

The Oregon Bureaucracy *

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* An edited version of this article will be published in Oregon Government and Politics Today, edited by Richard Clucas, Mark Henkels, Michael Parkhurst, and Brent Steel (publisher and date TBA).

“The people reserve upon themselves the power to require that the Legislative Assembly review and approve any administrative rule...upon the filing of a petition ...signed by at least 10,000 qualified voters...”

Ballot Measure #2¹

“The battle between bureaucracy and democracy is written into our history. So is the fact that democracy must win. All we have left to debate is the cost.”

Barry Karl²

Over the past decade Oregonians have successfully placed nearly a two-dozen initiative petitions on the ballot to severely circumscribe the discretionary authority of their administrative agencies.³ These measures would amend the Oregon State Constitution by establishing additional levels of review and approval for various administrative actions. While most of these efforts have failed, the margin of defeat has declined from a high of 73% in 1996 (Measure 27) to 56.3% in 2000 (Measure 2). Finally, in November, 2000 the voters passed Ballot Measure 7, which requires “fair market” compensation for any loss in property value resulting from regulatory actions by administrators. Oregon’s long tradition of populist democracy had once again triumphed over a system of representative government, which gives considerable deference to the claims of expertise and professional competence. Ironically, at the same time Oregonians were seeking to restrict the administrative discretion of their state agencies, they were simultaneously increasing agency discretion to build and manage prisons, improve and expand the state transportation infrastructure, stimulate the economy, and regulate the environment.

Oregonians, more than most Americans, have a love/hate relationship with their administrative agencies. In a much larger sense, though, this relationship reflects the troubled conscience and practice of Oregon’s larger system of democratic governance. While Oregonians expect the bureaucracy to be ever responsive to the will of the citizens, they do not want this responsiveness to erode the capacity of government to manage complex problem solving in the most technically efficient and

effective manner possible. Even though Oregonians may value efficient problem solving, they do not want this to come at the expense of protecting individual rights. What makes these conflicts particularly difficult for the bureaucracy is the expectation by the majority of citizens that career administrators manage these difficulties “so that the tensions work out just fine” in the end. This expectation is firmly rooted in a peculiar feature of our democratic system of decentralized administration. As Alexis de Tocqueville observed in his early nineteenth century travels throughout the United States, one of the **political** consequences of the American system of decentralized system of administration is that our career public servants are expected to share the sensibilities of the fellow citizens who stand at their side and to transform their bundle of conflicting expectations into the sanctity of law and right. ⁴ This is why one student of American history has characterized the struggle between bureaucracy and democracy as “a history of sheep in wolves clothing”. ⁵ As sheep, the bureaucracy is expected to docilely follow the will of the people. But as wolves, we fear that the bureaucracy may use its position to take advantage of the uniformed and naive citizens the bureaucracy is expected to serve. This fear has been developed to a high art in Oregon state government.

In this chapter we will review the long and troubled efforts to reconcile the conflict between democracy and bureaucracy in the State of Oregon. In Section I we will examine the two contradictory political traditions that pull administrators in quite opposite directions. One tradition emphasizes the importance of administrators “being on tap, not on top”, and not exercising any authority unless it is explicitly granted by the citizens. The other tradition emphasizes the importance of administrators freely using their professional expertise and discretionary authority to manage the public’s business as efficiently and effectively as possible, as long as it is not explicitly prohibited. The schism between the instrumental and constitutive role of the bureaucracy reflects a very **high fear** of the adverse consequences of bureaucratic discretion, but an equally **high set of expectations** that the bureaucracy fully use its discretion to “get the job done” efficiently, effectively and in a manner that is very sensitive to individual rights.

In Part II we will review the **democratic principles and political traditions** that have given rise to this schism. Parts III, IV and V will examine how the tension between the instrumental and constitutive role of the bureaucracy is manifest in efforts to maintain **political, organizational and legal control** over the bureaucracy. Finally, in Part VI we will discuss some of the unresolved issues that have arisen from the enduring conflict between the instrumental and constitutive roles of the bureaucracy in the State of Oregon. Table 8:1 on the next page provides a visual summary of the organizational structure of the sections that follow.

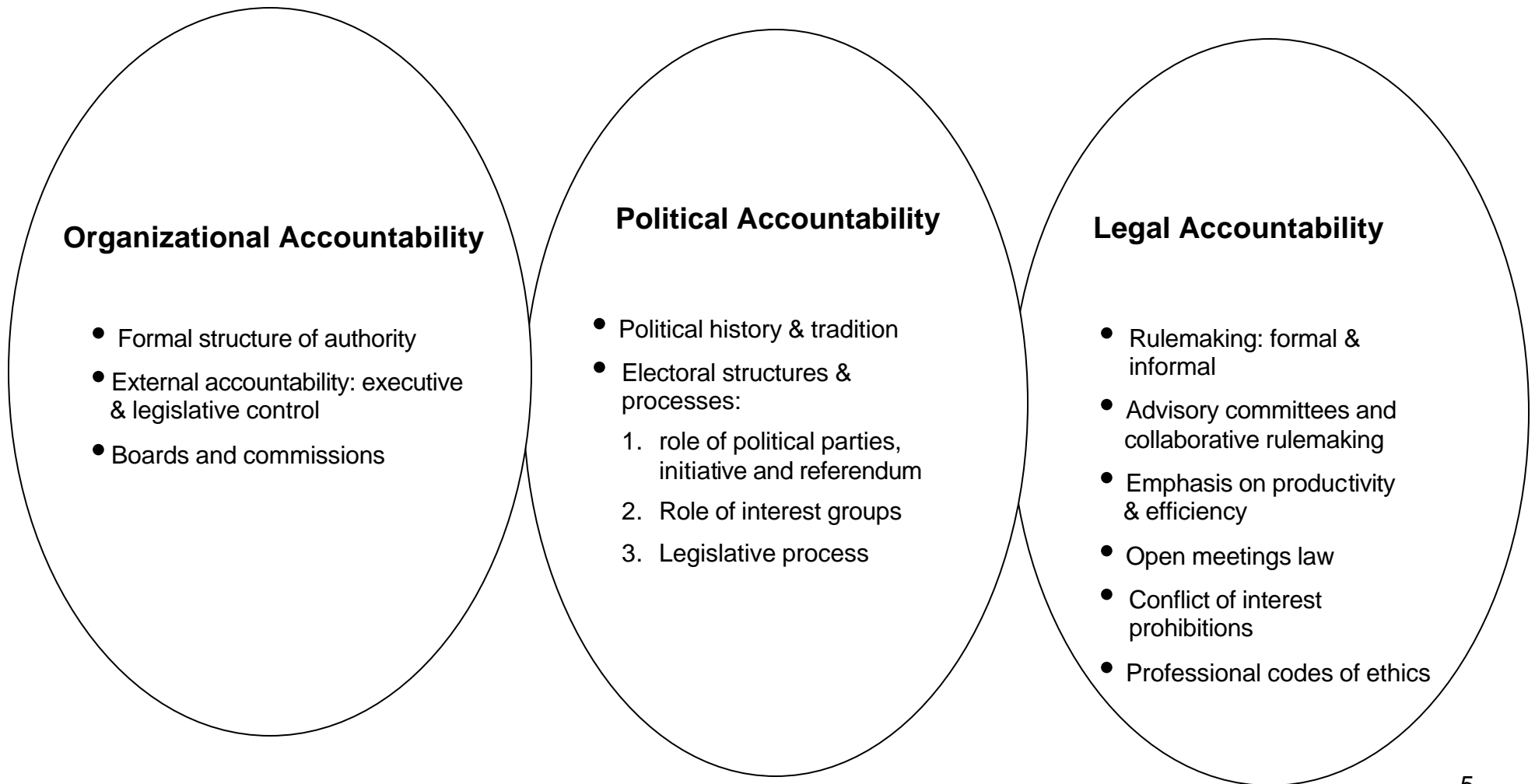
Section I: Oregon's Conflicting Political Traditions

There are two prevailing traditions of political accountability that are simultaneously at work in Oregon state agencies. The dominant populist conservative or civic republic tradition emphasizes a close personal relationship between the rulers and the ruled. This tradition draws from the “direct democracy” experience of our Jeffersonian and populist historical legacies and the Western frontier “self-help” approach to problem solving. The second, and somewhat less popular, **procedural republic and progressive tradition** relies on mediating social and political structures to filter and translate the wishes of the people into public policy outcomes and is grounded in our Madisonian systems of interest group politics, checks and balances, separation of powers and the importance of expertise and experience.

The **civic republic and conservative populist tradition** measures “good government” by the substantive agreements that emerge from the deliberative and participatory role that each individual plays in constituting a commonly shared sense of purpose and action. It emphasizes face-to-face communication, the building of interpersonal trust, and the importance of local knowledge. The civic republic tradition is suspicious of the claim of experts, elected representatives, and formal government participatory processes. There is a tendency to assume that these processes are merely foils to achieve predetermined results. Under the civic republic and populist

TABLE 8.1: BUREAUCRATIC ACCOUNTABILITY

Factors Shaping the Role of the Bureaucracy in Oregon State Government



tradition administrators operate under a constant cloud of suspicion and are expected to exercise little discretion in carrying out the will of the people.

On the other hand, the **procedural republic progressive tradition** measures “good government” in terms of adherence to formal rules, processes, and structures that create opportunities for access, a fair hearing, rule-bound decision making processes, the indirect representation of interests, the crucial role of expertise, and the value of mediating processes and structures in achieving the public interest. Under the procedural republic tradition administrators are expected to actively exercise their expertise and competence to improve both policy outcomes and processes. In Table 8.2 on the next page we have summarized the implications of these two “good government” traditions for Oregon’s administrative structure and processes. In the following section we will explore how these **conservative populist** and **progressive** traditions manifest themselves in the daily work that administrators seek to carry out on behalf of the Oregon citizens.

Section II

The Oregon Bureaucracy: Instrumental or Constitutive?

The state bureaucracy plays a very significant role in the daily lives of Oregonians. Table 8.3 below illustrates a bit more precisely what we mean when we speak of Oregon’s bureaucracy. It includes approximately 40,000 employees organized into six independent administrative structures that operate under the supervening authority of the following six separately elected political officials: Governor, Superintendent of Public Instruction, Treasurer, Secretary of State, Commissioner of Labor, and Attorney General. Together, these elected offices oversee more than 200 separate agencies, commissions and departments, most of which operate quite autonomously. But the street level bureaucrats and their administrative superiors face a nearly impossible task of reconciling two contradictory sets of expectations, as the following case examples illustrate.

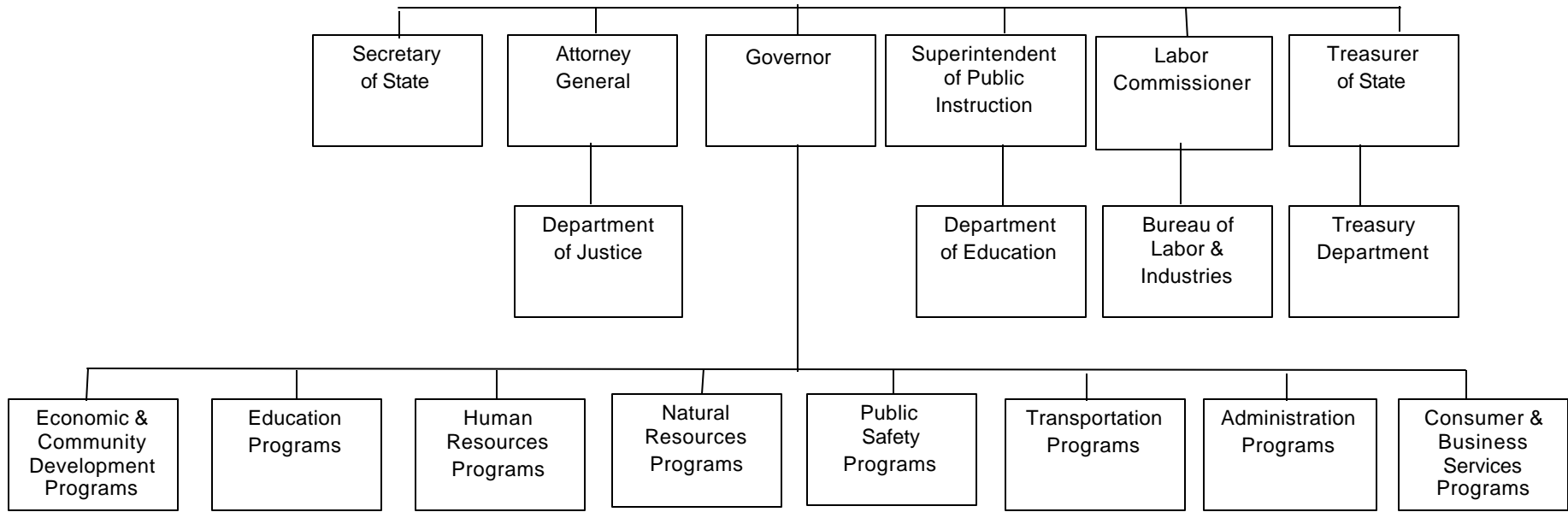
Table 8.3

Implications of Two Democratic Traditions for Oregon Administrative Structures and Processes

	<u>Conservative Populist:</u> <u>The Civic Republic Tradition</u>	<u>Progressivism:</u> <u>The Procedural Republic Tradition</u>
Origins:	<ul style="list-style-type: none"> • Antifederalists • small republic agrarian tradition • Populist movement 	<ul style="list-style-type: none"> • Federalists • interest group pluralism
Characteristics:	<ul style="list-style-type: none"> • face to face communication • emphasis on substantive equality • emphasis on substantive agreement and consensus • community is socially constructed through living & deliberating together • emphasis on importance of place • emphasis on action, i.e., doing things together, rather than simply getting formal agreement • emphasis on duties over rights 	<ul style="list-style-type: none"> • reliance on indirect representation • reliance on procedural equality • emphasis on voting and majority rule principle • community is a legal agreement • emphasis on procedural fairness with open access and right to participate • rule of law orientation • emphasis on rights over duties • Deference given to expertise
Citizenship Requirements:	<ul style="list-style-type: none"> • high level of deliberative skills • development of relevant knowledge and expertise • personal participation • citizen ownership and control of decisions 	<ul style="list-style-type: none"> • voting • heavy reliance on interest group participation • opportunity for individuals to advise and counsel • heavy reliance on elected officials and career administrators
Legitimizing Criteria:	<ul style="list-style-type: none"> • high levels of citizen participation • high degree of citizen control • sense of ownership of both process and outcome 	<ul style="list-style-type: none"> • Due notice of important decisions • Opportunity for a “hearing” • Procedural fairness in gathering and assessing information.

Table 8:3

Oregon Administrative Structure



- Economic Dev. Dept.
- Employment Dept.
- State Fair & Exposition Center
- Housing & Com. Services Dept.
- Lottery
- Dept. of Veterans Affairs

- Office of Com. College Services
- Dept. of Education
- Dept. of Higher Ed.
- Scholarship Commission.
- Teachers Standards & Practices Commission

- Com. for the Blind
- Board of Trustees for Children's Trust Fund
- Commission on Children & Families
- Disabilities Commission
- Department of Human Resources
- Insurance Pool Gov. Board
- Long Term Care Ombudsman
- Psychiatric Security Review Board

- Dept. of Agric. Columbia River Gorge Com.
- Dept. of Environ. Quality
- Dept. of Fish & Wildlife
- Forestry Dept.
- Dept. of Geology & Minerals Industries
- Dept. of Land Cons. & Development
- Land Use Board of Appeals
- Division of State Lands Authority
- Marine Board
- Dept. of Parks & Recreation
- Dept. of Water

- Dept. of Corrections
- Criminal Justice Com.
- Dispute Resolution Commission
- Dist. Attorneys & their Deputies
- Dept. of Justice
- Military Dept.
- Bd. Of parole & Post-Prison Supervision
- Dept. of State Police
- Dept of Public Safety Standards & Training
- Oregon Youth Authority

- Dept. of Transport.
- Dept. of Adm. Services
- Com. On Asian Affairs
- Com. On Black Affairs
- Capitol Planning Com.
- Employment Relations Board
- Gov. Standards & Practices Com.
- Office of the Governor
- Com. On Hispanic Affairs
- State Library
- Liquor Control Com.
- Public Employees' Retirement System
- Racing Com.
- Dept. of Revenue

- Bd. Of Chiropractic Examiners
- Construction Contractors Board
- Department of Consumer & Business Services
- Office of Energy
- Health-related licensing boards
- Landscape Contractors Bd.
- Bd. Of Medical Exam.
- Board of Nursing
- Real Estate Agency
- Public Utility Com
- Board of Investigators
- Psvchologist Exam. Board

The Constitutive Role of the Oregon Bureaucracy: The Department of Environmental Quality⁶

The Department of Environmental Quality (DEQ) received a call from a Mr. Q complaining that the oil recycling business run by his neighbor Ms. P was polluting the environment. Ms. P runs a small business that recycles used crank case oil collected from automobile repair shops. DEQ staff frequently receives similar calls and typically responds by making a phone call to the business, a site visit and a follow-up with the neighbor. During these conversations, the staff uses a variety of negotiating skills it has learned from professional training programs. Through these negotiations, Ms. P agreed to change some of her storage practices to allay the neighbor's concerns.

Ms. P wanted more than informal assurances from the agency staff. She asked the agency for a declaratory ruling. Under this procedure, the interested person asks the agency to issue a binding ruling on the application of agency law to a certain set of facts (ORS, Chapter 183.410). The agency head believed a declaratory ruling was appropriate in this case. The agency head issued a ruling that found the operation did not violate the law. As required by law, the ruling was limited to the specific description of the operation submitted by Ms. P in her request for the declaratory ruling.

After several years, Ms. P modified her operation. Mr. Q complained again about the operation, and the agency staff looked into the matter. The staff concluded that the new operation did violate the law. Rather than file a formal complaint, the agency offered to speak with Ms. P regarding her business. Ms. P was convinced that her new operation was within the law. Although the negotiations were conducted in good faith, the agency and Ms. P were unable to reach an agreement.

At that point, the agency determined the oil recycling operation constituted a danger to public safety. The agency issued a notice asserting that Ms. P was in violation of the law, directing her to cease operations and assessing a monetary penalty (ORS, Chapter 183.415).

Ms. P answered by claiming that the operation was being conducted legally and requested a hearing (ORS, Chapter 183.415). The matter was set for hearing before a

hearing officer. Her attorney represented Ms. P, and an assistant attorney general represented the agency. The hearing officer suggested that Ms. P and her attorney sit down with the agency staff before the hearing and at least try to reach an agreement on the facts at issue. They did so and found that their dispute was over the agency's interpretation of the law. They stipulated to an agreed set of facts and avoided the need for a formal contested case hearing (ORS, Chapter 183.413-458).

The hearing officer issued a proposed order finding that Ms. P's recycling operation was in violation of the law. Ms. P's attorney filed exceptions to the findings of the hearing officer. After reviewing the proposed order by the hearing officer and Ms. P's exceptions, the agency issued a final order adopting the hearing officer's conclusion.

The agency's decision was controversial. A number of persons in the same business as Ms. P would go out of business under the agency's ruling. On the other hand, many members of the public supported the ruling because it protected them and their businesses.

Since there were a limited number of interest groups, the agency thought there might be a way to modify the rule so that Ms. P could operate and the other members of the public would be protected. Because the agency believed that development and implementation of a new rule would be most effective if it were based on agreement of all the interested parties, the agency decided to use a negotiated rulemaking process authorized by the legislature in 1997 (ORS, Chapter 183.502) . The agency hired a convener to begin forming a negotiated rulemaking committee. With the help of the convener, the agency developed an agenda, scheduled a first meeting and published a notice of the committee's formation. The committee met, selected a facilitator and developed ground rules. The facilitator assisted the committee by conducting a brainstorming session, which generated an idea to use a new alternative technology. Ms. P determined that she could modify her operations to employ the new technology. The committee investigated the idea and presented a final report to the agency, proposing that the current rules be modified to allow the use of this new process. Because the agency believed the committee's suggested rule was reasonable, the

agency did not appoint a rulemaking advisory committee (ORS, Chapter 183.025(2)). but merely issued a notice of intent to adopt administrative rules. The proposed rule was so popular that no one requested a hearing. The rule was put into effect.

This example, even with the storybook ending, illustrates some important characteristics of the work that Oregon administrative agencies do:

- Street-level bureaucrats have considerable discretion to affect the daily lives and activities of the citizens of Oregon.
- Administrative agencies have a wide array of tools and strategies to solve problems and enforce the law. In the case example, the agency used an informal negotiation, a declaratory ruling, a contested case, a negotiated rulemaking committee and rulemaking. The requirements for all of these processes and other additional options are set forth in a set of procedures called the Administrative Procedures Act (ORS, Chapter 183), discussed in greater detail in section V below.

This DEQ case example is repeated on a daily basis throughout every State administrative agency - child custody cases, social service eligibility, regulatory violations, land-use approvals, pollution mitigation, habitat and wildlife protection, transportation planning, licensing requests & renewals, etc. In all of these instances administrative agencies play a dominant constitutive role in shaping the substantive outcomes that decisively define what quality of life means for every Oregon citizen. Equally important, these bureaucratic encounters provide the affected citizens with an example of what democracy means in everyday practice.

Despite the far-reaching daily role Oregon administrative agencies play in shaping the substantive outcome of public policy, the citizens are inclined to treat their career administrators as merely instrumental agents of policy implementation, exercising only the will of the citizens and their elected representatives. When administrators go beyond the boundaries of this perceived set of expectations, the consequences may be swift and lasting, as the following case illustrates.

The Instrumental Role of the Oregon Bureaucracy: Land Use Planning and Private Property Rights

In 1987, we asked the City of Tigard for permission to expand our plumbing store. The City agreed, but said they would not issue a building

permit unless we gave them a portion of our property for a bike path. We told the City that we would sell them the land they wanted for \$14,000, which was the fair market value of the land. But the City said no, and told us that we would not get our permit unless we gave them our land for free. We spent the next 10 years fighting the City over a \$14,000 strip of land. We went to the Oregon Land Use Board of Appeals, the Oregon Court of Appeals, the Oregon Supreme Court, the United States Supreme Court, and back down again. Finally, after 10 years of fighting, the City had to buy our land and pay our attorney fees. The cost - \$1.5 million of your taxpayer dollars. That's \$1.5 million of taxpayer dollars for land that we would have voluntarily sold to them for \$14,000. What a waste. We support Measure 7 because it will cut down on endless litigation like ours. If Measure 7 had been in place in 1987, the City would have purchased our land for \$14,000, instead of fighting us every step of the way and eventually wasting \$1.5 million of your hard earned tax dollars. Please vote yes on Measure 7.⁷

As owners of A-Boy Plumbing in the City of Tigard, the Dolan's experience helped to trigger a citizen-centered counter-revolution that resulted in the passage of Measure #7, discussed in the opening paragraphs of this chapter. Perhaps more importantly, the Dolan's successful appeal to the U.S. Supreme Court resulted in the establishment of a new and stricter standard of review by administrators who are involved in taking private property for public purposes.⁸

At the time of the Dolan's request for a permit to expand their business in 1987, Tigard administrators had little doubt that they were properly exercising their authority under state land use laws.⁹ But they miscalculated the enduring strength of Oregon's instrumental view of the bureaucracy and the public's ability to reverse the course of history and administrative practice.

Like all administrative agencies throughout the United States, Oregon state agencies serve two major organizational functions. As **policy** instruments they are used to carry out the political agenda of the Governor and the legislature. As **managerial** instruments, they insure that state programs are implemented as efficiently and effectively as possible. How well state agencies serve these dual roles depends on the following three types of control: 1. political (section III), 2. organizational structures and processes (section IV), and 3) legal (section V). In the next three sections we will examine how Oregon dominant populist influence has

consistently triumphed over the state's latent progressive concerns for the exercise of independent professional expertise by administrators in conducting the affairs of the state.

Section III:

The Political Accountability of the Oregon Bureaucracy

The political control exercised by recent governors over state agencies has honored Oregon's "progressive" and "conservative populist" traditions, both of which view the bureaucracy as a neutral agent of the people's will rather than an instrument of partisan policy or political advantage. One long time career administrator observed that he had never been asked his party affiliation in more than 20 years of public service, even when he was appointed by the Governor to serve as the Director of the Department of Transportation and later appointed to serve as Director of the Executive Department (now Department of Administrative Services).¹⁰

Another recently retired Director of the Department of Administrative Services repeated the same story and observed that in his 30 years of public service in Oregon state government he had never experienced any heavy-handed attempt by elected officials to drive an agency administrative agenda for narrow partisan purposes. Most elected officials, he noted, take a "Driving Miss Daisy" attitude toward the bureaucracy: They want the ride to go smoothly; they don't want any sudden surprises; and they don't want rapid acceleration. In short, elected officials reflect the attitude of the general citizenry who do not want the bureaucracy to take excessive risks with their tax dollars and want good reliable service at an affordable price.¹¹

Former Governor Barbara Roberts believes these conditions have helped to make Oregon's career public service among the best in the nation. Because they are kept out of partisan political battles and because the legislature has respected the neutral competence of the advice they get, administrative agencies have played a powerful role in shaping public policy initiatives that have made Oregon famous. She worries, however, that these conditions have begun to change over the past half dozen years as a result of term limits. Members of the legislature simply aren't in office long enough to develop a deep understanding of public policy issues. She

speculates that instead of relying on the expertise of career administrators, the strategies of campaign financing, coupled with Oregon's populist suspicions of the bureaucracy, might incline short-term legislators increasingly to rely on the expertise of paid lobbyists.¹²

Even if governors wished to aggressively manage state agencies to achieve a set of political ends, the sheer number and independence of Oregon agencies makes this very difficult. Table 8.2 captures the breadth and depth of this complexity and independence. There are six separately elected statewide officials, each of whom is in charge of an independent set of administrative structures and processes. Of the 132 agency and commission directors, only 26 (4 commissions and 22 agencies) hold their position at the discretion of the Governor.¹³ While the **reach** of the Governor's political control is **limited**, the control that does exist is **broadly defined**. This is because Oregon law is very liberal in its definition of those who are exempt from civil service protection. The law permits the governor and other elected executives not only to appoint department heads, but also to have controlling influence over the appointment of the "deputy of each division within a department of state government" and all "principal assistants and deputies". Principal assistant is defined as any "manager of a major agency organizational component who reports directly to an executive or administrative officer" (ORS 240.205). But most of the 132 agencies and commissions are exempt from the political reach of the governor's direct authority because they are governed by independent boards whose chair and members are appointed for fixed terms, with the advice and consent of the Senate.

As a practical matter the Governor's extensive legal authority to control the Directors of the 22 agencies and 4 commissions he appoints is seldom aggressively exercised. A former head of the Department of Administrative Services estimated that he spent no more than 6 hours a month in policy level discussions with his agency directors, and even less time with the Governor and his/her policy staff. His primary goal was to make certain there was clear communication across agencies, to emphasize the importance of providing him with an early warning of potential problems, and to reassure agency directors that DAS could be trusted as a supportive problem-solver.¹⁴

Under these conditions the governor is left to work directly with an agency director to pursue any special substantive policy interests that he/she may have brought to the office. For example, Governor Goldschmidt spent considerable time and energy on revitalizing the state economy and regional economic development, while Governor Kitzhaber used his tenure to create a coherent approach to state environmental policy. As a result, the state agencies involved in driving these personal agendas received far more scrutiny than those agencies on the periphery.

But many agencies find themselves in an unexpected spotlight, not because of the political agenda of the governor or legislature, but because of the “climate of the times”. Governor Barbara Roberts speaks eloquently and often about the importance of the “political backdrop” that sets the stage for governing.¹⁵ She cites the example of her own election to office in 1990 to illustrate the power of “backdrop” in determining administrative priorities. During the same election that brought her into office in 1990, the voters passed Ballot Measure 5. Because of this property tax limitation measure her administration was suddenly and unexpectedly left with the difficult task of drastically cutting the state budget and shifting funds from other programs to meet the new requirement for state support of primary and secondary education. To accomplish this difficult task the Governor proposed cutting 4,000 positions, but the legislature selected a lesser target of 2,700.

To cite another example of the importance of political backdrop in shaping administrative priorities consider the challenge faced by Governor Kitzhaber who was forced to deal with prison siting and corrections issues during his administration. These issues were not driven by choice but by a decision made at the ballot box many years earlier by voters who wanted more prisons and mandated sentencing guidelines. The Governor happened to be on duty when the momentum of these separate ballot box decisions over a ten-year period culminated in the necessity to focus extraordinary energy and attention on administrative issues dealing with corrections.

In the absence of strong background pressures or personal policy direction by the Governor, state agency direction is left to the Director of the Department of Administrative Services. The form and style of this direction is largely a function of a

Governor's personal interests and the size and independence of state agencies. ¹⁶ For example, during the tenure of Governor Straub (1974-1978), only two of the state's 100 plus administrative agencies were invited to attend the Governor's weekly staff meetings. The Governor did not consider the state agencies a core function of the Governor's central administrative arm. This changed with the election of Governor Atiyeh in 1978. Atiyeh took the view that he was commander in chief of the entire state government. To operationalize this view he divided the state agencies into roughly equal groups of 25 each and met on a weekly basis with approximately 75 department heads. These meetings mainly focused on budget issues. Atiyeh did not use these regular meetings with state agencies to provide policy guidance to agency directors

Another change occurred when Neil Goldschmidt was elected governor in 1986. During his one-term governorship, Goldschmidt organized the operations of state government along the lines of a private corporate model with a fairly clear delineation between a chief of policy staff and a chief of operations. The director of the Executive Department (reorganized in 1993 into the Department of Administrative Services) served as the chief of staff for operations while a member of the Governor's staff served as chief of the policy staff. Since Governor Goldschmidt was primarily interested in policy issues, the director of the Executive Department was left to organize and direct the state agencies on behalf of the governor. This practice continued when Barbara Roberts was elected Governor in 1990. Fred Miller, who served as Director of the Executive Department across two administrations (Governors Goldschmidt and Roberts) aggressively sought to manage the state agencies on behalf of the Governor. Miller organized state agencies into three categories: the largest 20-25 state agencies with whom he met on a weekly basis; approximately 60 of the smaller agencies with whom he met on a monthly basis; and periodic meetings with staff members representing the six other elected officials for the state of Oregon. Jon Yunker choose to meet biweekly with the largest state agencies, in groups of approximately 12, organized around similar policy interests, i.e., natural resources, public safety, human services, etc.

Section III: Organizational Accountability

In addition to direct political control over the bureaucracy, populist-centered administrative accountability is also indirectly maintained through organizational structures and processes. One of the unique features of the Oregon state bureaucracy is the wide range of organizational structures that have been legally put into place, largely a reflection of the conflicting tensions between Oregon's dual commitment to "conservative populism" and "progressivism". The following examples of Oregon's three most prominent models for organizing administrative agencies reflect the dominating influence of the populist tradition.

1. **Exclusive Control by the Governor** – **The Department of Administrative Services (DAS)** is one of the few agencies explicitly created to work on behalf of the Governor. The history of DAS's historical development is a testimony to the strong progressive strain in Oregon politics with its commitment to the efficient and effective management of the public's business through reliance on professional expertise and technical competence. The Legislative Assembly created DAS in 1993 by combining two large existing agencies, the Department of General Services and the Executive Department. This 1993 consolidation was simply the most recent in a long history of efforts to consolidate and centralize administrative activities in the name of greater efficiency and effectiveness.¹⁷ This centralization mirrors the pattern of administrative consolidation at the national level where the goal has been largely driven by the desire for greater **managerial control** with only a secondary interest in greater political accountability.

In keeping with its primary emphasis on managerial efficiency, the mission of the Department of Administrative Services (DAS) is "to improve the efficient and effective use of state resources" through the provision of centrally provided services and systems, including purchasing, fleet, personnel, management information, and budgeting and finance (ORS 184.305).

DAS is one of the very few state agencies that explicitly provides that the "Governor may assume the office of director of the department whenever and for whatever time the Governor deems advisable" (ORS 184.315). While there are a

handful of agencies, like the Department of Human Services (ORS 409.100) and the Department of Transportation, where the Directors work at the "pleasure of the Governor", these appointments still require the advice and consent of the Senate. This is not the case with the Department of Administrative Services.

2. Strong Commissions with Weak to Moderate Control by the Governor - Most state agencies in Oregon reflect Oregon's strong commitment to "conservative populism", with its strong emphasis on citizen control of, and access to, governance institutions. Most commissions operate with an appointed commission of 5-7 members who serve 2-6 year terms. For example, the **Department of Transportation** has a five-member commission appointed by the Governor for a 4-year term. The Governor is required to take into consideration the different geographic regions of the state in making recommendations that must be confirmed by the Senate. No more than 3 members can belong to the same political party (ORS 184.612).

The Oregon Transportation Commission has far-reaching policy development and implementation authority. At the policy level the Commission is required by statute to "develop and maintain a state transportation policy.... The plan shall include, but not be limited to, aviation, highways, mass transit, pipelines, ports, rails and waterways. The plan shall be used by all agencies and officers to guide and coordinate transportation activities and to insure transportation planning utilizes the potential of all existing and developing modes of transportation" (ORS 184.618). At the implementation level, the Commission is given the "general power to coordinate and administer programs relating to highways, motor vehicles, public transit, transportation safety and such other programs related to transportation as may be assigned by law to the department" (ORS 184.617).

These sweeping policy development and implementation responsibilities place the Director of Transportation in a very subordinate role to the commission. In fact, the statute charges the director with the responsibility of preparing and submitting implementation programs to the commission for approval. While the Director can appoint deputy and assistant directors to carry out this work plan without the approval

of the commission, the Director is required to appoint a **Chief Engineer who must be approved by the Commission.**

There has been repeated and concerted efforts in recent years to strengthen the role of the Governor in appointing and directing the work of the state agencies, especially the Department of Transportation. This has resulted in some changes that increase the Governor's authority, but it has not fundamentally changed the role of the commissions in shaping and directing state policy. For example, as a result of legislative changes in 1999, the Director of the Department of Transportation now serves at the pleasure of the Governor, but this change did not fundamentally alter the policy oversight role of the Transportation Commission.

The **Department of Veterans' Affairs** (DVA) is another example where the role of the Governor has been strengthened as result of recent legislative changes. Unlike many departments the DVA does not operate under the **policy-making** authority of a commission. Instead, the Department has a nine member **advisory** committee, which has only the authority to make recommendations. However, there is an unusual provision in the law that requires the Governor to have "the written approval of the Advisory Committee" (ORS 406.210) before making an appointment of a new Director. This provision once prevented Governor Goldschmidt from filling a vacancy after pressuring the Director to resign. Not favoring a change, the Advisory Committee simply exercised its statutory veto over a new appointment

3. Independent Commissions with Little Control by the Governor - Many administrative agencies operate under the control of very independent commissions. The **Racing Commission** and the **Liquor Control Commission** are typical examples of how these commissions are structured in ways that frustrate the capacity for centralized control by the Governor or the legislature. The Oregon Racing Commission consists of 5 members appointed for four-year terms by the governor, with the advice and consent of the Senate. The Governor may remove any commissioner "for inefficiency, neglect of duty, or misconduct in office, giving to the commissioner a copy of the charges made and an opportunity of being publicly heard in person or by counsel, in the commissioner's own defense, upon not less than 10 days' notice. If such commissioner is removed, the Governor shall file in the office of

the Secretary of State a complete statement of all charges made against such commissioner, the findings thereon, and a complete record of the proceedings” (ORS 462.230).

The **Oregon Liquor Control Commission** is even more independent of the Governor. The commission consists of 5 members appointed for four-year terms, with no more than 3 persons chosen from the same party. The Governor designates one person who serves as chair. But the law provides that the commission “shall appoint an administrator who shall serve at its discretion. The administrator shall be subject to policy direction by the commissioners, and shall be the secretary of the commission and custodian of commission records. The administrator shall manage the commission, administer the laws, and appoint, assign and coordinate personnel of the commission within budget limitations and the State Personnel Relations Law” (ORS 471.705-710)

The overall pattern of Oregon’s administrative structure reflects a dominant commitment to the “populist conservative” tradition, with a secondary emphasis on progressive concerns for efficiency and effectiveness. The former Director of the Executive Department under Governors Goldschmidt and Roberts observed that the Governor’s ability to control Oregon’s agencies for either policy or managerial ends is extremely limited:¹⁸ 1) The budget can be used to penalize agencies that do not fall into line, especially for agencies that rely on general fund dollars. But this is a limited option, since sixty percent of the state budget consists of earmarked, dedicated and grant funds. 2) Through regular meetings and communication, you can remind agency directors that they work for the governor, in addition to the legislature, their commissions, their clientele groups, etc.. These observations are merely a reflection of Oregon’s system of separation of powers and checks and balances, which create even more ambiguity than exists at the federal level about who agencies are supposed to serve.

Section V: Legal Accountability

The United States has long been known as “a rule of law” system. In practice this means that government and its political and administrative agents must be able to

find a law, rule, or constitutional provision to justify their actions. As the case examples in Section II illustrate, the legislature frequently uses the language of “may” rather than “shall” in instructing administrators how they should do their work. This means that there is considerable room for discretionary judgment exercised by administrative officials. This discretion is tightly controlled through a set of laws governing how rules are made and, more generally, how administrators may use their position of privilege and power to influence the outcome of the public policy process.

1. Administrative Rulemaking and Adjudication – Given the need for discretionary judgment in the implementation of public policy, one of the more difficult problems faced by modern government is how to make a rule of law system work when the legislative branch cannot possibly anticipate all of the circumstances and conditions facing administrators who are charged with implementing the law. Administrative rulemaking is the process for accomplishing this “gap-filling” role.

In the aftermath of the Second World War the federal government and all of the states began to adopt guidelines that administrators must follow in crafting the detail of legislation as they make adjustments in the process of implementing the law. In Oregon these guidelines are known as The Oregon Administrative Procedures Act (APA). This act was adopted in 1957 and has been significantly revised in subsequent legislative sessions. The provisions of Oregon’s APA are set forth in ORS, Chapter 183.¹⁹ They outline the procedures for making of agency rules, how and when the rules shall be published, how contested cases shall be conducted, how hearings officers are to conduct proceedings, a new section on alternative dispute resolution that was adopted in 1997, and provision for judicial review of administrative actions. These administrative rulemaking procedures have been described by one of the leading legal scholars as “one of the greatest inventions of modern government”.²⁰

At the heart of the administrative rulemaking process is the principle of “notice and comment”. This principle requires agencies to notify citizens if they are considering the development or a change in agency policy, procedures or practices that “substantially affects the interests of the public”. The agency is required to include a statement of the need for the rule and how the rule meets the need. But the need does not have to be documented. The “need” contemplated by ORS

183.335(2)(b)(C) is the need “that the rule-proposing agency *perceives*”.²¹ This “burden of proof” standard is far less than what is required of federal agencies, which must meet the test of “substantial evidence based on the record taken as a whole.”²²

During the rulemaking process citizens have an opportunity to comment and the agency is required to keep a record of all written materials submitted in response to a proposed rule. All proposed or adopted rules are required to be published in a monthly publication, called the Oregon Bulletin.²³ The purpose of the administrative rulemaking process mirrors the three-fold objectives served by Oregon’s larger system of checks and balances and separation of powers: 1) to obtain useful information that will broaden and deepen an understanding of a given problem and the appropriate range of solutions; 2) to legitimate the processes of governance by providing opportunities for participation; and 3) to provide a check against the arbitrary and capricious exercise of governmental authority.

One of the unique features of Oregon’s administrative rulemaking process is the definition of a rule. This is critically important, since administrative agencies undertake numerous actions that provide employees with guidelines on what policy means, how to set priorities, and how to interpret and apply their discretionary authority. For example, if the Director of the State Police issues a directive that gives first order priority to drug trafficking and second order priority to missing persons or the recovery of stolen property, is the Director engaged in rulemaking? Or consider, for example, the simple question of whether a state Department of Environmental Quality (DEQ) administrator in Burns, Oregon can allow a solid waste operator to cover disposal debris with dirt only once a week in contrast to a DEQ administrator in the Portland Metropolitan area who may require debris to be covered daily. The amount of debris, the density of the population, and the prevailing winds may create quite different health hazards at the two separate sites. Where is the line between administrative rulemaking and routine management oversight and control?

Oregon’s Administrative Procedures Act defines a rule to include “directive, standards, regulation or statements of general applicability that implements, interprets or prescribes law or policy or describes procedure or practice requirements of any agency”.²⁴ However, a rule does not include interagency or internal statements,

regulations or directives that do not “substantially affect the interests of the public.” This very broad and all-inclusive definition of a rule means that Oregon administrative agencies have very little discretion in deciding what is a rule and what is not a rule. The Attorney General’s Office takes the position that rulemaking procedures are to be followed in all cases where management practices and policies “substantially affect the interests of the public”.²⁵ This contrasts sharply with the United States APA, which draws a clear distinction between substantive/procedural rules and interpretive rules. The latter are explicitly exempt from the notice and comment requirements of the Administrative Procedures Act.²⁶ In the state police and DEQ examples cited above, the Director of both agencies would be required to follow Oregon Administrative rulemaking requirements as a state employee, but would not be required to do so if acting as a federal employee.

There are some unintended consequences of Oregon’s far-reaching requirement to use the formal rulemaking process rather than rely on internal management guidelines and interpretive rules.²⁷ Because Oregon administrators have little discretion to formally accommodate local conditions and special circumstances, agencies sometimes appear rigid and bureaucratic to citizens who are demanding more user-friendly approaches to policy implementation. Second, agencies have adopted a variety of techniques to avoid the extra expense and time delay (2-5 months) of making rules. For example, some agencies draw clear distinctions between “employee guidelines” and “policies”. The former are considered employee supervision and management issues, thus avoiding the need for rule-making. Finally, there are a very large number of agency informal rules and procedures that have never been officially promulgated according to the procedures outlined in ORS 183. Some small agencies simply do not have the staff necessary to promulgate all of the rules that may be required. For others, it is worth the risk of operating with **unpromulgated** rules in order to save money, preserve managerial discretion and provide geographic flexibility. Agencies vary in their motivation to write rules. For example, the Department of Corrections has a clearly defined and well-organized constituency who will readily sue the Department if there is the slightest departure from required protocols.

Lest you become unduly alarmed over the wide variation in rule-making practice as well as failure of some agencies fully to use their rule-making authority, consider all of the rules, procedures and practices of Oregon cities, counties, fire districts and water districts, local school boards, and thousands of special districts throughout the state. In nearly all of these cases, most rules, procedures and practices have never been officially promulgated through any formal rulemaking process, and for those that have, it may be difficult for citizens to locate them.

By comparison, the State of Oregon provides citizens with numerous points of access to information and the rulemaking process, most of which are seldom used. For example: ²⁸

1. Few individuals show up at **hearings** on proposed rules (ORS 183.335).
2. Citizens do not use their **right to petition** an agency to adopt, amend or repeal any rule (ORS 183.390).
3. Interested parties to a rulemaking process do not use their **right to automatically stop the process for no less than 21 and no more than 90 days** by simply making a request of the agency (ORS 183.335(4)).
4. Citizens do not use their **right to request the Legislative Council to undertake a review** of any existing or proposed rule. The Council has the authority to determine whether a rule: 1. falls within the authority of the enabling legislation and 2. raises any constitutional issue. (ORS 183.720)
5. Citizens seldom invoke **their right to request a public hearing** on a rulemaking process (ORS 183.335).
6. At the judicial level, citizens have a very large array of options to influence the rule-making process, including: getting their names on the Attorney General's rule-making notification list, filing a direct action on a promulgated rule in the Court of Appeals, challenging a rule during a contested case hearing, and asking for a declaratory judgment against a rule.

In 1997 the legislature added an additional "populist" provision that requires agencies to notify the legislature of all administrative rulemaking activities (ORS 183.335(14)(15)). The potentially invasive impact of this provision in micro-managing the affairs of an agency can be largely avoided by refraining from rulemaking activities during the legislative session.

In addition to their rulemaking authority, Oregon administrative agencies frequently perform the same function as courts in their adjudicative role in deciding

individual cases. For example, whenever an agency revokes a license from a driver, liquor owner, or any professional possessing a license to practice; or removes children from the custody of parents; or revokes a person's parole or probation, the agency is engaged in administrative adjudication. It is deciding the outcome of an individual case by applying and interpreting existing rules, rather than developing new rules. Oregon's Administrative Procedures Act (ORS Chapter 183.413-470) sets forth the guidelines that administrators are required to follow when engaged in these adjudicative activities.

2. Uses of Advisory Committees, Collaborative Decisionmaking and Negotiated Dispute Resolution – One of the most unique and recent features of Oregon's administrative process is the provision for formal consensus-based approaches to create rules and negotiate disputes after rules have been made.²⁹ Once begun, the parties commit to abiding by the results of the process, although any party has the right to withdraw from participation while the process continues. The purposes of these processes are four-fold: a. to reduce the time, money and effort expended on developing and enforcing rules; b. reducing the time for policy implementation; c. creating higher compliance; and d. developing more cooperative relationships between agencies and the parties affected by agency rules and policies.

For agencies that have used collaborative decisionmaking and negotiated dispute resolution, the experience has been a good one. A few agencies have been reluctant to use this new statutory authority because they believe it reduces their managerial discretion by creating pressures to accept a result that may not be in the larger public interest. Others believe that you can accomplish the same result with the existing rule-making process through the use of hearings, advisory committees and conflict resolution techniques.³⁰

3. Productivity Mandates – Oregon administrative agencies have been at the national forefront in the emphasis recently being given at all levels of government to the importance of measuring the results and outcomes of administrative programs. As citizens became increasingly disenchanted with the traditional approach of measuring administrative processes (such as number of clients served, number of applications processed, number of phone calls, etc.), the Oregon legislature took a

bold step in 1989 and created The Oregon Progress Board. The new agency was charged with keeping Oregonians focused on the future by developing and implementing a state strategic plan for achieving the following three goals: 1) quality jobs, 2) safe, caring and engaged communities, and 3) a healthy, sustainable environment. The goals are organized into 7 areas with 90 quality of life indicators that are measured and reported on annually.³¹

In addition, there is a separate statutory provision to reward agencies for productivity improvement. A special Productivity Improvement Revolving Fund, administered by the Department of Administrative Services, is used for “making loans, grants, and matching funds or cash awards available to state agencies or units for implementation of productivity improvement projects” (ORS 182.375).

4. Ethics and Professional Accountability – Other important tools for maintaining administrative accountability consist of a variety of legal provisions that prohibit career administrators from engaging in various kinds of conflict of interest. These conflicts are broadly defined to include using one’s official position or personal knowledge for private gain. The mechanisms for enforcing such conflicts include: post-employment prohibitions that prevent certain administrators from working for agencies as lobbyists or consultants within a specified period of time after leaving public employment; accepting funds or gifts while employed; and public disclosure of assets and business/personal relationships that may conflict with their official duties.³²

Section VI

Enduring Issues and Conflicts

A gloss on the history and role of administrative agencies in the State of Oregon might be read as the simple story of the triumph of democracy over bureaucracy. But just beneath the surface is a deep and abiding tension among three competing roles the bureaucracy should play in maintaining Oregon’s democratic health: being **responsive to the wishes and preferences of the citizenry** at large, serving the **managerial goals of efficient and effective administration**, and supporting the **political policy objectives** of the Governor and the legislature.

The most prominent purpose of Oregon agencies reflects the state's strong civic republican and populist conservative tradition of direct citizen participation and accountability. The multiple and independent commissions; citizen access to, and oversight of administrative rulemaking; open meetings laws; and the use of advisory committees, all testify to the importance of the bureaucracy being directly responsive to the will of the citizens and jealous guardians of their liberties.

But these populist-appearing processes can be misleading. For example, the purpose of Oregon's open meetings law has been interpreted by the Attorney General to mean that government business needs to be conducted openly, not that it needs to allow high levels of participation. (33)³³ This interpretation recognizes the importance of managing the business of state agencies with an eye to efficiency and effectiveness. This concern for efficiency and effectiveness has been officially memorialized in Oregon's productivity and benchmarking legislation discussed above. It also has been made the primary purpose of the Department of Administrative Services.

Finally, Oregon agencies are structured with an eye to maintaining political control, first, by the Governor and, second, by the legislature. Control by the Governor is exercised through the power to appoint 26 department heads. Daily operational control is mainly accomplished through the Department of Administrative Services, which is the only agency that can legally have the Governor as its head. But compared to the President of the United States, the Governor's control over the administrative process is weak. The legislative branch exercises its control mainly through the power to authorize and appropriate the expenditure of funds.

A review of the role of administrative agencies in Oregon state government leaves us with a deep disjunction between the "espoused theory" of democratic governance and a "theory-in-action. The espoused theory is quite hostile to the bureaucracy, but the "theory in action" places administrative agencies at the very center of implementing all of the good things that Oregonians take the most pride in – the bottle bill, beach protection, medical insurance for the poor, clean air and water,

community policing, watershed restoration, effective transportation systems and dozens of other similar services that produce a high quality of life.

One of the yet unresolved issues is the role that the bureaucracy is likely to play in the future of Oregon politics. Several characteristics of the current political landscape make this more than a mere academic curiosity. The increasing pressures on growth, declining revenue sources, term limits, the globalization of the economy, mandated federalism and rising regulatory requirements create a recipe for growing citizen frustration and more responsive mechanisms of governance. Will the Oregon bureaucracy succeed, as it has done in the past, in using its administrative tools to strike an acceptable balance between the instrumental role of merely executing the popular will and its constitutive role in crafting creative and collaborative solutions outside the legislative and electoral processes? Most of the tools are in place to enable the bureaucracy to succeed, including the authority to use advisory committees, collaborative dispute resolution, and negotiated rulemaking. If these tools become widely used, the future looks bright for the central role the bureaucracy can play in Oregon's unique system of democratic governance.

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