GETTING PAST DEMOCRACY

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INTRODUCTION

The tension between our concept of democracy and the government we actually possess is well known, despite our insistent efforts to claim that the term "democracy" accurately describes our governmental system. One area where this tension has been apparent is American constitutionalism. The conflict between our concept of democracy and the institution of judicial review became a political issue when the Supreme Court placed itself in opposition to Progressive Era and New Deal legislation. This same conflict subsequently served as a central concern of the Legal Process School, which indelibly characterized it as the "counter-majoritarian difficulty."1

The more far-reaching and intractable source of tension, however, involves the existence of the administrative state. At least since the writings of John Stuart Mill,2 political and legal thinkers have been acutely aware that the existence of a massive, appointed, and credentialed bureaucracy that carries out the great bulk of the government's activities represents a challenge to our characterization of that government as a democracy.3 In contemporary constitutional and admin-

1 Alexander M. Bickel, The Least Dangerous Branch 16 (1962); see id. at 19 ("Nothing can finally deprecate the central function that is assigned in democratic theory and practice to the electoral process . . . . Judicial review works counter to this characteristic."); see also Jesse H. Choper, Judicial Review and the National Political Process 10 (1980) ("[T]he procedure of judicial review is in conflict with the fundamental principle of democracy—majority rule under conditions of political freedom."); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 4-5 (1980) ("[T]he central [problem of] judicial review [is that] a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like.").
2 See John Stuart Mill, Considerations on Representative Government 120 (New York, Henry Holt & Co. 1882) (considering bureaucracy as one of the infirmities to which representative government is liable).
3 See, e.g., Robert Michels, Political Parties 183-201 (Eden Paul & Cedar Paul
istrative law scholarship, the bureaucracy has been viewed as a violation of the three branch system specified in the Constitution, an interference with the unitary nature of the presidency, and, more generally, an abandonment of our democratically based commitments to popular sovereignty and public accountability.

Recently, however, legal scholars and political scientists have begun to reassess this issue and to question whether the conflict between


Specifically, congressionally created independent regulatory commissions have been condemned as a “headless fourth branch.” THE PRESIDENT’S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 40 (1937) [hereinafter BROWNLOW REPORT]; see JOHN ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE 135-53 (1986) (discussing the Brownlow Report’s call for eliminating multimember administrative boards in favor of agencies that could more efficiently transmit executive directives); see also Geoffrey Miller, Independent Agencies, 1986 SUP. CT. REV. 41, 44 (arguing that independent regulatory agencies violate the Constitution).

See, e.g., Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 ARK. L. REV. 29 (1995) (considering the impact of independent agencies on the strength of the executive); Steven G. Calabresi & Salikrishna B. Prakash, The President’s Power to Execute the Laws, 104 YALE L.J. 541 (1994) (positing that the notion of a unitary executive has its basis in the Constitution); Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 HARV. L. REV. 1155 (1992) (examining the relevance of congressional power in restricting federal court jurisdiction to the debate over the unitary executive); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 COLUM. L. REV. 1 (1994) (contending that the notion of a unitary executive, with strong powers over administrative officials, is not truly compelled by what the Framers constitutionalized).

democracy and the administrative state is as pervasive or profound as traditionally claimed.\(^7\) By carefully assessing the meaning of the term "democracy," they have concluded that this term does not necessarily carry such strong anti-administrative implications; by carefully assessing the operation of governmental agencies, they have observed that the agencies do not necessarily violate the policies that underlie the scholars' revised understanding of democratic theory. These scholars have often reached their conclusions through a technique that can be called microanalysis—the effort to describe human activities on an operational level, to trace the way that individuals actually interact without relying on overly conceptual generalizations about either society or individual behavior.

This Article is an effort to carry the recent insights about the administrative state's relationship to the concept of democracy one step further, using this same microanalytic technique. It argues that the

\(^7\) See, e.g., THE ASPEN INSTITUTE, THE ALTERNATIVE PATH: A CLEANER, CHEAPER WAY TO PROTECT AND ENHANCE THE ENVIRONMENT 4 (1996) (arguing that better environmental management will require a new and strengthened role of the regulator); IAN AIRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 158-62 (1992) (advocating getting beyond the intellectual stalemate between those who favor deregulation and those who favor strong state regulation of businesses); BRIAN J. COOK, BUREAUCRATIC POLITICS AND REGULATORY REFORM 19-34 (1988) (studying, with a focus on the EPA, the debates over proposed alternative forms of regulation); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 131 (1997) (considering whether administrators should make political decisions); Matthew D. Adler, Judicial Restraint in the Administrative State: Beyond the Countemajoritarian Difficulty, 145 U. PA. L. REV. 759 (1997) (seeking to demolish the conception of judicial review as countemajoritarian); Cynthia R. Farina, The Consent of the Governed: Against Simple Rules for a Complex World, 72 CHI.-KENT L. REV. 987 (1997) (arguing that scholars should come to terms with modern democracy and abandon efforts to reconcile the regulatory enterprises with the will of the people); Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. REV. 1 (1997) (proposing a model of collaborative government as an alternative to interest representation in regulatory agencies); Philip J. Harter, Negotiating Regulations: A Cure for Malaise, 71 GEO. L.J. 1 (1982) (suggesting that negotiating proposed regulations should replace formalized rulemaking procedures in developing federal regulations); Jerry L. Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J.L. ECON. & ORG. 81 (1985) (citing weaknesses in the arguments of nondelegation critics and proposing arguments in favor of delegation that are based on political organization theory); Robert Reich, Public Administration and Public Deliberation: An Introspective Essay, 94 YALE L.J. 1617 (1985) (critiquing the emphasis on the administrative process and focusing, instead, on what the administrator does); Susan Rose-Ackerman, Progressive Law and Economics—And the New Administrative Law, 98 YALE L.J. 341, 347 (1988) (urging the development of a "reformist law and economics" that redirects the study of administrative law); Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 HARV. L. REV. 1512 (1992) (arguing that the theory of civic republicanism provides the best justification for the American bureaucracy).
term "democracy" irretrievably incorporates premodern conceptions of government that do not reflect our genuine political commitments. It is the administrative state, and not the concept of democracy, that embodies these commitments. As soon as we invoke the term "democracy," therefore, we are smuggling outmoded values, that will inevitably conflict with the government we actually possess, into our political discourse. Consequently, this Article proposes that we simply set the term "democracy" aside and cease using it in scholarly discussions of modern government. It then uses microanalysis to propose a different way of looking at contemporary government and, more specifically, at the relationship between that government and its citizens that we now describe in terms of democracy. The Article argues that this relationship can be more accurately described in terms of interaction that occurs through the mechanisms of elections and administration. Describing these interactions without invoking the concept of democracy provides a picture of contemporary government-citizen relations that is fully consonant with the state's administrative character, and that also reflects our genuine political commitments.

Democracy is an "essentially contested concept," in William Connolly's terms, on which agreement can never be achieved. Such disagreement may be frustrating, but it does not destroy the value of the contested term. The term "democracy" can serve as an arena in which contending parties test the strength of their perspectives, or as a prize to be gained by the side that can assert the most convincing arguments. The problem with treating it in this fashion is that the arena it creates is not merely an open space, but a highly structured one that favors some contestants over others, or, more precisely, forces all of them to distort their competitive efforts. It embeds premodern concepts and values that exaggerate the significance of certain political mechanisms, underestimate the significance of others, and generate unwarranted dissatisfaction with the government we actually possess. Like asking the contestants to fight with broadswords or debate in Latin, it privileges antiquarian arguments over those that are more relevant to contemporary conditions.

It is common to condemn aspects of our government as anti-democratic—judicial review is a well known target—but the characteristic features of the administrative state receive even more criticism on this ground. The reason, it will be argued, is not that the administrative state violates our genuine political values, but that the traditional

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conception of democracy incorporates a variety of anti-administrative sentiments that cannot otherwise be justified. We will think more clearly about the government we actually possess if we abandon the term "democracy" as an instrument of analysis and seek to describe the situations to which it refers in other ways.

There is, of course, a certain danger in this enterprise. Although the meaning of the term "democracy" may be contested, everyone believes in it these days. It is the temple at which all modern political leaders worship. Current debate tends to focus on who is defiling this edifice or claiming entrance when supposedly unjustified in doing so. The point of the following inquiry, however, is not to attack our current form of government. Rather, it is to ask whether the concept of democracy really serves as a good description of that government, or whether it is just a façade that conceals a different reality. Obviously, there is no serious possibility that this term will not continue to be used in political discourse. The point of this Article is to argue that the term should not be used, and certainly not used reflexively, in legal and political analysis.

Part I of this Article discusses the original meaning and subsequent evolution of the term "democracy." Part II traces the way this traditional concept of democracy has insinuated itself into contemporary democratic theory and undermined its relevance. In Parts III and IV, an alternative description of modern government is advanced, using the concept of interaction in place of democracy. Part III discusses electoral interactions, and Part IV discusses interactions at the administrative level.

I. THE EVOLUTION OF THE TERM "DEMOCRACY"

A. Democracy and Direct Democracy

The term "democracy" comes from ancient Greece. It disappeared as a practice with the rise of the Roman Empire and as a concept with the Empire's decline, re-entering European thought only when Aristotle’s *Politics* was translated into Latin by William of Moer-
beke around 1260. Discussion of democracy became part of Western culture at that time and has continued in an unbroken and ever-expanding stream until the present day.

When Aristotle wrote about democracy, he meant direct democracy, in which all citizens are "to rule and be ruled in turn." Thus, a government is a democracy to the extent that the appointment to all offices, or to all but those which require experience and skill, should be made by lot; . . . that no one should hold the same office twice, or not often, except in the case of military offices; that the tenure of all offices, or of as many as possible, should be brief; . . . that the assembly should be supreme over all causes, or at any rate over the most important, and the magistrates over none or only over a very few.

When these conditions are not satisfied—when most offices are filled by election, are held for long terms, or involve an extensive policymaking role—the government is not a democracy but an oligarchy, even if all the citizens participate in the elections. In fact, "when only selected individuals and not the whole people share in the deliberations of the state, then, although . . . [these individuals] observe the law, the government is a pure oligarchy." Sparta's constitution is a mixture of democracy and oligarchy, in Aristotle's view, because in addition to its democratic elements, such as the fact that all the citizens eat the same food and wear similar clothing, it has a number of oligarchic elements: "that all offices are filled by election and none by lot, is one of these oligarchical characteristics; that the power of inflicting death or banishment rests with a few persons is another."
Until the late eighteenth century, the term "democracy" retained this Aristotelian association with direct democracy. The difficulty with the term's adoption into the Western political tradition is that it is not very useful—it has no relationship to any government that has ever existed in the post-classical, Western world. As Benjamin Constant and, more recently, Giovanni Sartori have noted, the Greek polis was really a community rather than a modern state. At the time the Politics was translated, a few small republics, such as the Swiss cantons and the city-states of northern Italy and the Netherlands, bore a superficial resemblance to Aristotle's democracies. Their governmental structure was quite different, however, and, in any case, they proved to be a dead end in the development of Western government. The

He describes the characteristics of democracy as including "the election of officers by all out of all." Id. at 239. He goes on, however, to qualify this by stating "that all should rule over each, and each in his turn over all" and "that the appointment to all offices, or to all but those which require experience and skill, should be made by lot." Id. at 239-40. Thus, Aristotle's reference to elections, which is paralleled in his incredibly elaborate discussion of the ways in which officials can be selected, seems to mean that an election can be consistent with democracy provided that it is an election without nominations—that is, where all the citizens are eligible to vote at the time the election is held. See id. at 182-84. Alternatively, he might even mean that the election must not be based on any definitive criteria, such as birth or merit, although this seems a bit peculiar. The most plausible possibility, suggested by the qualification that "all should rule over each, and each in his turn over all," is that electing an official is democratic as long as the elected position tends to circulate through the citizenry over time rather than being limited to a particular group, or, to use contemporary parlance, an elite. Id. at 239-40. Modern equivalents might be the election of the chair by an academic department or executive officers by a small social club. Any political election in modern society is quite remote from this model, however, and accurately described by Aristotle's formula for oligarchy.

"So, THE FEDERALIST NO. 10, at 58 (James Madison) (The Modern Library ed., 1941) (defining "a pure democracy . . . [as] a society consisting of a small number of citizens, who assemble and administer the government in person"); THE FEDERALIST No. 14, at 81 (James Madison) (The Modern Library ed., 1941) ("[T]he natural limit of a democracy is that distance from the central point which will just permit the most remote citizens to assemble as often as their public functions demand, and will include no greater number than can join in those functions . . . "). The term that Madison used for the government created by the Constitution was "republic." See also Marci A. Hamilton, Representation and Nondelegation: Back to Basics, 20 CARDOZO L. REV. 807, 809-14 (1999) (discussing the skepticism of the Framers of the Constitution toward direct democracy).


17 See, e.g., M.V. CLARKE, THE MEDIEVAL CITY STATE (1926) (examining the problems of internal government and the struggle to survive that medieval society faced);
modern nations that we characterize as democracies are, of course, representative governments, and the disjunction between direct democracy and representative government is a dominant theme in political science, as Edmund Burke,19 Carl Schmitt,20 and Hanna Pitkin21 have discussed.

In fact, the development of representative government—certainly one of the triumphs of Western culture—owes virtually nothing to the traditional concept of democracy. Rather, it is the product of medieval corporatism. In the Middle Ages, people struggled to conceptualize their collective organizations, such as the Church, guilds, trading companies, universities, and towns.22 Once they had done so, they needed a further conception if these entities were to play a role in governance. The nobles could participate directly and the clergy could participate either directly or through hierarchical assignments, but the towns, and the growing bourgeoisie that inhabited them, needed a more particular mechanism. The mechanism they developed was representation, and its basic elements, as Gaines Post and

Henri Pirenne, Early Democracies in the Low Countries: Urban Society and Political Conflict in the Middle Ages and the Renaissance (J.V. Saunders trans., 1963) (discussing economic, political, and social features of low country towns); Daniel Waley, The Italian City-Republics (1969) (contrasting city-states with the modern political sphere); Quentin Skinner, The Italian City Republics, in Democracy: The Unfinished Journey 57 (John Dunn ed., 1992) (discussing the political history of the Italian city-republics). In fact, citizenship in a Greek polis had a racial component: even free men were excluded if they could not demonstrate some ancestral link to the city. Cleisthenes may have relaxed this rule in Athens when he organized the ten tribes (demes), but it was subsequently reasserted. See John Myres, The Political Ideas of the Ancient Greeks 347-51 (1968).


22 See Ernst H. Kantorowicz, The King's Two Bodies 273-313 (1957) (addressing features of continuity prevalent in early modern western corporate bodies); Jacques Le Goff, Time, Work, and Culture in the Middle Ages 135-49 (Arthur Goldhammer trans., 1980) (analyzing relations between universities and public authorities from the twelfth to the seventeenth centuries); J.P. Canning, Law, Sovereignty and Corporation Theory, 1300-1450, in The Cambridge History of Medieval Political Thought 454, 454-76 (J.H. Burns ed., 1988) (examining the influence of juristic theory on political ideas from the late thirteenth to the mid-fifteenth centuries).
Arthur Monahan point out, came from Roman civil law.\textsuperscript{23} One element—useful for resolving joint interests in a single subject matter—was the principle that "what touches all similarly is to be approved by all."\textsuperscript{24} A second element was that a procurator, or proctor, could act in another's place, or represent that person. When these and other conceptual elements were combined, it generated the idea that a collective entity could select a person, by the joint action of its members, who would then act on the entity's behalf.

Representative legislatures are central to the modern Western governments that call themselves democracies. In parliamentary governments, the legislature possesses the most extensive authority, whereas in presidential systems, the legislature shares this authority with an elected chief executive. Substantial decisions are never made by an assembly of the populace at large. The French Revolutionaries, even in their most extreme moments of relying on the brute force of the mob, never tried to assemble the populace in any authorized capacity, but struggled with various representational formulas.\textsuperscript{25} Even the ratification of the American Constitution, where "we the people" spoke outside the existing governmental structure, was performed by representatives.\textsuperscript{26} While some American states hold public referenda on election days, usually concerning secondary, idiosyncratically selected issues, these are far removed from governing through popular assembly.\textsuperscript{27} To be sure, modern nations are much too large for the


\textsuperscript{24} "Quod omnes similiter tangit, ab omnibus compobetur." Code Just. 5.59.5 (Lampadius & Orestes 531); see also Post, Studies, supra note 23, at 164-66 (discussing the maxim and its knowledge by English legal scholar Henry de Brocton, who examined the importance of Roman law for English common law).

\textsuperscript{25} See Biancamaria Fontana, Democracy and the French Revolution, in Democracy: The Unfinished Journey, supra note 18, at 107, 117-21 (discussing the structure of the French Assembly during the French Revolution era).

\textsuperscript{26} See 2 Bruce Ackerman, We the People: Transformations 57-68 (1998) (describing the states' decisions to hold a constitutional convention); M.E. Bradford, Original Intention (1993); Carl Van Doren, The Great Rehearsal 176-238 (1948) (providing a detailed account of the drafting and ratifying of the Constitution).

populace to assemble in its entirety, but the populace is never even gathered in small groups, which might be feasible. Moreover, extensive use of interactive television or the internet could overcome the size problem and allow citizens to state their views directly to each other and the government, but there does not seem to be any movement in this direction among political participants. This suggests, as Rousseau in fact acknowledged notwithstanding his enthusiasm for direct democracy,28 that the impediments to direct democracy are primarily conceptual rather than technological.

Representative government, moreover, does not end the list of political developments in Western society. As Max Weber observed,29 and innumerable political theorists have subsequently affirmed, a further transformation has occurred due to the advent of the administrative state.30 Our government now consists primarily of a vast number of appointed, specially trained officials, employed full-time and organized in hierarchical institutions. They are not representatives whose task is to reflect the desires of a group of citizens, and they are certainly not Aristotle’s randomly selected citizens who would reflect the citizenry’s general attitudes and serve for short periods of time. Among contemporary institutions, only a jury—that most unadministrative of governmental institutions—is organized according to these principles. In short, even the traditional Western concept of representative democracy is itself out of date.

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29 See 1 Max Weber, ECONOMY AND SOCIETY 217-26 (Guenther Roth & Claus Wittich eds., 1968) (discussing legal authority within a bureaucratic government); 3 id. at 956-1003 (discussing the characteristics of a modern bureaucracy).

30 See generally Martin Altbrow, BUREAUCRACY (1970) (examining the development of the concept of bureaucracy); Michel Crozier, THE BUREAUCRATIC PHENOMENON (1964) (discussing the bureaucratic functioning of human organizations); Samuel P. Huntington, POLITICAL ORDER IN CHANGING SOCIETIES (1968) (analyzing how societies undergoing economic and social change can achieve political stability); Jacobs, supra note 6; 2 Michael Mann, The Sources of Social Power 444-75 (1993) (discussing the role of bureaucracy in the rise of the modern state); Charles Tilly, Coercion, Capital, and European States, AD 990-1990 (1990) (comparing features of European cities and states over the past millennium).
B. Democracy and Mixed Government

The long association of the term “democracy” with the largely nonexistent political structure of direct democracy is not necessarily fatal to the term’s usefulness in the Western political tradition. The term can be seen as a convenient way of referring to the rather different concept of mixed government. Aristotle used the term mixed government, or politeia, to describe a constitution, like Sparta’s, that combined the features of democracy and oligarchy. Cicero, who adapted Aristotle’s theory, added monarchy to the mixture, producing a tripartite structure. St. Thomas Aquinas, who also adapted Aristotle, interpreted the government Moses established for the Israelites as possessing this same tripartite structure, thereby adding the authority of the Old Testament to the luster of the Greeks and Romans. Unlike direct democracy, this concept of mixed government possessed genuine descriptive value for Western European regimes. Venice, the one Italian city-state to retain its republican constitution, was clearly regarded as a government of this sort, with its Doge, its aristocratic Senate, and its elected Grand Council. Similarly, Eng-

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31 See ARISTOTLE, supra note 10, at 162-66. The term politeia has no satisfactory translation. It is the origin of our word “polity,” but we use that term to describe any government, not one particular variety. In fact, Aristotle acknowledges that the same problem existed in ancient Greek, see id. at 115, since politeia was the general term for constitution. Aristotle’s explanation of why this general term should be used for a specific form of constitution is uncharacteristically unrefined. Thus, the word “polity” is actually a correct translation in that it reproduces the awkwardness and ambiguity of the original; it is not a useful one, however.


33 See THOMAS AQUINAS, SUMMA THEOLOGICA 1091-93 (Fathers of the English Dominican Province trans., 1981); BRIAN TIERNEY, RELIGION, LAW AND THE GROWTH OF CONSTITUTIONAL THOUGHT, 1150-1650, at 88 (1982) (discussing the ecclesiastical development of the theory of mixed government and stating that Aquinas was the first to associate “the government of Moses . . . with the mixed constitution of Aristotle”).

34 See generally WILLIAM J. BOUWSMA, VENICE AND THE DEFENSE OF REPUBLICAN LIBERTY (1968) (discussing the Venetian contribution to the Renaissance and to the general European culture during the sixteenth and seventeenth centuries); 1 QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE RENAISSANCE 139 (1978) (describing Venice as having “the most enduring commitment to the traditional values of independence and self-government”); WALEY, supra note 18, at 11 (discussing “the republican city-state in northern and central Italy, and in particular . . . its
land was viewed as a mixed government, with the King representing the monarchic principle, the House of Lords representing the aristocratic one, and the House of Commons embodying democracy. Because the King was also recognized as the executive, the House of Commons as the legislature, and the House of Lords at least partially as the judiciary, this theory of mixed government developed a vague association with the separation of powers concept, which was developing rapidly in the seventeenth and eighteenth centuries.

At this time, "democracy" appears to have been substituted for the term "mixed government." The term "democracy" was associated with direct democracy, with the chaotic, and ultimately with the self-destructive government of ancient Athens. Consequently, most writers prior to the late eighteenth century used this term the way we might use the term "mobocracy," to mean the rule of the unruly populace or the selection of demagogues as state officials. Mixed government, on the other hand, was regarded as a regime of fairness, balance, and stability, where each segment of society was represented and each exercised a salutary restraint upon the other. Radical thinking during the English Civil War led, however, to a compurgation of the term "democracy." James Harrington, who incorporated several Athenian features into his utopia of Oceana, coined the term anarchy to describe mob rule and reserved democracy for any regime in which the populace possessed the leading role. Montesquieu exerted even greater effects on the political theory of his time.

See 1 WILLIAM BLACKSTONE, COMMENTARIES *48-*51 (discussing the benefits and detriments of these three forms of government and claiming England supreme because its government has the best elements of all three); J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 310-14 (1987) (discussing the means through which England became a mixed government); M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 33 (1967) ("The theory of mixed government... remained a part of English political thought well into the nineteenth century.").

See VILE, supra note 35, at 39-43 (explaining how England "transition[ed] from the theory of mixed government to the doctrine of the separation of powers").


See JAMES HARRINGTON, The Commonwealth of Oceana, in THE POLITICAL WORKS OF JAMES HARRINGTON 155, 162-64 (J.G.A. Pocock ed., 1977) (characterizing the cor-
greater influence when he used the term to mean a republic ruled by the "people as a body," contrasted with republics ruled by aristocracies. According to Jennifer Roberts and Gordon Wood, the American revolutionaries began with the standard admiration of mixed government and distrust of democracy. But by the time they adopted the Constitution, they were beginning to reject mixed government, with its implicit recognition of nobility, and, encouraged by Montesquieu, embrace the fearsome term "democracy." This usage of "democracy" spread throughout Europe during the nineteenth century. De Tocqueville used it in his description of America and George Grote supported it with his scholarly rehabilitation of ancient Athenian government. By the end of the century, democracy had acquired the sacrosanct character that it currently possesses, at least in America, Great Britain, and France.

Given this evolution, the disjunction between the traditional and modern uses of the term "democracy" would not seem problematic. A wide range of writers, from Aristotle to Cicero to Aquinas to Montesquieu, have recognized that mixed governments would be virtuous
and stable. Finding the term "mixed government" a bit awkward, we have simply replaced it with the term "democracy." All that is needed to achieve verbal clarity is to remember that at some time in the early nineteenth century the usage switched, and what had been called mixed government until that time was subsequently described as democracy.

This, however, is not a satisfactory solution. While the mixed or middle constitution Aristotle describes may combine oligarchic and democratic elements, allowing for more extensive use of elections, and the Ciceronian addition of the monarchy reflects the existence of a chief executive, neither effectively describes modern representative and administrative government. In fact, Aristotle's discussion of the methods by which a polis could mix oligarchy and democracy—that it could combine them, average them, or take parts from each—sounds more like a mathematical formula or a cookbook recipe than a political theory precisely because he cannot conceive of new strategies such as representation or indirect elections.

Moreover, Aristotle's concept of a politeia, or mixed government, is just as distant from an administrative state as his concept of democracy. More extensive use of elections would allow some specialization of functions—even Athens elected all its military and some of its financial officers. But while an administrative state is also specialized, it does not choose these specialized officials by election. Conversely, Aristotle makes no allowance for a hierarchy of appointed salaried officials and seems adamantly opposed to specialized training that would separate a person from the general run of citizens on the basis of knowledge rather than virtue. The state that best embodies the features of mixed government, in Aristotle's view, is Sparta, which was even more unadministrative than Athens and bears a closer relationship to some place that the Starship Enterprise would come across than to any modern Western nation.

Theories of democracy do not end with Aristotle, of course. Even if he accurately stated and decisively elaborated the original meaning of that term, there is no necessary reason why the word cannot be appropriated by modern writers and used in connection with contemporary structures. Indeed, that is precisely what has occurred: contemporary theories of democracy are legion, and most of them have received sophisticated theoretical elaboration and extensive empirical

\textsuperscript{45} ARISTOTLE, supra note 10, at 166.

\textsuperscript{46} This was recognized at the time of the founding. See supra note 41 and accompanying text.
support. These theories, however, have not freed themselves from Aristotelian political concepts. Instead, those concepts are sedimented into the term "democracy." We may think that we have appropriated the term for our own uses, exercising control over its meaning, but the term is more likely to exercise control over us, challenging us with questions from our vaguely recollected past such as: "Shouldn't all your decisions be made by an assembly of the entire populace? Shouldn't public officials be selected by lot, so that each of you may rule and then be ruled in turn?"

The problem, as stated, is that direct democracy is quite foreign to representative government and is virtually the antithesis of the modern administrative state. As a result, these embedded associations mean that our continued use of the term "democracy" creates a continuous tension with the government we actually possess. It beclouds our ability to describe that government, leading us to overlook or underestimate features that are central to that government's operation and to imagine or overemphasize other features that are of minimal importance. Democracy is not merely a descriptive term, however; it also possesses such powerful normative associations that "democratic" is virtually a synonym for good or desirable in modern political and academic discourse, while "nondemocratic" is virtually the worst thing that can be said about a government. Thus, the term's embedded associations are likely to exercise a certain control over our judgments. Since these associations are quite foreign to the government we actually possess, use of the term leads to a sustained bias against modern government, particularly against its administrative features that are most foreign to the concept and practice of direct democracy. Of course, the government we presently possess should not be immunized from criticism, but it should be criticized on the basis of genuine political values, not semiconscious or instinctive attitudes that were embedded in our terminology by theories that we no longer accept.

II. CURRENT THEORIES OF DEMOCRACY

The extent to which continued use of the term "democracy," with its embedded associations, distorts both our descriptive and our normative accounts of modern government can be illustrated by the leading theories of democracy. Four such theories will be considered here: self-government, which comes in both liberal and participatory
forms; elitism; pluralism, with its step-sister, public choice; and deliberative democracy. Each is a vast topic and cannot be fully canvassed. The principal point of the discussion is to demonstrate how these descriptively plausible and normatively meaningful approaches to government have become convoluted and confused by their efforts to characterize themselves as theories of democracy.

A. Self-Government and Participatory Democracy

The concept of self-government, or popular sovereignty, is a natural starting point. It is the oldest of the modern theories of democracy, and the only one that is prominent among political leaders and ordinary citizens. The theory was featured in Thomas Paine’s polemical writings, the Preamble to the United States Constitution, and Lincoln’s Gettysburg Address. One element of the concept is political independence—a particular group of people do not govern themselves if they are controlled by someone outside that group. While this is regarded as a necessary condition for democracy, and one that would be particularly salient to a rebelling colony like the United States, it is obviously not sufficient. A further requirement is that this independent group cannot be dominated by a monarchy, a hereditary aristocracy, or any other predefined subgroup, but must be controlled by the populace at large. Such control is generally conceived as being exercised through the election of the nation’s leaders. According to the classic liberal thinkers, such as Locke, Montesquieu, Madison,
and Mill, elections are the essential component of democracy. The conceptual starting point of this assertion is the idea that people are basically concerned with living their own lives and have a right to do so. But since people's interests invariably clash, as Madison observed, this right, as well as others, can only be secured by government. The government, however, will only safeguard people's rights if its leaders are elected by the people themselves. This is often qualified by the observation that the leaders are not inherently trustworthy. Consequently, a leader's willingness to safeguard people's rights must be secured by structural and substantive constraints, such as the separation of powers and legally enforceable claims by individuals.

As a description of contemporary government, much of this account is unassailable, but characterizing it as self-government raises formidable difficulties. One commonly stated difficulty is that the structural and substantive constraints are counter-majoritarian, or antidemocratic. This tension between democracy and constitutionalism, however, can be resolved by simply acknowledging that they constitute two separate principles. A more essential problem is that the term self-government is an oxymoron because the basic concept of governance is that one person rules over another. It makes sense to say that one rules over oneself only if the self is seen as divided into two opposing parts, such as reason and emotion. Applied to the political realm, this concept suggests that a nation achieves self-government to the extent that one aspect of its totality, or populace, rules over another aspect of that same totality. Whatever this might mean, it clearly conflicts with representative government. In such a government, it is the

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52 See generally ANTHONY H. BIRCH, THE CONCEPTS AND THEORIES OF MODERN DEMOCRACY 45-68 (1993) (discussing the multiple theories of democracy espoused by the different contingents among our founding fathers); DAVID HELD, MODELS OF DEMOCRACY 70-120 (2d ed. 1996) (discussing generally the extent to which the voice of the people influences and plays an active role in different theories of democracy, including those of Locke, Montesquieu, Madison, and Mill).

53 See THE FEDERALIST No. 10 (James Madison) (stating that factions would threaten the stability of the newly constructed union).

This is the central argument of the legal process school regarding judicial protection of individual rights. See BICKEL, supra note 1, at 17 ("Representative democracies—that is to say, all working democracies—function by electing certain men for certain periods of time, then passing judgment periodically on their conduct of public office."); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 2 (1980) ("[A]lthough judicial review is incompatible with a fundamental precept of American democracy—majority rule—the Court must exercise this power in order to protect individual rights . . ."); ELY, supra note 1, at 77-86 (arguing that representative democracy has faults that can result in the violation of minorities' rights and that the courts can remedy these faults).
representatives who are ruling, not the populace.

The advent of the administrative state exponentially increases the difficulties that political representation creates for the theory of self-government. An administrative state is not governed by elected representatives, but by a vast number of appointed, specially trained, hierarchically organized officials. Elections provide the means of choosing a small number of representatives who are authorized to issue commands to these officials and to supervise their performance in various ways, thereby exercising only partial control over their actions. Administrators make the vast majority of government decisions, including many of the most important ones, on their own. In short, elected representatives are only partially responsive to the voters because the inherent limitations of the representative and administrative processes limit voter control over the government. Any control that the people themselves exercise over governmental operations is thus doubly attenuated by the intervening representatives and administrators, and far removed from anything that could plausibly be described as self-government.

Popular sovereignty, a concept that Gordon Wood attributes to the American revolutionaries, is no better than self-government in describing the populace’s role in an administrative state. The term itself is another oxymoron because sovereign originally meant a king or monarch. There is something odd about using the term to describe any aspect of a modern representative republic. The most

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55 See Wood, Creation, supra note 40, at 445-53, 524-47 (stating that the recognition of a sovereign public resolved the conceptual problem of dividing governmental authority among three branches while maintaining a supreme and unitary sovereign federal government).


57 See Edmund S. Morgan, Inventing the People: The Rise of Popular Sovereignty in England and America 58-64 (1988) (stating that popular sovereignty is an argument that legislators used to justify their independent authority, not a device for ensuring representation of the people’s interests). For another argument that the American revolutionaries did not really free themselves from this concept, but simply transferred their idea of a sovereign from the king to the Continental Congress, see Jerrilyn Greene Marston, King and Congress: The Transfer of Political Legitimacy, 1774-1776 (1987).
charitable interpretation is that “sovereign” refers to the ultimate or supreme authority in that republic, but this tells us nothing unless we define the word supreme. One can conclude that the populace or electorate occupies this role by asserting that the supreme authority is the one that chooses or elects the leaders of the government, without being ordered or coerced. This does not change the fact that the voters do not govern, but only exercise an uncertain, secondary control over the government’s administrative apparatus.

In short, the liberal theory of self-government appears to be driven by an embedded commitment to the concept of direct democracy, rather than by any effort to grasp the realities of the representative, administrative state. According to Aristotle, a democracy is a government where citizens rule and are ruled in turn, where all major issues are decided in an assembly, and where government officials are selected by lot and rule for brief periods of time. It is Aristotle and his intellectual progeny who are whispering to us, through the borrowed concept, that the people should govern themselves. We have developed a form of government that is unique to us and was unknown to him. It is a government that includes a wide range of mechanisms for ensuring that it benefits the people, including representative legislatures, elected chief executives, judicial review, and elaborate administrative hierarchies. It embodies many important values, but it simply does not implement the foreign, vaguely defined concept of self-government.

These descriptive defects of liberal theory are widely recognized. One possible response is to abandon the concept of self-government entirely and seek ways of improving the representative, administrative government we actually possess. But because self-government is regarded as a component of democracy, or indeed, as the essence of democracy, and democracy is regarded as sacrosanct, few people are willing to take this approach. Instead, the most common response is a normatively based rejection of the liberal model of human beings and government and an attempt to reconstruct the latter, and possibly the former, so that self-government can be secured. This complex body of scholarship is generally described as participatory democracy. John

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58 See, e.g., ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989) (exploring competing theories of anarchism and elitism and proposing a democratic theory embodying future needs); SARTORI, supra note 17 (reviewing major democratic theories); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1942) (exploring the historical and theoretical underpinnings of socialism and democracy).
Stuart Mill may be regarded as one of its progenitors, and the theme has since been renewed by communitarians such as Amitai Etzioni, Michael Sandel, and Philip Selznick, neo-Marxists such as C.B. Macpherson, Ralph Miliband, and Nicos Poulantzas, industrial democrats such as John Burnheim, G.D.H. Cole, Carol Gould, Paul Hirst, and Robert Dahl in his later work, English idealists such as Bernard Bosanquet and T.H. Green, civic republicans such as Hannah Arendt, Benjamin Barber, Jane Mansbridge, Frank Michelman, and

59 See MILL, supra note 2 (considering bureaucracy as one of the infirmities to which representative government is liable); JOHN STUART MILL, ON LIBERTY (1859), reprinted in ESSENTIAL WORKS OF JOHN STUART MILL 249 (Max Lerner ed., 8th ed. 1971) (arguing that freedom is found in the attitudes of people themselves, and that tyranny of the majority is as dangerous as tyranny of the state).


61 See, e.g., C.B. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY (1977) (reviewing the major democratic theories and suggesting that participatory democracy is liberal democracy); C.B. MACPHERSON, THE REAL WORLD OF DEMOCRACY (1966) (offering a theory of liberal democracy and liberalism generally); RALPH MILIBAND, THE STATE IN CAPITALIST SOCIETY (1969) (giving a neo-Marxist interpretation of the state system, state elite, and role of government); NICOS POULANTZAS, CLASSES IN CONTEMPORARY CAPITALISM (David Fernbach trans., 1975) (exploring the relationship between the bourgeoisie and the state); NICOS POULANTZAS, POLITICAL POWER AND SOCIAL CLASS (Timothy O'Hagan trans., 1973) (examining the capital state through its class system, concept of power, and state regimes).

62 See, e.g., JOHN BURNHEIM, IS DEMOCRACY POSSIBLE?: THE ALTERNATIVE TO ELECTORAL POLITICS (1985) (suggesting that democracy does not exist in practice and that other organizations guide the polity); G.D.H. COLE, THE CASE FOR INDUSTRIAL PARTNERSHIP (1957) (considering the status of the average working individual in Great Britain and how the government could better address his or her absolute necessities); ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY (1985) (describing the interplay between democracy, political equality, and economic liberty); CAROL C. GOULD, RETHINKING DEMOCRACY: FREEDOM AND SOCIAL COOPERATION IN POLITICS, ECONOMY, AND SOCIETY (1988) (providing a new democratic theory shaped by developments in self-management, participation, and democratization in social and cultural institutions); PAUL HIRST, ASSOCIATIVE DEMOCRACY: NEW FORMS OF ECONOMIC AND SOCIAL GOVERNANCE (1994) (espousing associationist societies and their advantages over traditional democracy). For a discussion of Dahl's earlier, better known work, see infra notes 90-93 and accompanying text.

Judith Shklar, social scientists such as Robert Putnam, and even the Port Huron statement of the Students for a Democratic Society. This diverse group is unified by the belief that self-government must be restored by facilitating people's active participation in the governmental process. Some of its members emphasize the idea that citizens can only realize self-fulfillment through such participation. For others, the more important issue is that participation is required to make the government responsive to the people's needs and to combat its leaders' tendency toward self-aggrandizement, self-absorption, or outright oppressiveness. Most agree with both positions and regard the minimally active voters of the modern state as endangering both the personal integrity and the political liberty of all individuals.

Like the claim of liberal theory that self-government actually occurs in modern states, the claim of participatory theory that it ought to occur seems to be derived from the concept of direct democracy. Mill, for example, considered the best form of government to be one in which every citizen not only has "a voice in the exercise of [the] ultimate sovereignty, but [is], at least occasionally, called on to take an actual part in government, by the personal discharge of some public function." We recognize, of course, that this is not our present reality, but the use of the term "democracy" induces us to adopt it as a norm and then to criticize the government we presently possess because it falls short of this norm. Let us change our government; let us change our own personalities so that we can remain within the blessed ambit of our borrowed terminology.

On reflection, however, the concept of self-government that we...
have derived from democracy is no more desirable as a norm than it is accurate as a description. Imposing a moral or legal obligation on people to participate in government is very different from giving them the opportunity to do so. The opportunity to participate is readily recognizable as an element of human liberty, like the opportunity to travel or write poetry. This is a valid norm, being internally coherent and consistent with the realities of the modern state. The argument that all people should actively participate in government is, however, grounded on false consciousness claims. Most people in Western nations choose to avoid participation, even when the opportunity is readily available. They continue to support the specialized, appointed hierarchies of the administrative state although the political rhetoric of our day would easily validate any effort to disband those hierarchies and decentralize their administrative functions to permit more political participation.

False consciousness arguments are epistemologically suspect, since they demand a strong interpretive overlay. They are particularly dangerous in a political context—a great deal of oppression has resulted, and a great deal of liberty has been lost, because sincere, self-righteous people thought they could discern what others needed better than those others could themselves. Moreover, a false consciousness argument with respect to self-government deconstructs itself quite rapidly. The basic justification for self-government is that people know their own interests and should be able to choose a government that will be responsive to those interests. To argue that their lack of desire to govern themselves fails to reflect their real interests is a contradiction. Furthermore, if the claim is true, it undercuts the reason for arguing that people should govern themselves in the first place.

The second difficulty with adopting participatory self-government as a norm is its incompatibility with the administrative state. For many writers, that is the source of its appeal. Mill explicitly identified this theme, contrasting the virtue of participation with the vices of bureaucracy. See id. at 114-18 (praising seemingly tedious and drawn out discussions by representative assemblies as indicators that lawmakers are addressing all voices of the people).
ment, guarding public health, combating commercial fraud, and opposing race and gender inequality. Do we really want to abandon or dilute all those goals in favor of a concept of democratic self-government that is unworkable in practice and foreign to our political tradition?"'

B. Elite Theory

The elite theory of democracy is an outgrowth of the self-government theory and may be regarded as a sociologically based critique of it. It has two major strands: an analysis of elected leaders and an analysis of the electorate. The essential claim regarding democratic leaders is that these leaders, although elected, are drawn from a narrow social group and generally reflect that group's ideological commitments. This group is not necessarily the capitalist class, nor are its commitments inevitably of an economic character. Thus, although the theory bears a certain resemblance to Marxism, it allows for a more complex, less deterministic analysis of society and avoids many of Marxism's theoretical and empirical weaknesses.

Among the major figures in the leadership strand of elite theory are Robert Michels, C. Wright Mills, and Gaetano Mosca. All three

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174 Even more modest levels of participation that would not alter the basic structure of our government may be difficult to achieve in the modern world, and may not have the salutary political effects that are often assumed. Robert Putnam attributes the decline in "social capital," which includes political participation, to deep structural factors such as the decline of the two-parent family, suburbanization, and the growing influence of the media. See PUTNAM, supra note 65. While his account of the baneful effects of this trend on social life is moderately convincing, he cannot sustain his claim that it has similarly deleterious effects on the political structure. In his chapter entitled "Democracy," the only quantitative correlation he provides between his relatively high social capital states (North Dakota, Iowa, and Montana) and democracy is their lower incidence of tax evasion (and it is a rather weak correlation at that). See id. at 348. Putnam assumes that the lower level of tax evasion is attributable to a presumed higher sense of trust among the citizens for each other and for their government. See id. We could lower the rate of tax evasion by allowing the IRS to execute tax evaders on its own authority, however, and few people would associate this mechanism with democracy or with inspiring greater trust in government. In general, it is difficult to see why tax evasion rates have much to do with democratic values. Putnam can only demonstrate that lower levels of participation lead to lower levels of participation. He has no evidence, and no argument, that this phenomenon has produced some observable change in governmental structure.

175 See generally MICHELS, supra note 3 (analyzing the characteristics of leadership and democratic aristocracy); C. WRIGHT MILLS, THE POWER ELITE (1956) (describing the characteristics and duties of the elite within society); MOSCA, supra note 3 (promoting a theory of the ruling class that combines the practical and theoretical aspects of human nature). For an argument that Mills's concept of the power elite was closely
regarded the elite group in a modern democratic state as a sort of technocratic aristocracy, a group of people with exceptional abilities or opportunities. Elites are not unique to democratic states, of course, being found in virtually all societies. The point is that democratic regimes are not exempt from their control. According to Michels, any organization is inevitably dominated by its leaders, who will use their position to favor their own interests rather than the interests of those whom they purportedly represent. Since this is true for political parties as well, it means that the interests of ordinary citizens will always be ignored, even in a democratic, electoral regime. Michels labeled this the iron law of oligarchy.

The second strand of elite theory focuses on the sociology of the voters rather than the leaders. Originated by Joseph Schumpeter, and to a lesser extent, Walter Lippmann, it was elaborated by Murray Edelman, the French postmodernists, most notably Jean Baudrillard, and American postmodernists such as Zygmunt Bauman, Ronald Collins, and David Skover. The claim, in essence, is that the voters are uninformed about the issues at stake in an election and are easily manipulated and misled by rival politicians. This is not because they are stupid, but, as Schumpeter points out, because political issues are so far removed from their daily lives and ordinary knowledge base that they cannot rely upon the native sagacity and experience that they display when making more personal decisions. Jürgen Habermas, whose earlier work is at least affiliated with this school of thought, linked to the administrative bureaucracy, see T.B. Bottomore, The Administrative Elite, in The New Sociology 357, 359 (Irving Horowitz ed., 1964).

See Schumpeter, supra note 58 (stating the importance of the human element in consideration of socialism and democracy).

See Walter Lippmann, The Phantom Public (1925) (showing how the public may affect political discourse).

See generally Jean Baudrillard, In the Shadow of the Silent Majorities, in In The Shadow of the Silent Majorities . . . Or the End of the Social and Other Essays 1, 6 (Paul Foss et al. trans., 1983) (claiming that representation of the silent majority is no longer possible); Zygmunt Bauman, Modernity and Ambivalence (1991) (analyzing the problems of ambivalence and indeterminacy); Ronald K.L. Collins & David M. Skover, The Death of Discourse (1996) (examining the culture of discourse in America and the freedom of speech and press); Murray Edelman, Constructing the Political Spectacle (1988) [hereinafter Edelman, Constructing] (suggesting that mass democracy is a political spectacle and that political problems are meant to rouse the masses); Murray Edelman, The Symbolic Uses of Politics (1964) (examining how people’s different reactions to political actions define the political system).

See Schumpeter, supra note 58, at 262 ("Thus the typical citizen drops down to a lower level of mental performance as soon as he enters the political field. He argues and analyzes in a way which he would readily recognize as infantile within the sphere of his real interests. He becomes a primitive again.").
GETTING PAST DEMOCRACY provides the most systematic, phenomenologically based analysis of the problem.75 Every person's individual experience, he argues, constitutes an all-encompassing lifeworld.76 As long as the forces structuring that lifeworld are contained within it, the external reality that the individual perceives will be comprehensible and the individual's ability to evaluate and control her experience will be considerable.77 In the modern world, however, complex, diffuse, remotely generated mechanisms, most notably the political and economic systems, colonize the individual's lifeworld, rendering it incomprehensible and reducing the individual to the status of quasi-feral being who gibbers in amazement at the waning moon.

Voters not only are being asked to make decisions about issues that are beyond their experience, but also are being systematically manipulated and befuddled by political leaders. Schumpeter, writing before the advent of broadcast television, noted the similarity between political campaigns and advertising, where "merely assertion, often repeated, counts more than rational argument and so does the direct attack upon the subconscious which takes the form of attempts to evoke and crystallize pleasant associations of an entirely extra-rational, very frequently of a sexual nature."78 The present situation can only be worse; as Baudrillard and Collins and Skover suggest, political campaigns are carried out through sound-bites and evocative visual images that do not even masquerade as arguments.79 There is thus no popular will, no general consensus about the common good, and, most strikingly, no final set of natural or ideological interests that voters want to satisfy. The public's political views are essentially based on emotions, which are largely generated by the politicians who are competing for their votes.

Elite theory has been extensively criticized on both empirical and

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76 See id.  
77 See id.  
78 SCHUMPETER, supra note 58, at 257-58; see also id. at 263-64 (discussing the manufacturing of popular will as analogous to commercial advertising). For an elaboration of this theme, see COLLINS & SKOVER, supra note 73, at 139-84.  
79 See Jean Baudrillard, Fatal Strategies 81-99 (Jim Fleming ed. & Philip Beitchman & W.G.J. Niesluchowski trans., 1990); COLLINS & SKOVER, supra note 73, at 3-15 (examining the influence of mass entertainment media on the cultural direction of First Amendment freedoms).
epistemological grounds. The theory's leadership strand would be illuminating and insightful if the elite from which the leaders are recruited could be defined independently of their political positions. But no such definition can be sustained empirically. Even in the Middle Ages, when the nobility claimed to be a dominant elite and then justified its claim with genealogies, heraldic crests, castles, falcons, hunting dogs, and the blessing of the only true Church, commoners were recruited regularly as the king's leading ministers. At present, social mobility is significantly more extensive. In the absence of an independent definition, the elite from which political leaders are chosen can only be identified as the group that produces those same leaders, which is a definition, as Anthony Birch observes, that is largely tautological.

There is, however, a more sympathetic interpretation of this theory. Rather than asserting the existence of an independently established elite, identified by some cabalistic sign, the theory could simply be observing the ineluctable distortions that arise from the separate incentives and mentality associated with the role of leadership. Michels's iron law of anarchy is essentially equivalent to agency theory in microeconomics: just as the firm's agents tend to favor their own personal self-interest over the interests of the stockholders, political leaders tend to favor their own interests at the expense of their followers. In addition, the information, life experience, and sense of responsibility that result from political leadership inevitably generate attitudes that differ from those of the average citizen and even from those that the same individual held prior to acquiring her leadership position.

The elite analysis of voters can be criticized as equally unempirical and tautological. While survey data can demonstrate that citizens in a modern state are not very well informed, it cannot show that they are manipulated, or that their voting decisions reflect artificially constructed inclinations, because no survey can discern their real interests. Moreover, Schumpeter's empirical assertions are partially re-

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80 See, e.g., BIRCH, supra note 52, at 51-53, 169-85 (critiquing the works of various elite theorists); HELD, supra note 52, at 157-98 (rejecting Schumpeter's theory of competitive elite democracy); CAROL PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 17-20 (1970) (same); SARTORI, supra note 17, at 40-46 (clarifying the misunderstandings of political realism).

81 See BIRCH, supra note 52, at 177 ("To say that the reins of government must always be in the hands of a minority is a truism, and to call this minority a ruling class is a tautology."); id. at 169-70 (noting that virtually all organized societies have political authority concentrated in the hands of a small group of people).
futed by his own definition of democracy as a competition for votes between rival politicians. As is generally true with respect to advertising, such competition tends to mitigate manipulation. Politicians, like advertisers, will hasten to point out the distortions and inaccuracies of their competitors. While the truth of politicians’ substantive claims may be difficult to discern amidst a farrago of conflicting views, the fact that this difficulty exists is itself a truth that will be accurately communicated to the voters, furnishing them with the defense of cynicism. More importantly, politicians in a competitive environment are likely to be attentive to the voters’ wishes. The risky strategy of manufacturing a new desire, however possible in the abstract, is likely to seem less appealing than the more cautious one of catering to voters’ existing inclinations.

Here again, however, there is a more modulated, sympathetic interpretation of elite theory’s claim. It need not advance a full-blown false consciousness argument, but it only needs to emphasize another set of distortions in the electoral process. In fact, the modern world presents too many issues and too much information for ordinary voters to process, at least in the amount of time they are willing to devote to these often uninteresting matters. One role of political leaders, particularly when campaigning for election, is to select and structure the issues and to persuade the voters that these issues are important. 

American politicians were a major force in shaping the environmental movement of the 1970s and the family values movement of the 1980s, and they succeeded in both instances through the creative and aggressive use of the mass media, particularly television. 

The major difficulty with both the leadership and the electoral elite theory of democracy does not lie in their description of the contemporary political process but in their claim that the description, by its own force, represents a global condemnation of the modern state’s relationship with its citizens. The overstatements, unjustifiable char-

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82 See SCHUMPE\_TET, supra note 58, at 271 (“We have restricted the kind of competition for leadership which is to define democracy, to free competition for a free vote.”).

83 See STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA 101-17 (1993) (discussing how politicians mobilize political participation around issues); see also EDELMAN, CONSTRUCTING, supra note 73, at 37-65 (discussing how political leaders help construct political meaning and politics).

acterizations, tautological assertions, and despondent conclusions of elite theory seem to spring from its accompanying emotions. All these emotions, however, are not justified by any general metric of citizen control. Modern government is controlled by elites, but what government has not been? Modern voters are not fully informed about political issues, and they rely on leaders to provide both emphasis and information, but when has the entire populace ever been fully knowledgeable and self-directed?

Once these questions are asked, the answer seems fairly clear. The only regime that is obviously superior to our own in these respects is the Aristotelian image of direct democracy. In an Aristotelian democracy, there is no political elite because the officials who control the state are selected by lot, may not hold the same office twice, and serve for a fairly brief and clearly delimited period of time. Moreover, these officials do not even constitute a temporary, situationally defined elite because the assembly of the entire populace is "supreme over all causes, or at any rate over the most important, and the magistrates over none or only over a very few."85 In such a democracy, moreover, the citizens will be well-informed and resistant to manipulation because each person is equally likely to hold office and everyone participates in the assembly where all major issues are debated and decided.

As a descriptive matter, a modern administrative state cannot be governed by an assembly of citizens or run by randomly selected officials serving for short periods of time. Everyone knows that this approach is foreign to our own political tradition. Consequently, we do not use it even for small, simple organizations, like churches, social clubs, or academic faculties, where it would at least be feasible. The historically sedimented image of direct democracy functions as an unconscious norm. It then becomes a matter of seemingly great descriptive significance that our modern state, which we describe as a democracy, falls short of the norm, or that the state is led by leaders and that those leaders influence the beliefs of the people. Thus, the use of the term "democracy" transforms elite theory's plausible but unsurprising observations into a condemnation, and that condemnation becomes a normative theory.

Perhaps it could be argued that elite theory, although overstated and overheated as a description, reflects a genuine commitment. Even if all societies exhibit the features the theory observes, and even

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85 ARISTOTLE, supra note 10, at 240.
if these features are inevitable, they might still be proper objects of condemnation. In order for this condemnation to be normatively coherent, however, it must rely on genuinely felt values, such as security, prosperity, and liberty, not on values that have been smuggled into our thought processes by an historically sedimented term. Leaders often represent their own interests and oppress the people whom they rule, but the separation between the leaders and the populace, which is the reality that lies at the core of elite theory, can have beneficial effects as well. The size of our modern state, its technological complexity, and the unprecedented level of security and prosperity that it provides for its citizens require enormous technical expertise on the part of those who govern. This is obviously true for many appointed officials, but it is even true for elected ones. It is easy to underestimate the skills required for this role, but effective legislators and chief executives typically combine genuine aptitude with extensive practical experience. To fulfill our values, we should not seek to reduce governmental expertise but to expand and control it so it serves the instrumental purpose of improving people's lives. After all, this is the core purpose of modern political morality.

Elite theory also correctly maintains that political leaders strongly affect popular views, "constructing a political spectacle," but this can be beneficial as well. If the issues are so far removed from the lives of the voters, what precisely are those voters' real interests? What is the real interest of the average American voter in the preservation of the Alaskan wilderness or in ensuring that American foreign aid does not subsidize abortions? The voters' beliefs about these issues are deeply felt, but they are not exogenous to the political process. Rather, they are products of the interaction between the voters and the leaders, an interaction that creates new desires through education as well as through manipulation. Even when the voters have direct, material interests, there may be no simple way for them to grasp the relevant issues on their own. For example, nothing affects people more than a financial panic, but the possible mechanisms for eliminating those disagreeable events are unknown to the public until political leaders make them an issue.

To be sure, the means by which contemporary politicians communicate with the public may seem more manipulative than educational. Television, in particular, has been criticized for its debased commercialism and its sound-bite sensibility. Once again, however,
we must be sure that unconscious attitudes do not distort our judgments. The eighteenth century coffee houses, which Habermas offers as the model for intelligent political debate, were attended only by a small segment of the population and may be as irrelevant to us as ancient Athens. In modern society, we not only have television, but also talk radio, newspapers and magazines, the internet, and the most extensive educational system in the history of the world. Even television's cheap commercialism, although deeply offensive to intellectuals, is not necessarily an evil; premodern politicians were undoubtedly more grand and dignified, but their very grandeur could serve as the mechanism for manipulation. Monarchic or aristocratic leaders who appear before the populace clothed in the regalia of a God-ordained regime, accompanied by the graceful majesty of exquisitely decorated palaces and a family tradition reaching back into the mythic past, are not exactly opening themselves to public criticism. In contrast, the aesthetic ruin that the modern world has visited upon its leaders compels them to leave their palaces, strip off their finery, and crawl through the commercialized dust to beg ordinary people for their votes. That may be uncouth, but it is probably a better means of avoiding oppression and securing liberty than any nostalgia-driven opposition to expertise, specialization, or policy elites.

C. Pluralism and Public Choice

A third theory of democracy is pluralism. It also comes in two different versions, but unlike elite theory, these versions emerge from different academic methodologies and involve different normative associations. The first version, which can be called polyarchic pluralism, is grounded in political science and considers its findings a source of optimism about government. The second version, public choice, is grounded in microeconomics and considers its findings a source of pessimism. Despite these differences, both versions share the empirical assessment that the economy and civil society are composed of a multiplicity of organizations. Some organizations have no

88 The phrase is taken from Robert A. Dahl, who is the leading exponent of this theory. See ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION I-32 (1971) [hereinafter DAHL, POLYARCHY] (examining the circumstances that increase the chances of public contestation and polyarchy); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 63-89 (1956) [hereinafter DAHL, PREFACE] (examining polyarchal democracy).
political program, some include a political program among a variety of functions, and some are organized for predominantly political purposes. Politically active organizations interact with government in different ways: they campaign for particular candidates during elections; they lobby the legislature, the chief executive, and the administrative agencies; they negotiate with these various governmental units; and they appeal to one governmental unit against the other.

The pluralist account is specifically designed as an alternative to the image of society embodied in both liberal and elite democratic theory. Against liberal theory, pluralism asserts that the citizenry cannot be regarded as an undifferentiated mass that governs itself through the electoral process. As Robert Dahl, James Buchanan, and Gordon Tullock point out, elections do not effectively aggregate individual preferences. Even if they could, they occur only intermittently and do not address the full range of political issues. Thus, people must express their preferences by contributing and campaigning during elections and by communicating in various other ways with government officials during the relatively long intervals between elections. Usually, all this activity occurs through the medium of organizations. Therefore, organizations, not the electorate in general, exercise control over the government.

Against elite theory, pluralism asserts the multiplicity of organizations and their varied strategies for exercising influence. Dahl and Nelson Polsby have shown, through careful empirical work, that most American governments are not dominated by a single, independently defined elite but are controlled by shifting alliances of organizations. Mancur Olson points out that the political strength of organizations often is not attributable to the social status of their members but to their ability to mobilize resources and votes.

Polyarchic pluralism, represented by the work of Dahl, Polsby, and David Truman, goes beyond these important, widely accepted obser-
vations and advances the further claim that the patterns it has
discerned constitute a theory of democracy. This claim is based on the
contention that all political interests in society, or perhaps the primary
political interests of all members of society, are reflected in the
organizations that vie for political control. In addition, these groups will
exert sufficient force to balance out each other, so that each group
will secure at least minimal recognition of its members' interests, but
no group will become dominant enough to take control of the state
and tyrannize society. Dahl traces this conception of democracy back
to Madison and Hamilton, and describes it as the rule of the minori-
ties, rather than the rule of the majority.93

As critics have regularly observed, this homeostatic account of
pluralism's operation is empirically implausible. To begin with, it
does not ensure that all interests will be recognized.94 Some individu-
als may not find their interests represented by any politically active or-
ganization, or the organization that represents them might be system-
atically excluded from the governmental process by a majority that
defines itself as "us" and the excluded group as "other."95 As a result,
the oppression of racial minorities, religious minorities, linguistic mi-
norities, or any other readily identifiable subgroup threatens the
values of fairness and liberty. The lugubrious history of African-
Americans in the United States is an extreme example, but a continu-
ally instructive one. In addition, it is possible for stable coalitions of

THE GOVERNMENTAL PROCESS (1951).

93 See DAHL, PREFACE, supra note 88, at 4-33.
94 See ELY, supra note 1, at 135 (noting that pluralism has come under powerful at-
tack as more stress is placed on concentrations of power and inequalities among politi-
cal groups); HELD, supra note 52, at 186-220 (discussing the criticisms of pluralism); JACk LIVELY, DEMOCRACY 131-45 (1975) (examining participation as an end of democ-

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allied organizations to dominate the government and oppress large numbers of the populace, perhaps even the majority. This may seem unlikely in a nation such as the United States, where civil society is so diffuse, government is relatively decentralized, and cultural traditions are measured in mere decades, but it is a palpable threat in more settled cultures such as France, Britain, and Japan, as well as in third world electoral regimes with a large uneducated underclass, such as Mexico, Brazil, or India. While elite theory cannot sustain its strong claims that society is dominated by a narrow group, a stable coalition of wealthy or prestigious organizations might achieve such dominance for long periods of time. Similarly, the agenda control described by Lukes and Bachrach and Baratz might serve as a means of foreclosing the populace from raising certain issues.

Although the inaccuracies of pluralism are sometimes ascribed to 1950s complacency, the tone of major works in this tradition does not seem particularly smug. What these works reveal is a commitment to democracy, and perhaps it was this commitment that led them to overstate their case. Dahl’s working definition of democracy is a process “by which ordinary citizens exert a relatively high degree of control over leaders,” and his more elaborate definition of polyarchy specifies the manner in which such control is exercised by individuals. Clearly, this concept is not entirely congruent with his empirical description of the United States as being ruled by the interplay among organizations. The disjunction might have been resolved by stating that these organizations represent the interests of many but not all the citizens, thereby implementing a weaker, second order citizen control over the government. But this was not enough for Dahl; he was using the term “democracy,” and that suggested to him that the people should rule themselves and play an active role in governance. Dahl and other polyarchic pluralists therefore declared that political organizations represent the interests of all ordinary citizens and implement comprehensive citizen control over the state. In other words, the term “democracy” implied direct democracy, and this concept then affected the description of modern government that Dahl proposed.

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16 See Bachrach & Baratz, supra note 94, at 949 (stating that an individual or group could limit decisionmaking to noncontroversial matters by influencing community values and political rituals). But see Lukes, supra note 94, at 21-25 (considering the agenda control analysis a major advance but still finding it inadequate).

17 Dahl, Preface, supra note 88, at 3.

18 See id. at 84-89 (giving a detailed definition of polyarchy).
In some sense, the polyarchic pluralists described America as the modern equivalent of Athens, with organizations occupying the place of idealized Athenian citizens. Like these idealized citizens, organizations are fully informed, participate enthusiastically in governance, and exist in relatively small, manageable numbers. They do not gather in an assembly, to be sure, but the shifting alliances that Dahl and Polsby found enable all of them to rule and to be ruled in turn. This carries the delicious implication that the administrative apparatus is epiphenomenal, a reflection of the collaboration among the meta-citizens who constitute the real essence of our government.

Public choice, the pessimistic, microeconomically inspired strand of pluralist theory, begins from the premise that all individuals are trying to maximize their material self-interest. Since the self-interest of elected politicians lies in retaining their positions, their primary motivation is to maximize their chance of re-election. By itself, this claim is neither particularly pessimistic nor particularly microeconomic; one standard account of representative government is that the representatives should strive to reflect the wishes of their constituents. When this approach is combined with a pluralist view of the general populace, however, it leads to the conclusion that the elected officials maximize their chance of re-election by reflecting the wishes of politically active organizations, rather than the wishes of ordinary citizens. The microeconomic analysis of organizations then adds a further complication. Since all people are motivated to maximize their material self-interest, they will only contribute their effort and money to a political organization designed to obtain legislation or executive decisions that satisfy those interests. Worse still, since government action cannot be directed toward contributors only, but must apply to an entire category, individuals will conclude that they can increase their material advantages still further if they avoid contributing entirely, and "free ride" on the efforts of others. Because each person will reach this same conclusion, large groups of people with vaguely defined interests, such as consumers, taxpayers, or parents, can never organize. The groups that coalesce and obtain sufficient resources for political activity will be those that are sufficiently small and narrowly focused so that the leadership can police the members and impose a sanction for failure to contribute. These will be special interest groups, such as used car dealers, funeral directors, and independent insurance agents. Viewing the political process as a market, where voters buy governmental programs with their votes, the organizational advantages of small, narrowly focused groups constitutes a market
failure; the result is that the government programs generated by this defective political market always favor special interest groups and disadvantage the unorganized majority.93

As a descriptive theory, public choice suffers from grave empirical defects. Many observers have pointed out that it does not accurately explain the behavior of voters, who have no personal incentive to vote, and in any case do not always vote in accordance with their economic interests.109 Neither does it explain the behavior of legislators, who are often motivated by ideological considerations.101 Most significantly for present purposes, it fails to explain the development of politically active interest groups. The public choice analysis of interest group formation was developed by Mancur Olson in his 1965 book, The Logic of Collective Action. Soon afterwards, as social movement theorists such as William Gamson, Ethel Klein, Kristin Luker, Anthony Oberschall, and Sidney Tarrow have observed,102 political entrepreneurs were able to

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101 S. RICHARD F. FENNO, JR., CONGRESSIONAL COMMITTEES 1-14 (1973) (discussing the goals of members of committees in the House of Representatives); JOHN W. KINGDON, CONGRESSIONAL VOTING DECISIONS 29-223 (3d ed. 1989) (exploring the various factors influencing the voting decisions of congressmen); ARTHUR MAASS, CONGRESS AND THE COMMON GOOD 3-74 (1983) (proposing a framework for the analysis of congressional decisionmaking); WILLIAM K. MUIR, JR., LEGISLATURE 105-57 (1989) (exploring the legislative process in the California state legislature).

102 For examples of representative works, see WILLIAM A. GAMSON, THE STRATEGY OF SOCIAL PROTEST (2d ed. 1990); ETHEL KLEIN, GENDER POLITICS (1984); KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984); ANTHONY OBERSCHALL, SOCIAL CONFLICT AND SOCIAL MOVEMENTS (1973); SIDNEY TARBOW,
collect resources from large groups with diffuse interests, and began playing a major role in the issues of the day. These included consumer and environmental activists in the liberal 1960s, and were joined by anti-abortion and family values activists in the more conservative 1970s and 1980s. Not only did these entrepreneurs mobilize significant resources, but they often did so by emphasizing the very same free rider problem that public choice theorists believed would doom their efforts. Consumer representatives collected funds from the middle class to protect low income consumers who lacked the skills to protect themselves; environmentalists collected funds to protect politically inactive wolves and eagles; anti-abortionists collected funds to protect the voiceless, voteless fetus. As it turned out, it was meaning, not self-interest, that motivated many citizens' participation.

The difficulty with this public choice analysis, as a normative theory, is that it is an unexplained comparison. No political mechanism can reflect the views of citizens with perfect accuracy; thus, global condemnation of our existing system is convincing only if some demonstrably better alternative can be presented. Public choice's explicit suggestion that the unregulated market constitutes such an alternative has been rejected for at least a century as normatively unacceptable and politically unsustainable. Everyone recognizes that the modern administrative state has serious defects, and virtually everyone recognizes that its absence, in a mass industrial society, is worse;

Power in Movements (2d ed. 1998).


104 For descriptions of the extent to which people join interest groups to express ideological or emotional needs, see, for example, James Q. Wilson, Political Organizations 33-40 (1995); Thomas L. Gais & Jack L. Walker, Jr., Pathways to Influence in American Politics, in Mobilizing Interest Groups in America: Patrons, Professions and Social Movements 103 (Joel D. Aberbach et al. eds., 1991); Hayes, supra note 94.
that is why no significant group of voters or leading public officials ever contemplate abandoning it. The reason public choice scholars can plausibly advance such a retrograde suggestion is that they are relying on a much less explicit comparison—the comparison between modern government and the polyarchic pluralists' *politeia* of organizations. If one begins with the expectation that interest groups can serve as Aristotelian citizens, determining policy by their direct participation while ruling and being ruled in turn, then the public choice demonstration that these groups do not accurately represent the people's views seems like a fatal criticism. But such a *politeia* of organizations is a chimera born of the premodern concept of democracy. Once this antiquarian ideal is subtracted from the equation, and the inherent inaccuracy of any political mechanism is recognized, the normative force of public choice dissolves.

Both polyarchic pluralism and public choice represent a real contribution to the empirical account of government, but their expectations about the nature of democracy induce them to overstate their case. Moreover, both assume that democracy, with its embedded but unexplained Aristotelian features, is an unquestioned good, so that a government that achieves this vaunted state is worthy of great praise, while one that fails to do so merits condemnation.

**D. Deliberative Democracy**

Deliberative democracy is the final theory that will be considered here. As the most recently developed approach, it incorporates many of the insights, and responds to many of the problems, that have emerged from other democratic theories. Its central claim is that democracy is defined by the existence of a free, inclusive, rational debate by citizens that determines the basic thrust of public policy. In the course of this debate, citizens exchange views, persuade or are persuaded on the basis of sound reasons, and reach conclusions that represent a mutually agreed-upon position at the very least, and perhaps a vision of the common good. Because previous sociological research suggests that these requirements are rarely met, deliberative theory tends to be normative in tone.

Leading proponents of this approach include Bruce Ackerman, John Dryzek, John Ely, James Fishkin, Amy Gutmann and Dennis Thompson, Jürgen Habermas, John Rawls, Cass Sunstein, and Joshua Cohen. For a complete articulation of each proponent's argument, see BRUCE A.
participatory theories because the two perspectives are mutually supporting. Very roughly, participatory democracy focuses on the quantity of citizen involvement, while deliberative democracy focuses on its quality. To meet the participatory standard all citizens must be politically active, but their involvement need only be sincere, not rational; to meet the deliberative standard, citizens must engage in rational discussion of the issues, but many need do nothing more than listen, talk, and vote. While these positions are distinct, few proponents of either view would deny the advantages of incorporating the other. Thus, the benefits of full citizen participation would increase if they participated rationally, while more widespread participation would amplify the benefits of rational discussion among citizens. Perhaps the clearest distinction between the two approaches is that participatory democracy tends to absorb civil society into the political system, while deliberative democracy recognizes, and even celebrates, the independent existence of the political realm.

As a description of the contemporary government's relationship to its citizens, the theory of deliberative democracy displays some distinct advantages over earlier accounts. It acknowledges that the citizens themselves do not govern, and can even accept the empirical conclusion of elite theory that government officials constitute a separate and identifiable group, if only by virtue of their office. Deliberative democratic theory also acknowledges the pluralist insight that citizens are often organized in political, social, or religious groups and that much of their politically oriented activity occurs within such groups. In addition, it opens an inquiry into the process of social interchange, opinion formation, and conceptual development among ordinary citizens that other theories of democracy tend to disparage or ignore.

Because it is characterized as a theory of democracy, however, the deliberative approach has been enticed by the meanings embedded in

ACKERMAN, SOCIAL JUSTICE AND THE LIBERAL STATE (1980); JOHN S. DRYZEK, DISCURSIVE DEMOCRACY: POLITICS, POLICY, AND POLITICAL SCIENCE (1990); ELY, supra note 1; JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM (1991); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (William Rehg trans., 1996); JOHN RAWLS, POLITICAL LIBERALISM (1993); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993); Joshua Cohen, Deliberation and Democratic Legitimacy, in DELIBERATIVE DEMOCRACY 67 (James Bohman & William Rehg eds., 1997). In legal scholarship, this approach overlaps to a considerable extent with the civic republican movement. See, e.g., SUNSTEIN, supra; Michelman, supra note 64, at 17-36 (discussing the civic republican movement in the context of a contemporary Supreme Court term).
the term into two empirically implausible assertions. To begin with, the basic concept of deliberation must be recognized as a metaphor when applied to the political realm. It describes an intensive pattern of statement, response, and counter-response, where the speakers are in direct contact of some sort and can answer or accept each others’ arguments. This undoubtedly occurs among individuals and within certain organizations, but can it really be said to occur within civil society at large? In a modern state, particularly an administrative state with its hundreds of operational agencies, citizens and citizen groups are more likely to be engaged in intensive interactions with a particular agency than they are with each other. Bankers, factory managers, and large-scale farmers do not interact with members of the other groups very much, but they may talk to their own regulatory agencies more often than they talk to anyone outside their immediate families and colleagues.

The metaphor of deliberation among the members of civil society in general seems inspired by an ancient Greek assembly, where all the citizens meet to debate and decide “all causes, or at any rate . . . the most important.”106 No one would take such an image seriously these days, but descriptions of the citizenry, or civil society, as a single entity implicitly invoke that image. The motivation for invoking it is the belief that such descriptions are somehow necessary for a democratic polity; the cost of indulging in this enticing metaphor, however, is that one underemphasizes or ignores the more subtle gradations of contemporary politics.107 Examples of public deliberation include: the way political parties operate; the way existing organizations in civil society formulate political positions; the way new groups coalesce to represent previously unexpressed or nonexistent views; the way these groups communicate with potential recruits, governmental agencies, and each other; and the way national media adopt their approaches and are differently understood or appreciated by these different groups. The image of civil society as a whole deliberating about some issue is an unproductive metaphor driven by the premodern image of democracy.

The second implausible assumption of deliberative theory is that

106. ARISTOTLE, supra note 10, at 240.
public deliberation must be rational. Contemporary political debate obviously fails to achieve this standard, something one can readily confirm by spending a few minutes listening to political talk radio. It is easy enough for people, especially those with secure, middle or upper middle class jobs that depend on rational thought, to condemn this widespread irrationality as a character deficit. But the idea that political issues have consensus solutions that can be perceived by reason is another outmoded notion of premodern origin. Modern social science teaches us that people in a given society often have genuinely incompatible views, based on both their interests and their ideology, that these views are generated by, and generate, intense emotional responses, and that the resulting conflicts are resolved by compromise or suppression, rather than persuasion.\(^{108}\) This does not mean that citizens are incapable of reasoned argument, nor even that reason cannot triumph over emotions under certain circumstances. The point, rather, is that reason operates in particular regions of political discourse, and that interest or emotions prevail in others.\(^{109}\)

If one wants to hear interchanges that approximate the deliberative ideal of rationality one need only turn the radio dial from the political talk show to the sports talk show. There, instead of people shouting, insulting, and interrupting each other, one will find knowledgeable fans debating complex issues in a coherent, often thoughtful manner. An absence of emotional involvement is not the reason why the discourse on the sports program is so much more rational. People care passionately about sports; as Antonio R. Damasio points out, they could not sustain their interest if they did not care.\(^{110}\) But it is relatively easy for them to separate their emotional involvement with their team from their intellectual assessment of its merits. To begin with, the very meaning of sports is that the contestants are roughly matched in ability, so that each team wins some games and loses others. Seeing


\(^{109}\) See Miriam Galston, Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy, 82 Cal. L. Rev. 329 (1994) (describing how Aristotle's view of political behavior incorporated emotive values as well as rationality, and thus conflicts with deliberative democracy's emphasis on rationality). Aristotle believed, however, that people could reach agreement on political issues; his concept of virtue does incorporate certain emotive elements, but he did not see them as having the subjective quality we now associate with emotion. See Alasdair MacIntyre, After Virtue 145-64 (2d ed. 1984).

one's team lose may be disappointing, but it does not challenge either the validity of one's commitment to that team or one's confidence in the fairness of the general enterprise. In addition, winning and losing are unambiguous, and fans evaluate the individual performances that contribute to these results according to a set of internally defined criteria such as home runs, batting average, and runs batted in. Finally, the results of a sports event have no material effect on the lives of fans; it is sad to see one's team lose, but it does not reduce one's salary, endanger one's liberty, or decrease the opportunities available to one's children. These features will never apply to politics. As long as people perceive the meaning of politics as a search for optimal answers, as long as there are no fixed criteria for evaluating political outcomes or individual performances, and as long as politics affects people's personal lives, emotionalism will drench the entire enterprise.

We need not despair, however, about the inextricably emotional character of the political realm. The whole point of a representative, electoral regime is to translate people's intensely felt political beliefs into an orderly, responsive, governmental process. The virtue of our modern governmental system is not that it displaces people's emotions with rationality, but that it displaces people's natural responses to those emotions, which is to kill each other, with an orderly governmental process. Fortunately for us, this does not demand that the citizens possess virtue, but only that they abjure egregious vices.

In his recent book, Between Facts and Norms, Habermas tries to resolve these two implausibilities of deliberative democratic theory. He previously argued that the rationalization of Western consciousness enables us to achieve the emancipatory possibilities inherent in human language. In a rationally, as opposed to a traditionally, ordered world, we might interact with other human beings by means of communicative action, which is speech directed toward reaching mutual understanding, rather than through strategic action, which is speech designed to achieve the speaker's private purposes. Thus,

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the rationalization of Western society would no longer lead to the proliferation of a morally disconnected, instrumental rationality, as Weber envisioned, but to a rational discussion of empirical data, moral positions, and personal emotions, that would abolish oppression, enabling individuals to reach their full potential. In other words, we would break out of Weber's iron cage. What prevents us from doing so is the colonization of the lifeworld by the steering mechanisms of money and power. These place the forces operating on individuals outside of their personal control and comprehension, thus limiting the emancipatory possibilities of communicative action.

Deliberative democracy is a solution to this problem, in Habermas's view, because it institutionalizes communicative action. The collective opinion and will formation that occurs within civil society becomes the steering mechanism for the government, and for the economic system it controls. As a result, the lifeworld of the individual regains the dominance it possessed in traditional society, but it is now a rationalized lifeworld that contains the possibility of emancipation—a possibility that can be realized through the interaction between civil society and the political system. In a metaphor derived from Bernard Peters, Habermas envisions political institutions such as the legislature in the center of society, the administrative agencies surrounding it in a concentric ring, and civil society surrounding the entire government as a second concentric ring. The mechanisms of representative government constitute channels or "sluices" by which the opinions formed in civil society can be communicated to the political institutions at the center. Communicative action enables civil society to generate, or constitute, a "public sphere," which autonomously produces opinions and decisions that influence the political system through these structurally established channels.

Habermas's theory of modern government is an impressive one,

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113 See id. at 243-71 (discussing Weber's theory of rationalization); see also 2 HABERMAS, supra note 75, at 301-403 (discussing possibilities for rationalization in modern society).

114 See 1 HABERMAS, supra note 112, at 113-97 (discussing the relationship between system and lifeworld). For a discussion of the relationship between this aspect of Habermas's thought and elite theory's analysis of voters, see 2 HABERMAS, supra note 75.

115 See HABERMAS, supra note 105, at 287-328.

116 See id. at 354-58. The book to which Habermas refers is BERNARD PETERS, DIE INTEGRATION MODERNER GESELLSCHAFTEN (1993), which is not available in an English translation. The critique advanced in the text, therefore, is a critique of Habermas's use of Peters's book, not of Peters.

117 See HABERMAS, supra note 105, at 329-87.
and it certainly builds on the capacity of deliberative democratic theory to explain the intersection between civil society and government. But it does not really resolve the descriptive implausibilities of deliberative democracy. Neither a shared ordinary language, grounded in the lifeworld, nor a set of overlapping mechanisms for communicating information, are sufficient to transform civil society or its public sphere into a unified, functional entity; the Aristotelian image of an assembly is still distorting the description of the citizenry's actions. In any society there will be generally held views, but those views typically will be expressed by particularized interactions between citizens and government, not in any form of collective expression that reflects the beliefs of the citizenry as a whole. Habermas's metaphor supports this contention rather than his own; if civil society is a second concentric ring surrounding the administrative apparatus, then each portion of that society will be significantly closer to some portion of the administrative apparatus than to most other portions of civil society in general. The idea that the individuals in that widely dispersed outer ring will communicate intensively enough to generate mutually held views and then force those views down narrow sluices, bypassing the adjacent agencies, does not plausibly describe either the image or the empirical data about political behavior.

Nor does Habermas resolve the descriptive difficulties with deliberative theory's assertions about the necessary rationality of citizens. Like Aristotle, he argues that the inherent nature of language demonstrates that language, when used rationally, or communicatively, provides a means of reaching understanding capable of generating political consensus. But Habermas's own need to ground his emancipatory theory in a real-world, institutional context drives his claim that the citizenry is capable of dealing with political issues through communicative action; he fails to explain why people would not use language instrumentally, why they will not continue to treat each other as opponents, and why they will not continue to assess political issues in emotional terms. At most, he claims that, "the lifeworld can . . . reproduce itself only through communicative action." Even

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115 S.v. ARISTOTLE, supra note 10, at 28-29 ("[W]hereas mere sound is but an indication of pleasure and pain, and is therefore found in other animals . . . . the power of speech is intended to set forth the expedient and inexpedient, and likewise the just and the unjust.").

116 S.v. HABERMAS, supra note 105, at 315-28 (discussing the sociological translation of the concept of deliberative politics); 1 HABERMAS, supra note 112, at 273-337 (discussing language as a means of understanding).

117 HABERMAS, supra note 105, at 324; see also id. at 55-56, 352-59; JÜRGEN
assuming that such a process must occur, the claim seems unconvincing. The lifeworld, as the totality of felt experience, contains a variety of emotive, symbolic, and strategic elements; these seem as capable of generating new structures of consciousness as communicative action. In fact, it is difficult to see why rationality, or communicative action, is necessary for any of the political roles that Habermas assigns to civil society other than the role of implementing Habermas's theory.

One could argue that deliberative democracy is primarily a normative, rather than a descriptive, theory, and that its descriptive implausibilities should not detract from its aspirational appeal. But the normative assertions that the concept of democracy produces seem as questionable as its descriptive claims. The idea that civil society should be independent from the government, generating an autonomous discourse and autonomous opinions, seems attractive only until one contemplates the correlative possibility that the government might then be equally independent from civil society. Given the monopoly of physical force that most modern governments possess, such a situation poses significant dangers for our value of liberty. One of the main reasons why government officials in Western nations do not deploy force against civil society is that they are interconnected with that society and feel as much sympathy with some people or groups in that society as they do with many of their fellow officials. More generally, the sluices in Habermas's metaphor seem dangerously narrow and too easily closed off or clogged. A continuous interaction between civil society and government—a porous boundary between the two that allows a constant, high volume flow of information—is more likely to protect the substantive value of liberty, to encourage fairness, and perhaps even to produce efficiency.

With respect to rationality, two observations are worth noting. First, reason may be the best approach for professional academics, but it is a somewhat peculiar stance for ordinary people in a political environment. People tend to have strong feelings about politics; those individuals who can set these feelings aside and address questions about the environment, civil rights, the distribution of wealth, and international relations in purely rational terms may end up being somewhat more bizarre than we envision. Second, Aristotle's belief that reason would lead all people to the same basic conclusions about political issues is not one that most people share today. Given the possibility of different outcomes, an unconditional reliance upon reason may be a dangerous strategy. Conflicts among people who all believe, perhaps

HABERMAS, LEGITIMATION CRISIS 47-75 (1975).
rightly, that they have reached their differing conclusions on the basis of reason may be difficult to resolve in an amicable manner. We may well end up with a more effective, fair, and efficient government if people feel a pre-rational, emotionally based commitment to compromise and act agreeably. One would not want to be agreeable to Nazis, of course; then again, people who are committed to being agreeable probably would not become Nazis in the first place.

III. ELECTORAL INTERACTION

The term "democracy," with its embedded implications, has misled us, distorting our account of the way modern government relates to its citizens. If we want to explain this process, it is preferable to set aside, or bracket, the term, disconnecting its claim to provide an accurate description of the system that we presently possess or to establish an emotionally satisfying and cognitively useful norm. We should then seek an alternative account that will describe our actual government in a more recognizable way and correspond to our genuine commitments more closely.

A. A Microanalysis of Elections

Microanalysis offers a way to develop such an alternative account of our system. This methodology, drawn from transaction cost economics, begins from the premise that the actions of individual human beings create social systems. It does not assume that human beings are rational or motivated exclusively by material self-interest, as does Chicago School economics. People can have emotional or ideological motivations as well, but these motivations must be exclusively their own, as individuals, not a product of the general will or of the autonomous behavior of institutions. Microanalysis attempts to describe the way that the actions of these independently motivated individuals create social systems by tracing the way individual actions aggregate to produce larger structures. It consciously avoids relying on generalizations, conceptualizations, or metaphors, and resists the natural tendency to invoke them as explanatory mechanisms. For example, it abjures explaining governmental action as the result of the balance between different branches of government: what precisely is a "branch" of government and how do these branches "balance" one another? From the perspective of microanalysis, the question is what actions by identifiable human beings result in the observed governmental actions. Of course, it is impossible to eliminate all metaphors
and conceptualizations; the aspiration is to minimize their use and be vigilant against the tendency to rely on them in preference to more concrete explanations.\textsuperscript{121}

The term “democracy” is used to describe the government’s relationship to its citizens, or at least certain aspects of that relationship. A microanalysis of this subject would focus on the particular interactions between human beings that define that relationship. One such interaction, or set of interactions, is the process of voting or elections. Elections have always been regarded as a necessary condition for democracy; they sustain the claim of self-government and provide the primary medium for citizen participation.\textsuperscript{122} Their distortion is the central theme of elite theory,\textsuperscript{123} their validation through the participation of organized groups defines polyarchic pluralism, and their distortion by these groups is critical to public choice.\textsuperscript{124} Elections are the primary subject of the deliberation upon which deliberative theory rests and the principal sluices by which communicative action trickles or gushes into government.\textsuperscript{125} In microanalytic terms, however, elections are simply one particular, albeit very important, type of interaction between the government and the citizenry.

Contrary to the implications of many democratic theories, elections, when viewed in microanalytic terms, are not a mechanism by which citizens control the government; citizens do not, as autonomously acting individuals, select their leaders in the manner of the legendary German tribes.\textsuperscript{126} Rather, an election is a response from a defined electorate that is produced by a mechanism established by the government itself. As we are all painfully aware of after Florida, some organization within government has authority to specify the time and place for voting, set up polls, and list the issues for decision. Various individuals, who are sometimes inside the government and sometimes outside it, will then campaign for the result they want. The citizens respond to this mechanism, and the information provided in the

\textsuperscript{122} See supra note 52 (citing sources).
\textsuperscript{123} See supra notes 71-74 (citing sources).
\textsuperscript{125} See HABERMAS, supra note 104, at 287-328, 352-59.
\textsuperscript{126} TACITUS, \textit{Germany and Its Tribes}, in \textit{COMPLETE WORKS OF TACITUS} 709-16 (Moses Hadas ed. & Alfred Church & William Brodribb trans., 1942) (recounting a well known, possibly fictitious account of democracy among German tribes).
campaign, by going to the polls and casting votes; their votes then constitute a signal transmitted to the governmental mechanism designed to respond to it. The votes of the citizens must be uncoerced, and the citizens must have access to sufficient information so that they understand the basic implications of their votes. These requirements are simply definitional and not based on any theory about the relationship of elections to human rights. If coercion causes the citizens to make a particular choice, then the citizens do not determine the outcome of the election; rather, the mechanism of coercion determines the final result. If voters are uninformed, then they are not really making a choice but are being used as a randomizing mechanism, like the last digit of the pari-mutual handle.

In this microanalysis of the electoral process, the abstract concepts of the populace, the popular will, and public opinion disappear, since only an individual or organization can generate an autonomous signal to the government, and the populace is neither. Elections consist of a government-generated signal that elicits a responding signal from a large group of citizens, acting as individuals. This mechanism constructs the populace, or more specifically, it constructs a particular kind of populace by virtue of its operations. Public opinion polls, focus groups, and mass movements of various kinds construct different populaces. There are, of course, regularities among the lifeworlds of the individuals who comprise each structured populace; the structures and components of civil society will powerfully affect the intersubjective meanings that individuals experience, as Habermas suggests. These phenomena can be analyzed and will yield useful information about citizens' voting patterns in elections, just as they will yield useful information about public responses to opinion polls, focus groups, and grassroots leaders. The pattern, however, is complex—different people will possess different intersubjective experiences, and the way these experiences are activated will vary with the mechanism that regulates their interaction with the government. As Cynthia Farina points out, there is no such thing as public opinion in the abstract, just as there is no assembly—actual, conceptual, or virtual—where the citizens meet to debate the issues of the day.

127 Habermas, supra note 105, at 329-87.
128 Farina, supra note 7, at 992. For an empirical critique of the popular will, see H.B. Mayo, An Introduction to Democratic Theory 87-89 (1960).
B. The Function of Electoral Interaction

Having described the structure of the electoral process, the next step in a microanalysis of that process is to describe the role that the electoral signal plays when it is transmitted to the government. In an attempt to convince themselves that the historically derived expectations of self-government can be fulfilled, many observers tend to overestimate the significance of elections.\(^2\) In fact, the role of elections, although exceedingly important, is delimited. Their most crucial function, as Edwin Baker points out,\(^3\) is to determine the identity of a particular category of government officials, generally those who exercise the broadest and most complete authority. In other words, elections are a mechanism designed to authorize those individuals to exert policy control over the administrative apparatus.

This mechanism offers a number of distinct advantages over other methods of selecting top-level officials. To begin with, it represents a solution to the problem of succession. The threat of a succession crisis hovers over every monarchy because monarchy relies on the ruler's physical ability to produce an heir. While the succession of subordinate officials can be resolved readily in any governmental hierarchy, the replacement of the top-ranking policymaking officials is a more difficult matter. Elections, when fully institutionalized, solve this problem so decisively that the significance of their achievement can be easily forgotten. It is truly impressive, for example, that world powers such as the United States and Britain have not seen a single drop of blood shed during the past century over the potentially incendiary issue of succession. Of course, elections do not guarantee this happy outcome; the American Civil War was triggered by the results of the 1860 election,\(^4\) and other nations have dissolved into chaos when powerful groups refused to abide by an election's results.\(^5\) Elections, however, are one of the best solutions to the prob-

\(^2\) See supra notes 122-25 (citing sources).
\(^4\) See MAURY KLEIN, DAYS OF DEFIANCE 130 (1997) (describing the post-election sentiment that the states would be unable to compromise due to the "irrepressible conflict" between the North and the South); KENNETH M. STampp, AND THE WAR CAME 6-11 (1950) (describing the pre-election unrest in 1860 that foreshadowed the Civil War).
\(^5\) Obviously, if significant groups in a society will not accept the results of the election, the problem of succession has not been resolved. The United States has just finished struggling with its first genuinely disputed election in more than a century. But the succession was resolved without violence to anything except, in Justice Stev-
lems of succession so far devised.

A second role of the electoral signal is to solve the problem of competence. Neither heredity nor random selection provides any guarantee that a successor will be competent; sadists, sybarites, and people with incurably bad judgment are just as likely to succeed under these systems as intelligent and conscientious leaders. Elections, in contrast, generally incorporate some assessment of the successor’s capabilities. By definition, in any genuine election, the voters are presented with an uncoerced choice and receive enough information to understand the nature of that choice. Under these circumstances, the competence of the successor is likely to be a major factor in determining the voters’ choice.

Another aspect of competence, which elections partially resolve, is the problem of debilitation. Hereditary regimes are hostages to the physical body of their ruler. The same is true for electoral regimes if the leading officials are elected for life, like the Pope or the Holy Roman Emperor. Elections held after a term of years or a loss of confidence do not fully solve the problem because the ruler can fall ill before the term runs out or the next election can be organized. Nonetheless, regular elections substantially reduce the likelihood that this will occur. Candidates must be reasonably healthy when they run for office and are likely to fulfill their term, or wear out their welcomes, with their bodies still intact.

In addition to containing implicit information about the competence of the individual selected, the results of an election also reveal the policies that the individual will likely pursue. This provides a partial solution to the endemic problem of governmental unresponsiveness by ensuring that the persons selected will pay at least some modicum of attention to the electorate’s desires. There are two interpretations of how this mechanism functions. The first assumes that the views of the rival candidates are fixed; consequently, the argument states that the voters’ selection of one candidate incorporates a judgment about that person’s policy preferences and competence. The second assumes that candidates are capable of learning, and argues that the selection contains information to which the elected official might respond.

Elections, however, are not a complete solution to the problem of nonresponsiveness. The electorate may represent only a portion of the citizenry, even in a government that we would be willing to de-
scribe as a democracy. The English property qualification, for example, led to the election of representatives who were singularly unresponsive to the poor, while American racial exclusions produced similarly predictable results. There are, in addition, the familiar inaccuracies and distortions of the electoral process that favor the views of the wealthy, the well organized, and the vociferous. Nevertheless, the use of the electoral mechanism for selecting leaders does provide at least some likelihood that the leaders will be responsive to the views of their constituents.

Elections thus provide imperfect, but adequate, solutions to the problems of succession, competence, and nonresponsiveness. Though subject to the inevitable qualifications that attend any humanly designed device, these advantages are considerable—they argue strongly for the value of elections in achieving our commitments to security, prosperity, and liberty. That is, however, all that can be achieved by this particular mechanism. Elections do not enable the citizenry to govern the country, do not provide personal fulfillment through political participation, do not ensure that government will be responsive to organizations representing all sectors of the population, and do not generate collective deliberation within civil society. Most of all, elections do not transform the dispersed, vaguely disaffected citizens of a modern administrative state into a decisionmaking assembly, or allow them to rule and be ruled in turn.

The limited nature of the electoral mechanism that microanalysis reveals brings us back, once more, to the inevitable reality of the administrative state. The factors that preclude the electoral mechanism from effecting any significant transformation of the administrative state are inherent. Ordinary citizens can vote for only a small number of government positions. Perhaps that number is as high as five or six or as low as one or two. Perhaps it depends upon the number of candidates who are competing, the education level of the voters, or the intensity of political controversy at the time. But the limit is real: elections can be used only to select a few officials who necessarily will interpret their role in political terms and who can govern only by issuing broadly defined assignments to the administrative apparatus. Citizens simply will not, and perhaps cannot, absorb the information nec-


134 See generally Ely, supra note 1, at 77-104 (stating that underrepresentation of groups produces defects in the democratic process).
ecessary to elect the hundreds of currently appointed officials who constitute the leadership of the administrative state. Of course, it would be possible to include candidates for these positions on a ballot, but this would only increase the bewilderment that most Americans experience when confronting a ballot that already lists candidates for city council, local school board, state judiciary, municipal water district, and a variety of other institutions about which they have never thought. As previously stated, an election is real only if the citizens possess the information necessary for them to make a real choice; otherwise, the choice is made for them by a political party or some other entity. To list candidates for more than a few positions when citizens cannot possibly evaluate those candidates, or even recognize them, is just as artificial as coercing people's votes. While it is certainly more benign than the coercion employed in the former Soviet Union, it springs from a similar capacity for self-delusion.

The same is true for referenda, where citizens decide specific issues that otherwise are resolved by legislative or administrative action. Such referenda have become common in several American jurisdictions, most notably California. The narrow-minded selfishness that referenda results reveal is disconcerting to many observers who were willing to confer some normative priority on direct expressions of the voters' views. As a result, a scholarly literature has developed to recount the deficiencies and inaccuracies of these referenda—that they are subject to the same interest group pressures that operate in elections for representatives and that they add the further difficulty of asking voters to understand complex, abstract issues rather than more comprehensible choices between rival human beings. These are

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1. Supra text accompanying note 110 (evaluating deliberative democracy and stating that the "virtue of our modern governmental system is not that it displaces people's emotions with rationality, but that it displaces people's natural responses to those emotions... with an orderly government process").

2. See CRONIN, supra note 27, at 38-59 (describing the history of the direct democracy movement and demonstrating how extensive that movement has become); MAGEEY, supra note 27; SCHMIDT, supra note 27 (discussing the popularity of ballot initiatives from the 1960s to the 1980s).

useful points, but the underlying sense of surprise or dismay is misplaced. A referendum, like an election, is simply a mechanism by which citizens interact with the government. Like any mechanism, a referendum possesses both virtues and defects, but it cannot be regarded as a direct conduit to some mystical source of political justification or a means to replace the administrative state with a participatory or deliberative one.

Prescriptions for improving the electoral mechanism provide further insight into its functions in an administrative state. While proposals to expand the range of governmental actions that elections determine often reflect the outmoded quest for direct democracy, proposals to improve the electoral mechanism itself are more realistic. For example, as long as voter participation levels remain relatively low, elected officials will not be responsive to those segments of the population who do not participate—generally, the poor, the marginalized, and the disaffected. The National Voter Registration Act, the "Motor Voter" Law, addressed this problem in part by facilitating voter registration. Additionally, the recent use of the internet in the Arizona primary highlights another possible mechanism to facilitate the process of voting itself. There was no need to wait for such path-


138 See Ruy A. Teixeira, The Disappearing American Voter 8, tbl.1-2 (1992) (showing voter turnout rates in the United States to be considerably lower than in most other democracies); G. Bingham Powell, Jr., American Voter Turnout in Comparative Perspective, in Controversies in Voting Behavior 55, 78 (Richard G. Niemi & Herbert F. Weisberg eds., 3d ed. 1993) ("[V]oter turnout in the United States is very low in comparison with the other democracies.").


141 The Arizona Democratic primary was held on March 11, 2000. Registered Democrats could vote for the candidate of their choice on that day in the regular fashion—at physical polling places. In addition, however, internet voting was provided pursuant to the Democratic Party's contract with a private firm, alternately called Election.com and Votation.com, which previously arranged internet elections for organizations such as the Sierra Club and the Florida Bar Association. See Election.com, Inc., Electronic or Traditional Election Services, at http://www.election.com (last visited Oct. 19, 2000) (providing information on internet based election services). The firm provided remote voting from computer terminals for the four days preceding March 11, 2000. See generally Elections in Cyberspace: Toward a New Era in American Politics (Anthony Corrado & Charles M. Firestone eds., 1996).
getting past democracy

breaking technology, however, as voting could have been greatly facilitated a long time ago had people been allowed to vote by telephone. If private firms can authenticate a credit card over the telephone and ship thousand-dollar items on that basis, the government should be able to authenticate a vote. Our continued dependence on paper ballots and trips to the polling booths is outmoded, and seemingly reflects the Aristotelian image of a physical assembly.

A related need is to provide voters with more complete and accessible information about the choices they face. Television debates represent a good first step, but more needs to be done. Here, again, interactive television or the internet may provide new solutions. None of this will obviate the fact that modern media, even with an interactive component, can be used only for the structured presentation of information to a largely passive audience. To make use of new technological possibilities, we need to wean ourselves from the image of elections as votes cast at the end of a face-to-face debate, and think of them more as a mechanism to achieve certain delimited purposes.

Elections also need to be more fairly organized. Fund-raising ability and personal wealth currently play too large a role. Campaign finance reform is an obvious solution. In the long run, government funding of major candidates at a level that would render additional spending otiose is probably the most promising strategy, but restrictions on the expenditure of private funds also have value. The Federal Election Campaign Act of 1971 was a step in this direction. The Supreme Court, in striking down the expenditure provisions of this Act in *Buckley v. Valeo*, reached its conclusion by equating the expenditure of money with free speech and then arguing that expenditures may not be restricted in an electoral setting. The perspective presented in this Article underscores Edwin Baker's criticism of this conclusion. The Court conceded that free speech is subject to time, place, and manner restrictions, but argued that "expenditure limitations impose direct quantity restrictions on political communication.

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115 Id. at 14-23, 48-50 (holding that "suppressing communication" by restricting campaign expenditures violates the free speech protections of the First Amendment).
116 See Baker, supra note 130.
and association." As Baker points out, this argument analogizes an election to society and encourages the idea that an election is constitutive of society as a democracy. If, instead, an election is viewed as one particular mechanism by which the government and the citizens interact, a different analogy emerges. An election resembles a trial—a specific, highly structured mechanism by which we implement a particular function in our system. Fairness demands that both sides in a civil trial not only be given the opportunity to state their case, but also that their statements be limited and channeled to create a rough equality between opposing parties. This equality is not complete, of course—the side with more money can buy a better lawyer—but it would be truly odious if one side could buy more time to state its case or cross-examine the opposing witnesses. Elections present a similar issue: they are not distillations of a free society, where unrestricted quantities of speech are deemed desirable. Instead, they are specific mechanisms by which such a society solves the problems of succession, competence, and nonresponsiveness. Consequently, placing limits on the expenditure of funds so that the candidates can state their cases in a roughly equal manner should be permissible.

C. The Value and Meaning of Electoral Interaction

The foregoing account of electoral interaction's functions may seem mechanistic, precisely because it avoids resonant terms such as "democracy" and employs the microanalytic approach of focusing on specific individual behaviors. But microanalysis, unlike Chicago School economics, does not adopt a reductionist view of human beings as motivated exclusively by material self-interest. Instead, it allows for a full range of emotional and ideological motivations, provided that these motivations are actually experienced by individuals. In fact, by avoiding both abstraction and reductionism, microanalysis offers an account that corresponds more closely to our genuine commitments relating to the electoral process, and captures the perceived meaning of that process more accurately than the concept of democracy.

Our use of the term "democracy" belies our genuine commitments to security, prosperity, and liberty. At present (within the last
century at least), we achieve security and prosperity through the mechanisms of the administrative state. These mechanisms comprise our primary means of governance and of addressing many crucial social issues. The anti-administrative undercurrent in democratic theory—the myth of self-government, the condemnation of elites, the pluralist praise for competing interest groups, the condemnation of the government that those competing interest groups disproportionately influence, the image of public deliberation, and the more subterranean concepts of selection by lot and direction by public debate—represents a rejection of the government we actually possess. Describing the electoral process in microanalytic terms avoids this anti-administrative implication. In fact, it specifically acknowledges the administrative nature of the modern state and the use of elections to select officials who exercise a general control function, rather than actually governing the state. This is not to suggest that our existing government is unassailable. We certainly can improve our governmental system, perhaps by regulating more, perhaps by regulating less, and perhaps by regulating differently. But we are committed to its basic structure and, despite our discontent and disaffection, no one has suggested seriously that we abandon it.

The term "democracy" is most commonly linked with our commitment to liberty. To some extent, this connection is the result of purely stipulative definitions. If democracy is defined as a system of government in which all citizens have the right to speak freely, then democracies undoubtedly provide freedom of speech. The instinct behind a usage of this sort is a pre-analytic commitment to the term democracy itself. The result is an agglutinated discourse that forestalls analysis of the real connection between government structures and their consequences. If we want to know which governmental structures secure liberty, it is best to avoid the term democracy, with its embedded normative associations, and ask directly how such structures operate. This turns out to be a complex empirical question that is best answered by using the alternative description of electoral interaction. In light of this description, the answer is that such interaction secures liberty to some extent, by making government somewhat responsive to the electorate and requiring a certain level of free speech so that the electorate can make a genuine choice. But as both abstract analysis and historical experience readily demonstrate, electoral interaction does not preclude severe restrictions on liberty. Historical examples of such severe restrictions include nineteenth century Britain’s rigid class structure, nineteenth century America’s enslavement of one
portion of the population, and both nations' subordination and disenfranchisement of women in that era. To say that these nations were not democracies is a counterintuitive and counterhistorical use of the term, but to say that they were seems to undervalue the liberty interests that they denied.

Microanalysis also enables us to form a more realistic assessment of the meaning of electoral interaction. Some observers' tendencies to overestimate the significance of the electoral process stem from the unrealistic aspirations that the concept of democracy induces; the countervailing tendencies to overestimate the insignificance of elections stem from the frustration of those same outmoded aspirations. The mere fact that elections do not secure self-government, participation, or deliberation does not mean that they are merely a mindless selection among competing elites or blind expressions of material self-interest. Rather, elections are an important part of our governmental system and, as such, have meaning for both elected officials and the electorate.149

For elected officials, election is a source of status in addition to their actual authority; it is an indication to these officials that they are central to the governmental process. In an administrative state, most public officials are appointed, often by other officials who supervise them and function as their structural superiors.150 Elections are used to determine the identity of officials who have no direct superiors and, therefore, cannot generally be chosen by the convenient process of appointment. Elected officials generally are the primary policymakers in the government, the persons assigned the most extensive authority. Thus, selection by an electoral process indicates that one enjoys the prestigious position of having no superior and being responsible for making the most important decisions.

Beyond the status issue, popular election places the official in an interesting middle ground between expertise and politics. The usual account, as conceived by Edmund Burke151 and elaborated by Hanna

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150 See HENRY JACOBY, The Bureaucratization of the World 31-35 (Eveline Kanes trans., 1973) (discussing characteristics of bureaucracies); MAX WEBER, Economy and Society 212-29 (1968) (analyzing types of authority, including legal authority with a bureaucratic administrative staff).

151 See BURKE, supra note 19.
Pitkin,\textsuperscript{154} is that an elected official—a legislator, paradigmatically—can either be a conduit, transmitting the views of her constituents, or a trustee, chosen by her constituents to exercise her own best judgment.\textsuperscript{155} This formulation, however, seems overly schematic. Empirical evidence suggests that most legislators construct a meaningful account of their professional lives by integrating their roles as elected representative and government official.\textsuperscript{156} This integration requires combining a variety of complex inputs from the electorate with an equal or greater variety of complex inputs from other persons in the governmental structure. Elected officials tend to view their role as linked precisely to this process of mediating between two distinctly different sources of influence and information. The officials are able to do so because they can exercise practical judgment—the pragmatic, common sense approach that American decisionmakers tend to regard as their essential skill.

For voters, elections also possess a variety of meanings. Perhaps the most important include the government's duty to serve the public's needs and the voters' ability to evaluate and criticize the government's performance of that function. These factors may seem to be rather rudimentary entitlements, far less gaudy than self-government or popular sovereignty, but this impression derives from the premodern concept that people are capable of self-rule and the superimposed norm that they are supposed to do so. The administrative state's norm is that government is an instrumentality for meeting the needs of its citizens. Thus, the responsiveness that elections help secure is central to our entire conception of government. Elected officials view their election as a validation because they share this same instrumental norm.

A second meaning of elections, as a device for solving the problems of succession, competence, and nonresponsiveness, is that the voters are part of the same political system as the government. While

\textsuperscript{154} See Pitkin, \textit{supra} note 21 (providing an exploration of the theory of political representation).

\textsuperscript{155} See Hamilton, \textit{supra} note 20, at 558-62 (advocating the attorneyship model).

\textsuperscript{156} For an overview of empirical evidence, see generally JAMES DAVID BARBER, THE LAWMAKERS: RECRUITMENT AND ADAPTATION TO LEGISLATIVE LIFE (1965); CHRISTOPHER J. DEERING & STEVEN S. SMITH, COMMITTEES IN CONGRESS (3d ed. 1997); FENNO, \textit{supra} note 101; KINGDON, \textit{supra} note 101; MAASS, \textit{supra} note 101; MUIR, \textit{supra} note 101; Edward L. Rubin, \textit{Legislative Methodology: Some Lessons From the Truth-in-Lending Act}, 80 GEO. L.J. 233 (1991). Public choice scholars generally take issue with this view and assert that legislators are pure election maximizers. Unlike the sources cited above, however, they rarely interview actual legislators.
elections do not transform voters into rulers of the polity, they enable voters to see themselves as members of it. At the individual level, making a choice and casting a vote means that in some sense one is functioning as part of that governmental structure. In addition, voting often creates an emotional bond between voters and selected candidates. This bond is important in securing the enthusiasm of those who favored the ultimate victor, but is even more important in securing the quiescence of those who favored her opponent. At the institutional level, any group that participates in the electoral process, no matter how marginal its origins or radical its political philosophy, is likely to modify its message to attract more votes or support more incremental changes that might actually be implemented. Thus, the group is likely to organize its efforts around electoral politics to an increasing extent as time progresses. Overall, it will tend to develop an internal structure that is homologous with mainstream groups, a phenomenon that Paul DiMaggio, Walter Powell, and John Meyer have described as institutional isomorphism. Elections are thus effective means of defusing opposition to the government, even more effective than oppression. Often, this effectiveness is a source of frustration to those observers who would like to see disadvantaged or marginalized groups serve as the shock troops of radical change, but the members of those groups generally decline to play that role once they are involved in an electoral system.

Normative considerations, once again, can extend to these observations. We tend to regard elections as the expression or natural outgrowth of a profound and mysterious conception of social ordering known as democracy. At our very worst, as Hannah Arendt points out, we then treat this conception as the particular creation of the Anglo-Saxon volk, sprung from the soil between Kent and Chester, and capable of transplantation only to new lands where English-speaking

\[155\] See CHARLES TILLY, THE CONTENTIOUS FRENCH 1-8 (1986) (arguing that modernization of government and creation of national electoral politics induces citizens to reconceive their own political activism in national, and often electoral, terms).

people have exterminated or suppressed the native population.\footnote{See Hannah Arendt, The Origins of Totalitarianism 175-84 (1951) (discussing the concept of human rights in terms of British exceptionalism and its attendant attitudes).} Even if we free ourselves from this unattractive mythology, we maintain our view that fair elections are part of an elaborate, sophisticated, somewhat fragile governmental system that can only be implemented, and perhaps only merited, by a well educated populace that is already committed to its underlying morality. What our exalted and outmoded conception of democracy obscures is that elections are a governmental mechanism. They neither require nor ensure individual liberty and social justice, but, if run in a reasonably honest manner, they can solve the problems of succession, competence, and nonresponsiveness, while binding the government to the welfare of the citizens and the citizens to the stability of the government.

What would have happened had we decided to fight the Cold War by supporting elections instead of anti-Communism? Effectively, what we said to the leaders of third world nations, such as El Salvador, Nicaragua, South Korea, and South Vietnam, whom we regarded as incapable of establishing our sophisticated mode of democratic governance, was: "We will give you money, we will give you armaments, we will train your security forces to hunt and destroy anyone who rebels against your regime, if you will declare yourself an anti-communist and leave your infant industry and outdated agriculture in the hands of your entrenched, sybaritic elites." What we might have said was: "We will give you money if you run fair elections." As recent events have demonstrated, this turns out to be a rather appealing message.\footnote{See Jose Maria Maravall, Regimes, Politics and Markets: Democratization and Economic Change in Southern and Eastern Europe (Justin Byrne trans., 1997) (examining the political economy of democratization in southern and eastern Europe); Basilios Tsingos, Underwriting Democracy: The European Community and Greece, in The International Dimensions of Democratization: Europe and the Americas 315-55 (Laurence Whitehead ed., 1996) (evaluating the extent to which the European Community has been central to democratization in eastern Europe by helping to "permanently entrench democratic institutions by offering an elaborate structure of economic and social incentives").}

Moreover, once elections are institutionalized, they possess unexpected staying power as a result of the problems they solve and the commitments they generate. It is impossible to know how such a strategy would have worked, but, despite its more modest scope, it would have certainly been more consistent with our own political morality.
IV. ADMINISTRATIVE INTERACTION

If the foregoing discussion seems reductionist, despite its references to social meaning, the reason is that it addresses only one aspect of the electoral process: the signal from the voters to the government. Traditional theories of democracy generally focus on this same event, although they tend to treat it as an apotheosis, rather than a signal. Contemporary political and legal analysis is more sophisticated, however, and focuses on the multiplicity of interactions that accompany elections. One such interaction is lobbying by private groups, itself a complex process that includes threatening, begging and cajoling, testifying, supplying information, and drafting legislation. Other types of interaction are the various vote-gathering, support-building, and opposition-blunting activities in which elected officials engage. These include campaigning, providing information to constituents, negotiating with interest groups, and casework—that is, intervening with other parts of government on behalf of influential groups or individuals.

These interactions provide means to amplify some of the advantages of elections by transforming the intermittent signal that elections provide into a continuous one. Of course, they have no direct effect on the problems of the succession, competence, or debilitation of top-level officials. They have important effects on elections' role in achieving responsiveness, however, and on the social meaning of elections. The information flow provided by lobbying and interelection support-building is much more intensive and detailed than that provided by the election and its attendant campaign.

For citizens, these activities provide additional ways of interacting with the government beyond casting a vote, and thus give them a greater sense of connection with the government. Of course, lobbying and support-building activities may favor some groups over others, and may distort the equality of votes upon which elections are

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159 See generally AFTER THE REVOLUTION: PACS, LOBBIES AND THE REPUBLICAN CONGRESS (Robert Biersack et al. eds., 1999) (analyzing the Republican-controlled Congress of 1996 and its impact on various lobbying groups); JAMES DEAKIN, THE LOBBYISTS (1966) (discussing both the attributes and shortcomings of lobbying groups and their effect on government); MICHAEL T. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS (1981) (defending the importance and influence of interest groups by analyzing different legislative circumstances); KEN KOLLMAN, OUTSIDE LOBBYING: PUBLIC OPINION AND INTEREST GROUP STRATEGIES (1998) (explaining the reasons why, and the occasions when, interest group leaders lobby for public opinion in addition to their primary objective of lobbying for legislative influence).
based. Elections are subject to similar distortions, however, and all political mechanisms have disadvantages. The point is to understand the functions that each particular mechanism can potentially fulfill, without resorting to global condemnations based on inherited images of direct democracy.

A. The Nature of Administrative Interaction

Continuous interaction between private citizens and government officials is not limited to elected officials. With the advent of the administrative state, and the consequent growth of governmental functions at the administrative level, interactions between citizens and nonelected officials have become equally intensive and significant. Private groups lobby agencies with equivalent assiduousness: they threaten, beg and cajole, testify, supply information, and draft regulations just as they do with elected legislators and elected executives. Conversely, agency officials are often as assiduous as their elected colleagues in building support or blunting opposition. Their motivation is not to gather votes, but to obtain cooperation in program implementation and avoid appeals from the public to superior authorities. They do not campaign in the literal sense, but they certainly give speeches, provide information, negotiate with interest groups, and issue administrative indulgences that are equivalent to casework. One cannot view these interactions as dependent on elections for their significance because administrative officials are not elected. Rather, understanding their role in modern government requires a new perspective that is not directly linked to the electoral process.161

Recent scholarship in political science and sociology includes several studies containing insightful microanalyses of these interactions and their contribution to the relationship between citizens and gov-

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161 This is the theme of both progressive critiques of the governmental process. See, e.g., CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 239-52 (1913) (suggesting that ratification of the Constitution occurred in part because of constitutionalist interest groups' efforts and not because of its popularity among either the public or legislators); GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM 2-10 (1963) ( theorizing that the "progressive era" of 1900-1916 is a misnomer because politicians often based decisions on the solutions proposed by, and for the benefit of, a select group of powerful businesses); see also supra note 90 (arguing for a model of shifting coalitions and organizational alliances as the basis of community power).

161 See POST, supra note 149, at 3-10 (suggesting that our standard mode of political discourse places democracy and administration in separate domains).
ernment. To some extent, however, the continued use of the term "democracy" distracts even this more sophisticated body of scholarship. Discussion often focuses on whether interaction between citizens and administrative agencies contributes to, or derogates from, democratic values, with the term "democracy" typically being undefined, treated as an unquestioned good, and inevitably sedimented with all its premodern implications. Once we get past this term, however, we can avoid these anguished questions and focus on the actual interaction between citizens and administrative officials. As Peter Schuck suggests, this interaction possesses a number of structural

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162 See Gordon Adams, The Politics of Defense Contracting 165-72 (1982) (addressing the problem of private members of defense advisory committees and their self-interested motivations); Eugene Bardach & Robert Kagan, Going by the Book: The Problem of Regulatory Unreasonableness (1982); John E. Chubb, Interest Groups and the Bureaucracy: The Politics of Energy 18-57 (1983) (suggesting modern energy politics must be understood in terms of the relative influence of numerous groups contending for protection or promotion by the government); Cook, supra note 7, at 87-99 (examining government regulations and the processes and factors effecting them, particularly within the context of interest groups and the Environmental Protection Agency); Martha Derthick, New Towns In-Town: Why a Federal Program Failed 25-102 (1972) (describing seven attempts by the Johnson Administration to build new communities on federal land, the reasons why the initially promising projects failed, and the persons and groups responsible for such failures); Martha Derthick & Paul J. Quirk, The Politics of Deregulation 147-206 (1985) (crediting Congress for listening to, and heeding, public opinion over the efforts of lobbyists and industrial interest groups in the deregulation of the airline, telecommunications, and trucking industries); Jeffrey L. Pressman & Aaron Wildavsky, Implementation 35-69 (3d ed. 1984) (discussing the failed implementation of federal employment programs in Oakland, California, and the problems of policy implementation in general).

163 For arguments that administrative interaction contributes to democracy, see Marshall J. Breger, Government Accountability in the Twenty-First Century, 57 U. Pitt. L. Rev. 423 (1996) (suggesting that increased technological opportunities for Congress to "double-check" regulatory goals will foster a broader range of discretion by bureaucrats); Frank Fischer, Citizen Participation and the Democratization of Policy Expertise: From Theoretical Inquiry to Practical Cases, 26 Pol'y Sc. 165 (1993) (attempting to demonstrate that collaborative citizen-expert inquiry may hold the key to solving contemporary policy problems); Ernest Gellhorn, Public Participation in Administrative Proceedings, 81 Yale L.J. 359 (1972) (examining the trend of allowing citizen groups and individuals to intervene as full-scale public parties in administrative hearings). For arguments that this interaction derogates from democracy, see Kay Lehman Schlozman & John T. Tierney, Organized Interests and American Democracy 386-410 (1986) (describing interest group politics as characterized by "dispersed inequalities" and concluding that these inequalities are likely to persist for the foreseeable future); Sidney Verba & Norman H. Nie, Participation in America: Political Democracy and Social Equality (1972) (highlighting the negative impact of the close relationship in America between social status and political participation); Lowi, supra note 6, at 166-68 ("Delegation today represents a bastardization of earlier realtides.").
similarities with the electoral process and often serves similar purposes.\footnote{See Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 Cardozo L. Rev. 775 (1999) (arguing against a proposal to resurrect the nondelegation doctrine vis-à-vis government agencies).}

The point is not that administrative interaction is good or bad; clearly, it is both, just like elections. In some cases, interest groups appear to dominate both processes,\footnote{For an analysis of the way that different types of groups interact with administrative agencies, see Mark Seidenfeld, *Empowering Regulatory Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation* (1999) (unpublished manuscript, on file with the University of Pennsylvania Law Review).} while in other cases, general public values seem to control. To think clearly about these processes, we must stop comparing them to the standard of self-government, participation, or deliberation derived from a pre-administrative concept of democracy having little relationship to contemporary government. We also need to stop regarding these mechanisms as qualitatively different from elections and making categorical judgments on the basis of this perceived difference. They are different, to be sure, but they are both part of the interactive process by which a modern administrative state relates to its citizens.

According to John Rohr, this overlap between elections and administration is part of America's constitutional design.\footnote{See ROHR, supra note 4 (claiming that the modern administrative state is consistent with the goals of the Framers).} As originally conceived, the Senate was a quasi-executive body, possessing expertise and stability, while the House of Representatives was expected to maintain direct contact between the people and the government.\footnote{See id. at 28-53 (comparing the rationales behind the creation of the Senate and the House of Representatives).} The Framers, worried that House districts were too large for the Representatives to fulfill this function, reduced them from 40,000 to 30,000 people on the last day of the Convention.\footnote{See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 643-44 (Max Farrand ed., 1966) (describing unanimous approval of the motion of Mr. Gorham to substitute 30,000 for 40,000 as "greater security for the rights and interests of the people").} At present, of course, House districts have grown to about half a million people, which is one-seventh of the population of the entire United States at the time of ratification. Their intended function, Rohr argues, fell to administrative agencies, the one part of government numerous enough to maintain direct contact with a population of 250 million. The fact that agency officials are unelected may seem to distinguish them from the original representatives, but, according to Rohr, both
the federalists and anti-federalists agreed that elections are irrelevant to the process of representation. Since the people are sovereign, government officers who are selected in accordance with a Constitution ratified by the people can be counted as their representatives.169

Rohr's account appears a bit overstated, primarily because it relies too heavily on the origin of government as a source of legitimacy. The initial ratification of a governmental design surely does not guarantee that our norms will be fulfilled; the ratified design must contain mechanisms to implement those norms on a continuous basis. Elections have proven to be a crucial mechanism for selecting the most authoritative government officials, and it seems unlikely, although not inconceivable, that we would be able to achieve our norms through any other means. Rohr, however, is correct in noting that the Framers were sophisticated enough to look through this tradition to its underlying purpose even though they may have been motivated largely by tradition in their use of elections. They recognized that election is indeed a mechanism, and might well have searched for other mechanisms, in the radically different setting of the modern state, to achieve their underlying commitments.170 In fact, the interaction between administrative agents and the citizenry is an essential means by which we currently achieve those commitments—security, prosperity, and liberty. They are not the same as elections, but they provide a substitute when the electoral process reaches its natural limit. The tendency to ignore this continuity and underemphasize the value of administrative interaction is another effect of using the term "democracy" to describe our current government.

Moreover, there is a further continuity that democratic theory tends to ignore. Just as citizens interact with administrative agencies

169 See ROHR, supra note 4, at 45-46 (discussing the suggestion that the administrative state may cure the defects of the representative system).

170 A number of observers note that these commitments cannot be described in terms of the direct democracy concept of self-rule. See Rebecca L. Brown, Accountability, Liberty and the Constitution, 98 COLUM. L. REV. 531 (1998) (arguing that elected and unelected branches of government are interdependent rather than in opposing positions of legitimacy); Erwin Chemerinsky, Foreword: The Vanishing Constitution, 103 HARV. L. REV. 43 (1989) (describing the 1988-1989 Term Rehnquist Court jurisprudence and its effects on the majoritarian paradigm); Lawrence G. Sager, The Incorrigible Constitution, 65 N.Y.U. L. REV. 893 (1990) (recognizing the inability to harmonize absolute popular sovereignty with constitutional traditions). Given the fact that they were trying to solve practical problems of governance and that direct democracy was a Greek idea with little role in the development of Western governments, the Framers' rejection of direct democracy is not particularly surprising. The sense of unease that it generates dissipates after getting past the description of our Constitution as a "democratic" one.
in a variety of distinctive ways, these agencies interact with their administrative and elected superiors in an equivalent fashion. They lobby their superiors, threatening, begging, and cajoling on the basis of the emergent institutional behaviors intersubjectively generated within their structure. When dealing with the legislature—their ultimate superior—agencies generally favor or oppose legislation that affects them. In a parliamentary system, their position typically will be negotiated within the confines of the ruling party; in a presidential system, like the United States, agencies often testify, supply information, and draft legislation just like nongovernmental lobbyists. Conversely, elected officials often engage in support-building or opposition-blunting among the relevant administrative agencies, as well as among citizens. All of these activities need to be understood by a microanalysis of their actual operation, not by global characterizations.

B. The Function and Meaning of Administrative Interaction

As stated, administrative interaction differs from electoral interaction in that it does not address the issues of succession, competence, or debilitation. Elections are unnecessary at the administrative level because an administrative hierarchy deals with these issues quite definitively through the appointment process. Administrative interaction, however, does address the issue of government responsiveness in a manner that is quite analogous to electoral interaction, and exercises similar influences on the social meaning of governance. To start, it secures responsiveness through a continuous flow of information from citizens to government that resembles lobbying in many ways. Interestingly, this process is not tied to an electoral sanction, but stands on its own. As Mark Seidenfeld suggests, there has been an

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171 See, e.g., Adams, supra note 162 (examining the external and internal politics of the government's defense agencies and programs); Derthick & Quirk, supra note 162, at 74-85 (weighing the influence of staffs on commission leaders in the deregulation of the airline, telecommunications, and trucking industries); Ronald N. Johnson & Gary O. Libecap, The Federal Civil Service System and the Problem of Bureaucracy: The Economics and Politics of Institutional Change (1994) (discussing the evolution of the federal civil service system and the relationship of government employees to their elected and appointed leaders); Thomas K. McCraw, Prophets of Regulation 308 (1984) (rejecting the assumption that regulators must have failed simply because regulation has failed to achieve its goals and fulfill its purposes); Michael Pertschuk, Revolt Against Regulation: The Rise and Pause of the Consumer Movement (1982) (recalling experiences and lessons learned during the author's career as a consumer advocate and eventual head of the Federal Trade Commission).

172 See Seidenfeld, supra note 7, at 1516 ("Congress should amend the Administra-
effort to provide a legal basis for it by statute, specifically the Administrative Procedure Act. First, the Act requires the agency to give notice of proposed rulemaking to the public, and gives any interested person an opportunity to submit written comments to the agency before the rule goes into effect. Second, it provides various procedural protections, such as notice and a hearing, for a person subject to an administrative adjudication. Third, the agency's compliance with the requirements is supervised by the judiciary. In the case of administrative adjudication, this supervision is fairly stringent since the agency is expected to demonstrate that it has taken account of the nongovernmental inputs in various ways, and since there exists a thousand year-long tradition about what these expectations mean. In the case of rulemaking, the supervision is somewhat less stringent, and certainly more mercurial. There is no clear idea about the way the agency is expected to respond to submitted comments—the statute provides no guidelines and the whole mechanism is only fifty years old, having been invented by the statute and lacking the tradition that establishes an intersubjective comprehension of its meaning. As a result, the judiciary's doctrinal gyrations in carrying out its supervisory function regarding regulations have become notorious.
These statutorily defined and judicially supervised nongovernmental inputs do not, however, represent the total repertoire of interactions between agencies and the society. Indeed, they include only the small fraction of that repertoire that receives disproportionate attention because it fits traditional models of governmental action. Regulations seem particularly significant because they are analogized to statutes, both in the scholarly literature and the Administrative Procedure Act itself. Adjudications acquire a similar prominence because they are analogous to civil trials. In fact, the relationship between any agency and those whom it regulates goes far beyond anything that resembles either legislating or adjudicating. The agency is in direct and continuous contact with the regulated industry. It interprets existing rules, enforces those rules, investigates potential infractions, demands information about general industry conditions, supplies information about legal compliance or technical requirements, provides employees to the industry and draws its own employees from that source, opposes the industry’s legislative initiatives, or joins it in those initiatives. During this process, it constantly receives communications from the firms it regulates. These communications include information, suggestions, complaints, threats to appeal to the agency’s administrative or elected superiors, promises to comply, and threats and promises to sue.
Nor are these the only signals that the agency receives from non-governmental sources. In situations where the regulated parties opposed the initial statute—and this is not always the case, by any means—there will be other groups that favor its enactment; if there were no such groups, there probably would have been no statute. These groups, which, in a typical case, may consist of environmentalists, consumer advocates, social welfare advocates, and investor representatives, also send signals to the regulating agency. Moreover, the general norms that support the electoral process, and are supported by it, are that the government is an instrumentality of its citizens and that the citizens are part of the political process. These norms often increase the influence that public interest groups exert. The result is that a regulatory agency will receive strong signals from civil society, as well as from the economic system represented by the regulated firms.

Both legally regulated and relatively unregulated interactions at the administrative level are crucial elements in the relationship between an administrative state and its citizens. These interactions serve some of the same purposes as elections in that they make government more responsive to citizens, and they contribute to various aspects of its social meaning. This does not mean, once again, that they always achieve these goals any more than elections always do. It simply means that the basic structure of legally regulated and relatively unregulated interactions gives them that potential. When we regard

\[180\] See CHUBB, supra note 162 (explaining the organizational politics and theoretical perspectives of the relationship between interest groups and regulators); MCFARLAND, supra note 103, at 67-105 (describing the actions of six public interest groups); MELNICK, supra note 176, at 35-38 (discussing the interest groups participating in clean air regulation); cf. STAGGENBORG, supra note 103 (discussing social advocacy in the form of the impact of the movement to legalize abortion). But see NADEL, supra note 103, at 169-73 (finding that consumer groups do not adequately lobby administrative agencies).

\[181\] For accounts of the influence of “public interest groups,” defined here simply as lobbying organizations whose members’ motivations are non-economic, see ROBERT A. KATZMANN, INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED (1986) (discussing the influence of dignity and rights related disabled groups such as the Paralyzed Veterans of America and the American Coalition of Citizens with Disabilities); MICHELE Mckeegan, ABORTION POLITICS (1992); Edward L. Rubin, Introduction: Minimizing Harm as a Solution to the Crime Policy Conundrum, in MINIMIZING HARM: A NEW CRIME POLICY FOR MODERN AMERICA 1, 29-30 (Edward L. Rubin ed., 1999) (explaining the effects of public opinion on harm minimization strategies and suggesting the appropriate weight legislators should accord this public opinion); UNDERSTANDING THE NEW POLITICS OF ABORTION (Malcolm L. Goggin ed., 1993).

\[182\] See supra notes 98-102 and accompanying text.
these interactions on their own terms, rather than in the distorting light of democratic theory, their potential advantages, as well as their actual shortcomings, become easier to understand.

With respect to responsiveness, the negative image of bureaucracy that is most vivid and indelible is of the petty autocrat who tramples on the rights and sensibilities of helpless citizens—the Very Important Person of Gogol’s *Overcoat*, the law court officers of Kafka’s *Triä*, the EPA official in *Ghostbusters*, the rule-bound bureaucrats of Philip Howard’s *Death of Common Sense*. This dreaded personage is deaf to logic, blind to experience, and invulnerable to supplication; he will do nothing other than follow orders from above, or, as Bardach and Kagan state, go by the book. Given the abstract nature of rules and the complexity of actual circumstances, his decisions often will be unfair and will regularly detract from human liberty.

The standard theory of democracy suggests that bureaucrats are supposed to be controlled by elected officials, specifically the legislators and the chief executive. Modern versions of democratic theory add the possibility of lobbying these officials, negotiating with them, or inducing them to perform casework on one’s behalf. None of this is very reassuring, however. For most people, electoral control is simply too intermittent and remote. Conceivably, a regime that people would be willing to call a democracy could function as Habermas envisions, with the administrative agencies completely insulated from the citizens and all interactions running through elected officials. It would subject the people to tremendous risks of oppression, however, and deny itself essential and familiar mechanisms by which such op-

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1 Nicolai V. Gogol, *The Overcoat*, in *Tales of Good and Evil* 272 (David Magarshack trans., 1949).
3 GHOSTBUSTERS (Columbia/Delphi 1984).
5 See Bardach & Kagan, supra note 162.
6 See James Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 58-77 (1978); Jerry L. Mashaw, *Greed, Chaos, and Governance* (1997). There is no question, at least in the United States, that all administrative agencies must be authorized by elected officials, usually Congress and the President, in the form of a statute, and occasionally either body acting individually (for example, the Congressional Budget Office and the Office of Management and Budget). The only subject of controversy is whether these elected officials are exercising enough control to pass constitutional standards. See Schoenbrod, supra note 6; Lowi, supra note 6.
7 See Habermas, supra note 105, at 329-87.
pression is constrained. Fortunately for us, modern Western governments do not conform to this pattern. They consist of a multiplicity of agencies that are connected to the firms or individuals they regulate by linkages allowing two-way interactions. Through these linkages, as well as other, more attenuated linkages to the agencies' superiors, both elected and appointed, nongovernmental entities communicate regularly with their public counterparts, stating various demands that may frustrate many regulatory initiatives but also secure fair and efficient treatment for themselves.

This interaction also contributes to the responsiveness of agency officials by providing them with information—not only unexpected or previously unwanted information, but also information that they need and would seek out on their own if it were not provided to them. It does so, however, in a quantity that a tax-supported government could not realistically collect with its own resources. Such information contributes to responsiveness because it enables administrative officials to avoid the unexpected consequences of their policies that neither they, nor those subject to them, would desire: regulations aimed at one problem can cause economic losses that are unrelated to the problem, and that could be avoided if more complete information were obtained. Of course, this same process also provides administrative decisionmakers with lies, half-truths, and distorted interpretations motivated by the mindsets and material self-interest of the participating private parties. As long as there are multiple interests involved and multiple sources of information, however, the process has a self-corrective quality: experienced administrators readily discount exaggerations and generally discover outright lies, with serious consequences for the credibility of their originators.

In addition, administrative interaction contributes to government responsiveness through a more general or diffuse effect. Government officials—in any kind of government—can become isolated from the

190 But see ROBERT KAGAN & LEE ALEXRAD, REGULATING ENCOUNTERS (2000) (explaining that the United States's legal system is characterized by lower levels of cooperation than other industrialized nations and relies more heavily on litigation, a pattern that leads to inefficiency).

citizenship, even if their stated goal is to serve the people's interests. Because they want to keep their jobs and do them well, they can easily become self-protective and develop a withering contempt for the impoverished, disorganized individuals, the resource-laden, recalcitrant firms, and the self-centered citizenry in general whom they are expected to control. Such isolation becomes particularly problematic when governance issues are highly technical and when administrative bureaucracies are as large as those of modern states. Formal and informal obligations to interact with their clients and regulatees generate countervailing attitudes and institutional structures. By bringing the citizenry into the decisionmaking process and creating opportunities for face-to-face negotiation, these interactive mechanisms compel administrators to confront the people whom they regulate. In addition, interaction often generates affective bonds between participants, even in situations where legal rules compelled the initial contacts.

With respect to social meaning, administrative interaction is again analogous to elections in various ways. It does not, of course, provide administrators with the sense of status that elections provide. On the contrary, the fact that administrative officials are appointed, not elected, generally indicates their subordinate status. This interaction, however, does place many administrators in the same middle ground between expertise and politics that most elected officials inhabit, generating the same desire to integrate these various inputs and the same ethos of practical judgment.

In recent years, an extensive scholarly discussion has focused on an issue generally framed as the conflict between expertise and pluralism. Many observers claim that pluralism is increasing at the cost of expertise, that the administrative agency's elaborate machinery that was supposed to manufacture optimal results is being dismantled, to be replaced with a political struggle between the opposing sides of expertise and pluralism. But this interpretation of modern develop-

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Footnote:


2 See Lowi, supra note 6, at 175-76 (discussing the decline of legislative policymaking); Richard B. Stewart, Madison's Nightmare, 57 U. Chi. L. Rev. 335 (1990) (lamenting the influence of factions on administrative agencies); Stewart, supra note 192 (discussing the traditional model and the interest representation model of agency discretion). But see Martin Shapiro, On Predicting the Future of Administrative Law,
ments, and the lugubrious conclusions often drawn from it, arises partially from the beliefs that only electoral interactions are part of the legitimate, democratic process and that administrative interaction undermines that process. The critique of Dahl's high expectations for polyarchic pluralism is equally relevant to administrative interaction. Once the term "democracy" is set aside, and administrative interactions are treated, like elections, as a mechanism for interaction between government and society, both the trend and its interpretation disappear.

The idea that nongovernmental input into agency decisionmaking is increasing results from the greater salience that contemporary events possess for us. This input has always been high in the United States, the only recent change being the developments in civil society that generated more public interest groups. The dichotomy between this input and expertise is equally misleading. When widespread social consensus exists about the proper way to carry out some functions, like how to build a bridge, that consensus is likely to prevail because political opposition to it would lack meaning. Many technical issues, however, are in fact regularly contested: the proper method of valuing bank assets, the level of specified substances that is dangerous to human health, the effectiveness of a particular medicine, and the economic impact of insider trading are all matters that knowledgeable parties debate intensely. The expert advice that an administrator receives from within the agency will not necessarily be free from political considerations. Different people in the agency have different ideologies, and the ultimate decision may be one that affects the agency's budget or the scope of its discretion. Conversely, the exercise of political influence from outside the agency is rarely characterized by outright threat. Typically, interested parties will present the best case for their position by invoking the same sorts of expertise that is available within the governmental apparatus. It is not an expression, nor a distortion, of the people's will, but simply part of the complex variety of inputs that a modern decisionmaker invariably confronts. To resolve the situation, the decisionmaker will try to integrate these inputs, relying on the same sense of practical judgment that animates elected officials.

From the citizens' perspective, administrative interaction tends to produce a similar sense of membership in the political process as elec-

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Regulation, May/June 1982, at 18 (asserting that expertise is making a comeback).

For discussions of interest group domination in earlier eras, see Beard, supra note 160; Kolko, supra note 160.
tions do. To begin with, it provides additional opportunities for citizens to participate in governance without, of course, an Aristotle-inspired requirement of participation. The kind of participation that administrative interaction involves may seem mundane compared to images of an aroused electorate unseating corrupt legislators or presenting petitions to the chief executive. It serves similar needs, however, and provides similar kinds of opportunities. A citizen who finds fulfillment in political action to protect the environment may be unable to do so unless she can interact with the administrative agency that implements governmental policy in that area.

Furthermore, interactions with an administrative agency tend to induce citizens to cooperate with regulatory commands, in part because they feel they have had some input into the process, and in part because of the institutional isomorphism that the process generates. It is virtually impossible for any government to obtain a reasonable level of compliance from an entirely recalcitrant populace. Even a government that recruits its troops from foreign lands and is ready to use unlimited amounts of force will be hobbled quickly if the populace responds only to direct compulsion. Regulated parties are more likely to cooperate if they have interacted with government decision-makers at the time the program was designed.

Like elections, interaction in program design changes attitudes. The individuals in the participating institution will become acclimated to the regulatory regime and see themselves as operating within it, rather than opposing it in its entirety. More concretely, interaction will generally give an in-

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195 See DiMaggio & Powell, supra note 156; Meyer, supra note 156.
196 This is a major theme of the growing literature on regulatory implementation. See, e.g., Ayres & Braithwaite, supra note 7; Bardach & Kagan, supra note 162; Pressman & Wildavsky, supra note 162; Jay A. Sigler & Joseph E. Murphy, Interactive Corporate Compliance: An Alternative to Regulatory Compulsion (1988); Tom R. Tyler, Why People Obey the Law (1990); Douglas C. Michael, Cooperative Implementation of Federal Regulations, 13 Yale J. on Reg. 535 (1996); Lars Noah, Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority, 1997 Wis. L. Rev. 873. Much of this work was done by social scientists who study law or by legal scholars who are sociologically oriented. From a doctrinal point of view, the important issue is to state the proper or desirable legal rule. Once the sociological perspective on the legal system is in place, the question is whether this statement has any effect. Administrative agencies, of course, are designed partly to ensure that the legal rule does have real-world effects. The agencies can thus be regarded as the result of political participants developing the same social science mentality as political observers.
stitution the opportunity to alert the administrators to truly disastrous consequences that were not foreseen and could have been avoided. Once the program is in place, moreover, compliance with it is always a matter of negotiation—always the product of an interactive process between the agencies and the parties whom it regulates. Although this interactive process often appears to decrease the level of compliance, it generally increases it by securing higher levels of cooperation with less stringent requirements. Achieving compliance without cooperation would generally require higher levels of force and greater expenditures of resources than elected representatives would be willing to tolerate in all but the most extreme situations.

C. Administrative Interaction and the Design of Government

Administrative interaction, therefore, can be considered on its own terms and in relation to our genuine political commitments, rather than in terms of its impact on the premodern concept of democracy. It then becomes possible to think more realistically about ways of using administrative interaction in the design of contemporary institutions. The question is not whether administrative interaction should be increased, altered, or restricted to make government more democratic. Rather, we should ask how we can vary the level of administrative interaction to achieve agreed-upon goals such as security, prosperity, and liberty.

To begin with, the catalogue of administrative interaction’s functions and meaning is not meant to imply that this mechanism is free of disadvantages. In fact, these disadvantages are substantial. As Jim Rossi points out, interaction can seriously disrupt the deliberative process within an administrative agency. Thus, particular mechanisms for interaction must be designed to mediate between their potential disadvantages and the potential advantages previously discussed. In some cases, the disadvantages are so great that they warrant

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radical constriction of the interactive process, typically by means of formal rules. When the status of an individual is being adjudicated, for example, our general view is that the only fair considerations are the pre-existing rule that establishes the status in question, and the pre-existing facts that the rule establishes as relevant to its application. Parties with no direct involvement in the case cannot provide information about such matters. They might provide information about a particular decision's impact, but that is usually deemed an irrelevant and, indeed, unfair consideration. Consequently, the interactive linkages are highly formalized and constrained in the adjudicative setting.

The adjudicative example is a temptingly familiar one, but the need for insulation from the interactive process should not be conflated with the role of judges or the separation-of-powers concept. Administrators perform the bulk of adjudications in modern Western governments, while judges do many things that cannot plausibly be called adjudication, such as drafting procedural rules, managing the judicial budget, hiring staff, and administering the courts' daily operations. Moreover, adjudication is not the only setting in which interaction needs to be constrained. Western nations have concluded that their central banks' control over the money supply should not be influenced by private parties. It seems unlikely that any convincing connection between this function and adjudication can be asserted. Rather, the decision to restrict the interactive process must be based on a microanalysis of the particular decision, guided by the moral commitments that we perceive to be at stake. In the adjudicative setting, interaction external to formal rules is generally regarded as unfair; in the monetary control setting, it is viewed as inefficient. It can be excluded because the government's decision is generally not regarded as raising any liberty or fairness issues that would demand participation. The decisionmaker has adequate internal sources of information and the government can implement its policy decisions without private cooperation. The point is that the restriction of interaction, like interaction generally, is a specific mechanism of governance that should be deployed on the basis of our consciously identified commitments and a microanalysis of the decision in question. Certainly, a categorical, tradition-based rule, such as the separation of

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200 See Mashaw, supra note 175.
201 See Geoffrey P. Miller, An Interest-Group Theory of Central Bank Independence, 27 J. Legal Stud. 433 (1998) (discussing how an independent central bank prevents rent-seeking behavior by regulators that is possible when the bank is subject to the influence of interest groups).
the judicial branch from the legislative and executive branches, cannot explain either the actual or ideal application of this mechanism.

While administrative interaction needs to be restricted in some situations, it needs to be encouraged and facilitated in others. The Administrative Procedure Act recognized three important, albeit tradition-bound, models of interaction: comments on proposed rules, participation in adjudicatory decisions, and appeals to courts as supervisors of rulemaking and adjudication. The Freedom of Information Act gave citizens access to internal agency records that facilitated formal and informal interaction. With the Sunshine Act, the government gave citizens access to agency meetings that provided additional information, as well as opportunities for direct negotiation. The latter two acts were rather bluntly drafted instruments that granted comprehensive rights and then provided restrictions by excluding broad categories of information or meetings. As a result, the rights they granted can be abused by private parties, and their exceptions can be abused by government agencies. They seem to have been patterned on the rather traditional model of civil litigation, giv-

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204 Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552b (1994)). This is one of the earliest American laws with a cutesy name. The reference is to the famous line by Justice Brandeis that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman." LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1932).

ing private citizens' rights that are akin to discovery and agencies a
counterbalancing privilege to resist discovery. Clearly, these two acts
need to be fine-tuned, but they also need to be joined by other provisi-
tions that are not bound to traditional models.

Congress has made several efforts to facilitate administrative in-
teraction in ways that go beyond traditional patterns. The Magnuson-
Moss Act attempted to provide funding for consumer groups to par-
ticipate in Federal Trade Commission rulemaking. The Consumer
Product Safety Act allowed citizens to petition the Consumer Product
Safety Commission to initiate a rulemaking proceeding and to partici-
pate in Commission-initiated rulemaking by producing their own
proposals. Criticism of these innovations is often based on exagger-
ated expectations of them. They will not ensure fairness, secure self-
government, or conform to our inherited concept of democracy. All
that these innovations can reasonably achieve is to increase the quan-
tity and quality of interaction at the administrative level. It seems un-
likely that inherited models of interaction, based on prior experience
with legislation and adjudication, really exhaust the possibilities for
developing interactive mechanisms in this relatively new arena.

Consider three exemplary government activities: environmental
protection, public welfare, and foreign intelligence. For all three, a
more active and regularized interaction process would advance the
goals of security, prosperity, and liberty. In the environmental area,
proponents of development possess an impressive capacity to present
their claims to both electoral and administrative officials, and since
development is an inherently specific process in most cases, firms with

Barry B. Boyer, Funding Public Participation in Agency Proceedings: The Federal Trade
compensation provision, its implementation, and its effects on rulemaking proceed-
ings). For a critique of agencies’ paying representational costs, see Shapiro, supra note
193, at 22.

95 Stat. 703, 721; see also Antonin Scalia & Frank Goodman, Procedural Aspects of the Con-
sumer Product Safety Act, 20 UCLA L. REV. 899 (1973) (examining some of the novel
problems of administrative procedure posed by the Consumer Product Safety Act).
For critiques of the design to increase public participation, see JERRY L. MASHAW, DUE
PROCESS IN THE ADMINISTRATIVE STATE 262 (1985); Rossi, supra note 199, at 180-82;
Teresa M. Schwartz, The Consumer Product Safety Commission: A Flawed Product of the Con-
sumer Decade, 51 GEO. WASH. L. REV. 32 (1982). While the problems with giving private
parties so much control over the regulatory process are obvious, failure of one experi-
ment can hardly be an indication that no further experiments should be attempted.
a particular concern about any given issue can readily identify themselves. Public choice analysis predicts that those who favor environmental protection cannot coalesce. In fact, however, they have done so quite effectively. The problem in this area is to develop mechanisms by which these two well organized alliances can negotiate with the agency and each other to produce acceptable compromises and perhaps even optimal solutions. This is a process Jody Freeman describes as "collaborative governance." A notable step in this direction is the Negotiated Rulemaking Act, which establishes procedures under which interest groups can participate in designing agency regulations. Its success has been quite mixed, however, and it clearly represents only the first small, clumsily built encampment upon relatively unexplored legal territory. A variety of more refined mechanisms need to be developed to integrate the essentially adversarial confrontation between developers and environmental groups with an instrumentally rational planning process designed to achieve optimal results. We cannot evaluate such mechanisms by relying on an ab-

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208 Freeman, supra note 7, at 8; see also THE ASPEN INSTITUTE, supra note 7, at 19-23 (discussing the development of a new, collaborative environmental management system for the United States); Reich, supra note 7 (discussing how public deliberation in the administrative decisionmaking process helps elicit and define social values).


210 See, e.g., Cary Coglianese, Assessing Consensus: The Promise and Performance of Negotiated Rulemaking, 46 DUKE L.J. 1255 (1997) (presenting an empirical assessment of the impact of negotiated rulemaking on its principal goals); William Funk, Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest, 46 DUKE L.J. 1351 (1997) (surveying the judicial reaction to negotiated rulemaking); William Funk, When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards, 18 ENVTL. L. 55 (1987) (suggesting that the nature of regulatory negotiation subverts the search for the public interest); Susan Rose-Ackerman, Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation, 43 DUKE L.J. 1206 (1994) (contrasting the regulatory negotiation recommendations with the incentive-based proposals of the National Performance Review Report). Many of these negative assessments are based on an implicit standard derived from our concept of democracy—that the people should govern or that there is some mechanism, like an assembly of all citizens, that can communicate their actual preferences to government officials. The real question is how negotiated rulemaking compares to other means of drafting regulations. See KERWIN, supra note 174, at 190 (documenting the frequency of reported concerns of interest groups participating in a rulemaking); Philip J. Harter, Points on a Continuum: Dispute Resolution Procedures and the Administrative Process, 1 ADMIN. L.J. 141 (1987) (focusing on using non-Administrative Procedure Act procedures to resolve disputes in decisionmaking).

211 One possibility is "Project XL," which involves comprehensive planning of a plant's entire industrial process from an environmental perspective. See Freeman, supra note 7 (relying on empirical evidence related to Project XL to argue that multistakeholder processes are promising); Dennis D. Hirsch, Bill and Al's XL-ent Ad-
stract, ill-defined criterion such as democracy.

Public welfare programs are perennially regarded as abject failures, subjecting the developers of each program to excoriation for their naivete or ineptitude at the time of its inevitable replacement. But we are asking too much of the experts. In the United States, a familiar, if unstable, mixture of expertise and public input generates public policy, and the real task is to improve this complex process. Admittedly, encouraging the poor to participate in program planning and implementation was a feature of President Johnson’s War on Poverty, and its disastrous results have been documented by Daniel Moynihan. Johnson’s plan, however, was far too grandiose; with its inappropriate implications of a social welfare crusade, it aspired to create a sense of community among the poor, mobilize them politically, and grant them direct control over government programs that affected them. In other words, Johnson’s plan tried to provide the poor with the advantages of democracy as we conceive it. The debacle of this one attempt, however, reveals more about our misconceptions than about the viability of its underlying inspiration. Clearly, interaction between welfare recipients and government depends on organized groups; only the wealthiest individuals can sustain such interactions.

venture: An Analysis of the EPA’s Legal Authority to Implement the Clinton Administration’s Project XL, 1998 U. ILL. L. REV. 129 (examining the legal foundations of Project XL); Seidenfeld, supra note 165, at 63-85 (describing the benefits and dangers of Project XL).


While such groups exist, they are underdeveloped and would require positive encouragement and funding from government.\textsuperscript{214} Precisely why civil society can generate environmental groups with such fecundity, but not welfare rights groups, is far from obvious in advance, but it is clearly true in actuality.\textsuperscript{215} Since it is difficult for a government agency to encourage the development of groups that will frequently oppose it, another agency would probably need to be involved. In place of the War on Poverty's grand aspirations, we need a realistic mechanism for sending different sets of signals to social welfare agencies that could be combined with the signals coming from the legislature or the agency itself to produce more fair, effective programs.

The third example of a governmental activity that would benefit from increased interaction is military intelligence. Strictly speaking, this is an activity without clients, other than the citizens in general. The rationale for its insulation from the citizenry, however, lies not in this lack of clients but in the need for secrecy that its staff members proclaim, and that elected officials join with varying degrees of enthusiasm. Of course, certain intelligence functions must be kept secret—we cannot reveal the identities of our spies. But there is nothing particularly unique about this. Prosecutors must keep their targeting strategy secret and tax agencies must not disclose incomes reported to them. The need to keep specific information secret does not justify the insulation of an entire agency from public interaction.\textsuperscript{216} Rather, that insulation has been based on our democracy-derived belief that citizen participation is a mode of self-governance. Since an espionage agency demands both expertise and secrecy, such participation seems inappropriate. In fact, participation serves the more mundane, but

\textsuperscript{214} See Boyer, \textit{supra} note 206 (examining the Federal Trade Commission's compensation provision and the types of groups that have received funding).

\textsuperscript{215} See FRANCES FOX PIVEN \& RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL (1979) (discussing the inability of the poor to generate sustained representation of their interests).

thereby more generally applicable purpose of increasing security, prosperity, and liberty. Some separate agency needs to encourage the development of private institutions committed to monitoring and assessing intelligence activities. Those institutions then need to be given specific linkages to the agency’s decisionmaking processes. This is not an encumbrance that our system imposes on us as a price for other liberties; it is our basic means of governing effectively, and to exclude it in this situation represents both a loss of faith and a failure of nerve.

Of course, other governmental units are expected to supervise the intelligence apparatus. In the United States, Congress is the authorizing agency and structural superior of the Central Intelligence Agency (“CIA”), and the courts have some specific areas of jurisdiction. The example, however, demonstrates the danger of relying solely on these traditional mechanisms. Because the electoral process is heavily affected by certain types of public anxieties, members of Congress have been too easily intimidated by CIA staff members who naturally prefer to avoid supervision. The courts have been equally timid. In United States v. Richardson, for example, the Supreme Court refused to require the CIA to disclose its budget on the basis of a poorly argued procedural technicality, even though the Constitution explicitly requires such disclosure. This is not to suggest that direct citizen interaction would necessarily have been more clear-headed or courageous during the difficult Cold War years, but it would certainly have given us one more opportunity to supervise an agency that had, in fact, spun out of control.

CONCLUSION

In the final analysis, of course, the term “democracy” is too familiar, and too emotionally resonant, to be abandoned. Besides, we have no other word for the form of government found in modern Western nations, and it would hardly be practical to call them systems of electoral and administrative interaction. But democracy should be set aside as an operative term for political analysis. The premodern images that it incorporates create unrealistic expectations and blind us to contemporary circumstances. Instead, we should rely on micro-

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418 U.S. 166 (1974). Richardson is generally treated as a taxpayer’s standing suit. Thus, the plaintiff’s claim is subject to the objection that it shifts responsibility for a particular decision from the legislature or executive to the judiciary, violating the constitutional scheme. Whatever one thinks of this rationale, it does not apply to Richardson, because the Constitution’s Reporting Clause, U.S. CONST. art I, § 9, cl. 7, explicitly grants citizens a right to the requested relief.
analysis of the actual interactions between the government and its citizens. Nothing is lost by imposing such a discipline on legal and political science scholarship. The meaning that people both inside and outside the government attach to their actions cannot be captured by such imagery alone, but it can be captured more effectively once we stop viewing their actions through the distorting lens of premodern conceptions. There is, moreover, a great deal to be gained by getting past resonant, but outmoded, terms that we have inherited from a different society, and focusing on describing and improving the government we actually possess.