

The Life of Administrative Democracy

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* Visiting Associate Professor of Law, University of Pittsburgh School of Law. © 2020, Joshua Ulan Galperin. This Article is a companion to another, *The Death of Administrative Democracy*, which is forthcoming. See Joshua Ulan Galperin, *The Death of Administrative Democracy*, 82 U. PITT. L. REV. (forthcoming 2020). Both explore the USDA Farm Service Agency’s elected county committees. For both Articles I owe thanks to many. Alex Schluntz, Christine Kwon, Will Liang, and Heather Wong are former students at Yale University who brought the elected committees to my attention. Susan Schneider taught me a heck of a lot about agriculture law. Nate Rosenberg persuaded me that my initial positive reaction to the elected committees might be naive. The many who workshopped this Article with me: Phil Hackney; participants in the Academy of Food Law and Policy workshop at Harvard Law School, especially Melissa Mortazavi and Peter Barton Hutt; participants at the AALS New Voices in Administrative Law workshop, most importantly Jack Beerman, Kent Barnett, Bill Buzbee, Chip Murphy, and David Rubenstein; participants in the AALS Food Law Section workshop, including Sarah Morath, Robert Glicksman, Laurie Beyranevand, and Mathilde Cohen; participants in Mike Pappas’ online workshop, including Ed Richards, Justin Pidot, Katy Kuh, Brigham Daniels, Deepa Badrinarayana, Shi-Ling Hsu, Dave Owen, and Sharmila Murthy; finally, Miriam Seifter and the participants in the Administrative Law New Scholarship Roundtable, especially Michael Sant’Ambrogio, Kati Kovacs, Nick Bagley, Kristin Hickman, Matt Lawrence, Chris Walker, and Nick Parillo. Thanks finally to Janae Staicer, Alden A. Fletcher, Hannah Flesch, Monica Wooley, Amy Chau, Erin O’Neill, and Silvia Bruckback of *The Georgetown Law Journal* for their awesome editorial work.

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INTRODUCTION

The New Deal may not have been the start of the modern administrative state, but it is often flagged as the historic anchor of administrative governance.¹ Stylized as it is, that governance system is characterized by expert agencies that Congress empowers, the President superintends (to one degree or another), and courts police.² Central to this model is a power struggle between the President and Congress.³ Congress enables agencies that it expects are bound by clear statutory criteria and are independent from partisan or particular political whims.⁴ The President, on the other hand, expects to direct agency action and control the policy machinery of her administration.⁵ Congress and presidents have always engaged in this tug of war,⁶ so the courts have become arbiters of bureaucratic fidelity to either Congress or the President. During the New Deal period, the Supreme Court was skeptical of President Franklin D. Roosevelt’s aggressive regulatory agenda and, in consequence, tended to limit presidential power.⁷ Today, focusing on the President’s unique capacity to represent “the people,” the Court is hesitant to circumscribe presidential control over administrators.⁸

1. See, e.g., BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 127 (2019); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 13 (2012); JERRY L. MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* 8–9 (2018) [hereinafter MASHAW, *REASONED ADMINISTRATION*]; K. SABEL RAHM, *DEMOCRACY AGAINST DOMINATION* 35 (2017); Patrick M. Corrigan & Richard L. Revesz, *The Genesis of Independent Agencies*, 92 N.Y.U. L. REV. 637, 639 & n.4, 671 (2017); Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 51–52 (2017); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 422 n.1 (1987).

2. See Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1141–44 (2014); see generally JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938) (laying out the classic justification of the administrative state).

3. See Sunstein, *supra* note 1, at 426.

4. *Id.*

5. *Id.*

6. See generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008) (cataloguing presidential exertions of authority over the administrative bureaucracy).

7. See, e.g., *Humphrey’s Exec. v. United States*, 295 U.S. 602, 631–32 (1935) (deciding “[w]hether the power of the President . . . shall prevail over the authority of Congress” and holding in favor of Congress).

8. A long line of cases increases presidential control by broadly interpreting the phrase: “Officers of the United States” in Article II, Section 2 of the Constitution, thereby demanding more presidential input in the selection of government officials, *Lucia v. SEC*, 138 S. Ct. 2044, 2051, 2055 (2018); *Freytag v. Commissioner*, 501 U.S. 868, 881 (1991); *Buckley v. Valeo*, 424 U.S. 1, 118, 140–41 (1976) (per

Now imagine if the New Deal were the origin of a different administrative experiment and trajectory. Imagine if Congress, the President, and the industries they hoped to regulate all decided that neither politically isolated bureaucrats nor a popularly sanctioned President should wield the power to administer the laws, to make legislative-type policy, to enforce that policy, or to adjudicate disputes under it. Imagine if there were another experiment—one that has persisted, but that few have noticed.

Imagine no longer. Among its many novelties, the New Deal marked the beginning of an ambitious program of agricultural regulation,⁹ and the newly empowered United States Department of Agriculture (USDA) needed a way to administer the program. Eventually, the USDA settled on something new, radical, untested, and totally foreign to administrative governance: elected administrators.¹⁰

Rather than claim legitimacy from insulated expertise, congressional authorization, or presidential direction, elected administrators unchain themselves from these traditional sources and seek legitimacy directly from voters. Putting aside, for a moment, the question of the constitutional propriety of this system of direct administrative democracy,¹¹ elected bureaucracy is a noteworthy New Deal experiment that the world of administrative law has forgotten. The struggle between Congress and the President looms large today, yet the legal literature has mostly ignored administrative democracy.¹² In fact, legal scholars seem wholly

curiam), and by creating a removal doctrine that centers around presidential authority, *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 497 (2010); *Myers v. United States*, 272 U.S. 52, 117 (1926).

9. JESS GILBERT, PLANNING DEMOCRACY: AGRARIAN INTELLECTUALS AND THE INTENDED NEW DEAL 80 (2015); see, e.g., Agricultural Marketing Agreement Act of 1937, Pub. L. No. 75-137, 50 Stat. 246; Soil Conservation and Domestic Allotment Act, Pub. L. No. 74-461, 49 Stat. 1148 (1936); Agricultural Adjustment Act, Pub. L. No. 73-10, 48 Stat. 31 (1933).

10. See Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, § 227, 108 Stat. 3178, 3216–18 (codified as amended in scattered sections of 7 U.S.C. and 16 U.S.C.); see Reed L. Frischknecht, *The Democratization of Administration: The Farmer Committee System*, 47 AM. POL. SCI. REV. 704, 704 (1953).

11. In a companion article, I discuss in detail the constitutional questions of electoral administration and what the answers to those questions can tell us about administrative law more broadly. See Galperin, *supra* note *. In brief, the companion article argues that elected committees are unconstitutional because they do not meet either constitutional requirements for appointment or the Supreme Court's expectations—articulated primarily in constitutional removal doctrine—for presidential control over administrators. *Id.* (manuscript at 4–5). The committees are “Officers of the United States” but they are “appointed” through elections, which is not a constitutionally sound method. *Id.* (manuscript at 40). The committees are likewise cut off from presidential control or control by presidential appointees because their tenure is determined by electors, not by the President or presidential appointees. *Id.* (manuscript at 42).

12. There are only two works that discuss the elected farmer committees in any detail. See generally Cassandra Jones Havard, *African-American Farmers and Fair Lending: Racializing Rural Economic Space*, 12 STAN. L. & POL'Y REV. 333 (2001); Note, *The Federal Agricultural Stabilization Program and the Negro*, 67 COLUM. L. REV. 1121 (1967) [hereinafter *Agricultural Stabilization and the Negro*]. Both pieces focus on the disgraceful racism of the elected committees but pass over their larger history, operations, and impacts on our understanding of administrative law. See discussion *infra* Section IV.A. These writings represent the extent of study within the legal literature. Agricultural historians and farm-policy scholars have been somewhat more attentive. See *infra* notes 204–15 and accompanying text.

unaware that there is such a thing as administrative democracy. Leaders in the field such as Professors Jerry L. Mashaw, Lisa Schultz Bressman, Steven G. Calabresi, Cass R. Sunstein, and then-Professor Elena Kagan have written extensively, carefully, and thoughtfully about administrative legitimacy, remarking specifically on what they imagine is a consistent feature of bureaucracy—that bureaucrats are unelected and therefore unaccountable.¹³ Professor Richard B. Stewart once even wrote that electing administrators could be a solution to the bureaucratic accountability deficit, but he dismissed the idea as a “radical departure from established principles and practices,” having failed to discover the elected administrators already within the USDA.¹⁴

Judges, for the most part, are equally unaware that at present the United States is home to elected administrators. In 2010, for a majority of the Supreme Court, Chief Justice John Roberts wrote that “people do not vote for the ‘Officers of the United States.’”¹⁵ In June 2019, Justice Neil Gorsuch dissented with two other Justices in *Gundy v. United States*, arguing that administrative policymaking, in its entirety, is questionable because bureaucrats are not directly accountable to voters.¹⁶ Justice Antonin Scalia, Justice Byron White, Judge Patricia Wald, and others have repeated the misperception that all administrators are unelected.¹⁷ And yet, electoral administration does exist.

Today, the USDA’s elected farmer committee system is made up of over 7,700 elected farmers sitting on over 2,200 county committees.¹⁸ The elected farmer committees are charged with real administration and implementation of federal law, not mere advice-giving. They make and enforce policy and adjudicate disputes that impact the rights and obligations of people outside the government. And they are elected. As such, they represent the most important, and apparently the only, example of genuine electoral administration. This Article will explore the elected farmer committees in detail and provide the first and only complete look at the committees in the legal literature.¹⁹ One of the important conclusions that this Article will reach is that although these elected farmer committees fly a

13. See MASHAW, REASONED ADMINISTRATION, *supra* note 1 at 5; Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462 (2003); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 81–82 (1995); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331 (2001); Sunstein, *supra* note 1, at 505.

14. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1800–02 (1975). It is, of course, understandable that scholars have not taken much note of elected administrators given that the elected farmer committees example in this Article is likely the only such example in the federal system.

15. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497–98 (2010).

16. *See* 139 S. Ct. 2116, 2131, 2134–35 (2019) (Gorsuch, J., dissenting).

17. *See, e.g., City of Arlington v. FCC*, 569 U.S. 290, 305 (2013); *INS v. Chadha*, 462 U.S. 919, 968 (1983) (White, J., dissenting); *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981).

18. U.S. DEP’T OF AGRIC., FARM SERV. AGENCY, 2019 COUNTY COMMITTEE ELECTIONS 2 (2019), <https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/NewsRoom/County-Committee-Elections/pdf/2019%20County%20Committee%20Elections.pdf> [<https://perma.cc/XM4T-RR88>].

19. For two articles that have meaningfully addressed discrete aspects of the elected committees, see *supra* note 12.

banner of “administrative democracy,” meaning they purport to administer laws based on direct democratic engagement, their democratic bona fides are questionable and they are better termed, at best, “electoral administration” because majoritarian elections are their closest connection to a meaningful understanding of “democracy.”

There are several examples of schemes that superficially look like electoral administration, but upon closer scrutiny are not. The Federal Home Loan Bank program elects bank directors,²⁰ but these directors, and the banks themselves, serve a private-governance function more than a public-administration one.²¹ The Department of Housing and Urban Development provides for public housing “resident councils,” which are elected²² but perform a distinctly advisory, rather than administrative, function.²³ The Department of Labor relies on input from elected state employees to plan for its regular employment-statistics assessment.²⁴ But it is also their purpose too to provide advice to the federal government.²⁵ Within the USDA, grazing advisory board members are elected from among ranchers operating on federal lands.²⁶ As the name suggests, they provide advice, not administration.²⁷ All of these examples feature genuine elections, but these elections populate advice-giving panels, not regulatory or adjudicatory administrative bodies.

Another example, distinct from the first four in an important way, is the USDA commodity committees. (Reread that: I am speaking here of *commodity* committees, not *county* committees. The latter are the focus of this Article. The former are important now as a counterpoint.) The commodity committees are self-organized but federally sanctioned cartels that regulate the production and marketing of certain agriculture products.²⁸ Their role here is genuine administrative regulation

20. 12 C.F.R. § 1261.3(c) (2019).

21. *See, e.g.*, *Fed. Home Loan Bank of Seattle v. Deutsche Bank Sec., Inc.*, 736 F. Supp. 2d 1283, 1289 (W.D. Wash. 2010) (finding that the Federal Home Loan Bank of Seattle was not a “government agency” for the purposes of section 1345 jurisdiction); OFFICE OF THE FED. REGISTER, THE UNITED STATES GOVERNMENT MANUAL (2019), [https://www.usgovernmentmanual.gov/Agency.aspx?EntityId=Kg73y4l/18E=&ParentEId=+klubNygV0o=&EType=jY3M4CTKVHY=\[https://perma.cc/DC2P-DF6R\]](https://www.usgovernmentmanual.gov/Agency.aspx?EntityId=Kg73y4l/18E=&ParentEId=+klubNygV0o=&EType=jY3M4CTKVHY=[https://perma.cc/DC2P-DF6R]) (last visited Feb. 10, 2020) (describing the main activity of Federal Home Loan Banks as providing “funding for financial institutions and the U.S. mortgage markets”); *see generally* Federal Home Loan Bank Boards of Directors: Eligibility and Elections, 73 Fed. Reg. 55,710 (Sept. 26, 2008) (codified at 12 C.F.R. pt. 1261) (regulating the eligibility and election of individuals to serve on the boards of directors of the twelve Federal Home Loan Banks).

22. 24 C.F.R. § 964.130 (2019).

23. *Id.* § 964.135(b); *Resident Councils: A Voice for Public Housing Tenants*, RESIDENT NEWSLETTER (U.S. Dep’t of Hous. & Urban Dev., Wash., D.C.), Dec. 2011, at 2, https://www.hud.gov/sites/documents/RESIDENT_DEC2011.PDF [<https://perma.cc/KL2R-HKDB>].

24. *See* 29 C.F.R. § 44.2 (2019). *But see* Workforce Innovation and Opportunity Act, Pub. L. No. 113-128, § 308(e), 128 Stat. 1425, 1629–30 (2014) (codified as amended at 29 U.S.C. 491-2 (2012)) (eliminating the statutory requirement for elections).

25. *See* 29 C.F.R. § 44.1 (2019).

26. 36 C.F.R. § 222.11(b)–(c) (2019).

27. 16 U.S.C. § 580k(b) (2012); 36 C.F.R. § 222.11(e).

28. 7 U.S.C. § 608b (2012); *Marketing Orders & Agreements*, U.S. DEP’T OF AGRIC., AGRIC. MKTG. SERV., <https://www.ams.usda.gov/rules-regulations/moa> [<https://perma.cc/V7HY-5KAQ>] (last visited Feb. 10, 2020).

with real legal consequences. And there are administrative elections. Sort of. Farmers who produce would-be regulated commodities must vote to establish the cartels and then vote again for membership on the commodity committees.²⁹ But the elections in this scheme are not the formal mode of membership appointment. The elections are a way of collecting names, which are then presented to the Secretary of Agriculture who makes the formal, legally requisite appointment.³⁰ This is electorally *informed* administration, but it is not electoral administration.

The county committees (yes, now we are talking again about *county* committees and not *commodity* committees) have real elections. They are not merely appointed after some prefatory electoral pretense, and they have a variety of real administrative powers that extend to adjudicating disputes and setting binding policy. Former Secretary of Agriculture Tom Vilsack, however, seems to think, or at least has promoted the misconception, that farmer committees are not much more than advisors. In a 2014 press release, then-Secretary Vilsack praised the committees, saying, “Through the county committees, farmers and ranchers have a voice; their opinions and ideas get to be heard on federal farm programs.”³¹ The Farm Service Agency describes the committees as “a direct link between the farm community and the U.S. Department of Agriculture.”³² This message that farmer committees are opportunities to “be heard,” in other words, to advise and share opinions with the USDA, seems to have made its way to farmers as well. Among some farmers and farm advocates there is a sense that the committees are powerless.³³ They are not, as this Article explains.

Perhaps most have overlooked electoral administration as a concept because so much comes close, but fails to cross the threshold of meaningful electoral administration. Or perhaps most have overlooked electoral administration because the role of the elected farmers is buried in rhetoric of mere advice-giving. In either case, this Article should help uncover an important example of administrative participation and untangle some of the confusion.

The first Part will describe the general administrative structure of the county committees. Part II will describe the history, authority, and responsibility of the committees over time. Part III will try to understand the committees better by

29. § 608c(8), (19).

30. *See, e.g.*, 7 C.F.R. § 905.23(a) (2019) (establishing that the Secretary “shall” select members from the list of elected nominees “or from other qualified persons” for the commodity committee of certain Florida farmers); *id.* § 906.22 (establishing that the Secretary “shall” select members of the commodity committee for certain Texas farmers); *see also id.* § 906.23 (“The Secretary may select the members of the committee and alternates from nominations which may be made in the following manner . . .”).

31. Press Release, U.S. Dep’t of Agric., Service Agency County Committee Nomination Period Begins June 15 (June 6, 2014), https://www.fsa.usda.gov/news-room/news-releases/2014/nr_20140606_rel_0101 [<https://perma.cc/XLP8-7E27>].

32. *County Committee Elections*, U.S. DEP’T OF AGRIC., FARM SERV. AGENCY, <https://www.fsa.usda.gov/news-room/county-committee-elections/index> [<https://perma.cc/4DBW-2GWB>] (last visited Feb. 12, 2020).

33. *See, e.g.*, Telephone Interview with Cara Fraver, Bus. Servs. Dir., Nat’l Young Farmers Coal. (Mar. 11, 2019).

looking at several competing philosophical and ideological justifications for their existence. The penultimate Part IV describes the modern trajectory of the committees and argues that there has been a (perhaps inevitable and expected) failure to meet the aspirations of administrative democracy and that the committees, as structured, are unconstitutional. The Article's final Part V concludes by briefly pondering some of the lessons of electoral administration.

I. STRUCTURE

Before delving into the history and powers of the elected county committees, it is helpful to have an overview of the committee structures, of the electoral process, and of the committees' place within the larger USDA infrastructure.

From the beginning, the basic purpose of the elected farmer committees was to help implement the vast array of new federal farm programs.³⁴ Today, Congress explicitly permits the Secretary of Agriculture to use the committees to help carry out any program over which the Secretary has authority.³⁵ The exact nature of this help has changed over time and is discussed more in the following sections. The structure of these committees has also changed since their inception over seventy years ago, but today a detailed statutory regime provides a clear framework.

The elected county committees are housed within the USDA's Farm Service Agency (FSA).³⁶ The FSA is a huge component of the USDA, with responsibility for "Farm Programs, Farm Loans, Commodity Operations, Management and State Operations."³⁷ This list covers farm safety-net programs, credit programs, and environmental-conservation programs, among others. Under the FSA umbrella is the work of the FSA Deputy Administrator for Field Operations.³⁸ This Deputy Administrator is charged with overseeing a large system of local USDA programs.³⁹ These local programs include state-level committees across the country.⁴⁰ The state committees are appointed by the Secretary—the traditional top-down administrative process.⁴¹ Beneath the state committees are the elected county committees.

Congress has directed the Secretary of Agriculture to establish a committee in each jurisdiction where the USDA provides farm-support programs.⁴² Although these jurisdictions typically overlap with county boundaries, and I therefore use

34. Agricultural Adjustment Act, Pub. L. No. 73-10, § 10(b), 48 Stat. 31, 37 (1933).

35. 16 U.S.C § 590h(b)(5)(B)(i)(I) (2012).

36. 7 C.F.R. § 7.1(a) (2019).

37. *Agency History*, U.S. DEP'T OF AGRIC., FARM SERV. AGENCY, <https://www.fsa.usda.gov/about-fsa/history-and-mission/agency-history/index> [<https://perma.cc/K6AR-3WH5>] (last visited Feb. 12, 2020).

38. *Deputy Administrator for Field Operations*, U.S. DEP'T OF AGRIC., FARM SERV. AGENCY, <https://www.fsa.usda.gov/about-fsa/fsa-biographies/deputy-administrator-for-field-operations/index> [<https://perma.cc/C3P8-LAM9>] (last visited Feb. 12, 2020).

39. *Id.*

40. 7 C.F.R. § 7.1(a), (g).

41. *See* 16 U.S.C § 590h(b)(5)(A) (2012).

42. § 590h(b)(5)(B)(i)(I).

the term “county committees” throughout this Article, the Secretary may also establish “area committees.”⁴³ Area committees are committees that follow the boundaries of more than one county or carve out a smaller jurisdiction within a county.⁴⁴ In either case, the committees are widely distributed and locally oriented, but are nevertheless federal agencies.

Once the Secretary has established a committee, it is populated with three to five members.⁴⁵ “To be eligible for nomination and election . . . an agricultural producer shall be located within the area under the jurisdiction of a . . . committee, and participate or cooperate in programs administered within that area.”⁴⁶ Committee members are thus farmers within the committee’s geographic boundaries who are engaged with the USDA farm programs.

Members are “elected by the agricultural producers that participate or cooperate in programs administered within the area under the jurisdiction of the . . . committee.”⁴⁷ In other words, these are committees made up of farmers who are elected to their position by other farmers within the same jurisdiction. As with eligibility for membership on the committee, only those farmers who are involved in the USDA programs are eligible to vote.⁴⁸

Elected members serve three-year terms on a county committee.⁴⁹ By regulation, USDA further imposes a limit of nine consecutive years, or three consecutive terms.⁵⁰ Committee members may serve three consecutive terms or forgo committee service for at least one year and then serve for another nine years before the regulatory limit kicks in again.⁵¹ Beyond the three-year term and the three-term limit, it is doubtful that elected committee members can be removed, other than through the electoral process.⁵² The regulations provide a for-cause removal provision, asserting that officials within USDA can remove elected committee members for certain limited reasons through a specified removal process.⁵³ This purported authority conflicts with the statutory scheme, which does not provide for removal and authorizes USDA to make regulations, but only regulations

43. *See id.*

44. *See* § 590h(b)(5)(B)(i)(II).

45. § 590h(b)(5)(B)(ii)(I). When a committee covers a jurisdiction wider than a single county, the committee may be made up of as many as eleven members. § 590h(b)(5)(B)(ii)(II).

46. § 590h(b)(5)(B)(iii)(III)(aa).

47. § 590h(b)(5)(B)(ii)(I)(bb).

48. Although outside this scope of this Article, this limited electorate raises a constitutional question because the Supreme Court has held that restricting the voting franchise, even in the context of an administrative matter, can violate the Equal Protection Clause. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632 (1969).

49. 16 U.S.C. § 590h(b)(5)(B)(iv).

50. 7 C.F.R. § 7.18(10) (2019).

51. *Id.*

52. *See Galperin, supra note ** (manuscript at 27–29).

53. 7 C.F.R. § 7.28 (2019).

addressing the selection (not removal) of committee members and the exercise of their programmatic authority.⁵⁴

Although USDA personnel have no authority over the selection or removal of most committee members, they have substantial control over committee operations. At the highest level, the Secretary has complete discretion to use the committees for essentially any purpose.⁵⁵ Below the secretarial level, the county committees are “subject to the general direction and supervision of the State committee,”⁵⁶ the FSA Administrator,⁵⁷ and the Deputy Administrator for Field Operations.⁵⁸ Each of these supervisory authorities has the power to direct or correct action of the county committees.⁵⁹ Moreover, although the elected committees have diverse authority (described further in the next section) their decisions are appealable to the state committee, or to the USDA’s centralized National Appeals Division.⁶⁰

The statutory and regulatory structure, the electoral process, and their role within the USDA are prerequisites for understanding the surprising existence of these elected federal administrators. But to fully understand their existence and the lessons they might teach, it is important to also trace their origins, the ebb and flow of their powers, and the complex ideologies that have kept them alive.

II. HISTORY & POWER

This Part explores the history of the elected farmer committees, describes their powers more fully, and addresses several common misconceptions. The first section describes the practical emergence of the elected committees in response to changes in agricultural governance at the outset of the New Deal and the subsequent organizational changes that shaped the committee structures. The second section traces the power of the committees from their emergence in 1933 to present. The final section addresses frequent misconceptions about the power of the elected committees and their place within the government.

A. HISTORY

The Agricultural Adjustment Act of 1933⁶¹ was a watershed moment for agriculture, moving the USDA for the first time into a significant regulatory role.⁶²

54. See 16 U.S.C § 590h(b)(5)(E). Congress’s choice to limit removal of elected committee members may have important constitutional consequences, though that is beyond the scope of this Article. For further discussion of this point, see Galperin, *supra* note * (manuscript at 40–43).

55. See 16 U.S.C § 590h(b)(5)(D).

56. 7 C.F.R. § 7.23.

57. *Id.* § 7.1(a).

58. § 7.1(f).

59. See, e.g., *id.* §§ 7.1(c)(1), (f), 7.34.

60. CHRISTOPHER R. KELLEY, NAT’L AGRIC. LAW CTR., THE USDA NATIONAL APPEALS DIVISION: AN OUTLINE OF THE RULES OF PROCEDURE 2 (2003), https://nationalaglawcenter.org/wp-content/uploads/assets/articles/kelley_nad.pdf [<https://perma.cc/6E54-QRPW>].

61. Pub. L. No. 73-10, 48 Stat. 31 (1933).

62. See MURRAY R. BENEDICT, FARM POLICIES OF THE UNITED STATES 1790–1950: A STUDY OF THEIR ORIGINS AND DEVELOPMENT 283 (1953).

Under the Act, Congress sought to raise farm incomes by directly regulating farm production.⁶³ The Act permitted acreage-reduction agreements, under which the USDA paid farmers to limit the amount of land on which they would plant certain crops, thereby lowering the supply and raising the price of those crops.⁶⁴ The Act permitted a tax on agricultural processors, with which the USDA paid farmers for acreage reductions.⁶⁵ The Act also provided for a new processor licensing scheme to help collect the tax.⁶⁶ All of this new authority required new administrative machinery.⁶⁷ What the USDA had in 1933 was a well-developed, well-respected, and well-ensconced research and education program.⁶⁸ What the USDA did not have was regulatory and enforcement capacity.⁶⁹

To make this transition, many changes within the existing USDA were made.⁷⁰ But as an initial matter, to get the new payment-for-reduction program started, “a vast amount of help was needed to sign up millions of farmers, inspect their fields, and certify them for payments.”⁷¹ “Millions of farmers” undersells the scale of the effort. In the mid-1930s, there were 6.8 million farmers in the United States.⁷² USDA needed help persuading each of these farmers that it was wise to accept cash payments for plowing up their fields.⁷³

The “vast amount of help” first came from the agricultural Extension Service.⁷⁴ The Extension Service was already well-integrated into rural America and well known to many farmers.⁷⁵ Founded in 1914, Extension was then, and is today, a cooperative organization that ties together the USDA and state land-grant colleges in order to conduct research and provide educational resources to farmers.⁷⁶ The problem here was that an entity designed for adult education was not necessarily well-prepared for regulatory administration.⁷⁷ Extension agents were physically well-positioned (across the country and in many counties) to support the new agriculture programs, but given their historic role in advising farmers on best practices and new technologies, the agents were not substantively well-positioned.⁷⁸ The tension between regulatory administration and education

63. *See id.*

64. *See id.*

65. *Id.*

66. *Id.*

67. *See* CHARLES M. HARDIN, *THE POLITICS OF AGRICULTURE: SOIL CONSERVATION AND THE STRUGGLE FOR POWER IN RURAL AMERICA* 115–16 (1952); Frischknecht, *supra* note 10, at 706.

68. *See* HARDIN, *supra* note 67, at 133; Frischknecht, *supra* note 10, at 707–08.

69. *See* Frischknecht, *supra* note 10, at 706.

70. *See generally* BENEDICT, *supra* note 62, at 283–84 (describing the early implementation of the Agricultural Adjustment Act).

71. HARDIN, *supra* note 67, at 115.

72. GILBERT, *supra* note 9, at 81.

73. *Id.* at 84.

74. HARDIN, *supra* note 67, at 115, 132–33.

75. *Id.* at 132–33.

76. *See id.*; *Extension*, U.S. DEP’T OF AGRIC., NAT’L INST. OF FOOD & AGRIC., <https://nifa.usda.gov/extension> [<https://perma.cc/M5Y6-8JGR>] (last visited Feb. 14, 2020).

77. HARDIN, *supra* note 67, at 115, 133.

78. *See id.* at 133; Frischknecht, *supra* note 10, at 707–08.

outreach, along with Extension's grant-based and therefore more tenuous connection to USDA leadership, made an alternative administrative structure necessary.⁷⁹

Extension's early role in administering the agricultural adjustment program was always an emergency stop-gap, not President Roosevelt's long-term plan. In his now-famous Topeka campaign address, then-Governor Roosevelt first laid out his plans to pull American agriculture out of its years-long nosedive.⁸⁰ Central to that speech was his promise that administration of the massive agricultural adjustment program would be decentralized, avoiding too much influence from Washington.⁸¹ Rather than bureaucracy, which even in 1932 was a target of bipartisan attack,⁸² President Roosevelt and his agricultural advisors, Henry A. Wallace and M.L. Wilson, envisioned a system of "agricultural democracy" to take over the temporary role of the Extension Service.⁸³ Surely, though, as discussed elsewhere in this Article, ideological commitments to local democracy were only part of a calculus that also included white supremacy.⁸⁴

The Agricultural Adjustment Act laid the groundwork for this vision of agricultural democracy. Section 10(b) of the Act permitted the Secretary to "establish, for the more effective administration of the functions vested in him by this title, State and local committees."⁸⁵ This authority manifested differently in different regions. In the Midwest, elected committees took root early.⁸⁶ In the Southeast, Extension Service county agents appointed committee members.⁸⁷ But as experience with the committees grew, electoral selection became the norm. Although it is not obvious on the face of the statute, section 8(b) of the Soil Conservation and Domestic Allotment Act of 1936⁸⁸ was understood to mandate the use of elected committees in response to the broader trend in that direction.⁸⁹

Over the course of the mid-twentieth century, as USDA and congressional politics shifted, merger and reorientation of the farmer committees was common, but their core electoral structure, though tested, remained unchanged. The farmer committees first lived within the broad structure of the Agricultural Adjustment Administration because the committees' primary purpose was administration of

79. See HARDIN, *supra* note 67, at 133; Frischknecht, *supra* note 10, at 707–08.

80. BENEDICT, *supra* note 62, at 273 ("Later, in his Topeka speech, Roosevelt outlined his farm program."); Dale Clark, *The Farmer as Co-Administrator*, 3 PUB. OPINION. Q. 482, 483 (1939) ("Governor Roosevelt in his Topeka campaign address, in which he outlined farm policy, spoke for decentralized administration."); Frischknecht, *supra* note 10, at 705 ("In his Topeka address of September 14, 1932, Franklin D. Roosevelt announced that the new farm program would be decentralized . . .").

81. See Clark, *supra* note 80, at 483; Frischknecht, *supra* note 10, at 705.

82. See BENEDICT, *supra* note 62, at 273.

83. See Frischknecht, *supra* note 10, at 705.

84. See *infra* Section IV.A.

85. Agricultural Adjustment Act, Pub. L. No. 73-10, § 10(b), 48 Stat. 31, 37 (1933).

86. HARDIN, *supra* note 67, at 116.

87. *Id.* at 115–16.

88. Soil Conservation and Domestic Allotment Act, Pub. L. No. 74-461, § 8(b), 49 Stat. 1148, 1150 (1936) ("In carrying out the provisions of this section, the Secretary is authorized to utilize county and community committees . . .").

89. HARDIN, *supra* note 67, at 116 & n.3.

the Agricultural Adjustment Act.⁹⁰ A 1945 USDA reorganization created the Production and Marketing Administration out of the Agricultural Adjustment Administration.⁹¹ The Production and Marketing Administration continued to house the elected farmer committees.⁹² Less than a decade later, in 1953, another USDA reorganization shifted the Production and Marketing Administration's duties to the new Commodity Stabilization Service, which was itself short-lived and became the Agricultural Stabilization and Conservation Service in 1961.⁹³ The Agricultural Stabilization and Conservation Service had by far the longest tenure, remaining home to the elected committees until a USDA reorganization in 1994.⁹⁴ The 1994 reorganization created the Farm Service Agency (originally called the Consolidated Farm Services Agency) by merging the Agricultural Stabilization and Conservation Service with another branch of the USDA tree, the Farmers Home Administration.⁹⁵ The Farmers Home Administration had grown out of the old Farm Security Administration, which itself began as the New Deal-era Resettlement Administration.⁹⁶ Interestingly, this second branch of the USDA had housed its own incarnation of local committees, but these committees were appointed rather than elected, and were distinctly advisory and educational rather than administrative.⁹⁷

When Congress merged the Farmers Home Administration lineage with the Agricultural Stabilization and Conservation Service lineage in 1994, maintenance of the elected committees was a priority of many.⁹⁸ The reorganization combined two lines of USDA, both with committee structures. Rather than house two similar structures in a single agency, Congress made the decision to maintain just one committee framework and wanted to be sure the elected committee framework was the one that would survive.⁹⁹ The reorganization made the elected committees mandatory and also empowered USDA to use the elected committees for almost any activity for which USDA had statutory authority.¹⁰⁰

90. See, e.g., Clark, *supra* note 80, at 484 (“The association assume[d] the active responsibility for local administration of the [Agricultural Adjustment Administration] program through an elected county committee.”).

91. HARDIN, *supra* note 67, at 106.

92. See *id.*

93. *Agency History*, *supra* note 37.

94. See Alan R. Malasky & William E. Penn, *USDA Reorganization—Fact or Fiction?*, 25 U. MEM. L. REV. 1161, 1172, 1174–75 (1995).

95. *Agency History*, *supra* note 37.

96. Wayne D. Rasmussen, *New Deal Agricultural Policies After Fifty Years*, 68 MINN. L. REV. 353, 366–67 (1983).

97. See, e.g., PETE DANIEL, *DISPOSSESSION: DISCRIMINATION AGAINST AFRICAN AMERICAN FARMERS IN THE AGE OF CIVIL RIGHTS* 223 (2013).

98. See, e.g., *Reinventing the U.S. Department of Agriculture: Hearing Before the Info., Justice, Transp., & Agric. Subcomm. of the H. Comm. on Gov't Operations*, 103d Cong. 77–78 (1993) (statement of Leland H. Swenson, President, Nat'l Farmers Union); *Review a Proposal for Reorganization of the U.S. Department of Agriculture (Secretary Mike Espy): Hearing Before the H. Comm. on Agric.*, 103d Cong. 52, 99, 122 (1993) (statements of Mike Espy, Secretary, U.S. Dep't of Agric., and E. (Kika) de la Garza, Chairman, H. Comm. on Agric.).

99. H. R. REP. NO. 103-714, at 22 (1994); Malasky & Penn, *supra* note 94, at 1174–75.

100. 16 U.S.C. § 590h(b)(5)(D) (2012); Malasky & Penn, *supra* note 94, at 1174–75.

Today, thanks primarily to the 1994 Reorganization Act¹⁰¹ and the 2002 Farm Bill,¹⁰² a detailed statutory electoral system has replaced the terse hints of 1933 and 1936 and has combined the disparate electoral efforts.¹⁰³ Congress has directed the Secretary of Agriculture to promulgate electoral procedures, to include nondiscrimination statements in outreach materials, to provide detailed public notices of balloting, to have transparent vote counting, and to issue public reports on every election.¹⁰⁴ Congress further set across-the-board term limits and eligibility requirements; for instance, only farmers who participate in farm programs are permitted to vote or run in committee elections.¹⁰⁵ USDA's regulations reflect even more detailed provisions covering issues such as voter eligibility, resolving tie votes, filling vacancies, dealing with challenges and electoral appeals, and filling slots in particularly low-population jurisdictions where there are no nominees on the ballot.¹⁰⁶

B. POWER

As attorneys Alan R. Malasky and William E. Penn noted in their early review of the 1994 USDA reorganization, it was initially hard to guess how USDA would use the farmer committees given that these committees could technically do almost anything that USDA could.¹⁰⁷ In fact, the committee's responsibilities after 1994 seem to have practically diminished from their peak in the mid-twentieth century. This section traces the history of the committees' powers.

The central purpose of the Agricultural Adjustment Act of 1933 and its replacement, the Soil Conservation and Domestic Allotment Act of 1936,¹⁰⁸ was to control agricultural production by limiting planted acres.¹⁰⁹ Farmers would voluntarily agree to restrict their planting and therefore their output, and the government would make cash payments in return.¹¹⁰ Under this policy framework,

101. Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, § 227, 108 Stat. 3178, 3216–18 (codified as amended in scattered sections of 7 U.S.C. and 16 U.S.C.).

102. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10708, 116 Stat 134, 522–25 (codified as amended at 7 U.S.C. § 2279-1 (2012)).

103. See also Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 1615, 122 Stat. 1651, 1749 (2008) (adding additional electoral process) (codified as amended at 16 U.S.C. § 590h (2012)).

104. 16 U.S.C. § 590h(b)(5)(B)(iii) (2012).

105. See § 590h(b)(5)(B)(iii)(III)(aa).

106. 7 C.F.R. pt. 7 (2019).

107. See Malasky & Penn, *supra* note 94, at 1175; see also 16 U.S.C. § 590h(b)(5)(D) (“The Secretary may use the services of such committees in carrying out programs under other authorities administered by the Secretary.”).

108. The 1936 Act replaced the 1933 Act after the Supreme Court struck down the 1933 Act on federalism and taxation grounds in *United States v. Butler*, 297 U.S. 1, 74, 77–78 (1936).

109. E.g., GILBERT, *supra* note 9, at 83–84.

110. *Id.* at 84–85; Agricultural Adjustment Act, Pub. L. No. 73-10, § 8(1), 48 Stat. 31, 34 (1933) (giving the Secretary power to “provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods”).

county committees were essential. The committees would establish the historical base of production for farms in their jurisdiction—that is, the committees determined how much the farmers had grown in the past to allow for calculation of yield reductions and consequent payments.¹¹¹ Here, Washington, D.C. would dictate how many total acres all farmers in a given county could plant,¹¹² and the committees would take that total acreage allowance and distribute it across participating farmers.¹¹³ The committees would measure plantings on each farm to verify that farmers were fulfilling their obligations and qualifying for their payments.¹¹⁴ When satisfied, the committees would then distribute the cash payments.¹¹⁵ And the elected committees would adjudicate disputes when they arose.¹¹⁶ For instance, if a question of fair allotment, of actual planted acres, or of the size of the government payment were raised, the committees would resolve the question.

Such was the role of the committees in the early stages of the New Deal. As the farm programs became more widespread and more diverse throughout the middle stages of the New Deal, the responsibility of the committees continued to grow. Under laws requiring mandatory production limits for cotton and tobacco and for new soil conservation programs, the farmer committees became responsible for determining eligibility for payments and loans, and even for imposing penalties for noncompliance.¹¹⁷ A critical, though little-remembered aspect of the case *Wickard v. Filburn*¹¹⁸—famously known for its broad interpretation of the Commerce Clause—illustrates the real implications of all this committee authority. In *Wickard*, it was the elected farmer committee in Montgomery County, Ohio that set farmer Filburn's wheat production quota and enforced the law against him when he produced excess wheat for his animals and family.¹¹⁹ A committee of elected farmers made what ended up as a critical decision for federal regulatory authority over intrastate, and even local, economic decisionmaking when it granted Filburn a small wheat allotment, discovered that he was growing more than his allotted share, imposed sanctions, and adjudicated the initial dispute.¹²⁰

Among the most important and difficult early responsibilities of the elected committees was determining how to divide the various federal payments between the landlord and the tenant farmer—an issue of less importance in the family-

111. GILBERT, *supra* note 9, at 84.

112. Agricultural Adjustment Act § 8(1), 48 Stat. at 34.

113. GILBERT, *supra* note 9, at 84; *see also id.* § 10(b), 48 Stat. at 37.

114. *See* GILBERT, *supra* note 9, at 84–85.

115. *Id.*

116. *Id.*

117. *See, e.g.*, Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, §§ 101, 302, 325, 52 Stat. 31, 31–32, 43–44, 51 (authorizing payment and loan programs as well as penalties for quota violations and empowering farmer committees to assist in carrying out these provisions.); HARDIN, *supra* note 67, at 133–34.

118. 317 U.S. 111 (1942).

119. *Id.* at 114–15.

120. *See id.*

farming Midwest, but one of critical importance in the more hierarchical Southeast.¹²¹ This racially and economically charged discretion is key to the long-term failings of the committees discussed in detail in Part V.

By the 1960s, in addition to their first responsibilities, the committees made decisions on the direct purchase of farm products (another strategy, in addition to planting restrictions, to reduce supply of agricultural products on the open market) and the management of government-purchased inventories.¹²² They also determined eligibility for emergency relief payments, which involved decisions about the presence or absence of emergency situations in a given county.¹²³ During times of war, the committees were also tasked with ensuring the national defense agricultural reserves program to assure food availability.¹²⁴

The agricultural adjustment programs of the early New Deal provided the basic structure of farm policy—and therefore of committee responsibilities—until 1996.¹²⁵ One of the foundations of these policies was the concept of parity, which aimed to keep farm prices high enough that farm income was roughly equal to pre-World War I levels.¹²⁶ In the 1960s, Congress abandoned parity and made most of the production-control restrictions voluntary again,¹²⁷ but this likely only reduced the burden on committees, not the nature of their responsibilities. In 1996, however, the nature of farm programs shifted from price support managed by federal regulation to direct payments tied to market conditions.¹²⁸ This shift began the process of trimming, though by no means obliterating, committee responsibilities. The modern payment programs, including loan-deficiency payments and traditional conservation payments, are still implemented in varying degrees by elected county committees.¹²⁹ However, these are quantitative decisions that somewhat limit committee discretion—at least as compared to the height of the committees' sweeping authority.

Certainly, discretionary decisions are still part of committee action. Committees, for instance, can make individual adjudicatory decisions, such as a decision to grant relief from certain conservation restrictions if they determine that holding

121. See U.S. COMM'N ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN FARM PROGRAMS: AN APPRAISAL OF SERVICES RENDERED BY AGENCIES OF THE UNITED STATES DEPARTMENT OF AGRICULTURE 90 (1965).

122. U.S. DEP'T OF AGRIC., AGRIC. STABILIZATION & CONSERVATION SERV., REVIEW OF THE FARMER COMMITTEE SYSTEM: REPORT OF THE STUDY COMMITTEE 7–8 (1962) [hereinafter 1962 REVIEW].

123. *Id.*

124. *Id.*

125. SUSAN A. SCHNEIDER, FOOD, FARMING, AND SUSTAINABILITY: READINGS IN AGRICULTURAL LAW 9 (2011).

126. See *id.* at 10.

127. *Id.*; Nathan A. Rosenberg & Bryce Wilson Stucki, *The Butz Stops Here: Why the Food Movement Needs to Rethink Agricultural History*, 13 J. FOOD L. & POL'Y 12, 18 (2017).

128. SCHNEIDER, *supra* note 125, at 10–11. The 2014 Farm Bill further changed this system, such that the current farm programs might now be described as a mix of crop insurance, commodity payments, and conservation programs. E-mail Interview with Nathan Rosenberg, Visiting Scholar, Food Law & Policy Clinic, Harvard Law Sch. (June 6, 2019).

129. SUSAN A. SCHNEIDER, FOOD, FARMING, AND SUSTAINABILITY: READINGS IN AGRICULTURAL LAW 71 (2d ed. 2016).

a farmer to the statutory restrictions would result in economic hardship.¹³⁰ They can judge whether a farmer planted a crop by certain threshold dates, which dictate whether the farmer is eligible for various federal payments.¹³¹ When a farmer proposes to transfer disaster payments to a new landowner, the committees have discretion to disapprove of such a transfer.¹³² And committees can make important countywide, legislative-like policy determinations in addition to these individualized orders. For example, committees can set the countywide “final planting date” for a given crop, after which a crop, if destroyed or damaged by natural forces, is not eligible for payment.¹³³

The Farm Service Agency (FSA) itself makes understanding the exact scope of committee responsibilities difficult because the bulk of their material on the farmer committees is for recruitment purposes and therefore somewhat vague. Still, the FSA nicely summarizes the general array of committee duties. FSA recognizes that the committees today “are a critical component of the day-to-day operations of FSA and allow grassroots input and local administration of federal farm programs.”¹³⁴ The committee members are asked to use “their judgment and knowledge” to administer farm programs, specifically “[i]ncome safety-net loans and payments, including setting county average yields for commodities; [c]onservation programs; [i]ncentive, indemnity, and disaster payments for some commodities; [e]mergency programs; and [p]ayment eligibility.”¹³⁵

FSA likewise promotes hiring and supervising FSA county executive directors as one of the central roles of the committees.¹³⁶ The directors themselves have significant discretionary responsibilities that FSA does not explicitly describe as committee responsibilities. But because the elected committees hire, fire, and supervise the executive directors, it is most accurate to define the executive directors as agents of the elected committees, and thus describe the executive directors’ tasks as inherent to and delegated from the committees. Among these tasks are running day-to-day operations of farm program administration within a

130. MEGAN STUBBS, CONG. RESEARCH SERV., R42459, CONSERVATION COMPLIANCE AND U.S. FARM POLICY 2 (2016).

131. *See, e.g.*, U.S. DEP’T OF AGRIC., FORM CCC-471 NAP BP, NONINSURED CROP DISASTER ASSISTANCE APPLICATION FOR COVERAGE 3 (2015) [hereinafter FORM CCC-471 NAP BP].

132. *Id.* at 17.

133. *Id.* at 3, 7.

134. U.S. DEP’T OF AGRIC., FARM SERV. AGENCY, COUNTY COMMITTEE ELECTIONS—2019: FACT SHEET (2019), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafilms/FactSheets/2019/county_committee_elections_fact_sheet.pdf [https://perma.cc/E4XM-VDES].

135. *Id.*

136. U.S. DEP’T OF AGRIC., FARM SERV. AGENCY, BE A LEADER WITH FARM SERVICE AGENCY COUNTY COMMITTEE ELECTIONS 3 (2018), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafilms/NewsRoom/County-Committee-Elections/pdf/2018_coc_powerpoint_for_stakeholders.pdf [https://perma.cc/LT6W-FPM2] [hereinafter BE A LEADER]; *see* Press Release, Dana Rogge, U.S. Dep’t of Agric., Farm Serv. Agency, FSA County Committee Nominations Launch June 15 (May 22, 2018), https://www.fsa.usda.gov/news-room/news-releases/2018/nr_20180522_rel_0085 [https://perma.cc/7ZCM-YLMW].

county, hiring, firing, and managing other local staff, and accounting for all FSA property and finances in the elected committee's jurisdiction.¹³⁷

In addition to their administrative responsibilities of hiring personnel and implementing various farm programs, FSA also identifies and markets the committees as an important advisory link between farm communities and the federal government. FSA asks farmers to "Be the Voice of Your Community" by providing "local agricultural guidance and insight" and sharing "information about FSA opportunities within your community and focus[ing] outreach efforts to underserved producers and beginning farmers."¹³⁸ Committee members, the FSA urges, "[e]nsure USDA's farm programs continue to serve farmers, ranchers and families."¹³⁹ They may represent local priorities, but they also plainly have the power to use the authority of government to advance those priorities.

C. MISCONCEPTIONS

Scholars and practitioners unfamiliar with farm programs seem to have two general reactions when first learning about the elected county committees. First, they say that the committees seem to be local governments rather than federal bodies. Second, the committees sound like advisory committees similar to the few other examples of electoral bureaucracy.¹⁴⁰ Both reactions are as easily understandable as they are plainly wrong.

The committees are not local or state governments. This mistake is understandable because the committees are arranged according to local jurisdictional boundaries—they are, after all, typically *county* committees.¹⁴¹ They have some similarities to conservation districts (sometimes also called soil conservation districts or soil-and-water conservation districts).¹⁴² These districts are also overseen by elected committees¹⁴³ and part of their responsibility has been to help implement federal law.¹⁴⁴ But quite unlike the USDA county committees, the Conservation Districts are creatures of state law.¹⁴⁵ The Roosevelt Administration envisioned and championed the districts and drafted model enabling legislation, but enactment of that legislation was strictly a matter of state

137. CAROL CANADA, CONG. RESEARCH SERV., R40179, FARM SERVICE AGENCY: STATE EXECUTIVE DIRECTORS, AND STATE AND COUNTY/AREA COMMITTEES 5 (2009).

138. BE A LEADER, *supra* note 136, at 4.

139. *Id.* at 5.

140. This assertion is based on my personal observations when discussing and workshopping this Article with colleagues, many of whom are named in the acknowledgements.

141. See 16 U.S.C. § 590h(b)(5)(B) (2012).

142. See, e.g., *NACD History*, NAT'L ASS'N OF CONSERVATION DISTS., <http://www.nacdnet.org/about-nacd/nacd-history/> [<https://perma.cc/JZ6L-JMEA>] (last visited Feb. 17, 2020).

143. See *Committee Structure*, NAT'L ASS'N OF CONSERVATION DISTS., <https://www.nacdnet.org/about-nacd/nacd-leadership/committee-structure/> [<https://perma.cc/2YMS-UB3G>] (last visited Feb. 17, 2020).

144. See Larry C. Frarey, Ron Jones & Staci J. Pratt, *Conservation Districts as the Foundation for Watershed-Based Programs to Prevent and Abate Polluted Agricultural Runoff*, 18 HAMLIN L. REV. 151, 153 (1994).

145. *About NACD*, NAT'L ASS'N OF CONSERVATION DISTS., <https://www.nacdnet.org/about-nacd/> [<https://perma.cc/QLG6-BTLP>] (last visited Feb. 17, 2020).

prerogative.¹⁴⁶ The committees also look something like a local school district or a state or local housing authority, both of which are creatures of state or local government but receive federal funds and implement federal programs.¹⁴⁷ The county committees do not fit either of these molds because: they are exclusively a creation of federal law; they are statutorily defined as part of a federal agency;¹⁴⁸ they do not carry out any functions under state law; and they report up through the USDA, not to any local government authority.

Given FSA's promotional materials, paired with the electoral composition of the committees, it is also understandable that there is an impression of the committees as mere advisors, rather than as bona fide administrators. The committees have an advisory function, but this section should make clear that unlike the federal advisory committees with which administrative law scholars and practitioners are familiar,¹⁴⁹ elected county committees have both quasi-judicial and quasi-legislative authority as well. They can make countywide policy decisions such as establishing the availability of, and setting dates for eligibility in, disaster relief programs.¹⁵⁰ They can also make regular, individualized factual determinations including whether economic conditions should exempt a farmer from federal conservation requirements,¹⁵¹ whether a given farmer planted crops by a given date, or whether local conditions merit certain categories of federal payments.¹⁵²

Corroborating the meaningful regulatory and adjudicatory role of the committees, more than a handful of litigation has stemmed from committee decisions over the past years and decades. In just the last several years, courts have dealt with committee decisions related to the application of disaster assistance coverage,¹⁵³ farm inspection and subsequent denial of Conservation Reserve Program benefits,¹⁵⁴ and loan amortization approval.¹⁵⁵ This quantity of litigation is unlikely to arise from a merely advisory function but is common for an

146. *NACD History*, *supra* note 142.

147. *See, e.g.*, 42 U.S.C. § 1437a(b)(6) (2012) (describing public housing agencies); *see generally* Benton Martin, *An Increased Role for the Department of Education in Addressing Federalism Concerns*, 2012 BYU EDUC. & L.J. 79 (describing the role of federal involvement in local school governance and recommending reforms).

148. *E.g.*, 7 U.S.C. § 6991(2) (2012).

149. *See, e.g.*, Daniel E. Walters, Note, *The Justiciability of Fair Balance Under the Federal Advisory Committee Act: Toward a Deliberative Process Approach*, 110 MICH. L. REV. 677, 679–80 (2012).

150. *See* FORM CCC-471 NAP BP, *supra* note 131, at 3, 6–7.

151. MEGAN STUBBS, CONG. RESEARCH SERV., R42459, CONSERVATION COMPLIANCE AND U.S. FARM POLICY 2 (2016).

152. *See* FORM CCC-471 NAP BP, *supra* note 131, at 8–13.

153. *See* Hixson v. U.S. Dep't of Agric., No. 15-cv-02061-RBJ, 2017 WL 2544637, at *1 (D. Colo. June 13, 2017).

154. *See* Mittelstadt v. Perdue, 913 F.3d 626, 631 (7th Cir. 2019). Inexplicably, the court at times refers to the Agricultural Stabilization and Conservation Service as overseeing the committees, *id.* at 634, despite the consolidation of the Service into the Farm Service Agency over two decades earlier, *see supra* notes 94–96 and accompanying text.

155. *See* United States v. Pratt, No. 4:16-cv-00108-DCN, 2017 WL 4341850, at *1–2 (D. Idaho Sept. 29, 2017).

administrative program that determines the legal rights and obligations of private individuals and businesses.¹⁵⁶

Further, the scholarship on advisory arms of government offers several theoretical justifications for advisory committees, but none explain the nature of the county committees. One theory of advisory bureaucracy, the “Enacting Congress Account,” describes advisory committees as congressional tools to maintain influence beyond initial passage of a substantive statute that the advisors help implement.¹⁵⁷ In the case of farmer committees, this theory is inapplicable because the farmer committee members are elected, not responsive to Congress. A new article by Professors Brian D. Feinstein and Daniel J. Hemel introduces what might be called the “agency-head independence account” of advisory committees, which posits that agency heads can use advisory committees to gain expertise distinct from what is available within their own civil service staff.¹⁵⁸ This theory has much to recommend as an explanation of advice-giving in the Executive Branch, but it still fails to explain the county committees because their electoral constitution separates the committees from both political appointees at the head of agencies as well as from civil service employees.

The “Agency Reputation Account” of advisory committees holds that advisory committees help increase buy-in from the regulated industry by bringing it into the policy process.¹⁵⁹ As discussed in more depth in the next section, this account certainly helps to understand the purpose of farmer committees. Unlike other accounts of advisory committees, the electoral structure of the farmer committees does not undermine the theory because elections are one way to engage a regulated community. However, Professors Feinstein and Hemel point out that this Agency Reputation Account only explains a small group of committees within the government,¹⁶⁰ and fails to explain the vast majority of advisory committees that are not drawn primarily from the regulated industry. Thus, although the Agency Reputation Account does indeed help explain elected farmer committees, it does not suggest that the committees are equivalent to advisory committees. When paired with the committees’ clear administrative functions, the inapplicability of advisory theories confirms the fundamentally administrative role of the county committees.

The preceding sections, I hope, provide a new resource for understanding the committees. What they do not provide is an explanation of why the farmer committees are elected in the first place and therefore unique within the entire

156. Any action of advisory committees, in contrast to actions by the farmer committees, is unlikely to be enough, on its own, to support Article III standing because any injury that may exist could not be traced to the non-binding actions of an advisory committee. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (holding that causation is a constitutional requirement in a standing analysis); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (stating that an injury must be “fairly traceable to the defendant’s allegedly unlawful conduct”).

157. Brian D. Feinstein & Daniel J. Hemel, *Outside Advisors Inside Agencies*, 108 *GEO. L.J.* 1139, 1153 (2020).

158. *Id.* at 1159–60.

159. *Id.* at 1155.

160. *Id.* at 1157–58.

expanse of the federal bureaucracy. The next Part is an attempt to explain the motivations behind reliance on administrative democracy.

III. PHILOSOPHY

The emergency New Deal agriculture programs needed geographically-widespread administration, but it was not essential for this administration to be elected. Pairing local administration with elections was, at least in part, an ideological commitment, not a practical necessity.

The goal of this section is to understand why the USDA utilizes elected-farmer committees to administer federal farm programs or, at least, how the committees fit within various theories of political legitimacy. Given that divining congressional intent is always a challenge, this endeavor would be hard, arguably impossible, if Congress were the only prime mover.¹⁶¹ The ad hoc nature of the early farmer committees, which were authorized by Congress but were established and operated differently from region to region and county to county,¹⁶² made this endeavor even harder at the outset. Given these difficulties, the effort is significant and understanding its motivating ideologies, its governing philosophies, helps us move beyond platitudes and into a meaningful understanding of how elected administrators differ from appointed administrators. It is certainly tempting to say that because we are dealing with a diverse set of decisionmakers, there is no point in looking into subjective purpose—that digging below the surface will uncover esoteric disagreements rather than a singular justification. But it would be foolish to pretend that nothing motivates policy action. A refusal to explore motivations does not move us beyond competing ideologies; it just leaves us with untested, unexercised, lazy theories. Further, there is no reason to believe that distinct philosophies cannot work together to support a policy goal. That seems to be exactly the case here.

The farmer committees are elected because a number of different ideologies came together to recommend, for better or worse, an electoral structure. The intellectuals in the Roosevelt Administration relied on modern visions of Jeffersonianism, with its agrarian idealism, to support the electoral structure. Contemporary political commentators pointed to the merits of deliberative democracy and civic republicanism, with their attention to expressive process, as justifications. It was not long, however, before critics pointed to less lofty, even categorically repugnant, arguments for electoral administration. Some critics described the elections as a way to put regulated industry in charge of its own regulations, that is, a form of narrow pluralism or New Deal corporatism. Others, particularly more modern commentators, explain the electoral structure as simple elitism and racism—a scheme in which the powerful could use elections to

161. See generally Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992) (arguing that Congress is a "they," not an "it" and therefore has no single intent).

162. See GILBERT, *supra* note 9, at 85–86 (discussing the variety of modes of selecting local committee members and regional ideological and demographic differences of the committees).

maintain their preferred social hierarchy. This Part will explore these accounts in more detail.

A. JEFFERSONIANISM

Jeffersonianism is the most obvious tradition to undergird electoral farm administration given the Jeffersonian plea for rural leadership. Jeffersonianism, or Jeffersonian democracy, was a call for highly local democracy based on “face-to-face” interactions, emerging particularly from farm country.¹⁶³ The Jeffersonian ideal dominated American self-identity, if not actual governance from the Founding, naturally reaching a crescendo during the Jefferson Administration.¹⁶⁴ By the time of the Great Depression, the idea of rural republican democracy had faded from the public consciousness and urbanism, industrialism, and expertise had taken its place as visions of the American ideal.¹⁶⁵

In his famous article describing how the New Deal changed American constitutionalism, Professor Cass Sunstein argued that the New Deal fully rejected the notion of Jeffersonianism,¹⁶⁶ and that “the belief in localism seemed unrealistic or perverse.”¹⁶⁷ However, certain intellectuals within President Roosevelt’s USDA, as well as many farmers themselves, still maintained a vision that independent, rural farmers not only should lead society, but in fact had a duty to govern the country.¹⁶⁸ This is the crux of the Jeffersonian vision of America. “[Jefferson’s] political economy required self-sufficient property owners in order to meet the prerequisites of democracy.”¹⁶⁹ In President Jefferson’s own words, “those who labour in the earth are the chosen people of God. . . .”¹⁷⁰ If farmers embodied the ideal of self-sufficiency necessary to energize not only democracy, but humanity, then it was self-evident and *a fortiori* that they also possessed the spirit to govern their own industry.

Jeffersonians may have seen a problem at the start of the New Deal. Jeffersonians valued rural farmers for the special role farmers were supposed to play in governing, but they could look far and wide and find little example of the Jeffersonian ideal in practice.¹⁷¹ The elected farmer committees could implement the Jeffersonian vision in a way it had yet to be implemented.¹⁷² The committees

163. *Id.* at 30; Sunstein, *supra* note 1, at 442.

164. See GILBERT, *supra* note 9, at 30.

165. See Jess Gilbert, *Agrarian Intellectuals in a Democratizing State: A Collective Biography of USDA Leaders in the Intended New Deal*, in *THE COUNTRYSIDE IN THE AGE OF THE MODERN STATE: POLITICAL HISTORIES OF RURAL AMERICA* 213, 220–21 (Catherine McNicol Stock & Robert D. Johnston eds., 2001); Sunstein, *supra* note 1, at 504–05.

166. See Sunstein, *supra* note 1, at 442.

167. *Id.* at 504.

168. Gilbert, *supra* note 165, at 221.

169. *Id.*

170. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 164–65 (William Peden ed., Univ. of N.C. Press 2d ed. 1996) (1955).

171. See GILBERT, *supra* note 165, at 220–22; Sunstein, *supra* note 1, at 504–05.

172. See GILBERT, *supra* note 165, at 220–22.

would draw on rural energy and, in turn, they would empower farmers to grab hold of the authority Jeffersonians believed rightly belonged to them.¹⁷³

Pure Jeffersonian idealism, however, was at an awkward crossroads in the early 1930s. On the one hand, the number of farmers in the country was at its peak, with numbers reaching 6.8 million,¹⁷⁴ and the struggles of the farm economy were at the forefront of national politics.¹⁷⁵ On the other hand, the broader mood of the country was invested in “rising urban-industrial capitalism.”¹⁷⁶ Certainly other aspects of the New Deal, such as the National Industrial Recovery Act with its empowerment of industrial cartels, pointed aggressively towards urban-industrial capitalism, not towards modest-rural individualism.¹⁷⁷ Jeffersonianism, therefore, seems a fitting explanation for the inclusion of farmers in administration, but it cannot be the sole justification in a world, and in a presidential administration, that was not chiefly committed to the virtues of ruralism.

B. DELIBERATIVE DEMOCRACY AND CIVIC REPUBLICANISM

The local jurisdictions of the elected committees fit well within political traditions that advance popular control through civic deliberation. The related ideas of deliberative democracy and civic republicanism are such ideals. They are farther reaching than Jeffersonianism insofar as they are not tied to any geography or vocation, but to process. This latitude makes them more complete, or at least more complementary, justifications for electing administrators. Civic republicanism takes agrarianism, urbanism, and other ideological frameworks at face value and argues that rather than choosing an overriding preference, government must enable the public to engage in group deliberation and itself reach a satisfying outcome to a given debate.¹⁷⁸ Deliberative democracy similarly aims to move beyond the substance of issues and concentrate on the process of reasoning, focusing on self-realization through participation.¹⁷⁹ John Dewey, a leading twentieth-century proponent of deliberative democracy, saw communication as central to the meaning of democracy,¹⁸⁰ and smaller-scale institutions seemed to facilitate that robust democratic ideal.¹⁸¹ Thus, civic republicanism and deliberative democracy converge on the general promise that “government’s primary responsibility is to enable the citizenry to deliberate about altering preferences and to reach consensus on the common good.”¹⁸²

173. *See id.*

174. *Id.* at 81.

175. JONATHAN COPPESS, *THE FAULT LINES OF FARM POLICY: A LEGISLATIVE AND POLITICAL HISTORY OF THE FARM BILL 16* (2018).

176. Gilbert, *supra* note 165, at 220.

177. *See* National Industrial Recovery Act, Pub. L. No. 73-67, § 1, 48 Stat. 195, 195 (1933).

178. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1514 (1992).

179. *See* JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 73, 142, 151 (1927).

180. *See id.* at 142.

181. *Id.* at 131.

182. *See* Seidenfeld, *supra* note 178, at 1514.

The existence of elected committees that connect with the relevant public at a grassroots level arguably provides a justification for the exercise of authority and the impetus for the “democratization of rural America.”¹⁸³ Writing in terms that Dewey himself might well have used, sociologist Jess Gilbert explains that the farmer committee system was a “participatory form of rationalization” and “a democratic type of modernization that combined bottom-up (local citizen) and top-down (state expert) initiatives . . . that could result in progressive social reform.”¹⁸⁴

Justification of elected farmer committees along these deliberative and civic republican lines, however, seems to paper over two related but distinct issues: decentralization and elections. Elections may help foment more direct democracy and engage individuals in collective decisionmaking by creating an easily exercised and easily understood form of participation. Decentralization, if it means geographical diffusion, might make electoral participation more meaningful. As the electorate gets smaller, the weight of each vote increases. Therefore, the two concepts work together. Elections can facilitate participation. Decentralization in the form of localism can make electoral participation more potent. In that way, the elected farmer committees tend to manifest the core ideals of civic republicanism and deliberative democracy.

But civic republicanism and deliberative democracy also fail to fully explain the elected farmer committees. The farmer committees are, indeed, *farmer* committees. Only farmers (and ranchers) are eligible to sit on the committees and vote for committee members.¹⁸⁵ But the committees are even more exclusive than that. Only farmers who participate in the federal farm programs are eligible to sit on the committees and vote for committee members.¹⁸⁶ Under a civic republican or deliberative democratic theory, participation would not be limited only to farmers let alone a subset of farmers. The existing structure, limiting participation to farmers alone, betrays “the unstated but implicit belief that agricultural legislation and administration are the concerns of farmers only,” as political-science professor Grant McConnell wrote.¹⁸⁷ That belief is untenable. Professor McConnell continued, “Stated thus bluntly, the idea is absurd; anything that affects the price or supply of food and clothing is certainly a matter of general concern. In fact, however, the idea is rarely stated thus bluntly and the insistence that farmers should make decisions on farm affairs enjoys much respect.”¹⁸⁸

Given that civic republicanism and deliberative democracy would justify local elected committees only if the committees were also thoroughly democratic and open to a larger array of interests—that is, only if their eligibility structure did not

183. See GILBERT, *supra* note 9, at xiv.

184. *Id.* at 5.

185. 7 C.F.R. §§ 7.5, 7.8 (2019).

186. *Id.*

187. See GRANT MCCONNELL, *THE DECLINE OF AGRARIAN DEMOCRACY* 166 (1969).

188. *Id.*

presume an a priori special interest unique to farmers—alternative or additive explanations are still needed.

C. CORPORATISM AND PLURALISM

Putting only farmers in control of agricultural policy demonstrates a political commitment to interest-group-based governance. Corporatism and pluralism both fit this mold. Pluralism is the theory that government's role is to facilitate negotiations among heterogeneous interest groups in order to "implement deals that divide political spoils according to the pre-political preferences of interest groups."¹⁸⁹ Said differently, pluralism views the government as "only an umpire to avert and remedy trespasses of one group upon another."¹⁹⁰ Dewey and Professor Mark Seidenfeld both explicitly reject pluralism and its presumption that politics launders rather than creates policy preferences.¹⁹¹

Corporatism is a version of pluralism, one with particular salience during the New Deal, which grants it one of the strongest claims as an explanation for the elected farmer committees. Corporatism is a version of pluralism insofar as corporatism involves "state sponsorship" of corporate interests, which themselves are among the groups that government seeks to balance in an ideal pluralist system.¹⁹² In corporatism, one group, the private industry, is imbued with government authority. The New Deal's earliest and most far-reaching program, the National Recovery Administration, was an intense implementation of corporatism in practice, "delegating governmental authority to private cartels."¹⁹³ Aspects of agriculture law also reflected the corporatist inclination such as the milk-marketing programs, which Justice Sandra Day O'Connor described as "a cooperative venture among the Secretary, handlers, and producers. . . . Nowhere in the Act, however, is there an express provision for participation by consumers in any proceeding."¹⁹⁴ In many respects, the delegation of authority to farmer committees—which one must understand as committees of self-interested and self-regulating industry participants without outside influence—is simply corporatism tempered by the residue of Jeffersonianism and the symbols of democracy.

Peeking behind the legislative veil helps show that the private agricultural interests were not afraid to exert influence over policymaking and to command special treatment. Professor McConnell recounts a story of almost shocking hubris. In the 1920s, the American Farm Bureau Federation demanded that when members of Congress participated in unrecorded votes on agricultural issues, the members must report those votes, officially unavailable, "directly to the

189. Seidenfeld, *supra* note 178, at 1514.

190. DEWEY, *supra* note 179, at 73.

191. *See id.*; Seidenfeld, *supra* note 178, at 1514–15.

192. *See* James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. COMP. L. 747, 749–50 (1991).

193. *Id.* at 748.

194. *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 346–47 (1984).

Federation offices.”¹⁹⁵ This pressure is not conclusive as to the purpose of creating elected committees, but it demonstrates the strength of industry in the halls of Congress.

Scholars and administrators alike were not blind to the notes of corporatism in the farmer committee system. Professor Theodore J. Lowi, one of the leading critics of pluralism and corporatism in government during the twentieth century, wrote the influential “polemic” (his word), *The End of Liberalism*, which argued that government hides its coercive authority by delegating decisionmaking to private actors and technocrats. In doing so, the government thereby cuts off the possibility of transparent and open conversation about the use of government coercion.¹⁹⁶ *The End of Liberalism* used U.S. agriculture programs as one of its central lines of evidence. “Agriculture,” Lowi wrote, “is that field of American government where the distinction between public and private has come closest to being completely eliminated.”¹⁹⁷ How has this merger happened?

This has been accomplished not by public expropriation of private domain—as would be true of the nationalization that Americans fear—but by private expropriation of public authority. That is the feudal pattern: fusion of all statuses and functions and governing through rigid but personalized fealties. In modern European dress, that was the corporativistic way; it is also the pluralist way, the way of contemporary liberalism in the United States.¹⁹⁸

As evidence of this corporatist and pluralist merger of the public and the private, Lowi bases his critique squarely on the elected farmer committees.¹⁹⁹ When the stakes of coercive authority are high, as they are in agricultural regulation—particularly in limiting production—government tends to shirk responsibility and instead rely on expertise and local self-governance.²⁰⁰ Creating such a narrow and self-interested political space leaves little chance for change. “There is an immense capacity in each agriculture system, once created, to maintain itself and to resist any type of representation except its own.”²⁰¹ As a result, “in agriculture, as in many other fields, the regulators are powerless without the consent of the regulated.”²⁰²

Professor Mancur Olson’s famous work on group theory was written around the same time as *The End of Liberalism* and reached a similar conclusion about the farm programs, tending that, by entrusting agricultural regulation to private agriculture interests, the government effectively created new pressure groups that

195. GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 18 (Vintage Books 1970) (1966).

196. See generally THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES, at xxi (40th anniversary ed. 2009) (explaining the purpose and point of view of his work).

197. *Id.* at 68.

198. *Id.*

199. See *id.* at 72.

200. See *id.*

201. *Id.* at 75.

202. *Id.* at 77.

made it difficult, if not impossible, for those outside the agriculture bloc to influence agriculture policy.²⁰³ In a world where regulatory capture by regulated interests is a frequent concern, narrow electoral structures make capture the purpose of the administrative configuration rather than the unintentional consequence.

Professors Lowi and Olson each had expertise in governance, not specifically in agriculture, but agriculture policy experts had similar, and even more informed critiques, which tended to argue that corporatism was not merely the structure of the farmer committees, but the purpose. Reed Frischknecht, a professor of economics and former administrator within the USDA, complained in 1953 that although political spokesmen promoted the farm programs as rightful because they were administered locally by elected farmers, the reality was a bifurcated system of, on the one hand, farmers who were unprepared for the complexities of administration and, on the other, a powerful “‘hard core’ of professional farmer committeemen who dominate the system.”²⁰⁴ This politics of self-aggrandizement and enrichment is exactly what Professors Olson and Lowi lamented.

In 1939, Dale Clark, then an employee in the Agricultural Adjustment Administration, approached the farmer committees with more optimism, but also with the notion that the key to legitimacy in government programs that “invade branches of our economic life” is to merge the public and the corporate.²⁰⁵ Obliquely referring to the reality, if not the desirability, of corporate pluralism, Clark wrote that “[t]he comprehensive set of devices for group representation and consultation with which the farm group has been equipped may play a significant part in better adapting democratic technique to the group pattern of machine-age society.”²⁰⁶ Clark continues:

This whole trend toward democratic participation of members of an economic group in administration seems to be prompted by a realization that the techniques of democracy must be fitted to a society in which the group pattern is becoming more dominant. It is inevitable that farmers and members of other interest groups press for expression and representation in the governmental policies directly affecting them. It becomes a question whether or not regularly instituted procedures of consultation with government should be provided, or whether the group should find its way to government through informal means, such as the lobby.²⁰⁷

In the case of the farmer committees, Congress and the USDA opted to give local economic interests a voice not through informal procedures, but through formality. The farmer committeeman “does, in fact, have some quasi-official

203. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 149, 151 (1971).

204. See Frischknecht, *supra* note 10, at 719.

205. Clark, *supra* note 80, at 482.

206. *Id.*

207. *Id.* at 483–84.

status; he is an elected local administrator serving [as] an instrumentality of the government.”²⁰⁸

In his 1971 Ph.D. dissertation, future political science professor Ivan Garth Youngberg put the corporatist compromise most bluntly. He argued that the Roosevelt Administration, farm organizations, and Congress all knew that dramatic action was needed to improve the farm economy, but there was less agreement on specific policy solutions.²⁰⁹ The Administration and Congress avoided choosing and instead turned the decisionmaking over to industry leaders.²¹⁰ “Their decision to utilize farmers—to bring prospective clients into the administrative structure—was a practical way to not only create immediate and necessary administrative machinery, but also to minimize opposition”²¹¹

Ultimately, Youngberg concluded that this corporatist political compromise, cloaked in promises of democracy, was merely a strategy of deception.²¹² He implies the critical question that the previous section of this Article on civic republicanism and deliberative democracy ended with: How can we pretend that agricultural policy is only a matter of farm governance when it is really a matter of broad public interest?²¹³ If we agree that regulation of food production touches on lives far beyond farm country, then it is hard to maintain the façade of democracy when the privilege of democratic participation is decided by industrial classifications. It is much easier to see that what looks like the privilege of participating is in fact a payment for compliance.

A similar critique by Professor Morton Grodzins agrees that the electoral system is a cloak, but a cloak for federal rather than corporate control. “Democratic forms may camouflage central control,” Professor Grodzins wrote in 1962.²¹⁴ “To the extent that Washington officials preserve the committees in order to mask central control, or make it more palatable, they are guilty of using democratic forms in an authoritarian manner.”²¹⁵

Whether a crude scheme for obedience or an idealistic conviction in pluralistic, corporate self-governance, the weight of evidence suggests that corporatism and control, more than idealized democracy, were central factors in the creation of elected farmer committees. Though it is impossible to settle on any causal proof, there remain still other drivers of the electoral system: elitism and racism.

208. *Id.* at 485.

209. Ivan Garth Youngberg, *Federal Administration and Participatory Democracy: The ASCS Farmer Committee System* 28–29 (Aug. 1971) (unpublished Ph.D. dissertation, University of Illinois at Urbana-Champaign) (on file with the University of Illinois at Urbana-Champaign).

210. *Id.*

211. *Id.* at 36.

212. *Id.* at 4–5.

213. *See id.* at 35–36 (discussing the broad public outrage that often surrounds farm policy and the “clientele”-based solutions employed to implement that policy).

214. 1962 REVIEW, *supra* note 122, at 46-D.

215. *Id.*

D. ELITISM AND RACISM

Using an electoral system for farm administration points to a basic desire to maintain the social status quo, to “preserve[] the traditional structure of agriculture.”²¹⁶ President Roosevelt and his USDA leadership were certainly not driven by a desire to upend American agriculture,²¹⁷ and neither Congress nor the American people seemed keen to reshape the power structure.²¹⁸ Historian Pete Daniel goes a step further. He explains that the administrators used a “semblance of democracy” to further their own social preferences, which included “trimming away” black farmers, poor farmers, and low-tech farm practices.²¹⁹ “Discrimination,” Daniel writes, “was also inscribed onto New Deal legislation.”²²⁰ As the title of the first chapter of his book implies, maintaining a social hierarchy and furthering racial divides were the “intended consequences” of the farm programs.²²¹

There were many built-in mechanisms for discrimination. The first and clearest way for powerful farmers to promote their own interests was to control the flow of information.²²² The New Deal farm programs brought with them huge infusions of money and technology, and by dominating local politics and connections with the federal government, local elites were able to direct these opportunities to themselves and their compatriots.²²³ The best example of this strategy was the effort to have all farm payments flow to landlords rather than to tenant farmers, who were disadvantaged by laws across the farm programs.²²⁴ By the time electoral committees took root, the problem only became worse. Elite landowners dominated county agricultural leadership.²²⁵ Plus, although there were black

216. Rasmussen, *supra* note 96, at 354. *See also* 1962 REVIEW, *supra* note 122, at 46-F-G (“The very fact of intimate acquaintanceship with and participation in the local community may lead not to even-handed justice but to subservience to the powerful and neglect of the weak. (It is worth noting that in all the county committees of the South there has never been, as far as I can discover, a single Negro member.)”); DANIEL, *supra* note 97, at 61 (describing how the county committee system “from the beginning” set up a system for elite domination of other farmers, particularly black farmers); U.S. COMM’N ON CIVIL RIGHTS, *supra* note 121, at 62 (“[The Farmers Home Administration’s] use of Negroes in its administrative structure has conformed to the patterns of a segregated society.”); *Agricultural Stabilization and the Negro*, *supra* note 12, at 1121–22 (arguing that the committee structure is “infected with racial discrimination”).

217. Rasmussen, *supra* note 96, at 376.

218. *Id.* at 367.

219. DANIEL, *supra* note 97, at 9.

220. *Id.* at 10.

221. *See id.* at 1 (chapter entitled “Intended Consequences”).

222. *See id.* at 12, 32–33.

223. *Id.*

224. *See, e.g.,* Louis Cantor, *A Prologue to the Protest Movement: The Missouri Sharecropper Roadside Demonstration of 1939*, 55 J. AM. HIST. 804, 809 (1969) (“The parity check was made out to the landlord, who was supposed to share it with his tenants according to the portion each tenant held in the crop. Many landlords found it easier to evict their croppers, keep the entire check, and work their land with day labor. [Administration] planners had anticipated this, but had done very little to guard against it.”); Rosenberg & Stucki, *supra* note 127, at 14 (explaining that New Deal farm programs were designed to benefit large landowners at the expense of farm labor, tenant farmers, and sharecroppers.).

225. HARDIN, *supra* note 67, at 119.

landowners,²²⁶ many black farmers were tenants, and nearly all black farmers—whether tenants or owners—were excluded from decisionmaking.²²⁷ In many cases, indirect elections further reduced the opportunity for marginalized farmers to take leadership roles.²²⁸ With unyielding, wealthy, white control over the committees, it was easy for members to direct benefits only to those like themselves.

In one instance, a black farmer near Lexington, Mississippi requested an increase to his cotton allotment.²²⁹ In an apparent attempt to punish the farmer for his request, the staff of the elected committee remeasured the farmer's cotton plantings, which had always previously measured at 3 acres, and determined that it was now 4.3 acres.²³⁰ The remeasurement forced the farmer to plow up more than an acre of his already small cotton crop.²³¹ This is just one example. It is not hard to imagine the damage that a malicious committee could cause when using race and income as key factors in deciding which farmers receive loans, how much farmers can plant, and which farming methods to advance.²³² Committees rejected applicants based on race,²³³ refused to share information outside their closest social groups,²³⁴ and simply lied when disfavored farmers—primarily black farmers—asked the direct questions about USDA programs.²³⁵

After receiving complaints about committees treating black farmers this way, a USDA employee defended the all-white committees by grumbling that black farmers chose not to participate.²³⁶ That assertion runs counter to the evidence, which reveals that white farmers actively and intentionally stopped black farmers from participating.²³⁷ For nearly 300 pages, Daniel documents the efforts of black farmers, young civil rights activists, and others, to increase representation on elected farmer committees in the face of physical violence and misinformation that would be familiar to anybody who has looked at other contemporaneous efforts of the Civil Rights Movement.²³⁸

One of the important lessons we can learn from a survey of the ideals that undergird the farmer committees is that a policy premised on superficial

226. DANIEL, *supra* note 97, at 10.

227. *See id.* at 28; Cantor, *supra* note 224, at 809, 822 (explaining that committees were dominated and controlled by large farmers and landlords). The roots of this discriminatory structure are varied. Widespread and long-standing societal discrimination no doubt played a central role. Because the electoral structure built off a base of appointed leadership, *see* Frischknecht, *supra* note 10, at 709, it is easy to imagine an elite, all-white appointed committee setting up electoral procedures and selectively sharing electoral information in a way that disadvantaged black farmers, small farmers, and poor farmers.

228. *See* Frischknecht, *supra* note 10, at 711 (describing the process for convention-based rather than direct elections).

229. DANIEL, *supra* note 97, at 23.

230. *Id.*

231. *Id.*

232. *See, e.g., id.* at 28.

233. *See id.* at 23.

234. *Id.* at 32.

235. *See id.* at 39.

236. *Id.* at 23.

237. *Id.*

238. *See, e.g., id.* at 58–99.

consensus or unexplored ideology may in fact encompass alternative values that remain uncriticized and unaddressed because they are veiled by platitudes about democracy and win-win solutions. When the values embedded in a policy go unconsidered, the policy can result in failure—sometimes dramatic failure—or at least serious fault, because there has been no admission of, nor any opportunity in the policymaking process to account for, diverging ideologies. As the next Part will explain, the widespread and reprehensible racism of many elected committees and elsewhere within the USDA is the most blatant and well-known problem plaguing the farmer committee system. It is not the only problem. It may well be that the failure to confront the various motivations described in this Part led to the problems described in the next.

IV. FAILURES

This Part highlights a number of failings of the elected farmer committees. This Part further argues that even if some of these failures were instead intentional design features, they were certainly predictable in a system of electoral bureaucracy, narrow issues, individualization, expertise, geographic diffusion, and limited transparency. Plus, the early committee structures and operation made too-little effort to account for these failures. The failures described here are racism and discrimination,²³⁹ poor administrative capabilities, and—perhaps as a consequence of the first two—lack of respect within farming communities.

There is also the underlying failure of electoral design, which likely gives rise to these other problems. The underlying problem is that elections are not an articulate way to gather public input for administrative action. The confusion grows when we consider that adding electoral guidance to administrative action is not novel. Only the direct connection between elections and administration is new. Administrators are already beholden to congressional direction and presidential oversight. Elections animate both. When administrators appear to additionally have independent electoral authority, they answer not only to the two political branches of government, but also to their own electorate. The first problem here is the legal one. Creating independent electoral authority necessarily diminishes the administrators' constitutionally indispensable connections to Congress and the President. Practically, administrative elections add a third manager, the administrative electorate, to the already crowded supervisory c-suite. This incoherent structure is likely part of the reason the other important failures have occurred.

A. RACISM AND DISCRIMINATION

As far as my research could uncover, there have only ever been two works in the legal literature that give more than passing mention to farmer committees. Written nearly a half-century apart, both focus on the most obvious and most

239. Of course, if the purpose of creating the committee system was to promote and entrench a racist social hierarchy, then the existence of widespread racism cannot fairly be called failure. However, it was a social failure even if it was a design feature not a design flaw.

reprehensible failure of the farmer committee systems: widespread, race-based discrimination.²⁴⁰ This section will discuss each piece in turn, as well as the key documents on which each relied.

An unsigned²⁴¹ *Columbia Law Review* note from 1967 describes the “wholesale exclusion of Negroes from the processes of government,” and uses the farmer-committee system as a key example.²⁴² Among the elected farmer committees in the Southeast, agricultural governance was “under virtually all-white control—even where the people it affect[ed] [we]re mostly Negro.”²⁴³ The Note continues, “The exclusion of Negroes from the . . . program mean[t] that decisions which can cause economic disaster for small Negro farmers [were] committed to rural southern whites.”²⁴⁴ As long as social paradigms remained racially abusive, the racial impact of an electoral system was “inevitable.”²⁴⁵

This 1967 note draws much of its critique from federal reports created earlier in the decade.²⁴⁶ In 1962, an independent-study committee conducted a review of the farmer-committee system for the Secretary of Agriculture.²⁴⁷ The majority of the study committee issued a favorable overall review of the farmer committee system, but did identify what it called “unwholesome situations” in the local electoral administrative program.²⁴⁸ Although the majority of the Study Committee did not clearly articulate the nature of the “unwholesome situations,” a single committee member wrote a dissenting report that shed more light on what, in hindsight at least, was an obvious problem. In his minority report, Morton Grodzins wrote: “The very fact of intimate acquaintanceship with and participation in the local community may lead not to even-handed justice but to subservience to the powerful and neglect of the weak.”²⁴⁹ Parenthetically, Grodzins

240. See generally Havard, *supra* note 12 (discussing racism of elected committees); *Agricultural Stabilization and the Negro*, *supra* note 12 (same).

241. I was curious about who might have written this piece, but *Columbia Law Review*'s policy at that time was that all notes were unsigned. I was in contact with several staff editors and senior editors of the 1967 volume of the *Columbia Law Review*, and none could recall which of their classmates wrote this piece. However, one suggested that it might have been the work of the late Robert Cover who was indeed on the *Review* that year and later became a professor known for his work on racial justice. Despite my excitement over having discovered a missing piece of Professor Cover's canon, research help from librarian Julian Aiken at Yale Law School suggests that Professor Cover was not the author because Aiken definitively identified Professor Cover as the author of another unsigned note (also on racial justice) published that same year.

242. *Agricultural Stabilization and the Negro*, *supra* note 12, at 1121.

243. *Id.*

244. *Id.* In several quotes, including this one, I have removed the reference to the Agricultural Stabilization and Conservation Service (ASCS) or replaced a reference to ASCS with “elected committees” in order to avoid confusion. The ASCS was home to the elected committees until the ASCS merged into the FSA in 1994. See *supra* notes 93–94 and accompanying text. Rather than flip between USDA denominations, I am making an effort at more generalized consistency throughout this Article.

245. *Agricultural Stabilization and the Negro*, *supra* note 12, at 1121.

246. *Id.* at 1122–23.

247. See generally 1962 REVIEW, *supra* note 122 (evaluating the farmer-committee system and recommending improvements).

248. *Id.* at 5.

249. *Id.* at 46-F–G.

added, "It is worth noting that in all the county committees of the South there has never been, as far as I can discover, a single Negro member."²⁵⁰

In 1965, the United States Commission on Civil Rights pursued this thinking more aggressively and issued a report on civil rights within the farm programs.²⁵¹ Although that report has broad coverage of USDA programs, a full section is dedicated to the elected farmer committees.²⁵² Drawing heavily on Grodzins' 1962 minority report, the Commission points out that between electoral politics that marginalized black farmers and an economic system that isolated black people and limited them to subservient agriculture roles, the meaningful participation of black people in the committee system was of "paramount importance if the . . . committee system is to function properly."²⁵³ This statement is more damning than it first seems. It powerfully indicates that the electoral system of 1965 was not, in fact, functioning properly. In 1964, only 75 out of 37,000 elected committee members in the South were black.²⁵⁴ And 75 was a substantial improvement from earlier years thanks to "intensive activity by the Mississippi Summer Project of the Council of Federated Organizations," which sought to empower black voters and candidates and to overcome widespread and substantial hurdles to participation.²⁵⁵ The final results of this voter—and candidate—empowerment effort might have been even larger had white farmers, landowners, and police officers not arrested and assaulted some of the black farmers attempting to vote and others attempting to observe the elections.²⁵⁶

Discrimination extended beyond the electoral process itself. The 1965 Civil Rights Report describes, as one example, the way elected committees distributed federal benefits.²⁵⁷ Recall that for some crops, farmers had to receive a federal allotment before they could grow and market that crop.²⁵⁸ For a variety of reasons, a farmer may have ultimately grown a less-than-full allotment, in which case the remainder of the allotment went back to the elected farmer committee for redistribution.²⁵⁹ This redistribution heavily favored white farmers in two respects. First, white farmers were more likely to request redistributed allotments, possibly because they understood that the committees were apt to grant such a request.²⁶⁰ Second, when black farmers did request redistributions, the committees granted

250. *Id.* at 46-G.

251. *See generally* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 121 (evaluating selected programs and recommending corrective action).

252. *See id.* at 91-97.

253. *See id.* at 92.

254. *Id.*

255. *See id.*; *see generally* DANIEL, *supra* note 97 (documenting the absence of black farmers on elected farmer committees).

256. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 121, at 92.

257. *Id.* at 93-96.

258. *See supra* notes 229-31 and accompanying text.

259. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 121, at 93-94; DANIEL, *supra* note 97, at 31.

260. DANIEL, *supra* note 97, at 32-33.

smaller allotments to black farmers than white farmers.²⁶¹ Key here is that the committees are able to discriminate both in the actual administration of the programs and in subtler ways, such as failing to share information with all farm program participants.²⁶² The Civil Rights Report thus concluded, “The virtual exclusion of Negroes . . . poses one of the most serious problems with which the Department of Agriculture should be concerned, particularly because this exclusion is compounded by the discriminatory operation of the county committee elections.”²⁶³

All of this racial injustice prompted the author of the *Columbia Law Review* note to urge Congress to do away with the elected farmer committee system all together.²⁶⁴ “If the [electoral committee] system survives in its present form, it can only hinder the advance of human rights and racial harmony in the South and in the nation as a whole.”²⁶⁵ The author offered a range of tools to mitigate the discrimination, but ultimately concluded that there was “no adequate protection against [the committee system’s] abuse.”²⁶⁶ Over a half-century later, this is still the response of many black farmers and farm advocates when they discuss the elected committee system.²⁶⁷ In an interview on the broader subject of racism within the USDA, at least one farmer has proposed a parallel committee system to exclusively serve black farmers.²⁶⁸ This strategy, however, certainly faces a variety of challenges of its own, not least of which is questionable constitutionality.²⁶⁹

The second law journal work to address the subject of elected farmer committees and racial discrimination was published in 2001, but given the still-mounting evidence of racial injustice in the electoral system, rather than reporting on progress in the wake of the 1965 Civil Rights Report and the powerful case that the 1967 note made against the electoral system, this twenty-first-century criticism renewed the same concerns.²⁷⁰ Professor Cassandra Jones Havard focused her critique on the role of elected committees in distributing federal-loan dollars at the local level. The first sentences of her article neatly summarize the problem she was trying to tackle: The USDA “loan qualification scheme allows locally elected farmers—who, with few exceptions, are white—to make substantive decisions

261. *Id.* at 45. This was in part because white farmers tended to request larger allotments, likely for the same reasons they were more likely to make a request in the first place. *Id.* at 87.

262. *See, e.g., id.* at 32.

263. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 121, at 96.

264. *Agricultural Stabilization and the Negro*, *supra* note 12, at 1136.

265. *Id.*

266. *Id.*

267. *See* E-mail Interview with Nathan Rosenberg, Visiting Scholar, Food Law & Policy Clinic, Harvard Law Sch. (June 7, 2019) (drawing on Rosenberg’s extensive interviews with black farmers over the past several years). Rosenberg did not specifically survey farmers about the committees but reports a majority negative response among those farmers who mentioned the committees on their own initiative. *Id.* Unpublished transcripts of those interviews are on file with Rosenberg. *Id.*

268. *Id.*

269. *See infra* Part V.

270. *See generally* Havard, *supra* note 12 (discussing racism of elected committees).

regarding an applicant farmer's creditworthiness. For many African-American farmers, this structure has resulted in a sustained lack of access to USDA's low-cost funds and, eventually, to land loss.²⁷¹

Like the 1967 note, Professor Havard had two critical new revelations and resources upon which her critique could draw. In 1997, the USDA Civil Rights Action Team (CRAT) painted a picture of widespread discrimination in the USDA, little improved, if at all, since the 1960s, with the elected farmer committees central to the problem.²⁷² In 1999, a federal judge of the U.S. District Court for the District of Columbia approved a settlement between the USDA and a class of black farmers who suffered USDA discrimination over more than a decade.²⁷³ Although the order approving the settlement only barely mentions the role of elected committees,²⁷⁴ the lawsuit and settlement made national news and brought renewed attention to the issue of discrimination in agriculture.²⁷⁵

The CRAT Report from 1997 illustrated "a county committee system that shuts out minorities and operates for the favored few."²⁷⁶ The inherent problems with the elected-farmer-committee system had not notably changed since the earlier indictments, but the 1997 Report completely reversed course from the 1960s era assessments in a critical way. Where the 1962 Report alleged that discretion and independence from D.C. was a key to success of the farmer committees,²⁷⁷ in 1997, the "wide-ranging and relatively autonomous local delivery structure" was a source of unmanaged, perhaps unmanageable, injustice.²⁷⁸ Elected committees are responsive to their electors rather than leadership in Washington, D.C. Thus, the local committees "tend to be influenced by the values of their local communities . . . rather than by standard policies promulgated at the national level."²⁷⁹ This structure undermines any effort at an institutional failsafe. Elected farmers are (too-) often compelled to racial discrimination by their communities, and D.C.'s efforts to curb discrimination are rebuffed because D.C. has little effective authority over administrators who are independently legitimated by local elections rather than by centralized appointment and oversight. The CRAT team therefore recommended that Congress establish more centralized control over the elected committees and, at the same time, remove certain authority, such as authority over loan eligibility determinations.²⁸⁰

271. *Id.* at 333.

272. See generally CIVIL RIGHTS ACTION TEAM, U.S. DEP'T OF AGRIC., CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE (1997) [hereinafter CRAT REPORT] (reporting results, findings, and conclusions of an audit of civil rights issues facing the USDA).

273. *Pigford v. Glickman*, 185 F.R.D. 82, 113 (D.D.C. 1999).

274. See *id.* at 86-87.

275. See, e.g., Havard, *supra* note 12, at 333 & n.2 (quoting from *Pigford* in the epigraph).

276. CRAT REPORT, *supra* note 272, at 7.

277. 1962 REVIEW, *supra* note 122, at 65-66.

278. See CRAT REPORT, *supra* note 272, at 14.

279. *Id.* at 18.

280. *Id.* at 64.

Professor Havard incorporated the CRAT recommendation into her own work. If committees are to make loan determinations, they should be made up of experts, she argued, not interested farmers.²⁸¹ As experts, they should be more accountable to central review, but that safeguard only provides real safety if the central review itself is fair and careful,²⁸² which has not been the case for much of USDA's history.²⁸³

Historian Pete Daniel wrote the most extensive critique of the racial animus and race-based economic warfare that has occurred within the elected farmer committees since their inception. Daniel's book, *Dispossession: Discrimination Against African American Farmers in the Age of Civil Rights*, tells story after story of racial injustice in both the administration of farm programs and the committee elections themselves.²⁸⁴ His treatment focuses on reform efforts in the 1960s, but he is quick to point out that these problems were not unique to that period and continued through 2013, the time of his writing.²⁸⁵ Even as Congress and USDA have paid more attention to racism and discrimination within the farm programs, the problems have not stopped.

B. INEXPERT ADMINISTRATION

The second notable failure of the elected farmer committees is their inability to effectively administer the vast and important programs over which they have authority. One of the enduring justifications for the administrative state is, after all, expertise.²⁸⁶ Though limiting participation on farmer committees to farmers assures some knowledge of the industry, it does not assure expertise in the details of administering farm programs.²⁸⁷ Probably more important, by lodging authority in electors, the farmer-committee structure is by design leaning on popularity as a first priority, not expertise. This analysis is evident in a number of critical reviews over the last eighty years.

Professor Frischknecht, the economist and former USDA lawyer mentioned above, praised the farmer committees in many respects, but complained that they could not deliver the best administration.²⁸⁸ Alluding to the contemporary expectation of expert federal administration, Professor Frischknecht wrote that the farmer committee is "an administrative body which structurally defies the fundamental rules of public administration."²⁸⁹ But his primary concern was not with the electoral structure, it was with the nonprofessional nature of the committees.

281. Havard, *supra* note 12, at 344.

282. *See id.* at 338.

283. *See* Pigford v. Glickman, 185 F.R.D. 82, 86–87 (D.D.C. 1999).

284. *See generally* DANIEL, *supra* note 97 (chronicling the systematic mistreatment of black farmers).

285. *Id.* at xi–xiii, 1–5.

286. *E.g.*, LANDIS, *supra* note 2, at 23–24.

287. *See, e.g.*, Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1099 (2015) (explaining the distinction between professional expertise, which is typical administrative expertise such as in law or economics, and craft expertise, which is expertise learned on the job).

288. Frischknecht, *supra* note 10, at 713.

289. *Id.* at 716.

He argued that a multi-headed body made up of farmers who are busy with their own farms simply does not have the focus or time to oversee day-to-day administrative business.²⁹⁰ Committee members may be great farmers, he explained, but that does not make them great administrators.²⁹¹

The 1962 Study Committee, which otherwise praised the farmer committees, was most critical in its assessment of committee expertise. The key problem of the county committees was their capability, and the first priority of the study team's report was that the elected committees' "competence for administration should be more firmly secured."²⁹² To do this, the study group wanted to see the USDA "attract the most competent and responsible men to serve on . . . committees and to equip them for imaginative and thoughtful administration of farm programs" because "[t]here is a great unevenness in the quality of men who have been attracted to serve on the community and county committees."²⁹³ The study team here, unlike Professor Frischknecht, thought the inadequacy of the members was more clearly tied to the electoral process because most farmers did not exercise their right to vote, so the few who did vote ended up electing unqualified individuals.²⁹⁴ Were more farmers to vote, the quality of service might have improved.²⁹⁵

But the problem ran deeper. A few candidates and committee members sought office because they opposed the USDA farm programs and thought that holding a position on the county committee would allow them to undermine or otherwise work against those programs.²⁹⁶ The purpose of elections, after all, is at least in part to provide a forum for electors to decide between competing ideological and policy visions. Nevertheless, the Study Committee thought those who challenged the existence of farm programs were manipulating or exploiting rather than fairly employing the electoral system and recommended that the USDA only permit those sympathetic to farm programs to be on the ballot.²⁹⁷ That would surely make administration more effective insofar as it would make the average administrator more enthusiastic and dedicated, but in so doing it would directly undermine the ideal of a majority-based electoral system that—one presumes—should not a priori take account of ideology.²⁹⁸

290. *See id.* at 713.

291. *See id.*

292. 1962 REVIEW, *supra* note 122, at 5.

293. *Id.* at 5–6.

294. *See id.* at 6, 20.

295. *See id.*

296. *Id.* at 17–18. At the time the USDA raised this concern, there were no statutory conditions for committee membership. *See supra* notes 101–05 and accompanying text. Therefore, candidates who opposed farm programs apparently did not need to receive USDA benefits in order to participate in the electoral process.

297. 1962 REVIEW, *supra* note 122, at 18.

298. There is a majoritarian paradox here because one might argue that a strong majoritarian system would allow a present-elected majority to change the electoral scheme, not only substantive law, thereby assuring a continued majority. That would undermine the value of achieving an electoral majority but would be difficult to prohibit in a majoritarian framework that links legitimacy to majority preference. If

In a similar vein, the 1962 report also flagged that committee members were not able to “acquire adequate knowledge about the programs and apply this knowledge in administering them.”²⁹⁹ To remedy this problem, the report team suggested longer terms in office.³⁰⁰ This may have been a minor quibble, but the consequence of longer terms is fewer elections—fewer opportunities for voters to have their say—effectively more expertise at the expense of majoritarian influence. Thus, on at least two counts, though the Study Committee praised the system, their criticisms were aimed at features inherent in elections and their proposals would have dampened electoral vigor.

But the Study Committee was probably right in identifying scarce administrative expertise among the committees. Indicative of these struggles is a series of lawsuits over the past several decades that resulted from committee misunderstandings, omissions, and other errors. From this trove came cases where committees apparently failed to verify claimed loss amounts,³⁰¹ never responded to applications for federal program support,³⁰² misunderstood the legal importance of an appeal that overturned their own adjudicatory decision,³⁰³ and, most remarkably, refused to conform to orders of a supervisory body within the USDA.³⁰⁴ In each instance, the errors betray nothing about farming savvy but much about lack of managerial capability.

C. DISINTEREST

The final important failure of the elected committees has been farmers’ resounding lack of interest in them. With farmers as the only people eligible to serve on the committees and the only eligible voters, disinterest in farm committees poses a sharp problem. From mid-century reviews to today, there has simply been little awareness of or excitement about the elected farmer committees. Today, there are farmers and farmer advocates who are unaware or only vaguely aware that the committee system even exists; even when they are aware of the committees, they tend to underestimate committee authority.³⁰⁵ It seems this has long been the case.³⁰⁶ But more fundamental for the functioning of the committees, there has been little interest in serving on the committees and attendant low turnout for committee elections. The 1962 Report found that in 1961, the median voter turnout in elections was only nine percent, making increasing turnout one

the majority prefers a different electoral process, so be it. Of course, the constitutional system in the United States would never let this come to pass, right?

299. 1962 REVIEW, *supra* note 122, at 18.

300. *Id.*

301. *See, e.g.*, Hixson v. U.S. Dep’t of Agric., No. 15-cv-02061-RBJ, 2017 WL 2544637, at *1 (D. Colo. June 13, 2017).

302. *See, e.g.*, Moralez v. Vilsack, No. 1:16-cv-00282-AWI-BAM, 2017 WL 4652730, at *2 (E.D. Cal. Oct. 17, 2017).

303. *See, e.g.*, Lucio v. Yeutter, 798 F. Supp. 39, 44–45 (D.D.C. 1992).

304. *See, e.g.*, Gross v. United States, 508 F. Supp. 1085, 1086 (D.S.D. 1981), *vacated in part*, 676 F.2d 295 (8th Cir. 1982).

305. *See, e.g.*, Telephone Interview with Cara Fraver, *supra* note 33.

306. *See* Youngberg, *supra* note 209, at 164.

of the key goals of the study team.³⁰⁷ The average (including elections allowing mail-in votes and polling places) was somewhere near twenty-three percent in that same year, with one county having a turnout of just 4.8 percent.³⁰⁸

Things have not improved. The most recent data is from the 2014 election cycle, in which only 9.3 percent of eligible voters turned out.³⁰⁹ In the years for which data is available, 2002–2014,³¹⁰ the highest turnout occurred in 2006, at fifteen percent.³¹¹ This disinterest is not only a symptom, it is a flaw in the promise of electoral administration. Administrative issues may often be too esoteric or technical to arouse widespread interest among candidates or voters.³¹² In a search for democratic legitimacy, asking for majoritarian input about an issue that is not on the radar of voters may do more to undermine legitimacy by empowering small blocs with heightened interest compared to the larger public.³¹³

D. CONGRESSIONAL RESPONSES TO ELECTORAL FAILURES

The critiques and data from inside and outside the USDA are enough to demonstrate the clear failure of the electoral system when it comes to racial justice and effective administration. Although the USDA has been hesitant to explicitly point the finger at the electoral structure itself, two statutory changes are case in point that elected bureaucrats with wide discretion cannot appropriately administer the federal farm programs. Both of these statutory instructions are described in Part II, but are reiterated here in the context of how they were responsive to particular failings of the electoral structure.

The first change proves the problem of inept administration. In 1994, Congress authorized a wholesale restructuring of the USDA.³¹⁴ Central to the reform was the creation of a National Appeals Division (NAD).³¹⁵ NAD established a formal, quasi-judicial, centralized, and politically-insulated process through which aggrieved farmers can seek review of farmer committee decisions

307. 1962 REVIEW, *supra* note 122, at 19–20.

308. *Id.* at 46-D. One report claims that in some counties, the total number of elected members actually exceeded the total number of voters. *Id.* at 46-D–E. Though it is not entirely clear how this could have happened, it may be that the only voters were also slated candidates and not even all the candidates voted.

309. U.S. DEP'T OF AGRIC., FARM SERV. AGENCY, 2014 FARM SERVICE AGENCY COUNTY COMMITTEE ELECTION REPORT (2014), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/NewsRoom/County-Committee-Elections/pdf/election-results/2014_election_results.pdf [<https://perma.cc/MU6J-XL8N>].

310. *County Committee Elections*, *supra* note 32.

311. U.S. DEP'T OF AGRIC., FARM SERV. AGENCY, NATIONAL BALLOTS CAST (2006), <https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/NewsRoom/County-Committee-Elections/pdf/election-results/2006electionresults.pdf> [<https://perma.cc/EWW3-EDHK>].

312. See Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 170 (2018) (“The more specific and narrow any agency’s work becomes, the harder it becomes for watchdogs to monitor it and to sustain collective interest in it.”).

313. See OLSON, *supra* note 203, at 12 (discussing the power of lobbies); see generally Galperin, *supra* note * (discussing constitutional implications of elected committees).

314. Malasky & Penn, *supra* note 94, at 1165.

315. KELLEY, *supra* note 60, at 1; Malasky & Penn, *supra* note 94, at 1165.

(as well as decisions from elsewhere in USDA).³¹⁶ Although, strictly speaking, this does nothing to strip the elected committees of their power, it does limit the impact of their power by funneling decisions through a system that looks much like a traditional administrative review process and little like the decentralized electoral system of the farmer committees.³¹⁷ In the same vein, the USDA's regulations describing the structure and functions of the farmer committees are explicit that the Farm Service Agency Administrator in Washington, D.C. retains authority to reverse or modify any action, or to force action, from the elected committees.³¹⁸ The NAD and the central oversight evident in the regulations both signal enhancement of central, expert, popularly-insulated administration over the dispersed, overtly corporate-populist, and often inexpert farmer committees.

The second statutory change, likewise discussed briefly in Part II, was cemented in 2002 when Congress dramatically reformed the election process and set up the system that now governs committee elections.³¹⁹ In addition to the pronounced electoral framework for the farmer committees, there are also provisions to assure equal access and transparency of elections, along with the possibility of secretarial appointment of one member to represent otherwise underrepresented farmers.³²⁰ Like the creation of NAD, the new process is not nominally an attack on the elected committees; at first blush it is quite the opposite—a reaffirmation of elections. Still, the 2002 amendments recognize the failures of the committees with respect to race and attempt to build a framework that takes power out of the hands of the dominant farming elites by making elections more equitable, forcing oversight, and including nondiscrimination as a mandatory, transparent commitment in all electoral communications.³²¹ Appended to the electoral reform is the opportunity for the Secretary to appoint an unelected member to speak for the interests of otherwise underrepresented farmers.³²² This strategy, again, does not explicitly challenge the electoral system, but it admits a central failing of electoral administration and attempts to remedy that failing by increasing authority in the presidentially appointed, Senate-confirmed Secretary.³²³

That the changes were an implicit insult to the majoritarian electoral system was not lost on critics. When the USDA issued proposed election guidelines in 2005 pursuant to the 2002 amendments, the vast majority of commenters

316. KELLEY, *supra* note 60, at 1–2.

317. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 336–39 (1976) (surveying the administrative review process used in Social Security Disability Insurance proceedings, beginning with widespread decisionmaking and funneling through successive levels of federal review).

318. 7 C.F.R. § 7.1(d) (2019).

319. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10708(b), 116 Stat. 134, 522–25 (codified as amended at 16 U.S.C. § 590h(b) (2012)).

320. 16 U.S.C. § 590h(b)(5)(B)(iii)(IV)(aa) (2012), (b)(5)(B)(iii)(IV)(cc), (b)(5)(B)(iii)(VII)(cc).

321. *See, e.g.*, § 590h(b)(5)(B)(iii)(II).

322. *See* § 590h(b)(5)(B)(iii)(VII)(cc).

323. *See* 7 U.S.C. § 2202 (2012).

objected to the new rules.³²⁴ Most of these commenters specifically objected to the secretarial appointment of minority representatives.³²⁵

The failures of the electoral farmer administration system are real, and though Congress and the USDA have marginally changed the system to address the most glaring problems—racism, incompetence (or limited competence), and anemic participation—there seems to be too much investment in the symbol of electoral administration to do away with the system. Even though they are maintained for mainly symbolic reasons, elected administrators' very existence raises serious questions. Thus, the next Part looks more closely at some of the lessons of electoral administration with respect to administrative and constitutional law.

V. LESSONS

Any system branded as “administrative democracy” has a rhetorical appeal, but electoral administration is not something to strive for. There are no doubt other critiques, but here I focus on two critiques and one fatal flaw. First, as a means to integrate the public into administration, elections are both inarticulate and, in practice, too narrow. Second, elections give rise to obvious, undesirable majoritarian consequences and, unlike a constitutional system that checks raw majoritarianism, the administrative system has limited tools for that job. Third, and related to the previous lesson, electoral administration is intentionally isolated from the President, and under constitutional-appointment and removal doctrine, is therefore unconstitutional.

As described earlier, elections are undoubtedly a way to inject public participation into administration, but for public participation to be meaningful, individuals must understand their special role and what they are voting for. Susan Rose-Ackerman and Lena Riemer recently wrote that the system of public participation in administrative decisionmaking in the United States is comparatively strong but still does not sufficiently “seek to elicit public input and articulate how it will feed into the ultimate policy choice.”³²⁶ A charitable interpretation of the elected committees would fulfill the first prong of Rose-Ackerman and Reimer’s charge: elections “seek to elicit public input” in a way that is far more assertive than the Administrative Procedure Act’s framework for public comment³²⁷ or judicial

324. Uniform Guidelines for Conducting Farm Service Agency County Committee Elections, 70 Fed. Reg. 2,837, 2,837 (Jan. 18, 2005).

325. *See id.*

326. Susan Rose-Ackerman & Lena Riemer, *Strengthening Democracy Through Public Participation in Policymaking: The EU, Germany, and the United States*, 36 YALE J. ON REG.: NOTICE & COMMENT (May 6, 2019), <http://yalejreg.com/nc/strengthening-democracy-through-public-participation-in-policymaking-the-eu-germany-and-the-united-states-by-susan-rose-ackerman-lena-riemer/> [<https://perma.cc/8AB6-UUHV>].

327. *See* 5 U.S.C. § 553(c) (2012) (requiring opportunity for public comment, but not for proactive outreach).

review.³²⁸ But elections fail the second prong. Elections do not articulate how public input will feed into the ultimate policy choice, and they further undermine this second prong because they muddy the role of public input. The existence of administrative elections does not determine the meaning of a vote. A vote might tell the elected bureaucrat to pursue a certain policy, but what if that policy is contrary to congressional authorization or presidential discretion? Surely an elected administrator is not free to depart from congressional or presidential authority, but the opportunity to vote sends exactly this message. Thus, administrative elections are both unconstitutional and misleading to voters. A narrow interpretation of electoral administration could recommend that a voter only vote for the most technically or managerially competent candidate, but is the voter qualified to make that choice and would the voter have any sense that the vote was constrained to only that judgment?

The various failures of the elected committees are not random; they are predictable consequences in an electoral system. This is not a challenge to elections generally, but to cabined, esoteric elections without the countervailing safeguards that the Constitution otherwise provides. Surely nobody is surprised to learn that in a local election that deals with ownership, government payments, and local economics, racism plays a central role. There is a good argument that racism was a central motivation in the first place. Relatedly, elections are not an ideal mechanism for selecting the most qualified technocrats. Congress and the President are charged with exercising political will, but county committees and bureaucrats are tasked primarily with implementation. Of course, administration in the United States includes policy decisions, but those decisions are constrained, and the central role of administrators is to manifest the political will of others. Elections do not select for that skill.³²⁹ Finally, because the role of administrators is to hustle through the details of earlier political decisions, elections are unlikely to spark the interest of qualified candidates or voters.

The final problem, which is not determined by but is certainly copacetic with the prior, is that an electoral administrative system is unconstitutional.³³⁰ Constitutional appointment and removal doctrines apply where an administrator

328. See *id.* § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

329. Of course, as has been well documented elsewhere, the constitutional appointments process provides no promise of qualified bureaucrats, see, for example, Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 484 (2011), or bureaucrats who will carry out congressional direction, see Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE. L.J. 359, 381 (1972). See generally Andrew Kent, *Congress and the Independence of Federal Law Enforcement*, 52 U.C. DAVIS L. REV. 1927 (2019) (discussing degrees of presidential control over law enforcement agencies). Nevertheless, it is arguable that the principal officers or presidents who typically appoint administrators have more incentive and are better positioned than others to select more qualified bureaucrats. See THE FEDERALIST NO. 76 (Alexander Hamilton).

330. I work out this argument in much greater detail in another article. See generally Galperin, *supra* note * (arguing that elected committees are unconstitutional).

is an “Officer” under the Appointments Clause.³³¹ An officer is an official who holds a “continuing office established by law” and has significant statutory authority.³³² In *Lucia v. Securities and Exchange Commission*, the Supreme Court determined that administrative law judges of the Securities and Exchange Commission are constitutional officers because they fill statutory roles and are empowered with “significant discretion.”³³³ Congress has permanently established the elected farmer committees and endowed them with wide and discretionary powers to, for instance, adjudicate disputes much like the Securities and Exchange Commission’s administrative law judges, and to make legislative-type policy determinations related to county-wide applicability of farm programs.³³⁴

As constitutional officers, committee members must be appointed in conformance with one of the prefabricated constitutional mechanisms. The Constitution provides that the President, with the advice and consent of the Senate, must appoint a principal officer.³³⁵ The President alone, the heads of departments, or judges may appoint inferior officers.³³⁶ Regardless of whether the committee members are principal or inferior officers, electoral appointment is not an available option. On appointment grounds alone, the elected committees, and probably any bona fide electoral administration, are unconstitutional.

Removal doctrine is more difficult, and its application to the farmer committees more complicated, but an administrative electoral scheme seems to falter under these constitutional limits as well. In broad strokes, the Court allows Congress to create constitutional offices and then insulate those offices from direct presidential control, but the Court does not allow Congress to insulate officers to such a degree that the President is “stripped” of power and unable to “hold[] his subordinates accountable for their conduct.”³³⁷ The provisions that govern the elected farmer committees reserve removal to the electorate only. The President, Secretary of the USDA, and lower-level appointees such as the Deputy Administrator for the Farm Service Agency have no ability to remove committee members, despite USDA regulations purporting to establish a for-cause removal process.³³⁸ Without removal authority lodged in the presidential chain of command, electoral committees are unconstitutional. Careful drafting could avoid this removal problem by lodging some removal powers in political supervisors.³³⁹

331. See U.S. CONST. art. II, § 2, cl. 2; *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991).

332. 138 S. Ct. 2044, 2052 (2018).

333. *Id.* at 2053 (quoting *Freytag*, 501 U.S. at 878).

334. See *supra* Section II.B.

335. See U.S. CONST. art. II, § 2, cl. 2.

336. *Id.*

337. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496 (2010).

338. Galperin, *supra* note * (manuscript at 27–29) (arguing that the statute provides only for electoral appointment, Congress’s silence on removal implies only electoral removal, and that the USDA regulations are not authorized by the limited statutory grant of rulemaking authority).

339. *Id.*

Presuming Congress could also solve the appointment problems, shifting removal authority might steel a system of administrative elections against constitutional failures, but it would weaken the electoral design in equal measure. Every quantity of authority added to the central bureaucracy is subtracted from the local electors. Allowing “Washington bureaucrats” to overrule local voters has merit, but is orthogonal to the first arguments for elected administrators.

The lessons of electoral administration need not convince us that electoral administration is untenable, but they should force us to confront problems that are not evident in the superficial promises of electoral accountability.

CONCLUSION

The life of administrative democracy—if “democracy” is even an appropriate moniker—is represented by just one experiment within the USDA about which few seem aware. The USDA Farm Service Agency is home to over 7,700 elected administrators who sit on over 2,200 county committees and administer aspects of the vast and diverse federal farm programs. These administrators make regular adjudicatory decisions that decide the legal rights and obligations of individual farmers, and they set area-wide policy that applies to all participating farmers within their jurisdiction. They are elected, they are administrative, and they are almost entirely unknown outside of the USDA even though they represent a remarkable anomaly in the federal administrative structure.

The death of administrative democracy, of electoral administration, has not yet arrived, but if and when it does, bureaucratic elections probably will not be missed. Or rather, the USDA’s elected farmer committees probably will not be missed. Champions of administrative democracy could point to a number of justifications for the endeavor. The farmer committees were born, in part, out of the ideal of Jeffersonian rural empowerment, which is not unique to farm governance, but does not extend to all possible forms of administrative democracy. More broadly, administrative democracy may fulfill goals of deliberative democracy and civic republicanism, which are more vital at the local level. Elections actively invite civic participation. But the zero-sum nature of elections also dampens continued deliberation and ongoing participation. Pluralism that turns governmental decisionmaking over to interest groups is one feature of administrative democracy that could work, but in the case of USDA committees there is no competition because the elected committees are not pluralistic, but corporatist, empowering only a single industry to self-govern. The area in which the elected committees have most notably met early expectations is their ability to entrench social, predominantly racist, hierarchies. The committees were created in part to help wealthy, mostly white, agricultural landlords maintain control in industry and communities. Decades of elected committees in which elections, information, and money were controlled by local elites have proven that electoral administration, despite its sense of egalitarian voting, can effectively demean and repress. Failure to meet the high hopes of most of these philosophical motivations—and the bitter irony

that the greatest success was in the most shameful goal—will blunt much grief at the passing of electoral administration.

Though its life has not been much celebrated, upon its death, condolences for the concept of administrative democracy may be more plentiful. The word “democracy” is powerful. It evokes accountability, equality, and control. Given the frequent pleas for more accountability, equality, and control in the federal bureaucracy, it is possible that some observers will still see elected bureaucrats as a viable option. But accountability, equality, and control, if even possible, would come at the expense of other constitutional promises, such as the promise of Congressional and Presidential power over administrators and the promise of non-majoritarian democratic engagement. Each of these unfulfilled promises could conceivably exist in other attempts at electoral administration. Surely, the story of the USDA’s elected farmer committees is an anecdote, not the story of the administrative state more broadly. Though the lessons reach beyond farm policy, it is unclear how far exactly they do reach. But it is clear that we should take the lessons seriously.

Elected farmer committees have not fulfilled their role as both representatives *and* administrators. The committees cannot thrive as administrators because elections do not advantage experts, do not excite voters, and are most likely to favor regulated industry. The committees cannot effectively represent their voters because they are constrained by constitutional demands to obey the limits of their congressional authorization and the direction of presidential oversight. If the Supreme Court were ever to hear a challenge to the USDA’s elected committees, they would doubtless find flaws in the mode of appointment by voters not by the President, a head of department, or courts of law. They would also surely find flaws in a system that restricts executive removal authority and places that authority instead in the hands of voters.

The allure of “democracy” may keep this USDA experiment on life support, but the legality of the system will not survive. From a policy perspective, the loss will not be so great. From a scholarly perspective, it is just a shame that the life of administrative democracy has been so little remarked on.