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# Informal Rulemaking and Democratic Participation FDA – Food Labeling, FCC – Net Neutrality, a Text Mining Study

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Informal Rulemaking and Democratic Participation

FDA – Food Labeling, FCC – Net Neutrality, a Text Mining Study

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In partial fulfillment of requirements for PAD 690 Masters Project

SUNY Buffalo State

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### Abstract

The Administrative Procedure Act (APA) is supposed to make the rulemaking process at the administrative level democratic. This study will look at two examples of federal regulatory agencies – Food and Drug Administration (FDA) and the Federal Communications Commission (FCC). The topics are food labeling, and net neutrality respectively. The APA highlights the process of notice and comment rulemaking. The APA is evaluated in the literature review for effectiveness and shortcomings. Interest groups play a key role in the policy making process; interest groups inform and mobilize citizens, and then coordinate commenting on agency rule propositions. This can sometimes lead to what is called astroturfing, or large amounts of identical posts. Most of the general public are not aware of notice and comment rulemaking. Public participation and access to information, especially through the internet is very important in a modern democracy. This is what makes the net neutrality so important. Also, obesity and diseases like diabetes are on the rise in America. This is a serious concern, and having updated food labels is a great way to make sure people know what is in their food to make healthy choices. The comments were added up to see how many were for and against the two mentioned laws. The results for FCC show that most comments came from interest groups, most were opposed to repealing net neutrality, however, it was repealed. The results for the FDA were most of the comments came from either health professionals or consumers, and most people felt the FDA was not doing enough but still largely supported most of the revisions. The FDA made the decision to extend the compliance deadline for updated nutrition facts labels.

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## Chapter 1: Introduction

Administrative agencies were created to carry out legislation. Congress delegates power to agencies to regulate and update existing laws when necessary, and without administrative agencies, there would be no institution to carry out repercussions for violations (Kiewiet & McCubbins, 2018). There became a need for more openness in government. Government overreach became exceptionally problematic according to conservatives after the Great Depression era (Carpenter, 2018). The number of agencies has risen drastically over time. They have also expanded in scale, range of duties, and bureaucratic intricacy. The New Deal created a lot more government programs that required a larger bureaucracy which in turn led to the need for more checks and balances to be sure that the administrative side of government did not become too powerful. “A major aim of the New Deal was to use government as an agent in balancing the relationship between contending forces in society, particularly industry and labor” (Loomis & Cigler, 1991, p. 11). The Wagner Act was passed in the 1930’s and that gave the right to form unions which were some of the first interest groups. After passing the New Deal, FDR created the Brownlow Commission to conduct a report on procedural problems and conceivable solutions. This led to the creation of the APA (Warren, 2010a).

The purpose of this study was to evaluate notice and comment rulemaking to see if it is democratic. The purpose of agencies reviewing the comments is an attempt to make the legislative administrative process more democratic, by creating another form of review, or check, however, the agencies are not required to make any changes. Interest groups are a very large player in notice and comment rulemaking politics as well. This paper analyzed two rules in two different agencies in order to have a comparison. The first rule was food labeling law in the Food and Drug Administration. The rule being studied was Food labeling: Revision of the

Nutrition and Supplemental facts label 2012. The other agency is the Federal Communications Commission. The rule being studied was the repeal of net neutrality also known as the Restoring Internet Freedom Act. This study examined if the majority of the comments were in favor or against each law and compared that to the final action of the agency.

“The APA is the most comprehensive, authoritative and enduring legislation governing administrative practice in the U.S. today” (Warren, 2010b). This quote exemplifies the importance of the APA in administrative law. The APA covers numerous topics. Warren believes that the APA is the most essential document regarding administrative law. Some scholars say that the APA is running smoothly, and others see it as a stepping stone and that it is not complete. Walker states that the APA needs to be modernized and highlights many ways in which this can be accomplished (Walker, 2017). Many other scholars have written on the issue and are discussed in the literature review such as Rubin, Dooling, Woods and others.

*Administrative Procedure Act*

- Mandates administrators to have their procedures and actions available to the public
- Allows those injured by the actions of administrators to testify
- Permits those that need to be seen by the agency to have access to council
- Makes administrators give away unclassified information if citizens desire it
- Administrators are responsible for providing proof in certain cases
- Injured persons have the right to reasonable information, so they can provide their thoughts and feedback
- Agencies are required keep records of everything
- Providing remedies in the agency
- Making agencies quasi-independent for administrative law judges to improve the integrity of any hearings
- Give judicial branch the power to review agency policies and decisions
- Trying to limit unnecessary discretion

*Box 1 Administrative Procedure Act*

(Warren, 2010a)

Figure 1 listed above, illustrates the functions of the APA. In summary, the APA does many things. One of the major functions is that it requires agencies to disclose information if it is not classified if the public desires it. So, part of the APA is to make sure there is transparency in government. It also provides protection for those injured by agency actions so they can have representation, and the agency enforcing the regulation must have proof that the injured is in violation. The APA also makes the process more democratic, because it (a) brings in an outside judge when using adjudication to make the process less biased, (b) gives the power to the supreme court to review all agency decisions to watch for overstep, and (c) congress also has the power to review agency behavior and can take away any agency at any time. In conclusion, the APA provides more transparency and provides protections against over use of power, as well as making the process more democratic (Warren, 2010a).

There are two major types of rulemaking under the APA. One is formal, and the other is informal. Informal rulemaking refers to discretion. Discretion is day to day administrators making decisions based on past practices and their training that doesn't involve the public in the process. The other form of informal rulemaking is through notice and comment boards. Then there is formal rulemaking. Adjudication is a form of formal rulemaking that is quasi-judicial, meaning it resembles a trial format. In adjudication there is an administrative judge present and the agencies as well as those affected by them meet to discuss the circumstances. Another form of formal rulemaking is negotiated rulemaking (Warren, 2010b).

Access to information is crucial to the American democracy. Many people get their information from the internet now. "Democracy requires an informed and involved citizenry, yet this is possible only if the citizens have access to information about their government and the



opportunity to participate in political discourse” (Schement, 2009). Access to news via internet and cable is disparate among minority groups. Groups that have limited access to electronic news are older generations, African Americans, Hispanics, and those of lower income. So even before net neutrality was repealed, there was already a problem with unequal distribution to access to news (Schement, 2009).

Net neutrality was repealed by Ajit Pai, the commissioner of the FCC. It is unclear where the comments came from and if it is truly representative of the public. There was a finding that peoples’ information was stolen from a website and fake comments were posted on the FCC’s rule and comment boards on the net neutrality board (Fung, 2017). The FDA is one of the oldest regulatory agencies. It is good to have more than one agency to compare, to have a better understanding of the process. The FDA’s notice and comment board on food labeling is a more typical example of what goes on in notice and comment rulemaking. The FCC’s net neutrality repeal was much more politicized and got more attention, and therefore provides an interesting comparison between a normal case and an unusual case.

The FDA was functioning before its official creation in 1930. When Teddy Roosevelt was in office, he passed the Pure Food and Drug Act. The research was first being done under the Department of Agriculture. Eventually it became its own separate agency under the Department of Health and Human Services. The FDA’s organization structure is first the office of the commissioner, and then the four underneath are: regulating medical products and tobacco, foods, global regulatory operations and policy, and operations (FDA, 2016).

Dr. Harvey Washington Wiley was the first head of the FDA. It was very important to him to set the precedent that food and drugs must be accurately labeled. At the time when he was starting out, companies were not being honest about what was in their products. For example,

one company labeled their product strawberry jam, but it actually contained no strawberries, and instead had hay seeds, pulped apple skins and some glucose (Hilts, 2003, p. 22). Dr. Wiley was a very firm believer in making sure food was properly labeled and not at all misleading, which was taking things farther than Roosevelt at first thought was necessary (he thought if it was safe it was good enough), but this led to setting the precedent that food should not only be safe to consume, but also accurately labeled (Hilts, 2003).

American consumers have so many choices of what to eat today, but have difficulty making healthy choices. One potential reason is that food labeling is not as effective as it could be. One problem the U.S. faces today is the health of its citizens. One in three adults in the U.S. are obese. Obesity is on the rise and it leads to many chronic health problems such as diabetes. Statistics show that 9.4% of the U.S. population is diabetic (National Institute of Health, 2017).

Front of package food labeling is helpful but also confusing when consumers are trying to decide which food item to purchase when they are bombarded with information on the package. There has been effort throughout history to encourage healthy choices using both education and visuals. First there were the basic seven foods, and then the food guide pyramid, and now nutrition facts. The seven basic foods are as follows:

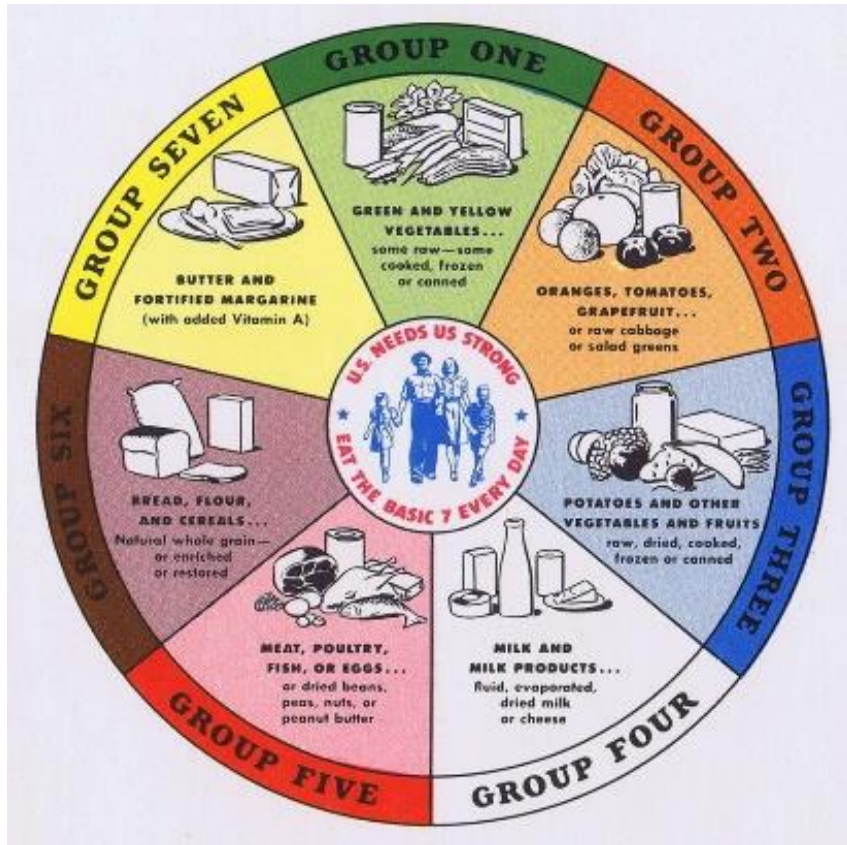


Figure 1 Seven basic foods

(Gable)

*Food Pyramid example:*

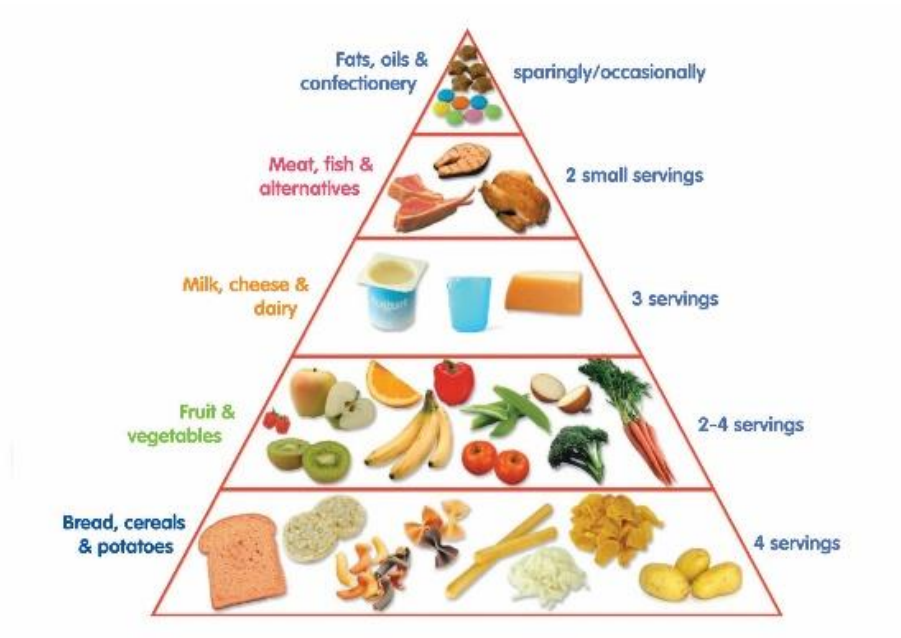
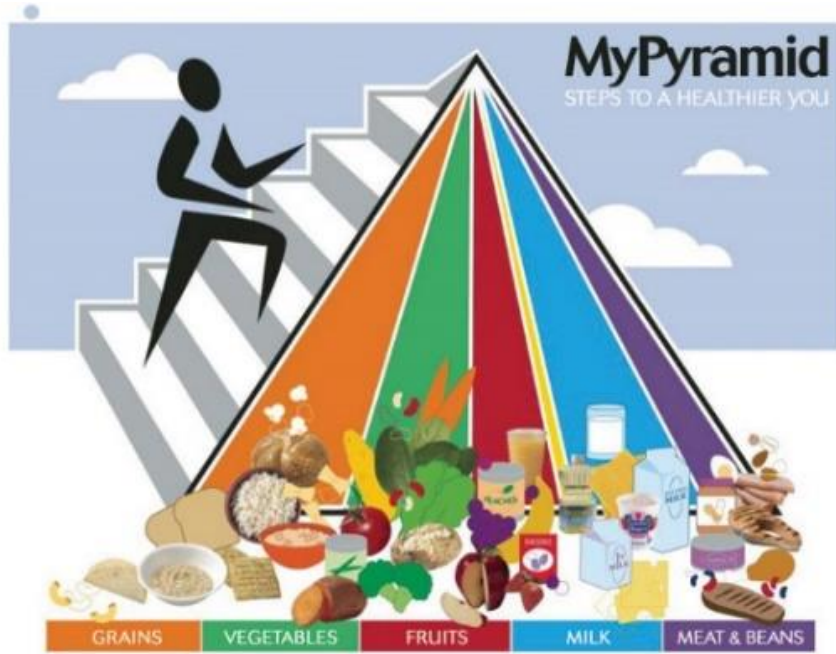


Figure 2 Food Pyramid

(n.a., 2018b)

*Updated to add exercise:*



*Figure 3 Updated Pyramid*

(Nuelle, 2016)

*Nutrition facts example:*

<b>Nutrition Facts</b>			
Serving Size 1 Banana (124g)			
Servings per Container 1			
<b>Amount Per Serving</b>			
<b>Calories</b> 270	Calories from Fat 130		
% Daily Value*			
<b>Total Fat</b> 15g	<b>23%</b>		
Saturated Fat 10g	<b>49%</b>		
Trans Fat 0g			
<b>Cholesterol</b> 0g	<b>0%</b>		
<b>Sodium</b> 25mg	<b>1%</b>		
<b>Potassium</b> 320mg	<b>9%</b>		
<b>Total Carbohydrate</b> 38g	<b>13%</b>		
Dietary Fiber 5g	<b>18%</b>		
Sugars 25g			
<b>Protein</b> 3g			
Vitamin A	2%		
Vitamin C	15%		
Calcium	2%		
Iron	6%		
Riboflavin (Vitamin B2)	4%		
Niacin	4%		
Vitamin B6	15%		
Folate	4%		
Magnesium	6%		
Copper	4%		
Manganese	10%		
* Percent Daily Values are based on a 2000 calorie diet. Your daily values may be higher or lower, depending on your calorie needs:			
	Calories	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

Figure 4 Nutrition facts label

(n.a., 2018c)

The FCC was created by the Communications Act of 1934. This replaced the Federal Radio Commission and transferred that work to the FCC (Paglin, 1989). It wasn't so much a new agency, rather than a reorganization and consolidation of existing laws. This merged telecommunications common carrier laws and radio regulation into the same agency (Paglin, 1989).

The FCC has seven bureaus. They are Consumer and Governmental Affairs, Enforcement Bureau, International Bureau, Media Bureau, Wireless Telecommunications Bureau, Wireline Competition Bureau, and the Public Safety and Homeland Security Bureau. Then there are ten offices. They are: Office of Administrative Law Judges, Office of Communications Business Opportunities, Office of Engineering and Technology, Office of General Counsel, Office of the Inspector General, Office of Legislative Affairs, Office of the Managing Director, Office of Media Relations, Office of Strategic Planning & Policy Analysis, and Office of Workplace diversity (Wallechinsky, 2016). Currently the FCC is headed by Ajit Pai. The FCC has a very specific mission. “The Federal Communications Commission regulates interstate and international communications by radio, television, wire, satellite, and cable in all 50 states, the District of Columbia and U.S. territories. An independent U.S. government agency overseen by Congress, the Commission is the federal agency responsible for implementing and enforcing America’s communications law and regulations” (Federal Communication Commission, 2018a). The FCC also states their strategic goals. Their goals are: promoting economic growth and national leadership, protecting public interest goals, making networks for everyone, and lastly, promoting operational excellence (Federal Communication Commission, 2018a).

This is what the Communications Act of 1934 did. Title one section one states that the purpose of the act is to create the FCC. There are a few sections and titles that are relevant to the topic of democracy, net neutrality, and freedom of information in this act that are mentioned. Also, in Title one, it highlights the importance of not discriminating against access to communication services based on race, color, religion, national origin or sex. As stated in the introduction, there is a divide on access based on these things, though not intentional. Many of these divisions are based on factors such as poverty, age, and education level. Other factors are

rural versus urban. Some rural areas do not have good cellular service, internet access and cable ("Communications Act of 1934," 1934).

Title 1 section 10 is important as well. Section 10 (A) deals with regulatory flexibility. The commission must determine if regulations are necessary, and consistent with the public interest. Section 10 (B) focuses on how the FCC actions affect the market. The purpose is to promote competition ("Communications Act of 1934," 1934).

Section 11 (A)(B) is the biennial review of regulations. Every other year the FCC must review their regulations to determine necessity and modify if something is no longer necessary for public interest. ("Communications Act of 1934," 1934).

In Title II section 254 of U.S.C. 47, in regards to internet, the statute goes over universal service principals ("Communications Act of 1934," 1934). This includes that the service must be good quality and the rates must be just, reasonable and affordable ("Communications Act of 1934," 1934). The statute also covers that services must be provided in rural and high cost areas, and must be available for schools, health care, and libraries ("Communications Act of 1934," 1934).

Before there was internet there was Arpanet. The invention of this led to the invention of the internet (Altschiller, 1995). Arpanet was first designed as a network to connect computers within the Department of Defense (Altschiller, 1995). Altschiller refers to the dawning of the internet as the third wave economy. He states first wave was farming economy and the second wave was the industrial economy. The creation of the internet has made many changes to life as we know it. One way that it has impacted the economy is online shopping. Another way is online business communication like business websites, instant messaging customer service, and the increased use of email over other uses like standard mail and faxing. Another way that



Altschiller says that the internet affects the economy is it provides a different platform for advertising. The creation of the internet also led to more developments in communications like video messaging and so forth (Altschiller, 1995).

The advent of new communication technology led to the creation of the FCC. Communication technology in all forms is extremely important to the function of modern democracy, from where you get your news, to how you communicate about politics with peers, the sharing of information, and the ability to just google anything you want to know at the click of a button.

In 2010, Comcast and NBCU merged (Crawford, 2013). Comcast is the largest internet and cable provider and this merge made them even larger. Comcast has a lot of control on how much they can charge people especially with the way the system is set up. Americans have less access, worse service, and pay more for internet and cable than in Europe (Crawford, 2013). Comcast and Verizon are two of the biggest supporters of the repeal of net neutrality.

Through the examination of the notice and comment boards of the FCC and the FDA on the topics of net neutrality and food labeling respectively, the process of notice and comment rulemaking was analyzed. The goal of the study was to determine if the agencies are taking note of the comments and using that as a basis to move forward with the legislation. By looking at these examples, the results would show if the process is truly democratic. This study was significant because no one has compared the FDA and FCC comments yet, and used them to measure democracy in administrative rulemaking.

## Chapter 2: Literature Review

### Introduction:

Notice and comment rulemaking is an instrumental process in the creation and implementation of rules. Regulatory agencies like the FDA and FCC, are what makes America function. Congress and the president may pass legislation, but it is up to administrative agencies to develop the process, and specific details, as well as implementation of laws. Regulations are meant to protect the public, and keep corporations in check. The APA is what governs regulatory agencies.

The first section of the literature review is scholarly critiques of the APA. The following section is addressing the inter-relationship of interest groups, agencies, and public participation. Next is the discussion of the specific issues in the context of the FDA, and then the FCC. Ever changing technology has a large impact in public knowledge of current issues, and this also impacts participation. Participation is very important for a functioning democracy. Many people are not familiar with notice and comment rulemaking processes. The way they do sometimes get involved is through submitting comments through interest groups.

## Administrative Procedure Act

Dooling analyzed notice and comment rulemaking processes in the digital age, and he reviewed the APA requirements (2011). “E-rulemaking has been described as the use of digital technologies in the development and implementation of regulations” (Dooling, 2011).

Technology has changed significantly, but notice and comment rule making remains unchanged.

The process of rulemaking involves electronic notices of propositioned and conclusive rulemakings. It involves disclosing supportive files. Next the agencies must have it open to receive public comments and responses to the proposed rule. Another part of the process is organizing the rulemaking records in what is called electronic dockets, an electronic filing system. The dockets are restricted access only. They are used to store, sort, and manage comments before they are posted to regulations.gov. The APA requires notices to be posted on the federal register, however, this does not prevent some agencies from doing more, like provide advance notice, and reaching out to the public. Some agencies host public meetings online, or use various forms of social meetings as an attempt to reach out to the public (Dooling, 2011).

Sometimes organized campaigns send duplicate comments; sometimes as letters and sometimes electronically. Dooling mentions a study by John M. de Figueiredo, which analyzed if e-rulemaking increases the number of comments (Dooling, 2011, p. 899)? The study looked at the FCC over the years of 1994-2004. The finding was that the comments shifted from paper to online, but did not significantly increase the number of comments (Dooling, 2011). Online advocacy creates many duplicates of comments which is sometimes referred to as notice and spam. Software that does natural language processing can be utilized to detect the number of duplicates. This can be a more cost-effective alternative to having staff read them themselves.

The APA requires agencies to provide as much opportunity as possible for people to respond. They accept mail, courier, fax, email, and postings on regulations.gov. Some people leave voicemails, but often they get lost in transition. Dooling encourages agencies to utilize software to keep track of and analyze comments. It is a better way than trying to read all of them. It is also more efficient and cost effective to keep electronic dockets, because it doesn't require as much staff to do the work (Dooling, 2011).

Comments are always processed before they are published online. The comments are sent to agency staff and logged by them and then entered in to an electronic docket or a physical copy is filed. Screening is done before the information is posted. Staff members look for the following things: is the information legally obtained; are they providing personal information that should not be available to everyone to read; are they revealing a trade secret; and is the information confidential. Agencies make sure the information is not copyrighted. Finally, the comments are screened for obscene and/or threatening language. One way to speed up the process that Dooling suggests, is to create a feedback loop to automatically screen for inappropriate content (Dooling, 2011). A feedback loop is software that could detect inappropriate content and notify the user, so they can alter it.

The same conflicts of opinions on the APA when it was drafted have persisted through time and are in alignment with the classic conservative and progressives debate on the purpose and role of government. In one view, the APA provides too many requirements and restrictions on agencies which makes carrying out their duties difficult. In the other view, the APA has too few restrictions and regulations which allows agencies too much authority. These two views are in conflict with how to solve the problems of the statute (Rubin, 2003).

The APA relies too much on public participation. Most participation comes from or is organized by interest groups and corporations. The majority of the comments come from lawyers and lobbyists. The general public is less likely to be informed on the issues and the internal working of the administrative agency (Rubin, 2003).

Rubin asserts that modern America is an administrative state, and the APA is not written in a way that recognizes this, and does not properly address the problems. Rulemaking is inherently legislative rather than judicial; however, the APA requires that in order to exercise formal rulemaking, the best process must be adjudication. Formal rulemaking for all intents and purposes is null. Formal rulemaking requires a hearing which is impractical and causes delay in new regulations. In order for agencies to put this into practice, they would need to have to do quasi-judicial hearings with overbearing amounts of clients in their jurisdiction. There is a well-known FDA example of this. There was a hearing on how many peanuts need to be in peanut butter. It was between 3% points that they were deciding. The hearing took many years and produced a document that was over 1,000 pages (Rubin, 2003).

There is the option of informal rulemaking. This is a much more practical approach to agency rulemaking. This is the process of giving notice to those affected by new regulations, and providing for a comment period, then followed by agency reviewing comments, and then posting the final rule. This process is what is used most of the time for new regulations. The democratic problem with this is that agencies are not required to respond or make changes to the final law based on these comments (Rubin, 2003).

Not all agency rulemaking is creating regulations. Some things agencies do are plan future actions, evaluate prior actions, allocate resources, negotiate, and all of this is informal adjudication (Rubin, 2003). These are typical office duties that are done in any corporation.

Rubin gives a very thorough analysis of what he feels about the APA. He believes that the APA has been out of date since the day it was written because it fails to address the increasing development of the administrative state. He recommends transitioning to a new administrative oriented APA. The reason is the advent of the administrative state itself, the transition from a system of the basic three branches, to a fourth, the implementation and discretion of regulations now being carried out by government agencies staff workers. Rubin believes that the APA is inefficient and counterproductive the way it is written. He thinks it is imposing the wrong rules, and in some areas where there should be rules, there is not guidance at all (Rubin, 2003).

The central notion of the APA is control through private participation. This requires government actions to be publicized for public scrutiny. Two examples of legislation passed in that light following the APA were the Freedom of Information Act (FOIA), and the Government in the Sunshine Act. These laws increased public accessibility to government information. If someone requests information, as long as it is not considered top secret or confidential, the government is required to provide the information requested. These laws also require government agencies to have websites with information available for the public to learn about what the agency does. The APA also highlights procedural requirements for both rulemaking and adjudication. Lastly, the APA allows injured peoples to challenge an agency decision or action if they think it may violate the constitution or law (Rubin, 2003).

Rubin defines a few things based on the APA, adjudication as, “agency process for the formulation of an order.” He defines order as, “the whole or part of a final disposition whether affirmative, negative, injunctive, or declaratory in form” (Rubin, 2003, p. 123) These definitions suggest that order represents a subset of administrative actions like final disposition, and agency

actions lie outside that defined category. The statute does not impose procedural limits on informal adjudication. It is hard to define at what point informal adjudication becomes the final disposition (Rubin, 2003).

Some people, mainly conservatives or libertarians, feel that the government is too large and there needs to be more control over the administrative section of government. Here are some ways that the administrative agencies are checked. The executive branch, the legislative branch, and the courts all check the administrative branch. The executive branch exercises control by setting the agenda and appointing agency heads. The legislative branch creates laws that are approved by the president then have to be carried out by the agency that handles that type of work. Sometimes the laws are not written clearly, and agencies have to work out the logistics. For example, when the Clean Air Act was passed, congress wrote that air quality should be kept at an acceptable level. Then the Environmental Protection Agency (EPA), had to determine what exactly was considered acceptable, and how they were going to reach that goal. This is highlighted in the case *Whitman V. American Trucking Association, Inc.* Christine Whitman was the head of the EPA at the time and imposed regulations for ambient air quality. In this case the court granted deference, citing *Chevron*, which means the agency was correct in their decision (Warren, 2010b). Rubin is not fond of the *Chevron* doctrine. He thinks that the courts should be more involved with the process of rulemaking rather than saying the agency knows best, in most situations. Most of the time, very few read the federal register or challenge decisions, unless they are professional lobbyists or lawyers (Rubin, 2003). Congress is sometimes called the watchdog of the administrative agencies. It is mainly their duty to make sure they are doing what they are supposed to be doing. However, congress is already so busy

with all of their other duties and obligations that they do not spend much time at all reviewing agency actions (Warren, 2010b).

*These are the four categories of administrative action.*

Formal Rulemaking	Informal rulemaking
Formal adjudication	Informal adjudication

*Table 1 Types of rulemaking*

According to Rubin, formal procedures are all those required by statute to be more on the record after opportunity for an agency hearing –and all others fall under informal procedures. Rubin argues that formal rulemaking is null or impractical because it requires the agency to provide parties potentially affected by the rule with an oral hearing in which they can present witnesses and can examine opposing witnesses. Informal adjudication is pretty much anything that doesn't fall under the other boxes. Rubin states that executive action would be a better term for informal adjudication. It is also sometimes referred to as agency discretion. Informal rulemaking or agency discretion is used instead of formal rulemaking. Notice and comment rulemaking is a form of informal rulemaking. Agency discretion is informal rulemaking, meaning, that day to day decisions are made on the job while enforcing their legislation by using interpretations for the law, and by following past practices (Rubin, 2003).

These are Rubin's suggestions for a new and improved APA. The first step should be for the agency to identify the goal of the rule. It should be very clear and concise. Next the goal of the rule should be submitted to the President and congress for approval. It should then be publicized for other agencies and the public to view and comment on. Then the agency should be moving on to other steps of policy making. The final goal must be instrumentally rational. To be instrumentally rational means that the law is going strictly by hard facts rather than politics



or other estranged influences. Then the courts will make sure that it is indeed rational. This would displace the chevron doctrine, because the supreme court would have to review all of the rules first (Rubin, 2003).

Courts are sometimes tempted to ban ex parte contacts in informal rulemaking. It is important that judges are impartial decision makers (Rubin, 2003). It is important to have an impartial decision maker, instead of being influenced by ex parte contacts (Rubin, 2003).

Walker feels that the APA needs to be modernized. The APA has only been modified sixteen times since its adoption in 1946, and only four of these changes were significant, and nothing significant has been done in 40 years. The most recent change was making information available electronically in 1996. In 1966, the Freedom of Information Act was passed. In 1974, the Privacy Act was passed, which referred to individuals' privacy when coming to government records regarding the FOIA. In 1976, the Government in the Sunshine Act was passed. Then in 1976 as well, a waiver of sovereign immunity was passed. More changes have been made also through the courts; the Supreme Court, and the D.C. Circuit Court. The courts established some administrative common law doctrines (Walker, 2017). President Trump passed a law that for every new regulation an agency creates, two need to be eliminated to offset costs and cut back on regulations (Walker, 2017). There were nine recommendations made by the American Bar Association (ABA) to update the APA. In April of 2017, a bipartisan law was introduced called the Regulatory Accountability Act of 2017 which includes seven of the nine recommendations (Walker, 2017). The first recommendation is that the agency disclose all data, studies and research that were used to make the final decision after the comment period had elapsed. The second recommendation is to make complete records assessible to the public. The third recommendation is to establish a minimum comment period for significant legislation of 60 days,

and 30 days for less significant legislation. The fourth recommendation is to update the definition of rule in the APA. The fifth recommendation is regarding midnight rules, which refers to when new administrations are in office, they sometimes make policy adjustments on rules, and this suggestion would require that there be another notice and comment period before the president can just undo something. The sixth recommendation is that there should be mandatory retrospective review on old rules. The seventh suggestion is regarding the executive order 12,866 – Unified Regulatory Agenda. This requires agencies to give notice of planned rule-making semi-annually. The APA currently does not address this. The recommendations are that the agency maintain a website containing the regulatory agenda, and they must update the agenda in real time, and explain how rules were resolved, list all active rulemaking, and make reasonable efforts to accurately classify all agenda items. The seventh recommendation is updating rulemaking exemptions. They should repeal exemptions from notice and comment rulemaking for public loans, grants and benefits. Also, they should narrow exemptions for public property and contacts, and military or foreign affairs functions. The final recommendation is regarding post-promulgation of notice and comment rules. APA allows the notice and comment process to be bypassed if there is a good cause. Good cause is if it is in the public's interest to not do the notice and comment process. The problem is that this is happening much more than it should and is on the rise. Between 2003 and 2010, 35% of major rules were not put up for notice and comment. It is 44% for non-major rules. 65% of the time they post them publicly after the fact. The recommendation is that if an agency chooses to do this, they must allow for a notice and comment period after they have implemented it and they have to post any changes made since the comments. They also need to set a target date for the process. These were all recommendations by the American Bar Association (Walker, 2017).

The house passed a bipartisan bill called the Regulatory Accountability Act of 2017. This bill addressed many of the ABA suggestions and some other reforms of the administrative state. The bill has many parts and they are: All Economic Regulations Are Transparent Act (ALERT), Providing Accountability Through Transparency Act, Evaluation Before Implementing Executive Wishlist Act (Review Act), Separation of Powers Restoration Act, Small Business Regulatory Flexibility Act, and the Regulatory Accountability Act (Walker, 2017). This law will require agencies to publish timely information about developing regulations and they must also provide a summary in plain English that anyone can understand. The Review Act allows for judicial review of new laws that cost over a billion dollars. The Separation of Powers Restoration Act calls for the elimination of the Auer and Chevron doctrine. The Small Business Regulatory Flexibility Improvement Act will require agencies to consider the new regulations impacts on small businesses (Walker, 2017).

One way that administrative agencies are checked is through congressional oversight. There are two main ways that congress can check administrative agencies; police patrols or fire alarms. The police patrol model is very centralized, active and a direct way to regulate agencies. Police patrol strategy utilizes regular surveillance. The fire alarm oversight model is more reactive. Congress will establish rules in legislation that allow citizens and interest groups to evaluate administrative decisions and charge agencies with violating the rules, and then the agency, courts or congress can respond. The fire alarm system is much more practical than the police patrol system. Congress has not neglected its oversight responsibility (McCubbins & Schwartz, 2018).

Administrative agencies sometimes have autonomy. "Bureaucratic autonomy occurs when bureaucrats take actions consistent with their own wishes, actions to which politicians and

organized interests defer even though they would prefer that other actions (or no action at all) be taken” (Carpenter, 2018, p. 316). Bureaucratic autonomy happens because agencies achieve political legitimacy because of their reputation of expertise, efficiency and moral grounding (Carpenter, 2018). During the progressive era, late 1800’s and early 1900’s, bureaucracy was on the rise for the first time. At the same time, congress was spending more time on committees, and the committees were working closely with executive agency officers which led to a comfortable relationship. Uncertainty about bureaucracy was declining because of this relationship and the media had an impact on this as well. The rural and urban press were writing positively about the agencies like the Department of Agriculture and the post office. This made the public more comfortable with the administrative state. All this led to more bureaucratic autonomy (Carpenter, 2018).

A study was done on how state level agencies promote public participation and access in rulemaking. Woods conducted a survey that was sent to 991 state agencies in fifteen different states to be filled out by the agency directors. This was a quantitative study because it was a survey. The researcher came up with the following conclusions. Public participation is influenced by a variety of actors. The results showed that besides interest groups, public notifications of agency rules and more access procedures increases the influence of other agencies, courts and the governor. The courts appeared as being the least influential to agency rule-makers (Woods, 2009). This may be because typically the courts do not respond unless there is a known reason to be involved in an administrative law case. Often times they just cite the Chevron case and leave it at that. Interest group involvement leads to increased information and substance for agency rulemaking. Increased interest group involvement is not looked highly upon by the courts. The results also show that agency directors that have been in their positions

for longer time, seem to feel that there is less interest group involvement in rulemaking. One finding was that states with more interest groups did not report larger interest group involvement in agency rulemaking. One other important finding, that should be expected is that certain state agencies such as social services and criminal justice organizations had less public participation and interest group involvement than other more regulatory agencies (Woods, 2009).

Public participation in rulemaking is small in scale. Many administrators feel that involving public participation is a burden and try to avoid it when possible. Agencies do not have strong incentives to take public comments seriously. Public comments seem to have little effect to alter agency regulations in reality (Woods, 2009).

A survey was sent to federal employees to gauge agency rule-makers feelings and attitudes towards the newer e-rulemaking process (Lubbers, 2010). Lubbers used a convenience sample and snowball technique to get his sample. The researcher had 18 different agencies, 4 that were listed under other. The majority of respondents were from the Department of Transportation (DOT), followed by Department of Homeland Security (DHS), followed by Environmental Protection Agency (EPA), followed by Department of Labor (DOL). The majority of the respondents worked in the majority of their day in rulemaking. There were a few who only spent 5-10% of their time on rulemaking. The majority of the respondents were attorneys. Other employee respondents were policy experts, technical experts, economists, and political scientists. There were some that were not listed. Some of the ones falling under other category were regulations analysts, one who has a JD degree, writers and editors, and information technology professionals, and lastly, project managers (Lubbers, 2010). Most of the respondents were in the age range of 40-59 and have been working in the field for 5-10 years. Many of the respondents worked in rulemaking before it was all electronic (Lubbers, 2010). The survey

utilized a Likert scale. The majority of respondents said that it is the same or easier to do their job with e-rulemaking. One way that it makes it easier, is people can look at the same rulemaking docket without getting in each-others way, since it is now on the computer (Lubbers, 2010). Even though the process is much easier for them, there are many worries that the survey results highlight. Some of the information in the docket is inappropriate, risky or confidential; for example, confidential business information, ensuring protection of personal privacy, copyright violations, and obscene language (Lubbers, 2010). Agency rule-makers were less worried about integration of scanned paper comments with email and electronically submitted comments. Agency rule-makers felt the risk of information destruction or loss of information was less of a concern with e-rulemaking (Lubbers, 2010). There has only been an incremental increase in comments since electronic rulemaking (Lubbers, 2010). Comments with new or useful information have stayed the same. The amount of identical comments is either the same or a little more. The value of comments from average citizens is the same. There are more comments responding to comments already in the docket than before electronic rulemaking. The amount of questions to rulemaking the office receives is the same as before e-rulemaking (Lubbers, 2010). There are more comments that are opinion and not supported by facts. People are concerned about the possibility of hacking with rulemaking being electronic (Lubbers, 2010).

### Interest group involvement in democracy

During the creation of the constitution there were federalists and antifederalists. Antifederalists were not in favor of an overarching federal government. Antifederalists wanted the states to have separate autonomy. Federalists wanted a national government with federalism, which means layers of government broken down between interrelationships between national, state, county and local (Brutus, 2018). In a large republic, the public good could be sacrificed to many other views (Brutus, 2018). In a small republic, the interests of the public are easier to see and there are fewer abuses. In a free republic, the laws must be derived from the consent of the people (Brutus, 2018). The antifederalists warned that having a senate and representatives in a federalist government would lead to problems of gridlock and could prevent laws from being passed to help the public good because of conflicts of opinion from a large group of people (Brutus, 2018).

Vanhanen quoted Lipset's definition of democracy. Democracy can be defined:

as a political system which supplies regular constitutional opportunities for changing the governing officials, and a social mechanism which permits the largest possible part of the population to influence major decisions by choosing among contenders for political office (Vanhanen, 2000).

There needs to be a peaceful transfer of power from one election to the next. There are two basic dimensions of democracy: competition, and participation (Vanhanen, 2000). Competition refers to competition between political parties. There cannot be a democracy if there is only one political party. There also needs to be at least 30% of support for a smaller party to be

considered a legitimate multiple party system. Participation refers to the people voting. Vanhanen states that 10% of political participation or more is a good measure of democracy (2000).

Schattschneider argues that political scientists idealize democracy based on the principles that philosophers like Aristotle came up with, the ideas of everyone in society getting together to make decisions by a majority vote. People are measuring modern democracy based on an outdated society and comparing it to America and other developed nations, where this type of law-making is not practical. The writer argues for a new redefinition of democracy for modern society (Schattschneider, 1960).

Democracy is a competitive political system in which competing leaders and organizations define the alternatives of public policy in such a way that the public can participate in the decision making process (Schattschneider, 1960, p. 141).

In the book *The Semisovereign People*, the author calls America semisovereign for a few reasons. One is that despite having universal suffrage, still only a small percentage of the population chooses to vote. This non-involvement leads to a less democratic society since not every voice is being heard. He also talks about the idea of the competition of conflicts. First, conflict is contagious, as similar as the idea of an outdoor fight that escalates as more actors get involved. All of these actors contribute to the shift for the most prominent conflict or issue that the populations feel needs to be addressed. The development of organized interests and big business contributes to the competition of power and attentions. Every shift an actor makes influences the whole policy universe (Schattschneider, 1960).



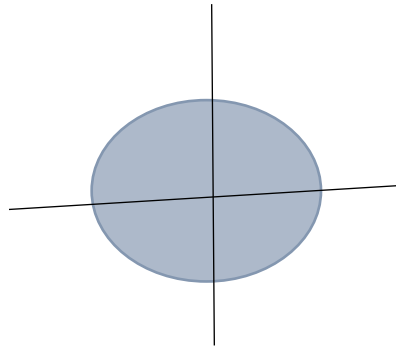


Figure 6 political universe

Schattschneider creates a similar image to figure 6. The circle represents the policy universe, and the lines represent specific issue interests. Any time power shifts in one line, it shifts the dynamic of the policy universe. The lines would intersect in a different spot for example. This represents that conflicts compete for attention and every change in actors can result in a shift in public policy direction (Schattschneider, 1960). These lines can represent interest groups interests for example the Natural Resource Defense Council and the fight against the use of toxic pesticides in farming. Another line could be the National Rifle Association's fight to protect the second amendment. The conflicts do not have to be related. The diagram simply suggests the fights of interest for relevance and public opinion.

There is also the idea of Dualism. Business and government are competing interests. The Republican party represents the ideas of business and the Democratic party represents unions more so. The division of government and business creates an equilibrium that allows for a democracy. Since the industrial revolution, business has been growing more powerful and wealthy, and that wealth can buy power. Government keeps business in check by competing for power which creates stalemates but allows for more than one interest to be heard (Schattschneider, 1960). "Competition is the life of government. To destroy the equilibrium is to

destroy one government and to create another” (Schattschneider, 1960, p. 125). “The major parties are now the most highly competitive large scale organization in American society, more competitive than business (which usually competes marginally,) or the churches or the labor unions” (Schattschneider, 1960, p. 95).

Interest group liberalism is a new form of liberalism. It came about between the 1960’s and 1970’s. Interest group liberalism is “optimistic about government, expects to use government in a positive and expansive role, is motivated by the highest sentiments, and possesses a strong faith that what is good for government is good for society” (Theodore Lowi, 1979, p. 51). Lowi believes that interest group liberalism is flawed for the following reasons:

1. Pluralist component has badly served liberalism by propagating the faith that a system built primarily upon groups and bargaining is self-corrective
2. Pluralist theory is also comparable to laissez-faire economics in the extent to which it is unable to come to terms with the problem of imperfect competition
3. The pluralist paradigm depends upon an idealized conception of the group

(Theodore Lowi, 1979, pp. 57 - 58)

Lowi believes that with the rise of the administrative state, that capitalism is on a downward spiral and socialism could be coming. Lowi fears that this could lead to reduced civil liberties. He believes this can be corrected by the emergence of the idea of juridical democracy (Theodore Lowi, 1979).

The idea of interest groups is not new, as there were interest groups (or factions or associations) even during the building of the constitution. The nature of interest groups has changed over time (Loomis & Cigler, 1991). There has been a significant rise of interest groups

since the early 1960's. Currently, the majority of interest group headquarters are now in Washington D.C.. Major technology changes like computers and internet have led to better and more effective lobbying. There has also been a rise of single interest groups, which are groups that only focus on specific issues. Campaign finance laws have changed over time as well and there has been a rise of political action committees (PAC). Interest groups are increasingly involved with bureaucracy (Loomis & Cigler, 1991). "Interest groups are natural phenomenon in a democratic regime – that is, individuals will band together to protect their interests" (Loomis & Cigler, 1991, p. 2). Madison also believed that it was in mans' nature to be involved in groups like factions (Loomis & Cigler, 1991).

People began to become wary of interest groups especially during the industrial age where there was a rise in monopolies and political corruption. This distrust remains today. One contributor to this is the rise of PAC's. There is an ongoing debate whether interest groups are positive or negative. Political scientists normally see interest groups more positively than the general public (Loomis & Cigler, 1991). This idea comes from Madison's federalist papers and the growth of modern America (Loomis & Cigler, 1991). Interest groups are at the center of politics and policy making (Loomis & Cigler, 1991).

Pluralist theory assumes that within the public arena there will be countervailing centers of power within the governmental institutions and among outsiders.

Competition is implicit in the notion that groups as surrogates for individuals, will produce products representing the diversity of opinions that might have been possible in the individual decisions days of democratic Athens (Loomis & Cigler, 1991, p. 4).

There are two major themes of criticism regarding pluralist theory. The first is that some interests continuously lose in the policy making process, while others frequently are successful (Loomis & Cigler, 1991). The other criticism is that inequality of results continues to be an important part of group politics. This is argued by Theodore Lowi. All interest groups get something, but will not get everything. This is the idea of interest group liberalism. It is proliferation of groups and their growing access to government. Interest groups liberalism is only a little different than pluralism. The main difference is that it is sponsored pluralism, with government being the biggest sponsor (Loomis & Cigler, 1991).

A primary western liberal idea is the notion that as long as there are multiple interests, there will never be a majority, and this is a public good (Theodore Lowi, 1974). Lowi feels that there is an insufferable sum of optimism in the connection linking interests and the consent to govern (1974). There are three major assumptions in modern mass democracy. They are: the free access of interests to the political system, inputs of demand and support, and to produce maximum legitimacy with minimum force. Interest groups are able to comment on agency rulemaking and lobby Washington. Interest groups can act as inputs to demand certain laws, or to support certain laws. Maximum legitimacy with minimum force refers to interest groups that are backing and legitimizing public policy and influencing the approval of the masses. This is minimum force by government, still producing maximum legitimacy (Theodore Lowi, 1974). Madison, a liberal, wrote in the federalist 10 paper, free interaction of a multitude of interests produces a public good, and this prevents tyranny (Theodore Lowi, 1974). Liberals found republics superior to democracies. A republic can be defined as a government in which a scheme of representation takes place (Theodore Lowi, 1974). This means that elected politicians are in office and represent the public interest in law making (Theodore Lowi, 1974).

Alexis de Tocqueville wrote about associations which are similar to the modern interest group in his book *Democracy in America* (Goldhammer, 2009). Tocqueville was a French political philosopher writing during the 1800's. He traveled to America to learn about our democracy and made comparisons to how things were in France. There was just a revolution and now Louis Phillippe was in power at the time he was writing. Louis Phillippe outlawed political associations because he felt that it would lead to him being overthrown, because that is how he started his own revolution. Tocqueville disagreed strongly with Louis Phillippe's law (Goldhammer, 2009). Tocqueville mentions the free trade association convention of 1831 as a great example of an association in American democracy. Tocqueville believed that associations were partially responsible for the success of American democracy and that associations could reject the extortions of democracy (Goldhammer, 2009). Tocqueville was very wary of absolutism. Absolutism comes about when the country pursues its own interest instead of the peoples'. In France there were intermediary bodies that at one time had a say such as the bourgeoisie, nobility, religious leaders and others. When Louise Phillippe took over, he squashed them under his foot (Goldhammer, 2009). Tocqueville believed that political associations and interest groups can create an intermediary group between government and the masses. Associations give the lower class a voice to compete with the upper class and the most popular opinion would win (Goldhammer, 2009).

Group theory is the notion that people who have a collective interest, work together to achieve their goal. Interest groups are an example of one of these groups (Olson, 2018). Mancur Olson is in opposition to the idea of pluralism, he writes about it in the article "The Logic of Collective Action," and he states the problem is the free rider (Loomis & Cigler, 1991). Voluntary membership to a union is a good example of the free rider problem. If you are not a

member of the union, but the union works to get a raise, whether you put in the work or not, you still get the benefits (Olson, 2018). Olson used the rational economic man model to come up with this theory. It is the economic idea of measuring opportunity costs with benefits such as time, money, and what you get for it (Loomis & Cigler, 1991). The key to interest group formation and survival is the provision of selective benefits (Loomis & Cigler, 1991). Different from Olson's philosophy is Terry Moe's, who believes that non-material incentives such as fellowship and self-satisfaction are enough to motivate group formation (Loomis & Cigler, 1991).

Government has acted in a way that encourages the development of interest groups. One way is through the Wagner Act. This made collective bargaining a right. Citizen participation in government has two major missions. One is that citizens can act as a watch dog over agencies, and on the other side of the spectrum citizens act as an advocate for its programs (Loomis & Cigler, 1991).

Principle agent theory is a political science term that describes the relationship between authorities and those who carry out public policy. The principal is congress, and the agent is the administrative agencies. Congress delegates power to administer policies and update laws to the administrative agencies. "Organizations can be defined as networks of overlapping or nested principal agent relationships." (Kiewiet & McCubbins, 2018, p. 39) This means that there are multiple layers of larger and smaller principle and agents in government. For example, more than one agency, and power dynamics within agency besides the obvious interaction between agencies and the legislative, executive or judicial branch. By delegating the division of labor, and the development of specialization, congress gives agency some power. This means that agencies are delegated tasks to complete and are experts in their fields. Collective action is the

idea that groups contribute resources to provide a public good that they may or may not need. There is the problem of agencies having hidden information for example, who are the best workers. There can be a conflict of interest between what the principle wants, and what the agent wants, hidden information or actions can hurt this relationship. There can sometimes be agents that collude together to change direction of policy. The problem is that resources or power, given to an agent for the function of moving the interest forward of the principle, can be turned against them (Kiewiet & McCubbins, 2018).

Significant split in opinions on issues by citizens are crucial for the emergence of interest groups (Loomis & Cigler, 1991). There are several factors that lead to the development of interest groups. The constitution allows for free speech, freedom of association, and the freedom to peacefully assemble. Federalism and separation of powers makes for many entry ways for policy influence. Political parties are also less unified in the U.S. in comparison to other countries which allow for more influence by interest groups (Loomis & Cigler, 1991). Lastly, American culture and values also exemplify interest group involvement. Alexis de Tocqueville believed that the ideas of individualism and the need for personal achievement lead to citizens wanting to join groups so that they can be influential in reaching some of their own needs (Loomis & Cigler, 1991). “Not only do Americans see themselves as joiners, but they actually tend to belong to more political groups than do people of other countries” (Loomis & Cigler, 1991, p. 6).

Interest groups do not appear from nowhere. Even when there is a group with a need, it may take time before they band together for a cause and become active politically. Typically, there is an economic need or a significant technological change, that leads to a need for representation or change in policy. Often times, group formation comes in waves. There were a

few points in history that led to the creation of interest groups. One was the industrial revolution, another was following the civil war, and around the time of the 1960's – there was a rise in business centered interest which also led to counter interest regarding issues like consumer protection and environmental concerns (Loomis & Cigler, 1991).

Truman's theory of group proliferation suggests that the interest group universe is inherently unstable. Groups formed from an imbalance of interests in one area induce a subsequent disequilibrium, which acts as a catalyst for individuals to form groups as counterweights to the new perceptions of inequity (Loomis & Cigler, 1991, p. 7).

Political parties are seen as similar to interest groups (Beck & Hershey, 2001). PAC's and interest groups serve as intermediaries between citizens and government. Parties nominate candidates that make policy and stand for certain issues. Intermediary groups are always in competition in a fight for political power. Parties also compete with each other and with other interests. Some view parties as important marks of modern government. It is important to democracy and especially in the beginning for the continuing of a democracy. Some founding fathers were not in favor of the idea of political parties. Madison definitely opposed what he called political factions, which are similar to the idea of parties and interest groups. Political parties have formed anyway naturally. We have a two party system in America (Beck & Hershey, 2001).



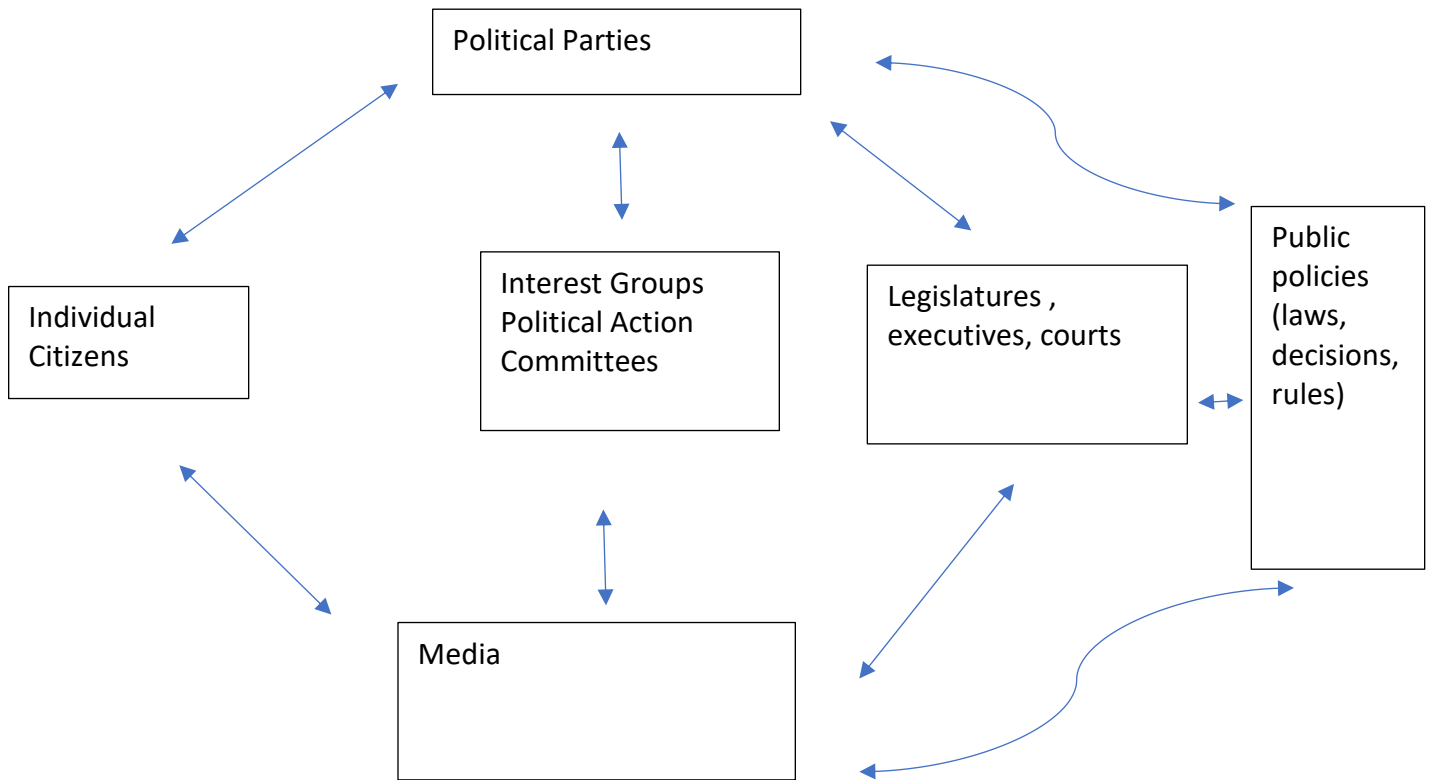


Figure 7 Political Organizations as intermediaries in the political system

(Beck & Hershey, 2001)

Figure 5 shows how all of the parts play together in order to come up with a public policy. The pieces of the puzzle are political parties, citizens, media, legislature, executive branch, the supreme courts, interest groups and PAC's, and they all influence public polices, laws, decisions and rules (Beck & Hershey, 2001)

A study was done on interest groups in democracy in the EU, but much of this is relevant to the United States. The public is not always engaged and interested in politics. There has been increasing distrust and pessimism regarding politics (Maloney, 2009). Interest groups help to motivate and engage citizens. Governments like having interest groups (Maloney, 2009). Interest groups provide policy legitimacy and civic vibrancy (Maloney, 2009). Public policy results are more legitimate if it appears to be a clear problem that was addressed. Interest groups often mobilize citizens to be in favor of certain policies, or get out and vote. They often will endorse a candidate that is in line with their cause. Civic vibrancy is good because it can build a common identity for a policy, solve problems and yield new ideas (Maloney, 2009).

America was built on capitalist ideology, liberalism and pluralism. Capitalism comes from the economist Adam Smith. Adam Smith believed in laissez faire economics which meant that government should not get involved in the economy and the invisible hand would regulate the economy. Adam Smith believed that capitalism would benefit all classes of society. This ended up being wishful thinking. There were ills of capitalism like extreme differences from the wealthy and the working class. This led to Marxist hypothesis that the working class would rise up and communism would be the solution. However, what happened instead was pluralism. Pluralism displaced the capitalist ideology, because the emergence of other interest groups forces such as labor unions began to bridge the gap between workers and industry. During the Great Depression the new idea of new liberalism or the idea of expansion of government to step in to provide a minimum standard of living for the working class came about. There was a conflict between old liberalism which is now redefined as conservatism, and new liberalism. New liberalism is similar to the ideals of the democratic party platform, as well as conservatism is similar to the ideas of republicans and libertarian parties. It comes down to the debate of

whether to expand or contract government and reflects the ideas of the federalists and antifederalists ideas of large and small government (Theodore Lowi, 1979).

Interest groups can be defined as a group of people drawn to or acting together in support of a common purpose or concern ("Dictionary.com" 2018). The literature shows a few different theories explaining interest groups. One is called the iron triangle. The iron triangle is a three-pronged diagram or way to visualize policy being created. The iron triangle is made up of congress, bureaucrats and interest groups. All of these sections influence the direction of public policy (N.A., 2018a). Anderson defines an iron triangle like this, an iron triangle ideally involves a pattern of symbiotic relationships among some congressional committees (or subcommittees), and an administrative agency or two, and the relevant interest groups centered on a policy area (2015, p. 74). It is symbiotic because they all work together and benefit one another in a way similar to a cycle which is envisioned as a triangle with arrows pointing in either direction.

See Figure 2 below.

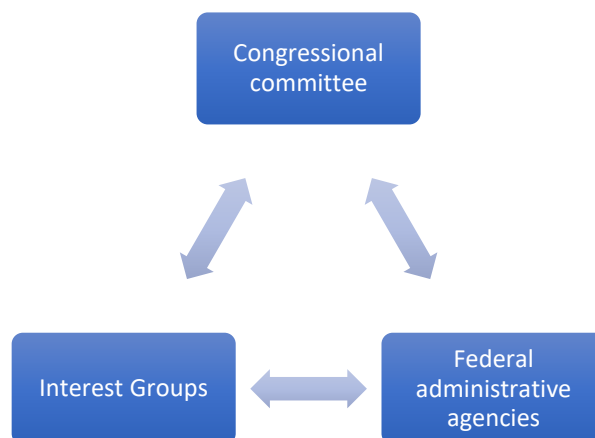


Figure 8 Iron Triangle

Interest groups can help administrative agencies in many ways. They have the ability to sway public opinion on related issues, raise awareness, and secure agency budgets (Yackee, 2006). Interest groups help resist too much political control (Yackee, 2006). Interest groups also help agencies when they disagree with the presidential directions (Yackee, 2006). It is a give and take relationship that is sometimes mutually benefiting. Interest groups are typically viewed as an indirect influence on congress but they are additionally a direct influence on regulatory agencies (Yackee, 2006).

Martino Golden conducted a similar study looking at interest group involvement in agency rulemaking. He looked at three agencies and multiple rules per agency. The study focused on the Environmental Protection Agency (EPA), the National Highway and Traffic Safety Administration (NHTSA), and the Housing and Urban Development Agency (HUD). These agencies were chosen because they all serve different clientele and therefore are influenced by different interest groups; secondly, all three agencies took on a lot of regulatory authority around the 1970's. Regulations were chosen under the Clinton administration. There were a total of 10 rules being analyzed (Martino Golden, 1998). The study was analyzed by going through the comments. There were multiple findings in his research. The majority of comments to NHTSA and the EPA were from businesses. The percentage of citizen involvement in all rules never was above 11% (Martino Golden, 1998). Eight out of ten rules changed minimally as a result of the comments. The agency was most likely to make changes if there was a consensus among commenters (Martino Golden, 1998). He also found that there is hardly significant influence based on comments in notice and comment rulemaking. From his study, he did not find a clear pattern on whose voice was heard the most. Ultimately, it is the agency that makes the final decision (Martino Golden, 1998). He also stresses that it is issue

networks not iron triangles that are most prevalent in notice and comment rulemaking (Martino Golden, 1998).

A study measured the degree of interest group influence on federal agency rulemaking. Forty rules were chosen with a total of 1,693 comments. Under the Department of Labor, the agencies Occupational Safety and Health Administration, and the Employment Standard Administration and under the U.S. Department of Transportation, the Federal Railroad Administration, and the Federal Highway Administration were chosen. The researchers chose only rules with comments between 2 and 200 in order to use normal situations (McKay & Yackee, 2007). The dependent variable was rule change. The researchers used a three-point scale to assess the direction of change between initial writing and the final rule. The scale was more government involvement, same government involvement or less regulations. The unit of analysis was the rule. There were two predictive variables to measure the level of conflict in comments. The first was interest group split which is basically tallying the amount for and against, and the second was comment intensity differential which was the number and degree of change desired (McKay & Yackee, 2007). The findings showed that the squeaky wheel gets the grease. They also tested to see how competitive competing interest were, if lobbying on one side led to more on the other. The statistics showed that they were not able to make the claim with confidence (McKay & Yackee, 2007).

George M. Guess and Paul G. Farnham provide good explanations and examples of interest groups involvement in public policy making in the text "Cases in Public Policy Analysis" (2011). The literature suggests that a key difference between iron triangle and issue networks is that iron triangles tend to be viewed more positively than issue networks. Issue networks are looked at as an entity that slows down the process of law making. "Issue networks

are shared knowledge groups of experts who have developed an industry on particular policies” (Guess & Farnham, 2011). Those participating in issue networks typically do not have direct issues at stake, it is more so an idea or belief that propels them forward to act (Anderson, 2015). Issue networks focus on a particular task - for example the protests against hydraulic fracking. When it’s a major issue then protests and documentaries will follow. People will go door to door, call their legislators to vote against allowing hydraulic fracking. If this issue was resolved and hydraulic fracking stopped, the issue network would either disappear or find a new issue they would like to tackle. An issue network is not a solid entity like an organization such as the Sierra Club, they would be more so an interest group because they are an organized and well-respected long-term environmental advocacy organization, and as long as there continues to be any form of environmental concern, they will be there. In summary, interest groups are professional organizations looking to influence policy such as lobbyists that work for industries or perhaps organizations like the NRA or Sierra club, whereas issue networks concentrate on a narrow issue and disappear once the issue has been resolved like an organized protest or movement such as Black Lives Matter. Another important distinction is issue networks could be a combination of many interest groups, professionals and citizens that are all on the same page and working to influence policy but not form a specific organization.

Another theory is policy communities. Policy communities are broader in scope than the theory of the iron triangle. They are more easily identifiable than issue networks (Anderson, 2015). Policy communities and policy networks are theories used a lot in comparative and international politics (Atkinson & Coleman, 1992). The idea of policy communities and networks seem to show structure, however in reality it is more chaotic (Atkinson & Coleman, 1992).

Policy networks have been described as corporatist, state directed, collaborative or pluralist, not simply on the basis of who partakes but also on the basis of the distribution of organizational resources within the network (Atkinson & Coleman, 1992, p. 161).

The idea that policy comes from the interests of organized society has not been proved wrong, but the idea of responsive politicians and compliant bureaucrats needs to be reevaluated (Atkinson & Coleman, 1992). A state (nation) is considered an active agent molding society and serving the interests of office holders sometimes as much as or more than, the interests of its citizens (Atkinson & Coleman, 1992). “At the national level, domestic groups pursue their interests by pressuring the government to adopt favorable policies, and politicians seek power by constructing coalitions among those groups (Atkinson & Coleman, 1992, p. 170). Pluralist theory is only relevant in certain selected instances. Pluralist theory was originally seen as realistic but more recently it has been seen more so as idealistic. Within each political system public policy making can work a little differently, this is the case even with different topics from agriculture to transportation (Atkinson & Coleman, 1992).

The pre-proposal stage is sometimes overlooked. There was a study based on seven different federal government transportation agencies. The researcher created a list of completed actions from these agencies since 1999. The researcher ended up compiling a list of 19 rules with a total of 619 comments (Yackee, 2012). The researcher randomly selected either 15 comments or 10% of comments, which came to a sample size of 230 comments which was a coverage rate of 37% (Yackee, 2012). The Researcher used content analysis to look at the comments and proposals. Then the researcher did kappa and logistic regression models to test reliability and got acceptable scores. The dependent variable was a desired rule shift with two

indicators, degree and direction of shift. The independent variables were to capture the ex parte contact and influence of interest groups. The researcher measured the potential for political intervention by conducting a telephone survey (Yackee, 2012). The results showed that off the record lobbying matters in notice and comment rulemaking. Most of the interest groups wanted to share information and ideas with the agencies. The researcher also found that there needs to be more transparency in the pre-proposal process. Finally, many times interest groups try to stop regulations from being put up for proposal (Yackee, 2012).

Some scholars suggest that in order to deal with interest groups influencing public policy and rulemaking, it is necessary to ban ex parte contacts in the process of informal rulemaking (Guess & Farnham, 2011). The reason is that the agencies would be focusing just on the facts rather than on politics, and would be able to create non-partisan policies based solely on what is best for the public, based on research and solid data.

Administrative agencies are not as apolitical as one may assume (Lee, 2012). Lee introduces the theory of “administrative broker.” It is the idea that agencies behave like brokers in the process of rulemaking (Lee, 2012). Agencies coordinate discussion between interest groups and stakeholders regarding new legislation specifics in new rule proposals. A policy is just words until agencies implement it. The beginning process of this implementation is breaking down the specifics of the rule (Lee, 2012). Even though information is cheaper and easier to access than many years ago, congress is still less informed on specifics of policies and laws than the agencies that deal with these issues on a daily basis. This is the premise of agency discretion (Lee, 2012). Agencies attempt to block congress from getting too much information on policies by meeting with stakeholders and interest groups in the pre-proposal stage so that interest groups have less incentive to inform congress. This enhances the idea of agency discretion (Lee, 2012).



This is a potential problem since congress is known to be the watch dog of administrative agencies. Congress has the authority to create agencies and defund agencies. If they are less informed about what the agencies are doing, this strengthens administrative agencies power and therefore also weakens congressional oversight.

*List of Interest groups that have lobbied the FDA in 2018 on Food topics*

- American Frozen Food Institute
- American Peanut Shellers Assn
- Hormel Foods
- National Association of American Wineries
- Alliance for Stronger FDA
- American Bakers Assn
- American Beverage Assn
- American Diabetes Assn
- American Farm Bureau
- American Feed Industry
- American Public Health Assn
- American Soybean Assn
- Anheuser-Busch In Bev
- Animal Defenders International
- Arctic Catering
- Beer Institute
- CA Leafy Green Products Handler MKT AGR
- California Dried Plums Board
- California Rice Commission
- California Walnut Commission
- Campbell Soup
- Corn Refiners Assn
- Council for Responsible Nutrition
- Council for Holistic Health Educators
- Dominos Pizza
- Food Laboratory Alliance
- Food Safety Net Services
- Grocery Manufacturers Assn
- HEB Grocery
- Honest Honey Initiative
- Independent Bakers Assn
- Infant Nutrition Council of America
- International Bottled Water Assn
- Internationals Dairy Foods Assn
- International Sugar Trade Assn
- International Food Service Distributors

- International Pizza Hut Franchise Holders Assn
- Juice Products Assn
- Juvenile Diabetes Foundation International
- Kraft Heinz Co
- Mars Inc.
- Lifeway Foods Inc.
- Mckee Foods
- National Cattlemen Beef Assn
- National Confectioners Assn
- National Corn Growers Assn
- National Council of Farmers Co Op
- National Farmers Union
- National Grape – Co Op Assn
- National Honey packers and dealers Assn
- National Milk productions federation
- National Potato Council
- National Sunflower Assn
- National Turkey Federation
- Nestle SA
- North American Blueberry Council
- Ocean Spray Cranberries
- Tyson Foods
- United Egg Producers
- United Fresh Produce Assn
- US Canola Assn
- US Cattlemen Assn
- US Dry Bean Council
- US Rice Producers Assn
- US Dry Pea and Lentil Council
- USA Rice Foundation

*Box 2 Interest groups lobbying FDA*

(Center for Responsive Politics, 2018b)

List of Interest groups that lobbied the FCC in 2018

- American Movil
- INCOMPAS
- NCTA The Internet and Television Assn
- Soft Bank Corp – Sprint Communication
- AT&T Inc.
- Century link
- Charter Communications
- City of Santa Monica, CA
- Community Assns Institute
- Granite Telecommunications
- Interactive Advertising Bureau
- International Soc for Tech in Education
- Lev 3 Communications
- National Amusements Inc. – CBS
- News Max Media
- True Blue Inc.
- US Chamber of Commerce
- WellCare Health Plans
- Writers Guild of America West
- 21<sup>st</sup> Century Fox
- 21<sup>st</sup> Century Privacy Coalition
- Alliance for Community Media
- Alliance of Automobiles Manufactures
- All State Insurance
- Article NV
- Amazon.com
- American Academy of Family Physicians
- American Advertising Federation
- American Assn for Justice
- American Assn of Advertising Agencies
- American Assn of Healthcare Administrative Management
- American Civil Liberties Union
- American Conservative Union
- American Farm Bureau
- American Financial Services Assn
- American Highway Users Alliance
- American Hotel and lodging Assn
- American Symphony Orchastra League
- American Tower Corp
- Apollo Global Management – ADT Security Services
- Apple Inc.
- Assn of National Advertisers
- Assn of Teleservices International

- Assn of Global Automakers
- AT&T Inc. – Fibertower Corp
- Black Television News Networks
- Boston University
- Broadbill Investment Partners
- Building Owners & Management Assn
- Cisco Systems
- City of Claremont CA
- City of West Valley, UT
- Cloud Factors LLC
- CloudFare
- CoBank
- Comcost Corp
- Common Cause
- Common Wealth of PA – PA Higher Education Assistance Agency
- Computer & Communications Industry Assn
- Computing Technology Industry Assn – Comptia Member Services
- Consumer Bankers Assn
- Consumer Union of the US
- Continental AG
- Credit Union National Assn
- Data Marketing Assn
- Deere & Co
- Dell Technologies - VMware Inc
- Deutsch Telekom – T- Mobile USA
- DF Advisory Group
- Digital Content Next
- DISH Network
- Electronic Transactions Assn
- Electronic Security Assn
- Etsy Inc.
- Facebook Inc.
- Ford Motor Co
- Fuse Media
- General Communication Inc.
- General Motors
- Globalstar
- Golden Gate Bridge Highway & Trans Dist
- Harbinger Capital Partners – Ligado Networks
- Hewlett Packard Enterprise
- Home Depot
- Honeywell International
- Huawei Technologies
- Hubbard Broadcasting

- IDT Corp
- Independent Film & Television Alliance
- Information Technology Industry Council
- Insights Assn
- Intel corp
- Interdigital Inc.
- International Assn of Fire Chiefs
- Internet Corp for Assigned Names/Numbers
- Kalispell Regional Medical Center
- Kansas Dept of Commerce
- Kansas Farm Bureau
- Lake County, MN
- Larm Industry Communications CMTE
- Leadership Conference on Civil & Human Rights
- Mach FM
- Marin County, CA
- Maximus Inc.
- Mescalero Apache Telecom
- Microsoft Corp
- Mon Health
- Motion Picture Assn of America
- Motor & Equipment Manufacturers Assn
- NAACP
- National Academy of Recording Arts & Sciences
- National Amusement Inc. – Viacom Inc.
- National Assn of African American Owned Media – Entertainment Networks.  
NAACP
- National Academy of Recording Arts & Sciences
- National Amusements INC – Viacom Inc
- National Assn of African American Owned Media – Entertainment  
Networks/NAACP
- National Assn of Federally Insured Credit Univs
- National Assn of Manufacturers
- National Assn of Police Organizations
- National Corn Growers Assn
- National Council of Higher Education Resources
- National Court Reporters Assn
- National Farmers Union
- National Lifeline Assn
- National Multi Housing Council
- National Society of Professional Surveyors
- National Treasury Employees Union
- National Tribal Telecommunications ASSN
- National Venture Capital ASSN

- National Assn of Secondary School Principals
- National Assn of Towns & Townships
- Navient Corp
- NelNET Inc.
- News Media Alliance
- NextEra Energy
- Northern Michigan University
- Oracle Crop
- Panasonic Corp - Panasonic Corp of North America
- PDV Wireless
- Port of Los Angeles
- Port of Los Angeles
- Portland General Electric
- Power & Communications Contractors Assn
- Quintillion
- Retail Industry Leaders Assn
- Rock Holdings - Quicken Loans
- Rockwell Collins Inc
- Rural AR Telecom
- Satellite Industry Assn
- Small Company Coalition
- Solix Inc
- South Central Foundation
- Sovereign Councils of Hawaiian Homelands Agencies
- Sports Fans Coalition
- Starry Inc
- Target Corp
- Telephone & Data Systems Inc. – TDS Telecommunications
- Telephone & Data Systems Inc - US Cellular
- Tenet Healthcare
- Trimble Navigation
- Twilio
- Twitter
- Unity Point Health
- US Chamber of Commerce
- US Public Interest Research Group
- Verizon Communications
- VNU International - TNC US
- Walt Disney Co - Disney Worldwide Services
- Western Telecommunications Alliance
- Wireless Infrastructure Assn
- Wireless Internet Service Providers Assn
- WorldVu Development

(Center for Responsive Politics, 2018a)

### Political Participation

Some government agencies utilize public committees in the rulemaking process. This is a way to increase public participation in agency rulemaking. Public committees are typically not government employees, just knowledgeable citizens that care about the topic. The typical format of the meeting is first the agency presents on the policy, then the public committees present, and afterwards there is open public comment, and questions, and then committee deliberation (Moffitt, 2018). Critics believe that public committees are not public enough, and tend to validate agencies rather than critically participate. Supporters believe public committees legitimate policy, promote capable citizenship, advance policy implementation, and help to come up with new ideas (Moffitt, 2018).

Figure 6 on the following page, illustrates different scenarios of agency independence and interdependence, and knowledge or ignorance. Agencies can be benefited by working together with public committees. Agency learning in and from the public contributes to democratic accountability (Moffitt, 2018). This idea that democratic accountability and bureaucratic expertise can coexist, is contrary to principle agent theory (Moffitt, 2018). Moffitt backs up this assertion citing Gailmard and Patty's article, *Learning while Governing* (2018).



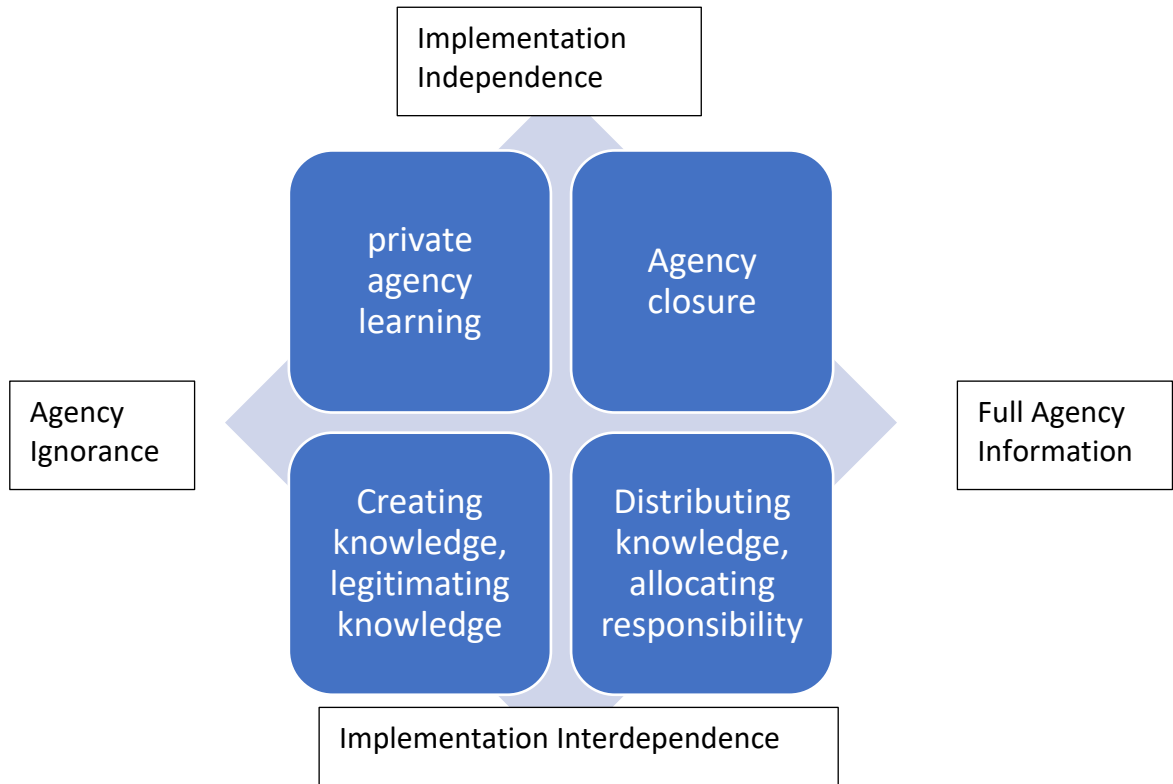


Figure 9 Participation in American Bureaucracy matrix

(Moffitt, 2018)

A study was done on how internet use affects public participation and political knowledge of citizens in the 2004 election. Xenos and Moy had two hypotheses. (H1) was “Exposure to online political information is positively related to civic and political engagement” (Xenos & Moy, 2007). (H2) was “The effects of online political information exposure on civic and political engagement are contingent on levels of political interest” (Xenos & Moy, 2007). In order to conduct this research, they used a survey. The survey they used was the NES pre-

election and post-election surveys. A multistage area probability sampling technique was used. The response rate was 66.1% for the pre-election survey and 88.0% for the post-election survey. The researchers analyzed the data using quantitative research methods and statistics. The results showed that web access to information was widespread among the public. The most significant variables for internet use was youth, education, and income. The results also showed that knowledge (calculated based on answering questions about politics) was significantly related to these variables: male, white, higher income, meaning that people who fit in those categories scored better on the tests. However, this is not significantly different from those who get their news from other media sources such as newspapers, television or radio. The same demographics using these other mediums of communication are testing as more knowledgeable about politics. Another result was that public interest in politics was not significantly relevant among internet users and their knowledge of politics. Other information they found, keeping in mind this article was from 2007, is that search engines are proving useful for those who want to look up something quickly when they think of a question. The report said that 84% of responders were familiar with search engines, and 56% use search engines daily. In sum, the article concluded optimistically that the internet is a positive force in modern democracy (Xenos & Moy, 2007). It shows that having internet access is helpful for getting quick information in a cost effective way (Xenos & Moy, 2007). It is a great tool for politicians to get their messages out on campaign websites. Xenos and Moy are in agreement with other scholars that the internet is quickly becoming a mainstream way to access information (Xenos & Moy, 2007).

Yamamoto et al conducted a study on the relationship between young adults' online political expression, use of political and news mobile apps and their actual political participation. Online political participation includes the following: posting statuses, following and sharing

posts from politicians and candidates, sharing news articles and videos on social media, engaging in political blogs, and having online chats and discussion about politics with friends or followers. There are a few different types of mobile apps. During the 2012 campaign Obama, and Romney had their own campaign apps. There are also apps that you can use to read the news and some that cater to conservative or liberal readers. Political participation includes many things. It includes voting, signing petitions, attending town hall meetings, and others. Yamamoto et al sent out a survey using college email addresses to reach young adults ages 18-29. The researchers had 600 usable responses which came to a 12% response rate. They found that young adults who consume political information online are more likely to participate in politics offline, as they express political opinions more often (Yamamoto, Kushin, & Dalisay, 2013).

There has also been the fear of “fake news” on the internet too. Mark Zuckerberg, the CEO of Facebook, is trying to tackle the issue of false news stories and inaccurate political memes going viral (Levin, 2018). This is relevant to this paper because having a more informed public, leads to more civic engagement, which could include choosing to comment on notice and comment boards. Internet access is an important tool for gathering information. It is a worthy goal to be able to keep the information that people are getting accurate. A lot of people get their news from Facebook, especially young people that are less likely to sit down and read a newspaper or watch the nightly news.

#### Corporate interests and corporate social responsibility:

Another important aspect to consider in this study is to look at all of these issues from the corporate perspective. Corporations are represented by interest groups. In recent years, customers care more about health and environmental issues. This has started the drive for corporations to make changes to how they are doing things to appeal to that base, and also use

that for marketing. This has led to the movement of corporate social responsibility. Corporate social responsibility is an effort to encourage companies to contemplate the effect of their business on the public, stakeholders and the environment. The goal is to benefit society rather than to cause harm (Costanigro, Deselnicu, & McFadden, 2015).

In a study conducted by Costanigro et al, they looked at the effect of certain labels and people's willingness to pay more or differentiate between products. The labels the study looked at were organic, hormone free (rbst- free), Colorado Proud and Validus. Organic means that there are no pesticides or GMO's used in plants. Organic beef, would be grass-fed beef, that doesn't receive hormones or antibiotics. Hormone free (rbst – free), is pertaining to dairy products claiming they do not use hormones to increase the cows' milk production. Colorado Proud is referring to the fact that the food is local (or from Colorado). Validus is a food labeling company that provides labels for sustainable farming and animal welfare. The study was conducted at a large university in Colorado. The research method was a quantitative survey using a Likert scale asking people questions about what is important to them when they are buying food products. The researchers used a convenience sample with a sample size of 96 responses. In the survey design they controlled for social desirability bias by making them do the survey twice, once asking them how they feel, and then how they thought their peers would respond. The survey was anonymous to make sure the participants felt more comfortable answering the questions. The results were that the most important issue was animal welfare, and that consumers are willing to pay more for a product that shows the company or farm has good practices for taking care of their animals. The second most important issue was sustainable agricultural practices and the least important was community involvement or buying local (Costanigro et al., 2015).

Eabrasu adds to the corporate social responsibility research by adding the perspective of moral pluralism (Eabrasu, 2012). She studied the idea of good business practices. Phrases like good business practices are very arbitrary. Some examples of what good business practices could be are reducing pollution, shutting down sweatshops, or discouraging tax evasion (Eabrasu, 2012). Depending on the business what they mean by “good business practices” may vary. She also brings up immoral practices. She mentions that there is no solid definition of what is moral or immoral. There is the paradox of how to deal with issues that are morally unacceptable, yet legally permissible and economically viable (Eabrasu, 2012). There are two alternative answers to these problems that she addresses. The first one is to monitor immoral behavior and publicly denounce it when it happens, and the second answer is governance and regulations (Eabrasu, 2012). In the study she argues that controversial activities in corporate social responsibility research are wider than realized, and some activities that are viewed as immoral could be justified if looked at through a different moral lens (Eabrasu, 2012).

## FDA

The first agency to look at is the FDA. I will go over some background on food labeling and their administrative rulemaking process, then the following section will be on the FCC following the same format.

There has never been more access to nutrition information in America as there is now. Congress delegated a committee to research and analyze the effectiveness of the nutrition labeling system. The results showed that the current system is not effective, and that the FDA should start a new approach. One solution is to have standardized front of packaging labeling similar to the approach of appliances using the energy star label (Wartella, 2011). This is a very straight forward way to provide consumers with quick information. It also would encourage business to make their products healthier, so they can get the FDA approved healthy label, which they would potentially need to stay competitive. If consumers see that label, some may be more likely to purchase that product. For some, cost is a bigger concern than nutrient content. Individuals with lower incomes and who are less educated are more likely to have a hard time making healthy choices. More educated people are more likely to understand the nutrition facts table than those who are less educated. (Wartella, 2011). Wartella makes four suggestions on the characteristics front-of package labels should have. The labels should be simple and not require significant knowledge of nutrition. Second, it should be shown as guidance rather than specific facts, and third, it should use an ordinal approach. Finally, it should reflect easily identified names or symbols (Wartella, 2011, p. 3)

There are two main categories of front of package labeling. The first is a summary symbol, an example of this is the United Kingdom's traffic light system showing red for

something unhealthy or green for something healthy and of course yellow would be somewhere in between. The summary symbol system is very easy to understand at a glance and is the most effective when it comes to consumers making healthier choices. The second type is nutrient specific front of package labeling. An example of this is Kellogg's nutrients at a glance, which basically states specific nutrient facts in an easy to read manner.



Figure 10 Nutrients at a glance

(Narayan, 2010)

The Kellogg's nutrients at a glance is all in green and it highlights calories, fat, sodium and sugar, as well as positive highlights such as vitamins it may contain. The strength of nutrient specific labeling is that it works to educate the consumer better, although it does not always lead to healthier choices. One of the problems is that there are so many different systems of front of package labeling that it is confusing to consumers. The FDA is working on addressing the issue to try and make it more standard (Andrews, 2014).

Food and dietary supplements are not pre-approved by the FDA, but drugs are pre-approved. The FDA will send warning letters to food or dietary supplement companies if they label things incorrectly (Brody, 2016). Brody explains misleading labels.

“Structure/function” claims take the form of, for example, “promotes the development of lean muscle.” This type of claim refers to a benefit relating to biochemistry or physiology, not relating directly to any disease. “Health claims” address benefits for healthy consumers (not to consumers with an illness). For example, a health claim can take the form of, “calcium may reduce the risk of osteoporosis.” “Nutrient content” claims take the form of, for example, “loaded with,” “rich concentration,” “high in,” and “good source of” (p. 93).

The FDA will send out warning letters to manufacturers if food or dietary supplements claim to cure a disease, and will tell them they will have to apply for a new drug approval or make sure the product is labeled appropriately. Wording is everything. A dietary supplement label could legally read, “may reduce the risk of heart disease,” if it isn’t claiming it is a direct cure. If the manufacturers are trying to claim that it is a cure it will be classified as a drug and have to be pre-approved (Brody, 2016). There are mandatory labeling elements. The first is the statement of identity. The second is the net quantity of contents. The third is nutrition facts. The fourth is ingredient statement, and the fifth is the manufacture’s statement. The statement of identity is what tells the consumer what type of food they are getting. If something is not 100% accurate it has to be labeled as such in a way that is visible. One example is apple juice that is artificially flavored or sweetened must be labeled as so. Net quantity of contents refers to how much food is in the package. The nutrition facts panel shows all the required ingredients they must list and may list. The FDA will test the food product to make sure it is accurate. The ingredients list



must list the ingredients by the highest concentration first and lowest on the bottom. They must include all common allergen ingredients, for example nuts or wheat. The manufacturer's statement must include the company name and contact information (Kirchsteiger-Meir & Baumgartner, 2014).

There have been some challenges for the FDA when they are trying to regulate labeling. A couple of court cases have come up over the years arguing that the FDA has been violating the first amendment, more specifically free speech, when they say what a company can't say in an advertisement and labels across the board from the pharmaceutical field, to the dietary supplement field to regulating the tobacco industry. Two examples of court cases are *Allergan V. United States*, *United States V. Caronia*. The cases were about off label promotions such as advertisement (Masoudi, 2011). Commercial speech is entitled to the right to free speech. Characteristics of commercial speech are that it constitutes an advertisement, highlights a particular product, and is economically motivated. There is a four-part checklist that a government agency must look at to determine if they can ban commercial speech. First, if the activity is illegal, second if it is misleading, third, if the speech could cause real harm, and fourth, the speech must be rational. It is also important that the agency provides evidence that there was misconduct (Masoudi, 2011).

The FDA had the authority to inspect food to make sure that it is okay for the market. If they discover that a food product is in violation of the labeling law or that it could cause sickness or death, they have the authority to mandate a recall of the product. There are three types of recalls. Class I recall is when the product could cause serious harm or death. Class II recall is when it could cause temporary health condition. Class III recall is when it doesn't cause a health problem. The FDA can enforce the law. The first action is to send a warning letter. The FDA

can have a court order to seizure of a product by a Federal Marshal. The FDA can suspend a facility's license if the product can cause a serious health problem or death. The FDA also has the authority to pursue a criminal prosecution when it makes sense to do so (Kirchsteiger-Meir & Baumgartner, 2014).

The FDA, like many other agencies, has not always used the same approach to rulemaking throughout history. Currently, the FDA uses informal rulemaking. More specifically, "informal guidance", which can be defined as, "agency advice that influences regulated entities but does not carry the force and effect of law" (Lewis, 2011, p. 1). In the beginning (1902), the FDA, or at that time the bureau of chemistry, their process was doing research for the regulated entities to answer their questions (2). The secretary of agriculture confirmed that they were simply providing guidance (2). Theodore Roosevelt is the one who created the FDA and put Dr. Wiley in charge when it was still under the Bureau of Chemistry under the Department of Agriculture. At one point, Roosevelt thought that Dr. Wiley was making poor decisions and decided to put someone else in charge over him, which is when the FDA lost some of its initial regulating power. Originally Dr. Wiley would go on case by case basis using adjudication, to sue companies that were engaging in unsanitary food processing habits or misleading drug advertising or labeling. Dr. Wiley sent back a shipment from France for distilled vinegar because their labeling suggested that it was more natural than it really was. Roosevelt found this to be too far and confronted Dr. Wiley about it. They put a check on Dr. Wiley so that he could not have as much power. They then created a panel that was in favor of the industry rather than the public that had to have thing approved by them as well. Eventually they did get rid of the panel when they realized it was corrupt (Hilts, 2003, pp. 56-71). "The Bureau of Chemistry's stated purpose for utilizing informal guidance, were to conserve resources

and prevent offenses” (Lewis, 2011, p. 2). Then in 1938 under President FDR, they tightened things up. The official Food and Drug Administration was created. “Congress delegated substantial authority to FDA to use whatever policymaking tools it deemed best to effectuate the FD&C’s statutory mandate” (Lewis, 2011, p. 3). From then until the 1970’s, the FDA used adjudication. In 1946, the APA was passed which encouraged all agencies to use more formal methods. This began a gradual step towards formality. Then in the 1970’s, it went back to guidance. At times the guidance was binding and at other times it was not (Lewis, 2011).

The Public Health Reports journal states that in 1982, the FDA imposed food labeling rules regarding listing sodium and potassium on food labels. This was an effort to help people trying to watch their blood pressure or who have kidney disease, have a better idea of sodium and potassium intake to improve their health. At this point nutrition facts were already listed on food, but now sodium and potassium had to be listed as well. It also stated specific guidelines as to what is considered “low sodium.” or “low potassium.” This is an example of them using regular rulemaking vs adjudication/informal guidance. This was a binding law that had to be followed created by the FDA (Public Health Reports, 1982).

It is feared that the FDA relies too much on guidance documents which undercuts the normal notice and comment rulemaking process. This is contradictory to the administrative procedure act. It also puts more burdens on industries. The FDA does this because their work load is so large and they are also one of the smallest in size (Stankiewicz, 2017). The FDA is a very important regulatory agency tasked with promoting public health. It is their job to make sure that people have safe and properly labeled food and drugs. For the most part, they are not a corrupt agency. There has been a power struggle between industry and the public for years. In some points in history the power leaned a bit too far on the side of industry. This happened a few

times: most notably during the Nixon era, where Nixon decided to illegally reassign many FDA higher up employees to menial labor jobs and replace them with those in favor of industry. The employees that were dismissed were sent to such demeaning position based on their status and education that they ended up quitting or retiring. Around this time in the 70's it became normal to switch out FDA commissioners when new presidents came into office or new political parties. The FDA became politicized. In the 80's and 90's, there were complaints about the alleged drug lag. The idea of deregulation was becoming a more popular public opinion and was also frequently supported among conservatives. This led to a call for the FDA to approve drugs more quickly, yet they were understaffed, underfunded, and expected to do more than ever. Under the George H.W. Bush administration, Kessler was the commissioner of the FDA (Hilts, 2003)

Kessler worked with congress and the new law Nutrition Labeling and Education Act was passed. For so long, the FDA had been slacking on enforcing false claims made by food companies. It had fallen to a lesser priority for a time. Kessler was appointed under a conservative leadership, but ended up being a very progressive and respected leader. Under the Nutrition Labeling and Education Act, food companies now had to have nutrition facts labels on food and the labels had to meet the standards of the FDA for claims like "low fat" etc. The law was passed in 1990. During the early to mid 90's there was a conservative campaign led by Newt Gingrich, to severely deregulate the FDA or completely discard it entirely. Luckily, the plan fell through as they could not come to compromise between parties. This could have been a backlash against the progressive policies of Kessler (Hilts, 2003).

Kessler is known as one of the greatest FDA commissioners. America at this point in time was approving more drugs that were also reliable and safe than any other country. The drug lag was myth being supported by adjusted statistics as an attempt for conservatives and industry

to bring down the strength of the FDA in favor of business and profit. The government was willing to risk the lives of people viewing them as simply “externalities.” Externalities is an economics term for unintentional positive or negative effects of a policy or action. The government was dehumanizing people, and they were willing to experiment on people to see if drugs worked so that there wouldn't be a drug lag caused by scientific testing (Hilts, 2003).

Following commissioner Kessler, was Commissioner Heney. She didn't have quite as good of a term to say the least. Because of the law passed in 1992, a user-fee, that was paid to quicken the approval of new drugs, things started to go downhill. One person was quoted saying that working at the FDA under the kind of pressure was like working at a sweatshop. Even with all the hard work, eleven drugs were approved that later had to be recalled because of fatalities. If the FDA had more time and more resources these things could have been prevented. Even though my study is primarily focused on the issues of food labeling, this is very important, because how people and congress view the pharmaceutical issues, impacts the budget and staff that is able to work on issues regarding food safety and nutrition (Hilts, 2003, pp. 178-337).

The specific law in question is, “Food labeling: Revision of the Nutrition and Supplemental facts label.” I have created a table that illustrates what this law will change. This revision was posted in May of 2012.

*Summary of Major Provisions of 2012 Food Labeling law*

- Take away “Calories from fat.” – current science shows it is the type of fat that matters not how much fat it is
- Must show “added sugars” per serving, and % daily reference value
- Changing “sugars” to “total sugars” and added sugars needs to be added  
indented below
- Updates Vitamins and Minerals: Vitamin D and potassium now required, permits Vitamin A and Vitamin C but not required
- Updating certain reference values in % daily value
- Revising format of labels to emphasize word “Calories”
- Removing footnotes on difference calorie diets
- Requiring documents to support declaration of certain nutrients
- Compliance date of 2 years for large corporations and 3 years for small corporations. (\$10,000,000.00 in sales)

## FCC

Net Neutrality is the principle that owners of internet networks should not discriminate against content provider access to the network and should not control how consumers use that network (Gilroy, 2017). It is about promoting a more equal access to information and protecting consumers from being over charged or cheated because of unfair business policies. Net neutrality is “the idea that internet service providers should treat all data that travels over their networks fairly, without improper discrimination in favor of particular apps, sites, or services” (Schuleman, 2018, p. 2). Net neutrality was passed by the FCC under Obama in 2015. It then went into effect in June 2015. Last December, 2017, the FCC under the Trump administration decided to roll back net neutrality (Gilroy, 2017). The first actual law passed by Obama was titled the “Open Internet Order.” It was passed in 2010. The law added the rules of transparency, no blocking, and no unreasonable discrimination (Schuleman, 2018). Obama made a statement in 2014 supporting open internet and suggesting the FCC reclassify consumer broadband service under Title II of the Telecommunications act. Chairmen Wheeler of the FCC took on that job in February 2015, and the FCC voted in favor to regulate broad band internet as a public utility (Schuleman, 2018). The rules of no blocking lawful content and no throttling rule, were added equally to both broadband and mobile service providers (Schuleman, 2018).

When Trump was elected, this was reversed. The revision was titled the Restoring Internet Freedom Act. This title is a bit backwards. The law requires transparency when things are being blocked or throttled but it doesn't say that the corporations cannot do it. It restores their freedom to do what they want with the internet service they provide. Ajit Pai's argument for this is that it will foster economic growth and competition between new service providers.

There will be more choices in the market. He believes that loosening regulations will better the free market. It will not be better for consumers though if they are not getting good service for what they are paying for.

Some say that a lighter approach on corporations will lead to greater competition, lead to more development and progress, and provide more options for consumers. The other side is that it leaves companies less regulated and makes them more prone to take advantage of consumers by doing things like over charging, and not providing the best speeds (Gilroy, 2017).

There was a congressional hearing on net neutrality in March 2015. The hearing was opened by Representative Goodlatte who is the Chairman on the Judiciary, and is a Republican from the state of Virginia. Goodlatte opened with remarks in opposition to the then proposed net neutrality. His main concern was that adding the Title 2 classification to broadband internet would hinder economic growth, innovation and lead to higher expenses due to regulations which would call for a tax increase of \$11 billion. He, as well as commissioner Ajit Pai, believe that the internet isn't broken and nothing needs to be fixed. Also present were two individuals representing the Federal Trade Commission (FTC), because they are regulators of fair-trade regarding situations like monopolies and following anti-trust laws. Commissioner Wright of the FTC believes that the anti-trust laws are all that is needed to keep broadband providers in check. They already had been challenging unfair business practices by broadband providers in federal courts settling hundreds of cases. He believes that it is not necessary for the FCC to do any more regulations. On the contrary, McSweeny, another commissioner at the FTC disagrees. McSweeny feels that the FCC should go forward with net neutrality for more than just economic reasons but for promoting free speech and access to information that is fair to everyone. It is



interesting to note, that though Ajit Pai and others say that net neutrality is bad for business, on the contrary, paid prioritization done by major telecommunications and broadband companies harms start-up companies and small business as well as artists. Net neutrality prevents throttling and blocking which can help small businesses and artists get their content out and available to consumers. ("Wrecking the Internet in order to Save it: The FCC's Net Neutrality Rule. Committee on the Judiciary. ," 2015).

The past New York State Attorney General Eric Schneiderman started a petition against the rollback of net neutrality. The following states have signed: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New York, New Mexico, New Jersey, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia. In the press release he calls it illegal citing the APA (Schneiderman, 2018).

Under the Administrative Procedure Act the FCC cannot make "arbitrary and capricious" changes to existing policies, such as net neutrality. The FCC's rule fails to justify the Commission's departure from its long-standing policy and practice of defending net neutrality, while misinterpreting and disregarding critical record evidence on industry practices and harm to consumers. Moreover, the rule wrongly reclassifies broadband internet as a Title I information service, rather than a Title II telecommunications service, based on an erroneous and unreasonable interpretation of the Telecommunications Act. Finally, the rule improperly and unlawfully includes sweeping preemption of state and local laws (Schneiderman, 2018).

Barbara D. Underwood is now the Attorney General of NY state and she followed up on the investigation. She subpoenaed the FCC for the comments. Underwood found that many comments were falsely submitted under the names of real people (Confessore, 2018). Half of the comments which is around nine million, used stolen identities (Confessore, 2018).

### *Net Neutrality Order of Events*

- 2010 Open Internet order
- June 2015 Net Neutrality goes through
- 2017 Trump was elected president; he appointed Ajit Pai commissioner of the FCC
- March 2017 Congress overturns Obama's consumer protection
- April 2017 Ajit Pai announces proposal to repeal net neutrality
- May 2017 FCC votes to review net neutrality policy
- December 2017 FCC voted 3-2 to remove net neutrality rules

### 2017 and 2018

- Many state attorney general's sign petitions against net neutrality
- Senate votes against the repeal, has yet to be brought to the house
- October 2018 Underwood gets results on the subpoena on the FCC

Cyber security is becoming a threat to the democratic process regarding notice and comment rulemaking. There was an article in the Washington Post stating that hackers were using fake names to comment on the FCC's website trying to influence net neutrality. Ajit Pai stated that they made the decision to repeal net neutrality on the basis that that was what people who commented on the notice and comment board wanted. Without net neutrality, internet companies will be able to restrict access and charge you more for certain sites. This also allows internet companies to charge you whatever they want to for inconsistent speeds of internet. The argument for this is that doing this increases healthy competition, and allows for more choices of internet providers. However, this action may cause inequality to access of information in America which is a cause for concern. This could be viewed as a threat to the first amendment. There are countries like China that have limited access to information. It is unclear at this time what the implications for sure will be as a result of the FCC's action. The other question is if this is going on with FCC could it also be going on with other agencies as well like the FDA (Fung, 2017)?

There was a news article about possible ethics violation. Ajit Pai and Michael O'Rielly went to a conservative political action committee meeting. This might be a violation of the Hatch Act for heads of federal agencies to attend political fundraising and conference events. This was not the only unethical thing that happened at this event. Furthermore, Ajit Pai received

a gun as a gift from the National Rifle Association (NRA), as a thank you for “saving” the internet. Also, O’Rielly of the FCC spoke at the CPAC supporting a reelection of Donald Trump, and to increase conservative representation in congress in the midterm elections (Brodkin, 2018). This suggests a level of corruption going on in the FCC. It seems as if their actions were very politicized and as if there was a certain agenda, rather than simply representing the public’s desire to repeal net neutrality.

A similar study was done about the FCC regarding a different rule. This one was on a review of media consolidation of the 2002 biennial regulatory review. The telecommunication act of 1996 requires that the FCC reevaluate regulation laws every so often. The FCC decided to go ahead and relax regulations on media ownership despite the majority of comments by the general public that opposed it (Underwood, 2008). The FCC commented on their decision:

We received more than 500,000 brief comments and form letters from individual citizens. These individual commenters expressed general concerns about the potential consequences of media consolidation, including concerns that such consolidation would result in a significant loss of viewpoint diversity and affect competition. We share the concerns of the commenters that our ownership rules protect our critical diversity and competition goals.... And we believe that the rules adopted herein serve our public interest goals, take account of and protect the vibrant media marketplace and comply with our statutory responsibilities and limits (Underwood, 2008).

Underwood argues that this statement the FCC wrote should not count for “giving consideration.” She believes that the APA is not strong enough in its definition of agencies considering public comments. She believes that the FCC should have made changes.

*Summary of Restoring Internet Freedom act.*

“In this document, the Federal Communications Commission (Commission) returns to the light-touch regulatory scheme that enabled the internet to develop and thrive for nearly two decades. The Commission restores the classification of broadband internet access service as a lightly-regulated information service and reinstates the private mobile service classification of mobile broadband internet access service.

The *Restoring Internet Freedom Order* requires internet service providers (ISPs) to disclose information about their network management practices, performance characteristics, and commercial terms of service. Finding that transparency is sufficient to protect the openness of the internet and that conduct rules have greater costs than benefits, the Order eliminates the conduct rules imposed by the *Title II Order*”

(Federal Communication Commission, 2018b).

Box 6 Summary statement Restoring internet freedom act

*Restoring Internet Freedom Act (repeal net neutrality)*

- Promote Internet company competition, less regulations
- Ends Public Utility classification of internet
- Reinstates information service classification of broadband internet access service
- Reinstates private mobile service classification of broadband internet access service
- Return broadband privacy authority to FTC
- Must be transparent, but allows for:
  - Blocking – completely blocking legal sites
  - Throttling – slows down certain sites
  - Affiliated Prioritization
  - Paid Prioritization
  - Congestion management
  - Application specific behavior
  - Device Attachment rules
  - Security

*Figure 11 Components of Restoring Internet Freedom Act*

In conclusion, the FDA and FCC are both regulatory agencies that are governed by the APA. They are subject to following the procedures of different types of rulemaking - formal, and informal. These processes are meant to promote democracies and openness in government. Legislation such as the sunshine laws and FOIA also contribute to this idea of open government, democracy and the freedom to access information, as long as that information is not top secret or sensitive personal information and such. Some problems emerge such as the level of awareness of the process of notice and comment rulemaking. As noted earlier, scholars have seen a trend that the majority of comments are from interest groups and professional lobbyists and lawyers. As McKay says the squeaky wheel tends to get the grease. So, my questions going forward are as follows: Who is commenting? Who is the FDA and FCC listening to?

## Chapter 3: Methods

Consistent with other similar studies on notice and comment process, more than one agency was chosen to better analyze if the process is democratic. Having more than one agency helps to provide a comparison. Other studies done by Yackee, Mckay, Martino Golden, are examples of researchers that used content analysis to analyze notice and comment boards to draw conclusions on public participation and interest group involvement in the process. These researchers also analyzed more than one agency.

Content analysis is one of the text analysis process approaches. Content analysis is the approach that searches for word and phrases and conducts frequency counts of them. The strength of this approach is that it turns something typically viewed as qualitative and makes it possible to analyze quantitatively (Banks, Woznyj, Wesslen, & Ross, 2018). Creswell defines quantitative research like this, “A means for testing objective theories by examining the relationship among variables. These variables can be measured typically on instruments, so that numbered data can be analyzed using statistical procedures. The final written report has a set structure consisting of introduction, literature and theory, methods, results, and discussion” (2014).

The study was conducted using the process of text mining. Text mining is “the process of distilling actionable insights form text” (Kwartler, 2016). Text mining is a way to scan large documents for specific words so that you can understand key things about the document. There are thousands of comments on each board. Text mining allows you to be able to make key inferences from thousands of comments and find duplicates quickly.



Programs Considered		
	Pros	Cons
R	Free, widely used by researchers, text mining,	Very basic technology, requires knowing computer programming language and commands
WordStat	Easy to use, great reviews, text mining,	Cost over \$200, and only works on PC computers
Rapid Miner	Free, great community online that can answer questions, text mining	Cannot import more than one document at a time, documents need to have identical format if you want to combine them and run text mining at the same time, still not that easy to use
Excel	Already installed on my computer, can organize and sort data on spreadsheets quickly and easily, can search for specific phrases using find and replace and it will count the number of times it appears.	Have to do one document at a time and have a separate spread sheet to record the results and tally all the data after each individual document.

Table 2 Programs considered

The program used was Excel. Excel was available already, and it is an easy way to sort through spreadsheets. Excel was used only for the FCC comments. First the files had to be converted from JSON format to excel. Then each file was opened and find and replace was utilized to calculate the frequencies of comments. It was not possible to use Excel for FDA comments because the comments were in html and pdf format which is not convertible to Excel. The FDA comments were read individually. A tally was kept in a separate Excel sheet for specific categories and then the sum function was used to get exact totals. Charts based on the data were created both in pie chart to show percentages, and bar graph to show the difference.

The population size for the FDA comments on the food labeling law in 2012 is 1,777 comments. The population size for the FCC comments was 21.7 million. 234 comments were

read on the FDA food label law which was a representative sample size of 8%. 1 million net neutrality comments were used out of the 21.7 million which comes out to a 5% representative sample size.

Specific variables were used when conducting the text mining. The first variable was whether the commenter was for or against the policy being discussed. Next an evaluation was done to determine if the comments were coming from a public interest group, a private interest group, or the public. The variables that are being used are nominal, meaning that it is a type of category rather than specific amount. This was a quantitative study. Text mining can be both quantitative and qualitative. My study is quantitative because frequencies of certain phrases were tallied.

<i><b>Net Neutrality Key Phrases</b></i>	
<p><b>Key:</b>                      * = high repetitions      + = average repetitions      - = low repetitions</p>	
<b>For repeal of net neutrality</b>	<b>Against repeal of net neutrality</b>
<ul style="list-style-type: none"> <li>• Regulatory Scheme +</li> <li>• As a concerned taxpayer *</li> <li>• The Obama-era *</li> <li>• And leftist globalists -</li> <li>• Before leaving office *</li> </ul>	<ul style="list-style-type: none"> <li>• Support net -</li> <li>• Neutrality is essential +</li> <li>• Neutrality is important -</li> <li>• In favor of strong net *</li> <li>• Protect them *</li> <li>• Keep internet -</li> <li>• Keep net -</li> </ul>

Table 3Key Phrases

Findings

There was 4.6% sample of the FCC comments and a 13.9% sample of the FDA comments. FDA comments were collected chronologically, and the FCC comments randomly. See below the charts showing the results.

FDA:

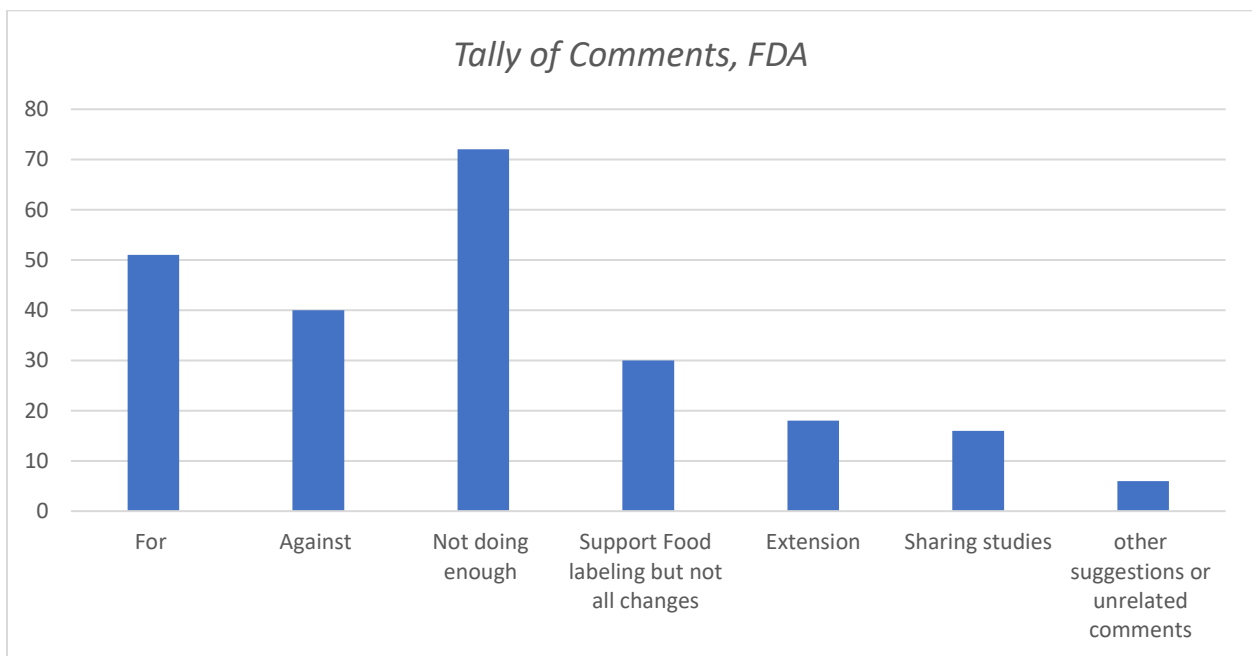


Figure 12 Tally of Comments, FDA

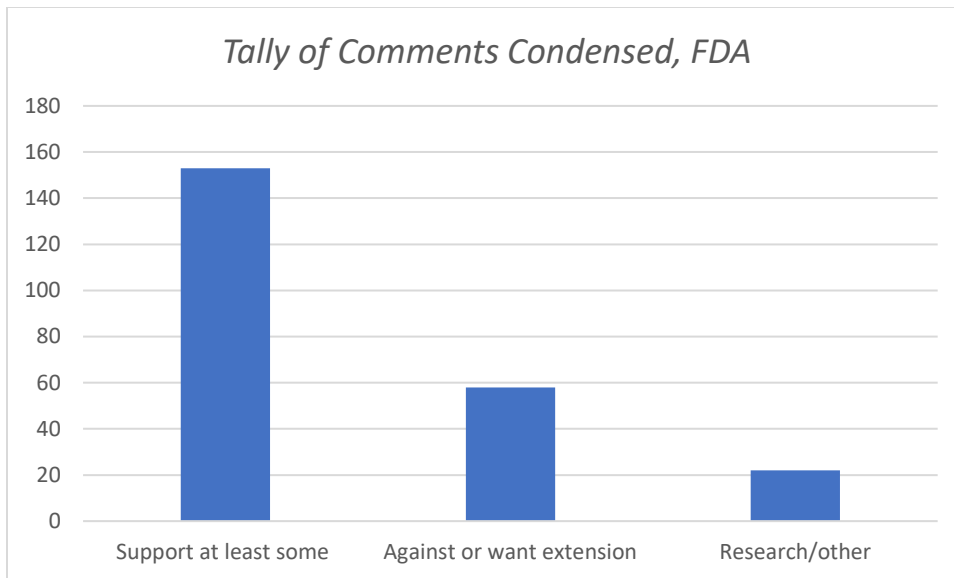


Figure 13 Condensed tally of comments, FDA

The majority of the people commenting felt that the FDA was not going far enough with the food labeling changes. The most popular reason was due to the lack of phosphorous on the food label. People with kidney disease have to have a very low phosphorous diet. Currently, companies are not required to list phosphorous content on the food labels. Having a lot of phosphorous in foods can be fatal to people with kidney disease. In some cases, people are losing fingers and other body parts because their body cannot digest phosphorous and it ends up being stored. This build up can be deadly to people with kidney disease.

Overall, “not doing enough”, and “for” represent changes in the same category in the condensed chart, because people who said “not doing enough,” were still proponents of food labeling in general and as well as most of the changes. Also added was “support some changes except one or two things” in the “for” column as well. This shows that substantially more people support the changes. Some people disagreed with some of the reclassification details like: percent daily value, and getting rid of calories from fat. Many people were also opposed to vitamins A and C being optional instead of mandatory to list.

Fifty-eight comments were either opposed or wanted an extension. A large portion of these were cranberry farmers. They were opposed to the “added sugars” label. Since Cranberries are tart, they add sugar to them and the drinks they make. They fear that including added sugars on the label will hurt their business. Some avocado growers were also against the new labels arguing that even if avocados are high in fat or calories, they are still a health food and very good source of nutrition especially compared to some products that are lower in calories or fat but do not provide much nutritional value. They fear that the label will hurt their business because people will decide they are not as healthy as they thought. Some commenters wanted an extension. These were mainly private interest groups representing corporations that wanted more time to do their own research, provide more comments, and have more time to update their labels. Twenty-two of the comments were people sharing research or commenting on something they want done that is unrelated to the changes the FDA is proposing. Some of the unrelated comments were interest groups who were opposed to marijuana legalization and demanding that the FDA require marijuana in legal places to be labeled, especially for edibles. This is unrelated predominantly because the FDA is a federal agency not a state agency and it is not within their jurisdiction.

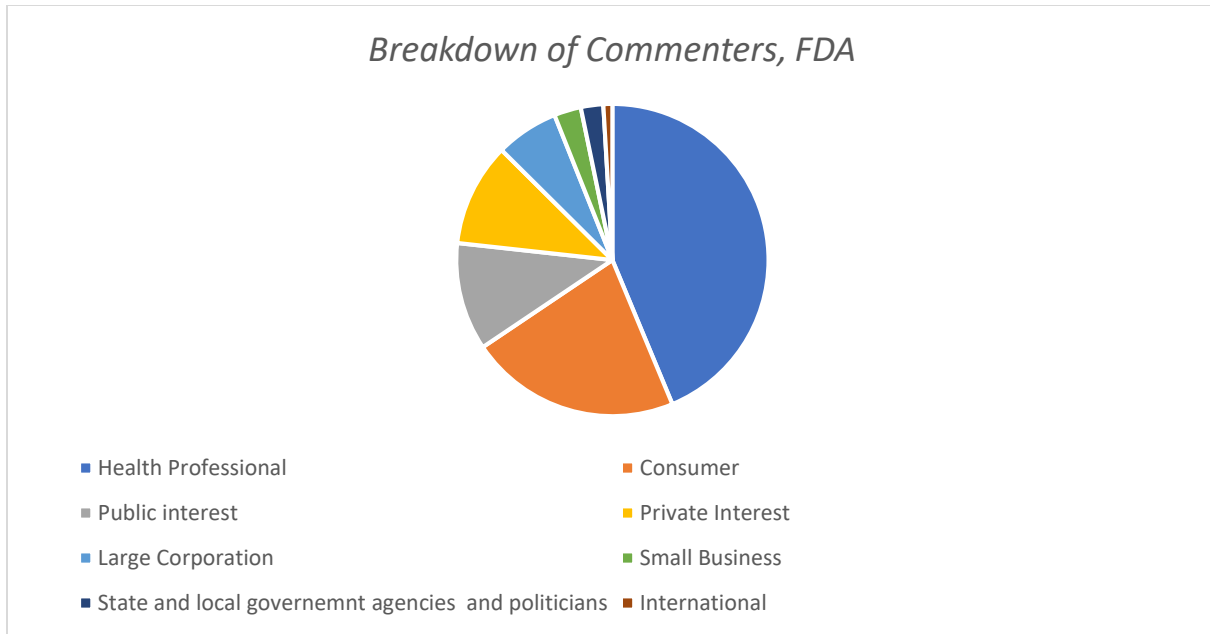


Figure 14 Breakdown of commenters, FDA

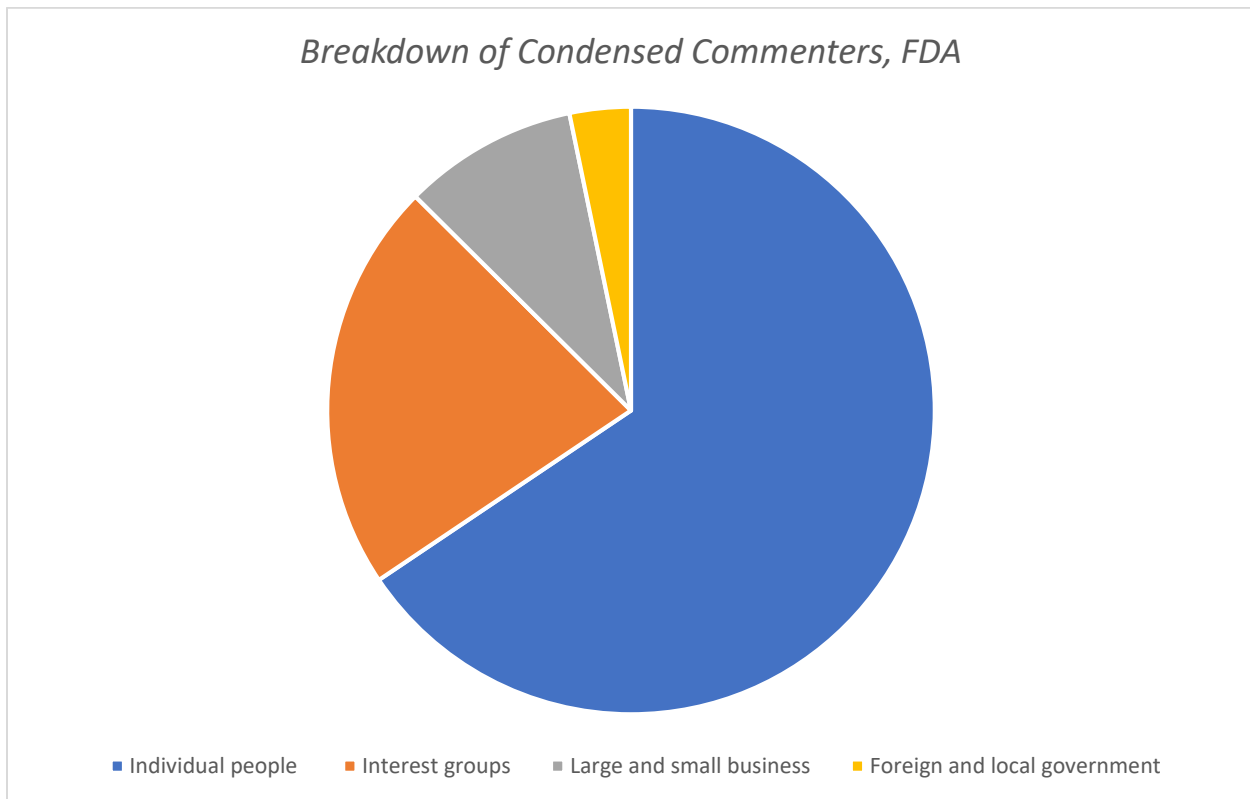


Figure 15 Breakdown condensed commenters, FDA

Almost half of the comments were from health professionals. This includes doctors, nurses, dietitians, and nutritionists. This was the largest category of comments. The second largest group was from consumers. The comments were counted as consumers if they did not specify being medically trained as a profession such as high school and middle school health teachers. Public and private interest groups were even on the amount of comments at 11% respectively. Large corporations made up 7% of the comments, and small businesses made up 3% of the comments. Most businesses were represented by private interest groups which is why the businesses themselves are so small of a percentage. State and local government agencies and politicians made up 2% of the comments and international governments made up 1% of the comments. One politician was Governor Scott Walker who was opposed to the changes. International governments post because when they sell food to America, they have to abide by the FDA's regulations. There were comments from Australia, and the Republic of Korea.

66% of the comments came from individual people. 22% of the comments came from interest groups. 9% came from businesses. Finally, 3% came from state and local governments or foreign governments. These results were not expected by the writer.

The final rule for the FDA is that there will be a compliance extension. There are two compliance dates based on the annual sales of the manufacturer. Manufacturers with \$10 million or more in annual sales must comply by January 1, 2020. Manufacturers with annual sales of less than \$10 million must comply by January 1, 2021. In the end, the FDA sided with comments of industries and not the public. This is in opposition to the majority of the public comments. The majority of the comments came from health care workers, consumers, and public interest groups

but the FDA sided with business and private interests. Furthermore, the FDA did not make any of the recommended changes to the food labels.

FCC:

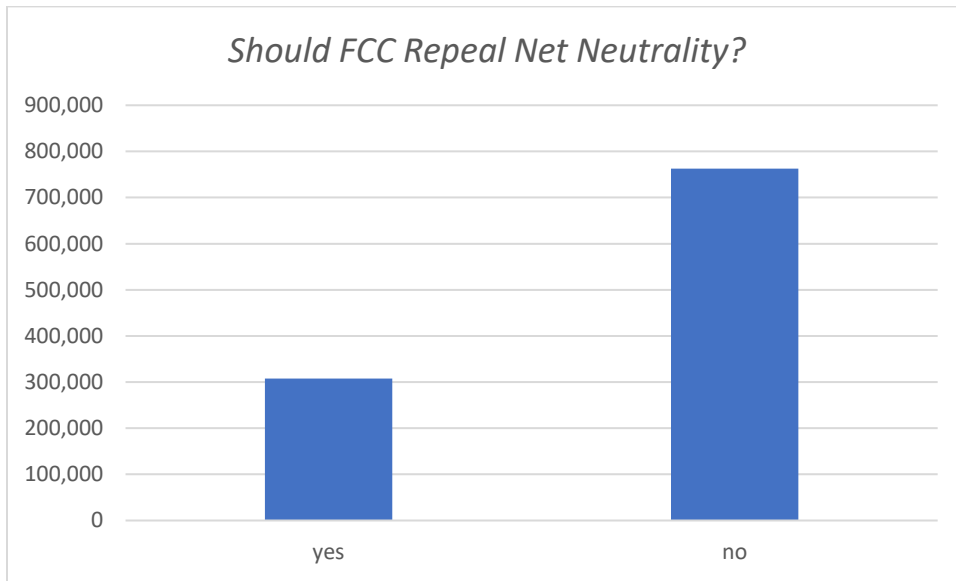


Figure 16 Tally of comments, FCC

Figure 13 shows the amount of people who wanted net neutrality repealed versus those who did not. Based on the 1 million comment sample, 71% of people were opposed to the repeal of net neutrality. 29% of people supported the repeal. It is clear from figure 16, that many more people were opposed to the repeal.



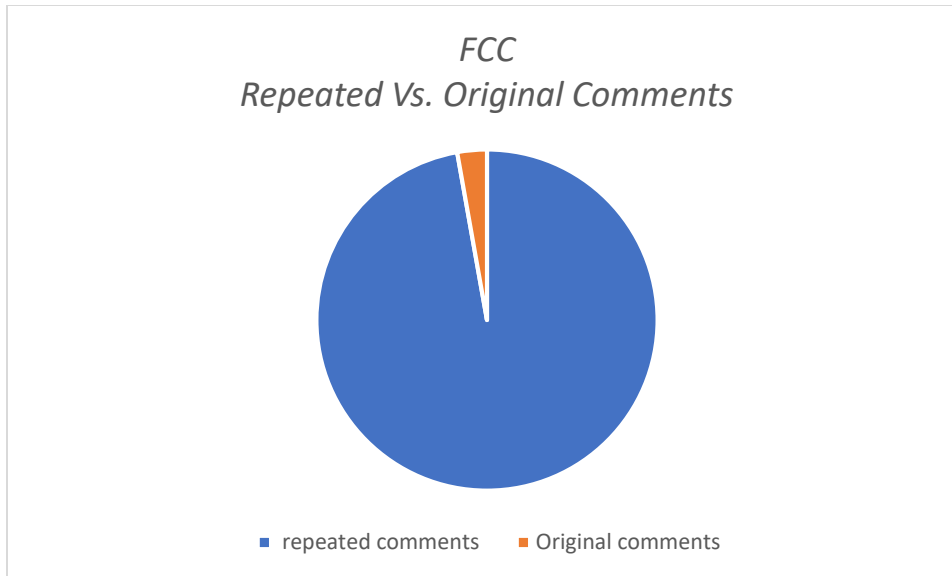


Figure 17 Repeated vs original comments

Figure 14 shows the ratio of repeated comments to original comments. 97% of the sample were the same sentence repeated. 3% of the sample were original comments. Identical comments are an indicator that they were organized by interest groups. That means that 97% of the comments were from interest groups. Something that really stood out was the comments by interest groups that were opposing the repeal all had signatures, and some even had an original preface before the prepared words from the interest groups. The comments supporting the FCC's repeal of net neutrality were a set of five different statements with no original comments or signatures added. It made it seem very fake. Since there have been articles suggesting that there may have been bots and hackers putting in misleading comments, it seems that the majority of these "fake" comments were in support of the FCC's decision.

I am supplementing my research with Pew Research Center's study. They went through all of the comments. "57% of the comments used temporary or duplicate email addresses, and seven popular comments accounted for 38% of all submissions" (Hitlin, Olmstead, & Toor,

2017). The 38% is over a four-month comment period. According to the Pew research study, 94% of the total comments were submitted multiple times, and only 6% were unique (Hitlin et al., 2017). This is very similar to my results. Of my 4.6% sample, 97% were repeated, and 3% were unique. This is only a 3% difference. At times, thousands of comments were submitted in a single second (Hitlin et al., 2017). Many submissions had fake personal information (Hitlin et al., 2017). One address found was Sleepy Hollow, j. depp, 43. For some reason this address was listed under international. The writer decided to google it to see what came up. What came up was the movie Sleepy Hollow starring Johnny Depp. This was clearly a fake address. Some people's names were listed as "the internet," or "net neutrality." The FCC did not utilize an email verification process. Only 3% of the emails were validated (Hitlin et al., 2017).

The most frequent comment was a pro-net neutrality comment that appeared a total of 2.8 million times making up 13% of the comments (Hitlin et al., 2017). Many comments can be traced back to battleforthenet.com, tpaaction.org. tpaaction.org is tax payer alliance. These were against net neutrality (Hitlin et al., 2017). At times there were thousands of comments being submitted at once, followed by long periods of time of very few submissions (Hitlin et al., 2017). On May 7, the FCC reported a distributed denial of service attack (DDos) (Hitlin et al., 2017).

One other similar study on the FCC net neutrality comments was contracted by Broadband for America, to emprata, a data analysis firm. They conducted an unbiased study and came up with some interesting results. When looking at the total comments, 60% were against repealing net neutrality, and 39% were for the repeal. However, emprata took it a step further. They then analyzed only the unique comments (those coming from individuals and not interest groups). 99% of the unique comments were against the repeal of net neutrality (emprata, 2017).

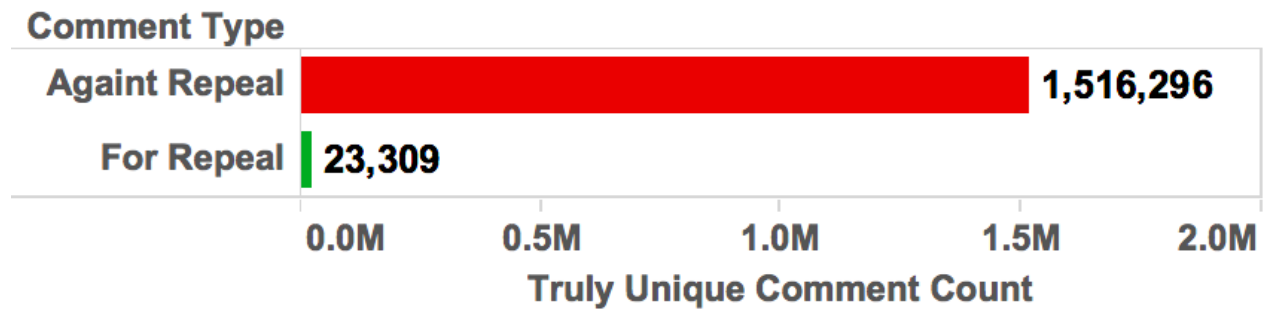


Figure 18 Unique comment count

(emprata, 2017)

The FCC’s final rule was to repeal net neutrality. It has been in effect as of June 11, 2018 (Collins, 2018). The rule is extremely unpopular. There has also been very little media coverage. FCC sided with private interest groups and corporations like Verizon, Comcast, and AT&T.

## Chapter 4: Discussion

Technology has changed over time, but notice and comment rulemaking has stayed relatively constant (Dooling, 2011) There have been some updates to the APA over time regarding this. One was that in 1996, they required rulemaking to be electronic and online (Walker, 2017) There still is a requirement for paper records in the occasion that something is hacked or a computer malfunctions (Dooling, 2011). Federal employees who work in rulemaking are concerned about hacking and other similar technological problems that come with electronic data storage and processes (Lubbers, 2010). There have been news reports about the potential hacking and interference in rulemaking from Russia (Fung, 2017). There is also a concern regarding duplicate comments from interest groups and other unknown sources which is known as astroturfing (Hitlin et al., 2017). There were issues like this in the FDA comments especially with astroturfing, however it was much more prevalent in the FCC case. There was an unusual amount of comments on the Restoring Internet Freedom Act.

Most participation comes from interest groups (Rubin, 2003). This was consistent with the findings in the FCC, but not the FDA. The majority of the comments were from individual people, mostly those who had concerns regarding phosphorous labeling for their patients with kidney problems. They were looking out for specific interests for a particular population, so in a way they are similar to interest groups. The majority of comments from the FCC were from interest groups sending in mass comments at a time.

There is an ongoing debate about whether or not an administrative state is a good thing. Conservatives view the administrative state negatively because they feel that a smaller government is better for ongoing democracy. Liberals feel that the administrative state is necessary in modern times and benefits the public. The APA is a compromise between these two ideals that allows for the administrative state, but assures that there will be accountability, transparency, and a chance for the public to be more involved (Warren, 2010b). There are some parallels to this in the antifederalist debate during the constitutional convention. The same fear of government being too large and powerful, and lacking proficient representation for all (Brutus, 2018). In the end our founding fathers voted to have a strong central government but with checks and balances in order to keep one branch from having too much power. This was a great compromise. The founding fathers could not have imagined the rise of the administrative state. The country was small then, and technology has also changed so much of daily life over time, that it became necessary to have more rules and regulations. It is hard to say what the founding fathers would think of our evolved system. It is important though, to make sure that our system is as democratic as it can be. Notice and comment rulemaking is a way to add a check to administrative agencies which some now refer to as the fourth branch.

Administrative agencies are not required to make changes, only to review the comments (Rubin, 2003). This does not make for a strong and efficient check. In the FCC examples and the FDA example, the agencies sided with corporate interests. This was despite having more comments and concerns coming from the public interest and ordinary citizens combined.

Congressional oversight is a major check for administrative agencies. Congress has been fulfilling its duty (McCubbins & Schwartz, 2018). There were many congressional hearings

about the net neutrality debate over the years, one of which was mentioned in the literature review. Congress has also exercised oversight over the FDA. This is especially true in the 80's and 90's when some republicans were considering drastically reducing the power of the FDA or dismantling it completely. There was a fear that there was a drug lag cause by too much red tape at the FDA (Hilts, 2003).

Interest groups provide government maximum legitimacy with minimum force (Theodore Lowi, 1974). Although like Schattschneider says, "the flaw in the pluralist heaven is that heavenly chorus sings with a strong upper-class accent," interest groups are only funded by those who have the means to fund them, and the time to spend carrying about certain issues. The poor will be much less able to be a member of an interest group. Sometimes those interests are large corporations, like Verizon in the FCC example. The ones with more money, that speak the loudest, are going to get heard (McKay & Yackee, 2007). In both the cases of the FDA and FCC, it was the corporations that got their way. Sometimes the maximum legitimacy with minimum force can benefit the upper class more so than the lower class.

The foundation of American government not only allowed for interest group involvement, it encouraged it. This has continued through time as actions by FDR regarding the Wagner Act encouraged the development of organized labor (Loomis & Cigler, 1991). Interest groups and government mutually benefit each other. Agencies get information from corporate interests that can influence their decisions and come up with a compromise that makes sense for both entities. In the example of the FDA, an extension in compliance for the food labeling laws benefited the small businesses and the FDA because they won't have to get on them for not being on time if they have the appropriate time to alter their products and labels. It takes time, money and research for food companies to get up to par with every new regulation. It is easier on

large businesses that have a lot of money and staff to work on the changes. The notice and comment rulemaking process for the FDA and business is mutually beneficial. It doesn't help the citizens that have kidney problems know how much phosphorous is in their foods however. Going back to the idea of the upper-class advantage in policy making, this is a good example of that as well. The food businesses won on this particular case. Some important changes are still being made that will help the general public, an extension doesn't mean that the FDA is doing nothing. It is a compromise more than anything.

Public committees are a good way to add another layer of public participation in agency rulemaking. The FDA and the FCC did not utilize public hearings in this case. This would have been a great way to make the process more democratic.

## Chapter 5 Implications and Conclusions

### A. Implications

Overall, the question this study was supposed to answer was, does the notice and comment board process make rulemaking more democratic. The writer has concluded that it does not. The comments seem to appear as nothing more than astroturfing. The process has lost the human touch in the digital age even more so than in the past. Sure, in the past interest groups were still organization mass mailings, but now with new technology comes new problems. More so than other, interest groups can now send mass amounts of comments at the click of a mouse. Computers can be hacked. There are websites that generate fake and temporary email addresses. With all of these changes, it is truly hard to make meaningful sense out of the comments. It is hard to gauge whether these comments are truly representative of the public. In the report done

by emprata, they calculated the unique comments separately. There is some promise that it may be a more representative sample. However, on the other hand, is it fair to discount the people who decided to comment through an interest group? Their voice should matter too.

The fact that agencies are not required by the APA to make changes or go with the majority is also a procedural failure for democracy. Agencies are only required to read them and consider them. One reason for this is that it would really slow down the administrative process if the agency had to keep rewriting and adjusting policy based on public concerns. The whole point of a representative democracy is that people elect politicians based on their views and opinions and then those politicians carry out what their base wants or what they ran on. The president appoints the head of departments and agencies which are supposed to follow his policy agenda. Since the president won the vote, his policies are “what the people want.” This is one way to look at it. That being said, is that democratic enough, in itself, that the agencies should feel free to carry out those policies, even if a large portion of public comments were in disagreement?

In both cases the private interests benefited from the final rules. In both cases they were not the majority opinion. It is important to note though in the example of the FDA an extension is not a reversal, and the proposed changes will be going through, just not immediately. Even so, it was the private interest groups that wanted the extension.

A major concern is many people are not informed on the APA and the notice and comment rulemaking. This is a great hindrance to democracy. People need to be educated on where to see rules being proposed and where and how to comment. The rules are posted on the federal register and can be searched by agency, docket number, or keywords. Past rules and comments can also be found on [regulations.gov](http://regulations.gov).



### B. Limitations of the study

One limitation is that the study only looked at two agencies. Some other studies look at much more. However, despite their only being two agencies, it still shows similar results to other studies.

### C. Further Research

It would be interesting to do a survey to see the percentage of the U.S. population that is aware of notice and comment rulemaking. This would add a lot of insight into this project and similar studies. The main reason why mostly interest groups are sending the comments could be that they are the ones that are aware that notice and comment rulemaking exists. It would also be interesting to do other comparative studies of completely different agencies and regulations and see if the same results come through.

### D. Recommendations:

Agencies should put more effort into informing people about notice and comment rulemaking. Also, interest groups should focus on informing individuals how to post their own comments instead of posting for them. This way, the comments will be more individualized rather than spam like. This way it will be easier to tell what the majority of the general public wants. This may lead to better quality final rules. Hopefully in the future agencies will spend more time considering public wishes rather than those of industries.

One recommendation is that more administrative agencies do more to inform the public that a new rule is being considered potentially by utilizing forms of media like Facebook or

twitter. Some agencies do this already. If more get on board, this would lead to a more educated and active public. It is problematic that the average citizen is unaware of their ability to comment on new rules, and also ignorant of the fact the agencies create rules. This should be mandatory for high school history and government courses to spend at least a day on this topic. That would probably be the best way to ensure that future generations are aware of this process.

Utilizing public meetings in rulemaking would help to make the process more democratic. There are mixed opinions as to whether these meetings validate agencies or rather inform and affect decisions, but either way, it is another way to make the process more democratic.

The government should take seriously the recommendations of the American Bar Association. The ABA has some great ideas to address the short comings of the APA. One major change that should definitely be made is to address the bypass of notice and comment rulemaking for a good cause. It is being used much too frequently. There should be at least a notice and comment period after that fact like the ABA suggests.

Lowi describes some fears that the writer feels are unrealistic about the rise of the administrative state. Lowi believes that it would lead to socialism rather than capitalism which would in turn lead to reduction in civil liberties. At the time he was writing, there was a fear of communism in countries like China, Russia, Vietnam and Korea. The writer understands his fear relating to this at the time. However, many European countries like Sweden, or even England, or in our own North American – Canada, have adopted much more socialist policies especially in regards to health care, and have not seen any reduction in civil liberties. I do not agree that expansion in welfare policies in America would lead to the end of liberalism. Interest group liberalism may not be perfect, but it is still essential to democracy. Even if most of the time

agencies may side with the upper class, there is still a division of power. Just like in France in Tocqueville's example with the nobility, and bourgeoisie creating a competition of power, intervening for the country. In America of course, it is not that drastic, it is a better situation than that.

#### E. Conclusion

The APA's purpose is to make the administrative rulemaking process more democratic and transparent. Technically, there is transparency. The rules are posted, and people are able to request FOIA's if they want or need more information. I was able to request a FOIA from the FDA to get access to the exact comments between certain dates in the comment period because what was available online was not separated by post final rule comments. The FDA was very helpful and swift with my request. It only took about 2-3 weeks to get the information and only cost me \$25. On the other hand, if the vast majority of the public do not know about the process, can we really call it transparent? There needs to be more education on notice and comments rulemaking. It may be so that just having a more informed public would make the process more democratic. It is difficult to discern whether mandating agencies to implement public concerns would be feasible in the end. It would be more democratic, but would the slow down help in the end?

In conclusion the writer finds a need for improvement in the democratic process that the APA has allowed for. It is upsetting that blocking of websites is now legal, this is also a threat to democracy. The health and welfare of people are dependent on agencies like the FDA. It is important that America remains a nation for the people, by the people.

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## Appendix

## Sample of FCC tally

File	batach	For	Against	International	Repeat	original	country
17-108-1625		1	2032	7469	0	9997	3
17-108-1626		1	1616	8383	0	9998	2
17-108-1627		1	1623	8375	0	9999	1
17-108-1628		1	944	9054	0	10000	0
17-108-1629		1	1095	8903	0	9995	5
17-108-1630		1	620	9377	0	9994	6
17-108-1633		1	1235	9483	0	9993	7
17-108-1634		1	2564	7433	0	9996	4
17-108-1635		1	2796	7147	0	9993	7
17-108-1636		1	2979	7018	0	9997	3
17-108-1637		1	4406	5591	0	9997	3
17-108-1638		1	2986	7012	0	9998	2
17-108-1639		1	3952	6045	0	9997	4
17-108-1640		1	2748	7250	0	9995	5
17-108-1641		1	3535	6462	0	9997	2
1480	B		1	10000	0	582	9419
1481	B		2	9999	0	9497	520
1482	B		2	9998	0	9683	317
1483	B		151	9849	0	9554	446
1484	B		7	9993	0	6620	3370
1485	B		1	9999	0	9779	221
1486	B		0	9711	0	9542	458
1487	B		465	9206	0	9144	856

1488	B	15	9644	0	9463	356	
1489	B	6	9639	0	9476	530	
1491	B	6	9671	0	9661	339	
1492	B	343	9286	0	9617	383	
1493	B	6289	3572	0	9865	135	
1494	B	9341	645	0	9985	15	
1495	B	9961	39	0	10000	0	
1496	B	9017	944	0	9960	40	
1497	B	9998	2	0	10000	0	
1498	B	9978	22	0	10000	0	
1499	B	9959	41	0	10000	0	
1500	B	7777	2136	0	10000	0	
1501	B	8399	891	1	9290	710	Australia

FDA sample file number	For	Against	Not enough	other/ suggestions	support food labels but not all changes	external
145						1
181		1				
3				1		
4	1					
6				1		
7				1		
8				1		
9	1					
10	1					
11				1		
12				1		
13	1					
14	1					
15	1					
16	1	1				
17		1				
18				1		
19				1		
20				1		
21	1					
22				1		
23					1	

24										1
25	1									
26										1
27										1
28	1									
29	1									
30										

FDA sample continued

Doctor/Dietician	consumer	researcher	public interest group	Large corp	small business	politician/ g agency
	0	0	0	0	0	0
		1				