

# Improving E-Participation and Democratic Legitimacy Through Administrative Rulemaking in Korea and the U.S.

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## **Abstract**

*The internet revolution and the emergence of Web 2.0 technologies have not only revolutionized social media, they have also revolutionized approaches to government transparency, accountability and accessibility. Over the past several years, government websites have become increasingly detailed and interactive in attempts to increase citizen access to and participation in the government and its decision-making processes. Korea, in particular, has been ranked as number one in the world in e-government and e-participation initiatives since 2010. This article explores the impact of the U.S. and Korea's e-government and e-participation initiatives on reducing the impact of wealth in administrative rulemaking, and its implications for citizen participation and engagement in the two democracies. This article will discuss the origins of the U.S. and Korea's commitments to citizen participation and summarize the e-government technologies of the two nations using the criteria and rankings of the 2014 UN E-Government Survey report as the framework. It will then discuss the strengths and weaknesses of these technologies as used in recent rulemakings. This article will also offer recommendations of ways the two nations can facilitate more meaningful citizen engagement in government decision making processes.*

**Keywords:** democracy, e-government e-participation, rulemaking, oligarchy

*“You can have democracy in this country, or you can have great wealth concentrated in the hands of a few, but you cannot have both.”*

--Louis Brandeis, U.S. Supreme Court Justice

## I . Introduction

One of the key issues in the 2013 election in South Korea was how the candidates would deal with the power of chaebol families and Korea's growing economic inequality. The richest tier of Korean society earns 5.7 times more than the poorest tier, and a handful of companies—Samsung, Hyundai, LG, etc.—are responsible for more than half of the nation's economic growth.<sup>1</sup> The marginal victory of Park Geun Hye, Korea's first female president and daughter of former dictator Park Chung Hee, was widely considered a victory for the chaebol families, as her reform plans, unlike those of her opponent, did not require significant changes in the way chaebols operate.<sup>2</sup> Relatedly, the 2014 mid-term election in the U.S. had the lowest voter turnout in decades, with only 36.6% of the voting eligible population showing up at the polls.<sup>3</sup> Election spending, on the other hand, was the highest in modern history, with \$3.7 billion dollars spent during the election cycle, almost 13% of which came from outside interest groups and billionaire donors.<sup>4</sup>

The dominance of wealthy corporations and individuals in both nations is producing a growing perception that the voices of the voters do not matter as much as their wealth. This is evidenced in Korea, particularly among the young, by the popularization of the phrase *HellJoseon*.<sup>5</sup> This phrase implies not only voicelessness,

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- 1) See Lucy Williamson, *Chaebol Debate Rages In S Korean Election*, BBC NEWS, Dec. 18, 2002, available at <http://www.bbc.com/news/business-20752804> (last visited Apr. 10, 2016).
  - 2) See Rose Kim, *Park Presidency Gives Fighting Chance to Korea's Chaebols*, BLOOMBERG NEWS, Dec. 21, 2012, available at <http://www.bloomberg.com/news/2012-12-20/park-presidency-gives-fighting-chance-to-south-korea-s-chaebols.html> (last visited Apr. 10, 2016).
  - 3) See Michael P. McDonald, *2014 November General Election Turnout Rates*, UNITED STATES ELECTION PROJECT (Nov. 7, 2014), available at <http://www.electproject.org/2014> (last updated Dec. 30, 2015).
  - 4) See Communications, *Overall Spending Inches Up in 2014: Megadonors Equip Outside Groups to Capture a Bigger Share of the Pie*, OPENSECRETS.ORG CENTER FOR RESPONSIVE POLITICS (Oct. 29, 2014), available at <http://www.opensecrets.org/news/2014/10/overall-spending-inches-up-in-2014-megadonors-equip-outside-groups-to-capture-a-bigger-share-of-the-pie/> (last visited Apr. 10, 2016).
  - 5) See Anna Fifield, *Young South Koreans Call Their Country 'hell' and Look for Ways out*, WASHINGTON POST, Jan. 31, 2016, available at [https://www.washingtonpost.com/world/asia\\_pacific/young-south-koreans-call-their-country-hell-and-look-for-ways-out/2016/01/30/34737c06-b967-11e5-85cd-5ad59bc19432\\_story.html](https://www.washingtonpost.com/world/asia_pacific/young-south-koreans-call-their-country-hell-and-look-for-ways-out/2016/01/30/34737c06-b967-11e5-85cd-5ad59bc19432_story.html) (last visited Apr. 10, 2016).

but helplessness—a recognition of an inability to change a failing society for the better due to the almost feudal control over politics exercised by those in power.<sup>6</sup> The American situation was summed up, far less metaphorically, by Professor Lessig:

“[The American people] have lost the faith that their government is responsive to them because they have become convinced that their government is more responsive to those who fund... campaigns... Yet the funders are not the people... [W]e have evolved a system in which the elected are dependent upon the tiniest slice of America. Yet that tiny slice is in no way representative of the rest of America.”<sup>7</sup>

This article explores the impact of the U.S. and Korea’s e-government and e-participation initiatives on reducing the impact of wealth in administrative rulemaking, and its implications for citizen participation and engagement in the two democracies. Though it includes general information on e-government services, this article focuses primarily on e-rulemaking. This is due to the fact that rulemakings increasingly have a greater impact on the everyday lives of citizens than more general legislation and have become the focus of much modern democratic scholarship. Korea and the U.S. were chosen for comparison for two reasons. First, despite widespread perceptions among their citizens that only the wealthy can influence their governments, both nations are ranked among the top ten nations in the world for their e-government initiatives and citizen participation,<sup>8</sup> with Korea being ranked as number one for the past five years.<sup>9</sup> Moreover, there is a great deal of similarity between the Administrative Procedure Acts of the two nations<sup>10</sup> and their use of integrated e-rulemaking technologies to equalize and encourage citizen participation.<sup>11</sup>

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6) See Bo Eun Kim, *Koreans want to leave ‘Hell Joseon’*, THE KOREA TIMES, Jan. 18, 2016, available at <http://www.koreatimes.co.kr/www/news/nation/2016/01/116195720.html>(last modified Jan. 19, 2016).

7) *Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 18 (2012) (statement of Lawrence Lessig, Professor, Harvard Law School).

8) United Nations, *E-Government Survey 2014: E-Government for the Future We Want* (New York: United Nations 2014).

9) *Id.*; United Nations, *E-Government Survey 2010: Leveraging E-Government at a time of Financial and Economic Crisis* (New York: United Nations 2010); United Nations, *E-Government Survey 2012: E-Government for the People* (New York: United Nations 2012).

10) *Compare* Administrative Procedure Act 5 U.S.C. §§ 551-59 with The Korean Administrative Procedure Act.

11) United Nations, *E-Government Survey 2014: E-Government for the Future We Want* (New York: United Nations 2014).

This article is divided into three parts. Part I of this article discusses the continued centrality of popular participation in government to modern understandings of democratic legitimacy and the ways in which wealth disparities and the Internet pull democratic legitimacy in different directions, with the former increasing popular distrust of government and the latter increasing popular information about and influence on government. Part II notes the increasing use of the Internet, not merely to level the playing field for the dissemination of information *about* government or to coordinate citizen efforts to organize *against* government, but as a platform for citizen engagement *with* government. It will discuss the e-government technologies of Korea and the U.S. using the criteria and rankings of the 2014 UN E-Government Survey report as the framework. Part III will discuss the strengths and weaknesses of these technologies as used in recent rulemakings and will also offer recommendations of ways the two nations can improve citizen participation in e-government rulemakings.

## II . Citizen Participation and Democratic Legitimacy

### A. Democratic Constitutions and Oligarchic Practices

The modern democratic era arguably began with the ratification of the words, “We the People,”<sup>12</sup> instantiating popular participation in government as the touchstone of democratic legitimacy.<sup>13</sup> This part of the article highlights the tensions between the constitutional commitments to popular participation in the U.S. and Korea, and the inequities in political access and influence resulting from economic privilege. It addresses the ways in which wealth disparities and the Internet pull democratic legitimacy in different directions, while also discussing the potential of the Internet as a democratic equalizer.

The U.S. and South Korea are both constitutional democracies whose foundational principles and texts acknowledge the importance of grassroots participation. For example, citizens of the United States are guaranteed a democratic republic under the U.S. Constitution, though there is no explicit clause to that effect. The closest clause is the Guaranty clause, which “guarantees to every *State*... a Republican Form of Government.”<sup>14</sup> The U.S. Supreme Court, reading this clause in conjunction with the Fourteenth Amendment, concluded that the U.S. Constitution requires “that each

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12) Akhil Reed Amar, *America’s Constitution: A Biography* 8 (Random House 2005).

13) Patrick Flavin, *State Campaign Finance Laws and the Equality of Political Representation*, 13 ELECTION L.J. 362, 364 (2014) (citing Gilens (2005) for the proposition that “the ability of citizens to influence public policy is the ‘bottom line’ of democratic government”).

citizen have an equally effective voice in the election of members of his state legislature.”<sup>15</sup> Similarly, in *Reynolds v. Sims*, the U.S. Supreme Court noted that “[t]he theme of the Constitution is equality among citizens in the exercise of their political rights.”<sup>16</sup> While the political right that has most occupied the Court has been equalization of the right to vote without regard to race,<sup>17</sup> gender,<sup>18</sup> or age,<sup>19</sup> other forms of political participation have also received constitutional protection. Chief among them are the right of almost unlimited political speech and protest,<sup>20</sup> even for corporations.<sup>21</sup> In political participation around speech, however, the emphasis has been on freedom to speak rather than on equality or the effect of the speech.<sup>22</sup> For example, U.S. courts and first amendment scholars, have upheld<sup>23</sup> and even defended<sup>24</sup> the publication and dissemination of top secret documents in the name of public participation and debate.

Increasingly however, civic participation beyond the ballot centers upon agency action, though the courts have declined to find a general constitutional right to participation in legislative decision-making.<sup>25</sup> As a result, the U.S. commitment to citizen participation in this area has primarily been embodied in statutes. For example, the Administrative Procedure Act (1946)<sup>26</sup> guarantees to ordinary citizens the rights to participate in agency rulemakings through public comments and

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14) U.S. CONST. ART. 4, § 4.

15) *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

16) *Id.* at 564

17) U.S. CONST. amend. XV.

18) U.S. CONST. amend. XIX.

19) U.S. CONST. amend. XXVI.

20) *See generally Snyder v. Phelps*, 562 U.S. 443 (2011).

21) *See generally Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

22) *Id.*

23) *See generally New York Times Co. v. United States*, 403 U.S. 713 (1971).

24) Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 Harv. L. & Pol’y Rev. 281, 325 (2014) (advocating “introduction of a public accountability defense in criminal law to protect sources who inform the public of significant violations of human and civil rights, major matters of war and peace, and other instances of substantial error, incompetence, and malfeasance.”)

25) *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 283-287 (1984).

26) Peter L. Strauss et al, GELLHORN AND BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS 766, (10th ed. 2003).

hearings; they also have rights of cross-examination in select instances. Similarly, the Federal Advisory Committee Act is designed to make the process of agency advising more public and participatory by requiring that advisory group meetings be opened to the public,<sup>27</sup> and that the advisory groups themselves be “fairly balanced in terms of points of view represented.” The Act also requires that agencies take precautions to ensure that “their advice and recommendations ‘will not be inappropriately influence by... any special interest.’”<sup>28</sup> In addition, the Negotiated Rulemaking Act encourages agencies to create rule proposals in collaboration with interested stakeholders and citizens, rather than merely soliciting citizen comments on the agency’s proposed rules.<sup>29</sup>

Though the South Korean democracy has had less time than the U.S. to fully actualize its democratic comments, its constitution and courts have also underscored the importance of citizen participation. For example, the very first article of the Constitution of South Korea explicitly guarantees a democratic form of government:

**Article 1 [Democracy]**

- (1) The Republic of Korea shall be a democratic republic.
- (2) The sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from the people.<sup>30</sup>

The Korean Constitutional Court (KCC) has interpreted this article as an elucidation of the principal of popular sovereignty. Accordingly, it has held that the Constitution of South Korea requires that “the opportunity for the sovereign people to participate in the political process [be] ensured to the greatest extent possible.”<sup>31</sup> The KCC’s strongest protections of these participatory rights, as in many democracies, is in relation to the right to vote. It has invalidated laws restricting the voting rights of those convicted of crimes,<sup>32</sup> as well as of citizens residing overseas.<sup>33</sup> However, the KCC has also recognized that the guarantee of participation is not limited to the right

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27) Federal Advisory Committee Act 5 USC App §10

28) *Id.*

29) Strauss et al, *supra* note 26, at 670.

30) 1948 DAEHAN MINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 1 (July 17, 1948) (S. Kor.).

31) Constitutional Court [Const. Ct.], 2004Hun-Ma644 & 2005Hun-Ma360 (Consol.), Jun. 28, 2007 (S. Kor.).

32) Constitutional Court [Const. Ct.], 2012Hun-Ma409 Jan. 28, 2014 (S. Kor.).

33) *See supra* note 31.

to vote. Thus, despite a network of fairness laws that place numerous restrictions on political speech within six months of an election, the KCC upheld the right to engage in political expression and advocacy over the internet during election seasons.<sup>34</sup> However, unlike in the U.S., equality and fairness concerns are privileged above speech in the Korean democracy, leading to restrictions on offline political participation during elections<sup>35</sup> and on the political speech of civil servants.<sup>36</sup> Nevertheless, the trend in both nations seems to be towards protecting participation rights beyond the ballot box.

As in the U.S., an area of increasing public participation beyond the ballot box in Korea is in the area of administrative decision-making. Here too, doctrinal commitments to increased participation are obvious. For example, the Korean Supreme Court has given strong participation-centric interpretations to the Korean Administrative Procedure Act holding that “when previous notice of administrative action or the chance to express one’s opinion is not guaranteed, the administrative action is illegal because of defect in the procedure.”<sup>37</sup> It has adopted a similar participation-centric approach to the Information Disclosure Act. For example, in holding that reasons for non-disclosure must be specific and detailed, rather than generally comprehensive, the KSC noted that “public institutions in principle shall disclose information in their possession and management to the people in order to ensure people’s right to know and secure people’s participation in state affairs and the transparency of the operation of state affairs.”<sup>38</sup> Thus, both the U.S. and Korean democracies have clearly articulated participation principles and commitments.

At the same time, few would disagree that the cloud of oligarchy hangs over the Korean and American democracies. Despite Korea and the U.S.’s constitutional commitments to participatory democracy, a large number of citizens in both countries feel marginalized by the government and powerless to influence it.<sup>39</sup> In

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34) Constitutional Court [Const. Ct.], 2007Hun-Ma1001 etc. (consol.), Dec. 29, 2011 (S. Kor.).

35) Constitutional Court [Const. Ct.], 2011Hun-Ba17 & 2012Hun-Ba391 (consol.), Apr. 24, 2014 (S. Kor.)

36) Constitutional Court [Const. Ct.], 2012Hun-Ba185 etc. (consol.) Aug. 28, 2014 (S. Kor.).

37) Supreme Court [S. Ct.], 2000Du10212, May 28, 2001 (S. Kor.) as cited in Daein Kim, *Korean Administrative Case Decisions in ‘Law and Development’ Context*, Journal of Korean Law, vol. 6, 81 (2006).

38) Supreme Court [S. Ct.], 2001Du8827, Dec. 11, 2003 (S. Kor.) as cited in Daein Kim, *Korean Administrative Case Decisions in ‘Law and Development’ Context*, Journal of Korean Law, vol. 6, 83 (2006).



Korea, this marginalization is often attributed to political corruption,<sup>40</sup> rooted either in nepotism<sup>41</sup> or in placing the wealthy above the law.<sup>42</sup> For example, the Republic of South Korea is jokingly referred to as the Republic of Samsung, due to the pervasive presence of Samsung in almost every industry—construction, tourism, electronics, real estate—the list goes on.<sup>43</sup> Due to the company’s economic dominance, Samsung executives are often treated as being above the law. For instance, in 2009 Samsung’s chairman was pardoned by the President of Korea for the crimes of tax evasion and embezzlement due his important role in the Korean economy.<sup>44</sup> A year earlier, the chairman of Hyundai had been pardoned for a similar reason for the crimes of embezzlement and bribery of government officials.<sup>45</sup> President Park even acknowledged that the tragic sinking of the Sewol ferry was a product of the “regulators’ close links with the industries they oversee and a willingness to bend the rules”<sup>46</sup> for those with money and power. In addition, high impact government decisions and projects, such as the U.S.-Korea FTA, were

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- 39) Jennifer Shkabatur, *Digital Technology and Local Democracy in America*, 76 Brook. L. Rev. 1413, 1429, 1440 (2011) (noting that “citizens' experience with local government is often marked by apathy, inherent mistrust, and disbelief in the possibility of changing the status quo [because] too often, the outcomes of participatory initiatives (either online or face-to-face) are not formally binding and their implementation (or even thoughtful consideration) depends on the good will of the government.”)
- 40) See Kyung Moon Hwang, *Historical Origins of Korea’s Political Corruption*, THE KOREAN TIMES, Feb. 3, 2016, available at [http://www.koreatimes.co.kr/www/news/nation/2016/03/633\\_197187.html](http://www.koreatimes.co.kr/www/news/nation/2016/03/633_197187.html) (last visited Apr. 10, 2016).
- 41) See Young Jin Kim, *Minister Resigns Over Hiring of Daughter*, THE KOREAN TIMES, Sep. 5, 2010, available at [http://www.koreatimes.co.kr/www/news/biz/2016/02/123\\_72586.html](http://www.koreatimes.co.kr/www/news/biz/2016/02/123_72586.html) (last visited Apr. 10, 2016).
- 42) Tae Ung Baik, *Stabilizing Democracy and Human Rights Systems in South Korea*, 35 U. HAW. L. REV. 877, 901 (2013).
- 43) See Chico Harlan, *In South Korea, the Republic of Samsung*, THE WASHINGTON POST, Dec. 9, 2012, available at [http://www.washingtonpost.com/world/in-s-korea-the-republic-of-samsung/2012/12/09/71215420-3de1-11e2-bca3-aadc9b7e29c5\\_story.html](http://www.washingtonpost.com/world/in-s-korea-the-republic-of-samsung/2012/12/09/71215420-3de1-11e2-bca3-aadc9b7e29c5_story.html) (last visited Apr. 10, 2016).
- 44) Tae Ung Baik, *Stabilizing Democracy and Human Rights Systems in South Korea*, 35 U. HAW. L. REV. 877, 901 (2013).
- 45) *Id.*
- 46) See Jeyup S. Kwaak, *President Park Apologizes for Ferry Response*, THE WALL STREET JOURNAL, Apr. 29, 2014, available at <http://online.wsj.com/articles/SB10001424052702304163604579530750831476112> (last visited Apr. 10, 2016).

undertaken in spite of mass citizen protests and candlelight vigils,<sup>47</sup> increasing the perception of voicelessness and powerlessness among average Koreans.

In the U.S., similar realities of marginalization exist. For example, a recently published study by Gilens and Page concluded that the general American public has little to no independent influence on U.S. government policy.<sup>48</sup> Using a multivariate analysis to assess the independent effects of average citizens, economic elites, business interest groups and mass interest groups on public policy, they found that the drivers of U.S. government policy are the economic elites and business organizations. Their results provide no support for the widespread belief that the U.S. is a majoritarian electoral democracy, and instead suggest that self-governance by average citizens is still merely aspirational.

One need not look far for real life examples that seem to bear out this finding. Studies consistently show that the majority of Americans support some form of gun regulation,<sup>49</sup> particularly as the mass tragedies from gun violence continue to increase.<sup>50</sup> However, due to the power and wealth of the gun lobby, the U.S. Congress has failed to pass a single gun regulation, even one requiring little more than background checks for potential gun purchasers.<sup>51</sup> Similarly, despite the interest by a majority of Americans in GMO labelling,<sup>52</sup> the U.S. House of Representatives passed a bill that prohibited such labelling,<sup>53</sup> as did the Senate

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47) T. J. Lah. Public Policy Processes and Citizen Participation in Korea. In E. Berman(ed.), *Public Administration in East Asia: Mainland China, Japan, South Korea and Taiwan*. Taylor & Francis. 2010.

48) See Martin Gilens and Benjamin Page, *Theories of American Politics: Elites, Interest Groups, and Average Citizens*, PERSPECTIVES ON POLITICS 572 (2014), available at <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=9354310&fulltextType=RA&fileId=S1537592714001595> (last visited Apr. 10, 2016).

49) See Adam Edelman, *Vast Majority of Americans Favor Tougher Gun Control, 33% View Background Checks as Most Effective Method: Poll*, NEW YORK DAILY NEWS, Dec. 3, 2015, available at <http://www.nydailynews.com/news/national/vast-majority-americans-tougher-gun-laws-poll-article-1.2454131> (last visited Apr. 10, 2016).

50) See Bonnie Berkowitz, Lazaro Gamio, Denise Lu, Todd Lindeman & Kevin Uhrmacher, *50 years of U.S. Mass Shootings: The Victims, Sites, Killers and Weapons*, THE WASHINGTON POST, Feb. 26, 2016, available at <https://www.washingtonpost.com/graphics/national/mass-shootings-in-america/> (last visited Apr. 10, 2016).

51) See *Barack Obama: US gun control inaction must end*, BBC NEWS, Jan. 5, 2016, available at <http://www.bbc.com/news/world-us-canada-35236630> (last visited Apr. 10, 2016).

52) See Mary Clare Jalonick, *Poll Finds Most Americans Want GMO Food Labels*, PBS NEWSHOUR, Jan. 13, 2015, available at <http://www.pbs.org/newshour/rundown/poll-finds-americans-support-gmo-food-labeling/> (last visited Apr. 10, 2016).

Committee on Agriculture. This bill ultimately failed to obtain the cloture votes needed to advance in the full Senate,<sup>54</sup> and that was due in part to Internet activism.<sup>55</sup>

## B. The Internet and Citizen Participation

The spread and advancement of Internet technologies are a significant silver lining, offering the hope of a reversal of this trend in favor of broad based citizen engagement. For, unlike the print and broadcast media, no special financial or social status is required to disseminate one's thoughts to a cross section of the nation via the web. Almost anyone can create a blog, post a comment on Facebook or tweet a message, and reach a national audience for no more than the cost of their Internet connection. More importantly, the size of the audience the message reaches is not constrained by the speaker's wealth, but rather by the appeal of the message itself.

Though portions of American society are still non-internet users, a Pew Research study in January 2014 suggests that 87% of Americans currently use the Internet,<sup>56</sup> and in the 2014 election, 28% of Americans used their cell phones to remain abreast of political news and campaign coverage while 16% followed political figures on social media.<sup>57</sup> In South Korea, Internet usage statistics are even higher. South Korea has the highest level of Internet penetration in the world, with 97% of all households having access to broadband.<sup>58</sup> Moreover, in a 2012 survey, 49% of Koreans identified the Internet as the most important news source for information about the

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53) See Safe and Accurate Food Labeling Act of 2015, H.R. 1599, 114<sup>th</sup> Cong. (as passed by H.R., July 23, 2015), available at <https://www.congress.gov/bill/114th-congress/house-bill/1599> (last visited Apr. 10, 2016).

54) See Stephanie Strom, *Bill to Stop States Requiring Labeling of GMO Foods Fails*, THE NEW YORK TIMES, Mar. 16, 2016, available at [http://www.nytimes.com/2016/03/17/business/bill-to-stop-states-requiring-labeling-of-gmo-foods-fails.html?rref=collection%2Ftimestopic%2FGenetically%20Modified%20Food&action=click&contentCollection=timestopics&region=stream&module=stream\\_unit&version=latest&contentPlacement=1&pgtype=collection&\\_r=0\\_](http://www.nytimes.com/2016/03/17/business/bill-to-stop-states-requiring-labeling-of-gmo-foods-fails.html?rref=collection%2Ftimestopic%2FGenetically%20Modified%20Food&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection&_r=0_) (last visited Apr. 10, 2016).

55) See Just Label It Campaign (2016), available at <http://www.justlabelit.org/action-center/take-action-congress/> (last visited Apr. 10, 2016); EWG and Just Label It Campaign (2016), available at <http://signforgood.com/stoppeddarkact/> (last visited Apr. 10, 2016).

56) See Pew Internet Research Project, *Internet User Demographics*, Pew Research Center, available at <http://www.pewinternet.org/data-trend/internet-use/latest-stats/> (last visited Nov. 18, 2014).

57) See Aaron Smith, *Cell Phones, Social Media, and Campaign 2014*, PEW RESEARCH INTERNET PROJECT, Nov. 3, 2014, available at <http://www.pewinternet.org/2014/11/03/cell-phones-social-media-and-campaign-2014/> (last visited Apr. 10, 2016).

election, while 59% said they used the Internet at least once a day to obtain campaign information during the month before the election.<sup>59</sup>

Increased Internet access has given the Internet a new salience in democracy and politics,<sup>60</sup> and this was highlighted in presidential elections in both the U.S. and Korea. For example, Obama's 2008 victory was credited in large part to his strategic use of the Internet as a tool for organizing and fundraising among ordinary Americans and outside the traditional political "machines."<sup>61</sup> Similarly, in the 2002 South Korean election, the activism of the online political fan club, *Nosamo* and the citizen journalism website OhMyNews<sup>62</sup> are widely considered to have played a critical role in the victory of Roh Moo-Hyun.<sup>63</sup> The Internet is credited with a similar role in the 2011 victory of former civic activist Park Won-Soon in the race for Seoul mayor.<sup>64</sup>

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58) See OECD (2016), available at <https://data.oecd.org/korea.htm#profile-innovation-and-technology> (last visited Apr. 10, 2016).

59) See e.g. Lars Willnat and Young Min, *The Emergence of Social Media Politics in South Korea: The Case of the 2012 Presidential Election* in THE ROUTLEDGE COMPANION TO SOCIAL MEDIA AND POLITICS, 396 (Axel Bruns et al. ed. 2015).

60) See Michael Cornfield, *BUZZ, BLOGS, AND BEYOND: The Internet and the National Discourse in the Fall of 2004* (2004), available at [http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/news/press\\_releases/society\\_and\\_the\\_internet/PIPBlogs051605pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/news/press_releases/society_and_the_internet/PIPBlogs051605pdf.pdf) (last visited Apr. 10, 2016).

61) See Sarah L. Stirland, *Propelled by Internet, Barack Obama Wins Presidency*, WIRED, Nov. 4, 2008, available at <http://www.wired.com/2008/11/propelled-by-in/> (last visited Apr. 10, 2016); Soumitra Dutta & Matthew Fraser, *Barack Obama and the Facebook Election*, U.S. NEWS AND WORLD REPORT, Nov. 19, 2008, available at <http://www.usnews.com/opinion/articles/2008/11/19/barack-obama-and-the-facebook-election> (last visited Apr. 10).

62) See Jonathan Watts, *World's First Internet President Logs on*, THE GUARDIAN, Feb. 23, 2003, available at <http://www.theguardian.com/technology/2003/feb/24/newmedia.koreanews> (last visited Apr. 10, 2016).

63) See Eui Hang Shin, *Presidential Elections, Internet Politics, and Citizen's Organizations in South Korea*, 34(1) DEVELOPMENT AND SOCIETY 25, 28 (Jun. 2005), available at [http://isdpr.org/DnS/get\\_Journals/development-and-society?mode=view & seqidx=48 file:///C:/Users/jesus/AppData/Local/Microsoft/Windows/INetCache/IE/ J1I6FDZW/2005\\_34\\_1\\_Presidential%20Elections,%20Internet%20Politics,%20and%20Citizens'%20Organizations%20in%20South%20Korea.pdf](http://isdpr.org/DnS/get_Journals/development-and-society?mode=view & seqidx=48 file:///C:/Users/jesus/AppData/Local/Microsoft/Windows/INetCache/IE/ J1I6FDZW/2005_34_1_Presidential%20Elections,%20Internet%20Politics,%20and%20Citizens'%20Organizations%20in%20South%20Korea.pdf) (last visited Apr. 10, 2016).

64) Jongcheol Kim, *Upgrading Constitutionalism: The Ups and Downs of Constitutional Development in South Korea since 2000* in CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY (Albert Chen ed. 2014).

In addition, the potential of the Internet as a democratizing force has long been a factor in debates over net neutrality and Internet censorship, and was a key component of the Arab Spring revolutions. In keeping with the growing interest in a political Internet, governments have increasingly adopted e-technologies to improve citizen access and interaction.

### III. E-Government Technologies in Korea and U.S.

The Internet is increasingly serving as an outlet for citizen-led activism, but many perceived its greatest utility to lie in its ability to increase the legitimacy of the administrative state.<sup>65</sup> The policy choices that most directly affect the consumer—regarding the air we breathe, the food we eat, the products we buy, the places in which we work—are almost universally made by a bevy of unelected bureaucrats rather than elected representatives.<sup>66</sup> The processes used to make administrative rulemaking more democratic—consultation on proposal development, public notice, comment opportunities<sup>67</sup>—are themselves made simpler and more democratic through Internet technologies. This section discusses the rise of the administrative state and the e-government paradigm and provides a brief overview of the e-participation technologies of the Korean and U.S. governments, focusing on the criteria used in the UN E-Government Survey report.

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65) Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 Geo. Wash. L. Rev. 1343, 1344-45 (2011) (nothing that technological changes and e-rulemaking have the potential to substantially enhance “public understanding of and involvement in rulemaking.”); *see also* Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 Emory L.J. 433, 435 (2004) (noting e-rulemaking offers the means to remedy the democratic deficit of administrative law by presents “by using interactive technology to make citizen participation more manageable for regulators and more collaborative between government and citizens.”) and Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 Admin. L. Rev. 277, 279 (1998).

66) *See* Cynthia R. Farina, *Achieving the Potential: The Future of Federal E-Rulemaking, Report of the Committee on the Status and Future of Federal e-Rulemaking* 35 (Cornell Law Faculty Publications 2010), available at <http://scholarship.law.cornell.edu/facpub/35> (last visited Apr. 10, 2016).

67) *See generally* U.S. Administrative Procedure Act.

## A. Administrative Rulemaking and Internet Technologies

Democracy is premised on citizen participation, but the rise of the administrative state placed many fundamental policy decisions in the hands of unelected bureaucrats. The rise of the administrative state in the U.S. in the 1930s was in part a product of the Great Depression and a belief that scientific expertise could produce effective solutions to market dysfunction where politics had failed.<sup>68</sup> However, as it became clear that “agencies do not simply function as repositories of technical expertise, filling in minor details of statutory schemes while elected officials make the critical policy decisions,”<sup>69</sup> but were instead making key value determinations without public oversight or accountability,<sup>70</sup> criticism of “administrative absolutism”<sup>71</sup> increased. The lack of public input into rulemakings that intruded ever more deeply into the everyday lives of citizens created a “democratic deficit” and called the legitimacy of administrative rulemaking into question. As a result, a new administrative procedure law was passed in 1946, which attempted to mandate formal decision-making processes that would promote reasoned deliberation<sup>72</sup> and citizen engagement.

The administrative state in Korea began somewhat differently, being transplanted from Japan during the Japanese occupation of Korea.<sup>73</sup> After Korean independence, a series of dictators helped to create a very authoritarian administrative state, which emphasized efficiency and progress over transparency and citizen participation.<sup>74</sup> Thus, Korea did not pass an Administrative Procedure Act until 1996, in partial response to pressure from the U.S.<sup>75</sup> and OECD,<sup>76</sup> and in partial response to the

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68) Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev 1189 (1986) (noting a premise of the admin state as “faith in the ability of experts to develop effective solutions to the economic disruptions created by the market system.”)

69) Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 Geo. Wash. L. Rev. 1343, 1347 (2011).

70) Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 Geo. Wash. L. Rev. 1343, 1347 (2011).

71) Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev 1189 (1986).

72) Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev 1189 (1986).

73) Tom Ginsburg, *Dismantling the "Developmental State" Administrative Procedure Reform in Japan and Korea*, 49 Am. J. Comp. L. 585, 596-97 (2001).

74) Tom Ginsburg, *Dismantling the "Developmental State"? Administrative Procedure Reform in Japan and Korea*, 49 Am. J. Comp. L. 585, 590 (2001).

75) *Id.* at 585, 586.

76) Jeeyang Rhee Baum, *RESPONSIVE DEMOCRACY: INCREASING STATE ACCOUNTABILITY IN EAST ASIA* (University of Michigan Press 2011).

political needs and efforts of Kim Young Sam, the first civilian to be elected president since 1960.<sup>77</sup> The stated purpose of the Korean APA is very similar to that of that the U.S. APA: “to attain fairness, transparency, and confidence in administration, and to protect the rights and interest of citizens, encouraging citizens’ participation in administration by stipulating the common matters regarding administrative procedures.”<sup>78</sup> As a result, the two laws provide for similar processes.

For example, the U.S. APA requires two forms of rulemaking, formal and informal, which emphasize transparent decision-making and citizen consultation. Formal rulemaking provides for public participation through a trial like process in which interested persons have rights to present evidence and conduct cross-examinations.<sup>79</sup> The participation provisions of informal rulemaking, on the other hand, are limited to rights of “notice and comment,” hence the term “notice and comment rulemaking.” Under notice and comment rulemaking, by far the most popular form of rulemaking in the U.S., agencies are required to provide advance notice of proposed rules to the public and to allow interested citizens to participate in the rule making through comments—the submission of “written data, views or arguments with or without opportunity for oral presentation.”<sup>80</sup> The Korean APA has similar requirements. It “provides as a general administrative procedure such standard tools as a requirement of issuing a disposition upon proper application, selective formal hearing, public hearing, pre-announcement of administrative legislation, and pre-announcement of administration.”<sup>81</sup> In the early years of administrative procedure, however, participation was largely limited to industry experts and bureaucratic elites, due to the costs of accessing paper documents stored in agency record rooms and public reading rooms in the U.S.<sup>82</sup> and to the longstanding tradition of authoritarian government in control in Korea.<sup>83</sup>

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77) *Id.*

78) Administrative Procedure Act No. 5241 Dec 31, 1996 available at [http://elaw.klri.re.kr/eng\\_mobile/viewer.do?hseq=335&type=part&key=4](http://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=335&type=part&key=4)

79) Administrative Procedure Act, 5 U.S.C. § 556.

80) *Id.* § 553.

81) Jongcheol Kim, *Government reform, Judicialization, and the Development of Public Law in the Republic of Korea in Administrative Law and Governance in Asia: Comparative Perspectives* 2643-2644 (Kindle ed., Taylor and Francis 2008).

82) Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 Pace L. Rev. 382, 386-87 (2011)

83) T. J. Lah. *Public Policy Processes and Citizen Participation in Korea. In PUBLIC ADMINISTRATION IN EAST ASIA: MAINLAND CHINA, JAPAN, SOUTH KOREA AND TAIWAN* (E.Berman ed. 2010).

Thus, early engagement with the Internet by agencies focused on transparency and accessibility. They uploaded enormous amounts of government data to the Internet, making it available to ordinary citizens.<sup>84</sup> Recently, however the emergence of Web 2.0 technologies have combined to produce a shift in government Internet efforts from access and transparency to communication and collaboration.<sup>85</sup> This has led to global interest in e-government as an element of sustainability, as evidenced by the creation of the UN e-government survey.

## **B. UN E-Government Criteria and Rankings**

Every two years, the UN evaluates the e-government development of its 193 member nations.<sup>86</sup> It evaluates progress using two indexes—an e-government development index and e-participation index.<sup>87</sup> The e-government development index ranks nations based on three dimensions of e-government development—provision of online services, telecommunications connectivity and human capacity.<sup>88</sup> The e-participation index, on the other hand, focuses specifically on democratic participation, particularly on technological tools that governments use to engage the public. It ranks governments along three dimensions of e-participation: e-information, e-consultation, and e-decision making.<sup>89</sup> The e-information dimension is a measure of citizen access to government data and information.<sup>90</sup> The e-consultation dimension measures opportunities for citizens to provide feedback through online forums, online polls and social media.<sup>91</sup> The e-decision making dimension measures e-decision making services, such as a stated online participation policy, an online calendar of participation events, and information about participation outcomes.<sup>92</sup> This article focuses on the e-participation results.

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84) Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 Pace L. Rev. 382, 386-87 (2011) (noting that the “first generation” of federal e-rulemaking essentially put the conventional rulemaking process online).

85) *Id.*

86) United Nations, *E-Government Survey 2014: E-Government for the Future We Want 3* (New York: United Nations 2014).

87) *Id.* at 72.

88) *Id.* at 186.

89) *Id.* at 63.

90) *Id.* at 67.

91) *Id.* at 69.

92) *Id.* at 66.



In the 2014 UN E-Government Survey, South Korea tied with the Netherlands for first place in the e-participation index, with an index score of 1.0.<sup>93</sup> It scored 96% on the e-information dimension, 82% on the e-consultation dimension, and 89% on the e-decision making dimension.<sup>94</sup> Although the U.S. ranked first in the world for e-participation in 2008, subsequent changes in the indexing method lowered its ranking.<sup>95</sup> As a result, in 2014, the U.S. ranked ninth in the e-participation index, with an index score of .92.<sup>96</sup> It scored 96% on the e-information dimension, 64% on the e-consultation dimension, and 89% on the e-decision making dimension.<sup>97</sup>

The e-participation survey is designed to assess the “quality and usefulness of e-government programs for the purpose of engaging people in public policy-making and implementation.”<sup>98</sup> As a result, it focuses on key features of e-government websites and mobile applications, such as availability and accessibility of information on key topics in multiple languages, the use of social networking, online forums, voting, and polls obtaining “raw” public input and feedback, as well as the presence of e-decision-making tools such as participation calendars, participation policies, and information on participation rights and outcomes.<sup>99</sup>

A brief look at the various websites of the South Korea and U.S. governments reveals the presence of almost all of these features. Both South Korea and the U.S. make government data available online at sites such as data.go.kr (KR) and data.gov (U.S.). Also, Korean government sites such as [http://www.hikorea.go.kr/pt/main\\_en.pt](http://www.hikorea.go.kr/pt/main_en.pt), and [president.go.kr](http://www.president.go.kr), are available in multiple languages such as English and Chinese,<sup>100</sup> while many Korean agencies offer scaled-down versions of their websites in English.<sup>101</sup> In the U.S., various websites such as USA.gov are also available in Spanish, while the FDA offers website information in multiple languages.<sup>102</sup> In addition, websites such as [president.go.kr](http://www.president.go.kr) and [whitehouse.gov](http://www.whitehouse.gov) offer

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93) *Id.* at 240.

94) *Id.*

95) Cary Coglianese, *Enhancing Public Access to Online Rulemaking Information*, 2 Mich. J. Env'tl. & Admin. L. 1, 25 (2012).

96) United Nations, *supra* note 83, at 241.

97) *Id.*

98) *Id.* at 63.

99) *Id.* at 51, 66.

100) *See e.g.*, [http://www.hikorea.go.kr/pt/main\\_en.pt](http://www.hikorea.go.kr/pt/main_en.pt) and [president.go.kr](http://www.president.go.kr)

101) *See e.g.*, <http://www.mfds.go.kr/eng/index.do;jsessionid=jOt1Erp4PX9lZ3HaWCB3PEWa58XXlhKs38qKalHovoIf6ybzQOvKKKsSqtSjKhw>

102) *See e.g.*, [president.go.kr](http://www.president.go.kr); [whitehouse.gov](http://www.whitehouse.gov)

links to their pages and videos on various social media sites such as Facebook, Twitter, and Youtube, through which citizens can informally comment and interact with each other and the government.

In terms of participation in rulemaking and policy deliberation, Korea's e-people site contains interactive tools for submitting comments and votes on policy proposals and pending regulations, for participating in citizens' polls, and also for submitting citizen complaints. The U.S. sites of [regulations.gov](http://regulations.gov) and <https://petitions.whitehouse.gov> also provide opportunities for citizens to comment on pending regulations and to submit citizen complaints or comments.<sup>103</sup> However, unlike the e-people site, these U.S. sites did not contain tools for ranking online forum comments or for general voting on policy ideas.

## **IV. E-participation In Rulemaking**

As e-government technologies have become more widespread, increased attention has been paid to the types of participation they encourage and how that participation advances or retards the goals of democracy. This section uses two popular approaches to democratic legitimacy—deliberative democracy and interest group pluralism—as a framework within which to discuss the strengths and limitations of current approaches to e-government and to offer recommendations of ways the two nations can improve citizen participation in e-government rulemakings.

### **A. Theories of Democratic Legitimacy**

#### **1. Deliberative Democracy**

Deliberative democracy is an approach to democratic decision-making that seeks to root democratic legitimacy in public regarding reasons rather than aggregated self-interest. As a result, deliberative democracy rejects citizen participation as a good in itself in favor of “informed” participation. For participation to have value within deliberative democracies, it must be based upon preferences that have been formed through balanced consideration of full, accurate and fairly representative facts.<sup>104</sup> Spontaneous or reactive preferences that are the product of “low-thought

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103) See [regulations.gov](http://regulations.gov) and <https://petitions.whitehouse.gov/>

104) Cynthia R. Farina, Mary Newhart, Josiah Heidt, *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 44 *Envtl. L. Rep. News & Analysis* 10670, 10676 (2014).

extrapolations from the individual's general knowledge, underlying value system, and worldview” are of low value in many deliberative paradigms.<sup>105</sup> Treatments of group preferences, which are determined by reference to in-group values with little or no input from outside sources, are similarly discounted.<sup>106</sup> Above all, deliberative democracy values “adaptive” preferences, which are informed preferences modified (improved) by consensus-building aims.<sup>107</sup> This valuing of adaptive over all other preferences, however, has led to accusations that deliberative democracy is elitist, privileging the policy proposals and processes of the elite over those of normal citizens,<sup>108</sup> and making the rejection of authentic citizen preferences in favor of preferences constructed for citizens by the elite a precondition of public participation. However, whether one favors adaptive preferences or merely informed preferences, the Internet revolution makes deliberative democracy possible in ways that could not be imagined previously.

## 2. Pluralism

Pluralistic approaches to democratic decision-making locate legitimacy in numbers, rather than in reason giving. Within the pluralist paradigm, all preferences are equal, with no regard for the origin of the preferences or the quality of the information on which they are based. What matters, in pluralism, is ensuring that as many preferences are taken into account as possible. The more preferences that are taken into account the better and more legitimate a decision will be. This has led critics to argue that pluralism mistakenly substitutes the aggregation of private interest for the public interest, while also failing to recognize the extent to which articulated preferences may be the result of mass manipulation. Though pluralism is a beleaguered theory these days, elements of it remain an inextricable part of representative democracy and have also carried over to the Internet context. Whether one believes in bare pluralism or a more refined reasonable pluralism, the Internet offers the opportunity for unprecedented numbers of citizens and an unprecedented diversity of citizens to participate in agency rulemakings. The next section discusses e-participation in a few of those rulemakings.

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105) Cynthia R. Farina, Mary Newhart, Josiah Heidt, *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, Mich. J. Env'tl. & Admin. L. 123, 133-135 (2012).

106) *Id.*

107) *Id.*

108) Note, *Civic Republican Administrative Theory; Bureaucrats as Deliberative Democrats*, 107 Harv. L. Rev. 1401, 1417-18 (1994).

## B. Nutrition Labeling Rulemaking

In the past year, the food and drug agencies in both Korea and the U.S. undertook rulemakings designed, among other things, to replace calorie information based on artificial/outdated serving sizes with calorie information based on the amount individuals actually consume in one sitting.<sup>109</sup> Korea's Ministry of Food and Drug Safety opened a policy discussion on the proposed revisions to nutrition labels on September 6, 2015, accepting comments until September 20, 2015.<sup>110</sup> A notice of revision was issued in January 2016.<sup>111</sup> For its part, the U.S. Food and Drug Administration had begun soliciting comments on similar changes several years earlier, issuing an advanced notice of proposed rulemaking on Nov. 2, 2007.<sup>112</sup> It accepted comments on the advanced notice until Jan. 31, 2008.<sup>113</sup> However, it was not until March 3, 2014, that it published an actual notice of proposed rulemaking, with comments accepted until June 2014.<sup>114</sup> The comment period on specific documents<sup>115</sup> and issues<sup>116</sup> was then extended until September 25, 2015<sup>117</sup> and October 13, 2015<sup>118</sup> respectively. The comment period was then briefly reopened from October 20 to October 23 to compensate for technological difficulties during the earlier comment period.<sup>119</sup>

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109) Ministry of Food and Drug Safety Notification (No. 2016-19) (S. Kor.).

110) Ministry of Food and Drug Safety Notification (2015-09-06~2015-09-20) (S. Kor.), <http://www.epeople.go.kr/jsp/user/po/filterOff/forum/UPoForumView.jsp?callKey=I>

111) Ministry of Food and Drug Safety Notification (No. 2016-19) (S. Kor.).

112) 72 FR 62149, available at <https://www.gpo.gov/fdsys/granule/FR-2007-11-02/07-5440>

113) 72 FR 62149, available at <https://www.gpo.gov/fdsys/granule/FR-2007-11-02/07-5440>

114) 79 FR 11879, available at <https://www.gpo.gov/fdsys/granule/FR-2014-03-03/2014-04387>

115) 80 FR 44302, available at <https://www.federalregister.gov/articles/2015/07/27/2015-17929/food-labeling-revision-of-the-nutrition-and-supplement-facts-labels-reopening-of-the-comment-period>

116) 80 FR 44303, available at <https://www.federalregister.gov/articles/2015/07/27/2015-17928/food-labeling-revision-of-the-nutrition-and-supplement-facts-labels-supplemental-proposed-rule-to>

117) 80 FR 44302, available at <https://www.federalregister.gov/articles/2015/07/27/2015-17929/food-labeling-revision-of-the-nutrition-and-supplement-facts-labels-reopening-of-the-comment-period>

118) 80 FR 44303, available at <https://www.federalregister.gov/articles/2015/07/27/2015-17928/food-labeling-revision-of-the-nutrition-and-supplement-facts-labels-supplemental-proposed-rule-to>

Despite the accessible nature of the rule and the numerous e-consulting tools Korea makes available on its various websites, the nutrition labeling policy discussion, available on both e-people and the Ministry of Food Safety's individual website, received only seventeen comments.<sup>120</sup> Though official comments on the actual proposed rule were not available on any e-resources, workers within the Ministry indicated that the division received only five comments on the January 2016 draft rule—only one of which was from an individual.<sup>121</sup> For its part, the U.S. FDA received about 1,600 comments during the first comment period of which 125 were accessible via the regulations website. It received an additional 288,000 comments during the October extension comment period, 800 of which were accessible on the regulations.gov website. While the percentage of comments the U.S. received is higher than the percentage Korea received, both nations received responses from less than 1% of their populations.

While other e-rulemakings in Korea also had a response rate of less than 1%, they did enjoy e-rulemaking response rates that were much higher than that observed for the nutrition rulemaking and for the MFSD in general (whose highest number of comments was fifty).<sup>122</sup> For example, an electronic hearing on proposed campsite regulations by the Ministry of Sports and Tourism received 3,958 comments,<sup>123</sup> with twenty-five in favor of the rule<sup>124</sup> and 3,409 opposed.<sup>125</sup> The maximum number of comments received for an electronic hearing was roughly doubled this — 8,670.<sup>126</sup> The largest number of comments on the site, however, was not for an electronic hearing, but rather for a policy discussion related to full day kindergartens, which received 11,485 comments.<sup>127</sup> Similarly, in the U.S., high interest rules also received a far greater number of comments than in the nutrition rulemaking. For example, the U.S. Department of Agriculture received 1.6 million comments about its roadless areas rules, while the FCC received over a million comments, primarily from individuals, about its media ownership rule.<sup>128</sup> The next section discusses the

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119) 80 FR 63477, available at <https://www.federalregister.gov/articles/2015/10/20/2015-26636/food-labeling-revision-of-the-nutrition-and-supplement-facts-labels-reopening-of-the-comment-period>

120) <http://www.epeople.go.kr/jsp/user/po/filterOff/forum/UPoForumView.jsp?callKey=I>

121) Follow up phone call to the Nutrition Safety Policy Division on Friday, April 1, 2016.

122) <http://www.epeople.go.kr/jsp/user/po/filterOff/forum/UPoForumView.jsp?callKey=I>

123) <http://www.epeople.go.kr/jsp/user/po/filterOff/puhe/UPoPuheView.jsp?callKey=I>

124) *Id.*

125) *Id.*

126) <http://www.epeople.go.kr/jsp/user/po/filterOff/puhe/UPoPuheView.jsp?callKey=I>

127) *See supra* note 120.

strengths and weaknesses of the e-participation process suggested by these rulemakings and existing research.

### C. Strengths of the E-Participation Process

The e-participation processes in the U.S. and South Korea have several strengths. For example, the various policy forums and commenting procedures seem designed to combine political accountability with a high degree of reflection and consensus building.<sup>129</sup> Both nations have integrated comment sites, which function as a “one stop shop” for rulemaking comments.<sup>130</sup> These sites offer opportunities for comments on proposed rules and also on policy discussions that precede proposed rules.<sup>131</sup>

Moreover, in both nations, governments have made efforts to increase participation levels in various ways, by trying to advertise topics of specific interest to the public,<sup>132</sup> and by providing more feedback from government representatives through monitored Q&A boards<sup>133</sup> and citizen petitions.<sup>134</sup> In addition, Korea has created a system of rewards for high quality feedback and/or frequent participation,<sup>135</sup> and also successfully incorporated “crowdsourcing” ratings services into its e-participation design. This allows citizens to “recommend” the most helpful comments on a given issue, which is then visible to other commenters.<sup>136</sup> Lastly, both nations have also launched broad initiatives designed to make large amounts of government data accessible to the public.<sup>137</sup>

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128) Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 *Geo. Wash. L. Rev.* 1343, 1361 (2011).

129) Cass R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (Oxford University Press 2001) (describing these as essential features of deliberative democracy).

130) *See e.g.*, [regulations.gov](http://regulations.gov) and [epeople.go.kr](http://epeople.go.kr)

131) *Id.*

132) *See* [http://www.cha.go.kr/cha/idx/Index.do?mn=NS\\_01](http://www.cha.go.kr/cha/idx/Index.do?mn=NS_01) (*hot topics section*)

133) *See generally* [www.korea.go.kr](http://www.korea.go.kr)

134) *See generally* <https://petition.whitehouse.gov>

135) *See* [epeople.go.kr](http://epeople.go.kr)

136) [epeople.go.kr](http://epeople.go.kr) (offering the option to recommend the comments of others).

137) *See* <http://www.mpss.go.kr/en/gov/gov/> (describing one aspect of Korea’s Government 3.0 as making more government data available for public use); Executive Order, Making Open and Machine Readable the New Default for Government Information (May 9, 2013), *available at* [https://www.whitehouse.gov/the-press-office/2013/05/09/executive-order-making-open-and-machine-readable-new-default-government-](https://www.whitehouse.gov/the-press-office/2013/05/09/executive-order-making-open-and-machine-readable-new-default-government) (describing new “open data” initiative in U.S.) (last visited Apr. 10, 2016).

## D. Weakness of E-participation Process

Despite the utilization of many “best practices” in the design of e-government systems, e-participation rates in both nations are low.<sup>138</sup> For example, in 2010 only about three-fourths of Korean citizens were aware of the existence of e-government websites, and less than half utilized them.<sup>139</sup> In the U.S., only about 23% of Internet users are “government participators,” defined as those who “have posted comments or interacted with others online around government policies or public issues.”<sup>140</sup> Instead, the vast majority of citizen usage of e-government websites is informational and transactional rather than deliberative.<sup>141</sup> Thus, rather than increases in democratic participation, the results of e-government are often limited to increased managerial efficiency.<sup>142</sup>

In addition, in both nations, information about the government’s receipt and use of citizen feedback is lacking. For example, researchers have often suggested that the level of opaqueness around government use of citizen feedback in Korea is very high, despite such initiatives as Government 3.0.<sup>143</sup>

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138) *See infra* note 134-135.

139) *See* Je Hae Do, *E-Government Web Sites Underutilized*, THE KOREA TIMES, Feb. 19, 2010, available at [http://www.koreatimes.co.kr/www/news/nation/2010/02/117\\_61097.html](http://www.koreatimes.co.kr/www/news/nation/2010/02/117_61097.html) (last visited Apr. 10, 2016).

140) *See* Aaron Smith, *Part Two: Government engagement using social media and the government participatory class*, PC RESEARCH CENTER, Apr. 27, 2010, available at <http://www.pewinternet.org/2010/04/27/part-two-government-engagement-using-social-media-and-the-government-participatory-class/> (last visited Apr. 10, 2016).

141) *See e.g.* Hyeon Suk Lyu, *The Public's E-Participation Capacity and Motivation in Korea: A Web Survey Analysis from a New Institutional Perspective*, 4(4) J. OF INFOR. TECH. & POL. 71 (2008) (noting that in their study, the rate of transactional use to e-participation was 34% to 7%).

142) Christopher Reddick, Donald F. Norris *E-participation in local governments: An examination of political-managerial support and impacts*, 7(4) TRANSFORMING GOVERNMENT: PEOPLE, PROCESS AND POLICY 453, 456-7 (2013) (discussing studies which show that e-government initiatives often only produce change in service delivery but not transformed governments or empowered citizens); *see also* Kathleen McNutt, *Public engagement in the Web 2.0 era: Social collaborative technologies in a public sector context*, 57 CANADIAN PUB. ADMIN. 49, 52-54 (noting that e-government efforts centered on providing information improve efficiency but do not lead to genuine collaboration).

143) Soon Ae Chun & June-Suh Cho, *E-participation and transparent policy decision making*, 17(2) INFO. POLITY: THE INT'L J. OF GOV'T & DEMOCRACY IN THE INFO. AGE, 130 (2012).

The research for this article, though limited in scope, supports these conclusions. While the Korean websites provided summaries of citizen feedback on the proposed policy, there was little information about government use of this feedback. For example, though the nutrition labeling changes discussed in the policy discussion were later incorporated into a revision notice, this researcher could not find any links or attachments to the revision notice on the e-people policy discussion webpage. As a result, it is unclear whether or how the participants in the policy discussion were informed of the ultimate result.

For its part, the U.S. website did provide links to subsequent developments in the rulemaking and also included abbreviated responses/reactions to comments within the text of the draft rule. However, there is still room for improvement. Many high-interest rulemakings in the U.S. receive hundreds of thousands of comments in the form of mass mailings from community action groups.<sup>144</sup> Such mailings are seldom mentioned in the draft rules, and it remains unclear how the agency handles such citizen feedback,<sup>145</sup> though there are suggestions that it is often discounted.<sup>146</sup> This lack of information about government use of citizen feedback is a significant weakness for e-government. For, in the absence of information on how a government is using citizen feedback, there is no counterpoint to perceptions that citizen participation is merely symbolic, with the “real” decision-making taking place offline between government and industry.<sup>147</sup>

In this respect, the Korean e-government system faces an added hurdle in countering perceptions that citizen participation is merely symbolic. For, in this particular study, not only was electronic access to comments from industry unavailable, but one Korean department went so far as to insist that information about the *mere existence* of industry comments was barred from disclosure, formally (through FOIA) and informally.<sup>148</sup> Given the perception in both nations that the voices and wealth of industry groups dominate the deliberative processes of the government at the expense of ordinary citizens, this response is troubling. It suggests that industry influence is something to be hidden from the public rather than an essential element

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144) Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 Geo. Wash. L. Rev. 1343, 1345 (2011).

145) *Id.* at 1343, 1363-4

146) *Id.*

147) *Id.* at 1343, 1368

148) We made several calls to the MFDS during the week of March 17. During one call, the Pharmaceutical Policy Division told us that they could not reveal the number of industry comments due to privacy regulations, even if we filed a FOIA request.



of government transparency. Moreover, e-government efforts to increase citizen participation cannot succeed if the workers within the agencies are both resistant to increased citizen involvement and also able to act as gatekeepers barring access to basic information.

## **E. Recommendations for improvement**

The weaknesses described above seem to fall within three common e-government categories—participation, collaboration, and transparency.<sup>149</sup> This section will discuss recommendations for improvement in these three areas, as well as offering a general recommendation. Though the e-government systems of both countries can use improvement in these three areas (as discussed above) the recommendations in this section are tailored to the Korean e-government system, as this article is primarily addressed to Korean policymakers.

### **1. Within the Rulemaking Process**

Recommendation 1 for improving participation: John S. Mill described democracy as government by discussion, suggesting that it is not enough just to speak, but one must also be heard and responded to. Thus, the lack of interaction and dialogue between citizen discussants themselves and between citizen discussants and agency workers is a significant limitation of Korea's e-government portals. To facilitate discussions between citizens, some scholars have recommended employing an independent moderator for online discussions<sup>150</sup> to increase citizen engagement and thus citizen participation. The moderator would promote discussion and interaction between citizens on the e-hearing and policy discussion boards, by encouraging citizens to provide elaboration and clarification of their ideas when necessary and by encouraging them to comment on the ideas of others.<sup>151</sup> An independent moderator (instead of an agency worker) is recommended to avoid charges of agency bias or censorship<sup>152</sup> and also to ensure that facilitative comments are not construed as

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149) Similar to the categories in the Memorandum on Transparency and Open Government, available at [https://www.whitehouse.gov/the\\_press\\_office/TransparencyandOpenGovernment](https://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment) (last visited Apr. 10, 2016).

150) Cary Coglianese, *Enhancing Public Access to Online Rulemaking Information*, 2 Mich. J. Env'tl. & Admin. L. 1, 25 (2012).

151) *Id.*; Cynthia R. Farina, Mary Newhart, Josiah Heidt, *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 44 Env'tl. L. Rep. News & Analysis 10670, 10676 (2014).

binding on the agency.<sup>153</sup> In addition, it is important that moderators provide authentic, rather than scripted input, and this can be done more freely by individuals who are not required to speak for the agency.

Recommendation 2 for improving collaboration: citizens who participate in e-government comments and discussions, are not seeking merely to be heard by their fellow citizens, however. They are seeking interaction and responses from the government—collaboration. However, given the number of rulemakings and policy discussions, it is not feasible for government workers to participate in every single discussion. Thus, in addition to facilitators, I recommend that agencies use their existing crowdsourcing tools to implement a “threshold for response” model similar to that of [petitions.whitehouse.gov](http://petitions.whitehouse.gov).

Under the White House petitions model, if a petition receives 100,000 signatures, it will receive a response from the White House. This policy is clearly stated on the site and all searchable petitions have a counter that shows the current number of signatures a petition has. Korean websites, such as e-people, already include the software for “recommending” comments and tallying those recommendations, though even in the more popular discussions, this tool was not widely used. (At the time of this writing, the most popular comment had received only thirty-two recommendations.) Agencies could easily adopt a policy of responding to comments that receive a minimum number of recommendations. Given that participation in the Korean e-government system is significantly lower than that of the U.S., research should be done to identify an optimal minimum for Korea, one is that not unreachable, but that also requires the input of a meaningful number of citizens. This would not only encourage existing commenters by creating a culture of dialogue, but would also give them incentives to invite friends and acquaintances into the e-government process—if only to recommend their comments—thus increasing overall participation levels.

Recommendation 3 for improving transparency: currently, the major e-government portals and discussion boards seem to be geared towards citizens. While citizens benefit from opportunities to give comments and to read the comments of other citizens, it is important that citizens also have access to the comments of industry. The necessarily close relationship between agencies and the industries they regulate raise legitimate concerns about agency capture and political corruption.<sup>154</sup> This is

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152) Cynthia R. Farina, Mary Newhart, Josiah Heidt, *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 44 *Env'tl. L. Rep. News & Analysis* 10670, 10676 (2014).

153) Coglianese, *supra* note 150.

particularly true given Korea's continuing history of political corruption, and the shift from government-dominant to industry-dominant relationships between government and industry. The pressures of economic growth, coupled with the domination of the economy by a handful of firms, give industries enormous leverage with the government, independent of overt bribes, and make transparency in the interactions between government and industry, an essential addition to e-government regimes.

In this respect, freedom of information requests seem insufficient, for if citizens are unaware of the existence and number of comments from industry—of the degree of interaction between agencies and industry on key issues—they are limited in their ability to make informed freedom of information requests. Including industry comments on relevant e-hearing or policy discussion sites can increase trust in government and also given citizen commenters a more complete picture of the policy conversation, enabling them to respond in more meaningful ways.

## 2. Beyond the Rulemaking Process: Political Literacy

While implementation of these changes would do much to increase the quality of e-participation, increasing the quantity of e-participation is a more complex matter. This article argues that efforts to increase the level of e-participation at the door of the agency must be supplemented by efforts to increase e-participation before students leave the classroom.

E-government technologies combined with the ubiquity of administrative rulemaking, are pushing representative democracy closer and closer to direct democracy—to citizens speaking about policy choices on their own behalves rather than through their representatives. Implementing this on a wide scale does not merely require a different type of citizen participation, as current government efforts suppose, it requires a different type of citizen. Though there are many initiatives in e-government designed to “empower” citizens, authentic empowerment is not a gift the government bestows upon citizens through technology or goodwill.<sup>155</sup> Rather, it is the byproduct of a critical awakening on the part of the citizen to the social and political necessity of their personal transformative action.<sup>156</sup> Empowered citizens engage and participate in government, but their self-empowerment is a function of education even more than e-technology. For, if social and discursive practices

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154) Rachel E. Barkow, *Insulating Agencies: Avoiding Capture through Institutional Design*, 89 Tex. L. Rev. 15, 21-22 (2010).

155) Paulo Friere, *Pedagogy of the Oppressed* (New York: Herder and Herder 1970).

156) *Id.*

continue to conform to preexisting norms of mere symbolic participation, changing the medium of participation alone will not produce substantive participation.

Instead, changing these social and discursive practices to reflect new opportunities for meaningful engagement is essential. Though both the U.S. and Korea have a form of citizen education, it is often subsumed within other units (such as government or morals) that do not directly address civic participation skills.<sup>157</sup> A paradigm shift that seeks to engage large numbers of citizens in deliberation and shared decision-making, however, requires a robust and systematic emphasis on political literacy.

Political literacy has several definitions, related to understanding one's government and politics. For example, some scholars view political literacy as primarily concerned with knowledge of governmental structure and awareness of key issues of the day.<sup>158</sup> While such knowledge is crucial for an informed citizenry, this article advocates a more critical political literacy that seeks to instill in students a consciousness of their role and power within existing social and political hierarchies. Such an approach must foster an experiential understanding that government is a "we" not a "they." *We* make the decisions. *We* pass the laws. *We* design the policies—not "they" or "them" or "it." Unless students understand that they are always contributing to a political outcome—affirming traditional allocations of power and privilege by their silence and inaction or challenging the same through their action and protest—the true cost of political apathy will elude them. It is only by becoming aware of the effect of both their voices and their silence on the construction of political regimes and paradigms that students can truly make informed decisions about their role in government. Thus, this article argues that critical political literacy is a necessary precondition for meaningful citizen engagement with government.

Moreover, as numerous scholars agree, citizen engagement is positively correlated with citizen trust in government.<sup>159</sup> Citizen engagement, while it can be controversial and contentious, presupposes a connection between the citizens and their representatives that creates a foundation for collaboration and consensus. It transforms adversarial we/they dichotomies that present the people and the government as separate and opposing entities into a collective united in a common enterprise of securing the

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157) See e.g. Young Ran Roh, *Democratic Citizenship Education in the Information Age A Comparative Study of South Korea and Australia*, 5(2) Asia Pacific Education Review, 167-177 (2004).

158) Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 Pace L. Rev. 382, 441 (2011).

159) Soonhee Kim and Jooho Lee, *E-Participation, Transparency, and Trust in Local Government*, 72(6) Pub. ADMIN. REV. 819-828 (2012).

public interest. It is this shared work and the emergence of shared goals that facilitate the development of trust in government.

As a result, successful expansion of participation in e-government requires political literacy as well as technological literacy. This article recommends that Korea combine its e-technology initiatives with efforts to develop a meaningful political literacy curriculum. This could be done by developing incentives that encourage educators to incorporate e-government technologies into high school and university political science courses. Given the abuse of civic education during times of dictatorial rule, and the current controversy over government influence in history textbooks, however, it is recommended that the design for a political literacy curriculum not be dominated by the Korean Ministry of Education, but rather be a collaboration that includes legal and education scholars in Korea, as well as Korean and international NGOs committed to the advancement of democracy.

## V. Conclusion

*“Give me a place to stand, and a lever long enough, and I will move the world.”—Archimedes*

Increasing numbers of Americans and Koreans are unhappy with the political status quo and the domination of government by wealthy corporations and elites. They desire to move their nations closer to the fulfillment of the democratic promises embodied in their constitutions, but all too often lack the political levers to do so. Though successful implementation of e-government will not by itself create the ideal constitutional democracy that so many citizens desire, it will advance democracy’s pre-condition by ensuring that ordinary citizens have levers and processes by which they can access and meaningfully influence their governments.

Having a place to stand—constitutional and statutory promises of democratic government—is not enough. In order to actually move Korea and the U.S. closer to true democracy and away from the temptations of oligarchy, ordinary citizens must have rights to be heard and power to influence, not merely rights to speak. Thus, e-participation cannot remain an economy class tier of civic participation, with the real decisions being made in first class—private meetings between government and elites—without continuing the drift toward oligarchy. Rather, democracy requires that e-participation, with its potential to provide almost universal access for citizens, be as fully integrated into government dialogues and decision-making process as advisory committees and collaborations among elites. For, influential civic

participation is a prerequisite of self-governance; it cannot be treated as a luxury good limited to a select few. Korea and the U.S. should make every effort to move their e-government efforts beyond formal access to collaborative dialogue and engagement, giving ordinary citizens access to the levers of power and the ability to be truly self-governing members of their democracies.

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