NBER WORKING PAPER SERIES

DEMOCRATIC RULEMAKING

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Working Paper 21765
http://www.nber.org/papers/w21765

NATIONAL BUREAU OF ECONOMIC RESEARCH
1050 Massachusetts Avenue
Cambridge, MA 02138
November 2015

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NBER Working Paper No. 21765
November 2015
JEL No. K0,K23

ABSTRACT

This paper examines to what extent agency rulemaking is democratic. It reviews theories of administrative rulemaking in light of two normative benchmarks: a "democratic" benchmark based on voter preferences, and a "republican" benchmark based on the preferences of elected representatives. It then evaluates how the empirical evidence lines up in light of these two approaches. The paper concludes with a discussion of avenues for future research.

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I. Introduction

One feature common to all modern democracies is the delegation of substantial authority to unelected bureaucrats. For the most part, this regularity is driven by the simple fact that the demands of lawmaking in modern society have outstripped the institutional capacity of legislatures to craft their own rules (Cox 2006). Legislators do not have the time or expertise to fully solve the detailed and complex problems that a modern society faces. One important way legislatures have adapted to this shortcoming is to delegate to expert administrative agencies rulemaking authority[1]—the authority to make rules that carry the force of law.[2]

A more complete theoretical explanation for the regularity of delegation also points to incentives created by elections as well as the intertemporal instability of legislative coalitions. Some authors argue legislators delegate "difficult" policy choices to agencies, thereby claiming credit for "solving" the public policy problem, but avoiding blame for any pain that the solution imposes on electorally relevant actors (e.g., Ely 1980, Fiorina 1982, Schoenbrod 2008). More recent theoretical work, confronting the question of why voters do not blame legislators for the act of delegation itself, has stressed that voters, in an incomplete information environment, may not know if the delegation occurs for a "good" reason (such as agency expertise) or for a "bad" reason (such as corruption), creating the space for legislators to delegate for bad reasons without being held accountable (Jordan and Fox 2011). Yet another strand of literature argues that delegation may occur to allow the government to credibly commit to a course of action (e.g., Rogoff

[1] Although we briefly touch on other countries, our focus throughout is on rulemaking in the U.S. context.
[2] Delegated authority may also come, for example, in the form of the ability to adjudicate disputes between parties; although we touch on such alternative forms of delegated authority our focus is on rulemaking.

1985) and permit legislators to "insulate" policy from *future* legislative coalitions which may have divergent policy preferences (e.g., Moe 1990, Shepsle and Horn 1989, de Figueiredo 2002).

To give a sense of the magnitude of agency rulemaking, administrative agencies in the United States finalized over 2,800 rules in 2013, regulating virtually every corner of American life, from air and water quality, to food quality, to automobile and workplace safety.[3] By comparison, the U.S. Congress produced only 72 public laws during that same year. These figures cast into relief a fundamental normative question that has occupied scholars since the inception of the administrative state: in what sense can administrative rulemaking be "democratic" if we do not elect the individuals writing the rules?

We view the term "democratic rulemaking" as having three possible frames. The first is that democratic rulemaking requires the regulator to be directly elected. Outside of a few narrow circumstances, such as state Public Utility Commissions, citizens do not directly elect regulators. And this is for good reason. At present there are nearly 200 federal agencies with rulemaking authority;[4] it would be exceptionally difficult for voters to determine the quality or competence of each regulator for each agency because of the sheer number of regulators, and the fact that expertise is, by definition, difficult for laypersons (i.e., voters) to assess. Hence we rule out directly elected regulators as the normative benchmark.

[3] During 2013, that is, agencies reported a total of 2,803 actions in the Federal Register under the title "final rule"; this figure probably understates the total level of rulemaking, as agencies sometimes list the action as something other than a "final rule" when publishing in the Federal Register (for instance, "final action"). Of course, this figure masks incredible heterogeneity in the content of rules, some important, some not, some increasing regulatory burdens, some reducing regulatory burdens, and so on. On this last point, see, e.g., Carey (2015).

[4] We draw this figure of agencies with rulemaking authority from Farina (2010, 361).

This then leaves two main possibilities for democratic rulemaking benchmarks, both of which we consider in this chapter. The first is what we refer to as "legislative matching" or the "representative" or "republican" (with a small "r") benchmark.[5] Under this approach, the relevant question is whether the rulemaking matches what would have been passed as a statute, if Congress had the same expertise and time that the agency used to develop the policy. This normative baseline focuses on examining to what extent delegation from the legislature to agencies distorts public policy outcomes from contemporaneous congressional legislative preferences.[6]

A second possibility is what we refer to as "electorate matching" or the "democratic" (with a small "d") benchmark. Under this approach, the relevant question is whether the rulemaking matches what the median voter would have done, if that representative voter had the same expertise and time that the agency used to develop the policy. This normative baseline, therefore, essentially bypasses the legislature as an intermediate institution, asking to what extent rulemaking outcome is consistent with the preferences of the voters themselves, as if expressed through a referendum where voters had the relevant expertise and time.

With those normative baselines in mind, we organize this chapter around the central positive theories that scholars have advanced to address the democratic legitimacy of the administrative state. We divide the remainder of this chapter into three main parts. The

[5] We stress that the term "republicanism" refers to our representative institutions, and is quite distinct from notions of "civic republicanism" articulated in Seidenfeld (1992) and elsewhere.

[6] Benchmarking by the representative institution makes a certain amount of sense in the context of rulemaking, as it focuses on what is novel about rulemaking relative to lawmaking. Note that for most of the article, when we refer to "congressional" preferences, we have the Congress that is contemporaneous to the rulemaking in mind. One might also imagine a benchmark based on the preferences of the enacting legislature, and in fact when courts interpret statutes they at least formally have the enacting and not the current Congress in mind. Our enterprise in this chapter, however, is different from the courts' enterprise: we wish to establish a normative benchmark, not develop a theory of statutory interpretation.

first part of the chapter (Section II) explores how governmental *institutions* allow the legislature and the president to control agencies. These institutional structures lead to either republican or democratic outcomes for rulemaking. The second part of the chapter (Section III) explores how *procedures* within the agencies affect the ability of political principals to achieve republican or democratic outcomes. The final section of the chapter (Section IV) identifies shortcomings in the literature and suggests paths for future research.

The overall conclusion from this chapter and the literature is that no existing theory of democratic rulemaking predominates; they all suffer from serious conceptual and empirical faults. In this environment, there are many promising paths for future research by academics to fill gaps in the literature.

II. Institutions and Democratic Rulemaking

A. What Institutional Structures?

Institutional structures establish certain core rights and responsibilities of actors in the administrative policy-making process. Often, though not always, these roles derive from interpretations of the Constitution. For example, one critical set of structures relates to control over administrative personnel. At least the boundaries of the question of who controls the appointment and removal of officers, and in what contexts, largely turn on one's interpretation of the Constitution. Likewise, control over agency budgets is one important structure that influences regulatory policymaking, and congressional preeminence in this area is rooted in the Constitution.[7] Other times, working within

[7] Art. I, § 9, cl. 7.

permissible constitutional boundaries, institutional structures emerge through statute or executive order. The most notable structure in this regard is the Office of Information and Regulatory Affairs, within the Office of Management and Budget, which gives the President the capacity to audit the rulemaking efforts of many agencies.[8]

B. Executive Agencies and Presidential Control

An influential theory holds that rulemaking is "democratic" by virtue of the President, an individual who is envisioned both to control agencies and to be electorally accountable for agency actions (Hamilton, Federalist 70; Prakash 1991). This perspective, often alloyed to the so-called "unitary executive" theory, advocates for the concentration of administrative authority in the hands of the president, as doing so renders it plain who is responsible for regulatory actions, and provides voters the channel of presidential elections to discipline those actions.

The notion that concentrating authority and, runs the theory, responsibility in the hands of a single individual is historically well pedigreed. Attacking proposals for a "plural" executive consisting of several individuals, Alexander Hamilton wrote in Federalist 70 that, "one of the weightiest objections to a plurality in the Executive . . . is that it tends to conceal faults and destroy responsibility." In the event of maladministration under a plural executive, he continued, blame "is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author." By placing administrative authority in the hands of a single individual—the president—the public will readily understand the

[8] OIRA influence over independent agencies is limited.

author of any "pernicious measure," and then may use elections to punish him for these actions.

Though the history remains contested, courts have often construed the Constitution in ways sympathetic to this theoretical perspective, giving the President the preeminent role in administrative personnel decisions.[9] Prominently, it is the President who makes the appointments of principal officers to agency positions, with only the "advice and consent" of the Senate.[10] And, as interpreted by the courts, the President likewise generally enjoys a dominant position in the removal of such officers.[11] Over time, the President has developed additional tools and structures of control. Most importantly, the President, with help from Congress, created in 1980 the Office of Information and Regulatory Affairs (OIRA), which allows the President to audit agencies rulemaking efforts (Bubb and Warren 2014). But Presidents have also developed and amplified other tools. For example, they have burrowed their political appointees deeper into the agencies through non-confirmed and Schedule C appointments. (Lewis 2008).

Although this presidential domination perspective promises an elegant mechanism to impose democratic disciplining on rulemaking, we have several reasons to be skeptical. Perhaps most centrally, this perspective relies on presidential elections to endow rulemaking with democratic credentials. However, presidential elections may be poor institutions through which to discipline regulatory behavior.

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[9] This chapter is not the place to chronicle the many nuances of doctrine in this area of U.S. constitutional law, but it is still important to note at least that the President's control over personnel is more limited in independent agencies, see, e.g., *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

[10] Note that much turns on whether the appointment refers to an inferior or principal officer. For a case illustrating this fault line, consider *Morrison v. Olson*, 487 U.S. 654 (1988).

[11] Of course, there is no "Removals Clause" of the Constitution; for an early and still-influential interpretation on removal, see Myers v. United States (1926).

Besley and Coate (2003, 2008) observe that elections force voters to choose among "bundles" consisting of a potentially wide array of policy and regulatory commitments. The fact that voters only choose among bundles, they show, implies that politicians may adopt non-majoritarian positions on some issues. As Berry and Gersen (2008) and Gersen (2010) argue, this result diminishes some force from the notion that presidential domination of rulemaking necessarily produces "democratic" rules in the relevant sense. Rather, the fact that voters select only among bundles of policies suggests that the president enjoys wide discretion to adopt non-majoritarian positions on many regulatory policies.

A second criticism is that it seems unlikely that voters can process the information necessary to hold the president accountable for regulatory choices (e.g., Farina 2010, Mendelson 2008), even if the institutional limitations above did not apply or applied only at the margins. The most rudimentary legal distinctions—the difference between a statute and a regulation—elude even highly motivated citizens (Cuellar 2005), indicating they would have difficulty separating congressional from executive work product.[12] These considerations suggest that presidential elections most likely serve as poor institutions for delivering "democratic" rulemaking.[13]

[12] We discuss this point further in part III.B, where we engage with the deliberative potential of the rulemaking process.

[13] Another virtue of so concentrating authority, according to proponents, is that the president is the only individual that all citizens vote for. So being, goes the notion, the president is less prone to parochialism and other pathologies that afflict other representative entities. As Woodrow Wilson put it, "[t]he nation as a whole has chosen him . . . he is the representative of no constituency, but of the whole people . . . he speaks for no special interest" (Wilson 1885). These national credentials, unique to the president, elevate the "democratic" status of his regulations, pulling regulatory outcomes toward voter preferences and away from those of special interests. However, the coalitions that elect a president represent something less than the "nation as a whole." The Electoral College provides presidential candidates with an incentive to pursue a coalition consisting of a fraction of the voters, plausibly less than a majority, and in this sense presidential elections engender the same type of parochialism associated in Congress (Nzelibe 2005). Thus, in this view, elections introduce a certain form of disciplining of regulatory behavior, but quite plausibly induce

A third class of criticisms questions the ability of the president to control the bureaucracy—questions, that is, the fundamental premise, as a positive matter, of executive domination.

The seed of this class of criticisms is implicit in the long-standing debate over who controls administrative agencies (e.g., Weingast and Moran 1983; Weingast 1984; Hammond and Knott 1996; Clinton, Lewis and Selin 2014), an inquiry that only makes sense in the context of factually ambiguous control over agencies. But more recently, scholars have begun to generate data directly pertaining to the executive domination thesis. One set of scholars, for instance, surveyed agency officials, and they reported "sporadic" rather than systematic control by the White House over regulatory matters (Bressman and Vandenbergh 2006). Another recent study surveyed agency officials, asking, "In general, how much influence do the following groups have over policy decisions in your agency?", then listing, among other entities, "congressional committees" and the "White House." In a seeming direct refutation of the executive domination thesis, the average response by officials appears to lie between 0 and 1 on a scale between "-4" and "4", with "-4" representing complete congressional (committee) domination, and "4" representing suggesting complete White House domination (Clinton, Lewis and Selin 2014). All of this suggests that, in general, control over agencies is as a practical matter shared by Congress and the President. Based on the views of agency officials, the White House does not dominate policymaking to the exclusion of Congress. Even as the president asserts his interests through OIRA review and other means (Kagan 2001,

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accountability to some sub-coalition of voters rather than to the median of the electorate, much less to the "nation as a whole."

Croley 2003), Congress retains many tools of bureaucratic influence, and agencies retain their own policy agendas and means of evading executive oversight (Nou 2013).[14]

C. Temporal Considerations and the Role of Independent Agencies

As has long been argued, constitutions represent a technology to allow us to bind our selves to a certain course of action, a form of democratic action "by the body politic . . . to protect itself against its own predictable tendency to make unwise decisions" (Elster 2000, 88).[15] Following this notion, the U.S. Constitution contains many elements designed to resist responsiveness to transitory shifts in majority preferences: for example, a challenging amendment procedure; a core separation of powers structure; and a bicameral legislature, with the Senate acting as "an anchor against popular fluctuations" (Madison, Federalist No. 63). As many constitutions both embrace democratic ideals *and* resist popular impulses, so might administrative rulemaking. Most theories of "democratic" rulemaking, however, neglect this temporal aspect of preferences, so central to the study of constitutionalism (but see below; Majone 1996, 1997).

The basic notion of time inconsistency is that the preferences of an individual or institution may change over time. A major source of inconsistency derives from the fact

[14] This feature of "shared" powers of administration is deeply embedded in the structure of the American Constitution (e.g., Fisher 1998). The framers designed a system, which though termed a "separation" of powers system, in fact fostered near-constant interaction and contestation between the branches over shared areas of control. Congress routinely attempts to influence regulatory policymaking by using a wide range of tools: oversight hearings and the subpoena power (e.g., Aberbach 1990), appropriations (e.g., Stiglitz 2014b), influence over appointments (e.g., McCarty 2004), and so on. These tools tend to confine and condition executive discretion with respect to regulatory policymaking, and in this way undermine the core premises of the executive domination thesis. Given this fundamental constitutional structure of separated yet still shared powers, the idealized vision of this executive domination thesis is probably unlikely to be realized, through judicial decisions or other means (Stiglitz 2014a).

[15] More colorfully, the New Jersey politician John Potter Stockton, who resisted post civil war amendment to the U.S. Constitution, said, "Constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy," quoted in Elster (2000, 89).

that the individual or group that controls policy at time period *t* may not control it at time period *t+1*. For example, the dominant coalition in the legislature that passes a policy at time *t* may subsequently lose an election, and the identity of the dominant coalition shifts at time *t+1* (Shepsle and Horn 1989).[16] Or, classically, a legislature's preferences over actions may change once another actor takes some action, such as a decision to set wage levels or make an investment (e.g., Rogoff 1985).

Although the general notion of time inconsistency in preferences is not foreign to the study of administrative action, its role in democratic rulemaking is perhaps understudied. Scholars have long recognized that designing administrative agencies precisely to thwart majority impulses potentially enhances citizen welfare (e.g., Kydland and Prescott 1977; Rogoff 1985; Dixit 1996). Such studies, however, tend to concentrate on monetary policy, understanding the delegation of that policy to "independent" central banks as a way of committing to a policy of low inflation and defeating the problem of dynamic inconsistency in preferences (Rogoff 1985). There, the problem is that the legislature cannot commit to a policy of low-inflation. The solution, in the standard account, is to delegate monetary policy authority to an independent agency with the ability to so commit. This is the more or less conventional account for central bank independence (e.g., Drazen 2004), but the same logic might apply any time that the

[16] Temporal inconsistencies may also arise when a new group or coalition gains predominant control over the agency following delegation. One common concern, for instance, is that the regulated entities will "capture" the administrative agency, following the desires of the regulated entities by adopting lax regulatory standards (Kwak 2013) or, classically, erecting barriers to entry for potential competitors (Stigler 1971). This also is a form of temporal inconsistency, in the sense that the regulated industries, rather than the legislature, controls agency behavior post-delegation. Of course, one way in which this might *not* represent such an inconsistency is if the legislature delegated just so that the agency might be captured. Although we do not want to dismiss this as a relevant possibility, we want to focus on the cases in which the legislature is not so captured and the agency might be; such instances, prevalent in our view, reflect inconsistency in preferences in the relevant sense.

legislature wishes to commit to a course of action when otherwise faced with incentives to renege in some fashion. For instance, after inducing third parties to invest in costly infrastructure, such as railroads or communications networks, the government often faces an incentive to expropriate through "low-ball" ratemaking or other regulatory means. This is one plausible understanding of why many agencies with jurisdictions over policy areas requiring heavy investment, such as communications (FCC) or, in an earlier era, railroads (ICC) often have institutional features promoting autonomy from the political branches. By delegating policy authority to independent agencies, the legislature is able to induce investment that otherwise would wither in recognition of the legislature's inability to commit to not expropriate. Thus, as in the classic story of Ulysses and the sirens, in a range of policy areas, agency independence arguably serves to protect the legislature from itself.

Thus, what the constitution accomplishes through the separation of powers, bicameralism, and other devices, the administrative state might accomplish by structuring administrative agencies to be insulated from the political principals, centrally the President.[17] This is achieved, in the standard account, through various structures. For example, making officers of the agencies removable only "for cause," rather than "at will,"[18] but also, for example, by creating agencies with boards rather than a single head,

[17] It is worth noting, however, that on one view agency "independence" principally serves to insulate agencies from presidential influence—not "politics" or congressional influence—and that as a result, Justice Scalia notes, executive control is "simply . . . replaced by increased subservience to congressional direction," FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009). If all that is achieved by making an agency independent is that executive influence is displaced in favor of congressional influence, it is unlikely that many of the benefits we discuss in this part will be realized.

[18] For the seminal case on this point, casting such political insulation as constitutional, see Humprey's Executor v. United States, 295 U.S. 602 (1935).

staggering the terms of such members, and providing means of self-financing, as through licensing fees or other assessments, to the agency (e.g., Barkow 2010).[19]

Providing agencies with "autonomy" or "independence" is likewise one response to the problem of the enabling legislature not controlling agency policy in the future. Moe (1990) and de Figueiredo (2002), for example, observe that due to electoral uncertainty, today's legislative winners may be tomorrow's legislative losers, providing the legislature with an incentive to delegate policymaking authority to an "insulated" or independent bureaucracy. Barkow (2010), similarly, argues that one response to the problem of agency capture—in one interpretation, a source of inconsistent preferences—might be to insulate the bureaucracy from political and special interest pressure.

More recently, scholars have focused on another implication of the legislature's inability to commit: the development of agency expertise.[20] This literature begins with the premise that the agency has the time and ability to develop expertise, but that doing so is costly; the legislature either cannot develop this expertise, or it is much more costly to do so. This difference drives the legislature to delegate policymaking authority to the agency. However, the agency is concerned that the legislature will "expropriate" the expertise for its own ends, and this discourages agency investment in expertise, as in the

[19] The Federal Reserve is the most commonly noted self-funding agency, but many other agencies, often regulating the financial sector, have mechanisms of self-funding (see Barkow 2010). Fed funding is somewhat unique in that it has the ability to earn interest on government bonds bought using money it introduces into the system, apparently the agency's main source of funding. See http://www.federalreserve.gov/faqs/about_12799.htm.

[20] Note that the notion that agents' incentives to collect information are sensitive to the degree of independence from the principal is familiar to students of legislative politics, where "independence" derives from restrictions on floor amendments to committee legislative proposals (Gilligan and Krehbiel 1987). For an excellent assessment of the literature on administrative law and endogenous information acquisition, see Stephenson (2011).

more general story above.[21] Along these lines, Gailmard and Patty (2007) show that an agency's expertise is sensitive to the level of policy discretion conferred on the agency by the legislature. Cameron, de Figueiredo, and Lewis (2014, 2015) develop integrated models of agency expertise based on specificity of skills, political control, and discretion and show how both shirking and turnover in agencies occurs when there is an inability of politicians to commit to following the advice of expert bureaucrats. Bubb and Warren (2014) study the optimal level of agency bias and policy review, as through OIRA, in the context of endogenous information acquisition.

In many cases, independent or politically "insulated" agencies should be viewed as advancing democratic objectives. This is plain when agency independence is understood as a response to the possibility of agency capture by special interests. But it should also be understood as advancing democratic values even when independence protects one democratically elected coalition against another democratically elected coalition, or when independence protects the legislature from itself. This follows from the fact that independence enlarges the scope of public policy problems that the legislature can competently address.[22] Without these forms of constraint we might not be able effectively to pursue objectives sought by many voters: low inflation monetary policy, for example, or agencies that develop expertise in their policy domains. Depending on the context, these structures might promote either, in our terms, democratic or republican outcomes.

[21] One move in response to this problem is to reconceptualize information so as to not be fully expropriatable (Callender 2008; Hirsch and Shotts 2012).

[22] Another rationale for insulating decision-making from political accountability focuses on information asymmetries between voters and politicians; in this context, mechanisms of accountability can induce politicians to knowingly adopt inferior policies in an attempt to appear competent or otherwise congruent with citizens. For an excellent overview of this perspective, see Gersen and Stephenson (2014).

III. Procedures

A. What Procedures?

Procedures are similar to institutional structures in that they establish the rights and privileges of actors in policy-making; they differ primarily in that they derive almost exclusively from statute or executive order.[23] In the United States, administrative procedures come from three main sources: the Administrative Procedures Act (APA) of 1946 which provides the framework for rulemaking procedures and subsequent judicial review; the enabling or organic statute governing the functioning of a particular agency; and other general legislation that covers specific procedures across most or all agencies, such as the Paperwork Reduction Act of 1980 or the National Environmental Protection Act (Bressman 2007).[24] The procedures contained in these sources—importantly, often as glossed by courts—determine the role of individuals and interest groups in regulatory proceedings and govern the manner of information exchange and required steps before a rule can gain the force of law.[25]

Most often, agencies make policy through rulemakings or adjudications, along with the much discussed and legally ambiguous "guidance" documents (e.g., Magill 2004,

[23] The Due Process Clause provides some constitutional boundaries on administrative procedures, but such constraints apply for the most part in the adjudicatory context, which is not our focus in this article.
[24] For a discussion of international administrative procedures, see Jensen and McGrath (2011).
[25] For example, as discussed below, section 553 of the APA calls for agencies to publish notice of proposed rulemakings (NPRM) in the Federal Register, to allow interested parties to submit their views on the proposal, and to publish the rule 30 days before it is to take effect (APA § 4, codified at 5 U.S.C. § 553). The general procedures set forth in the APA have been refined and supplemented over the years by the agencies themselves and by the courts (see generally Breyer et al 2011). One can find agency-generated procedures in the Code for Federal Regulation (CFR) as well as other agency specific documents. Judges, of course, also effectively impose procedures on agencies. See, e.g., Bressman 2007). A full discussion of court-imposed procedures is beyond the scope of this article.

Epstein 2015).[26] Our focus is on rulemakings. In highly stylized form, a prototypical rulemaking emerges from the following procedures.[27] First, the agency publishes a Notice of Proposed Rulemaking (NPRM) in the Federal Register. The NPRM, in principle, sets out at least the basic substance the proposed rule,[28] along with the statutory authority for the rulemaking. Following notice, interested parties may submit comments on the proposed rule, explaining their support of or opposition to its various provisions. The agency then "after consideration of the relevant matter presented," (5 U.S.C. § 553(c)) may drop the rule, or more likely revise it as necessary and publish the final rule in the Federal Register. The rule becomes legally binding no sooner than 30 days after it is published in final form (5 U.S.C. § 553(d)).

B. Deliberative Democracy: Procedures as Achieving Democratic Outcomes

In a core innovation to rulemaking procedures, the Administrative Procedures Act sought to enhance public participation during the development of agency rules.[29] The APA codified procedures that endow the rulemaking process with elements of deliberation, and scholars have long argued that participatory procedures confer

[26] An agency "guidance" is an informal statement by the agency that purports to interpret or explain another legally binding rule. The fear is that these statements, in effect, create new rules rather than interpret or explain existing ones.

[27] These procedures derive from Section 553 of the APA. Note that for the purposes of this part, we abstract from the important role of OIRA in rulemaking, which we discuss above.

[28] A significant debate surrounds how detailed the notice of proposed rulemaking must be. See, e.g., Nou and Stiglitz (2016).

[29] In one account of the APA's history, the "bill's notice and comment rulemaking balanced the interests of agencies in speed and efficiency and the interests of the public in participating in the rulemaking process … it required agencies to solicit and consider public comment on the rules … it [was] the most important change that the APA impose[d] on [then-prevailing] agency practice" (Shepherd 1996, 1557). See McNollgast (1999); Shapiro (1986); Strauss (1996) for further discussions of the history of the APA.

legitimacy and various other benefits.[30] Most notably, the notice and comment procedures promote a type of democratic dialogue between government agency and regulated entities (Seidenfeld 1992; Carlitz and Gunn, 2002), which arguably improves policy decisions, for example by enhancing assessments about the cost-effectiveness of rules (Gailmard and Patty 2013; Brandon and Carlitz 2002; Coglianese 2001).

Recent advances in rulemaking technology have inspired fresh interest in this deliberative rationale for rulemaking. By fusing the traditional rulemaking process to the Internet and related information technologies, some see the "potential to enlarge significantly a genuine public sphere in which individual citizens participate directly to help make government decisions" (Shane 2004). Under the view that lowered costs of participation may induce citizens to participate in the rulemaking process (Stanley and Weare 2004; Schlossberg et al 2007), agencies have experimented with various methods to facilitate deliberations, including discussion groups, blogs, and real-time response capabilities (de Figueiredo 2006; Farina 2011).

The case for deliberative democracy and rulemaking is roughly as follows. To the extent that individuals are involved in a deliberative democratic rulemaking process—with their voices heard and reflected in regulations—regulatory policy outcomes may be close to the well-informed, well-considered median voter's preferences. Under the optimistic versions of this approach, "deliberative" democracy may in fact be better served through rulemaking than other methods of policymaking, such as legislation. After

[30] For example, such procedures increase bureaucratic legitimacy (Cramton 1972) and federal government credibility (Beierle 2004), strengthens individual autonomy and rights of self-governance (Noveck 2010), increases public understanding of rulemaking (Coglianese 2001), and enhances the accountability of administrative agencies to other branches of government (Coglianese). For a more complete review of the literature on participative democracy, with coverage of the public law, see Thompson (2008); Chambers (2003); and Ryfe (2005).

all, the rulemaking process structures decisions to ensure at least some minimum level of engagement and rational discussion between the government and the public—a characteristic often absent from the legislative process. Moreover, unlike legislation, citizens can argue that a court should set a regulation aside because the agency failed to adequately respond to adverse arguments presented in public comments; courts routinely do so. In this sense, rulemaking by agencies may be the "best hope" of realizing "deliberative decision-making informed by the values of the entire polity" (Seidenfeld 1992).

While the deliberative democracy argument has gained some traction in the academic literature over the past two decades, we also have reasons for pause. First, agencies have frequently determined the content of the rules and regulations *before* they issue the NPRM (Wagner et al 2011; Farber and O'Connell 2015; Nou and Stiglitz 2016). By the time open public deliberation supposedly transpires, agencies have, under a common view, largely determined the policy outcome through private, closed-door meetings (Kerwin and Furlong 2011). Moreover, not only are the meetings largely closed, but the set of interest groups participating in the crafting of the NPRM are highly unlikely to be representative of the median voter (Krasnow et al 2001; McGarity and Wagner 2008). Indeed, it may be this opaque character of the pre-NPRM period that interest groups and agencies find so attractive.

Second, even after agencies issue the NPRM, the rulemaking process does not proceed along the lines of a democratic ideal.[31] The meaningful public comments tend to come almost exclusively from a small number of highly interested groups (Cuellar 2005;

[31] It is important to note that the empirical results of studies of deliberative democracy are quite mixed (see Thompson 2008).

Yackee and Yackee 2006). These seasoned interest groups are not only trying to influence the regulations in the agency, but they are also laying the groundwork for future challenges to the rules in the courts. Those individual citizens who do engage the comment and reply process tend to be very poorly informed, often submitting form letters supplied by interest groups (Cuellar 2005, Mendelson 2008); the "grass roots" interest groups themselves often become involved for the publicity and fundraising opportunities afforded by the rulemaking (Scholossberg et al 2004).

The comments that individuals submit in response to NPRMs provide a glimpse into the understanding that the *most* engaged citizens have of regulations. One scholar, for example, examined the comments that individuals—as opposed to, for example, law firms or lobbyists—submitted for a proposed Department of Treasury rule on financial privacy (Cuellar 2005). He found that such individuals submitted the majority of comments, but that they "proved to be tremendously unsophisticated." Crucially, "[f]ew of them recognized the distinction between the regulation and the statute," (Cuellar 2005), suggesting that these motivated citizens lacked even the most basic awareness necessary to influence regulatory policy. This rule is one rule among thousands issued during an administration that a fully informed voter might consider; it is difficult to read such accounts and remain optimistic about citizen-deliberative potential of rulemaking.

Most accounts of e-rulemaking, similarly, indicate that technology has so far not greatly enhanced the participatory aspects of rulemaking (de Figueiredo 2006, Mendelson 2008). Indeed, even as technology lowers the cost of mobilization and appears to increase the number of comments somewhat, by the same logic, the average quality of individual comments may decrease as uninformed and marginally interested citizens represent a

larger share of those participating in the rulemaking. Most observers conclude that the vast majority of citizen comments are not helpful to agencies (Weare et al 2004; de Figueiredo 2006). As a result, so far, e-rulemaking does not appear to act as an effective counter-weight to agencies' otherwise strong incentives to focus on the well-informed (but non-median) interest groups most likely to present a litigation risk.[32]

Third, despite claims of transparency and disclosure through the carefully crafted and monitored notice and comment procedures, many of the more influential post-NPRM contacts occur outside of the formal notice-and-comment procedures (Kerwin and Furlong 2011). A parallel process in many agencies—"ex parte" procedures[33]—creates a privileged and more opaque process where considerable horse-trading occurs (de Figueiredo and Richter 2014; McGarity and Wagner 2008). During these ex parte meetings, individual interest groups gain preferential access to regulators to air their concerns, transfer ideas and information, and otherwise attempt to mold the regulations to their liking (Krasnow et al 2001). These ex parte contacts follow a predictable pattern of both timing and access (de Figueiredo 2005). Although agencies generally comply with disclosure requirements with respect to these contacts, analysis of the disclosures shows they reveal very little of the substance of the meetings. The disclosures, instead, generally report only the barest essentials: the fact the meeting occurred and the general topic or agenda for the meeting (de Figueiredo 2001, 2005).

[32] In response to these problems, researchers are seeking out innovative approaches to engage citizens through technology. For a promising approach, see Farina et al (2010).

[33] We use quotes to acknowledge that the APA only prohibits ex parte contacts in the context of formal proceedings, and that the term is often applied by analogy to informal proceedings, such as rulemakings under APA § 553.

Finally, agencies often avoid the rulemaking process altogether. They might do so by strategically relying on other policymaking forms with different procedural requirements, such as adjudications (Mashaw and Harfst 1986, Magill 2004, Stiglitz 2015c), or by channeling what amounts to policy changes into guidance documents, or interpretative rules, formally not legally binding instruments that regulated parties may nonetheless regard as effectively binding (Magill 2004, Magill and Vermule 2012, Epstein 2015). We note in passing that negotiated rule-making, where interested groups work together to foster deliberation and forge a solution that is mutually acceptable to all parties, may encourage negotiation and compromise. However, empirically, negotiated rulemaking is rarely used and is generally viewed as having limited success (Coglianese 1997). If our best hope for deliberative democracy lies in rulemaking, all of this suggests the hope is nonetheless dim.

C. Control: Procedures as Achieving Legislative Outcomes

An alternative view of administrative procedures is that their main purpose is to enhance congressional control of agencies, and to check the power of the bureaucracy and the President (McNollgast 1987). In this sense, they reflect more a republican rather than democratic tone.[34]

This congressional control procedural theory views agency control as a principal-agent problem (McNollgast 1987, 1989). The principal, Congress, must insure that the better-informed bureaucrats will show fidelity to the objectives of Congress in designing and executing policy outcomes. Rather than wait for *ex post* auditing to rectify

[34] We emphasize that Congress has other tools as well—it does not only rely on procedures to control agencies. See, e.g., footnote 14.

bureaucratic deviations from congressional preferences, positive political theory argues that well-designed procedures statutorily imposed upon the agency will minimize the zone of discretion for the agency through *ex ante* mechanisms. When bureaucrats test the boundaries of discretion and drift away from congressional preferences, "fire alarms" will be triggered during the rule-making process *ex ante* (McCubbins and Schwartz 1984, Lupia and McCubbins 1994), and judicial and congressional auditing will protect the congress *ex post*.

A number of classes of procedural mechanisms are available to Congress to mitigate the information asymmetry problem and control agencies (McNollgast 1987, 1989). A first class of procedures attempts to minimize information asymmetries by flushing the rule into the open before it becomes finalized. Most prominently, the notice and comment procedures, at least in idealized form, force an agency to reveal its agenda before it becomes a reality, allowing interest groups and aligned congressional factions the opportunity to intervene, for example through oversight hearings, budgeting, or scrutiny of executive nominees (McNollgast 1987, 1989; de Figueiredo et al 1999). A second class of procedures is designed to enfranchise interest groups whose views are close to the enacting Congress. For example, requiring agencies to complete environmental impact statements—part of the National Environmental Protection Act—provides a procedural avenue for groups to challenge rules on environmental grounds. In so doing, congress assures like-minded interest groups a place in the regulatory process; often this preferred position is judicially enforceable. Moreover, if the agency slights these voices, the favored groups may alert Congress to this fact, again allowing allied congressional factions to mobilize against the agency (McCubbins and Schwartz 1984,

Lupia and McCubbins 1994). A third class of procedures to enhance congressional control slow the regulatory process so that advocates of congressional viewpoints will have time to mobilize and influence policy outcomes (Eskridge and Frickey 1994; Ferejohn and Shipan 1990). Hence, for example, procedures require adequate notice of proposed rules, and delay the effective dates of rules by at least 30 days. Congress delegates enforcement of these procedures, in large part, through the courts. For example, a court may set aside a rule if the agency sidesteps the notice and comment process or ignores arguments presented in public comments.

Together, these procedures limit the discretion of agencies to affect policy and channel policy making to reflect the preferences of the enacting and/or current congress. This approach allows Congress to influence rulemaking cost- and time-effectively, as decentralized agents with similar interests commit their time and resources to monitoring agencies (Bressman 2007; Lupia and McCubbins 1994). Under this theory, procedures are designed to reflect a republican form of government—the procedures attempt to generate rulemaking outcomes similar to those that would obtain if Congress had the time and expertise to consider the issue.

Despite the intuitive elegance of this theory of congressional control of agencies, it faces a number of challenges. First, it is unclear how robust the theory is. For example, one rationale for notice and comment rulemaking is to enable congress to decentralize monitoring and delegate it to like-minded interest groups. These same interests, however, have preferences of their own which may cause them to untruthfully report the behavior of agencies to congress (Asimow 1994). A variety of asymmetric information models exist to describe this behavior (see Grossman and Helpman 2001, for an overview), but

each requires special assumptions. These games generally require additional apparatus for existence of pure strategy equilibria, such as repeated games and reputation, information verification, costly entry to the game, or additional features that do not always map to administrative procedures.

Second, while the McNollgast papers do admirably describe the mechanisms of the procedural control theory through anecdotes and examples, many academics have found it extremely difficult to empirically test the main tenets of theory (Huber and Shipan 2002).[35] Do procedures, in fact, enhance fidelity of administrative actions to legislative intent? There is little direct evidence in support (or against) this proposition, and the effectiveness of administrative procedures is thus unclear.

Third, critically, this procedures-as-control approach relies on the courts to interpret and enforce the procedures (Bressman 2007). Yet the courts themselves should be viewed as actors in this effort to control the agency. They have policy preferences over policy, preferences they can realize through their interpretation of procedures (Tiller 1997, 1998; de Figueiredo 2004; Spiller and Tiller 1999). These decisions can act directly counter to congressional preferences. Indeed, courts have effectively amended the APA through common law innumerable times, generally with the interests of the court (rather than the legislature) in mind (Bressman 2007). For example, the rise of hard look review induced agencies to generate considerably more comprehensive records during rulemaking proceedings, seemingly supporting the general purpose of the APA and mitigating the information asymmetries. However, in doing so the court also plausibly

[35] Huber and Shipan (2002:36) have noted that the procedural theory of congressional control of the bureaucracy is too general and thus hard to test and difficult to refute.

substantially raised the bar for any type of rulemaking and thus arguably crippled efforts to implement a variety of legislative initiatives (McGarity 1992).[36]

Thus, even as administrative procedures hold promise to enhance congressional control of agencies (McNollgast 1987), fostering "republican" rulemaking, many important foundations of the perspective remain largely unsubstantiated and contested.

IV. Discussion

To what extent is rulemaking "democratic"? How can we reconcile policymaking by unelected bureaucrats with our commitment to democratic principles? [37]

Scholars have made many important contributions to our understanding of the possibility of democratic rulemaking. The current literature provides a rich set of possibilities, and we highlight four: the so-called unitary executive theory, emphasizing presidential control and accountability; the structure and process school of thought, emphasizing congressional control; an insulation perspective, holding that the public interest and democratic values are often best advanced by retarding political control over administrative agencies; and a deliberative perspective, arguing that rulemaking is the "best hope" for achieving a vision of deliberative democracy.

We thus have a fairly rich sense of possibilities. But our sense of the plausibilities is less secure. And we have virtually no certainties. We believe that it is time for the literature of democratic rulemaking to enter a period of self-assessment, of pruning, and

[36] However, note that recent research questions the extent to which such doctrinal developments, in fact, impaired the ability of agencies to produce rule (O'Connell 2008; Yakee and Yakee 2012; Stiglitz 2015b).
[37] Those who doubt the possibility of democratic rulemaking often argue in favor of a more robust non-delegation doctrine, which would in principle force the legislature to develop policies itself. The debate over the wisdom and feasibility of this recommendation is vast and outside the scope of this article, which assumes the inevitability of delegation and rulemaking. For a recent entry, however, consider Stiglitz (2015a).

of dismissing. This means more social scientific inquiry into rulemaking: the combination of traditional social scientific tools, with at least a passing competence in the relevant institutional details and administrative law.

The most obvious path forward is empirical. For instance, we have little direct evidence on the core questions of whether institutional design of agencies, in fact, promotes policy outcomes consistent with presidential preferences; we have little evidence on whether administrative procedures promote policy outcomes consistent with congressional preferences. Our sense of whether rulemaking procedures, in fact, promote deliberative values—relative to, say, legislation—is a void. Legally and institutionally informed empirical studies promise to help us eliminate the most implausible theories currently in circulation. Moreover, the execution of more advanced empirical designs, such as natural experiments and field studies, hold promise.

But theory also holds much promise. We have at present very few formal models that study the democratic properties of rulemaking. For example, only recently have scholars started to study the theoretical relationship between political control and agencies incentives to develop (costly) expertise (Stephenson 2011; Bubb and Warren 2014; Cameron et al 2014; 2015; Gailmard and Patty 2012; see Bawn 1995 for an early article in this tradition). These contributions sharpen our understanding of the extent to which the fundamental motivation for having an administrative state—expertise—might be in necessary tension with democratic values. However, these models do not provide insights on differences in the tradeoffs that presidential versus congressional control might pose; executive and legislative institutions use different tools of control, for

example, which likely carry different implications for the incentives of agencies and their civil servants to develop expertise.

Finally, the scholars of democratic rulemaking will likely find traction going forward in integrating behavioral perspectives into the legal and economic frameworks to understand agencies. Advances in both theoretical modeling and empirical testing of behavioral approaches provide a basis for understanding more deeply, and in an more integrated way, the decisions of regulators and the participation of individuals and interest groups in the democratic rulemaking process.

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