consultation, but are owed relatively little deference by courts.[81] Adjudicative determinations are owed a greater level of deference, as they arise from a formal adversarial process in which opposed parties can argue their case before an administrative tribunal.[82] Administrative rules generated from the notice-and-comment procedure are

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[81] Neither formal nor informal rulemaking requirements apply to "interpretative rules" and "general statements of policy," which are meant to inform the public of the agency's interpretation of their organic statutes, but which are not legally binding. 5 U.S.C. § 553 (b). Such rules are accorded deference according to their "power to persuade, if lacking the power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). The Court in *United States v. Mead Corp., 533 U.S. 218 (2001).*, affirmed this standard and clarified that it applied to agency determinations not made pursuant to a congressionally delegated rulemaking, or adjudicative authority.

[82] The APA states that adjudicative determinations and rules established through formal rulemaking, which is adjudicative in format, are to be set aside by reviewing courts if "unsupported by substantial evidence." 5 U.S.C. 706(2)(E). For the paradigmatic application of

owed the highest level of deference, as they arise from a process in which any and all persons may submit their views.[83] Courts do not usually explain their standards of review by reference to deliberative democratic principles. But the structures of deference established by statute and by judicial precedent are hospitable to a deliberative democratic reconstruction.

The great failure of judicial review, however, is that the kind of reasoning courts expect and demand of administrative agencies is not deliberative, but rather instrumental. It is often assumed that the purpose of a statute is readily identifiable, and interpretable in the first instance by courts. The legitimate role of agencies is then simply to identify the most efficient technical means for realizing this purpose. As Jerry Mashaw observes, "Administrators claim by and large not to be making value judgments. Those are specified in the statute to be administered. Administration is just implementation; its rationality is to be judged by means-ends convergence, not by cogent argument concerning the rightness of the ends pursued."[84]

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this standard, see *Universal Camera Corp v. NLRB*, 340 U.S. 474 (1941) (holding that the substantial evidence standard required that findings of fact be supported by "the record considered on the whole").

[83] The APA states that informal rules are to be set aside by reviewing courts if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." 5 U.S.C. 706(2)(A). The arbitrary-and-capricious standard is significantly more deferential on its face than the substantial-evidence standard, even if the advent of "hard look" review has lessened the distinction between the two. As originally interpreted by courts, arbitrary-and-capricious review could, with little exaggeration, be described as a "lunacy test." See Martin Shapiro, "APA: Past, Present, Future," (1986): 462.

[84] Jerry L. Mashaw, "Small Things Like Reasons are Put in a Jar," *Fordham Law Review* 70 (2001): 32.

This instrumental form of reason ignores the incompleteness of public purpose at the legislative stage. As I argued in Chapter 4, the common concerns which animate the public are rarely definitively identified in a single instance of legislative expression. Rather, the interplay between public law and public sphere, through the medium of public rights, serves to elucidate the meaning of common purposes. This is not to say that administration should not involve means-end rationality. Of course public agencies should attempt to find the technically best ways to address particular problems that fall within the ambit of their statutory mandates. The subject-matter of agencies' statutory jurisdiction often involves highly empirical questions which require scientific, engineering, and social-scientific analysis to understand and address. But this linear means-end calculus should be, and often is, surrounded by iterative exchange between governmental and private actors over the content of the ends that are to be pursued. Regrettably agencies often conceal and distort this normatively laden, policy-based exchanged into a technically-neutral process of evidence gathering, in large part because this is what courts have come to demand of agencies. But when administrative reason functions at its best, instrumental reasons are sensitive to the push and pull of value-rational commitments communicated to the agency by members of the public. Courts must give judicial credence to a form of reasoning that is neither purely technical and instrumental, nor which simply sacrifices sound policy-making to dictates from elected political authority. Such administrative reason would be sensitive to the multiple perspectives, interests, and values that are implicated in their regulatory agenda, and give these an honest accounting in their decision making.

IV. Reconstructing Judicial Review: From Rational Technique and Arbitrary Policy to Discursive Reason

I have argued that administrative agencies articulate public rights, in the sense that they specify what entitlements the democratic public holds against the private interests of its constituent members. In reviewing the articulatory practice of agencies, courts should hold agencies to statutory commands, which represent abstract formulations of public purpose, and require them to exercise the discretion left to them by statute in a deliberatively rational fashion. To this point, however, I have not explained how this approach would actually work, and how it differs from the kind of review that courts in fact practice. In this section, I show the ways in which courts already partially recognize a deliberative democratic model of administration, but nonetheless fall prey to purely instrumental conceptions of rationality. They thus push agencies into a Weberian model of bureaucratic legitimation, which deprives the state of the democratic legitimacy it would garner from a more discursive form of rule.

Courts have come to police the technical rationality of administrative action aggressively, while conceding to agencies a great deal of discretion in determinations of policy which cannot be resolved in a scientific manner. The judiciary has thus carried over into administrative law the fraught dichotomy between politics and administration, between a realm of value questions which are not susceptible to rational analysis, and a realm of empirical questions which are. This approach obscures the possibility that certain contestations of value can and ought to be dealt with in a rational manner. It simultaneously overburdens courts and agencies with requirements of technical explanation which are often extremely costly for agencies to offer and beyond courts' institutional competency to assess. It is not surprising that courts have focused their

energies on the technical issues, since these are often at the forefront of the administrative determinations they are called upon to review. But by stopping at this point, they have fostered a form of administrative explanation, and of public contestation of such decisions, in which questions of value must masquerade as questions of technique. Administrative agencies, the courts, and the public at large, consequently suffer from a kind of false-consciousness. We often treat the substance of administrative decisions as clerical matters when in fact they often implicate profound questions about the substance of our political commitments.

The solution is not for courts to abandon their insistence upon the rationality of agency action, but to adjust the kind of rationality they are looking for. They should limit their analysis of agency factual determinations to ensure that there are no obvious logical contradictions, since any more detailed analysis of technical matters takes them outside of their area of expertise as legal practitioners and undermines the division of labor the administrative state is structured to accomplish. But they should require agencies to state with greater clarity the various values that are at issue in their interpretation and application of statutory terms, to rank those values where possible, and to explain how those values contribute to the regulatory decisions and plans they have developed. Further courts should permit and encourage agencies to explain their interpretation and application of values by reference to the opinions and information given by members of the public in the regulatory process. The quality of the process of deliberation leading up to a decision should count as a reason to defer to agency interpretations and applications of statutes. The basic framework for this kind of analysis already exists in the paradigm cases of administrative law, but it has been warped by the emphasis on technical

questions, and the failure to develop a justiciable conception of rational deliberation over contested values. What is needed is a language of judicial review which ensures the openness and integrity of public deliberation regarding the meaning and application of statutory terms. In what follows, I take a "hard look" at several landmark cases of administrative law to show what this kind of reasoning would look like, and how we might get there from our current legal discourse.

1. Overton Park*: Recording Rationality*

The leading case concerning the scope of judicial review of administrative action is *Citizens to Preserve Overton Park v. Volpe.*[85] There, the Supreme Court heard the complaint of various citizen groups that the Secretary of Transportation had violated federal law with his decision to authorize federal funds for the construction of an interstate highway through a portion of a public park in Memphis, Tennessee. The Department of Transportation Act of 1966 stated that "the Secretary shall not approve any program or project . . . which requires the use of any publicly owned land from a public park . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . resulting from such use."[86] The Court interpreted this standard stringently to require that destruction of parkland be avoided "unless there were truly unusual factors present in a particular case or the cost of community disruption resulting from alternative routes

[85] 401 U.S. 402 (1971).

[86] 49 U.S.C. § 1653(f) (1964 ed., Supp. V); 23 U.S.C. § 138 (1964 ed., Supp. V).

reached extraordinary magnitudes."[87] With this interpretation of the Act's requirements in hand, the Court determined that judicial review of the Secretary's decision was available. The applicable standard for review was to be found in the Administrative Procedure Act, which states that "a reviewing court shall hold unlawful and set aside agency actions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise contrary to law."[88] The Court maintained that this determination could only be made by looking to "the full administrative record that was before the secretary at the time he made his decision."[89] Since the District Court had relied upon the agency's litigation affidavits, which the Court characterized as "post hoc rationalizations," rather than the record before the Secretary at the time of decision, it remanded the case back to the District Court.[90] Looking at the whole record, the appropriate inquiry would then be to determine "whether the decision was based on the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."[91]

Overton Park's essential contribution to contemporary administrative law is to highlight the importance of a transparent and intelligible decision making process for the legitimacy and legality of administrative action. It requires agencies proceed on the basis

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[87] *Overton Park*, 401 U.S. at 413 (1971).

[88] 5 U.S.C. § 706(2)(A).

[89] *Overton Park*, 401 U.S. at 420 (1971).

[90] Ibid., 419.

[91] *Overton Park*, 401 U.S. 402, 416 (1971).

of explicitly stated reasons, which link their action both to the terms of the law and to factual findings the agency had made. It seeks to avoid arbitrary administrative behavior by requiring that agencies develop a written record of their policymaking activities. This record ensures that courts have something to review when agency action is challenged. More importantly, it promises to rationalize agency behavior: where officials know that they must be prepared to explain why they have chosen a certain course, they are more likely to reflect upon their reasons for action and to articulate a sound account for what they do. *Overton Park* therefore mandates a causal connection between the application of administrative power onto society and reasoned argument and explanation. It furthers the dialectic between rules and reasons which lies at the core of democratic objective spirit. To this extent, the case is a model for the kind of inquiry we should expect of courts, and the kinds of official behavior we hope that judicial review of administrative action will foster.

Overton Park's failure, however, lies in its inattention to the kind of reasoning that did in fact go into the Secretary's interpretation of the parklands provision, and the kinds of deliberative procedures through which the concern for parkland was operationalized. As Peter Strauss has detailed, the Secretary's decision with regards to the park was the result of a years-long, statutorily mandated and administratively elaborated process of consultation on urban highway construction, which included federal state and local officials, and multiple opportunities for public participation.[92] "Citizens to Preserve Overton Park," the named petitioner, was a particularly vocal, but small, group of

[92] Peter L. Strauss, "Revisiting *Overton Park*: Political and Judicial Controls Over Administrative Actions Affecting the Community," *UCLA Law Review* 39 (1992): 1251-1329.

residents in the neighborhood bordering the park, who had vigorously contested plans to run the highway through any portion of the park. Highway construction plans were extensively discussed not only in hearings but in the local press. The Secretary of Transportation expressed in Senate hearings his understanding that "We have no choice but to follow planning procedures which are sensitive to the needs of individual communities and elicit community involvement in the development of plans."[93] Park values were one set of concerns among many that were at play in this participatory process, including economic development, racial justice, neighborhood integrity, and historic preservation. The Department offered up multiple alternatives to, and less intrusive variations on, the route through the park, giving great weight to the City Council's preferences over which route should be taken. Plans were shifted in response to community resistance in order to make the highway less intrusive. The Council ultimately favored a less-intrusive park route, for which the Secretary approved federal funding.

This decision-making exemplified of deliberative democracy at work in the administrative state: various technical alternatives were presented, conflicting values ventilated, and plans adjusted to accommodate as far as possible the desires for park preservation and economic development. This deliberative process, I argue, could itself have formed the "record" which would provide the reasoned basis for the secretary's decision. Had the Department assembled a contemporaneous record of each of its interactions and meetings with local officials and measures of the public, and described how their plans evolved and adapted in response to local concerns, this would have

[93] Ibid., 1281.

provided all of the basis necessary to show that the Secretary's decision had been neither arbitrary nor capricious. The Secretary might have explained that his interpretation of the parklands provision was that the agency needed to give special attention to parkland issues and undertake all efforts to seek out alternative routes. In the event no other options were both feasible and prudent, in light not only of technical issues but community preferences, it would engage in participatory planning to minimize damage to parkland.

The Department is partly to blame for the Court's inattention to this process, because its brief only noted the fact that hearings had taken place without describing the deliberative content of those hearings.[94] But the Court's decision not only reversed the agency for failing to adequately explain itself; it went further and precluded this kind of deliberative explanation on remand with a strict, and perhaps even textually implausible, reading of the statute. The Secretary could not justify going through the park, even with the support of a lengthy consultative process, once the Court had definitively interpreted the Act to preclude the use of parkland except in unusual and extraordinary circumstances. The Secretary was therefore forced to abandon the park route altogether and release the funds to Memphis for other purposes.

The Agency thus failed to defend the deliberative work it had conducted. The Court then undermined this administratively organized democratic process with its own view of what ambiguous statutory terms should be read to require. What was lost in the Court's over-zealous statutory interpretation was an opportunity to accord judicial respect

[94] Brief for the Secretary of Transportation, Citizens to Preserve Overton Park v. Volpe at. 10, 401 U.S. 402 (1971).

to the deliberative democratic aspects of the administrative process. The opinion's laudable emphasis on the need for rationally guided and transparent decision-making was insensitive to the possibility that reason could emerge from a diffuse participatory process. What has resulted from the *Overton Park* approach is a jurisprudence which tethers rationality to technical explanation, and which fails adequately to respect the legitimate role of public participation in both the interpretation and application of ambiguous statutory language.

2. State Farm*: The Limits of Technique*

The technocratic approach to judicial review was most famously expressed in *Motor Vehicle Association v. State Farm.*[95] At issue was a decision of the National Highway Traffic Safety Administration (NHTSA) to rescind a "passive restraint" requirement for automobiles.[96] The rule requiring passive restraints had been promulgated pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, the purpose of which was to "reduce traffic accidents and death and injuries to persons resulting from traffic accidents."[97] The Act directed the Secretary of Transportation to issue safety standards that were "practicable," would "protect the public against unreasonable risk," and that "meets the need for motor vehicle safety," in consideration of the "relevant available motor vehicle safety data" and the "extent to which such

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[95] 463 U.S. 29 (1984).

[96] National Highway Traffic Safety Administration, *Federal Motor Vehicle Safety Standards; Occupant Crash Protection*, 46 Fed. Reg. 53419 (Oct. 29, 1981).

[97] National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. 89-563, 80 Stat. 718 (1966).

standards will contribute to carrying out the purposes of the Act." [98] The passive restraint rule mandated the use of safety technologies which did not require an affirmative action on the part of the drivers, namely automatic seatbelts and airbags. The agency explained its decision to rescind the passive restraint rule on the grounds that manufacturers had overwhelmingly opted for automatic seatbelts over airbags, and that passengers had usually detached the automatic seatbelts, such that they had little safety benefit.

The Court found that the rescission of the rule was arbitrary and capricious. It elaborated on *Overton Park*'s interpretation of this standard, holding that

> an agency rule would be arbitrary and capricious if the agency relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a to a difference in view or the product of agency expertise.[99]

Applying this reading of the standard, the court found that the agency had (1) failed to explain why it did not simply change the rule to require airbags, if automatic seatbelts had proved ineffective; (2) did not have sufficient evidence for its claim that detachable automatic seatbelts had no positive impact of public safety.

The Court's analysis is convincing on its face: even the relaxed standard factual review I argue for would find the obvious logical inconsistencies in the agency's explanation deeply problematic. Even if the result of the case is correct, however, the court and the agency's focus on the technical aspects of the issue conceals important questions of value that lay under the surface. By turning our attention to them, we can imagine a hypothetical *State Farm* judgment which solicited and recognized an agency's

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[98] Ibid., § 101.

[99] *State Farm*, 463 U.S. at 43 (1983).

rational consideration of questions of value in rulemaking and rule rescission, even if it ultimately found these wanting.

In their study of the federal effort to regulate automotive safety, Jerry Mashaw and David Harfst show that NHTSA was confronted by historically entrenched and contemporarily heightened public preoccupation with the value of negative liberty.[100] The car has always been a reification of ideals of personal autonomy and mobility. When concerns about automobile death prompted the 1966 motor safety legislation, this moment of social consciousness therefore stood in tension with deeply held public values. These values reemerged with a vengeance when NHTSA required an "ignition interlock" system, which prevented drivers from starting their cars without the seatbelt fastened. Americans were affronted by a direct and obvious intrusion on their capacity to choose what precautions to take. The public's strenuous resistance prompted Congress to override the agency's action, and led the agency to pursue passive restraints which were less intrusive. The agency's decision to rescind the passive restraint rule was motivated in part by the anti-regulatory stance of the Reagan Administration, and a growing recognition that the public resisted obvious intrusions on their negative liberty, even if this took the less coercive form of the automatic seatbelt.

Mashaw and Harfst conclude that the Agency might have succeeded in *State Farm* if it had justified its rescission not in terms of economic analysis but in terms of political values:

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[100] Jerry L. Mashaw and David L. Harfst, *The Struggle for Auto Safety* (Cambridge, MA: Harvard University Press, 1990).

> The agency could not justify its rescission while retaining the rationalistic, cost-benefit approach that had been its practice and that reviewing courts and OMB directives seemed to demand. It needed to take the much more radical step of insisting on the relevance, indeed the crucial importance, of political sentiment when assessing 'need' and 'reasonableness' under the statute. . . . Although this would have been a high-risk strategy, we suspect that only a candid assertion of the political nature of the decision could have saved the rescission.[101]

The suggestion that "political sentiment" could be an appropriate reason for an agency to take action contradicts the technocratic approach that reviewing courts usually undertake in arbitrary and capricious review. But administrative law must develop some such approach if it is to come honestly to account for the kinds of considerations that impinge upon agency reasoning and constrain its choices.

If we apply the discursive-rational approach I have advocated to the rule rescission at issue in *State Farm*, we can see the constraining effect that reasoned explanation would put on administrative reference to political values. We can imagine the agency's explanation to run like something like this:

> We interpret the "need" and "reasonableness" provisions of the Motor Vehicle Safety Act to require attention to public preferences and values. Data collection and public comment on consumer use of automatic seatbelts, and Congressional action to prevent the use of the ignition interlock system, have alerted NHTSA to the public's aversion to safety technologies which visibly or perceptibly interfere with consumers' movement within their automobiles. Public attachment to this sphere of independence suggests that the "need" for auto safety is qualified by concerns to avoid regulations which physically restrain individual consumers. The "reasonableness" of regulation therefore must be determined in part in terms of what kinds of burdens consumers are willing to tolerate with respect to their personal mobility.

This interpretation of the statute would explain why the agency would rescind the automatic seatbelt requirement, even if the requirement improved public safety. It would

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[101] Ibid., 221.

not, however, explain why the agency chose not to require the use of airbags.. Airbags do not in any way impinge the freedom of movement of the driver (until the occurrence of an accident, when the impingement of the airbag is inarguably less intrusive than other impending collisions). It would therefore be implausible for the agency to argue that airbags impinged upon the bodily liberty Americans cherished. As a consequence, the agency could not justify the rescission of the rule without requiring instead the installation of airbags. The turn to political sentiment, at least as I have attempted to capture it, would still leave the agency's explanation wanting.

The agency could try to argue that a broader anti-regulatory philosophy pervaded the public, as seen in the election of President Reagan, but it would have to specify this value in some way that would distinguish between which kinds of regulatory activity would be permissible and which kinds would not. A general preference for under-enforcing regulatory statutes would lack the degree of articulateness needed to constrain agencies' public right to interpret statutory provisions. Likewise, a general aversion to the costs imposed by regulation would not suffice since any mandatory safety regulation imposes costs. A thorough cost-benefit study, such as those required by regulatory impact analyses, might seem to provide an "objective" assessment of the values at stake. But because of the deep uncertainties involved in cost benefit studies, as well as their need to impute values without the benefit of market mechanisms, this approach simply begs the question of what kinds of values the agency ought to consider and how much weight it should give them. [102]

[102] McGarity, *Reinventing Rationality*, xv-xvi, 14, 298.

This hypothetical exercise should show that allowing agencies to introduce public value judgments into their regulatory justifications would not turn administration into an irrational free-for-all. Instead, it would encourage a kind of administrative reasoning which tries to understand, engage with, and respond to the public's own conception of its common needs and values. On this approach, agencies could not simply wave their hands at public sentiment, but would have to give some intelligible account of what values drove public sentiment, and what kinds of regulatory actions those values require, permit, or foreclose. Such interpretations would of course be contestable, both in how agencies characterize public values on the basis of the data they receive from elections and public comment, and in how they infer policy conclusions from such data. But given the resources agencies have to collect and synthesize information, and the availability of the notice-and-comment proceedings to solicit public views, courts should defer to these interpretations so long as the agencies draw plausible inferences from the information they rely upon.

3. Chevron: *The Convergence of Deliberative Competency and Political Accountability*

The Supreme Court has been more open to the possibility that political values, rather than technical data, may legitimately influence agency decision-making when it evaluates agencies' interpretation of ambiguous statutory terms, rather than agencies' factual determinations. In *Chevron*,[103] the Supreme Court upheld an EPA rule interpreting the term "stationary source" within the meaning of the Clean Air Act

[103] 467 U.S. 837 (1984).

Amendments of 1977.[104] The Act provides that states have to establish permitting programs for the construction or modification of stationary sources of pollution, as an element of their plans to attain, or to continue to meet, air quality standards set by the EPA.[105] The agency interpretation at issue was a departure from previous EPA rules. Earlier appellate court judgments had led the EPA to interpret the stationary source provision to have different meanings for areas which had already attained the air quality standards, and those which had not: for non-attainment areas, the permitting provision was interpreted to apply to the construction or modification of any plant or any pollution emitting equipment within a plant; for areas which were in attainment, the provision was interpreted to require permitting only for the construction or modification of plants as a whole.[106]

The plant-wide interpretation of stationary source for attainment areas was referred to as the "bubble policy," as it drew an imaginary bubble around the entire plant and treated it as a single emission source. This two-pronged interpretation of the Act enabled the EPA to pursue different policies for regions with different levels of pollution. For the former, non-attainment areas, the purpose was to improve air quality so as to meet the standards; for states already in attainment, the purpose was to prevent deterioration in air quality. Thus, a less exacting definition of pollution sources for the permitting program was thought to be appropriate for states which had already met EPA guidelines, as opposed to those which had not.

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[104] Pub. L. 95-95, §172(b)(6), 91 Stat. 685, 746 (1977).

[105] Ibid.

[106] Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979); ASARCO Inc, v. Environmental Protect Agency 58 F.2d. 219 (D.C. Cir. 1978).

Under the Reagan Administration, however, EPA changed course as part of a "government-wide reexamination of regulatory burdens and complexities."[107] The agency changed its interpretation for non-attainment states, such that a "stationary source" meant only an entire plant, both for non-attainment states and for attainment states. The effect of this change was to allow plants to install or modify any of its constituent equipment without a permit, so long as the over-all air pollution caused by the factory did not increase. In its final rule, the EPA justified its changes by arguing that it would "reduce regulatory complexity" with a unified standard.[108] It also offered a federalist rationale, arguing that the relevant provisions of the Clean Air Act "intended that states retain the maximum possible flexibility to balance environmental and economic concerns to clean up nonattainment areas."[109] Finally, the EPA explained that this relaxed interpretation "would be conducive to modernization of existing plants and so would enhance economic efficiency."[110]

The Court upheld the Agency's re-interpretation of stationary source. It analyzed the Agency's interpretation in two now-famous steps. First,

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[107] Environmental Protection Agency, *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, Proposed Rule,* 46 Fed. Reg. 16,280 (1980).

[108] , Environmental Protection Agency, *Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, Final Rule,* 46 Fed. Reg. 50,766 (1981).

[109] Ibid.

[110] Ibid.

> determine whether Congress has spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.[111]

The Court determined that Congress did not have a clear intent with regards to the meaning of "statutory source" and that the agency's interpretation was "reasonable."[112]

The Court offered two basic rationales for its deference to the agency's interpretation of the ambiguous statutory term: one focuses on the unique deliberative-rational qualities of administrative agencies; the other focuses on the democratic accountability of administrative agencies. The deliberative-rational account focused on the need to balance conflicting interests in air quality and environmental growth which had not been squarely addressed by the legislature: "The administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." [113] *Chevron* therefore recognizes the forward-looking and cumulative process of normative articulation that underlies policy development in the administrative state. Rather than characterizing statutory interpretation as always a search for a clearly defined purpose, the Court concedes that purpose is often underspecified at the outset. The determination of public purposes must then be passed on to other

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[111] *Chevron*, 467 U.S. at 843.

[112] Ibid., 854.

[113] Ibid.

institutional actors who are competent to participate in an ongoing process of normative elaboration.

The Court's second rationale for deference focused on the political accountability of administrative agencies to the President: "an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . ."[114] Here, the emphasis is not on the reasoning capacities of administrative agencies, but rather on the democratic legitimacy of executive agencies as a function of their accountability to the President.[115]

The democratic theory invoked by *Chevron* is of a special sort: it identifies democracy with the electoral accountability of the Congress and of the President. The first step of *Chevron* can be understood to ask whether the people, acting through Congress, articulated a clear intent with regard to the statutory term at issue. If it did, the Courts are bound to respect this democratic articulation. If, however, the people, acting through Congress, did not articulate a clear intent with regard to the meaning of that term, then the people, acting this time through the President, may articulate its meaning. In either case, the role of judicial review is constrained by the need to respect democratic political decisions. As the Court put it, "federal judges—who have no constituency—

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[114] *Chevron*, 467 U.S. at 865 (1984).

[115] Thomas Merrill, "The Story of *Chevron*: The Making of an Accldental Landmark," *Administrative Law Review* 66, no. 2 (2014): 256-57.

have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."[116]

As the Court applies this democratic theory, however, it seems to conflict with and undermine the deliberative-rationality of agency decision-making. If the President may simply fill in statutory gaps with his policy preferences, then this leaves no room for agencies to contribute their deliberative competencies to determine how best to accommodate and balance conflicting priorities. They must implement the statute as the President demands, not in the way that seems most appropriate in light of statutory purposes, technical feasibility, and conflicting public values. Administration thus becomes more democratically legitimate by becoming less rational. By the same token, if democratic authority consists in the degree of presidential and congressional control, then the deliberative-rational policymaking of administrators lacks democratic legitimacy. Policy judgments in this vein arise from the independent judgment of administrators of how to fill out ambiguous purposes in light of practical and technical constraints, as well as their own assessments of the relative weight of various agency priorities. In this case, administration becomes more rational by becoming less democratic. The relationship between deliberation and democracy appears to be zero sum. The Court offers two justifications for deference to agencies which seem to undercut one another.

A more descriptively accurate and normatively compelling approach would be to see the democratic legitimacy and deliberative competency of administrative agencies as potentially overlapping and mutually reinforcing dimensions of their institutional

[116] *Chevron*, 467 U.S. at 866 (1984).

credibility. This approach is descriptively accurate insofar as the EPA's interpretations and applications of the stationary source provision did not arise instantaneously from the election of President Reagan, but were rather a result of previous presidential policy agendas, internal agency deliberations, input from other agencies, regulated industries and public interest groups, court rulings, and congressional action.[117] As Douglas Costle, the EPA Administrator at the end of the Carter Administration acknowledged, the bubble concept was in part motivated by the regulatory agenda of President Carter: "President Carter . . . has directed us to . . . calculate the costs of each proposed regulation, and to weigh these against expected benefits. He has asked us to look for more efficient, less burdensome ways of achieving our regulatory goals."[118] The bubble concept was a particular application of the President's general policy interest in making regulation more efficient, as the concept allowed plant owners to trade one pollution source within a plant against another. The Presidential agenda oriented an internal agency debate about the appropriate use of economic incentives, rather than "command-and-control" regulation. Decision-makers within the agency were responsive to arguments as to the utility of more flexible incentives-based regulation, even though political ideology played a significant role in their assessments.[119] The internal deliberations of EPA were not simply short

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[117] Jack L. Landau, "Economic Dream or Environmental Nightmare? The Legality of the Bubble Concept in Air and Water Pollution Control," *Boston College Environmental Affairs Law Review* 8 (1980): 744-766.

[118] Douglas M. Costle, "New Ways to Regulate: The Bubble Policy," *Journal of the Air Pollution Control Association*," 30 no. 1 (1980): 10.

[119] Brian J. Cook, "Characteristics of Administrative Decisions About Regulatory Reform: A Case Analysis," *American Politics Quarterly* 14, no. 4 (1986): 294-316 (finding that, in the case of EPA deliberations over the bubble concept, "the greater the extent to which the decision maker engaged in discussion of incentives, the more likely it was that he or she saw the merits of the economic approach and supported the development of emissions trading." Ibid., 305).

circuited by directives from the President. EPA responded to input from the Department of Commerce and the Office of Management and Budget, which favored its use.[120] By the time Reagan had taken office, EPA had already proposed extending the bubble concept for non-attainment areas.[121]

The bubble concept also emerged from a more "bottom up" engagement with regulatory stake-holders: "Faced with mounting control costs, some plant manager began asking why they could not adjust the emissions of one pollutant at various points in their production lines."[122] EPA then sought to determine whether emissions trading could be quantified, whether the bubble concept was permissible under the terms of the Clean Air Act, and whether it was administrable by local agencies and EPA. "After more than a year of study and after listening to public comments, we think we have resolved these questions with a workable and enforceable policy. . . . The Bubble Policy should let the incentives that drive companies to find more efficient ways of production to also drive them to find better ways of controlling pollution."[123] The notice and comment process through which the bubble concept was implemented responded to concerns of industry, environmental groups, and states about the workability of the bubble concept and its

[120] ASARCO Inc. v. EPA, 578 F.2d at 323 (D.C. Cir. 1987).

[121] Laurens H. Rhinelander, "The Bubble Concept: A Pragmatic Approach to Regulation Under the Clean Air Act," *Virginia Journal of Natural Resources Law* 1 1981): 198.

[122] Costle, "New Ways to Regulate" 10.

[123] Ibid., 11.

ability to balance concerns about efficiency and innovation with environmental protection.[124]

The deliberative competency and democratic legitimacy of EPA in this process were not fundamentally distinct or at odds, but rather were interwoven with one another. From the perspective of democratic authority, EPA derived its credentials not merely from Congress and the President but from internal deliberative competency and its continual engagement with the regulated public through informal rulemaking. The Agency justified its approach not merely by reference to legislative purpose, or presidential directive, but by turning to the arguments and opinions that members of the public had directly offered to the Agency. For example, as the EPA summarized in its final rule, some commenters argued that the less stringent permitting standards would "remove an essential state tool for clean-up of nonattainment areas," and would ultimately make attaining the air standards more difficult and costly.[125] EPA responded that

> [S]tate plans must assure . . . attainment by the statutory deadlines. If a state wishes to use a plantwide definition and run the risks identified by these commenters, then the state has discretion to do so. . . . EPA believes that it is more appropriate for the states to make any needed decisions in this area, for it is the states that are closest to their own particular situations and problems and so it is the states that are best equipped to make choices about which the commenters are concerned.[126]

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[124] See Environmental Protection Agency, *Air Pollution Control; Recommendation for Alternative Emission Reduction Options Within State Implementation Plans*, 44 Fed. Reg. 71,780 (1979).

[125] 46 Fed. Reg. 50766 (1981).

[126] Ibid.

This explanation provides a compelling if contestable rationale for the policy choice. While the deference to states is partly based on an epistemic claim—that states are more proximate to and better informed about the practicalities of meeting regulating requirements—it is also a claim about political legitimacy—that in our federal system it is more appropriate for states to exercise autonomy in how they will meet nationally prescribed standards. Normative legitimacy and factual accuracy thus interpenetrate in the agency's account of its rules.

Chevron's deferential approach to agencies' statutory interpretations thus appropriately recognized the deliberative competence and democratic authority of administrative agencies. But the Court went too far in hitching the democratic authority of administrative agencies to presidential power, thus undermining the respect administrative agencies deserve as mediators and reconcilers between opposed viewpoints both within and without the government. It failed to conceptualize democratic authority and deliberative rationality in a way that acknowledges their potential compatibility. As a consequence, the two rationales the Court offers seem to be incompatible. The Court ought to have said that we defer to agencies' interpretations of ambiguous statutory terms, not only if they are justified by the democratically *representative* policies of Congress and the President, but also if the agencies can claim *deliberative* democratic competency from their reasoned engagement with the arguments of affected parties. The court should then ensure that the agency has resolved questions of policy and technique under dispute between these sources with a coherent, if contestable, articulation of the public purpose at issue.

Agencies must therefore heed the democratic voice in three registers: the Presidency, the Congress, and the affected public at large. To be sure, these three voices are not equal. As *Chevron* makes clear, the unambiguous Congressional intent cannot be second-guessed by the President's policy commitments. Nor should the President's policy commitments be lightly dismissed because of the objections of a regulated entity or beneficiary, given the President's legitimate claims as a nationally representative official. But given the frequent ambiguity of Congressional intent, and the limited time and knowledge of the President and his staff, there is often significant scope for agencies to develop their policies in direct consultation with the public, rather than merely as instruments of the political branches.

4. Judicial Norms for Deliberative Administration: Value Ventilation and Public Responsiveness

The twin concerns of deliberative competency and democratic legitimacy give new meaning to well-entrenched norms of administrative law. When agencies promulgate rules, the "concise general statement of . . . basis and purpose" required by the APA[127] must provide an adequate account of the deliberative process and major points of contention that went into the rule. As Judge McGowan put it in *Automotive Parts and Accessories Association v. Boyd* put it, "if the judicial review which Congress has thought it important to provide is to be meaningful, the 'concise general statement of . . . basis and purpose' . . . will enable us to see what major issues of policy were ventilated

[127] 28 U.S.C. § 553 (c).

by the informal rulemaking and why the agency reacted to them as it did."[128] This requirement of an articulate statement of the basis and purpose of administrative rules renders transparent and reviewable the way administrators reach their decision.[129]

A related deliberative-democratic norm is that agencies must respond to relevant issues raised in comments. As Judge Gurfein stated in *United States v. Nova Scotia Food Products Corp.*, "it is not in keeping with the rational process to leave vital questions raised by comments which are of cogent materiality, completely unanswered."[130] Agencies must also disclose the data they rely upon, for "to suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether."[131] The public right of administrative agencies to articulate public purposes through rulemaking thus carries with it a corresponding duty of deliberatively rational decision-making. This duty stems from the reciprocal public right of affected persons and groups to participate in the specification of the rules that bind them; to have their knowledge, interests, and views considered and responded to by the agency to which Congress has given primary articulatory authority.

As the discussions of *Overton Park*, *Chevron*, and *State Farm* show, agency deliberations often turn not merely upon the empirical evidence marshaled by the agency, but on value judgments as to how best to implement Congressionally articulated public purposes. Such value judgments loom particularly large where factual certainties are in

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[128] 407 F.2d. 330, 338 (D.C. Cir. 1968).

[129] Mashaw and Harfst, *The Struggle for Auto Safety*, 97.

[130] 568 F.2d 240, 252 (2nd Cir. 1977).

[131] Ibid.

short supply. In evaluating these policy judgments, as in evaluating factual determinations, courts have a responsibility to respect the public rights granted to the agency by Congress. This means that judges cannot substitute their own understanding of the purposes of the law for agency's; but it also means that the agencies' articulation of public purposes must be coherent and intelligible. As Judge McGowan stated in upholding Occupational Safety and Health Administration regulations, "What we are entitled to at all events is a careful identification by the Secretary . . . of the reasons why he chooses to follow one course rather than another. . . . [W]hen the Secretary is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, he should so state and go on to identify the considerations he found persuasive." [132] By soliciting and respecting the rational policy judgments by administrative agencies, courts can recognize that agencies have more than an instrumental role to play in the activist state. They do not simply plug empirical facts into a normative framework Congress has clearly established beforehand. Rather, they themselves lend a hand in constructing the normative framework, as they interpret broad statutory commandments and their legislative history in light of presidential and public input.

V. Conclusion

The framework thus exists within administrative law to foster and respect an administrative process that is both technically competent and democratically legitimate.

[132] Industrial Union Dept. v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974).

However, narrow emphasis on agencies' expertise has pushed agencies to explain themselves in purely technical terms even when normatively laden judgments are at play. More recent trends in administrative law seem to confirm this tendency. In a series of cases, the Court has carved out an exception to *Chevron* deference where the agency makes a "decision of vast economic and political significance."[133] Most recently, in *King v. Burwell*,[134] the Court refused, despite an acknowledge statutory ambiguity, to apply *Chevron* to the Internal Revenue Service's determination that tax credits would be available for both state-run and federal health care exchanges: "Whether those credits are available on Federal Exchanges is . . . a question of deep economic and political significance that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly."[135] This emergent "major questions doctrine"[136] allows courts to avoid deferring to agency reasoning—irrespective of its deliberative democratic credentials—when judges deem the issue to be really important. If courts may deprive agencies of their deliberative discretion whenever they think the issue is a significant one, agencies will have strong incentives to treat every regulatory matter as clerical and non-controversial. Agencies will then withdraw further into a technocratic mindset rather than growing into the role of public engagement. Important questions of political value will be pushed beneath the surface or passed into

[133] Utility Regulatory Air Group v. EPA, 134 S.Ct. 2427, 2444 (2014), quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000). See also MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994)

[134] 135 S. Ct. 2480 (2014).

[135] Ibid., 2483.

[136] Cass R. Sunstein, "Chevron Step Zero," *Virginia Law Review* 92, no. 2 (2006): 240-2.

the hands of judges. This is a recipe for an ironic and arbitrary form of statehood: ironic, because administrative agencies will say their interpretations are technical even if they are in fact political; arbitrary, because judges may supplant agency reasoning with their own when they reach a subjective determination that the issue actually matters.

The public rights approach to administrative law that I have defended instead insists that agencies can be, and should be, venues for deliberative democratic engagement. Courts should therefore assess agency decision-making by the norms of rational and inclusive discourse; agencies should have to explain what information they relied upon in making policy judgments; they should have to show how their policy judgment was shaped by the submitted views of public actors; their records must document the multiple and conflicting voices which contribute to the agencies' effort to articulate public commitments. If agencies are forthright about technical uncertainties, and explain their resolution of contested questions of social and political value, courts should be extremely reticent to hold that agency actions are unlawful or irrational. The performance and documentation of an open and responsive deliberative process should be sufficient to sustain the actions of administrative agencies.

This Chapter and Chapter 4 have thus opened up a fairly wide ambit in which agencies can legitimately act without the explicit direction from any of three constitutional branches. I have urged that we structure the exercise of administrative discretion within this sphere as a deliberative democratic process. I have focused on what this deliberative process looks like through the examples furnished by legislated procedures, presidential oversight mechanisms, and judicial review. In the next Chapter, I

turn directly towards the democratic substance of the administrative process, wherein the public sphere participates in the exercise of public authority.

Chapter 6

Emancipatory Tasks of the Administrative State: The Dialectic of Democratic Requisites and Democratic Contexts from the New Deal to Second Reconstruction

I. Introduction

In the previous two chapters, I have deployed the Progressive theory of democratic statehood to analyze the constitutional structures that shape administration from without: the statutory framework within which it proceeds; the executive pronouncements that direct its activity; the judicial judgments that review its legal and factual determinations. I have argued that these institutions should orient administrative agencies towards the democratic public they serve. In this way, the administrative state can augment the impoverished democratic authority which elections convey to the political branches. I have thus sought to answer persistent charges from the left and right that administrative discretion is unlawful, and to defend and heighten the democratic legitimacy of administrative forms of rule. While the theory advanced in the last two chapters endorses state activism, and outlines the conditions under which such social transformation is legitimate, it has remained neutral with respect to the political and social tasks administration ought to perform.

There is a danger, however, in over-emphasizing constitutional structure and procedural constraints without paying heed to the substantive, social labor that administrative agencies undertake. If we focus solely upon the formal requirements of

deliberative democratic politics, the socially progressive capacities of the activist state become obscure. We can only hope that the right institutional patterns will deliver to us the kinds of goods, the ways of life, and the spheres of collective autonomy that we are ultimately concerned with. I doubt that such a purely procedural approach, on its own, is likely to enliven public attachment to the administrative state, even if it serves to show how we can reconcile expansive administrative power with constitutional democracy.

In this final chapter, then, I intend to demonstrate the emancipatory potential of the administrative state, and the conflicting pressures that democratic norms place on its activity. I turn to historical examples where the state has deployed administrative mechanisms to advance various forms of social and economic equality. I will trace the development of Progressive administration from the New Deal through Second Reconstruction. These historical examples will explicate the conflicting, yet mutually-constitutive norms to which such activity must be committed. Progressive administration on the one hand aims to establish the material and institutional *requisites* for the existence of a free and equal democratic public, and on the other hand attempts to incorporate the public into the state by introducing deliberative democratic *contexts* within it.

Democratic requisites can take the form of goods and services, such as employment or housing, or the form of institutions, such as rules against discrimination, which create a more egalitarian social landscape. Such requisites are not necessarily provided through democratic methods of administration, but rather aim to reshape civil society and make the public more capable of democratic action. Democratic contexts, on the other hand, can take more or less intensive forms: Democratic administration can proceed through inter-branch deliberations, where the legislature, courts and agencies

enter into constructive dialogue. Such dialogue furnishes a democratic context in the attenuated sense that public purposes established by statutes undergo discursive elaboration by the coordinate branches, thus diversifying and multiplying the sources information, points of view, and institutional roles that inflect such purposes. In more radically participatory democratic contexts, the people themselves engage in the process of administrative implementation, holding real power to shape the meaning of legal norms and their concrete import at the social level. Here, the state brings the public sphere within its walls and empowers it to direct the course of political change.

I will describe how New Deal agencies such as the Tennessee Valley Authority and the Agricultural Adjustment Administration sought to provide democratic contexts within the state, whereas the Farm Security Administration sought to provide impoverished farmers with democratic requisites. I will then show how, during Second Reconstruction, the state sought to combine democratic requisites and democratic contexts in two different ways. In the administration of civil rights, the Department of Health, Education, and Welfare and the Equal Employment Opportunity Commission catalyzed intensive inter-branch deliberation to provide educational and economic requisites to African Americans. The Office of Economic Opportunity, by contrast, engaged in much more expansive public-sphere deliberation, giving citizens significant administrative control over Community Action Agencies.

I do not choose these institutions because they are the only examples of Progressive administration in our political history. Examples of participatory forms of administration abound, such as the notice-and-comment rulemaking procedures discussed in Chapter 4, or the highway planning procedures at issue in *Overton Park*, which I

discussed in Chapter 5. We might also consider the industry committee established by the Fair Labor Standards Act of 1938 to recommend fair wage and labor standards,[1] or the resident advisory boards for public housing authorities established by the Quality Housing and Work Responsibility Act of 1998.[2] Here, I choose examples from the agricultural New Deal because of their ideological links to the Progressive Era, which show that Progressive concepts of administration were in fact institutionally efficacious. I then turn to examples from the Civil Rights Revolution to show that, even after the direct intellectual influence of Progressivism has receded, the impulse towards deliberative democratic statehood continues be politically vital and socially formative.

The New Deal and the Civil Rights Revolution also reveal with great clarity the normative tensions between the twin Progressive requirements of democratic requisites and democratic contexts. During such constitutional moments, when social movements push for radical reform, fault lines between different aspects of democratic statehood are thrown into relief. As the history I reconstruct will show, efforts to provide preconditions for democracy may be subverted by deliberative procedures where such procedures empower vested interests to reassert their dominance, and thus replicate the social inequalities which administrative intervention seeks to remedy. Participatory forms of administration may also fail to provide the requisite goods where administrative decentralization generates inefficiencies. Finally, inter-branch deliberations may fail to sustain the provision of democratic requisites if courts fail to incorporate and make durable the critical social judgments of administrative agencies.

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[1] Pub. L. 75-718, § 5, 52 Stat. 1060, (1938).

[2] Pub. L. 105-276, § 511, 112 Stat. 2461 (1998).

At the same time, a purely instrumental form of administration, which insulates administrative action from the influence of other branches, and of the persons it affects, is unlikely to generate the kinds of goods, practices, and attitudes that will sustain support for transformative administration. Even with the most ethically motivated and technically astute administrators, such a form of rule tends toward authoritarianism and paternalism, because public officials then assume sole responsibility for interpreting public purposes and exercising administrative discretion. The more administration behaves and is perceived as an alien power, removed from those it governs, the less the state can claim to rule in the name of the democratic public. We are faced with a tension between the intersubjective forms of ethical life in which the public must ultimately be anchored, and the universal requirements of freedom which the state brings to bear on such concrete contexts through administrative action. The Progressive state must therefore attempt to combine the participatory and instrumental forms of administration within each sphere of programmatic activity, so that administration remains sensitive to the discursive input of the democratic public, while at the same time providing enough bureaucratic support to make public deliberation politically consequential.

II. Normative Tensions of the Progressive State

The Hegelian vision of administration from which my analysis set out in Chapter 1 stressed the emancipatory function of administration. Reflecting upon the period of social reform inaugurated by the Prussian General Code of 1794, Hegel sought to articulate and defend the spirit of administrators who moved Prussia from a feudal order into the beginnings of a classically liberal society.[3] He understood these bureaucrats as bourgeois reformers, who sought to emancipate the serfs, institute freedoms of property and contract, and provide basic public goods and welfare services. The form of emancipation Hegel and the Prussian "universal class" envisioned, however, was not democratic, but purely civil and economic. It neither contemplated, nor emerged from, a popular process of contestation, debate, and participation. Theirs was a paternalistic kind of social reform, relying upon the practical judgment and discretion of administrators to advance Enlightenment social values and the interests of German middle class. After the failed Revolution of 1848, this anti-democratic feature of Hegelian state theory remained deeply embedded in German public law scholarship, as Mohl, Stein, and Gneist sought to advance social reform through various kinds of administrative action.

By the turn of the twentieth century, the emancipatory task of administration had fallen by the wayside, as the main line of German administrative law scholarship turned to positivism, and thus eschewed any immanent connection between the system of administrative law and the political functions that it ought to serve. Thus when democracy arrived in Germany with the Revolution of 1917 and the founding of the

[3] On Hegel and Prussian administrative reform, see Koselleck, *Preußen*, 263. I discuss this historical background in greater detail in Chapter 1.

Weimar Republic, administrative law and organization did not adapt to the new constitutional circumstance in which it operated. As Otto Mayer succinctly put it, "constitutional law passes away; administrative law persists."[4] Administration remained insulated from society, politically conservative, and bound to the hierarchical form of rule inherited from the Empire.[5] Weber's account of bureaucracy, centering on formal legality, instrumental reason, hierarchical control, and official obedience was symptomatic of this peculiar amalgam of democratic constitutional forms and authoritarian administrative structure. As political and economic crises in the 1920s shifted the center of constitutional gravity from the paralyzed legislature to the independent executive, administration became equipped with ever more powers, the legitimacy of which could only be grounded in the decisive will of the chief executive.[6] The combination of plebiscitary presidentialism, increased administrative discretion, and legislative incapacity in the Weimar Republic thus opened the door for the totalitarian developments that followed. Without a democratic reformation of administration to accompany the shift to democratic constitutionalism, the emancipatory administrative state that Hegel had envisioned turned into its opposite.

As I argued in Chapter 2, the American Progressive adaptation of Hegelian ideas distinguished itself from its German counterpart precisely by stressing the democratic foundations of administrative legitimacy. Du Bois, Wilson, Goodnow, Follett, and Dewey sought to imagine, build, and legitimate an administrative state in which the

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[4] Mayer, *Deutsches Verwaltungsrecht, 3rd ed.*, Foreword (author's translation).

[5] Armin von Bogdandy and Peter Huber, "Staat, Verwaltung, Verwaltungsrecht," §30.

[6] Peter L. Lindseth, "The Paradox of Parliamentary Supremacy," 1361-72.

democratic public would emancipate itself from conditions of economic and social domination, rather than be the passive beneficiary of government benevolence. Like Hegel, they argued that individual freedom had legal, social, and material requisites, which the economic market could not furnish, and which the state must somehow provide. And they too saw bureaucratic discretion as a key element of social reform. They departed from Hegel and his German intellectual progeny, however, in insisting that individual freedom entailed the collective self-determination of the people as a whole, rather than the merely symbolic representation of such autonomy in the person of a hereditary monarch. They therefore outlined how the state could best incorporate, express, and give binding force to the concerns of a self-conscious public sphere.

There were two distinct, but interrelated visions of how the democratic spirit of administration should be institutionalized. On the one hand, Progressives stressed the social and material requisites of democratic life. Thus, Du Bois would uphold the work of the Freedmen's Bureau after the Civil War in ushering in a "dawn of freedom" for Southern blacks by providing the very kinds of institutions that Hegel had posited as foundations of modern liberty: rights of property and contract, marriage licenses, poverty relief, and education.[7] Dewey, Goodnow, and Wilson likewise proposed various forms of social legislation which would regulate the economy so as to curtail the excesses of industrial capitalism. This kind of democratic administration differed from the Hegelian *Rechtsstaat* not in the substance of the services the administrative state would provide, but rather in the function these services were thought to serve. The Progressives thought of administration as providing background conditions not merely for individual agency,

[7] Du Bois, *The Souls of Black Folk*, 14. Goldberg, *Citizens and Paupers*, 31-75.

nor merely for the passive and habitual experience of a shared communal life, but, more fundamentally, for the active political engagement of all members of the democratic public in discussing their common problems and determining solutions. Only a materially secure and educated citizenry could hope to take on the task of collective self-government under conditions of rapid economic and social change. The Progressives therefore argued for administrative institutions at the local, state, and national levels to furnish the goods, services, and regulatory functions that would equip the public for active democratic engagement.

The progressives also aimed at democratic administration in a more fundamental sense, however. They sought to create *contexts* for popular deliberation and participation within the state as a whole, and the administrative process in particular. Wilson thus stressed that administration must be "sensitive at all points to public opinion," arguing that "elections and constant public counsel" would discipline administration to conform to the popular spirit.[8] Dewey likewise underscored the need for public consultation in bureaucratic practice, and Follett advocated "experience meetings"[9] where members of the public would contribute their practical knowledge to administrative decision-making. As I argued in Chapters 3, 4, and 5, the Progressive administrative state they outlined derives its legitimacy not merely from legislative authorization or presidential direction, but from the discursive interaction of the branches in fleshing out public purposes, and from the engagement of the public in administrative decision-making processes. This understanding of administration recognizes the indeterminacy of legislative norms, the

[8] Wilson, "The Study of Administration," 210, 217.

[9] Follett, *Creative Experience*, 197.

imperfect capacities of executive management, and the limits of judicial competency. It emphasizes that the inequalities and antagonisms of civil society do not equip the political or judicial branches with an absolute claim to speak on behalf of the people. It therefore turns to mechanisms, such as the notice-and-comment rulemaking procedure, that enable the public to influence administrative deliberations over how to articulate and implement the rights of the public.

The requisites and the contexts which administrative agencies can furnish for the democratic public are constitutive for one another, and yet in conflict. They are constitutive for one another in the sense that the requisites for democratic life cannot be adequately identified except by consulting the self-understandings of the people for whom these goods and services are to be provided. A statute may provide for certain public benefits—consumer safety, employment, education, social insurance, environmental protection, poverty relief, etc.—but if the expert who determines the precise content of these broad commands is not sensitive to the needs, interests, and values of those to whom the goods will be administered, the goods she provides may not genuinely furnish the conditions for the existence of a democratic public. She will lack the necessary information about what individuals lack and what they require to contribute to rational and egalitarian public discourse. At the same time, administrative contexts for democratic participation will fail to engage the public if its members do not possess the requisite material, intellectual, and social capacities to participate on equal terms. If the public remains inchoate and fragmented, then the provision of an opportunity to participate is likely to recreate the current constellation of power, rather than to subject the social order to democratic transformation. Administrative contexts for democracy

thus require the efficient provision of administrative requisites for democracy, just as the requisites for democracy cannot be understood without opportunities for public participation in the state as a whole and the administrative process in particular.

Though the requisites and contexts for democracy within administration are mutually constitutive, they are also in tension with one another. The contrast between Du Bois and Wilson's assessments of Reconstruction illustrates the point vividly. Whereas Du Bois upheld the Freedmen's Bureau as an example of bureaucratically led democratization, which provided social recognition to freed slaves, Wilson saw Reconstruction as the North's oppressive intervention upon the local forms of rule and social life that existed in the South at that time.[10] Seen in the context of his Southern, racist politics, Wilson's plea for an administrative state that would be "intimately connected with popular thought" has more sinister connotations.[11] Though he treated the self-conscious national spirit that emerged from the Civil War as a salutary historical development, Wilson was glad to have seen the socially and politically transformative efforts of Reconstruction stifled. For him, the racist mores of the white Southern public were legitimate expressions of their local, "democratic" culture.

We should take care not to reduce fully the distinction between the Progressive administrative thought of Du Bois and Wilson to their opposite views on racial equality. More fundamentally, they set out two contrasting visions of how administrative reform should reflect democratic will. Du Bois's defense of the Freedmen's Bureau suggested

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[10] Woodrow Wilson, "The Reconstruction of the Southern States," *The Atlantic Monthly* 87, no. 519 (1901): 1-15.

[11] Wilson, "The Study of Administration," 217.

that democratic life had certain universal social, material, and institutional requisites, which the state must furnish, irrespective of the corroding influence which these interventions would have on local political control, folkways, majoritarian prejudices, and social identities. Wilson was more interested in a gradual, reformist form of Progressive administration, which would draw on and reinforce the local wellsprings of the democratic lifeworld, and cultivate a common ethic through participatory forms of decision-making. In this respect, his approach to Progressive administration was fully in line with that of Dewey and Follett, who did not share his racial prejudice.

The relevant contrast, for our purposes, is therefore not between a true model of Progressive administration, and a false one, but between the conflicting demands for the efficient provision of goods, services, and regulation, on the one hand, and deliberative and participatory techniques of administrative implementation, on the other. Participatory forms of administration promise to legitimate governmental authorities in the eyes of the public they serve, to draw on widely dispersed knowledge and insight, and to incorporate the views of affected parties into the administrative interpretation of legislative aims. But the more administration is subject to the critique, influence, and control of the affected public, or to the endorsement of coordinate branches, the greater the transaction costs of providing the requisite goods, and the greater the risk that the best organized, most powerful interests will have a decisive say in delimiting the scope of administrative interventions. The pathologies of our unequal civil society, which the Progressive state seeks to remedy, always threaten to undermine the democratic integrity of the administrative process by which remedies are conceived and enacted. The challenge posed by the dialectic of democratic contexts and democratic requisites is therefore to

identity forms of public participation which are transformative rather than reflective of the social status quo, and forms of efficient bureaucratic intervention which nonetheless remain somehow open to public critique and deliberative revision.

My treatment of the dialectic between democratic requisites and democratic contexts in the progressive theory of administration has so far remained conceptual. In the following sections, I will demonstrate the salience of this tension in the two great transformational periods of the twentieth century: the New Deal and Second Reconstruction.

III. Progressive Administration in the Agricultural New Deal

The contrast between democratic requisites and democratic contexts in progressive administration was starkly demonstrated in the New Deal's efforts to regulate and reform American rural society. On the one hand, New Deal bureaucrats, under the influence of Progressive administrative thought, developed participatory and cooperative forms of administration in the Agricultural Adjustment Administration (AAA) and the Tennessee Valley Authority (TVA). While these forums for democratic planning successfully engaged members of the affected public in interpreting and implementing agricultural reform policies, they almost invariably privileged the voices and interests of well-organized, upper- and middle-class farmers at the expense of impoverished farm tenants and sharecroppers, a disproportionate number of whom were African American. By contrast, the Farm Security Administration (FSA) provided much-needed financial support to poor farmers, and was less discriminatory towards African Americans. But this program was for the most part not participatory in structure. Rather, it was highly

bureaucratic and hierarchical, relying upon the centralized implementation of a reconstructive agenda from the national administrative offices, with very little in the way of local control or deliberative democratic engagement. Thus, the New Deal institutionalized the theoretical tension in Progressive administrative thought between the administrative provision of democratic requisites and the construction of democratic contexts within the state.

1. The Tennessee Valley Authority: Fertilizing Participation and Building Infrastructure

Among the many innovative administrative experiments of the New Deal, the TVA has long captivated the intellectual and public imagination. In 1950, Henry Steele Commager described it as the "proving ground, as it were, of a dynamic democracy. Here was tested the broad construction of the Constitution, large-scale planning, the recasting of federalism along regional lines, new techniques of administration and new standards of civil service, the alliance of science and politics, and the revitalization of democracy through a calculated program of economic and social reconstruction."[12] This explicitly progressive theory of dynamic democracy was hardly recognizable in the text of the TVA Act, but grew out of the philosophies and practices of TVA administrators.

The TVA was established as a public corporation by Congress in 1933 to control flooding and support agricultural and industrial development in the Tennessee River Valley.[13] It had the power to acquire and lease property, to construct dams and reservoirs,

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[12] Henry Steele Commager, *The American Mind: An Interpretation of American Thought and Character Since the 1880's* (New Haven: Yale University Press, 1950), 342-3.

[13] Tennessee Valley Authority Act of 1933, Pub. L. 73-17, 48 Stat. 59 (May 18 1933).

to produce and sell electricity, and to "cooperate with National, State, district, or county experimental stations or demonstration farms, with farmers, landowners, and associations of farmers or landowners" to develop and experiment with fertilizers and soil erosion prevention techniques.[14] The TVA's lasting economic contribution to its area of operation, and to the national economy as a whole, has been its infrastructure improvements.[15] But the cooperative aspect of its activity has become its most famous ideological feature. The cooperative mandate was interpreted by David Lilienthal, who was a commissioner and later chairman of the TVA from 1933 to 1946, as a far-reaching authorization of "grassroots" democracy in regional planning: "Working at the grassroots is the surest guarantee of that day-to-day adjustment to needs and aspirations of the people which is the liveliest form of public accountability."[16] In expounding this notion of democratic planning, Lilienthal quoted at length from Dewey: "American democracy can serve the world only as it demonstrates in the conduct of its own life the efficacy of plural, partial, and experimental methods in securing and maintaining an ever-increasing release of the powers of human nature, in service of a freedom which is co-operative and a co-operation which is voluntary."[17] By engaging affected farmers in administrative

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[14] Ibid., §5.

[15] Patrick Kline and Enrico Moretti, "Local Economic Development, Agglomeration Economies, and the Big Push: 100 Years of Evidence from the Tennessee Valley Authority," *Quarterly Journal of Economics* (2014), 275-331, 279. ("The investments in productive infrastructure resulted in a large increase in local manufacturing productivity, which in turn led to a 0.3% increase in national manufacturing productivity.")

[16] David. E. Lilienthal, *TVA: Democracy on the March* (New York: Pocket Books, 1944), 204 (emphasis omitted).

[17] Ibid. 216, quoting John Dewey, *Freedom and Culture* (New York: G.P. Putnam's Sons, 1939), 175-6.

decision-making, the TVA hoped to bolster its legitimacy and its efficacy, drawing on the knowledge and authority of local agents.

The grassroots ideology, however, concealed more profound social and political conflict as the TVA adapted to its local environment. As Philip Selznick argued in his classic sociological study of the agency, the TVA won support from local political and social elites for its public power program by giving substantive control over its fertilizer programs to politically conservative agriculture departments in state land-grant colleges and their allies in the American Farm Bureau—a lobby for upper- and middle-class farming interests.[18] While the farm demonstration programs were relatively participatory and deliberative amongst this group, it tended to exclude the voices and interests of poor and minority farmers.[19] As James C. Scott notes, the experience of the TVA shows that "working through local institutions, when those institutions reflect great inequalities in property, education, income, and political access, means accepting and reinforcing those inequalities."[20] The grassroots approach of the TVA therefore extended only to the greener pastures of the social landscape, leaving its parched tracts untended.

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[18] Philip Selznick, *TVA and the Grass Roots: A Study in Politics and Organization* (Berkeley: Los Angeles: University of California Press, 1984 [1949]), 114, 166, 226.

[19] Ibid., 231-8.

[20] James C. Scott, "High Modernist Social Engineering: The Case of the Tennessee Valley Authority," in *Experiencing the State*, Lloyd I. Rudolph and John Kurt Jacobsen (Oxford: New York: Oxford University Press, 2006), 3-52, 30.

2. The Agricultural Adjustment Administration: Deliberative Democracy for the Propertied Farmer

Similar dynamics were at work in the Agricultural Adjustment Administration (AAA). The AAA was established within a week of the TVA in 1933 to "relieve the existing national economic emergency by increasing agricultural purchasing power."[21] To address plummeting agricultural prices, the Act provided that the federal government would pay farmers to reduce their output, and tax agricultural processors to pay for the subsidies.[22] This was one of the most "successfully institutionalized" parts of the early New Deal, owing in large part to the well-developed administrative capacity of the Department of Agriculture and its links to state and local governments.[23]

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[21] Agricultural Adjustment Act, Pub. L. 73-10, 48 Stat. 31 (May 12, 1933)

[22] The latter taxation provision was ruled unconstitutional by the Supreme Court in *United States v. Butler*, 297 U.S. 1 (1936), on the grounds that the tax had a regulatory purpose which exceeded the enumerated powers of the federal government and intruded upon the police powers of the states.

[23] Theda Skocpol and Kenneth Feingold, "State Capacity and Economic Intervention in the Early New Deal," *Political Science Quarterly* 97 no. 2 (1982): 257.

The proposal for production controls was the brainchild of institutional economists like M.L. Wilson and Rex Tugwell, both of whom were deeply influenced by Dewey's philosophy of democratic planning and critique of laissez-faire ideologies.[24] The not only AAA grew out of Deweyan Progressive thought, but also relied institutionally upon a system of administrative federalism which had been developed under the Wilson administration. In his self-conscious role as legislative leader of the Democratic Party, Wilson supported and signed into law the Smith-Lever Act of 1914, which gave legislative bacing to the Department of Agriculture's education and technical assistance programs.[25] These programs worked through the "Agricultural Extension Service," which provided federal assistance for agricultural demonstration programs and adult education through a network of state land-grant colleges and county agricultural agents, who were appointed by state extension offices with local advice.[26] This federal grant program was in keeping with Wilson's philosophical commitment to an federal state which was responsive to local needs and interests. The extension service also mirrored Mary Parker Follett's defense of "federalism as the integration of parts," in which local and national interests would inform one another, as opposed to a false "mechanical federalism," in which state and federal authority would be categorically

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[24] Richard S. Kendall, *Social Scientists and Farm Politics in the Age of Roosevelt* (Columbia, MO: University of Missouri Press, 1966), 11-49.

[25] Smith-Lever Act of 1914, Pub. L. 63-95, 38 Stat. 372 (1914). Kendrick A. Clements, "Woodrow Wilson and Administrative Reform," *Presidential Studies Quarterly* 28 no. 2 (1998): 329; Marshall E. Dimock, "Woodrow Wilson as Legislative Leader," *The Journal of Politics* 19, no. 1 (1957): 9; David E. Hamilton, "Building the Associative State: The Department of Agriculture and American State Building," *Agricultural History* 64, no. 2 (1990): 207-18.

[26] Gladys A. Baker, *The County Agent* (Chicago: University of Chicago Press, 1939), 159; Alfred Charles True, *A History of Agricultural Extension Work in the United States, 1785-1923* (Washington, D.C.: Government Printing Office, 1928), 100-115.

separate.[27] "True Hegelianism," Follett claimed, "finds its actualized form in federalism,"[28] because the introduction of local participation into national programs would reconcile universal political purposes with particular knowledge and values.

The extension service, land-grant colleges, and county agents provided the organizational backbone for the drive to reduce farm production under the AAA.[29] Local farmers acted as "co-administrators" alongside the County Agent, serving on County AAA Committees, which determined the production allotments within their jurisdiction.[30] The representative farmers on these Committees were elected by the farmers participating in the adjustment program.

In the later, more experimental phases of the New Deal, the extension service continued to provide the foundation for a program of much more comprehensive participatory planning. The Department of Agriculture's County Land Use Planning Committees were organized by the state extension service, and composed of a substantial majority of "representative" farmers, as well as officials from relevant federal and state agencies.[31] By 1941 this program had organized almost 200,000 farmers and nearly 20,000 local, state, and federal officials into local committees which developed and

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[27] Mary Parker Follett, *The New State*, 301, 256.

[28] Ibid., 267.

[29] Sidney Baldwin, *Poverty and Politics: The Rinse and Decline of the Farm Security Administration* (Chapel Hill, NC: University of North Carolina Press, 1968), 30-1, 287-8.

[30] Dale Clark, "The Farmer as Co-administrator," *The Public Opinion Quarterly* 3, no. 3 (1939), 482-90.

[31] John D. Lewis, "Democratic Planning in Agriculture I," *American Political Science Review* 35, no. 2 (1931): 235.

implemented land use, healthcare, and education reforms.[32] As Jess Gilbert documents, the AAA and the progressive social scientists at the Bureau of Agricultural Economics set up

> a national network of local organizations that combined representatives of a major economic sector (here, farmers), researchers, adult educators, and administrators to plan and coordinate public policy. . . . To inform this cooperative planning initiative, citizens, scientists, and bureaucrats joined together in discussion-based education and action research.[33]

The program was designed to achieve "that fusion between the skill and experience of the expert and the political choices of the laymen which is the essence of modern democracy."[34] While the leaders of the AAA sought to modernize rural farming with advanced techniques, their approach was conciliatory and reformist, rather than oppositional and transformative. As M.L. Wilson put it, "the best way to modify a whole cultural system is for the educational processes to work within it, not to attack it broadside. The most effective way to work within any cultural group is to show how a program developed cooperatively by the group and the experts contributes to the solution of the problems of the persons and groups involved."[35]

Complementing this local, participatory planning initiative was an adult education program at the Department of Agriculture for planners and extension workers, with lectures on themes such as "individualism, democracy, and social control," "unity and

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[32] Jess Gilbert, *Planning Democracy: Agrarian Intellectuals and the Intended New Deal* (New Haven: Yale University Press, 2015), 115-141.

[33] Ibid., 2.

[34] Lewis, "Democratic Planning," 232.

[35] M.L. Wilson, "The Democratic Processes in the Formation of Agricultural Policy," Social Forces 19, no. 1 (1940): 8.

diversity in society," and "'progress' and the philosophy of history."[36] If the influence of progressive Hegelianism on the agricultural New Deal was not already obvious enough, one course went so far as to explore the question: "Was Hegel right, that the spiritual factors have in the main controlled historical trends, or was Marx right, that it is the physical and economic factors which drag the spiritual and cultural in their wake?"[37]

Given the organic intellectuals' commitment to Deweyan democracy and social planning, rather than economic determinism, the choice between Marx and Hegel seemed clear. Reflecting Dewey's Hegelian critique of classical liberalism in *Individualism Old and New*, the lecture outline suggested that "'natural rights' and the ownership of 'private property,' . . . served their purpose . . . by securing individualism, but they are fast becoming institutionalized at the expense of social welfare."[38] The lectures thus sought to frame the problems confronting rural society, without dictating to the extension workers any particular solution:

> In what is obviously a transition age, will the future be determined by forces beyond our control—by material conditions, or a mass psychology which is largely emotional—or is the human mind capable of controlling developments, largely by planning and foresight . . . ? What are the objects towards which we should direct our efforts in order to create a 'great society' in accordance with desirable human and social patterns?[39]

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[36] Gilbert, *Planning Democracy*, 161.

[37] Gilbert, *Planning Democracy*, 162, quoting Agricultural Adjustment Administration, Division of Program Planning, *Schools for Extension Workers: What is a Desirable Agricultural Action Program?* (Washington, D.C.: 1936) (on file with author).

[38] AAA, "Schools for Extension Workers," 3.

[39] Ibid.

The disciples of Dewey and the inheritors of Wilsonian institutions thus made a great step towards realizing the progressive Hegelian project of social transformation guided by critical social theory and deliberative democratic engagement. But precisely because of their reliance on local decision-makers and institutions, the "low modernists" in the Department of Agriculture tended to replicate and in some cases worsen social and economic inequalities within the agricultural economy.[40] The extension system through which production controls and local planning programs were implemented gave great discretion to the states in how to implement the program, thus allowing the extreme racial prejudices of Southern agricultural elites a free hand.[41] There, the AAA's local committees, composed of white, propertied farmers, represented the interests of their class almost exclusively: they failed to enforce the obligation of landowners to distribute a share of federal subsidies to their tenants, and, in violation of AAA regulations, evicted already-impoverished black and white tenants from their lands to meet production quotas.[42]

In the later, more politically progressive phase of the AAA, the class bias of the agency was less severe, but still real. The mid-western, middle-class intellectuals who developed the program were relatively blind to the issues of class and race inequality that permeated American agriculture.[43] More importantly, the extension service upon which the cooperative planning system was built remained a conservative institution. It favored

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[40] Baldwin, *Poverty and Politics*, 31; Gilbert, *Planning Democracy*, 85.

[41] Baldwin, *Poverty and Politics*, 31; Baker, *The County Agent*, 76, 206.

[42] Donald H. Grubbs, *Cry From the Cotton: The Southern Tenant Farmers' Union and the New Deal* (Fayetteville, AR: University of Arkansas Press, 2000), 17-61.

[43] Gilbert, *Planning Democracy*, 85, 87, 182.

economically and socially dominant agricultural interests of the American Farm Bureau, which the Service's architects believed were better positioned to accrue and convey technical knowledge and productive benefits.[44] As a consequence, the use of the extension service as an instrument of planning restricted participation to the white, bourgeois farmer, even while it engaged this group in otherwise exemplary forms of deliberative democratic engagement, and provided some ancillary material benefits to impoverished whites and blacks.[45]

3. The Farm Security Administration: Democratic Requisites for Farm Tenants and Laborers

The administrative labors of the Farm Security Administration were in sharp contrast to both the TVA and the AAA. While the core activities of the FSA were mostly not deliberative or participatory in format, the agency effectively reached out to and provided desperately needed goods and services to the agricultural underclass, and benefited its African American clients far more than the programs that engaged in democratic planning amongst landed farmers.

Like the TVA and AAA, many of the FSA's programs were not dictated in detail by Congress, but were rather the product of administrative creativity and experimentation. The FSA's institutional progenitor was the Resettlement Administration (RA), which was established by Executive Order by President Roosevelt to administer

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[44] Baker, *The County Agent*, 135-44.

[45] Gilbert, *Planning Democracy*, 214. Margaret Weir and Theda Skocpol, "State Structures and the Possllities for 'Keynesian' Responses to the Great Depression in Sweden, Britain, and the United States" in *Bringing the State Back In*, Peter B. Evans et al.,(Cambridge, UK: Cambridge University Press, 1985), 144.

funds appropriated by congress for "rural rehabilitation and relief in stricken areas."[46] Roosevelt tasked RA with the administration of resettlement programs for tenant farmers who had been displaced as a result of AAA production controls described above; with land use planning; and with a farm tenant loan program for equipment and purchase of lands.[47] The Bankhead-Jones Farm Tenant Act of 1937 provided further legislative support for some of the RA's programs, providing for tenant home ownership through long-term mortgage loans, and a host of rehabilitation measures: short-term loans for livestock and equipment, grants in aid, a debt reduction program, and federal purchase of sub-marginal lands.[48] Following the recommendations of his Committee on Farm Tenancy, Roosevelt then reconstituted the RA as the FSA to administer these programs within the Department of Agriculture.[49]

Most of the FSA's funds and efforts went not towards the farm mortgage lending program stressed by Congress, but rather towards various rehabilitation initiatives originally conceived by the public officials in the RA, the President's Committee on Farm Tenancy, the Farm Security Administration itself, as well as representatives of the

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[46] Emergency Relief Appropriation Act of 1935, 49 Stat. 115 (1935).

[47] Executive Order 7072, Establishing the Resettlement Administration (May 1, 1935).

[48] Pub. L. 75-210, 50 Stat. 522 (1937).

[49] The public investments of the FSA were significant: the Farm Security Administration's $180 million expenditures for fiscal year 1938 represented roughly one quarter of the Department of Agriculture's total expenditures, 8 percent of federal social spending, and 2.5 percent of total federal expenditures. Baldwin, 236. Edwin Amenta, *Bold Relief: Institution Politics and the Origins of Modern American Social Policy* (Princeton, NJ: Princeton University Press 1998), 4.

Southern Tenant Farmers Union.[50] In these core rehabilitation activities, the FSA differed from the TVA and the AAA with its bureaucratic, hierarchical, and centralized organization. Though the farm mortgage program was explicitly structured by Congress to mirror the AAA, with local farmers' committees making loan decisions, the FSA did not extend this model to most of its rehabilitation programs.[51] In the bulk of its activities, the FSA operated not by soliciting the participation of affected parties in shaping agency policy, but rather by providing goods, services, and legal, technical and organizational assistance to impoverished farmers. Unlike the administrators who implemented the AAA program, FSA administrators "had little faith in the panacea of local administration through committees of farmers, and they viewed the form of federal-state collaboration as an invitation to irresponsibility."[52] Thus, "The central unifying principle in the

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[50] Grubbs, *Cry From the Cotton*, 157. Between 1937 and 1944, FSA spent a total of $1.274 billion, $1.025 billion of which went to such rural rehabilitation programs. Baldwin, *Poverty and Politics*, 317.

[51] Monroe Oppenheimer, "The Development of the Rural Rehabilitation Loan Program," *Law and Contemporary* Problems 4, no. 4 (1937), 473-88, 483. The official FSA staff guidebook distinguishes between "County TP [Tenant Purchase] Committees," composed of three local farmers, "whose function is to *certify* applicants and farms as specified in Title I of the Bankhead-Jones Farm Tenant Act," and "County RR [Rural Rehabilitation] Committees," a "committee of three farm men and women selected from the community whose function is to *assist* RR supervisors in all problems involving FSA families and applicants." Department of Agriculture, Farm Security Administration. *Toward Farm Security*, by Joseph Gaer (Washington, D.C.: Government Printing Office, 1941), 185 (emphasis added). Thus, in the Tenant Purchase program, FSA followed the statutory mandate to delegate lending authority to local farmers, on the model of the AAA, whereas in the rural rehabilitation program, where it had no such legal obligation, The FSA chose to reserve decision-making power to FSA staff, giving the county committee only an advisory function. In addition, County Farm Debt Adjustment Committees composed of local farmers arbitrated voluntary debt adjustments between creditors and debtors. It seems likely that the FSA used committees in this case too because the Act said that the Secretary of Agriculture was only empowered to "assist in the voluntary adjustment of indebtedness," and "may cooperate and pay the whole or part of the expenses of State, territorial, and local agencies and committees engaged in such debt adjustment." Bankhead-Jones Act, §22.

[52] Baldwin, *Poverty and Politics*, 244.

Washington office . . . was the concentration of effective policy-making and control powers in the hands of the Administrator."[53]

This organizational centralization served to permeate the Administration with the political purpose espoused by its leadership: to furnish the conditions for democratic equality by lessening the dependency of agricultural tenants upon their landlords. As Keith Kenneth Conkin observes, "The Farm Security Administration . . . was a militant defender of the small farmer and laborer. It constantly stressed the lack of economic and social justice for the small farmers who had no stake in American democracy, contrasting them with the large farmers who were becoming more and more separate from those at the bottom."[54] The FSA's official guide for staff, *Toward Farm Security*, which was distributed to all county offices, stated that the "immediate objectives" of the Administration were not only to "relieve the suffering and misery among rural people," and "increase real income," but also to "weave into the general fabric of community living all the families which are at present gradually forced out of the general community life by their low incomes."[55] Moreover, "Of all the Farm Security objectives the most important is the desire, ultimately, to open up the gates of opportunity to all its families on an equal basis with the rest of the rural community."[56] This emphasis on furnishing democratic requisites, rather than maximizing popular control and participation, insulated the FSA from the power dynamics and prejudices of the rural political economy to a

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[53] Ibid., 245.

[54] Paul Keith Conkin, *Tomorrow a New World: The New Deal Community Program* (Ithaca, NY: Cornell University Press, 1959), 221.

[55] Department of Agriculture, *Toward Farm Security*, 62-3.

[56] Ibid., 65-6.

greater extent than the TVA and AAA. Because of its hierarchical bureaucratic structure, and the commitment of agency leaders of C.B. Baldwin and Will Alexander to racial equality, the FSA had the best record amongst agricultural programs in serving African American farmers, even though some disparities persisted.[57]

The FSA relied on Dewey to expound its administrative philosophy, just as David Lilienthal had in explaining the philosophy behind the TVA. But the selection from Dewey in *Towards Farm Security* reveals telling differences in administrative orientation: "The means have to be implemented by a social-economic system . . . for the production of free human beings associating with one another on terms of equality."[58] Whereas Lilienthal drew upon Dewey's ideas about voluntary "co-operation" in administration, the FSA cited Dewey's thoughts on the administrative "production" of personalities capable of participation in democratic life. In the agency's view, "*The people who need supervision most, need the Farm Security Administration most.*"[59] FSA loans and grants were thus accompanied by a fairly invasive process of budget consultation and home visits to ensure that borrowers and grantees were practicing sound household management, as understood by the Administration.[60]

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[57] Gunmar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy*, vol. 1 (New York: Harper & Row, 1944), 273-4; Donald Holley, "The Negro in the New Deal Resettlement Program," *Agricultural History* 45 no. 3 (1971): 181; Greta de Jong, "'With the Aid of God and the F.S.A.': The Louisiana Farmers Union and the African American Freedom Struggle in the New Deal Era," *Journal of Social History* 34 no. 1 (2000): 105-39; Grubbs, 158.

[58] Department of Agriculture, *Toward Farm Security*, 91.

[59] Ibid., 118.

[60] Charles Kenneth Roberts, "Client Failures and Supervised Credit in the Farm Security Administration," *Agricultural History* 83 no. 3(2013): 378-9.

The democratic requisites the agency furnished were not limited to loans, grants, and technical assistance for individuals and families. The FSA also sought to support and to create new forms of social cooperation, which it hoped would prepare their members for future, more transformative social change. In this respect, the FSA approach aligned with the institutional structure of Hegelian ethical life, providing administrative support not only for the defense and provision of rights of property and contract, and to the sustenance of the family, but also to forms of corporate membership, wherein farmers could develop a sense of common purpose.

The FSA inherited and expanded the RA's experiments with rural settlements communities, ultimately administering roughly 200 such settlements. Cooperatives initiated by the FSA were chartered as corporations, in which farmers collectively owned or leased and worked the land, with financial support from the FSA and an option to purchase their own plot in the future.[61] These collective farming associations would later draw the wrath of conservative members of Congress and their elite agricultural allies, who derided them as "communistic."[62] But the far more extensive programs were cooperatives wherein farmers pooled resources, with FSA financial assistance, to purchase services or capital goods. The vast majority of the 25,000 cooperatives survived at least until the FSA was abolished in 1946, with 63 percent repaying their loans to the Administration in full.[63] Perhaps the most far-sighted of these experiments were the

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[61] Conkin, *Toward a New World*, 220-1.

[62] Conkin, Toward a New World, 220-33. Select Committee of the House Committee on Agriculture, *Report of the Select Committee of the House Committee on Agriculture to Investigate the Activities of the Farm Security Administration* (United States: Government Printing Office, 1944), 2.

medical care cooperatives, wherein farmers received subsidized loans from the FSA to buy into health insurance pools administered by agency.[64] The program reached 615,000 clients at its peak in 1942.[65]

The purpose of these cooperative ventures was not simply to provide relief to impoverished farmers, but to inspire a kind of collective social consciousness amongst this social class. As Sidney Baldwin puts it, "the leaders of the agency hoped that such associations would significantly promote a sense of social and political solidarity among the clientele, and weld them into a politically more formidable power base for the FSA."[66] With its support for cooperatives the FSA aimed to build up the economic, social, and political capacity of low-income farmers, so that the FSA and its constituency could reinforce each other as regards one another's precarious positions in their respective bureaus and counties. The FSA therefore supported novel forms of social organization amongst farmers, even while it excluded the poor farmer from any significant participation in the decision-making process of the FSA itself. Whereas the TVA and AAA had fostered deliberative democratic forms of administrative action amongst property owning farmers, the FSA sought to equip this subjugated class with the economic and social capital necessary to acquire political agency. It furnished the

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[63] Baldwin, *Poverty and Politics*, 203.

[64] Michael Grey, "The Medical Care Programs of the Farm Security Administration, 1932-1947: A Rehearsal for National Health Insurance?" *American Journal of Public Health* 84, no. 10 (1994): 1678-87.

[65] Ibid., 1679.

[66] Baldwin, *Poverty and Politics*, 204.

requisites for democratic participation in civil society, rather than providing contexts for democratic participation within the administrative state itself.

If the AAA was the institutional actualization of Wilson's plea for democratic participation in administration, the FSA captured Du Bois's hope that administrative provision could lay the social and economic groundwork for the democratic reconstruction of state and society. Du Bois saw the FSA as an attempt to establish in public consciousness "a direct connection between politics and industry, between government and work, between voting and wages, such as the South was born believing was absolutely impossible and fundamentally wrong."[67] Du Bois was thus conscious of the historical development whereby the line between state and society, between a public realm and a private realm, could no longer be drawn categorically. The FSA, like the Freedmen's Bureau before it, had placed into question the stable set of asymmetric social relations which were deeply ingrained in the Southern political economy. Capturing at once the promise of the FSA and the class bias of the AAA, Du Bois urged

> the necessity in the South of facing new problems of democracy, of harking straight back to that attempt made in Reconstruction to include all human beings in the realm of democratic control. If this not be done then the South, still prisoned and controlled by old bars and patterns including not only the color line but the eighteenth century conception of freedom of industrial enterprise, becomes the pensioner of a Federal Government with all the difficulties of local administration in a region where local government is neither democratic nor efficient.[68]

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[67] W.E.B. Du Bois, "Federal Action Programs and Community Action in the South," *Social Forces* 19 (1940): 377.

[68] Ibid., 379.

Whereas Southern Congressmen indeed understood the AAA as a kind of belated compensation to the South for pro-Northern tariff policies, which should be subject to disposition of wealthy planters, Du Bois saw in the FSA the capacity to sow the seeds of political change with public welfare support for poor farmers. While he was inspired at this point in his career by Marxian class analysis, he retained a Hegelian faith in the capacity of a relatively autonomous state to advance the cause of dominated economic and racial classes through programmatic interventions. Du Bois therefore concluded that, with the most recent relief work of the Federal government,

> the South will be more compelled to put politics in industry, to reconstruct government so as to give and direct work, and to make that government democratic. I feel that the South is more or less consciously thinking of these things and groping towards a solution; and that this thinking is not so much the work of its intellectual leaders, of its colleges and writers, as of the man to whom the federal government has given bread.[69]

By providing basic goods and services to the southern poor, the FSA might provide the requisite material capacity to inspire grassroots social change. The precondition for democratic life, where it was as yet stunted, was a bureaucracy which provided for the poor, rather than one which privileged their participation in administration.

4. The Death and Life of Progressive Administration: From the New Deal to Second Reconstruction

This dream of social transformation was, however, deferred. The demands of the Second World War lessened financial support and public enthusiasm for the most progressive New Deal programs at the same time as Southern Democrats and propertied farmers increasingly resisted attempts to upset the rural political economy. Congressional

[69] Ibid., 380.

conservatives and the American Farm Bureau rightly saw the FSA as a threat to the system of white supremacy and economic domination. Appropriations were therefore reduced from 1942 onward, and, at the end of the War, in 1946, the FSA was dismantled after a scathing report from the Senate Agricultural Committee on the bureau's finances and ideological aims.[70] Likewise, the democratic planning program of the Department of Agriculture ran into a dead end in the face of stiff resistance from the American Farm Bureau and congressional conservatives, as the USDA, under Secretary Wickard, failed to institute many recommendations of the local planning committees, and reduced the influence of the Deweyan democrats in the Bureau of Agricultural Economics.[71]

The democratic requisites furnished by the FSA nonetheless left significant ideological and institutional legacies. In his groundbreaking treatise on racial problems in the U.S., which would be cited by the Supreme Court in *Brown v. Board*,[72] Gunmar Myrdal offered a detailed discussion of the FSA's interventions on behalf of low-income farmers in the South, concluding:

> Nobody who has had any contact with those doing field work for the Farm Security Administration can escape becoming impressed by these attempts to rehabilitate farm families. . . . The Farm Security work, after this period of rather diversified experimentation, has provided the kind of practical administrative experience which would be needed for a major reform of land and tenure conditions.[73]

Though the "major reform" of the rural political economy Myrdal hoped for did not come to pass, its "diversified experimentation" yielded significant institutional

[70] Baldwin, 365-404.

[71] Gilbert, 240-1.

[72] Brown v. Board of Ed. of Topeka, Shawnee County, Kan., 347 U.S. 483 (1954), fn. 11.

[73] Myrdal, *An American Dilemma*, 278.

benefits for the emerging civil rights movement and related interventions in the War on Poverty. The FSA resettlements in the rural south created small groups of landed black farmers, as well as safe institutional settings for mobilization, which empowered them politically in the struggle for civil rights.[74] Institutions furnished by the FSA provided the economic and social capital necessary to underwrite the Mississippi Freedom Democratic Party, which challenged the white primary in the state and led to the election of the first black Mississippi state representative since Reconstruction.[75] As Spencer Wood has argued, "by helping southern sharecroppers purchase their own farms the FSA planted the seeds of independence that matured for more than a generation, eventually bearing their most bountiful harvest during the civil rights movement."[76] The combination of subsidized landownership and encouragement of solidaristic social practices thus set up crucial bulwarks against the powerful forces of white supremacy which beset the civil rights movement on all sides.[77]

Nor were the contributions of the FSA limited to landownership in the Delta. The FSA's rural health operatives were both institutionally and ideologically influential for similar efforts conducted by the Office of Health Administration at the Office of Economic Opportunity in the 60s, as officials modeled their program on the FSA's

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[74] Lester M. Salamon, "The Time Dimension in Policy Evaluation," *Public Policy* 27, no. 2 (Spring 1979): 129-82.

[75] Spencer D. Wood, *The Roots of Black Power: Land, Civil Society, and State in the Mississippi Delta*, (PhD. Diss, University of Wisconsin-Madison, 2006).

[76] Ibid., 5.

[77] On the relationship between the STFU, the FSA, and early civil rights mobilization see Nan Elizabeth Woodruff, *American Congo: The African American Freedom Struggle in the Delta* (Cambridge, MA: Harvard University Press, 2003), 198-227.

medical cooperatives,[78] and built upon local institutional capacities nurtured by the FSA.[79] Likewise, FSA loans to rural cooperatives became the model for a similar program sponsored by the Office of Economic Opportunity, despite the resistance of southern congressional conservatives to the idea.[80] All of these discrete examples amounted to a substantial institutional legacy for the bureau in furnishing democratic requisites for the rural poor, and providing models for future efforts at social transformation.

While the FSA provided institutional infrastructure for the Southern civil rights movement, the AAA's crop reduction programs significantly accelerated black migration from the rural South to northern cities. Incentivized to reduce their output, and allowed by landlord-friendly adjustment committees to violate tenancy rights, white landowners reduced their acreage, shed their black tenants, and invested in capital goods to replace farm labor.[81] The result was greater concentration of African Americans in urban ghettos, and white flight from the cities.[82] The twin arms of civil rights—the struggle to end *de jure* discrimination in the South, and to end *de facto* discrimination in the urban North—were thus linked to the qualified successes and partial failures of the rural New Deal.

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[78] Grey, "The Medical Care Programs of the Farm Security Administration, 1932-1947," 1686.

[79] Richard A. Cuoto. "Heroic Bureaucracies," *Administration & Society* 23, no. 1 (1991), 123-47.

[80] Michael L. Gillette, *Launching the War on Poverty: An Oral History* (New York: Oxford University Press, 2nd ed. 2010), 307-10.

[81] Warren C. Whatley, "Labor for the Picking: The New Deal in the South," *Journal of Economic History* 43, no. 4 (1983): 905-929.

[82] Leah Platt Boustan, "Was Postwar Suburbanization 'White Flight'? Evidence from the Black Migration," *NBER Working Paper No. 13543* (2007), http://www.nber.org/papers/w13543.

These historical connections go to show that, in the dialectic between civil society and state, the administrative interventions of previous periods reshape society in ways that facilitate and structure new forms of social antagonism and potentials for change. The dynamics of this development are neither the same in every instance nor predictable in advance. But in retrospect, we can see their basic contours. The partial and sporadic democratic requisites furnished by the FSA provided important resources for the blacks who remained in the South, and buttressed their successful efforts to end Jim Crow. At the same time, the compromised democratic contexts of agricultural adjustment transformed structures of social and racial domination in the South by uprooting and modernizing the practically feudal system of cotton tenancy. Multitudes of blacks were thus cast off the land and thrust into new urban landscapes, setting the stage for Northern civil rights mobilization and urban unrest.

III. Progressive Administration in Second Reconstruction: Democratic Contexts and Democratic Requisites in the Administration of Civil Rights and the War on Poverty

Second Reconstruction was a period of intense social and administrative mobilization, where the resources of the public and its government were deployed in order to uproot segregation and promote racial equality. Just as the New Deal had challenged the stable boundaries between state and civil society with its administrative interventions into economic life, Second Reconstruction subjected forms of private economic organization and local government to unprecedented forms of federal regulation in order to enlarge and protect the entitlements and opportunities of African Americans. As Bruce Ackerman has argued, this civil rights state built upon the

administrative capacities which had been generated in the New Deal, but it also transformed them.[83] In civil rights enforcement, administrative agencies were the fulcrum for *inter-branch deliberation*, providing administrative rules and guidelines which interpreted broad statutory commands, and moved the courts towards more expansive understandings of the ills of racial discrimination and the demands of equal protection. Democratic requisites were furnished in a collaborative process between progressive legislators, bureaucrats and judges. In this process, the courts followed the New Deal paradigm of deferring to administrative articulations of public rights when they interpreted statutory commands.

In the War on Poverty, the administrative state provided extensive democratic contexts for excluded groups to participate in the implementation of its programs. These community action programs thus institutionalized a form of *public sphere deliberation* in the provision of material requisites for democratic life. Second Reconstruction thus offered new iterations of Progressive administration which recombined democratic requisites and democratic contexts in novel institutional forms.

[83] Bruce Ackerman, *We the People 3: The Civil Rights Revolution* (Cambridge, MA: London, Harvard University Press, 2014), 2.

1. Inter-branch Deliberation in the Implementation of Educational Requisites: The Case of the Department of Health, Education, and Welfare

Inter-branch deliberation was essential to the implementation of school desegregation in the South. In *Brown v. Board*, the Court explained that education had become a key requisite to democracy in holding segregation unconstitutional: "Today education is the most important function of state and local governments. . . . It is the very foundation of good citizenship."[84] But despite the Supreme Court's renunciation of the doctrine of "separate but equal," by 1964 only 2.25 percent of black children in the confederate States and only 10.9 percent in the entire South attended schools with white children, with more than half of the region's 3,000 school districts still completely segregated.[85] This was due to the massive resistance of Southern localities to desegregation, the federal courts' adherence to the gradualist logic of integration "with all deliberate speed" enunciated in *Brown II*, and the limits of constitutional enforcement through private litigation alone.[86]

With the Civil Rights Act of 1964, Congress authorized a powerful new administrative tool to address the problem.[87] Section 601 of the Civil Rights Act provided that "No person in the United States shall, on the ground of race, color, or national origin,

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[84] Brown v. Board of Education of Topeka, Kan., 347 U.S. 483, 493 (1954).

[85] United States Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States, 1965-66* (1966), 1.

[86] Brown v. Board of Education of Topeka, Kan., 349 U.S. 294, 301 (1955); Briggs v. Elliot, 132 F. Supp. 776 (D.S.C. 1955). See also Richard W. Brown, "Freedom of Choice in the South: A Constitutional Perspective," *Louisiana Law Review* 28, no. 3 (1968): 456 and Alexander Bickel, "The Decade of School Desegregation: Progress and Prospects," *Columbia Law Review* 64, no. 2 (1964): 199.

[87] Civil Rights Act of 1964 Pub. L. 88-432, 78 Stat. 241-267 (July 2, 1964).

be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance."[88] To effectuate this requirement, Congress authorized and directed "each Federal department and agency which is empowered to extend Federal financial assistance" to issue "rules, regulations, and orders of general applicability."[89] Because of its use of capacious and ill-defined concepts such as "discrimination," "exclu[sion]," "participation," and "benefits," Title VI gave great discretion to administrative agencies to give these terms definite meaning.

The Department of Health, Education, and Welfare (HEW) accordingly issued guidelines which stated that a school system would be found to be in compliance with Title VI if it "submits a plan for the desegregation . . . which the responsible Department official determines is adequate to accomplish the purposes of the Act . . . at the earliest practicable time, and provides reasonable assurance that it will carry out such plan."[90] This rule gave HEW officials the power to determine whether school desegregation plans were adequate, or whether districts were shirking their responsibilities. In an effort to win political support for compliance, HEW consulted with members of Congress and governors across the nation, in addition to civil rights groups, prior to promulgating them.[91] But this political support building did not eliminate local resistance, even if it

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[88] Ibid., § 601.

[89] Ibid., § 602.

[90] Department of Health, Education, and Welfare, United States, *Non-discrimination in Federally Assisted Programs of the Department of Health Education and Welfare—Effectuation of Title VI of the Civil Rights Act of 1964*, 45 C.F.R. 80.4 (1967).

[91] Responses to the proposed Guidelines showed their potential to win the qualified support of even hostile politicians as a flexible administrative remedy. Senator Richard Russell of Georgia,

may have for a time blunted vocal opposition from some state and national officials. Many southern states and localities simply submitted rote compliance statements without detailing plans to achieve desegregation; HEW replied that such statements of compliance were insufficient.[92] To address Southern foot-dragging, HEW elaborated on these requirements in successive Guidelines in 1965 and 1966.[93] By issuing "guidelines" rather than a "rule," which would by the terms of the Title VI have required presidential

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for example "expressed deep opposition to the whole idea of integration and to using the power of the Federal Government to force a region to do something distasteful. But then he said graciously that he realized he was resisting the inevitable, that HEW had handled things extremely well 'so far', and that we were trying to be fair and reasonable." Douglas S. Cater, *Memorandum to the President* (February 26, 1966) with attached *Interviews and Reactions Concerning New Title VI Guidelines for Elementary and Secondary Schools* (February 26, 1966), Lyndon Baines Johnson Library, Papers of Lyndon Baines Johnson, Files of S. Douglass Cater, box 14.

[92] By August 17th, 1965 As HEW Secretary John W. Gardner wrote in a Memorandum to White House Aid Douglass Cater, in Georgia and South Carolina "hundreds of school districts signed HEW Form 441 [indicating compliance with requirements of Title VI] . . . despite the fact that it is well known the districts operate a dual system. The motives for signing probably ranged from good intent coupled with misunderstanding to deliberate intention to evade the Act." Department of Health, Education and Welfare, *Memorandum from John W. Gardner, Secretary of Health, Education, and Welfare for Honorable Douglass Cater* (March 23, 1965), Lyndon Baines Johnson Library, Papers of Lyndon Baines Johnson, Files of S. Douglass Cater, Box 51. See also Department of Health Education and Welfare, *Memorandum for Honorable Douglas Cater, Special Assistant to the President, Subject: Report on HEW Departmental Activities in Regard to Implementation of Title VI in the State of Virginia* (April 6, 1965), Lyndon Baines Johnson Library, Papers of Lyndon Baines Johnson, Files of S. Douglass Cater, Box 51; See also Department of Health Education and Welfare, *Letter from Francis Keppel, U.S. Commissioner of Education, to Claude Percell, Georgia State Department of Schools* (March 31, 1965), Lyndon Baines Johnson Library, Papers of Lyndon Baines Johnson, Files of S. Douglass Cater, Box 51.

[93] As White House Aid Douglas Cater explained in a memo to the President, "After a great deal of deliberation between HEW and the Justice Department, it was decided to draft a detailed set of specifications to guie school districts in their desegregation plans submitted under provisions of Title VI of the Civil Rights Act. The problem was simply this: approximately 500 districts have submitted plans, most of them considered by the Commissioner of Education to be unacceptable. It would be impossible to negotiate with each on an ad hoc basis. . . . The decision reached was that specific guidelines would be the only way to break this impasse." Douglass Cater, *Memorandum to the President from Douglas Cater* (April 23, 1965), Lyndon Baines Johnson Library, Papers of Lyndon Baines Johnson, Files of S. Douglas Cater, Box 51.

approval,[94] HEW assumed direct responsibility for its desegregation policy.[95] This decision exemplified the Progressive conception of democratic statehood, which untethered administrative legitimacy from the democratic authority of the President, and re-anchored it in direct exchanges between the agency and the other branches.

Though the 1966 Guidelines followed judicial precedent in allowing "freedom of choice" plans, which provided that students may choose which school they wish to attend as a means of desegregation, it went beyond jurisprudence at the time in emphasizing that "A free choice plan tends to place the burden of desegregation on the Negro or other minority group students and their parents. . . . [*T*]*he very nature of a free choice plan and the effect of long-standing community attitudes often tend to preclude or inhibit the exercise of a truly free choice* by or for minority group students."[96] Accordingly, HEW

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[94] "No regulation, rule, or order shall become effective unless and until approved by the President." Civil Rights Act §602.

[95] "The question was raised whether to issue them as guidelines bearing only the authority of HEW. Secretary Celebrezze decided that HEW should bear the political burden and issue them as guidelines," Ibid.

[96] Department of Health, Education, and Welfare, *Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964*, 45 C.F.R. § 181.54 (1967)(emphasis added). This provision reflected an understanding of the problem of discrimination and school desegregation which the agency had adopted as early as April 1965. A draft of the Office of Education's "Interpretive Bulletin No. 1" stated that "To comply with Title VI and the HEW Regulations . . . elementary and secondary school authorities have a duty to take positive action to remove discrimination grounded on race, color, or national origin. *This duty is not discharged by adopting rules or practices which shift the burden of removing discrimination to the class or classes of persons previously discriminated against. The right not to be subject to discrimination, which Title VI . . . secures, is the right to a system of schools which operate without discrimination.* Where pupils, teachers or staff personnel have been assigned to schools on the basis of race, color, or national origin, school officials must take the actions necessary to *eliminate customs and practices* characteristic of such dual or segregated school systems. The prohItion of discrimination in Title VI . . . does not, however, prevent the use of race, color, or national origin as a factor in actions designed to prevent, ameliorate, or eliminate either de jure or de facto racial segregation." Department of Housing Education and Welfare, Office of Education, *Interpretive Bulletin No. 1, Elementary and Secondary Schools: Standards for Compliance with Title VI of the Civil Rights Act; Nondiscrimination in Federally Assisted Programs* (April 19,

shifted the burden to the local governments, stating that it would "scrutinize with special care the operation of voluntary plans," and set target percentage increases for schools, increasingly inversely to their rate of desegregation in the previous year; the Commissioner reserved discretion to reject such plans if he "concludes that such steps would be ineffective."[97]

The Guidelines' recognition that "community attitudes," and the "burden" which freedom-of-choice plans placed upon minorities, tended to "inhibit . . . truly free choice" was a normative, social theoretic judgment, and not merely a search for nails by a hammer-wielding agency.[98] HEW's approach to these problems harkened back to the progressive Hegelian critique of classical liberalism, emphasizing that individual choices occur within a social landscape, and that such choices cannot be truly free in circumstances where the community does not recognize the equal moral and political status of all of its members. But they arrived at this conclusion not through the direct influence of progressive thought, but rather through the encounter between civil rights ideologies and administrative experience. Based on its previous evaluations of voluntary plans, HEW staffers came to realize that the mere removal of legal barriers to integration was insufficient to establish real educational freedom for Southern blacks.[99] In addition

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1965), Lyndon Baines Johnson Library, Papers of Lyndon Baines Johnson, Files of S. Douglas Cater, Box 51 (emphasis added).

[97] Ibid., 408.

[98] Ibid.

[99] As Edwin Yourman, Assistant General Counsel at HEW, noted in the Department's 1968 Administration History: during 1966 and 1967, "both the courts and administrative policies and 'guidelines,' concerned at first with mechanisms to break down rigidly racial assignment patterns, have moved gradually but surely toward an insistence on attainment of the ultimate objective,

to this pragmatic experience, HEW staffers were motivated by a moral understanding of the American political tradition. Derrick A. Bell, Jr., who was Deputy Director of the Office of Civil Rights (OCR) at HEW from 1965 to 1968, stated that, in addition to the constitutional and legal issues involved, the "morality aspect" of Title VI and its implementation at HEW "should not be overlooked. Behind American institutions—law, statutes, legal precedents in case rulings—lies a traditional [sic], at least in theory, of ordering society according to basic principles of morality, fairness, justice. This is so despite patent betrayals of [this] principle in [the] relationship between the races."[100] At HEW, Bell, Peter Librassi, David Seeley, Elaine Heffernan, and other staff put this general moral consciousness to work as they sought to understand and to reconstruct the social spheres in which black students and their families made educational choices.[101]

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elimination of the dual school system. . . . School officials and community groups originally opposed the right of a Negro child to choose a school established for whites. *When experience showed that in most cases only a limited number of such choices would be made, they stoutly defended this type of arrangement as though it constituted a fundamental natural right.*" Department of Health, Education, and Welfare, Office of the General Counsel, "School Desegregation under the Regulation," by Edwin Yourman, Lyndon Baines Johnson Library, Papers of Lyndon Baines Johnson, Administrative History, Department of Health, Education, and Welfare Vol. I, Part III, Box 2, pp. 15-16 (emphasis added). See also Gary Orfield, *The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act* (New York: Wiley, 1969), 340.

[100] Interview with Elaine Heffernan, May 20, 1968, in "Office Of Civil Rights, OCR Historical Record, Title VI Implementation DHEW," by Elaine Heffernan. Lyndon Baines Johnson Library, Papers of Lyndon Baines Johnson, *Administrative History, Department of Health, Education, and Welfare* Vol. I, Part III, Box 2 (1968), Chp. II, p. 163. Derrick Bell would go on to become the first African American full professor of law at Harvard Law School, and would later become a famous critic of school integration, once efforts to do so stalled. See Derrick A. Bell, Jr. "*Brown v. Board of Education* and the Interest-Convergence Dilemma," *Harvard Law Review* 93 (1980): 518-33. Bell's background HEW suggest that his contributions to critical legal studies and critical race theory were in part motivated by his experience as an administrator, rather than only as a legal activist in the civil rights movement.

[101] Elaine Heffernan, who was an administrative assistant to Director of OCR Peter Libassi, argued in her Administrative History of the Office that "Considerably older than Title VI is its

Bell and Librassi, who directed the Office of Civil Rights, were both ideologically and institutionally aligned with the civil rights movement, and brought its reconstructive ethos to their work in the Department.[102] At HEW, their civil rights ideals of freedom, fairness, and equality were synthesized with administrative experience. This encounter between universal norms and their particular social application produced new understandings of what those ideals meant and required: not merely de jure desegregation, but a more thoroughgoing transformation of Southern civil society along racially egalitarian lines.

With its innovative Guidelines, HEW stepped beyond the existing judicial precedent to establish a new, results-oriented test of school district compliance.[103] The courts then followed HEW's lead, as the Fifth Circuit, in *Singleton v. Jackson Municipal Separate School District*,[104] gave these guidelines "great weight" in determining whether schools districts were maintaining segregated systems in violation of the Fourteenth

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governing principle, which may be formulated on broad terms as follows: *the practice of and participation in racial discrimination by the Federal government is improper*. . . . We recognize that the 'principle' we have posited is very broad. We recognize also that it does not stand alone, but rather, is grounded in fundamental principles of public administration, constitutional law, and morality," including the norm that "Public funds spent for the common good should be distributed equitably among the members of the public for whose benefit they are intended." Heffernan, *Office Of Civil Rights, OCR Historical Record,* 1-2.

[102] Librassi "had spent virtually his entire career as a civil rights specialist in New York with the Civil Rights Commission." Orfield, *Reconstruction of Southern Education*, 329. Derrick Bell was one of the plaintiffs attorney's in Singleton v. Jackson Municipal School Dist. 348 F.2d. 729 (5th Cir. 1965), to be discussed below, before he joined HEW.

[103] Gary Orfield, "The 1964 Civil Rights Act and American Education," in, *Legacies of the 1964 Civil Rights Act*, ed. Bernard Grofman (Charlottesville, VA: University of Virginia Press, 2002) 89-129, 102.

[104] 348 F.2d. 729 (1965) (emphasis added).

Amendment.[105] In explaining the court's deference to HEW's administrative standards in *Singleton*, Judge John Minor Wisdom succinctly expressed the discursive understanding of the separation of powers I have advanced:

> We attach great weight to the standards established by the Office of Education. The judiciary of course has functions and duties distinct from those of the executive department, but *in carrying out national policy the three departments of government are united by a common objective. There should be a close correlation, therefore, between the judiciary's and the executive department's standards in administering this policy.* Absent legal questions, the United States Office of Education is better qualified than the courts and is the more appropriate federal body to weigh administrative difficulties inherent in school desegregation plans.[106]

Judge Wisdom recognized that administrative agencies and courts have a special relationship when it comes to the implementation of public rights, such as the right of the public established by Title VI to non-discrimination in the distribution of federal education grants. The branches were here "united by a common objective," with the administrative agency playing the role of primary interpreter of statutorily defined public purposes.

Judge Wisdom's constructive, deliberative interpretation of the separation of powers is reminiscent of Justice Frankfurter's statement in *Scripps v. Howard Radio*, which I highlighted in Chapter 5, that "Courts and public agencies are not to be regarded as competitors in the task of safeguarding the public interest. Courts no less than administrative bodies are agencies of government. Both are instruments for realizing

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[105] United States v. Jefferson County Bd. of Ed. 372 F.2d. 836 (5th Cir. 1966), quoting Singleton v. Jackson Municipal School Dist. 348 F.2d. 729, 731 (5th Cir. 1965), affirmed en banc, United States v. Jefferson County Bd. of Ed. 380 F.2d 385 (5th Cir. 1967).

[106] Ibid., 731.

public purposes."[107] The courts ensure that administrative interpretations are within the boundaries of the law; if they are, courts are prepared to give these administrative determinations binding force, and elaborate on the social judgments administrators reach.

This constructive understanding of the relationship between courts and agencies in fulfilling public purposes bears out Hannah Arendt's observation that "power can be divided without decreasing it, and the interplay of powers with their checks and balances is even liable to generate more power, so long, at least, as the interplay is alive and has not resulted in stalemate."[108] HEW and Judge Wisdom realized this discursive concept of public rights, and of the iterative relationship that ought to obtain between administrative determinations and judicial judgments. Together they did indeed "generate more power" to reshape Southern civil society in the interests of social equality that the courts, or the agencies, could have exercised if acting on their own.

HEW's critique of socially constrained individual choice fundamentally shaped not only the courts interpretation of the Civil Rights Act, but of the Constitution itself.[109] As the courts gave great weight to the judgment of the agency in its interpretation of the very meaning of Title VI, court and agency engaged in inter-branch dialogue to articulate the public purposes of non-discrimination and equal protection. The lower federal courts did not replace spiritless number-crunching with social-theoretic values of their own making, but rather fleshed out, enforced, and constitutionalized concepts of freedom and

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[107] 316 U.S. 4, 15 (1942).

[108] Arendt, *The Human Condition*, 201.

[109] United States v. Jefferson County Bd. of Ed. 380 F.2d 385 (5th Cir. 1967); Green v. County School Board of New Kent. County, Va. 391 U.S. 430 (1968).

social domination which HEW officials had previously articulated in their internal deliberations and administrative guidelines.[110]

2. Inter-branch and Public Sphere Deliberation in the Provision of Economic Requisites: The Case of the Equal Employment Opportunity Commission

The administrative efforts to address discrimination in the labor market combined forms of inter-branch discourse and public sphere discourse. As the title of the 1963 "March for Jobs and Freedom" illustrated, members of the civil rights movement saw an immanent connection between legal and material equality, with marchers carrying signs demanding "equal rights *NOW*!" and "jobs for all *NOW*!" side by side.[111] Freedom and employment were not seen merely as independent goods, but as part of the fabric of democratic life. As Martin Luther King, Jr. proclaimed in his speech at the march, "Now is the time to make real the promises of democracy."[112] Title VII of the Civil Rights Act of 1964 sought to address the democratic requisite of equal employment opportunity with its provision that "It shall be an unlawful employment practice for an employer . . . to fail

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[110] Ackerman credits Judge Wisdom in *Jefferson County* with moving "beyond technocracy to ultimate constitutional values." Ackerman, *We the People 3*, 236. While it is true that Judge Wisdom applied HEW's statutory interpretation of the Civil Rights Act to his interpretation of the requirements of the Fourteenth Amendment, it is important not to cast the agency in the role of mere technocracy, and to valorize the courts as the voice of values. HEW's 1966 Guidelines did not merely pronounce a set of numerical guidelines, but explained why such a statistical approach was necessary given the agency's sophisticated understanding of the social constraints on individual choice. As I have argued, HEW officials' judgment that free choice was limited by community prejudice emerged from their intellectual mediation of egalitarian principles and administrative experience.

[111] Jacqueline Dowd Hall, "The Long Civil Rights Movement and the Political Uses of the Past," *The Journal of American History* 91 no. 4 (2005):1252-3.

[112] Martin Luther King, *"I Have a Dream . . ." Speech by the Rev. Martin Luther King at the "March on Washington"* (August 28, 1963), http://www.archives.gov/press/exhIts/dream-speech.pdf.

or to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[113]

While it was clear that Congress sought to prevent intentional and explicit discrimination, it was unclear whether discrimination "because of" an individual's race might be read to include employment practices with discriminatory effect, but lacking in explicit racial animus.[114] The deliberative democratic approach to legislative legitimacy I defended in Chapter 3 suggests that such legislative ambiguities are best resolved through a discursive process, involving both the other branches, and the public sphere, rather than

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[113] Civil Rights Act of 1964, §703(a)(1).

[114] Congress' intent remains a matter of scholarly disputation. Hugh Davis Graham argues that "the language of Title VII seemed to leave little room for broad statistical interpretations." Hugh Davis Graham, *The Civil Rights Era, Origins and Development of National Policy* (New York: Oxford: Oxford University Press, 1990), 246, 150-2. John David Skrentny likewise argues that "Title VII embodied the classical liberal, color blind model of justice in that it is designed to protect individuals from having legally unreal status traits get in the way of their economic activities." John David Skrentny, *Ironies of Affirmative Action: Politics, Culture, and Justice in America* (Chicago: London: Chicago University Press, 1997), 121. These scholars rely heavily upon the language of section 703 (g) of the Act, which provides judicial remedies for respondents who have "intentionally engaged" or are "intentionally engaging in an unlawful employment practices"; and section 703(j), which provides that "Nothing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual on account of an imbalance which may exist with respect to the total number or percentage of persons employed by such an employer . . . ." These provisions underscore that the primary purpose of the Act is to prevent intentional discrimination, and that the existence racial "imbalance" in employees is an insufficient reason on its own for a finding of discriminatory conduct. Neither of these provisions, however, foreclose the use of statistical techniques as one element of a broader test of whether discriminatory conduct has occurred. Even if racial imbalance may not be sufficient to demonstrate discriminatory conduct, it may be an important element of a discrimination claim. Moreover, the Act's emphasis on "intentional" discrimination does not foreclose the use of statistical inferences as part of an effort to prove intent to discriminate. As Ackerman notes "the law has traditionally used an objective approach to matters of intentionality, presuming that people 'intend' the 'natural and probable consequences' of their acts. This general rule reintroduces numbers into the equation when applied to the special circumstance confronting personnel directors in modern firms. . . . Nothing in the legislative history challenges this understanding." Ackerman, *We the People 3*, 177.

by attempting to impute a precise and original "intent" to a legislative majority. I have argued that the inequalities in civil society and the information deficits of voters and legislators impair the democratic authority of Congress. Because voters remain uninformed about the precise nature of the problems they confront, and because the electoral channels that convey information into the legislative process are compromised, Congress often does not understand the full nature of the problems it sets out to solve. Therefore, it does not have authority to declare the precise solutions to such problems.

In the case of racial civil rights, these arguments have special force because of the political subjugation African Americans, resulting from social marginalization and voting restrictions, and the racial biases that pervaded both the voter base and their representatives. Congress's broad commitment to uproot "discrimination because of an individual's race" was well-suited to the attenuated democratic authority that could be derived from this unequal and antagonistic civil society. In such circumstances of qualified democratic authority and limited information, it is appropriate for administrative agencies to play the central deliberative role, as they deepen the knowledge-base of the state, and open it up to the influence of those persons who are most strongly affected by its provisions.

The implementation of Title VII exemplifies this deliberative democratic theory of the administration state. The scope of this ambiguous phrase would be shaped through a process of inter-branch elaboration between the courts and the agency Congress established to implement Title VII: the Equal Employment Opportunity Commission (EEOC). The EEOC's powers were extremely limited. Because congressional Republicans wanted to avoid the creation of another National Labor Relations Board with

adjudicatory powers, they demanded that the EEOC have only technical assistance and complaint investigation functions. The EEOC nonetheless served as a site for civil rights mobilization, as the NAACP Legal Defense Fund strategically inundated the office with employment discrimination complaints, with hopes of showing the need for more potent legislation.

The EEOC responded by issuing guidelines which interpreted its anti-discrimination mandate expansively. The Commission "reasoned that it is an unlawful practice to fail to or refuse to hire, to discharge, or to compensate unevenly, or to limit, segregate and classify employees on *criteria which prove to have a demonstrable racial effect without clear and convincing business motive.*"[115] The Commission's experience with discrimination complaints, and its collection of racially disaggregated data on employment, showed that employment tests had a particularly negative impact upon black employment. Though Title VII specifically states that it shall "be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test,"[116] the EEOC issued a Guideline which stated that the Commission "interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks . . . . The fact that a test was prepared by an individual or

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[115] Equal Employment Opportunity Commission, *Equal Employment Opportunity Commission: Administrative History,* microformed on Civil Rights During the Johnson Administration, 1963-1969 part II, Steven F. Lawson ed., reel 1, frame 0249 (Univ. Publications Am. 1984 [1968]) (emphasis added).

[116] Civil Rights Act §703(h).

organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII."[117]

The EEOC's interpretations of Title VII were motivated by its critical evaluation of the social context in which it operated, rather than a perhaps futile search for the "true" congressional intent. As Alfred Blumrosen, a civil rights and labor lawyer who joined the EEOC shortly after the passage of the Civil Right Act, put it, "the legislative history sets limits beyond which administrators could not go in carrying out the statutory mandate, but it did not dictate the course of administration. . . . This view of legislative history requires the administrator to develop ideas, policies, and procedures which derive from an informed understanding of the dynamics of the social problem and the role of government in its resolution."[118] The EEOC's experience with the problem of black exclusion from the labor market over the first three years of its existence would convince it to shift from an individualist to an institutional, systemic understanding of the problem. As EEOC Commissioner Samuel C. Jackson put it,

> discrimination is becoming less often an individual act of disparate treatment flowing from an evil state of mind. Discrimination is more institutionalized—the application of a system of personnel selection. . . . We at the EEOC have reasoned that it is unlawful practice to fail to hire or to refuse to hire . . . employees on criteria which prove to have a demonstrable racial effect.[119]

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[117] *Griggs*, 401 U.S. at 433 n. 9 (quoting EEOC Guidelines on Employment Testing Procedures, CCH EMPL. PRAC. GUIDE, ¶ 17,304.53 (EEOC Dec. 2, 1966)).

[118] Alfred Blumrosen, *Black Employment and the Law* (New Brunswick, NJ: Rutgers University Press, 1971), 52.

[119] Erbin Crowell, Jr., *EEOC's Image—Remedy for Job Discrimination?*, *Civil Rights Digest* 1 (1968), 29-30.

Chairman William H. Brown, III would likewise state in an EEOC public hearing in 1970 that "discrimination is a condition of pervasive exclusion. It does not matter whether exclusion is the result of a deliberate act of discrimination or the maintenance of a traditional community pattern of employment or the perpetuation of past discrimination."[120] The EEOC leadership therefore did not interpret discrimination to mean simply making decisions on the basis of race, but a broader condition of social "exclusion." This was a concept of racism which concerned not primarily individual prejudice, but rather the social power of dominant groups and its manifestation in the structures of civil society. Equal employment thus meant the empowerment of minorities against an entrenched racial hierarchy.[121]

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[120] Equal Employment Opportunity Commission, *"They Have the Power – We Have The People": The Status of Equal Employment Opportunity in Houston, Texas, 1970* (Washington, D.C.: EEOC, 1970), i.

[121] Commissioner Brown's public statement that "discrimination is a condition of pervasive exclusion," and Commissioner Jackson's suggestion that discrimination had become less a matter of an "evil state of mind" than an "institutionalized" condition, casts serious doubt on Skrentny's claim that "there was no ideological or ethical attachment to the affirmative action model" amongst the EEOC officials who developed this model. Skrentny, 223. In reconceiving discrimination as a pernicious pattern of social behavior, rather than the isolated, irrational act of the bigot, the EEOC began piecing together a new critique of the injustices of civil society and an ethical vision for its reconstruction. The EEOC's petition to the FCC to intervene in AT&T's rate increase petition provides yet another example of the moral content of EEOC's effects-based arguments. The petition emphasized, in its analysis of black employment at the company, that the "present situation with respect to blacks represents historic exclusionary practices," indicating EEOC's reliance on a conception of discrimination as a state of social exclusion rather than intentional malice. The EEOC's assessment of AT&T was laced with moral reprobation, describing the company's statistical employment record as "appalling," and arguing that, in its employment practices (few of which evinced intentional bigotry by the corporation), "AT&T has violated the fair employment laws so flagrantly as to shock the conscience." Equal Employment Opportunity Commission, *Memorandum in Support of EEOC Petition to Intervene from Stanley P. Hebert, General Council, & David A. Copus, Attorney, EEOC, to FCC* (Dec. 10, 1970) (EEOC v. AT&T, NAACP Papers, Part V, Box 353, Folder 1), 3-4, 24 (on file with author). While Skrentny is right to emphasize that considerations of "administrative pragmatism" and "crisis management" influenced the EEOC and other government agencies in developing effects based arguments, these statements show that EEOC officials were also beginning to rethink the very meaning of racism in America, rather than merely using whatever administrative tools were

The EEOC's interpretation was not the isolated work of bureaucrats, but was rather a synthesis of administrative judgment, information gathering, and input from regulatory beneficiaries. In November 1965, the EEOC announced that it would require all employers with over 100 employees—118,000 in all—to submit "EEO-1" reports on their minority hiring practices.[122] EEO-1 reports collected and computerized data on minority and female employment participation. The rules were adopted after the public hearing, over the concerns of businesses, who found the requirement intrusive, and some civil rights advocates, who worried that it might actually enable further discrimination.[123] The EEOC published its reports, revealing highly unequal patterns of employment, particularly when it came to white-collar jobs.

The EEOC employment reports also served as the catalyst for a series of hearings with employers in different industries and different regions to shed light on unfair employment practices and encourage voluntary compliance. The hearings would create a

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available to address black unemployment and urban unrest. Their innovative interpretations of the Civil Rights Act were in keeping with Stokely Carmichael and Charles Hamilton's concept of "institutional racism" and anticipated Iris Marion Young's concept of "structural injustice," meaning injustice "embedded in unquestioned norms, habits, symbols, in the assumptions underlying institutional rules and the collective consequences of following those rules." Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990), 41; Stokely Carmichael and Charles Hamilton, *Black Power: The Politics of Liberation in American* (New York: Random House, 1967). Skrentny's implication that administrative rationality and ethical judgment cannot coexist, and that moral arguments only legitimately originate in persons and groups within civil society, rather than in the deliberations of public officials, bespeaks his Weberian sociological assumptions about the nature and proper functions of the state, rather than the more compelling Progressive Hegelian vision I have sought to advance.

[122] Equal Employment Opportunity Commission, *The Role of the EEO-1 Reporting System in Commission Operations* (1967), *in* EEOC, Administrative History, Reel 2, Frames 0633-0659.

[123] See generally The White House Conference on Equal Employment Opportunity. *Panel 1 – First Session: "Patterns of Discrimination."* Washington D.C. August 19, 1965 (Washington, D.C. Ward & Paul, 1965).

setting for further public reflection on the meaning of the nation's commitment to racial equality and non-discrimination. The 1968 New York City hearings on white-collar employment were perhaps the most successful of these meetings. The goals were to "focus public attention on the problem of discrimination" and to "serve notice on all concerned of EEOC's determination to exercise its legal authority imaginatively and aggressively" and "to discover, and lay a basis for, Commission action to remedy entrenched discrimination practices in white collar hiring and upgrading."[124] The hearings gained significant publicity, with a front page New York Times article declaring "Business Job Bias in City is Charged," and citing the Commission's finding that "56 of 100 major corporations in New York City 'had not a single Negro serving as official or manager.'"[125] EEOC Chairman Clifford Alexander, Jr. also observed, however, that a few firms had indeed hired African Americans and Puerto Ricans for white-collar jobs; this, he argued, undermined the claim that there were no viable minority candidates for such work.[126] Herbert Hill, labor secretary for the NAACP, complimented the EEOC's hearing for having exposed the "rigid pattern of exclusion" in New York's white-collar employment market.[127] The EEOC thus provided information and a forum to rethink the nature of discrimination—to understand and reveal it not merely as a problem of intentional malice, but of systemic exclusion.

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[124] Equal Employment Opportunity Commission, *The Role of the EEO-1 Reporting System in Commission Operations* (1967). In EEOC Administrative History, reel 1, frames 0150-1 (emphasis added).

[125] Douglas Robinson, "Business Job Bias in City is Charged," *New York Times*, Jan. 16, 1968, at 1.

[126] Ibid.

[127] Crowell, "EEOC," 32.

In all of the EEOC administrative activity, the opinions and interests of civil rights organizations and their clientele received special attention. As Luther Holcomb, Vice-Chairman of the EEOC from 1965 to 1971 attested, the EEOC treated the NAACP and its President, Roy Wilkins, as a "partner," and "the NAACP and the Urban League played a major role in the development of the EEOC."[128] But the EEOC was in no sense "captured" by civil rights groups, as Hugh Davis Graham has argued.[129] Its staff was not unanimously aligned with civil rights organizations,[130] and its statistics-based approach to identifying and remedying discrimination was initially resisted by some members of civil rights community.[131] Nonetheless, as Nicholas Pedriana and Robin Striker argue, "EEOC action is best understood within its broader social movement environment" as informal

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[128] Equal Employment Opportunity Commission, ed. *Recollections of Luther Holcomb, Vice-Chairman of the Equal Employment Opportunity Commission from 1964-1974 in* EEOC 35TH ANNIVERSARY PROJECT (Apr. 28, 2000), http://www.eeoc.gov/eeoc/history/35th/voices/oral_history-luther_holcomb-dana_whitaker.wpd.html.

[129] Ackerman, *We the People 3*, 181; Graham, *The Civil Rights Era*, 468-70.

[130] Nicholas Pedriana and Robin Stryker note that "the early EEOC was populated by an Ideologically and professionally diverse senior staff that, as a collectivity, was initially unsure about the Commission's central objectives or how they might be accomplished." Nicholas Pedriana and Robin Stryker "The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965-1971," *American Journal of Sociology* 110, no. 3 (2004): 721.

[131] Napoleon Johnson of the National Urban League argued at the Commission's 1965 White House Conference that "social statistics with racial designations are subject to possible misuse and bigots and the uninformed have used racial statistics to encourage the erroneous but widespread belief that race itself is a significant causal factor in delinquency, crime and other social pathology. . . . We reaffirm our opposition to the identification of race and religion of the individual." Equal Employment Opportunity Commission, *White House Conference on Equal Employment Opportunity*, 10. Clarence Mitchell of the NAACP voiced similar objections. See Skrentny, *Ironies of Affirmative Action*, 128.

contacts with and impact litigation from the NAACP motivated the Commission's broad reading of Title VII.[132]

For this litigation pressure to have real purchase, it was necessary for the EEOC to see its task as an ethically significant one, which could not be shirked by the taking path of least resistance—routine processing of the complaints according to the intent-based understanding of discrimination which Congress had unambiguously sanctioned. In its effort to find a solution to the problems demonstrated in the avalanche of employment complaints registered with the Commission, the EEOC had to rework the intentional understanding of discrimination initially embraced by civil rights groups into an effects-based, institutional perspective. The eventual embrace of this turn in the meaning of discrimination by the civil rights community should not be read as a capitulation to administrative pragmatism. It was rather the result of a constructive, dialogic process, where arguments advanced in the public sphere interacted with the judgment and expertise of administrative officials to develop new solutions to pressing social problems.

The critical evaluations of social contexts that emerged from the EEOC's public sphere interactions served as a crucial bulwark in a landmark case on employment discrimination law: *Griggs v. Duke Power.*[133] *Griggs* was an employee suit against a power company which had "openly discriminated on the basis of race" prior to the passage of the Civil Rights Act, and had subsequently introduced high school education and testing requirements for many of its departments.[134] The tests the company used were

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[132] Pedriana and Stryker, "The Strength of a Weak Agency," 721.

[133] 401 U.S. 424 (1971).

[134] Ibid., 427.

professionally prepared. The Court reversed the lower courts' determination that the tests were permitted under the Act because there was no "showing of a racial purpose of discriminatory intent."[135] On the contrary, the Court held that

> the Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes can not be shown to be related to job performance, the practice is prohibited.[136]

To reach the conclusion that the Civil Rights Act targeted racially unequal consequences of employment practices, and not merely discriminatory intent, the Court explicitly relied upon the EEOC guidelines: "The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting §703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference."[137]

The EEOC's innovative decision to issue testing guidelines, and the doctrine of judicial deference to administrative articulations of public rights, therefore led to a broad construction of the statute. In adopting the EEOC's interpretation, the Court applied the persuasive force of a previously non-binding advisory opinion, finding that the Commission's Guideline "comports with congressional intent."[138] The Commission thus deployed its powers of rational argumentation, rooted in discourse with the public sphere,

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[135] Ibid., 429.

[136] Ibid., 431.

[137] Ibid., 427.

[138] Ibid., 435.

to expand the power of the courts to redress discrimination in the absence of explicit evidence of discriminatory intent.

3. Public Sphere Deliberation in the Provision of Democratic Requisites: The Case of the Office of Economic Opportunity's Community Action Program

Congress passed the Economic Opportunity Act of 1964[139] in response to growing public and presidential concern about "poverty in the midst of plenty," and the emerging problem of unrest in urban ghettos.[140] While the Economic Opportunity Act explicitly targeted poverty, and benefited poor whites as well as blacks, it was widely understood at the time as an integral element of the civil rights struggle, and as an effort to improve the

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[139] Economic Opportunity Act of 1964, Pub. L. 88-452, 78 Stat. 503 (1964).

[140] John F. Kennedy, "Letter to the President of the Senate and to the Speaker of the House Proposing the Establishment of a National Service Corps.," (April 10, 1963), online at *The American Presidency Project*, ed. Gerhard Peters and John T. Woolley, http://www.presidency.ucsb.edu/ws/?pid=9150. Several best-selling books came out in the late fifties and early sixties highlighting the problem of poverty, including Michael Harrington, *The Other America: Poverty in the United States* (New York: MacMillan, 1962) and John Kenneth Galbraith, *The Affluent Society* (New York: The New American Library, 1958). President Kennedy and Johnson after him subsequently took up the call to address poverty. James L. Sundquist, *Politics and Policy: The Eisenhower, Kennedy, and Johnson Years* (Washington, D.C.: The Brookings Institution, 1968), 111-145. Johnson's proposed legislation won added support because of contemporaneous urban unrest, which commentators saw as inextricably linked with the civil rights struggles of the same year. For example, in the midst of rioting in New York City in August 1964, as the Act was before Congress, the New York Times Editorial Board wrote: "In New York and all the other many Northern cities with large Negro populations *what is called the civil rights struggle is also a movement inspired by resentment at mass unemployment and lack of access to other than menial jobs.* Though misguided and self-defeating, the disturbances of recent weeks are as much demonstrations against Negro poverty as against discrimination and what some call 'police brutality.' The anti-poverty bill, in the new perspective given by the disturbances of this long, hot summer, is also an anti-riot bill. The members of the House of Representations will do well to bear that in mind when the time comes for a vote." Editorial, *New York Times* (August 4, 1964) (emphasis added). In its official administrative history, the Office of Economic Opportunity cited this editorial in asserting that "to some extent outside pressure and events hastened the passage of the bill." Office of Economic Opportunity, The Office of Economic Opportunity During the Johnson Administration, November 1963 to January 1969, Vol. I - Administrative History, Part I, Lyndon Baines Johnson Library. Papers of Lyndon Baines Johnson, President, 1963-1969. Administrative History, Office of Economic Opportunity, Vol. 1 Box 1, p. 48.

social status of African Americans in particular.[141] President Johnson certainly considered civil rights and the war on poverty as interconnected, as he referred explicitly to the economic opportunity programs in his speech presenting the Voting Rights Act in 1965:

> The bill that I am presenting to you will be known as a civil rights bill. But in a larger sense, *most of the program I am recommending is a civil rights program.* . . . Because all Americans just must have the right to vote. . . . But I would like to caution you that *to exercise these privileges takes much more than legal right.* It requires a trained mind and a healthy body. It requires a decent home and a chance to find a job, and the opportunity to *escape from the clutches of poverty.*[142]

Johnson understood and expressed the connection between democratic requisites and democratic contexts: one cannot effectively participate in democratic life if one does not have the economic and social wherewithal to do so.

The Economic Opportunity Act established the Office of Economic Opportunity (OEO) in the Executive Office of the President, thus locating the War on Poverty's command center outside of, and above, the established departments and government agencies. While providing for rural rehabilitation loans similar to FSA programs, jobs training, and employment incentives, the core of the Act provided that the OEO would approve and provide grants to "community action programs" (CAPs) in cities and other localities to develop and implement comprehensive anti-poverty programs.[143] A

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[141] S.M. Miller and Martin Rein, "Participation, Poverty, and Administration," *Public Administration Review* 29, no. 1 (1969): 15-25; Morone, *The Democratic Wish,* 219.

[142] Lyndon B. Johnson, "Address on Voting Rights to Joint Session of Congress," Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965. Volume I, entry 107, pp. 281-287. Washington, D. C.: Government Printing Office, 1966 (emphasis added).

[143] Economic Opportunity Act of 1964, § 202.

"community action program" was a program which "provides services, assistance, and other activities of sufficient scope and size to give promise of progress towards the elimination of poverty or a cause or causes of poverty"; which was "conducted administered by a public or private non-profit agency"; and which was "developed, conducted, and administered with the maximum feasible participation of residents of the areas and members of the groups served."[144]

The "maximum feasible participation" requirement would become the most contentious and politically significant aspect of the War on Poverty. The language was drafted by the President's Task Force in the War on Poverty.[145] Members of the Task Force thought the phrase had numerous, overlapping meanings, including coordination between local government and private organizations, symbolic or real involvement of the poor in program administration, and support for transformative political action.[146] It was drafted as an intentionally ambiguous phrase to allow administrative flexibility later on.[147] Daniel Patrick Moynihan, however, subsequently argued that the phrase "was intended to do no more than ensure that persons excluded from the political process in the South and elsewhere would nonetheless participate in the *benefits* of the community

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[144] Ibid., §202(a)(4)

[145] Probably by Harold Horowitz, associate general counsel at HEW before he was assigned to the Task Force. Gillette, *Launching the War on Poverty*, 59, 98.

[146] Ibid., 95-104.

[147] James L. Sundquist, who was on the Task Force, argues that "the bill was deliberately drafted to grant the broadest possible discretion to the administrator." Sundquist, *Politics and Policy*, 145.

action programs in the new legislation."[148] He thus took the more expansive form of community action that the OEO later implemented to depart from legislative intent.

Moynihan's interpretation, which has dominated scholarship on the community action program, not only differs from the admittedly ambiguous intent of its drafters, but, more importantly, from statutory text and legislative history. Moynihan neglected to mention that the Act required that community action programs be "*developed, conducted, and administered with* maximum feasible participation of the residents of the area and members of the groups served."[149] This multi-dimensional participation requirement plainly contemplates more than participation in benefits. Nor does the legislative history support his reading. The Report of the Senate Committee on Labor and Public Welfare stated that "it is expected *the widest possible range* of community organizations will participate."[150] Likewise, the Report of the House Committee on Education and Labor claimed that the community action program was "based upon the belief that *local citizens* know and understand their communities best and that they will be the ones to *seize the initiative* and provide sustained, vigorous *leadership*."[151]

"Seize the initiative" is precisely what they did. When mayors and other local governments proposed community action programs which provided very little or no representation to minority and impoverished residents in the governance structure, they

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[148] Daniel P. Moynihan, *Maximum Feasible Misunderstanding: Community Action in the War on Poverty* (New York: Free Press, 1969), 87.

[149] Economic Opportunity Act §202(a)(4) (emphasis added).

[150] S. R. 1218, (1964), 20 (emphasis added).

[151] H.R. 1458 (1964), 10 (emphasis added).

met with a swift backlash from civil rights organizations.[152] The Office of Economic Opportunity responded to the protests of the newly organized urban poor by interpreting the statutory requirement of maximum feasible participation program literally, requiring in administrative guidelines at least one-third representation of the neighborhood served on agency governing boards.[153]

These community action agencies served to support an increasingly lively urban Black public sphere. In Harlem, for example, the HARYOU-ACT Community Action Agency sponsored the famous poet Amiri Baraka's "school of cultural history," which taught the "political philosophy of the black man in America," as well his Black-Marxist street theater productions, which drew audiences in the thousands.[154] In cities that saw destructive and violent unrest in the black communities, J. David Greenstone and Paul E. Peterson argue that "community residents active in CAPs worked to focus and to make concrete those demands which rioters articulated."[155] In these and similar contexts, such as in Syracuse and Newark, the community agencies were quite radical, and served as rallying points for direct and sometimes hostile challenges to the local government and the OEO itself.[156] Even in these cases, however, "the activity of the relatively large number of blacks involved in the more participatory CAPs involved concrete demands

[152] Morone, *The Democratic Wish,* 227-8; John H. Wheeler, "Civil Rights Groups—Their Impact Upon the War on Poverty," *Law and Contemporary Problems* 31 (1966), 152-8.

[153] Morone, *The Democratic Wish*, 230. Paul E. Peterson, "Formal Representation: Participation of the Poor in the Community Action Program," *American Political Science Review* 64, no. 2 (1970): 494.

[154] Office of Economic Opportunity, *Administrative History*, 117-18.

[155] J. David Greenstone and Paul E. Peterson, *Race and Authority in Urban Politics: Community Action and the War on Poverty* (Chicago: London University of Chicago Press, 1973), 306.

[156] Morone, 233-5.

articulated within the framework of the existing *political* regime, even though these activists sought major *social* transformation, namely, the elimination of racial inequality."[157] In most others cases community action agencies combined strategies of conflict and cooperation with local government and social service agencies, eventually retreating into more conventional roles of service providers and neighborhood advisory boards.[158]

The community action program thus aimed both to furnish democratic requisites and to provide democratic contexts within the administrative process. Whereas in the New Deal administrative contexts for deliberative democracy had excluded impoverished and minority farmers, and agencies which provided democratic requisites had not included the poor in the decision-making process, the War on Poverty sought to incorporate impoverished and minority citizens into the administrative apparatus of a program which would provide them with benefits. It synthesized the two dimensions of the Progressive state.

V. Assessing the Administrative Legacies of the Second Reconstruction

The administrative implementation of Second Reconstruction saw new configurations of the twin Progressive requirements of democratic requisites and democratic contexts. HEW's efforts to provide educational requisites through school integration primarily took the form of inter-branch deliberation, as it mediated between

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[157] Greenstone and Peterson, *Race an Authority,* 307.

[158] Robert Halpern, *Rebuilding the Inner City: A History of Neighborhood Initiatives to Address Poverty in the United States* (New York: Columbia University Press, 1995), 113-15.

the broad norms established by elected representatives and judicial judgments. The EEOC combined inter-branch deliberation with moderate public sphere engagement in an effort to provide economic requisites to minority participation in democratic life. The OEO sought to synthesize democratic requisites and democratic contexts by fostering public sphere deliberation over the control and content of the anti-poverty program. In this section, I review the legacies of these administrative efforts. I conclude that, in the case of inter-branch deliberation, the provision of democratic requisites is more likely to be sustained if the courts explicitly engage with and adopt agencies' critical evaluations of social context. This history also suggest that the creation of democratic contexts within administration will not efficiently furnish democratic requisites without significant bureaucratic support, supervision, and training.

1. Community Action: Political Empowerment and Economic Poverty

The OEO's community action program sought to combine democratic requisites and democratic contexts by giving the excluded, low-income African Americans a significant say in program implementation. This synthesis proved imperfect, however. On the one hand, community action succeeded in increasing Black political power at the urban level. This process could not be reduced to mere interest group bargaining, but had strong deliberative elements: it was a symbolic, ideological struggle, in which the discourse of "maximum feasible participation" mobilized, challenged, and altered social roles in urban politics.[159] The urban public sphere was transformed by the new claims African Americans could raise to full membership in the local political community. The

[159] Greenstone and Peterson, *Race and Authority,* 9-10, 111-62.

OEO's support for grassroots Black organizing not only enabled urban Blacks to thwart some of the most disastrous attempts at "urban renewal" in the Model Cities program,[160] but also led to increased Black political representation at the local and national level.[161]

At the same time as it succeeded in facilitating Black political organization and representation, however, Community Action's immediate effects on the material condition of impoverished Americans were meager.[162] Because of a failure to train or prepare local leadership for programmatic responsibility, Community Action Agencies were ill-equipped—financially, organizationally, and professionally—to effectively deliver desperately needed democratic requisites to the communities they represented.[163] Those programs that succeeded and became an entrenched part of the welfare state, such as Head Start, were not the product of input from community members, but were rather contrived at the national level.[164] While the Community Action Agencies attempted to

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[160] See, e.g. Mandi Isaacs Jackson, *Model City Blues: Urban Space and Organized Resistance in New Haven* (Philadelphia: Temple University Press, 2008), 82-4; Greenstone and Peterson, *Race and Authority*, 309.

[161] Greenstone and Peterson, 7. See also Robert C. Smith, "Black Power and the Transformation of Protest into Policies," *Political Science Quarterly* 96, no. 3 (1981): 431-443.

[162] S.M. Miller and Martin Rein, "Participation, Poverty, and Administration," Public Administration Review 29, no. 1 (1969): 17.

[163] Halpern, *Rebuilding the Inner City,* 113.

[164] Head Start, an early childhood education program, was a brainchild of the chief of the Office of Economic Opportunity, Sargent Shriver. While the plan initially worked through the community action programs, and thus involved parents to varying degrees in implementation, it was eventually removed to HEW, where it took on a more conventional, bureaucratic shape. Kathryn R. Kuntz, "A Lost Legacy: Head Start's Origins in Community Action," in *Critical Perspective on Head Start: Revisioning the Hope and the Challenge*, Jeanne Ellsworth and Lynda L. James, eds. (Albany, NY: SUNY Press, 1998), 1-48. The success of the early, more participatory program is a matter of some dispute, but observable educational gains were decidedly mixed where measured. Walter Williams and John W. Evans "The Politics of Evaluation: The Case of Head Start," *Annals of the American Academy of Political and Social Science* 385, no. 1 (1969): 118-135.

overcome the tension between democratic contexts and democratic requisites, the conflict between efficient implementation and the inclusion of all segments of the public in decision-making thus reemerged. Particularly where the most dominated, excluded, and under-resourced groups are concerned, maximizing participation imposes significant transaction costs for the allocation of programmatic benefits. The Economic Opportunity Act's core concern with economic poverty, rather than Black political empowerment, was likely not addressed as well as it would have been through a conventional, bureaucratic allocation of goods and services to the poor.

The War on Poverty is therefore to be credited with attempting, more so than any government program in the past, to reconcile the demands for democratic requisites and democratic contexts. Not all the blame for its insignificant effects on economic poverty should be cast on its participatory process: the failure to provide requisites was as much a function of the paltry resources dedicated to the program as of its inclusive administrative structure.[165] But the example of the OEO goes to show that conflict between administrative efficiency and deliberative democratic legitimacy are difficult to fully eliminate. The challenge is to contrive new administrative forms, which, in the spirit of the Community Action Program, attempt to combine democratic contexts and democratic requisites in new and untried institutional shapes. I would argue that greater technical and administrative support, combined with more cabined administrative discretion for Community Action Agencies, might have increased the success of the program. If OEO had done more to provide bureaucratic staff to Community Action Agencies and to train

[165] Much as World War II sapped resources and energy from progressive reform, the Vietnam War placed significant budgetary constraints on the program. Moynihan, *Maximum Feasible Misunderstanding*, 148, 152.

local black leaders to administer the program, and if it had provided such agencies with a clear menu of policy choices, it might have provided democratic requisites more efficiently, at the same time as serving as a venue for political empowerment. Though the tension between democratic requisites and democratic contexts cannot be eradicated, it can be better mediated through administrative structures which are alive to the genuine conflicts between them.

2. Disparate Impact and the EEOC: Successful Inter-branch deliberation and Institutional Durability

The institutional consequences of the inter-branch deliberations of the EEOC and HEW in providing democratic requisites show the importance of genuine discourse between agencies and courts, rather than formulaic deference to technocratic expertise. Though the concrete effects of EEOC policy on black unemployment rates are difficult to discern, EEOC policy enhanced the quantity and likelihood of success in discrimination suits up until the early 1980s.[166] These gains partially receded during the Reagan administration. Under the leadership of Clarence Thomas, the EEOC rejected the institutional approach to discrimination developed by the early EEOC, and reverted to a more traditional focus on cases where direct evidence of intentional discrimination could be proved.[167] An increasingly conservative Supreme Court subsequently rolled back the expansive, effects-based understanding of discrimination the Court endorsed in *Griggs*.[168]

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[166] Paul Bernstein and Kathleen Monaghan, "Equal Opportunity and the Mobilization of Law," *Law & Society Review* 20, no. 3 (1986): 355-88.

[167] See B. Dan Wood, "Does Politics Make a Difference at the EEOC?" *American Journal of Political Science* 34 no. 2 (1990): 509. Thomas criticized the work of the Commission under his predecessor, Eleanor Holmes Norton, for "concentrat[ing] on prospective relief in the form of

The EEOC's critical evaluations of social context have endured this period of conservative reaction, however. In response to the Supreme Court's narrowing of the EEOC and the *Griggs* Court's effects-based interpretation of discrimination, Congress passed the Civil Rights Act of 1991.[169] The Act states as a "finding" that the "decision of the Supreme Courts in *Wards Cove* . . . has weakened the scope and effectiveness of Federal civil rights protections";[170] its purposes are to "codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs* . . . and in other Supreme Court decisions prior to *Wards Cove*," and to "confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII."[171] It accordingly codifies a modified form of the disparate-impact claim developed by the EEOC and the *Griggs* Court. The legislation was the result of a decade-long struggle between a conservative executive, an increasingly reactionary Supreme Court,

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numerical goals and time tables rather than full relief for the party actually filing charge. . . . [T]he emphasis was on obtaining broad remedies for a theoretical group that had not filed charges. I find it ironic that anyone would put in place a policy that provided less relief for those who were actually hurt than for those who may have been hurt as a result of some attenuated, historical events. . . . [W]e have, unfortunately, permitted sociological and demographic realities to be manipulated to the point of surreality by convenient legal theories such as 'adverse impact' and 'prima facie cases.'" Clarence Thomas, "The Equal Employment Opportunity Commission: Reflections on a New Philosophy," *Stetson Law Review* 15 (1985): 33, 36.

[168] See, e.g. Wards Cove Packing Co., Inc. v. Atonio 490 U.S. 642 (1989), which significantly narrowed *Griggs*' disparate impact analysis by requiring to prove discrimination: a showing of disparities between an employers racial employment ratio and the racial composition of qualified population in the relevant labor market; specific causation between department practices and disparities; and a showing that any alternative employment practices that would reduce the disparity must be "equally effective in achieving the [employer's] legitimate employment goals," considerations of cost included. Ibid., 650, 657, 661.

[169] Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[170] Ibid. §2(2).

[171] Ibid. §2(3).

and civil rights groups and their liberal allies in Congress.[172] The EEOC's innovative, institutional understanding of discrimination had thus won the full-throated support of the civil rights community, providing a civil society constituency to counter the conservative effort to limit the meaning of the commitments of Second Reconstruction.

The EEOC's reinterpretation of the meaning of discrimination was recently enshrined by the Supreme Court in another sphere of social regulation: housing. *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*[173] addressed the question of whether the Fair Housing Act of 1968 (FHA)[174] barred housing practices and policies that produced a racially "disparate impact" in addition to those that evinced racially "disparate treatment." Lower federal courts[175] and the Department of Housing and Urban Development (HUD)[176] had previously interpreted the FHA to ban disparate impact. As Justice Kennedy noted in his majority opinion, HUD's regulations explicitly analogized their interpretation of the FHA to the disparate impact interpretation

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[172] Reginald C. Govan, "Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991," *Rutgers Law Review* 46 no. 1 (1993): 1-242.

[173] *Texas Dept. of Housing and Comm. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 (2015).

[174] Pub. L. 90-284, 82 Stat. 73, 42 U.S.C. §3601 et. seq. (2012). §3604(a) provides that it shall be unlawful "To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."

[175] As Justice Kennedy notes in his majority opinion, by 1988 "all nine Courts of Appeals to have addressed the question concluded that the Fair Housing Act encompassed disparate impact claims." *Inclusive Communities*, 135 S.Ct. 2507, 2511 (2015).

[176] Department of Housing and Urban Development, *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11,460 (2013).

of Title VII set forth in *Griggs*.[177] He endorsed this analogy from the sphere of employment to the sphere of housing, finding "The FHA imposes a command with respect to disparate impact liability,"[178] and that such an understanding of discrimination was an essential part of "our Nation's continuing struggle against racial isolation."[179]

Though Justice Kennedy did not credit the EEOC with the disparate impact theory he endorsed in the context of housing, Justice Clarence Thomas, in his dissent, did: "The author of disparate impact liability under Title VII was not Congress, but the Equal Employment Opportunity Commission."[180] For Thomas, the EEOC's authorship was an indictment of the law of disparate impact liability, as he believed the early EEOC had gone beyond the explicit terms of Title VII. Thomas's critique, however, relies on a strictly textual technique of statutory interpretation: "Statutory provisions—not purposes—go through the process of bicameralism and presentment mandated by our Constitution."[181] This rejection of the use of public purposes as an interpretive frame is a distinctly minority position on the current Court, most recently rejected in Chief Justice Roberts's majority opinion upholding Obama Administration's interpretation of the terms for granting health care subsidies, which appeared to depart from the plain language of

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[177] *Inclusive Communities*, 135 S.Ct. at 2523 (2015) ; 78 Fed. Reg. 11,470.

[178] *Inclusive Communities*, 135 S.Ct. at 2524.

[179] Ibid., 2525.

[180] Ibid., 2528 (Thomas, J., dissenting).

[181] Ibid., 2529.

the relevant statute.[182] The proper, purposive approach to statutory interpretation dovetails with the discursive understanding of the separation of powers I have advocated. Thomas was right that the "author" of disparate impact was the EEOC. But the agency was an author tasked by Congress with articulating the broad purposes it had set out with administrative specifications of its principled pronouncements. In *Griggs*, the court reviewed the agency's elaboration of public purposes, and confirmed it in judicial judgment.

The institutional durability of the disparate impact analysis inaugurated by the EEOC owes itself in large part to this explicit incorporation of the agency's analysis into its judicial precedent. By agreeing with the EEOC that "Congress directed the thrust of the Act to the consequences of employment practices, not simply motivation,"[183] the *Griggs* Court clearly set out a disparate impact theory of liability which subsequent courts could weaken, but which was very difficult to overturn once established. Though administrative guidelines come and go, like arguments in the public sphere itself, once they are embraced and remade into legal commands by the Supreme Court, they have lasting power—not only within the domain where they apply, but in new domains to which the highest court's precedents may be extended.

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[182] King v. Burwell, 135 S.Ct. at 2492 (2015), quoting New York State Dept. of Social Servs. V. Dublion 413 U.S. 405, 419-20 (1973) ("We cannot interpret federal statutes to negate their own purposes").

[183] *Griggs*, 401 U.S. at 432 (1971).

3. Desegregation at HEW: The Judicial Erasure of the Department's Social Theory

In the school segregation context, by contrast, the Court failed to clearly articulate the innovative understanding of the problem of segregation developed by HEW and endorsed by the Fifth Circuit. In *Green v. County School Board,*[184] it held that a 'freedom of choice' plan in a historically segregated school district in eastern Virginia was not sufficient to meet the desegregation requirements imposed by *Brown I* and *Brown II.* But, as Ackerman notes, in his opinion in *Green*, Justice Brennan offered a "formulaic opinion that replaced discussion of fundamental values with the language of imperial command. . . . Once stripped of basic principle, all that remained in *Green* was a dramatic show of impatience, a broad approval of technocratic measures of compliance, and a caution that lower court should temper desegregation demands with common sense."[185] The Court thus failed to explicitly embrace, and further articulate the values represented by, HEW's administrative determination that "[T]he very nature of a free choice plan and the effect of long-standing community attitudes often tend to preclude or inhibit the exercise of a truly free choice by or for minority group students."[186] It therefore did not enshrine in legal precedent the agency's thoughtful engagement with the social determinants of individual agency.

As a result of this judicial lacuna, and an increasingly conservative Supreme Court bench, jurisprudence on school desegregation has swung back to classical liberal understandings of school choice, with the Court holding unconstitutional local plans to

[184] 391 U.S. 430.

[185] Ackerman, *We the People 3*, 240.

[186] Department of Housing and Urban Development, *Non-discrimination in Federally Assisted Programs,* 45 C.F.R. §181.54 (1967).

achieve desegregation through race-conscious student assignment plans.[187] The public is for the time being bound to the administratively, historically, and theoretically uninformed pronouncement of Chief Justice Roberts that "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[188] Contrary to the Chief Justice's claim, it was only by taking into account the racial composition of southern schools that HEW and the federal courts were able to achieve such great gains in desegregation in the South.[189] The Court's erasure of the history of the implementation of Title VI, and of the Fourteenth Amendment, owes itself in large part to the failure of Justice Brennan to write that history firmly into Supreme Court precedent. The contrast between EEOC's durable articulation of economic requisites and HEW's quiescent articulation of educational requisites thus goes to show that inter-branch deliberation only succeeds when the courts acknowledge and inscribe into law the public right of agencies to determine the meaning of abstract statutory commands.

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[187] Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).

[188] Ibid., 748.

[189] Gary Orfield and Chungmei Lee report that "executive branch enforcement under President Johnson made the South the nation's most integrated region with just a few years of serious enforcement." Gary Orfield and Chugmei Lei, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies* (UCLA Civil Rights Project, 2007), 13, http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1. The trends continued for the next two decades as courts continued to provide injunctive relief to the victims of segregation: Though only 2 percent of Southern schools were integrated at all in 1965, by 1968 19 percent of African Americans in the South attended majority white schools; by 1991, 40 percent attended majority white schools. Ibid., 28.

VI. Conclusion

The American democratic vision of administration which was first developed by the Progressives, and which has been most fully implemented during the constitutional moments of the last century, continues to provide important ideological and institutional resources with which to confront the problems of our present. As we grapple with the threats posed by climate change, with the challenges of immigration, with the violent abuse of police power, and with discursive transformations of the internet, the twin demands of democratic contexts and democratic requisites must continue to guide our administrative practice. We must treat our administrative officials as articulators of public rights, and expect and demand that they perform their social-critical and ethical functions. The examples of the FSA, AAA, EEOC, and HEW show that administrators are capable of this combination of social-scientific and -theoretic sophistication; that they are more than mere technocrats whose highest calling is to perform a regulatory impact analysis, or to find ways to nudge and manipulate the public into efficient behavior. A crucial element of this social recognition of administrative capacity is for courts to solicit and respond to value-based arguments from administrators when they explain their resolution of statutory ambiguities. If courts explicitly engage with the critical social judgments agencies make, they will often fortify these interpretations to weather the reactionary storms that tend to follow moments of constitutional change and administrative creativity.

If public will coalesces for another great era of constitutional revolution and critical administrative intervention, we must also rely upon, and learn from, the participatory structures exemplified by the TVA, AAA, and OEO. We must ensure that deliberative democratic forms of administration include all affected persons on equal

terms. We must not commit the monumental error of the rural New Deal in providing democratic contexts for propertied farmers, while excluding the poor from the determination of their social environment. At the same time, we must ensure that such fully inclusive forms of democratic planning have sufficient administrative support, technical assistance, and programmatic guidance to efficiently deliver the requisites for a fully inclusive public sphere. We must ensure that all citizens are capable of participating as equals in the life of the Progressive state, and thus of recognizing one another's agency as elements of their own. In this way the state will better realize the requirements of individual freedom, and more clearly articulate the stifled voice of the democratic public.

Conclusion

This dissertation has developed a Progressive conception of statehood to assess, critique, and fortify our current state's legitimacy. The Progressive conception is grounded in American thinkers' reception and transformation of German legal theory at the turn of the twentieth century. From the thought of Hegel and his progeny, the Progressives derived an active, administrative form of government with an emancipatory orientation towards civil society. This state would create the institutional and material conditions for the exercise of individual agency, where these had been undermined by the complexities, inequalities, and antagonisms of modern social life. But the Progressives fundamentally altered the Hegelian conception of the state, for they sought to empower the public to determine the contents of freedom through institutionalized deliberation. The state would therefore attempt both to furnish the conditions for rational and inclusive discourse while also empowering this discourse, by including affected groups at key points in the policy-making process. In consultation with affected persons and groups, administrative officials would exercise their interpretive discretion to dismantle social relationships characterized by servitude, domination, and exclusion, and support in their place equal, integrated, and reciprocal relationships between citizens.

The guiding norm is that the administrative state must be structured in such a way as to render the democratic public sphere politically efficacious. Certain aspects of our constitutional order and our administrative process have realized this vision: Congress expresses broadly conceived public purposes in the form of statutes and remains watchful of administrative policy-making through oversight and budgetary control. The President directs executive agencies to act in accord with his or her popularly-endorsed platform, and supervises agency decision-making through centralized review of the rules they promulgate. The judiciary affords individuals and associations with an opportunity to challenge administrative actions that acutely affect them, and requires agencies to act lawfully and rationally. The procedures for administrative decision-making within agencies open up their deliberations to the contributions of the public. In this discursive separation of powers, all three branches of government, and the administrative organizations which are subject to their authority, contribute to a process of democratic will-formation, which is contested and concretized through interaction between each of the relevant institutions.

This system has at times brought the state into robust dialogue with the public sphere and achieved emancipatory alterations in the social order. In the New Deal, administrative agencies implemented agricultural policy in consultation with landowning farmers, and sought to strengthen the democratic foundations of rural life with material support for low-income tenant farmers. Despite exclusionary and paternalistic elements, these administrative labors wrought demographic changes and expansions in social capacity which helped to lay the groundwork for the Civil Rights Revolution. In this next milestone of Progressive state development, federal agencies engaged the constitutional

branches in dialogue over the content of the nation's commitment to racial equality. At the same time, the War on Poverty helped to foster Black civil society and African-American political power. The administrative dimensions of the twentieth century's constitutional moments thus demonstrate that the Progressive theory has some real purchase for understanding the transformative activity of the American state.

But this normative reconstruction of the democratic role that the administrative state has in fact played over time does not amount to a complete defense of our current state's democratic credentials. Nor does it deny that other forms of statehood are at work and compete for dominance within our current institutional matrix. I do not follow Hegel, or his more enthusiastic American followers, in suggesting that political development necessarily pushes forward towards the complete realization of freedom. There is much in the present to disabuse us of that confidence. The current combination of legislative inaction and increasingly intensive presidential control over administration undermines opportunities for public participation. The focus on instrumental rationality in the federal courts, and the suppression of value-based argument from administrative discourse, prevents the state from functioning as the deliberative democratic site it might be. As the institutional pattern of the American state has diverged from the progressive conception, competing theories of administrative legitimacy have gained prominence. Proponents of cost-benefit analysis argue that the state should analyze problems and justify solutions according to the metric of the perfectly competitively market. At the same time, the increasing predominance of the executive branch has led some to conclude that we no longer inhabit a liberal democratic order, but rather a presidential state, where the decisive will of the Chief Executive is the lodestone of democratic legitimacy.

We therefore live in an era in which what Hegel called the "sense of the state" is very much alive in the American mind; but what, precisely, this state is and ought to be remains in fierce dispute.[1] My argument has aimed to recover the Progressive vision so that it might reassert its claims against competing modes of discourse and frameworks for guiding institutional development. Because the Progressive understanding of the state often has been cast as a defense of technocracy, the ethical orientation of progressivism towards supporting and realizing democratic life through administration has been obscured. If the argument up to this point has succeeded, then this Progressive understanding of the state will have become a viable way to think about and to reconstruct our current institutions. In this Conclusion, I want to sharpen the critical edge of this vision by showing how it reveals the inadequacies and dangers of competing frameworks. I will show how the Progressive theory contains what is true and insightful about each, while rejecting the more pernicious elements of each. The Progressive theory thus offers a unified conception of the administrative state, which is insulated against the pathologies of other contemporary conceptions.

I. The Cost-Benefit State, or Market Mimesis

Cost benefit analysis (CBA) asks whether the benefits of regulation justify its costs.[2] Beginning in the Carter Administration as an attempt to increase governmental

[1] Hegel, "Proceedings of the State Assembly of the Kingdom Württemberg," 43. See also Skowronek, *Building a New American State*, 1 ("A 'sense of the state' pervades contemporary American politics.").

[2] Cass R. Sunstein, *The Cost-Benefit State: The Future of Regulatory Protection* (Chicago: American Bar Association, 2002), ix.

efficiency, CBA was employed as an anti-regulatory weapon by the Reagan Administration through Executive Order 12,291, which directed the Office of Management and Budget (OMB) to review regulations and prevent their implementation if their costs exceeded their benefits.[3] Subsequent administrations have retained cost-benefit analysis as a lens through which to evaluate agency actions, adjusting the framework in an effort to include a wider set of considerations.[4] For the proponents of cost-benefit analysis, a fair accounting of regulatory effects is a universal requirement for effective administration, and need not lead to conservative outcomes.[5] Critics of CBA, however, have pointed to serious problems with its practical operation and its normative suppositions: its indeterminateness, its susceptibility to political manipulation, and its failure to recognize non-market values adequately.[6]

Cost-benefit analysis assumes that the perfectly competitive market is the core metric by which to judge state activity. CBA attempts to simulate efficient economic transactions where there is a "market-failure" due to high transaction costs, asymmetries of affirmation, or the market power of particular firms.[7] Frameworks such as "willingness

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[3] 46 Fed. Reg. 13193 (February 17, 1981).

[4] Executive Order 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993); Executive Order 13563 76 Fed. Reg. 3821 (Jan. 21, 2011).

[5] Sunstein, *Valuing Life*; Richard A. Revesz and Michael A. Livermore, *Retaking Rationality: How Cost-benefit Analysis Can Better Protect the Environment and our Health* (Oxford: Oxford University Press, 2011); Peter L. Schuck, *Why Government Fails So Often and How It Can Do Better* (Princeton, NJ: Princeton University Press, 2014).

[6] Anderson, *Value in Ethics and Economics*, 190-210; Thomas O. McGarity, "Professor Sunstein's Fuzzy Math," *Georgetown Law Journal* 90 (2002): 2341-2377.

[7] Office of Management and Budget, *Circular A-4, To the Heads of Executive Agencies and Establishments, Subject: Regulatory Analysis* (September 17, 2003), 4, https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf.

to pay" and "shadow price" attempt to construct a "true value to society" for certain goods, behaviors, or other social outputs.[8] The thrust of this effort is to encourage the state to realize market logic where the market itself does not. It therefore posits contracts between individual property holders as the normative standard by which to evaluate administrative activity. As Elizabeth Anderson has observed, "the theory of market failure is a theory not of what is wrong with markets, but of what goes wrong when markets are not available: it is a theory of what goes wrong when goods are not commodified. . . . Cost benefit analysis is the state's way of mimicking the consequences of market transactions."[9] Cost-benefit analysis is therefore a kind of market mimesis, in the sense that it attempts to imitate in regulatory policy a world of fully informed, freely contracting agents.

The Hegelian progressive theory does not reject cost-benefit analysis categorically. As I described in Chapters 1 and 2, both Hegel and the progressives understood many of the problems in civil society in terms to similar to the logic of CBA: they argued that the growth of industrial organization and complexity had prevented individuals from fully understanding the nature of their contractual agreements (incomplete information); that transactions could create consequences for non-contracting parties, thus impairing their ability to understand their social context as their own (externality); and that certain firms had amassed such strength that economic exchange could no longer be understood as a consensual agreement between equally situated contracting parties (market power).

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[8] Ibid., 13, 20.

[9] Anderson, *Value in Ethics and Economics*, 192.

CBA is an effective instrument for addressing these kinds of market pathologies. When the price mechanism has failed to create accurate information about social costs, the government itself can step in to craft regulatory responses that bend the market back towards an efficient outcome. For example, when contracts between consumers and producers of energy do not take into account the full societal cost of the pollution their transactions cause, administrators can design regulations which will measure and reduce these costs in an efficient way. By considering the comparative costs and benefits of different approaches—such as mandating certain emission control technologies, capping total emissions from certain sources, taxing the production of pollutants, or auctioning exchangeable pollution permits—analysts can choose the policy response that most significantly reduces the harms caused by pollution at the lowest regulatory cost. Such a framework makes sense when the goal is for the government to make the market live up to its own normative criteria—the efficient allocation of resources through fully informed contracts.

CBA has an imperial tendency, however, to assert its jurisdiction beyond the limits of its authority. Once economic rationality becomes the centerpiece of regulatory analysis, it is tempting to equate the purpose of *all* regulation with the simulation of perfectly competitive markets. As Wendy Brown has observed, such indiscriminate use of CBA is a symptom of neoliberal governance, in which "the state is enfolded and animated by market rationality: that is, not simply profitability but a generalized calculation of cost and benefit becomes the measure of all state practice."[10] If universally

[10] Wendy Brown, *Edgework: Critical Essays on Knowledge and Politics* (Princeton, NJ: Princeton University Press, 2009), 42.

and exclusively applied as a technique of regulatory analysis, CBA reduces the scope of state power to mere market mimicry. At the same time, it cultivates a form of rationality among citizens and public officials that is inimical to political action. "A fully realized neo-liberal citizen would be the opposite of public-minded. The body politic ceases to be a body but is rather a group of individual entrepreneurs and consumers."[11] To avoid this dismal fate, it is no answer to abandon the state and attempt to form some kind of social movement without recourse to administrative forms.[12] A public requires a public authority to be efficacious. We need an alternative way to think about the state's functions that remains vital in our intellectual heritage and our institutional practices.

One of Hegel's most important insights, which the American Progressives adopted, was that the state cannot be "confused with civil society," nor its purpose "equated with the security and protection of property and personal freedom."[13] The state is rightly oriented towards preserving this realm of private freedom, where individuals can form their identities on the basis of propertied attachments.[14] But the state also institutes a different, higher kind of *public freedom*. It ensures that people are more than formally equal, contracting persons, but also relate to each other through more robust forms of interpersonal recognition. Whereas in the marketplace one person's end may be

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[11] Ibid., 43.

[12] Mitchell Dean and Kaspar Villadsen, *State Phobia and Civil Society: The Political Legacy of Michel Foucault* (Stanford, CA: Stanford University Press, 2016), 9-22.

[13] Hegel, *Philosophy of Right*, § 257.

[14] Margaret Jane Radin, "Property and Personhood," *Stanford Law Review* 34, no. 5 (1982): 957-1015.

satisfied by another's, in political life individuals' ends can intertwine and coincide.[15] Though Hegel found this public freedom in life under the perfect monarchical constitution, the Progressives advanced a more active, participatory conception. They argued that individuals can engage in public discourse and agree to pursue common ends. The shared goals that gain salience in public opinion become candidates for public law. They are proposed, refined, and challenged in interaction between the constitutional branches, and through the deliberations of administrative agencies.

A purely market-driven perspective on regulation ignores the reality that the public advances a variety of purposes that are at best only tangential to the function of the market: we redistribute income through the tax code; we provide for retirement savings and disability insurance; we proscribe forms of racial and gender discrimination even where purely economic rationality would hold them blameless; we subsidize homeownership and food consumption; we preserve natural beauty through the stewardship of public land. As Susan Rose-Ackerman observes, "a pure cost-benefit test, with its omission of distributive, fairness, and procedural concerns, would not encompass the purposes of these statutory mandates."[16] In these cases, we are not taking individual entitlements and interests as given, but rather are attempting to shape the existing distribution of property and preference according to some common idea about the nature of society we want to live in.

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[15] Axel Honneth, "Three, Not Two, Concepts of Liberty: The Idea of Social Freedom" (lecture, University of Chicago, November 12, 2014).

[16] Susan Rose-Ackerman, "Putting Cost-Benefit Analysis in Its Place: Rethinking Regulatory Review," *University of Miami Law Review* 65 (2011): 347.

The current practice of CBA by the federal government is not blind to the fact that there are non-market values that the administrative state has the authority to advance. The Obama Administration's cost-benefit Order allows that "each agency may consider (and discuss qualitatively) values that are difficult to quantify, including equity, human dignity, fairness, and distributive impacts."[17] The Office of Management and Budget's circular describing how to use CBA describes two kinds of reasons for regulation: "market failure or other social purpose," with the latter including distribution, non-discrimination, privacy, personal freedom, and "other democratic aspirations."[18] More than ever before, CBA admits the plurality of public purposes beyond the marketplace and allows these purposes some place within the framework of regulatory analysis.

To see how this procedure can work in practice, consider a recent Department of Housing and Urban Development's (HUD) rule implementing the Fair Housing Act of 1968.[19] The rule imposed information-gathering and public-participation requirements on local housing authorities in order to ensure that they "affirmatively further" racially integrated housing patterns. HUD estimated that the total annual compliance cost of the rule would be $30 million. After citing the Executive Order's provision on non-quantifiable benefits, it reasoned: "If the rule prompts communities to promote a more racially and socio-economically equitable allocation of neighborhood services and amenities, residents would enjoy the mere sense of fairness from the new distribution. Elevating communities out of segregation revitalizes the dignity of residents who felt

[17] Executive Order 13,563, 76 Fed. Reg. 14, 3821 (2011).

[18] Office of Management and Budget, Circular A-4, 4-5.

[19] Department of Housing and Urban Development, "Affirmatively Further Fair Housing, Final Rule," 80 Fed. Reg. 42349 (2015).

suppressed under previous housing regimes."[20] If HUD had had to perform a pure cost benefit analysis, it would have been forced to attempt to quantify the monetary consequences of decreasing residential segregation. This would have raised a host of questions that are irrelevant, or even repugnant, to the purposes of the Fair Housing Act: how much would wealthier white residents be "willing to pay" to maintain a segregated neighborhood? How much would less well-off, non-white residents be willing to pay to escape segregated neighborhoods created by past federal policies and racial malice? Permitting agencies to consider non-quantifiable, non-market purposes allows them to escape these kinds of inappropriate questions, which might thwart socially progressive purposes by assuming the justice of the existing distribution of entitlements and preferences.

The importance of non-quantifiable, non-market benefits is not limited to such plain questions of public freedom as civil rights enforcement. Rather, market and other political objectives often intersect in agency policymaking. Consider the Security and Exchange Commission's (SEC) recently proposed rule implementing the Dodd-Frank Act's disclosure requirements for payments to governments by resource extraction companies.[21] The Commission recognized that the purposes behind this provision were not merely economic, though it expected economic benefits to accrue from greater transparency. In addition, "the provision was intended to help combat corruption by increasing public transparency of resource extraction payments and, in doing so, to

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[20]Securities and Exchange Commission, *Disclosure of Payments by Resource Extraction Issuers, Proposed Rule*, 80 Fed. Reg. 80058 (2015).

[21] Dodd-Frank Wall Street Reform and Consumer Financial Protection Act, Pub. L. 111-203, §1504, 124 Stat. 1376, 2220 (2010),15 U.S.C. § 78m(q)(2)(A) (2012).

potentially enhance accountability and governance in resource-rich developing countries."[22] SEC thus interpreted the statute as furthering complementary market and political objectives, citing also the United States' foreign policy interest in preserving "the rule of law and confidence of citizens in their governance," as well as the need to prevent human rights abuses and organized crime.[23] A pure cost-benefit analysis would exclude these kinds of non-monetary factors from consideration. But such political values are an often important element of the public purposes Congress gives legal force, even in areas where market values are also appropriate considerations.

The problem with the Obama Administration's framework for considering such questions of public freedom is that such purposes are presented as marginal, rather than central, to the project of justifying state action. OMB's circular on cost benefit analysis provides that where there is some non-quantifiable social purpose implicated in a regulation, the proper procedure is to determine the upper and lower bounds of its value, and then to assess whether it would tip the scales in favor or against a regulatory proposal.[24] Even non-market values must therefore be quantified to the extent possible. This leads agencies to distort plainly ethical questions into dollar valuations. The Department of Justice, for example, sought to determine society's willingness-to-pay to avoid rape in justifying a rule that would reduce the incidence of prison rape.[25] Political

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[22] Ibid., 80065.

[23] Ibid., 80063, fn. 58.

[24] Office of Management and Budget, *Circular A-4*, 2.

[25] United States Department of Justice, *Regulatory Impact Assessment, National Standards to Prevent, Detect, and Respond to Prison Rape under the Prison Rape Elimination Act (PREA),* 28 C.F.R. 115, Docket No. OAG-131, RIN 1105-AB34 (May 17, 2012), 40-2.

values that cannot be reduced to monetary quantities (such as the enforcement of constitutional rights) are then lumped together into a residual category that is subordinated to the paramount work of identifying and remedying market failures.[26] Economists and efficiency-minded lawyers thus gain the upper hand over both the specialists who actually understand the problem at hand, and lawyers who represent interests other than the optimal allocation of risk and capital.

The Progressive alternative would be to ask first: what is the public purpose expressed in the relevant statute? If the purpose is to increase economic efficiency, then ordinary cost-benefit is plainly appropriate. If the statute's purposes include both market and political values, these political values *must* be considered alongside economic factors. If the statute primarily aims to further a political value, such as public health, workplace safety, or environmental protection, consideration of this value should have *priority* over the consideration of monetary costs and benefits. Otherwise, there is an acute risk that the interests of public freedom that are enshrined in law may be under-enforced in order to guard the marketplace against democratic control.

Under the Clean Air Act, for example, the EPA is directed to regulate emissions from coal- and oil-fired power plants if, after performing a study as to their "hazards to public health," EPA determines that regulation is "appropriate and necessary."[27] In this case, the primary goal of the statutory provision is the protection of public health, even though costs may be important in determining the optimal degree of regulation. It would seem logical, then, first to determine whether regulation is appropriate and necessary,

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[26] Ibid., 66-9.

[27] 42 U. S. C. §7412(n)(1)(A) (2012).

based on a consideration of detrimental public health effects and available technology, and then consider the most cost-effective means to do so at a later step in the regulatory process. But the Supreme Court has held that the EPA acted unreasonably by failing explicitly to consider cost when it first decided to regulate power plants.[28] As the dissent pointed out, however, the EPA had indeed gone on to consider costs in determining pollution thresholds.[29]

The Court's decision shows the danger of cost-benefit analysis when it assumes a hegemonic position. It can undermine the statutory priority accorded to public purposes over and above market efficiency. If properly interpreted, the Clean Air Act would allow a tiered consideration, where "appropriateness" was first evaluated according to the causal relation between power plant emissions and health effects, the availability of control technologies, and a normative consideration of what "public health" in fact means and requires. In light of social-scientific research and consultations with the broader public, EPA might find that the appropriateness of regulation should be understood according to the socioeconomic distribution of the health effects of pollution,[30] or the effects of health on political participation.[31] Once the agency, in consultation with the public, has thought through what kind of public health it should promote and protect, it will be in a position to consider the relevance of market values to its regulatory output. It

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[28] Michigan v. Environmental Protection Agency, 135 S.Ct. 2699 (2015).

[29] Ibid., (Kagan, J., dissenting).

[30] J.M. Samet et al., "Fine Particulate Air Pollution and Mortality in Twenty U.S. Cities, 1987-1994," *New England Journal of Medicine* 343 (2000): 1742-1749.

[31] Tony A. Blakely et al., "Socioeconomic Inequity in Voting Participation and Self-Rated Health," *American Journal of Public Health* 91, no. 1 (2001): 99-104.

could determine, for example, that a regulatory option which imposed higher quantifiable costs than benefits was nonetheless justified by its likely effects on the health outcomes of low-income or otherwise marginal communities. The Obama Administration's approach to CBA allows the consideration of these factors, but it does not take significant steps to ensure that they are not overshadowed by a totalizing emphasis on efficiency. It is therefore important to carve out stages in the decision-making process where these concerns gain the full attention of public officials, rather than being tacked on to an analysis primarily concerned with quantifiable economic effects.

Regulatory review therefore is an unfinished project, which has taken important steps towards realizing the Progressive conception of a democratically responsive administrative state. The key to continued gains is to deepen institutional emphasis on the state's role as a guarantor of public freedom, rather than only economic efficiency. Political freedom is constituted by the deliberative discourse of the public, as it is represented in law, through participation in administrative decision-making, and in the platform of the President. But political freedom must not be equated with the freedom of President to do as he or she deems necessary.

II. The Presidential State, or Weimar-on-Potomac

The structural position of the president, and the executive branch as a whole, has strengthened since the Progressive Era. With the growth of the regulatory and welfare functions of the state and the concomitant delegation of rulemaking authority to executive agencies, the President has assumed a central role in policymaking and implementation,

even as Congress remains an important institutional player.[32] When Congress empowers an executive agency with broad powers to determine the content of policy, the President's constitutional prerogatives and budgetary supervision allow him to direct, constrain, and otherwise influence agency action to a greater extent than Congress.[33] This has led scholars to diagnose, and in some cases to endorse, a form of "presidential administration," where executive agencies are treated primarily as the agents of the President, rather than Congress.[34] In recent years, the long-term trend in the consolidation of presidential power has combined with divided party government to further concentrate power in the executive.[35] When Congress is unwilling to work with the President because of major ideological cleavages, the President retains the power to deploy his existing authority to act unilaterally. In the words of President Obama, "If Congress won't act, I will."[36] President Obama has been true to his word, using his executive authority to push

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[32] Keith E. Whittington and Daniel P. Carpenter, "Executive Power in American Institutional Development" *Perspectives of Politics* 1, no. 3 (2003): 498-502; William G. Howell and David E. Lewis, "Agencies by Presidential Design," *The Journal of Politics* 64, no. 4 (2002): 1095-1114.

[33] William N. Eskridge, Jr. and John Ferejohn, "The Article I, Section 7 Game," *Georgetown Law Journal* 80 (1992): 523-64.

[34] Elena Kagan, "Presidential Administration," *Harvard Law Review*, 2245-2385.

[35] Abbé Gluck, Anne Joseph O'Connel, and Rosa Po, "Unorthodox Lawmaking, Unorthodox Rulemaking," *Columbia Law Review* 115 (2015): 1818-22, 1828-30. William G. Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (Princeton, NJ: Princeton University Press, 2003).

[36] Barack Obama, "Working When Congress Won't Act," Remarks of President Obama, Weekly Address, The White House (May 17, 2014), https://www.whitehouse.gov/the-press-office/2014/05/17/weekly-address-working-when-congress-won-t-act

forward his party's agenda without new Congressional authority in areas such as gun control,[37] immigration,[38] labor,[39] and the environment.[40]

The situation is in some ways eerily reminiscent of the executive-centered politics of the late Weimar Republic. With the legislative branch paralyzed by ideological conflict, power steadily accrued to the *Reichspräsident*. Democracy came to be associated with the decisive will of the executive, rather than with parliamentary debate, legislation, or more participatory forms of public engagement. Politics became a winner-take-all affair, a struggle to the death between fascists and communists, rather than a matter of deliberating over common purposes. Carl Schmitt's political thought remains the most eloquent expression of this historical moment. Politics for Schmitt was not a matter of public discourse, but of "the most intense and extreme antagonism" between "friend and enemy."[41] He argued that parliamentary debate had become a "facade," as the state became deeply involved in regulating society and thus had to abandon the forms of

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[37] David Nakamura and Juliet Eilperin, "Obama Details Executive Action on Gun Restrictions," *Washington Post* (Jan. 4, 2016), https://www.washingtonpost.com/politics/obama-to-unveil-new-gun-restrictions-slams-congress-for-inaction/2016/01/04/81d539e8-b2fb-11e5-a842-0feb51d1d124_story.html

[38] Michael D. Shear, "Obama, Daring Congress, Acts to Overhaul Immigration," New York Times (Nov. 20, 2014), http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html

[39] Executive Order 13658, "Establishing a Minimum Wage for Contractors," 79 Fed. Reg. 9849 (Feb. 12, 2014); Peter Baker, "Obama Orders Federal Contractors to Provide Workers Paid Sick Leave," New York Times (Sept. 7, 2015), http://www.nytimes.com/2015/09/08/us/politics/obama-to-require-federal-contractors-to-provide-paid-sick-leave.html

[40] The While House, Office of the Press Secretary, Presidential Memorandum: Power Sector Carbon Pollution Standards (June 25, 2013), http://www.whitehouse.gov/the-press-office/2013/06/25/Presidential-memorandum-power-sector-carbon-pollution-standards

[41] Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: The University of Chicago Press, 1996 [1929]), 29, 26.

bourgeois liberal law.[42] The state would instead operate through emergency measures, broad delegations of power to the president, and backroom deals between the great economic interests of the time. With the collapse of the ideals of the *Rechtsstaat*, the alternative was to turn to the executive, which enjoyed plebiscitary democratic legitimacy. Here deliberation has no place, for "the perspective of a dialectic-dynamic process of discussion can certainly be applied to the legislative but scarcely to the executive."[43] Schmitt therefore hoped to liberate the Weimar Constitution from its liberal shell, and place decisive power in the hands of the President, who "unites in himself lawmaking and legal execution and can enforce directly the norms he establishes, which the ordinary legislature of the parliamentary legislative state cannot do . . . ."[44]

To any engaged observer of early twenty-first-century American politics, Schmitt's critique of the Weimar Republic has purchase on the present. There has been a decline in genuine parliamentary deliberation; there are increasingly intense disputes between the left and right; and the executive has become increasingly prominent, founding his authority on democratic acclamation.[45] It is nonetheless breathtaking to see some contemporary American administrative law scholars not only *diagnose* our situation

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[42] Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge, MA: MIT Press, 1988) 49.

[43] Id., 48.

[44] Carl Schmitt, *Legality and Legitimacy*, 71.

[45]Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge, MA: Harvard University Press, 2012), 6-10; Geoffrey C. Layman, Thomas M. Carsey, and Juliana Menasce Horowitz, "Party Polarization in American Politics," *Annual Review of Political Science* 9 (2006): 83-110; Marc J. Hetherington, "Resurgent Mass Partisanship: The Role of Elite Polarization," American Political Science Review 95 no. 3 (2001): 619-31; Terry M. Moe and William G. Howell, "Unilateral Action and Presidential Power: A Theory," *Presidential Studies Quarterly* 29 no. 4 (1999): 850-72.

in Schmitt's terms, but enthusiastically *embrace* the plebiscitarian executive rule he advocated. Most prominently, Eric Posner and Adrian Vermeule state that "Carl Schmitt's critical arguments against liberal legalism seem to us basically correct," and concur with him that the "legislature and courts . . . are continually behind the pace of events in the administrative state; they play an essentially reactive and marginal role . . . ."[46] They argue that "the major constraints on the executive, especially in crises, do not arise from law or from the separation-of-powers framework defended by liberal legalists, but from politics and public opinion. . . ."[47] In their view, the President's electoral mandate, rather than legal constraints, become the hallmark of administrative legitimacy. Political theorists, too, are not immune to Schmitt's charms, drawing on his thought to conceptualize popular sovereignty as an agonistic, rather than deliberative, form of politics.[48]

The intellectual history of German public law and American progressive political thought shows that our ideas and institutions need not and should not take this Schmittian turn towards plebiscitary administrative legitimacy. To follow this path is to misunderstand the legal forms and normative commitments of the American state. Schmitt, Posner, and Vermeule all mischaracterize "liberal legalism," suggesting that legality is categorically incompatible with delegations of quasi-legislative authority to administrative agencies. This is not so. As I argued in Chapter 1, while the German

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[46] Posner and Vermeule, *The Executive Unbound*, 5.

[47] Ibid.

[48] For a review of this literature, see John P. McCormick, "Irrational Choice and Mortal Combat as Political Destiny: The Essential Carl Schmitt," *Annual Review of Political Science* 10 (2007): 315-39.

tradition of the *Rechtsstaat* maintained that administrative action must be authorized and constrained by law, it always left some space for discretion (*Ermessen*) in which indeterminate statutory commands could be interpreted and concretized by administrative officials. German public law scholars like Hegel and Mohl understood that the stability and generality of legal norms could only be preserved by allowing their meaning and application to shift over time and according to context. Schmitt never grasped this mutually-reinforcing relationship between legislative generality and administrative particularity. He was eager to convert every institutional tension into a life or death struggle, in which one side or the other must triumph.

In the context of early twentieth-century Germany, Schmitt's faulty conceptual analysis nonetheless had some appeal as a description of recent institutional developments. This is in part because Germany attempted to graft democratic constitutionalism onto an authoritarian administrative structure. Under the old monarchical system, the tension between legislative norms and administrative discretion remained encapsulated within a relatively stable constitutional architecture, wherein bourgeois liberal interests were represented in the legislature. At the same time, the monarchical executive could ensure the stability of state and society through the expert judgment of administrative officials. With the turn to democratic constitutionalism, however, the executive gained democratic legitimacy at the same time that parliament declined into conflict and inaction. The president, then carrying a democratic mandate, had at his disposal a massive bureaucratic apparatus to implement his will, without the constraints of deliberative debate and legislative oversight. Without a contrasting power

to place deliberative constraints on executive administration, the executive power became truly unbound.

American political thought and development have furnished a different set of ideas and institutions to counterbalance executive power in the face of decline in legislative control. We therefore have at our disposal modes of politics that the Weimar Republic did not. As I argued in Chapter 2, progressives like Du Bois and Goodnow enthusiastically embraced the Hegelian notion of a state in which legislative will would be carried out by competent and ethically attuned administrators. But the progressive vision required more than this. Dewey, Wilson, and Follett emphasized that an American administrative state would have to be democratic in a deeper sense than the Weimar state: it would have to afford the people an opportunity to participate in the administrative process; to deliberate with public officials as the co-authors of the rules that bound them. As I argued in Chapters 3 and 4, the Administrative Procedure Act of 1946 codified these ideals of the Progressive Era with a general notice-and-comment requirements for administrative rules. I showed in Chapter 5 how judicial decisions have elaborated these statutory provisions into a mandate that administrative decision-making follow deliberative democratic principles, taking into account the arguments of all affected parties in giving rational explanations of their actions. The result is an administrative state that can gain democratic legitimacy not only by statutory authority and executive directive, but also by the input of groups within civil society that are affected by administrative action.

Why, then, does Schmitt's theory of plebiscitary democratic legitimacy continue to have such analytic purchase and normative appeal, when Progressive institutions of

rational and inclusive administration remain integral to the American state? It is partly because the ethical significance of these institutions has been forgotten and distorted. Progressivism has been conscripted into the service of technocratic ideologies of administration. Legal scholars often encapsulate progressivism brusquely as an appeal to bureaucratic expertise.[49] The Supreme Court sometimes buttresses this trend by emphasizing that administrative reasoning must be instrumentally sound and justified solely on the basis of the scientific expertise of administrative agencies. While the Justices recognize the importance of certain deliberative values—reasoned decision-making, responsiveness to relevant arguments, etc.—they often attempt to craft a form of deliberation that is restricted to technical questions, and which brackets out the normative concerns that often underlie such instrumental disputes.[50] Such important questions, they argue, are best left to the courts, the Congress, and the President to answer, rather than to administrative agencies. Thus, in *King v. Burwell*, the Court refused to defer to the Internal Revenue Service's interpretation of a health insurance "Exchange" under the Affordable Care Act, because the question was of "deep economic and political significance."[51] The implication is that politically salient questions of statutory interpretation are too important for bureaucrats alone to resolve, and must instead be left in the hands of Article III judges. Administrators often respond to such cues by

[49] See, e.g. Martin Shapiro, "On Predicting the Future of Administrative Law," *American Enterprise Institute Journal on Government and Society* 6 (1982): 18-25; David B. Spence, "A Public Choice Progressivism, Continued," *Cornell Law Review* 87 (2002): 398-446; Mark Tushnet, "Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory," *Duke Law Journal* 60 (2011): 1565-1637.

[50] See e.g. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

[51] 135 S. Ct. 2480 (2015) (internal quotation marks omitted).

concealing the political content of their action as neutral problem-solving. Cass Sunstein, who led the Office of Information and Regulatory Affairs (OIRA) under President Obama, thus emphasized that "most of the OIRA process is technical, not political,"[52] even though there is significant evidence that OIRA's review process is indeed influenced by political pressure.[53]

This technocratic approach to democratic legitimation follows Weber in treating administration as a neutral and efficient means to implement purposes that have been identified elsewhere. It minimizes or dismisses the progressive idea that administration can be a democratic forum in which to carry out substantive debate about regulatory goals. If we do not avail ourselves of the democratic channels that administration opens up, value contestation becomes all the more intense at the apexes of political power. When the legislature abdicates its responsibilities to engage in constructive contestation with the executive, this value conflict condenses into struggles for control of the presidency. The embrace of Weber's conception of administration in this way complements the expansive conception of presidential power advanced by his "legitimate pupil," Carl Schmitt.[54] A politics of friend-and-enemy gains preeminence over a politics of inclusive and rational debate.

The threat we confront here is not necessarily a precipitous descent into fascism, but rather a highly unstable form of politics, where elections take on a zero-sum

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[52] Cass R. Sunstein, "The Office of Information and Regulatory Affairs: Myths and Realities," *Harvard Law Review* 126 (2013): 1871.

[53] Simon F. Haeder and Susan Webb Yackee, "Influence and the Administrative Process: Lobbying the President's Office of Management and Budget," *American Political Science Review* 109, no. 3 (2015): 507-22.

[54] Habermas, "Discussion of Talcott Parsons' 'Value Freedom and Objectivity'" 66.

characteristic and social conflict is heightened rather than worked through.[55] As voters and political elites think in terms of either/or, they lose the capacity to engage with one another in rational argument, which might otherwise have led to new commonalities and constellations of interests. Opportunities dwindle for Follett's idea of integrated solution, where conflicts are resolved not by compromise, but by identifying new alternatives that satisfy all interests.[56] Nor can we expect presidential administration to deliver on all of its policy promises. As I argued in Chapter 4, the President is not able to pervasively shape all administrative outcomes in the way he or she would like. Though presidents have strong incentives to maximize their control over administration, bureaucratic agencies that are responsible to statutory commands, judicial rulings, and public constituencies are not always efficient instruments of presidential directive. The result of greater presidential control is thus likely to be greater arbitrariness rather than the truly inform application of majoritarian preferences. If we wish to retain democratic control over administration, we therefore must seek solutions other than executive fiat.

The Progressive theory continues to offer a viable path forward out of the dangerous and ineffective politics of the plebiscitary administrative presidency. The Progressive understanding of the presidency I advanced in Chapter 4 does not dismiss his role as an executive leader. But it rejects the notion that the President is—or ought to be—the primary source of legitimacy in the administrative state. Following Wilson, the progressive theory understands the President as a spokesman for public opinion. The

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[55] Juan Linz, "The Perils of Presidentialism," *The Journal of Democracy* 1, no. 1 (1999): 51-69, 52.

[56] Mary Parker Follett, "Constructive conflict," in *Dynamic Administration: The Collected Papers of Mary Parker Follett*, ed. H. C. Metcalf and L. Urwick (New York: Harper, 1942 [1925]), 32-3.

President can and indeed should guide administration according to the policy preferences the public expresses by electing her. But she must do so in a way that transparently discloses her understanding of the public's policy priorities. I argued that regulatory review might be reformulated so as to disentangle and rank the various values that the President applies to the control of administrative action.

On its own, however, transparency is insufficient to ensure that public opinion remains efficacious beyond the timeframe of national elections. More than this, the President must ensure that her direction of the administrative apparatus does not squelch out further opportunities for affected parties to inform the experts about the problems at hand. Presidential policies should be the beginning of the process of interpreting statutory ambiguities, not the end. Because asymmetries of power and information in civil society prevent the formation of a fully informed and rational public opinion, the President's authority to articulate public purposes is partial and attenuated. She does not truly speak for the people as a whole, because the public remains inchoate, blocked from expressing its full interests by the imbalanced circulation of knowledge and influence within the world it inhabits. To fortify the legitimacy of state action, the people must be brought back into the administrative process when laws are concretized by administrative rules.

The live conflict between the Progressives' presidency and the Schmittian presidency can be seen in two of the Obama administration's recent programs. The implementation of the Climate Action Plan is an excellent example of Progressive ideals in action. The President's recent immigration executive actions, by contrast, fail to take advantage of the discursive competencies of the administrative state, and thus breed legitimate fear of executive aggrandizement.

The Obama Administration has followed a long tradition of unilateral executive action on immigration with a series of memoranda and guidelines which centralize and regulate prosecutorial discretion over removal proceedings of unauthorized residents.[57] Since 2001, Congress has considered and declined to pass various versions of a "DREAM Act," which would grant legal permanent residency to certain undocumented persons who entered the United States before the age of 16.[58] In the face of congressional inaction and increasing pressure from the Democratic Party's immigration-reform constituency in the run up to the Presidential election, President Obama relied on his existing authority to direct immigration enforcement authorities to take actions which approximate the provisions of the DREAM Act.[59] In 2012, Janet Napolitano, then-Sectary of Homeland Security, clarified and amended previous enforcement memoranda[60] to instruct immigration officials not to remove certain young persons who had entered the United States illegally.[61] Obama justified the action publicly at the time,

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[57] Adam B. Cox and Christina Rodriguez, "The President and Immigration Law Redux," *Yale Law Journal* 125 (2015): 135-141.

[58] For history of legislative development see, Congressional Research Service, "Unauthorized Alien Students: Issues and 'Dream Act' Legislation" (Jan. 30, 2007), http://trac.syr.edu/immigration/library/P1606.pdf; and Michael A. Olivas, "The Political Economy of the DREAM Act and the Legislative Process: A Case Study in Comprehensive Immigration Reform," Wayne Law Review 55 (2009): 1785-1802.

[59] Julia Preston and John H. Cushman, Jr., "Obama to Permit Young Migrants to Remain in U.S.," New York Times (June 25, 2012), http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html.

[60] Department of Homeland Security, *Memorandum from John Morton, Director of Immigration and Customs Enforcement, United States Department of Homeland Security, for All Field Office Directors* (June 17, 2011), https://perma.cc/V3FE-DTUG.

[61] Department of Homeland Security, *Memorandum from Janet Napolitano, Secretary of Homeland Security for David Aguilar et al.* (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

explaining: "In the absence of any immigration action from Congress to fix our broken immigration system, what we've tried to do is focus our immigration enforcement resources in the right places. . . . We focused and used discretion about whom to prosecute, focusing on criminals who endanger our communities rather than students who are earning their education."[62] In 2014, the Obama Administration broadened its deferred action policy to cover a class of immigrants wider than that contemplated by the DREAM Act, including adults whose children were citizens or legal permanent residents.[63] The memorandum set forth certain threshold criteria under which an individual would be eligible for deferred action. The Administration relied upon advice of the Office of Legal Counsel, which found that this deferred action program was lawful because it was a reasonable response to scarce enforcement resources, and was consistent with congressional policy favoring unification of families of lawful immigrants.[64] President Obama again explained his actions in an address to the nation:

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[62] The White House, Office of the Press Secretary, "Remarks by the President on Immigration," (June 15, 2012), https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-President-immigration.

[63] Department of Homeland Security, *Memorandum from Jeh Charles Jonhson, Director, U.S. Citizenship and Immigration Service, for Léon Rodríguez et al.* Nov. 20, 2016. https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

[64] Department of Justice, Office of Legal Counsel, *Memorandum Opinion for the Secretary of Homeland Security and the Counsel to the President*, 10 (Nov. 19, 2014), http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf.

> I want to work with both parties to pass a more permanent legislative solution. And the day I sign that bill into law, the actions I take will no longer be necessary. . . . Americans are tired of gridlock. What our country needs from us right now is a common purpose -- a higher purpose. . . . Most Americans support the types of reforms I've talked about tonight. . . . [W]e are and always will be a nation of immigrants. We were strangers once, too. And whether our forebears were strangers who crossed the Atlantic, or the Pacific, or the Rio Grande, we are here only because this country welcomed them in, and taught them that to be an American is about something more than what we look like, or what our last names are, or how we worship. What makes us Americans is our shared commitment to an ideal — that all of us are created equal, and all of us have the chance to make of our lives what we will.[65]

The President thus took on the Wilsonian role of spokesman for public opinion to justify his unilateral action on immigration, relying both upon recent polling indicating support for immigration reform and a broader American ethic of a "nation of immigrants."

The executive actions in 2012 and 2014 do not, however, follow the Progressive principle that administrative action significantly affecting the public at large must proceed through deliberative democratic procedures. The enforcement guidelines did not go through any process approaching the minimal procedures of notice-and-comment rulemaking. The consultations that were undertaken were primarily intergovernmental—as with the Office of Legal Counsel's review of the memoranda—or on technical questions regarding improvements to the visa system.[66] DHS did not publish the proposed enforcement principles in the Federal Register, nor allow make provisions for all interested parties to submit comments on the proposal.

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[65] The White House, Office of the Press Secretary, "Remarks by the President in Address to the Nation on Immigration," https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-President-address-nation-immigration.

[66] The White House, Office of the Press Secretary, "Presidential Memoranda—Modernizing and Streamlining the U.S. Immigrant Visa System for the 21st Century" (Nov. 21, 2014), https://www.whitehouse.gov/the-press-office/2014/11/21/Presidential-memorandum-modernizing-and-streamlining-us-immigrant-visa-s.

The unilateral and procedurally abbreviated character of the President's actions is troubling because the memoranda function as rules of general applicability, which determines the allocation of public benefits. Though the 2014 memorandum is styled as "guidance for case-by-case deferred action,"[67] its purpose was to regularize and control the wide discretion of immigration enforcement officers. The Office of Legal Counsel thus justified the rule in part because the "establishment of threshold eligibility criteria can serve to avoid arbitrary enforcement decisions by individual officers, thereby furthering the goal of ensuring consistency across a large agency."[68] If the guidance actually functions to avoid arbitrariness and ensure consistency, it must effectively constrain prosecutorial discretion in the vast majority of cases, equitable exceptions notwithstanding. The success of the guidance therefore depends on its substitution of "case by case" exercises of discretion with general principles of decision-making.[69] Nor is the guidance merely a device of internal management without effect on private parties. While the memorandum disclaims creating any substantive right, an individual granted deferred action under the criteria it promulgates does win legal benefits, such as eligibility for employment authorization and tolling the period of unlawful presence that might disqualify them for visas.[70] The guidance thus studiously evades the appearance of

[67] Department of Homeland Security, *Memorandum of Jeh Charles Johnson*, 2.

[68] Department of Justice, *Memorandum from the Office of Legal Counsel*, 23.

[69] Cox and Rodrigues, 175-82.

[70] Department of Justice, Office of Legal Counsel, *Memorandum Opinion*, 2, citing Classes of aliens authorized to accept employment, 8 C.F.R. § 274a.12(c)(14); 8 U.S.C. §1182(a)(9)(B)(i) (2012).

a rule of general applicability while at the same time trading on its rule-like character to achieve the President's policy objectives. It is an exercise in executive irony.

Immigration enforcement policies raise a host of crucial questions about the substantive commitments of our public sphere, such as: the humanitarian obligations of the people of the United States to families, including undocumented immigrants; the boundaries of our concept of "the people" that is the sovereign source of the Constitution and the laws; the expressive significance and incentive effect of tolerating unlawful entry and residence within the United States; the comparative weight of the distinction between violating immigration laws and violating serious domestic criminal laws; any obligations the United States carries towards nations from which immigrants came; the moral culpability of children; social obligations to protect children and their familial attachments from instability and disruption.

Where such fundamental and contestable questions of political value are at issue, notice-and-comment procedures should be used, even if they are not legally mandatory. Such procedures, which do not discriminate between citizens and non-citizens, could have and should have been adapted in this case to ensure that the immigrants and families most acutely affected by the proposed policies had a clear and distinct voice in the policy debate. The goal would be to ensure that not only citizens, but all acutely affected by our immigration enforcement policy, could contribute to the debate.[71] As Judge Richard

[71] Robert E. Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy & Public Affairs*, 35, No. 1 (2007): 40-68; Benhabib, *Another Cosmopolitanism*, 45-88.

Posner has stated in another context, "The greater the public interest in a rule, the greater reason to allow the public to participate in its formation."[72]

Because of the broad scope and the important political values it implicates, the guidance on deferred action should have been subject to greater public input and deliberation. Whether the guidance is actually a "legislative rule," which *must* be promulgated through notice-and-comment procedures, rather than an "interpretative rule" or "general statement of policy," which need not,[73] is a nice question of administrative law which existing case law does not definitively answer.[74] Precisely this question has been raised in a challenge to the deferred action program, which is currently pending review by the Supreme Court.[75] I do not wish to argue here that the Administrative Procedure Act and the relevant case law clearly requires DHS to issue its deferred action policy through rulemaking procedures, since there are plausible arguments that the

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[72] Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 171 (7th Cir. 1996).

[73] 5 U.S.C. 553 (b)(3)(A).

[74] Some cases suggest that the distinction turns on whether the rule creates legal rights or benefits. See, e.g. Nat'l Min. Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014) ("An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule. . . . An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy."). Others, however, suggest that rules are legislative if they substantially narrow enforcement discretion. See, e.g. McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1320–21 (D.C.Cir.1988) Guardian Federal Savings & Loan Ass'n v. FSLIC, 589 F.2d 658, 666–67 (D.C.Cir.1978) ("If it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is—a binding rule of substantive law.").

[75] Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015), as revised (Nov. 25, 2015), cert. granted, No. 15-674, 2016 WL 207257 (U.S. Jan. 19, 2016).

memorandum is better classified as general policy guidance rather a rule.[76] My argument is rather that the agency should have gone through the notice-and-comment process even if not was legally obliged to do so.

Because the Obama Administration did not resort to the procedures the Progressive state makes available to rationalize executive policymaking, his enforcement actions rightfully breed suspicion of a President who exercises his enforcement prerogatives in an arbitrary manner. Political considerations and the President's own conception of the public interest predominate over broad public deliberation over questions of common concern. This is a form of executive-centered governance which Schmitt and his progeny might find appealing, but which the Hegelian Progressives would reject. The Progressive state does not hinge its legitimacy on the soaring rhetoric of presidents, or on their claim to act where Congress has not, but rather upon the fine-grained and in-depth engagement of all affected parties in the administrative process.

The Obama Administration's immigration actions exemplify some of the pathologies of what Karren Orren and Stephen Skowronek have described as our contemporary "policy state."[77] The policy state is defined by flexible structures which allow political entrepreneurs to pursue their goals through future-oriented programmatic guidelines and opportunistic institutional gamesmanship. Such a state is compatible with the Progressive theory I have outlined, so long as major goals are pursued through an

[76] See Cox and Rodriguez, 216, fn. 313 (arguing that the guidance might not be interpreted by courts as a legislative rule because it does not "create or alter the legal obligations of immigrants").

[77] Karren Orren and Stephen Skowronek, "Pathways to the Present: Political Development in America," in *The Oxford Handbook of American Political Development*, Richard Valelly Suzanne Mettler, and Robert Lieberman, eds. (Oxford: Oxford University Press, 2014), doi: 10.1093/oxfordhb/9780199697915.013.19.

open and inclusive deliberative process. But when the President takes advantage of his prerogatives as Chief Executive to circumvent public deliberation on a matter of paramount public concern and sharp disagreement, he undermines the perceived and actual legitimacy of the administrative state. To retain its legitimacy, the state need not adhere to fixed constitutional boundaries, immutable procedural forms, or sacrosanct concepts of private rights. Rather, state actors need to police their own and one another's conduct according to a broad standard of democratic legitimacy: the more a general policy choice implicates salient and contested questions of political value, the more it must arise from and respond to the input of all affected parties.

President Obama's executive actions on climate change exemplify this deliberative approach to administration, in stark contrast to the plebiscitary leadership democracy he pursued in immigration policy. In his second inaugural address, President Obama interpreted his electoral mandate by declaring that "We, the people, still believe that our obligations as Americans are not just to ourselves but to all posterity. We will respond to the threat of climate change, knowing that the failure to do so would betray our children and future generations."[78] When he made this declaration, the Environmental Protection Agency (EPA) had already published a notice of proposed rulemaking on regulating greenhouse gas emission from power plants.[79] With his environmental policy platform endorsed by the electorate, the President issued a memorandum to the EPA

[78] The White House, Office of the Press Secretary, *Inaugural Address by President Barack Obama* (Jan. 21, 2013), https://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-President-barack-obama.

[79] Environmental Protection Agency, *Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units*, 77 Fed. Reg. 22,392 (2012).

directing it to continue its deliberations with "labor leaders, non-governmental organizations, other experts, tribal officials, other stakeholders, and members of the public on issues informing the design of the program."[80] The resulting 2015 final rule sets CO2 emissions goals for each state to reach by 2030, based on its current energy mix. It allows states "broad flexibility and latitude" to develop their own plans to meet these standards, including an option to work with other states to develop regional plans.[81]

The president thus exercised leadership by giving renewed impetus, electoral legitimacy, and ethical purpose to the EPA's ongoing efforts to address climate change. He insisted that the EPA engage with states and the public in general as it designed the program. The EPA took this emphasis on participation seriously. Prior to its promulgation of its original rule, the EPA had already engaged with states and stakeholders to get advice on how best to craft the greenhouse gas emission rule.[82] The

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[80] The White House, Office of the Press Secretary, *Presidential Memorandum: Power Sector Carbon Pollution Standards*, (June 25, 2013), available at: http://www.whitehouse.gov/the-press-office/2013/06/25/Presidential-memorandum-power-sector-carbon-pollution-standards.

[81] Environmental Protection Agency, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64662, 64665-6 (Oct. 23, 2015).

[82] "The EPA has been engaged in extensive interactions with many different stakeholders on the subjects of climate change, source contributions, and potential emission reduction opportunities. These stakeholders have included industries, environmental organizations, and many regional, State, and local air quality management agencies that have been actively engaged in efforts to address GHG emissions over a period of several years. In addition to these conversations, as part of developing this proposed rule, the EPA held five listening sessions in February and March 2011 to obtain additional information and input from key stakeholders and the public. Each of the five sessions had a particular target audience: The electric power industry, environmental and environmental justice organizations, States and Tribes, coalition groups, and the petroleum refinery industry. Each session lasted two hours and featured a facilitated round table discussion among stakeholder representatives who were identified and selected for their expertise in the CAA standard-setting process. The EPA had asked key stakeholder groups to identify these round table participants in advance of the listening sessions. The EPA accepted comments from the public at the end of each session and via the electronic docket system." Environmental Protection

EPA also held regional public hearings to receive comments on the proposed rule.[83] The rule itself further mandates that states conduct public hearings as they develop their emission reduction plans, with specific thematic focus:

> EPA is requiring states to demonstrate how they are meaningfully engaging all stakeholders, including workers and low-income communities, communities of color, and indigenous populations living near power plants and otherwise potentially affected by the state's plan. In their plan submittals, state must describe their engagement with their stakeholders, including their most vulnerable communities. The participation of these communities, along with that of ratepayers and the public, can be expected to help states ensure that plans maintain the affordability of electricity for all and preserve and expand jobs and job opportunities as they move forward to develop and implement their plans.[84]

The rule goes on to detail the Agency's understanding of climate change as an "environmental justice issue," focusing on the unequal impact of pollution and climate change on low-income and minority communities.[85]

The implementation of the Climate Action Plan thus institutes core concerns of the Progressive conception of the state. While the President plays an important role in directing and energizing agency action, the democratic content of the rule derives in large part from the ethical judgment of administrators and the input of the affected public. The rule addresses highly technical issues, such as identifying the best systems of emission

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Agency, *Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources. Proposed Rule,* 77 Fed. Reg. 22392, 22405 (2012).

[83] See, e.g. Environmental Protection Agency, *Carbon Pollution Emission Guidelines for Existing Stationary Sources and Standards for Modified and Reconstructed Stationary Sources, Notice of Additional Public Hearings*, 79 Fed. Reg. 37981 (2014).

[84] Environmental Protection Agency, *Carbon Pollution Emission Guidelines*, 80 Fed. Reg. 64,662, 64,667 (2015).

[85] Ibid., 64,670.

reduction for sub-categories of power plants. It interprets the statutory authority under which it acts. It references the President's directive authority. But it goes beyond these considerations in ensuring that the public is able to participate in the policy-making process on equal terms. It attempts to provide the democratic requisites of public health and welfare in and through a participatory administrative process that takes special note of unequal power and resources amongst members of the public. In this way, it recalls the some of the best elements of the Farm Security Administration's emphasis on protecting the most vulnerable members of society during the New Deal with the Office of Economic Opportunity's emphasis on empowering these groups to take political action during the War on Poverty.

The Progressive spirit is therefore alive and well in the EPA's efforts to address climate change. The courts ought to consider these sources of democratic legitimacy in determining whether or not the rule is arbitrary and capricious, and in keeping with American constitutional values.[86] Rules are non-arbitrary not only when they are instrumentally rational, but when they are formulated with equal regard to the interests and arguments of all members of the affected public.

[86] Supreme Court of the United States, Order in Pending Case, Chamber of Commerce v. E.P.A., No. 15A787, 2016 WL 502658 (U.S. Feb. 9, 2016) (granting a stay on Carbon Pollution Emission Guidelines pending appeal to United States District Court for the District of Columbia and possible writ of certiorari).

III. Outlook

Strong cross-currents of technocracy and presidential prerogative challenge the Progressive legacy of deliberative democratic statehood. But Progressive conceptions of public power nonetheless remain vital. Administrative agencies often do not allow economic considerations to drown out the claims of public freedom. They often go above and beyond legal requirements to include the affected public at several stages of the policymaking process. This dissertation has attempted to root these current practices in a distinguished theory and history of Progressive statehood, wherein the government emancipates the public sphere from the conditions of inequality and domination that pervade civil society. The hope is that Progressive institutions will fare better against the spurious ideologies of leadership democracy and economistic governance once we understand the ideas that underlie these institutions.

With a coherent notion of what the state ought to do, and how it ought to do it, political scientists and legal scholars should be better positioned to answer important empirical questions, such as: What kinds of requisites are truly necessary for individuals to participate as equals in the formation of public opinion? What kinds of procedures would most efficiently foster public deliberation within administrative process? What kinds of tradeoffs and complementarities exist between opportunities for public participation and the efficient provision of the requisites for democratic politics? Beyond stimulating these institutional research agendas, the reconstruction of the progressive state should lead political theorists and practitioners to think about the potentialities of the state anew. With a better appreciation for the immanent connections between public

law and public sphere, and for the shared fates of bureaucracy and freedom, we can imagine and build a state in which the people finds itself truly at home.

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