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The Accountable Bureaucrat

ABSTRACT. Common wisdom has it that bureaucrats are unaccountable to the people they regulate and must therefore be closely supervised by elected officials or (perhaps ironically) the federal courts. For many detractors of the administrative state, as well as many proponents, agency accountability hangs on the concentrated power of the President in particular. This Article presents a different vision. Drawing on in-depth interviews with officials from numerous agencies, we show that everyday administrative practices and relationships themselves support accountability of a kind that neither elections nor judicial review alone can achieve.

Our interviews reveal that agency officials work within structures that promote the very values accountability is supposed to serve: deliberation, inclusivity, and responsiveness. Three primary features of the administrative state support this vision of accountability. First, political appointees and career civil servants, often presented as adversaries, actually represent complementary decision-making modalities. Appointees do not impose direct presidential control but imbue agencies with a diffuse, differentiated sense of abstract political values and policy priorities tied to the electoral and civil-society coalitions that support the administration in power. Civil servants use expertise and experience to set the parameters within which decisions can be made. Combining these different but interdependent approaches to policymaking promotes deliberation informed by public opinion and the public interest. Second, agencies work through what we refer to as a decision-making web, which facilitates continual justification and negotiation among officials with different roles inside the state. This claim stands in stark contrast to the strict hierarchy often attributed to government bureaucracy. We show how the principal-agent model gives way, more often than not, to the dispersion of decision-making power, which promotes the pluralistic inclusivity of views in a way hierarchical decision-making does not. Finally, numerous practices connect agencies directly and pervasively to the people and situations they regulate. Those required by law, like notice-and-comment rulemaking, are supplemented by varied other means by which agencies respond and adapt to the views of affected publics and the realities of the regulated world.

Our research provides crucial empirical evidence of how the everyday work of government gets done and gives the often-invoked notion of accountability some real content. It leads us to reject formalistic claims about what constitutes accountability in the abstract and to focus instead on the relationships, structures, and practices that actually promote accountability—features of the administrative state that help head off arbitrariness, incorporate multiple perspectives, and encourage negotiated, provisional outcomes. These resources for promoting republican democracy within the bureaucracy, however, are neither inherent nor eternal: they must be actively nourished. This Article thus should change how we think about government accountability and inform how we structure our institutions to achieve it.



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INTRODUCTION

The image of the unelected bureaucrat indicts the administrative state. Judges and critics regularly marshal this menacing figure to challenge the excessive power and questionable legitimacy of the bureaucracy as a whole. On one view, the unelected bureaucrat heightens the dangers posed by executive government. When the Supreme Court enjoined the Biden Administration’s regulation requiring many employees to be vaccinated or test regularly for COVID-19, Justice Gorsuch praised the decision for helping “to prevent ‘government by bureaucracy supplanting government by the people.’”¹ The unelected bureaucrat also threatens the rightful power of the President. Chief Justice Roberts, on behalf of Court majorities, has expressed fear that removal protections for certain officials can lead agencies to “slip from the Executive’s control, and thus from that of the people.”² Whether aggrandizing the executive branch or sapping its one elected official of power, the figure of the unelected bureaucrat is a reliably winning card.³ Even many who support robust administration sometimes accept the premise that unelected bureaucrats pose a threat to accountable government. The dissent in the vaccine-or-test case, for example, argued that the agency’s rule had “the virtue of political accountability, for [the Occupational Safety and Health Administration (OSHA)] is responsible to the President, and the President is responsible to – and can be held to account by – the American public.”⁴

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1. Nat’l Fed’n of Indep. Bus. v. DOL (*NFIB*), 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (quoting Antonin Scalia, *A Note on the Benzene Case*, *REGUL.*, July/August 1980, at 27, <https://www.cato.org/sites/cato.org/files/serials/files/regulation/1980/7/v4n4-5.pdf> [<https://perma.cc/5ATY-QNVV>]); see also Josh Blackman, *Video and Transcript of Justice Alito’s Keynote Address to the Federalist Society*, *VOLOKH CONSPIRACY* (Nov. 12, 2020, 11:18 PM), <https://reason.com/volokh/2020/11/12/video-and-transcript-of-justice-alitos-keynote-address-to-the-federalist-society> [<https://perma.cc/8CDG-EGTL>] (providing a transcript of Justice Alito’s speech in which he decries the growing “dominance of lawmaking by executive [f]iat rather than legislation”).
 2. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2204 (2020) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010)).
 3. Critiques of the “deep state” amplify this concern for accountability and can in turn be used to argue for a unitary executive branch insulated from external constraints on the President’s power. For a recent and penetrating account of the interrelationship between the deep-state trope and claims for the unitary executive, see generally STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, *PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE* (2021).
 4. *NFIB*, 142 S. Ct. at 666 (Breyer, Sotomayor & Kagan, JJ., dissenting). The literature on agency accountability is vast and largely focused on legitimating bureaucratic power and the constraints placed on it. For a powerful elaboration of the history and recent growth of critiques of the administrative state, see generally Gillian E. Metzger, *The Supreme Court, 2016 Term – Foreword: 1930s Redux: The Administrative State Under Siege*, 131 *HARV. L. REV.* 1 (2017).

These claims all rest on the commonsense notion that elections create government accountability.⁵ In this Article, we argue instead that accountability within the American administrative state arises from elections only indirectly, if at all. Our empirical research, involving interviews with administrators across a range of federal agencies,⁶ reveals numerous structures, relationships, and practices within the state itself that produce various and important forms of accountability. These scaffolds augment and complement the accountability created by elections, in some cases producing the very sorts of accountability that elections supposedly, but do not actually, provide. Based on these findings, we argue that placing excessive emphasis on elections or elected officials – whether to constrict, justify, or structure administration – gets in the way of understanding how to build and sustain an accountable democratic state.

Democracy depends on accountability: those who exercise power should be held responsible for their actions and decisions.⁷ At its most basic, accountability requires government actors to justify their positions so that others can evaluate, challenge, or override them.⁸ Such justification has distinct payoffs. It renders

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5. See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 62–67 (1995) (arguing that “the true claimant to the executive throne” is “the conscious agent[] of . . . a national majority coalition”).
 6. We summarize our methodology below and explain it in detail in the Methods Appendix, which discusses the research subject population, interview questions, and analysis process. We did not set out to write about agency accountability. Instead, our study focused on how agencies engage in statutory interpretation as a daily practice – how they work with their statutes to produce policy. In related work, we will present what we learned about agencies’ relationships with their statutes. But we present this Article first, because when asked how they work with statutes, officials across agencies described practices that seemed to promote aspects of accountability often attributed to elections, such as pluralistic inclusivity, reasoned deliberation, and responsiveness to situations and opinions. Although distinct from elections, these factors resonate with the ideals of republican democracy. See, e.g., Philip Pettit, *Republican Freedom and Contestatory Democratization*, in DEMOCRACY’S VALUE 163, 164–65, 180 (Ian Shapiro & Casiano Hacker-Cardón eds., 1999) (arguing that a “contestatory mode of democratization” in which private parties serve not as “authors” but as “editors[]” of the law, serves the goals of “republican freedom” understood as “non-domination,” that is, freedom from “arbitrary” power).
 7. The “protean” concept of accountability is often used as a cover for normative debates about policy effects. See Jerry L. Mashaw, *Structuring a “Dense Complexity”: Accountability and the Project of Administrative Law*, 5 ISSUES LEGAL SCHOLARSHIP 1, 15, 19–20 (2005). We therefore offer a fairly minimal definition of the concept, removed from any particular policy content – a concept we think should be broadly acceptable.
 8. See Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073 (2005); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1254 (2009); see also Anya Bernstein, *Agency in State Agencies*, in DISTRIBUTED AGENCY 41, 46–47 (N.J. Enfield & Paul Kockelman eds., 2017) (noting that accountability

arbitrary or biased views more visible and contestable and pushes government actors to consider multiple perspectives in their decision-making. It allows interested publics to test the quality of government decisions and to change them over time, giving democratic subjects an ongoing role in their own governance.⁹ And it ensures that public institutions serve as sites for the contestations, negotiations, and provisional outcomes that characterize any successful democracy.¹⁰ This understanding of accountability fits with the notion of republican democracy, which rejects the arbitrary exercise of power or power that fails to take relevant interests into account.¹¹ In short, accountability occurs when government is made deliberative, inclusive, and responsive.

Agency action is often regarded by judges and commentators as accountable only insofar as it can be directly controlled by the elected President.¹² But our research locates the production of accountability elsewhere. We identify three

“may always depend on . . . the social conditions that render a particular attribution of responsibility felicitous”). An accountable actor may be subject to discipline for wayward – that is, not properly accounted for – actions, as well as to recognition for approved ones. Although discussions of accountability sometimes focus on the availability of sanctions, in our view it is the requirement, and the opportunity, to explain and justify positions to relevant audiences who can evaluate, affect, and potentially override them that is crucial.

9. See Pettit, *supra* note 6, at 180 (describing democratic populations as exercising “editorship” over the rules that govern them).
10. See SUSAN ROSE-ACKERMAN, DEMOCRACY AND EXECUTIVE POWER: POLICYMAKING ACCOUNTABILITY IN THE US, THE UK, GERMANY, AND FRANCE 2 (2021) (“Disparate policy views are normal in a democracy. Unanimous consent is not a realistic goal for most policy choices.”); BONNIE HONIG, POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS 72 (1993) (describing Friedrich Nietzsche’s argument that legal strictures do not resolve democratic contestation over values and practices but instead allow contestation to continue); see also Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 8-15 (2022) (outlining a vision of administrative agencies as a site of democratic contestation to legitimate the administrative state).
11. Pettit, *supra* note 6, at 165 (elaborating on the idea of freedom as nondomination).
12. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2204 (2020) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010)). The elections-accountability connection has also been a keystone of a well-organized and well-funded antiregulatory movement that dates back at least to the Reagan era. See generally STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2012) (tracing this history); Stephen M. Teles, *Transformative Bureaucracy: Reagan’s Lawyers and the Dynamics of Political Investment*, 23 STUD. AM. POL. DEV. 61 (2009) (describing the political aims of the Reagan Department of Justice (DOJ)). This movement has emphasized the accountability exacted by elections in contradistinction to bureaucracy’s supposed remove from popular control. Staszewski, *supra* note 8, at 1254 (“[I]n what might be considered optimistically circular reasoning, modern public law typically presumes that elected officials are politically accountable . . . because they are selected and potentially removed from office by the voters.”).

mutually supporting aspects of agency practice as particularly important to ensuring accountability: (1) diffuse, rather than concentrated, forms of political control; (2) nonhierarchical organizational structures of negotiation and deliberation among numerous actors and groups; and (3) practices that keep agencies attuned to affected publics and events in the regulated world. In this Article, we present each of these features of administration and explain how they should change the way scholars and lawyers conceptualize and pursue accountability in government.

In Part I, we show that, as a matter of practice, direct presidential involvement in agency policymaking is neither frequent nor the most important source of political control. Instead, political influence is usually broader and more diffuse.¹³ Political appointees chosen by the President or the heads of agencies play a crucial role, but they do not merely carry out the President's agenda. These appointees are usually relatively independent, acting on policy orientations congruent with, but not in any clear sense directed by, the President. Their bigger contribution lies in introducing forms of reasoning and decision-making that complement the work of career officials. The complex relationships between these epistemic communities help structure agency accountability. Meanwhile, presidential administration, though now entrenched, is often less significant than either its proponents or its detractors claim.¹⁴ We show how the broader political connection we identify helps ground accountability not through a direct connection to elections but through interdependent relationships between different modalities of decision-making.

In Part II, we bring to light the networked structures through which agency policymaking proceeds. Commentators sometimes assume that accountability in the administrative state rests on clear hierarchies and fairly simple principal-agent relationships.¹⁵ We found agency action to be characterized by something

13. Members of Congress also help to shape day-to-day agency behavior, but we focus in Part I on relations within the executive branch, not least because this form of political involvement in agency decision-making is far more routinized, regularized, and effective. In related work, we argue that, though day-to-day interaction with current members of Congress helps shape policymaking, agencies' primary fidelity remains to their statutes and the regimes those statutes created—not to the enacting Congress itself, much less the current Congress. See Anya Bernstein & Cristina Rodríguez, *Activating Statutes* (2023) (unpublished manuscript) (on file with authors).

14. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2284-2303 (2001) (grounding the President's influence over the administrative state in their ability to review agency decisions, give directives, and take ownership over agency actions).

15. See, e.g., Rubin, *supra* note 8, at 2073. Recent scholarship has lent increasing complexity to principal-agent models. See *infra* note 175. However, the common conceptions of accountability as presented in legal doctrine and much legal scholarship continue to assume fairly simple and limited relationships between principals and agents. It is this simplified image that we address.

quite different: broad participation, multifarious input, and ongoing reason-giving characterized as much by negotiation as by supervision.¹⁶ Participants in this process continually justify their positions not just to a particular principal but to many players within the bureaucracy. And supervisors' specific policy preferences often do not precede but rather emerge through policymaking practices themselves. Our findings thus challenge the simplified principal-agent model of agency practice and suggest that accountability can emerge from dispersed, rather than consolidated, authority.

In Part III, we pan out to consider agencies' external relations. Agencies frequently and intentionally react to events in the world and the public opinion that arises from those events. Officials utilize both the formal channels created through the notice-and-comment process and myriad informal, semistructured channels they themselves have opened to engage with the public.¹⁷ In so doing, agencies render themselves subject to evaluation and influence by those whom their decisions affect. Bureaucrats' relative insulation from elections leads some critics to assume that they are walled off from the world – computers in sealed rooms. But lacking a direct electoral connection does not keep administrators removed from regulated entities or the regulated world. Our findings suggest that, on the contrary, agencies have more diverse, frequent, and interactive relationships with the publics and situations they regulate than elections could provide.¹⁸ These ongoing interactions and agencies' attendant concerns with the efficacy of their actions promote accountability as well.

We conclude by considering the implications of the relational, negotiated, and contextual forms of accountability we identify. A popular challenge to the administrative state paints it as undemocratic – in the most sinister formulation, a “deep” state that threatens our freedoms.¹⁹ We find, in contrast, that everyday agency processes facilitate accountability. They build in requirements for officials to continually present ideas to be reviewed, vetted, and tested by other actors who bring to bear different forms of judgment and expertise and who themselves hold meaningful stakes in the policymaking process. Such interactions

16. In this sense, our work contributes to an emerging account of accountability that revolves around pluralistic networks. As Francesca Bignami puts it, scholarship needs to “recast[] administrative law as an accountability network of rules and procedures through which civil servants are embedded in their liberal democratic societies,” which produces both administrative and political accountability. Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMPAR. L. 859, 861 (2011).

17. See Administrative Procedure Act, 5 U.S.C. § 553 (2018) (setting out the core procedures for agency rulemaking).

18. See ROSE-ACKERMAN, *supra* note 10, at 4 (“[V]oting and political parties are not the only proper routes for public sentiment to influence political/policy choices.”).

19. See, e.g., SKOWRONEK ET AL., *supra* note 3, at 3.

routinely lead to the reconsideration of views with respect to legal questions, implementation issues, and policy desirability. These practices provide scaffolding that makes it possible for participants to enact the virtues of accountability: to be pragmatically responsive to social needs, to problem-solve in the public interest, and to justify the exercise of government power. The features of agency decision-making that we uncover are thus worth pursuing as a matter of institutional design, and their potential presence should inform both legal doctrines and political perceptions related to bureaucracy.

Elections, of course, remain crucial to legitimating government,²⁰ and their effects do and should permeate agency decision-making.²¹ But real accountability requires more.²² Narrowing the notion of accountability to the electoral connection instantiates a peculiarly anemic notion of democracy that leaves out

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20. The substantial literature pointing to the frailties of the American electoral system both underscores this point and makes clear the system's present-day limitations. See, e.g., Sanford Levinson, *Our Undemocratic Constitution: Where the U.S. Constitution Goes Wrong (and How We the People Can Correct It)*, 60 BULL. AM. ACAD. ARTS & SCI. 31, 31-33 (2007); ARI BERMAN, *GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA* 10-12 (2015). The system's structural minoritarianism is exacerbated by well-documented practices such as gerrymandering and voter suppression, the disenfranchisement of social subgroups (such as those with criminal records), and so on, which further undermine the possibility of electoral accountability. One would expect those committed to the electoral model to focus on eradicating these pathologies first and foremost.
 21. See, e.g., Metzger, *supra* note 4, at 71 (describing schools of thought in legal scholarship arguing that the "administrative state enables the exercise of unaccountable and aggrandized executive power" because "[u]nelected bureaucrats wield a combination of de facto legislative, judicial, and executive powers outside of meaningful political or judicial constraint"); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 6, 19 (2014) (arguing that administrative power is "extralegal" because the Constitution authorizes only elected members of the legislature, not unelected administrators, to make rules with binding force). This view resembles the "chain-of-legitimacy model," or *Legitimationskette*, of German law. ROSE-ACKERMAN, *supra* note 10, at 3-4. Significant recent scholarship challenges the historical pedigree of this view of legitimacy in the United States. See, e.g., Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1302-04 (2021); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279-80 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 86-88 (2021).
 22. Scholars have drawn attention to the limits of elections. See, e.g., Rubin, *supra* note 8, at 2077-83; Staszewski, *supra* note 8, at 1269-70; David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 123 (2000) ("Even if voters do choose politicians who share their personal values, politicians' policy choices are not always driven by those personal values. Rather, the relative immediacy and complexity of the electoral connection for politicians offers a great deal of opportunity for values that differ from those of the median voter to influence the policy choices of elected politicians."); Spence & Cross, *supra*, at 124 (noting that politicians may cater to "particular constituencies," play off the high or low salience of particular issues to particular groups, and generally let "self-interest, the desire for re-

many of the traits that make democratic governance normatively attractive.²³ Doing so amounts to insisting that elections do work for which they are not suited and ignores most of the accountability-forcing work that needs to be done. The legitimation produced through elections finds its complement in the practices we detail here, which build accountability into government work itself. In some sense, then, the imprecation that “unelected bureaucrats” are unaccountable is a complaint about the wrong thing: if bureaucrats are unaccountable, it is not because they are unelected but because they do not utilize the accountability structures that administration provides.²⁴

Unfortunately, the Supreme Court has begun to severely constrain the administrative state in the name of this anemic conception of democracy. Suspicion of the unelected bureaucrat is used to justify limiting both how Congress can design the regulatory state²⁵ and how agencies can address urgent problems in their statutory purview.²⁶ The Justices support these limits in the name of democracy, but their reliance on a formalistic conception of democratic legitimacy, unmoored from actual practices, threatens to undermine, rather than strengthen, agency accountability.

election, [] contaminate the policy choice”); *see also* Spence & Cross, *supra*, at 124 (“When an elected politician makes a policy choice so as to minimize the adverse electoral consequences of that choice at the next election, that decision may reflect a variety of values that are different from those that would have guided the median voter under those same circumstances.”).

23. Indeed, insisting on thorough presidential control may actively undermine accountability. For instance, Heidi Kitrosser has argued that the unitary executive vision allows the President “to shield or manipulate the very information” that voters need to make an informed decision. Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1743 (2009). It obscures the multiple people and processes involved in decision-making “with a single, intrinsically opaque and relatively inaccessible formal decision maker,” but still allows the President to “distance himself from unpopular decisions” by pinning the blame on “inferiors within an opaque executive branch.” *Id.* A model that puts all the responsibility in the single presidential node, then, undercuts accountability by impeding information flow. *Id.* Moreover, “empirical evidence . . . does not support the claims that independent bureaucrats advance their own interests at the expense of the commonwealth; to the contrary, greater independence may better promote the public interest.” Spence & Cross, *supra* note 22, at 119.
24. The crucial role of administration in democratic governance was recognized long ago: as Max Weber noted, “Bureaucracy inevitably accompanies modern mass democracy.” 2 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 983 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff trans., 1978) (emphasis omitted).
25. *See supra* notes 1-2 (collecting cases); *see also* Cristina M. Rodríguez, *The Supreme Court, 2020 Term—Foreword: Regime Change*, 135 HARV. L. REV. 1, 117-20 (2021) (arguing that the Court’s recent removal-power jurisprudence “prevents Congress from making complex trade-offs and determining how best to sustain good governance and legitimacy within the administrative state”).
26. *See* Rodríguez, *supra* note 25, at 110-16 (discussing the antidemocratic consequences of the major questions doctrine).

Our analysis also departs from a common assumption that government accountability depends largely on strict hierarchy or principal-agent relationships. The simplified principal-agent model, the foundation of much doctrine and legal scholarship on the administrative state, cannot account for the wealth of mutual accounting we found cutting across institutional hierarchies: the peers who needed to justify their positions to one another, the political appointees who had to persuade career staff to move an idea forward. These relationships, even when strictly speaking hierarchical, often do not function on a command-and-control basis. The model also fails to capture the dynamic development not just of policies but of policy preferences. It is often not the case that a superior commands a subordinate to carry out a predetermined policy position. Such a position is just as likely something that develops in the policymaking process itself: deliberation shapes preferences.²⁷ Of course, agencies provide many opportunities for superiors to give clear instructions that subordinates must obey. But taking the simplified principal-agent relationship as the model for government action obscures more than it reveals.

In addition to challenging some of the conventions of administrative law, our research contributes to a growing field of empirical studies of bureaucracy, which to date has focused largely on the “street-level bureaucrats” who make individualized determinations in a given policy context.²⁸ We study instead those we might call *elevator-level* administrators—the ones who produce the policies to begin with.²⁹ We do so not to explain how any particular policy was produced or how any specific agency functions, but rather to illuminate policymaking

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27. This is a universal phenomenon, not something unique to administration. Cf. James S. Fishkin, *The Televised Deliberative Poll: An Experiment in Democracy*, 546 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 137 (1996) (finding that participants in an information-gathering and deliberation experiment came to “new, considered judgments” over the course of deliberation).
28. See Michael Lipsky, *Street-Level Bureaucracy and the Analysis of Urban Reform*, 6 URB. AFFS. Q. 391, 392 (1971); see also Daniel E. Ho & Sam Sherman, *Managing Street-Level Arbitrariness: The Evidence Base for Public Sector Quality Improvement*, 13 ANN. REV. L. & SOC. SCI. 251, 252-53 (2017) (surveying this literature); Tatjana Thelen, Larissa Vetter & Keebet von Benda-Beckmann, *Stategraph: Relational Modes, Boundary Work, and Embeddedness*, in STATEGRAPHY: TOWARD A RELATIONAL ANTHROPOLOGY OF THE STATE 1, 1-2 (Tatjana Thelen, Larissa Vetter & Keebet von Benda-Beckmann eds., 2018) (collecting chapters analyzing “how specific state constellations and boundaries emerge and are reproduced or dissolved”); Bernardo Zacka, *Political Theory Rediscovered Public Administration*, 25 ANN. REV. POL. SCI. 21, 22-24 (2022) (discussing the recent interest of political theorists in the administrative state).
29. We also build on studies which have taken the kind of synthetic, transsubstantive view we do here. See generally MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS?: POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS (2000) (finding the complex interplay between political appointees and civil servants to be central to policymaking in a time of political change); JOEL D. ABERBACH & BERT A. ROCKMAN, IN THE WEB OF POLITICS: THREE DECADES OF THE U.S. FEDERAL EXECUTIVE (2000) (finding high responsiveness to legislative impetus in the administrative state).

trends and mechanisms broadly operative in the administrative state.³⁰ Given the variety of agency forms and cultures within the American bureaucracy, we do not claim that our picture is comprehensive. But our interviewees, dispersed across different roles in various agencies, overlapped sufficiently in their descriptions of agency practices to provide important empirical insight into the relationship between administrative policymaking and a well-functioning democracy.³¹

We do not claim that administrative agencies are accountable in some transhistorical, inherent way. Accountability inevitably depends on empirical realities that differ across circumstances: institutions can be more or less, and also differently, accountable depending on their participants, their structures, their cultures, and so on.³² Instead of asking whether an institution is accountable, we ask what scaffolds it provides to support and channel accountability. Such scaffolds do not themselves create accountability. There is always the possibility that

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30. A range of illuminating work has been done on specific agency processes. *See, e.g.*, DANIEL CARPENTER, *REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA* (2010) (exploring the ways in which the Food and Drug Administration (FDA) has cultivated a reputation for competence and vigilance and the impact of that organizational image on the agency's effectiveness as a regulator); R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* (1983) (discussing the impact of court decisions on the Environmental Protection Agency's (EPA's) policymaking processes); ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* (2020) (discussing the leading role of the presidency and the executive branch in the formation of immigration policy); Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 *LAW & CONTEMP. PROBS.* 57 (1991) (canvassing the internal dynamics of EPA's rulemaking process).
31. Our interviewees worked in presidential administrations from President George H.W. Bush to President Trump, though only a few worked in either bookend administration. The majority worked in the Obama Administration. We assume that some policymaking practices changed significantly over this long stretch of time. Particularly during the Trump Administration, some political appointees were reported to have had the explicit goal of enervating the bureaucracy. *See generally* David L. Noll, *Administrative Sabotage*, 120 *MICH. L. REV.* 753 (2022) (providing several examples of this phenomenon). Political control and interagency processes surely changed in response. Still, given the density and longevity of the bureaucracy as compared with any particular presidential administration, the breadth and complexity of the structures and practices we identified seem likely to persist. And our study provides insight into the supports available for administrations who do not seek to undermine the statutory mandates of the agencies they staff.
32. *See* Anya Bernstein, *Bureaucratic Speech: Language Choice and Democratic Identity in the Taipei Bureaucracy*, 40 *POL. & LEGAL ANTHROPOLOGY REV.* 28, 42 (2017) (arguing that bureaucracy is "an always localized phenomenon[,] . . . a loose organizational form that maintains certain similarities over times and places, but is always situated within, and reflective of, very particular sociocultural contexts and historical trajectories, with their attendant values, beliefs, and practices").

people will shirk, undermine, or attack them.³³ But these scaffolds encourage and enable accountability. Those we found in our work rest upon an assumption of pluralism, provide means for mediating differing interests, and build responsiveness to outside interests and events into agency action. Again, these findings do not mean that the bureaucracy *will* necessarily be accountable; but they do mean that it has developed tools for accountability – tools that we should understand, defend, and even replicate.³⁴

While we do not claim to present a complete or eternal picture of government accountability, our study raises normative and political questions that discussions of accountability too often ignore: questions about why accountability matters, what purposes it serves, and what it should look like in practice. That is, we not only provide empirical insight into accountability practices but advance the theorization of what accountability entails. We show that the bureaucracy can be accountable even though the officials who comprise it are unelected. But we also resist overclaiming the democratic bona fides and efficacy of presidential control. Our research should thus change how we think about accountability in the state and inform how we structure institutions to achieve it.

* * *

Before we get to our findings, a word on our methodology.³⁵ Much of the information and insight of this project comes from thirty-nine in-depth, open-ended interviews with political appointees and career civil servants from eleven agencies, small and large, old and new, benefit-managing and conduct-regulating. Interviews are useful for eliciting new information and unknown views because they solicit participant perspectives, experiences, and ideas. Our primary objective in conducting the interviews was to better understand agency statutory interpretation and policymaking, and we therefore inquired into interpretive approaches and tools; relations to Congress, the President, other agencies, and states; judicial influence; and participants' views on how agencies work with statutes. We asked no questions about accountability. Our conclusion that the practices interviewees described promoted government accountability emerged

33. See, e.g., Noll, *supra* note 31, at 763-65 (explaining the concepts of administrative sabotage, slacking, drift, and capture).

34. See Bernstein, *supra* note 8, at 42 (“Whether accountability is available, and what it looks like . . . depends not on some underlying relation between actor and action, but on the scaffoldings that structure the interpretation of action in particular social arenas. Understanding accountability scaffoldings in particular social realms is thus central to understanding the nature of accountability generally. Indeed, it may be more accurate not to speak of accountability generally, but only of local tropes of accountability.”).

35. The Methods Appendix describes our research process and methods in greater depth.

from our engagement with the interview transcripts, not from our subjects' self-descriptions.

In devising our interview protocols, we did not aim to produce structurally identical, easily comparable responses; we sought instead complex, nuanced images of administration from the bureaucrat's point of view.³⁶ To find resonances in these disparate conversations, we identified major categories of analysis in the interview transcripts and coded each passage with its relevant categories.³⁷ This engagement with the material also yielded an ambient sense of how our subjects' descriptions converged, which further guided our approach to the data.³⁸ Data collection, coding, and interpretation were informed by the qualitative methods of anthropology, which seek to explain how people create social orders and meanings.³⁹ Through this process, we recognized that our respondents described everyday work practices that corresponded to the values that scholarship and political discourse often demand of accountable democratic governance.

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36. See Clifford Geertz, "From the Native's Point of View": *On the Nature of Anthropological Understanding*, 28 BULL. AM. ACAD. ARTS & SCI. 26, 29 (1974) ("The trick is to figure out what the devil they think they are up to."). We did not attempt a true ethnography of our subjects in the tradition of anthropology, but we conducted and analyzed our interviews with an "ethnographic attitude," that is, an eye to understand how systems and processes make sense from the inside, as well as evaluating them from the outside. Anya Bernstein, *Saying What the Law Is*, LAW & SOC. INQUIRY (forthcoming) (manuscript at 1-2), <https://ssrn.com/abstract=3990976> [<https://perma.cc/GU55-QSWF>].
37. We developed the codes and coded the transcripts along with a team of research assistants, which brought numerous views of the data into play at this key point. See Antony Bryant & Kathy Charmaz, *Grounded Theory Research: Methods and Practices*, in THE SAGE HANDBOOK OF GROUNDED THEORY 1, 1 (Antony Bryant & Kathy Charmaz eds., 2007) ("[Grounded theory] method is designed to encourage researchers' persistent interaction with their data, while remaining constantly involved with their emerging analyses The iterative process of moving back and forth between empirical data and emerging analysis makes the collected data progressively more focused and the analysis successively more theoretical.").
38. See Anne Rawls, *Harold Garfinkel*, in THE BLACKWELL COMPANION TO MAJOR CONTEMPORARY SOCIAL THEORISTS 122, 122-23 (George Ritzer ed., 2003) (describing "ethnomethodology" as investigating the "shared methods" that people have "for achieving social order that they use to mutually construct the meaningful orderliness of social situations," on the understanding that "the meaningful, patterned, and orderly character of everyday life is something people must work constantly to achieve").
39. Bernstein, *supra* note 36 (manuscript at 3) ("Analyzing an ethnographic object involves recognizing it as a social product: shot through with cultural forces and exerting social effects. It also involves taking multiple perspectives on the object of analysis to explain how the social phenomenon makes sense to the people who engage in it, exploring how that sense-making fits into larger contexts, and illuminating some of what it leaves out or glosses over. Ethnographic inquiry seeks to approach its objects from many directions at once. We view our objects from the inside, but we also take perspectives that diverge from those the objects themselves suggest, and we stay on the lookout for implicit underpinnings and effects.").

Like any method, ours provides only a partial view of the object of analysis. Our limited number of participants constrains the range of experiences we encompassed, though we find this limitation in breadth amply balanced by the depth of discussion elicited by our wide-ranging, lengthy interviews. The extent to which our institutionally diverse respondents converged on key parts of their work leaves us confident that we have identified some central aspects of our administrative state.

I. THE POLITICAL CONNECTION

Courts and commentators tend to present agency accountability as defined by a direct connection from voters to the President through to the work of agencies. Recent Supreme Court jurisprudence on the removal power, for instance, posits that this connection helps to ensure agency accountability, concluding that the President, therefore, should not be constrained in firing certain agency officials.⁴⁰ Many scholars also have cited policy direction by the President—a form of supervision more continuous than the removal power—as crucial to accountability.⁴¹ For proponents of the unitary executive, this presidential control is required by the Constitution.⁴² Even champions of administrative governance who reject this formal theory often regard such control as inevitable, desirable, or necessary for ensuring accountability.⁴³

We agree that presidential control of the administrative state is both important and entrenched. But we argue that it is also subsumed within the larger phenomenon of political control, which is defined by the interplay between political appointees and civil servants. This political connection offers a much more

40. See, e.g., *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197–2200 (2020); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010); *Myers v. United States*, 272 U.S. 52, 125 (1926).

41. The situation described in the classic account of this phenomenon has arguably only deepened in the last two decades. See Kagan, *supra* note 14, at 2284–2303 (discussing presidential influence over the administrative state through the President’s ability to review agency decisions, give directives, and take ownership over agency actions).

42. In defending this conception, Steven G. Calabresi, for example, writes that “[t]he President of the United States and his subordinates are the conscious agents of . . . a national majority coalition [M]ost presidents . . . will work every day they are in office to try to keep their policies in accord with the wise and benevolent preferences of the national majority” Calabresi, *supra* note 5, at 67.

43. Elena Kagan makes the relative case for presidentialism, arguing that, while “responsiveness to the general electorate is not the sole criterion by which to assess administrative action . . . the President holds the comparative advantage” on that metric as compared to Congress. Kagan, *supra* note 14, at 2336–37.

diffuse link to voters than the stylized presidential control story suggests, but the connection permeates policymaking.⁴⁴

As an empirical matter, we show that Presidents generally have a highly attenuated relationship with any particular agency decision. They may set the tone, provide guiding values, or determine the orientation of an agency. But a President would very rarely be involved in any particular decision-making process or even express a specific view on one. Given the sheer number of agency decisions, such limited involvement is hardly surprising. Government policymaking is ongoing and involves myriad processes and influences that defy complete centralization. Meanwhile, elections provide limited guidance and information on policy issues.⁴⁵ They pose periodic yes-or-no, all-or-nothing

44. For an exploration of the relationship between presidential elections, the advent of a new administration, and political and democratic control over administrative policymaking, see Rodríguez, *supra* note 25, at 70-77.

45. In this sense, we believe the debate over whether the President can reflect or advance popular will through direct involvement in governance is a distraction, in no small part because of the extensive work challenging the presidency's representativeness and questioning whether officials are effectively held accountable by voters. See Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 317 (2019) (noting that the presidential administration argument was controversial "from the start" for favoring concentration of power in a single source that might ignore the will of the majority); Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 633-34 (2016) (critiquing presidentialism on the ground that a winning presidential candidate's platform only weakly correlates with majority preferences, and that "even well-functioning majoritarian processes can run roughshod over minority interests"); Staszewski, *supra* note 8, at 1266, 1279 (defending accountability through reason-giving requirements by attacking political control theories' central assumption that elected officials are accountable to the will of the people); Spence & Cross, *supra* note 22, at 123-24.

choices.⁴⁶ Expecting presidential elections to impose the kind of accountability required by a republican democracy ultimately asks too much.⁴⁷

This is not to say that the electoral connection is irrelevant to policymaking. The torrent of executive orders President Biden issued in his first month in office, mostly directing agencies to perform actions within their statutory authorities, underscores that a President's "ownership" of administration can generate the perception of accountability and respond to one conception of his electoral mandate.⁴⁸ But our research points to a presidential influence that operates in a less direct, more diffuse way – largely through the figure of the political appointee.

When a new administration takes office, key decision-making personnel change, subjecting government to the consequences of elections and linking the administrative state to a democratically elected figure. But as our interviewees consistently highlighted, political officials do not usually act as the President's direct agents. Instead, they spread broad presidential values or orientations through the administration in a way that complements the work of career civil servants, the usually longer-lasting colleagues who populate the state. This cru-

46. Presidents in particular face only two possible elections, usually against only one plausible opponent, and can be elected by a popular vote minority. Levinson, *supra* note 20, at 33 ("Because of the way the Electoral College operates, we have regularly, since World War II, sent to the White House presidents who did not have a majority of the popular vote."). Some scholars imagine the President as a particularly responsive elected official with a strong connection to the people's needs and desires. See, e.g., Calabresi, *supra* note 5, at 58. Yet the structure of American presidential elections argues against such a result. Moreover, since the Administrative Procedure Act (APA) does not apply to Presidents, the public has few opportunities to contest presidential decisions in court. *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992). See generally William Powell, *Policing Executive Teamwork: Rescuing the APA from Presidential Administration*, 85 MO. L. REV. 71 (2020) (describing the contours of the President's exemption from the APA's procedural requirements). For an overview of political-science literature that questions political-accountability models on empirical grounds, see Christopher J. Anderson, *The End of Economic Voting? Contingency Dilemmas and the Limits of Democratic Accountability*, 10 ANN. REV. POL. SCI. 271, 276-78 (2007).

47. Some mechanisms do draw attention to a President's policymaking role, which in turn might evoke reactions from the electorate. Congress, the media, and Presidents themselves may throw light on executive action. The Supreme Court may use its review powers to "ensure that the public has a fair opportunity to evaluate and respond to" presidentially influenced agency decisions. Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1755 (2021); cf. Rodríguez, *supra* note 25, at 102, 108, 117-20 (treating the Court's accountability justifications for blocking administrative action skeptically). All this can, at the margins, influence how voters think about Presidents or their parties. But elections themselves are only tangentially related to accountability for any specific policy decisions.

48. See generally Rodríguez, *supra* note 25 (arguing that the large-scale changes instituted by new presidential administrations are both common and compatible with democratic governance).

cial relationship, we contend, undergirds accountability by bringing complementary decision-making modalities to bear on policymaking, including decision-making attuned to the demands and needs of political constituencies.

In academic literature, the political-career relationship is sometimes presented as dichotomous, rivalrous, or contentious. But our interviews reveal its productive possibilities. The political connection matters greatly to agency accountability, we argue, due less to its direct link to an electorate than to the relevant forms of reasoning it introduces into agency decision-making—an epistemic advantage that helps support a thick notion of ongoing accountability.⁴⁹ The interplay of multiple forms of judgment we describe helps provide reasoned justifications for policy choices responsive to facts, interests, and public opinion on the ground—essential features of democratic governance that elections themselves cannot provide.⁵⁰

A. *Perspectives on the White House*

Presidential control takes center stage in public commentary and academic literature concerning political influence over the bureaucracy, so we begin there.⁵¹ Our interviews made clear that the White House is integrated into the

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49. The other obvious political connection is with members of Congress. We leave exploration of this connection to another paper because it is intimately connected to our inquiry into how agencies understand their relationships to their statutes. To preview a core argument of that paper: interactions between agencies and members of Congress are plentiful, but agencies see their duty as first and foremost to their statutes and the regimes those statutes have created, not to the enacting Congress, and certainly not to the current Congress.
50. Our more holistic view underscores the importance of the political connection without overclaiming or oversimplifying the role of the President. It also serves as a counterweight to critics who lament that presidential control has displaced authority delegated to agency officials, undermined bureaucratic independence, and threatened the separation of powers by divorcing the implementation of statutory regimes from congressional plans and oversight. See, e.g., PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY*, at vii-xi (2009) (arguing that the “increasingly assertive claims to unilateral presidential authority” and the failure of Congress and the courts to check this assertion of power, threaten constitutional democracy); Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 *UCLA L. REV.* 104, 111-12, 114-15 (2021); Ashraf Ahmed & Karen M. Tani, *Presidential Primacy Amidst Democratic Decline*, 135 *HARV. L. REV. F.* 39, 43-47 (2021).
51. See, e.g., Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 *MICH. L. REV.* 47, 73-74 (2006).

agency policymaking process.⁵² Irrespective of continuing debates about its desirability, presidential control has become entrenched.⁵³ At the same time, centralization remains incomplete. For one thing, the key actor is not the individual President but the White House bureaucracy: the Executive Office of the President (EOP). Presidential control thus matches the contours of the administrative state: as in other agencies, EOP functions are delegated to a combination of political and career officials with domain-specific expertise. The growth of presidential control has thus been accompanied by a diffusion of power and expertise. This is compatible with our general findings, which suggest that accountability arises from the diffusion of authority rather than its concentration.

Our interviews surfaced two models of White House control. One involved formalized interaction between EOP and agency personnel, including through the well-studied mechanisms of review by the Office of Management and Budget (OMB) and its Office of Information and Regulatory Affairs (OIRA). The other model involved the diffusion of presidential policy priorities throughout the executive branch. Interviewees noted that such priorities were usually not conveyed directly but still formed a part of almost every official's understanding of the factors relevant to policymaking and even statutory interpretation. Such preference diffusion – not especially visible in the literature on presidential control – is another way in which the White House becomes relevant to agency decision-making. Its prime driver is the political appointee, who functions as both an avatar of the President and an independent source of insight distinct from, but complementary to, the civil servant in the apolitical bureaucracy. In this Part, we show that the phenomenon of presidential control turns out to be something less (more limited in its reach) than what both proponents and detractors claim, as well as something different.⁵⁴

52. The one exception to the general thrust of our interviews was the Federal Trade Commission (FTC), a so-called independent agency. Some of our interviewees from the FTC did report interacting with the White House, but their interactions were different in kind. And though the interviewees clearly possessed policy priorities pursued through particular enforcement agendas, those priorities did not clearly diffuse from or change in response to a new political regime in town.

53. Even calls for reform often involve marginal changes, such as more transparency or subtle shifts in the distribution of power. See, e.g., Bressman & Vandenberg, *supra* note 51, at 92–98 (recommending reforms along these lines); Steven Croley, *White House Review of Agency Rule-making: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 879, 881 (2003) (acknowledging that the Office of Information and Regulatory Affairs (OIRA) review process could be improved through increased transparency).

54. For skepticism of presidential control as an empirical matter, see, for example, Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1760, 1771–77 (2013).

1. *Direct Collaboration and Control*

As our interviews highlighted, EOP constitutes an elaborate environment made up of numerous components that shape policy across the administrative state, chief among them the Domestic Policy Council (DPC), the National Economic Council (NEC), and OMB. Of these, the functions of OMB are the most visible in the academic literature and the most formalized within agency practice.⁵⁵ Indeed, the executive orders centralizing the regulatory agenda, which date back to the Reagan Administration, are by now constitutive documents.⁵⁶ OMB's functions include not only OIRA regulatory review but also the inter-agency processes utilized to coordinate policy development across agencies, as well as the production of the President's budget, which involves heavy participation (and competition) by agencies.⁵⁷ Just about all of our interviewees expressed awareness of these regulatory review processes, making observations about OIRA, in particular, that echoed scholarship by proponents and detractors alike: OIRA "slow[s] the process down,"⁵⁸ has the convening power to "pull

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55. See, e.g., Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2185 (2016) (describing "scholarship on administrative law" as "replete" with analyses of the functions of the Office of Management and Budget (OMB)); Croley, *supra* note 53, at 821 (examining presidential efforts to "exert greater control over regulatory agencies" through the OIRA review process); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 185 (1986) (same). See generally John D. Graham, *The Evolving Regulatory Role of the U.S. Office of Management and Budget*, 1 REV. ENV'T ECON. & POL'Y 171 (2007) (providing several case studies illustrating OIRA's role in the regulatory process and its relationship to the presidency).
56. See Pasachoff, *supra* note 55, at 2201 & n.80 (positing that "the scope of OIRA's review under President Reagan was unprecedented," and since Reagan "[e]very President . . . has required executive agencies to submit significant regulatory actions to OIRA for approval and to conform those regulations to various cost-benefit principles as justified in a Regulatory Impact Statement"); see, e.g., Exec. Order No. 12291 (1981) (creating this requirement).
57. See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1178-81 (2012) (describing how the OMB review process can promote interagency coordination); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 826 (2015) (discussing OMB's mediation of interagency coordination in rulemaking); Pasachoff, *supra* note 55, at 2186 (describing the presidential budget process as "a key tool for controlling agencies").
58. Interview Comment No. 468. Interview Comment citation numbers refer to the unique numerical identifier we gave each comment after coding all interviews and compiling spreadsheets of comments with each code. For a detailed description of our coding approach, as well as other information about the research process, please see the Methods Appendix.

people together,”⁵⁹ and can determine who will resolve conflicts (the DPC, the White House Counsel, or interagency negotiation overseen by OIRA).⁶⁰

One consistent theme in these discussions was that White House involvement varied greatly, occurring on what we would call a political timeline. Numerous interviewees underscored that a new administration heightens White House activity, demonstrating the proverbial desire to hit the ground running.⁶¹ Similarly, just as the enactment of a new statute generates a flurry of agency interpretations, it also prompts attention to the work of agencies from the White House.⁶² White House involvement ultimately ranged from regularized, sometimes daily, contact to episodic, events-driven, and context-dependent interaction.

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59. Interview Comment No. 95; *see also* Interview Comment No. 1293 (indicating the White House’s role in guiding interagency and intra-agency decision-making).
60. Interview Comment Nos. 472, 709, 785; *see also* Interview Comment Nos. 471, 708 (noting that OIRA itself must sometimes go up the White House chain of authority). In part because our aim was not to study regulatory review, few of those with whom we spoke were identified for their intimate familiarity with the process, and we cannot purport to shed light on the core debate over whether these offices’ functions are above all else coordinating ones, or whether they exert substantive and structurally biased forms of control over agency policymaking that favor deregulatory interests, as is sometimes suggested in the debate over cost-benefit analysis. *Compare, e.g.,* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1841 (2013) (“While OIRA’s own views may well matter, OIRA frequently operates as a conveyor and a convener.”), *with* Lisa Heinzerling, *Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV’T L. REV. 325, 352 (2014) (discussing OIRA’s imposition of cost-benefit analysis on health, safety, and environmental rules, which “produce benefits—in human health, in longer life, in cleaner air and water and land—that are hard to quantify and even harder to monetize,” suggesting a bias against regulating health, safety, and environmental harms).
61. Interview Comment No. 1223 (“We’re almost at the point now where every time a new administration comes in, they’re gonna change all the policies and regulations and it’s gonna be like a pendulum, just swinging back and forth every four or eight years. The regulated community is gonna constantly be swinging back and forth with it. Not ever really knowing what the long term rule is gonna be because there’s not gonna be one.”); *see* Interview Comment No. 253 (“Some of [regulatory change is] driven by new administrations coming in, and they want to see things done differently or an emphasis on one thing or another.”); Interview Comment No. 274 (explaining that part of resolving statutory ambiguities includes considering whether there is “a particular philosophy within a given administration”); *see also* Anne J. O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 891 (2008) (noting that new presidential administrations issue “‘crack-of-dawn’ regulations or suspensions . . . straight out of the gate, and withdrawals of uncompleted regulations begun under [the outgoing administration]”).
62. This was especially clear in conversations about the Affordable Care Act (ACA), the implementation of which became the object of intense White House oversight when it was enacted. *See* Interview Comment No. 4 (noting that the White House Office of Health Reform had “a massive chart” with a multiyear schedule for the production of ACA regulations).

Take, for example, DPC involvement in agency policy processes, which interviewees described as turning on an issue's political salience or the presence of congressional pressure.⁶³ One interviewee contrasted the “ministerial” norm of working with OMB through a regular clearance process on the one hand, with DPC involvement, which occurred when “a really hot political issue that Congress is paying a lot of attention to, that the administration has a lot of interest in” emerged, on the other.⁶⁴ Another emphasized that the more “political” the particular issue involved, the more likely the White House was to get involved in procedural matters during rulemaking.⁶⁵ And where a policy or legal conflict emerges between agencies – something that can pique interest on Capitol Hill – the White House might act as mediator.⁶⁶ Some decisive factors in White House involvement have nothing to do with policy substance at all: “Quite frankly,” one interviewee noted, “it’s a political issue to have too many regulations on the docket in any given period.”⁶⁷ OMB sometimes limits the number of rulemaking proceedings published at a given time, especially in the run-up to an election.⁶⁸

White House officials were frequently portrayed as mindful of where and when their interventions would be successful and perceived as legitimate, suggesting a situational awareness that policymaking capacity lies first and foremost

63. Interview Comment No. 301 (“Usually, OMB was the one that you spent 80 to 90% of your time with. Then the others, DPC and some of the others would get involved if there was a really hot political issue that Congress is paying a lot of attention to, that the administration had a lot of interest in that kind of escalated.”); Interview Comment No. 302 (“[I]t was a hot political issue. Anything dealing with immigration is hot political issue that rises up to that stage . . . Then of course, you got Department of Homeland Security that wants to be part of that conversation. A lot of folks at the White House want to be part of that conversation, so those kind of issues are the ones that kind of escalate to that kind of level.”); Interview Comment No. 304 (noting that officials within the Executive Office of the President (EOP) would not see an issue “until it hits the White House . . . radar screen when it’s there with them because there are just so many things going on”); Interview Comment No. 601 (“There’s a lot [of] interest in making sure that there’s consistency when you have two different agencies enforcing different titles.”).

64. Interview Comment No. 301.

65. Interview Comment No. 10 (discussing the decision whether to proceed through Interim Final Rule or issue a Notice of Proposed Rulemaking (NPRM) within an agency); *see also* Interview Comment No. 453 (characterizing the choice to enact the Deferred Action for Parents of Americans (DAPA) immigration relief program, and the timing of its enactment, as a political choice made knowing Congress would not be pleased).

66. Interview Comment No. 226; *cf.* Interview Comment Nos. 18, 225 (discussing an interagency policy disagreement about the implementation of the ACA that was elevated for White House resolution).

67. Interview Comment No. 1293 (“And I don’t think that this is unique to our administration, I think if any administration. You start reaching out to all the agencies and saying, ‘Okay, we’re gonna limit the number of regulations on the docket to X.’”).

68. *Id.*

with the agencies. OIRA must weigh “how much political capital [it] is willing or able to expend to overcome agencies’ objections.”⁶⁹ OMB must pick its battles.⁷⁰ Even where a particular White House has articulated high-level policy interest and pushed an agency to figure out “what it can do with its regulatory arsenal,” White House officials might still be reactive to agencies, particularly where policy depends on the agency’s technical expertise.⁷¹ Legal interpretation, in particular, was understood to be largely in the hands of agency general counsels or the Department of Justice, with OMB’s general counsel listening, consulting, and even cajoling;⁷² on matters of direct concern to the President and senior White House staff, though, the White House Counsel’s Office might weigh in or even seek to steer the administration’s course.⁷³ White House involvement

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69. Interview Comment No. 468; *see also* Interview Comment No. 1751 (citing awareness of potential resistance and friction with agencies).
70. *See* Interview Comment No. 125 (citing, as an example, the decision by OMB under the George W. Bush Administration to abandon efforts to review all agencies’ guidance documents).
71. Interview Comment No. 429; *see also* Interview Comment No. 474 (describing agency-driven policymaking in immigration, despite intense White House interest in the subject); Interview Comment No. 1412 (explaining similar dynamics within EPA). Interviewees also noted that, at times, the White House would rely on OMB’s advice about the feasibility of implementing particular policy priorities. Interview Comment No. 160.
72. Interview Comment No. 468 (noting that OIRA plays a “big role” in making sure “everyone is happy” but that “everyone resents DOJ in some respects, because they have a lot more power”); Interview Comment No. 641 (observing that DOJ’s opinion mattered more than “any other agency” in the OMB process); Interview Comment No. 715 (noting the importance of getting DOJ “on board” during interagency process). On OMB’s role in legal interpretation, *see* Interview Comment No. 532, which notes that OMB or the White House would sometimes have views about legality, particularly where something was “known to be high litigation risk,” but that legal analysis entailed a multilayered process; Interview Comment no. 711, which recalls that OMB was “very aggressive and deeply involved” in statutory interpretation with some agencies but not others; Interview Comment No. 713, which notes that OMB “were difficult because unlike the other agencies, they had veto power. You could say, ‘Thank you very much for your submission,’ to another agency as long as OMB let you do that, but if OMB thought that your statute meant something you thought the statute didn’t allow then OMB might well prevail, because they have to approve the rules”; Interview Comment No. 1265, which describes the process of persuading OIRA to permit agency to proceed through direct final rule rather than notice and comment; and Interview Comment No. 1383, which observes that “you might think it should be a certain way but if agencies or OMB are not going to buy off on that interpretation you have to come up with something that’s acceptable to them,” including by being mindful of impact on other agencies.
73. Interview Comment No. 100 (“Sometimes White House Counsel would get involved to help mediate.”); Interview Comment No. 1572 (“But we did have consultations with both DPC and White House Counsel throughout this process on both big issues and sort of smaller legal issues.”); Interview Comment No. 532 (“Both OMB, General Counsel and White House Counsel would sometimes have thoughts on legal viability again, most often when it was something that was known to be high litigation risk.”).

thus emerged in our study not as a top-down process displacing agency judgment with that of the President or his advisors but rather as a collaborative and participatory process.⁷⁴

One especially significant counterexample provides an exception that proves the rule. Implementing the Affordable Care Act (ACA) involved the creation of “a shadow control system in the White House” through which decisions made at the agency level were “second-guessed through review in the White House politically.”⁷⁵ As one interviewee told us, the White House “exercised a very heavy hand, it’ll blow your mind, how strict and detailed that oversight was.”⁷⁶ The President’s investment in the ACA meant that its implementation could not “just fall into bureaucracy.”⁷⁷

This parallel bureaucracy arguably presents the sorts of concerns expressed by critics, including Obama-era congressional Republicans, who object to White

74. Of course, frustration, resentment, and inefficiency can emerge from this sort of relationship, and some interviewees expressed such sentiments. One interviewee noted that several White Houses had demonstrated considerable interest in higher education, but only one of the two in which this person worked had the view that “you people don’t really know what you’re doing And if we didn’t press, you wouldn’t move, and it was not just your policy directions we would like you to do, but you will show up every week to report to us on how it’s going.” Interview Comment No. 581. In our interviews, this perspective was not prevalent. However, it is certainly possible for particular presidential administrations to work to centralize and control policymaking or to convert existing bureaucratic relationships into strict hierarchies. There are indications that President Trump’s White House attempted something like this in certain domains, though to what extent that project succeeded in producing centralization rather than dispersed and chaotic administrative sabotage remains to be determined. See Kathryn Kovacs, *From Presidential Administration to Bureaucratic Dictatorship*, 135 HARV. L. REV. F. 104, 110-11 (2021) (arguing that “Presidents have created new mechanisms for controlling the substance of broad swaths of regulatory activity,” and that President Trump made “unprecedented forays into agency adjudication” and heightened politicization of the “hiring and firing of all federal employees in policymaking positions”); Noll, *supra* note 31. For a detailed account of the Trump Administration’s efforts to assert political control over immigration policy, which required centralization at the Cabinet and White House levels but also empowered the bureaucracy, see COX & RODRÍGUEZ, *supra* note 30, at 184-88.

75. Interview Comment No. 2; *see also* Interview Comment No. 651 (stating that any regulation that would impact the ACA was carefully vetted at the White House level).

76. Interview Comment No. 2. Among the means by which it accomplished this oversight was to create a pop-up bureaucracy in the White House that generated implementation ideas, oversaw officials, and pulled expertise from the Office of Health Reform in the Department of Health and Human Services (HHS), which was itself created at the start of the Obama Administration as a nerve center of policy. Interview Comment No. 7 (describing the White House Office of Health Reform and recalling that “we had to go to meetings at the White House to answer questions about very small individual elements” of a draft NPRM that ran over a thousand pages long).

77. Interview Comment No. 58; *see also* Interview Comment No. 72 (describing the importance of implementing the ACA to President Obama’s White House).

House “czars” and EOP expansion. And yet, in our interviews, such strong White House direction was highly exceptional. Most regulation is not like the implementation of the ACA—the comprehensive legislation that dominated Obama’s first term and was implemented in a politically hostile environment. The ACA’s exceptional quality should deflate concerns about presidential control supplanting agency judgment.

Our research ultimately suggests that, irrespective of disputes about how much legal authority the President has to set agency policy,⁷⁸ in practice, contemporary Presidents do not appear to personally make much policy in the normal course of things. It certainly would be possible for a President to claim more direct control of the regulatory process. Our interviewees’ descriptions of the White House’s exceptional ACA bureaucracy, however, suggest that extending such power across multiple fields would require immense resources in terms of both personnel and attention.⁷⁹

2. *The Diffusion of Policy Priorities*

The precise extent and type of contact between the White House and agency officials varied greatly across agencies, policy areas, and personnel types. Career civil servants generally reported negligible interaction with EOP and did not present themselves as routinely receiving policy direction or information in any direct line from the President. In fact, many career officials were vague or unsure about how and to what extent their component interacted with the President or his close advisors.⁸⁰ Political appointees often had some level of contact with the White House, but again, the extent varied. Many of our interviewees were at least aware of formal White House involvement in the policymaking of their agencies. But when asked whether agency officials took presidential priorities into account in their decision-making and how such priorities were transmitted,

78. See, e.g., Peter L. Strauss, *Overseer, or “the Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 697 (2007).

79. See Nicholas R. Bednar & David E. Lewis, *Presidential Investment in the Administrative State 2* (2022) (unpublished manuscript), https://my.vanderbilt.edu/davidlewis/files/2022/02/Bednar-Lewis_Presidential-Investment_SPSA.pdf [<https://perma.cc/BR7M-R9XX>] (concluding that Presidents have little incentive to invest in long-term administrative capacity or exert strong control over agencies outside of particularly salient outliers).

80. See Interview Comment No. 938 (“At the staff level, even at the senior staff level, we don’t have any interaction directly with the White House very often.”); Interview Comment No. 1823 (“And usually, the only contact you have as far as just a regular career level person in the regulatory process is possibly through [occasional] phone calls or meetings, but usually, most people who are involved in the process will have no direct contact whatsoever with the White House.”).

numerous interviewees turned to the passive voice, noting the diffusion of high-level values and aspirations rather than the White House's direct commands.

This strand of our study highlights perhaps the most comprehensive and yet imprecise way in which a change in administration can shape policymaking—not through White House policy tools, but through a version of the President's bully pulpit from which ideas influence officials in agencies whose work matters to the President's agenda. One official observed, "I can't think of an instance where it was like, 'The President wants *X* in terms of policy,' but it was much more how he was communicating values to people and how those values were informing the broader policymaking process."⁸¹ Another expressed that presidential influence over policy was shaped in part by whether a "particular philosophy within a given administration" could be identified.⁸² "Nobody in the White House," another official noted, "ever says, 'I want you to amend 8 CFR 214.2(f)(10).' No. But there were things about saying 'We want you to expand the right of high skilled [workers] . . . or STEM students to be able to stay in the United States.'"⁸³

For the many issues that were not top administration priorities, presidential preferences could be communicated at an even higher level of generality, in a range of even more roundabout ways, leaving political appointees themselves to look for other clues to presidential values and the objectives of the political regime they had joined. Presidential campaign speeches,⁸⁴ Cabinet member speeches, testimony before congressional committees by senior administration

81. Interview Comment No. 62; *see also* Interview Comment No. 61 (explaining that, rather than directing specific action, the President's influence was "more like the values that he would bring to conversations with his staff, and then his staff were in meetings with all of us and were sort of carrying those values . . .").

82. Interview Comment No. 274. We took such references to indicate not simply partisan affiliation or party platforms, but rather more general and personal policy orientations of the sorts other comments in this Section describe.

83. Interview Comment No. 1777.

84. As one interviewee noted, "The speech is the policy." Interview Comment No. 388; *see also* Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 83-85 (2017) (describing how "presidential speeches can be an important site of policy development"); PEGGY NOONAN, *WHAT I SAW AT THE REVOLUTION: A POLITICAL LIFE IN THE REAGAN ERA* 75 (1990) (noting that major presidential speeches are "sent out to all of the pertinent federal agencies and all the important members of the White House staff"); Elisabeth Jacobs, Opinion, *President Obama's Speech Powerful, in Style and Substance*, BROOKINGS INST., Sept. 8, 2011, <https://www.brookings.edu/opinions/president-obamas-speech-powerful-in-style-and-substance> [<https://perma.cc/2NVG-QEN5>] (depicting a speech by President Obama to Congress as presenting "real, bold policy innovation").

officials,⁸⁵ conversations with higher-placed appointees with larger policy purviews within their agencies,⁸⁶ and even routinized documents produced in the course of agency practice all serve as resources for discerning priorities.⁸⁷

Some interviewees highlighted the dynamic nature of presidential priorities themselves: “I spent time at the White House [before getting appointed to the agency],” one person noted, “and so [I] was involved in the *formation* of presidential priorities.”⁸⁸ In many situations, moreover, there was a general understanding that the President *had* no specific policy priorities with respect to a given regulatory area. For example, one interviewee stated:

The President doesn’t know anything about the Mine Act, let alone about the technical science behind respirable coal mine dust exposure. They’re gonna leave it to their experts, and the only political person with enough expertise to know anything about that issue is the person who’s appointed to be the head of [the Mine Safety and Health Administration].⁸⁹

Both expertise and preferences were thus presented as dispersed among numerous nodes, from the President to agency leaders to those who helped develop an administration’s overarching objectives.

Many subjects also spoke in terms of overarching policy *orientation* rather than specific policy demands or proposals. Numerous interviewees articulated that they understood a general administration philosophy, not always tied directly to the President, with respect to the policies within their purview: that the

85. Interview Comment No. 390.

86. “[Y]ou might really have to go through personal relationships, through phone calls and frankly through very senior people like a secretary or deputy secretary calling around, and frankly sometimes people will look back to campaign speeches.” Interview Comment No. 386.

87. Although no interviewee mentioned them, the widely discussed tweets of the Trump Presidency resemble the variety of sources that our interviewees used to determine presidential policy preferences. Our sense is that tweets and speeches are analogous; both can convey a general value or aspiration without going into policy details. That is, it is not the tweet form itself that made President Trump’s outbursts so atypical, but their contents, which could be unmoored from overarching policy priorities, unusually specific, or simply at odds with agencies’ statutory missions. For an exploration of the tweeting presidency, see generally Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337 (2019).

88. Interview Comment No. 62 (emphasis added).

89. Interview Comment No. 1230; *see also* Interview Comment No. 62 (“I mean the presidential priorities I think would never have surfaced like questions like ‘Should we establish [a particular form of medical] risk adjustment?’ which was actually a . . . really important policy question we had to answer . . . but the President never would have been involved in something like that.”).

ACA should help cover as many people as possible for the lowest premiums possible;⁹⁰ that mine safety should be taken more seriously;⁹¹ that criminal-justice reform was pressing;⁹² that small-business grants should focus on economic recovery.⁹³ The most powerful expressions of administration philosophy were phrased in terms of an ethos, not as substantive directions: “[T]he guidance was much more like, ‘These are hard questions, and we work through them.’ You sort of continue to play with [the important] values.”⁹⁴

Most, though not all of, the interviewees who spoke of this values-transmission were political appointees, whose identity and frame of mind we explore in more detail immediately below. In some cases, the political appointee interacts directly with White House officials and serves as a conduit between the White House and career civil servants within agencies. But as we show in the next Section, more often the appointee is part of a larger political regime aligned in some way with the President’s values and priorities, which in turn come to inform the nitty-gritty of policymaking.⁹⁵ The role of political appointees and their relationship to the career civil service thus emerge as central to understanding agency decision-making and how it relates to conceptions of administrative-state accountability.

B. Political and Careers

As the preceding Section underscores, political appointees open the clearest channels for imbuing agency action with the priorities and values that animate a presidential administration. To the extent that scholars seek to evaluate the relationship between elections and government bureaucracy or track the influence of political actors on the administration, the relevant object of research is less the presidency than the political appointees scattered throughout the administration, especially in their relationship to the civil service.

90. Interview Comment No. 276.

91. Interview Comment No. 1224.

92. Interview Comment No. 1653.

93. Interview Comment No. 1691.

94. Interview Comment No. 62 (“A lot of the [ACA] rulemaking was about balancing tradeoffs between protections for individual beneficiaries of the insurance products we were selling compared to sort of what the overall premium was. And so, sort of how we navigated that line was something that could be more influenced by the President. So, if the President had had preferences that were like, ‘Keep the premiums as low as possible,’ that would have come out. Or if it had been, ‘Protect the beneficiary at all costs no matter what the premiums are,’ that would have come out, too.”).

95. *See, e.g., id.*

Our research shows that appointees' connections to both the President and the career civil servants who surround them are more complex than they are often made out to be. Although the United States has an unusually high number of political appointees in the executive bureaucracy,⁹⁶ by far the majority of federal employees remain career civil servants. Our interviews demonstrated that these two groups—as our interviewees often phrased it, “politicals” and “careers”—related in less conflictual and less clearly hierarchical ways than academic literature often assumes. Instead, politicals and careers are best understood as contributing complementary modalities to the production of policy. Because effective policymaking depends on both of these distinct modalities, politicals and careers must consistently present and defend their ideas to one another. Agency decision-making thus builds in negotiation among differing viewpoints and institutional positions, which themselves have varied relations to the world outside the agency. The connections of political appointees to the White House or high-level administration figures, their interaction with the regulated public or interest groups, and their expertise and experience in a particular legal or subject matter area all inform the way participants in the policymaking process understand the likely effects of different choices, as well as provide a range of norms and values through which to evaluate those effects. And so political accountability comes not only from the presence and influence of the political appointee, but also from the relationships between politicals and careers, which help instantiate a basic presumption of pluralism that supports ongoing accountability.

1. *Complementarity Versus Conflict*

Traditionally, scholarship has drawn a relatively straightforward line between political and career officials. The President, political appointees, partisan interest, and high-ranking officials stood on one side; the bureaucracy, civil servants, impartial expertise, and low-ranking officials on the other.⁹⁷ Other work has complicated this seemingly clear dichotomy. Scholars have noted that even a nominally political office like the Executive Office of the President is staffed

96. See DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 13-14 (2008); Greg Rosalsky, *Are There Too Many Political Appointees?*, NPR (Nov. 17, 2020, 6:30 AM ET), <https://www.npr.org/sections/money/2020/11/17/935430860/are-there-too-many-political-appointees> [https://perma.cc/BBE6-NS4Z] (quoting David E. Lewis as observing that other nations “have nowhere near the same percentage of political appointees working in their governments”).

97. See LEWIS, *supra* note 96, at 2 (“[Political appointees] are generally drawn from the political or private sector . . . and hold the jobs with the highest pay and greatest authority[, while c]ivil servants . . . work their way up and[] . . . are hired, promoted, and fired on the basis of merit”); Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 157 (2018).

partly by career civil servants. Studies also have shown that civil servants can retain significant independence,⁹⁸ occupy high-level positions where they “become key players in the policy process,”⁹⁹ and even sometimes manage political appointees.¹⁰⁰ Political, in turn, are often appointed precisely because they have subject-matter or disciplinary expertise and have distinguished themselves in the private sector or academia – economic and scientific advisors come immediately to mind, for example. Moreover, political appointees sometimes become career civil servants and vice versa.¹⁰¹

Nonetheless, a primary focus of the literature has been on conflict, such as civil servant resistance to political projects, or political officials’ efforts to undermine or sideline the civil service.¹⁰² The image of civil servant disobedience suggests a subordinate ignoring orders received from a superior. The language of resistance suggests a less powerful party fighting off the domination of a more powerful one. Such discussions thus imply that agencies are peopled by authoritative political appointees who issue orders to reluctant civil servants, who in turn find ways to subvert the political will. To some extent, this work presupposes that political and career roughly track principals and agents who have presumptively divergent interests.

This relationship surely characterizes some agencies in some situations, and we do not challenge the empirical findings of works in this vein.¹⁰³ At the same time, there is little reason to assume that such conflict pervades all agencies all the time or characterizes the normal, everyday functioning of the federal bureaucracy. Presuming political-career conflict, moreover, inaccurately paints agencies as generally governed by the passing whims and economic interests of a domineering but uninformed political leadership, on the one hand, or as controlled by deep-state career bureaucrats who undermine the electorally expressed will of the people, on the other. Such extreme images are neither warranted by most actual agencies nor helpful in assessing and improving them. They also can make

98. Bressman & Vandenberg, *supra* note 51, at 73-74.

99. Francis E. Rourke, *Responsiveness and Neutral Competence in American Bureaucracy*, 52 PUB. ADMIN. REV. 539, 542 (1992). This touches on the phenomenon of agency politicization, further discussed below.

100. Ingber, *supra* note 97, at 157-58.

101. Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 563 (2003).

102. See, e.g., Nou, *supra* note 54, at 1756-57; Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349, 352 (2019); Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627, 630 (2019); Oona A. Hathaway & Sarah Weiner, *Dissenting from Within the Trump Administration*, JUST SEC. (Jan. 17, 2017), <https://www.justsecurity.org/36420/dissenting-trump-administration> [<https://perma.cc/4FAW-PRGX>].

103. See, e.g., sources cited *supra* note 102.

it seem as if domination or resistance itself formed officials' primary focus. But even where that tension exists, officials of both kinds are also highly attuned to the actual, real-world contexts and effects of policy decisions. Their disagreements are often not just about who should decide but about which decision is best. Focusing on conflict can give short shrift to the value rationalities and practical concerns central to agency action.

It may be that strictly hierarchical or highly oppositional relations are particularly salient to both researchers and participants precisely because they occur against a contrasting backdrop of everyday functioning. It is this backgrounded, presumed, ordinary working state that we seek to illuminate. Learning more about the everyday workings of the state can offer a baseline understanding that makes aberrations—venal domination, entrenched opposition, administrative sabotage—easier to recognize.¹⁰⁴

While our interviewees did sometimes discuss political-career conflicts, the overarching image that emerged did not reflect a pervasively hierarchical, dichotomous, and oppositional principal-agent relationship. Rather, our interviews presented an everyday state of role-diversified coordination among political and careers. This is not to say that our interviewees presented their agencies as harmonious realms of nonstop consensus. We heard about many disagreements and dissatisfactions. Especially in the crosshairs of “administrative sabotage,” in which agency officials “affirmatively attack programs they administer,”¹⁰⁵ we can

104. See, e.g., Noll, *supra* note 31, at 762–63 (grounding a definition of administrative sabotage in an analysis of the intent of actors within agencies); Ming Hsu Chen & Daimeion Shanks, *The New Normal: Regulatory Dysfunction as Policymaking*, 82 MD. L. REV. 300, 310–11 (2023) (arguing that by “[a]cknowledging that irregularity is a baseline” in the policymaking process, we can better distinguish “the conditions that elevate routine irregularities into worrisome dysfunction”).

105. Noll, *supra* note 31, at 758 (examining this possibility); see also David E. Pozen & Kim Lane Scheppele, *Executive Underreach*, in *Pandemics and Otherwise*, 114 AM. J. INT’L L. 608, 609 (2020) (defining executive underreach as “a national executive branch’s willful failure to address a significant public problem that the executive is legally and functionally equipped (though not necessarily legally required) to address” (emphasis omitted)); Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 587 (2021) (describing “structural deregulation” as presidential action that undermines and “targets an agency’s core capacities” and “erodes an agency’s staffing, leadership, resource base, expertise, and reputation—key determinants of the agency’s capacity to accomplish its statutory tasks”); Freeman & Jacobs, *supra*, at 589 (noting that Presidents “can seek political advantage by undermining agency capacity”); Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 796 (2010) (describing “the ability of a President and his administration to shape policy by manipulating executive branch enforcement practices”).

expect collaborative relationships to fray.¹⁰⁶ But this was not the norm described by our interviewees, whose collective tenure spanned the administrations of President George H.W. Bush to President Trump. Similarly, although interviewees noted instances in which career civil servants hindered political appointees' policy plans, no interviewee characterized obstruction as normal or even frequent.¹⁰⁷

While the oppositional relationships highlighted in the literature certainly can arise, we think it makes sense to focus on the practices that *normally* characterize agency decision-making. Most of the work that interviewees described involved neither centralized command nor oppositional derailing. Rather, the theme that emerged was interdependence. One interviewee described the policymaking process as the “interplay between the career and the political,” where the “political . . . could always apply pressure to the career side to move things along . . . but also at the end of the day, the career team . . . actually have their foot on the . . . gas.”¹⁰⁸

Interviewees usually described even conflictual decision-making not in terms of orders given from principals to resisting agents but in terms of conversation,

106. There are certainly stories, for instance, of Trump-Administration appointees pushing policies through, with little career civil servant support. See, e.g., Christopher Sellers et al., *The EPA Under Siege: Trump's Assault in History and Testimony*, ENV'T DATA & GOVERNANCE INITIATIVE 38 (June 2017), <https://envirodatagov.org/publication/the-epa-under-siege/part-1-epa-under-siege> [<https://perma.cc/D7EC-8753>] (describing the Trump Administration's success in making “political appointments, budget cuts,” and reorganizing EPA, despite considerable resistance to the administration's deregulatory and antiscience agenda from within the agency); Jeffrey Gettleman, *State Dept. Dissent Cable on Trump's Ban Draws 1,000 Signatures*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/world/americas/state-dept-dissent-cable-trump-immigration-order.html> [<https://perma.cc/ZN4Z-BXW4>] (documenting the public dissent of over one-thousand U.S. State Department employees to the Trump travel ban, which the administration subsequently implemented).

107. Interview Comment No. 491 (noting that career civil servants could “sometimes . . . wait you out, and increasingly . . . in the waning parts of the [presidential] administration . . . things that folks didn't want to do with us, . . . they would just kind of slow-walk it”); Interview Comment No. 1273 (noting that a policy idea once faced “a lot of pushback from the career folks”); Interview Comment No. 1752 (recalling that career colleagues sometimes claimed a change was “not possible” because of “operational concerns,” but that “oftentimes – not always, but oftentimes – what it meant is, ‘We've never done it that way and we don't want to’”); see also Nou, *supra* note 102, at 356-62 (providing examples of career appointees' resistance to the incoming Trump Administration's directives).

108. Interview Comment No. 1648. As another political appointee noted,

Even though [interpretation questions were] ultimately my decision, I was always very reluctant to overrule the career staff, so a lot of it if I saw it differently . . . [or] maybe the Secretary wanted to do it differently, I viewed it as my job, “Could I convince the career staff to see it another way?”

Interview Comment No. 1042.

negotiation, and ongoing coalition-building among agency constituencies. Disagreements were generally presented as part of the way the work got done: integral aspects of administrative decisions built on multiparty input and negotiation rather than on command and control. Our interviews thus present legitimate contestation as a norm within the administrative state.

Even a political appointee who ruefully recalled a failure to produce a policy attributed it to a lack of support from *both* political and careers: on the one hand, “there was so much pushback from the career folks,” and on the other, “I didn’t have a [senior executive] partner” who “was really on board with taking this initiative.”¹⁰⁹ A political appointee who did succeed in promulgating policy echoed the need for multilateral support: “Why I think we had been successful is that we had our career champion and then . . . we had a political appointee champion, both who had the seniority in the organization to say, ‘Hey, this is a technical thing that we can do’”¹¹⁰ The policymaking process emerges in our interviews not as a matter of command and resistance but as a process of gradually marshaling support from a range of differently situated participants to consolidate around a plan.¹¹¹

The characteristics of decision-making we have identified are neither inherent nor eternal. But by recognizing the *norm* of political-career complementarity, we illuminate a rich set of practices available to leaders not mounting concerted opposition to an agency’s statutory mandate. Agency decision-making structures encourage participants to defend, challenge, and mutually evaluate different positions and interests in an open-ended process with provisional results, encouraging the two groups to keep each other accountable. Indeed, the norms we identify might ameliorate the excesses of administrative sabotage. For instance, lack of civil servant support, and the absence of the care and modulation that goes with it, likely contributed to the weakness of many of the Trump Administration’s most controversial regulations in court.¹¹² These failures reveal the benefits

109. Interview Comment No. 1273.

110. Interview Comment No. 1644.

111. See Bernstein, *supra* note 36 (manuscript at 11-12) (describing agency action regarding a statute as not easily divisible into interpretation and implementation, but as “consolidat[ing] around a plan of action”).

112. See Inst. for Pol’y Integrity, *Roundup: Trump-Era Agency Policy in the Courts*, N.Y.U. SCH. L. (Apr. 25, 2022), <https://policyintegrity.org/trump-court-roundup> [<https://perma.cc/L2DB-PBFZ>] (providing a complete list of the Trump Administration’s losses in the courts). For just a few examples, see *Pangea Legal Services v. U.S. Department of Homeland Security*, 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021), which enjoined a final rule creating new categories of crimes that would preclude asylum eligibility as contrary to Congress’s intent; and *Gilliam v. U.S. Department of Agriculture*, 486 F. Supp. 3d 856, 882 (E.D. Pa. 2020), which enjoined a policy that barred certain families from receiving emergency Supplemental Nutrition Assistance Program allotments as inconsistent with the Families First Coronavirus Response Act.

of building contrasting modalities into policymaking. Perhaps one could even say that the difference between resistance and accountability is a matter of degree.

2. *Interdependent Modalities*

As the previous Section suggests, political and careers are integrated within agencies, but they are not fungible. In our interviews, political and careers approached their work with somewhat distinct but compatible *modalities* of approaching government action. To many of our interviewees, these modalities were interdependent: both were necessary to make decisions, address problems, and produce policies. Canonically, political were described as proactive, policy-driven, politically sensitive, and risk-tolerant. Careers were said to be more reactive, expertise-driven, implementation-sensitive, and risk-averse.

For example, interviewees explained that a career administrator's "job . . . is to interpret things that are coming at them" while a political appointee's "job . . . is to push an agenda."¹¹³ A political appointee who helped to promulgate a controversial policy reported telling her nervous civil servant colleagues, "At the end of the day, you guys aren't gonna get in trouble. If the [Inspector General] is gonna complain to anybody or blame anybody, it's gonna be me."¹¹⁴ The reactive-proactive division of labor thus served to empower political to be primary decision makers, but it also helped to protect career staff who developed and carried out proposals.

The two groups also took on different aspects of policymaking labor. Careers developed the array of options from which political selected, and they served as the repositories of institutional memory, which sometimes informed, but sometimes undermined, political's plans and initiatives. One common theme in interviewees' discussions was that career civil servants researched and developed possible options for action, while political appointees decided which to pursue.¹¹⁵

¹¹³. Interview Comment No. 211.

¹¹⁴. Interview Comment No. 1256.

¹¹⁵. Interview Comment No. 754 ("We did try and indicate the range of permissible readings, what we thought was the reading most congruent with what the statute was getting at. Preserve the maximum range of legal actions for the ultimate decision makers, who were the political people."); Interview Comment No. 743 ("[T]he actual decision makers were the political people. Staff are not the ultimate decision makers. Certain rules reflected staff input more than others, but most rules reflect to some degree the policy preferences of the administration enacting them . . ."); Interview Comment No. 780 ("The ultimate decision is simply not the staff's to make; it's not our job."); Interview Comment No. 176 ("[When a high-level agency official] want[s] to adopt a policy that has high litigation risk and high risk of losing, that would be where the attorney would say, 'Well, you can adopt this policy, but I'm going

As one former career attorney put it, “[O]ur job was not to make policy. . . . We were trying to figure out, could you read the statute this way? . . . [W]hat’s the best interpretation?”¹¹⁶

Despite politicals’ explicit decision-making roles, interviewees generally described career officials as having enormous influence over policy formation. Career staff who developed a proposal, for example, shaped the range of choices considered in a decision-making process, setting the course of policymaking. This power was clear even when interviewees reflected on the constraints of the career role: “Part of the job is preserving policy options and a lot of thought would go into trying not to constrain the political decision makers’ choices.”¹¹⁷ Career personnel thus both evaluated the available possibilities and framed the outer bounds of potential decisions.¹¹⁸

In addition, although politicals were often presented as proactive policy initiators, many interviewees made clear that careers also spurred policy development from “the bottom up” because “career staff . . . are always briefing up.”¹¹⁹ Career staff at different levels routinely reported experiences and issues with policy implementation that “definitely help the agencies craft rulemaking” as they adjust to changing circumstances.¹²⁰ The experience of career staff, who often

to tell you right now, it’s going to be a hard policy to defend.’ It would be up to the decision maker to say whether they wanted to go forth with that policy and take the risk, or whether they wanted to adopt a policy that was more defensible.”); Interview Comment No. 277 (“Their ideology sometimes could drive it.”); Interview Comment No. 782 (responding to an inquiry about whether political officials depart from staff recommendations because of their agendas or differing interpretations of the relevant statute by noting that “[e]very administration should have an agenda, otherwise they’re just sorta tacking with the wind. So yes, people always come in with some idea of what they’d like to accomplish; and that is not only, I think, highly appropriate but needed for effective governing. So yes, people would have a point of view”); Interview Comment No. 783 (“[S]taff’s policy preferences really should not play that much of a role. And particularly lawyers, where to be an honest broker, you should not let policy preferences influence the legal advice you give. If that starts happening, then you’ll just be mistrusted.”).

116. Interview Comment No. 1044.

117. Interview Comment No. 778 (“[You should] be very careful in saying ‘no, the law prohibits you from doing this’ absolutely. Sometimes you would say that or sometimes you would say ‘if you take position X, Y, and Z [as] you seem to want to do, here are the arguments that could be made against them and the chances of those prevailing are quite high.’”).

118. See Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419, 421-22 (2018) (discussing how framing issues and options fundamentally influence institutional decision-making).

119. Interview Comment No. 395.

120. *Id.* (“One thing that I didn’t touch on was the bottom up. Agencies themselves know what’s not working, and career staff and agencies are always briefing up, ‘Hey, we’re trying to screen, oh, I don’t know, computer servers going to a certain country, and . . . my guy at the dock at

stay at an agency much longer than any political appointee or President, contributed not just to the staff's power but also to their reservoir of expertise, which political interviewees explicitly valued. As one political appointee told us, "You had really fantastic career staff who . . . had been [administering the program] for twenty years, they were very close with the community organizations that partnered with us . . . [and were l]ooking at ways to be responsive to what the community organizations were telling them . . . so that was one track of action."¹²¹

Political appointees were often quite conscious of the power career civil servants had to shape policy. Indeed, some echoed Max Weber's sense that "[t]he political 'master'" in a modern bureaucracy "finds himself, vis-à-vis the trained official, in the position of a dilettante facing the expert."¹²² As one interviewee bluntly noted, it was "hard to overstate the technical complexity of what's going on here. Political actors like me, we don't know peanuts compared to the career staff."¹²³ Or as another observed, "[T]he political usually know less about the substance than the people who are within the agency who have been doing it for decades in some cases."¹²⁴ Career civil servants often provided crucial information and analysis to political appointees—ideas that contributed to and affected policy deliberations and decisions. As one political appointee put it when asked if the agency had provided any training in interpreting the statute it administered, "No training manual or program on '[t]his is what the words mean and how to think about them.' Lots of in-real-time advice from [the Office of General Counsel] and career staff who'd been there a long time."¹²⁵ Career civil servants' expertise and experience—not just in technical topics and policy issues but also in legal interpretation—determined the landscape of options the agency might pursue and shaped political appointees' understandings of those options.

Career civil servants were also often best positioned to know how to effectuate a given policy, which might remain merely abstract and philosophical without their input. "[F]ar away at the administrator level or the decision-maker level, it's an opaque issue, 'How do you increase accessibility [to agency benefits] for . . . people [in a particular category]?' But actually at the programmatic operational level, it's, 'What language do we have to change?'"¹²⁶ Determining

the port of wherever is looking at a box, trying to figure out whether something is export controlled. This law or this regulation doesn't work for me.' Those things definitely help the agencies craft rulemaking, trying to fix those authorities, so there's a lot of that.").

121. Interview Comment No. 1642.

122. WEBER, *supra* note 24, at 991.

123. Interview Comment No. 43.

124. Interview Comment No. 491.

125. Interview Comment No. 528.

126. Interview Comment No. 1644.

what language to change or how to insert a new rule into an existing regulatory scheme affects the shape of the resulting policy, even if the people making these decisions are not labeled decision makers.¹²⁷

Some interviewees also described the career staff as shaping the social world of the agency, which affected policymaking quite apart from staff interactions with political appointees. As one political appointee who had worked in an agency with “a lot of career people who have senior positions” explained, “They’re not just there today. They’ve been there for twenty years. . . . [S]ometimes it seemed like [agency process] was dependent on what their relationships were.”¹²⁸

The characteristics typically assigned to the different types of officials, however, were not absolute. In some situations, the two types of officials might swap modes or share characteristics. For instance, some career civil servants might be just as knowledgeable about and sensitive to public reactions as political appointees. “Typically,” one interviewee explained, “the career staff are going to recommend what they think is the best policy option, and then the people with an eye toward the politics of something like the Office of Legislation” – themselves primarily career civil servants – “will raise, ‘Well this would be politically unpopular,’ and that may or may not change the decision.”¹²⁹ Relatedly, agency attorneys, who are primarily career civil servants, routinely reported considering litigation risk – another kind of public reaction – as part of policy development.¹³⁰ Similarly, political appointees’ ideological preferences might be the reason they get appointed to a position, but career civil servants could have strong ideological

127. For instance, in formulating ACA regulations, a manager would yearly compile

all the issues that we have to decide in the next rule making cycle, and then my staff would . . . develop[] their sections of the paper based on the issues that they have subject matter expertise on, then I would review it, edit it, then we would all troop down to the group director’s office We would discuss all of the issues and I would decide and make a recommendation for the group as to what we wanted to do on each of the policy areas.

Interview Comment No. 121.

128. Interview Comment No. 1821.

129. Interview Comment No. 163. Legislative liaison offices are more closely connected to, and more often in touch with, congressional staff than are policymaking or counsels’ offices.

130. *See, e.g.*, Interview Comment No. 232 (“But that was always a consideration. . . . [W]hat’s the probability of litigation, and what’s the probability that the federal government would prevail?”); Interview Comment No. 296 (“Sometimes you just say, ‘We know whatever we’re going to do here, we’re going to get sued. So the question is, what’s our risk on this one versus that one of winning the case in court.’”); Interview Comment No. 173 (“I would say the General Counsel’s office was very influential. They would never say, ‘Yes, you could do something,’ or, ‘No, you couldn’t do something.’ They would always couch it in terms of litigation risk.”).

preferences themselves, based on long-term experience in an agency and connection to its mission. And, of course, such preferences might have led them to seek employment there in the first place.

A person's preferred modality could thus have something to do with their role in the agency, not just their status as a political or a career. The effects of these different modalities were crosscut by other, orthogonal considerations. Some offices had particularly collaborative decision-making environments where appointment status mattered less than expertise and substantive position. Some interviewees singled out lawyers – whether political or career – as having particular characteristics. Others saw agency component culture as the main differentiator: “[L]awyers from some divisions were very conservative, very risk averse, whereas for other divisions, we’re much more flexible. . . . I don’t really feel like the appetite for risk was so different between political and career. It was really different across the career people.”¹³¹ The political-career distinction, though important, was not necessarily decisive, self-same, or oppositional across institutional locations or practical situations.

When we emphasize complementarity, then, we write in broad strokes; we did not find a complete, mechanical, or uniform division of roles. The modalities themselves seemed to persist outside the career-political distinction, with different institutional sites divvying them up in different ways. This suggests that these ways of approaching agency action are not just complementary but also integral to the regulatory process – that political appointees and career civil servants represent compatible and, indeed, mutually dependent modalities of reasoning and acting within the agency. Some participants press policy initiatives with a view to political reactions; others determine the scope of possibilities, evaluate the possible effects, and figure out how to operationalize them. While these roles may be broadly split between political and careers, the point is more that each role forms an integral part of the policymaking process regardless of who occupies it. Moreover, as we explain further in the following Part, these everyday processes of agency decision-making might be a better place than presidential elections to seek the reason-giving, deliberation, public responsiveness, and pluralistic inclusivity that comprise accountability.

II. THE WEB OF AGENCY ACTION

Those who worry that agencies’ insulation from politics renders them unaccountable sometimes see agencies’ hierarchical organization as mitigating that danger. The theories of presidential control we discussed in the previous Part are a species of this argument. In this Part, we show that many agency policymaking

131. Interview Comment No. 1076.

processes, rather than being structured as top-down hierarchies with agents following commands from principals, are rife with multilateral, negotiated interactions amongst officials at different levels of seniority and with different forms of expertise. These sorts of structures and relationships emerged vividly and repeatedly in our interviews.

One of our interviewees used the image of a spiderweb to describe agency decision-making structures. We might also describe this internal organization as scaffolding—a metaphor we ourselves use throughout this Article. In this Part, we argue that the reticulated, multifarious structures and relationships we identified help to support and channel democratic accountability by ensuring that the state articulates and tests the reasons for its actions, subjecting them to dispute and evaluation on an ongoing basis and in myriad ways.¹³² These structures thus help to legitimate government power and make policy more effective (and therefore more likely to serve the public interest).¹³³

132. See Staszewski, *supra* note 8, at 1255 (proposing that “policy choices are democratically legitimate to the extent that they are supported by public-regarding explanations that could reasonably be accepted by free and equal citizens with fundamentally different interests and perspectives”); Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115, 118 (Michael W. Dowdle ed., 2006) (describing the key questions of accountability as detailing “*who* is . . . accountable *to whom*; *what* they are . . . account[able] for; *through what processes* accountability is to be assured; *by what standards* . . . behavior is to be judged; and, what the potential *effects* are of finding those standards have been breached”); Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1816 (2012) (arguing that rational reason-giving “shapes agencies through their organizational structures and their social interactions with the other branches of government,” while merely political decisions are “likely to erode the social mechanisms that shape agencies . . . and that discipline their day-to-day activities”); Short, *supra*, at 1861 (arguing that reason-giving can “create social relationships and organizational structures that tend to channel the exercise of agency discretion within politically and socially acceptable parameters”).

133. Jerry L. Mashaw points out that the political-control model is often contrasted with a model that values technocratic expertise but argues that “this traditional tension between politics and expertise does not put the question in quite the right way.” JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 157 (2018). Rather,

these two justifications appeal to distinct aspects of democratic theory. Political accountability as a legitimating feature of administrative governance is premised on majoritarian politics. . . . Deliberative democratic theory takes a different approach. For deliberative democrats, coercive government action is justified in impinging on individual liberty to the extent that government can give public-regarding reasons that all citizens might accept. All deliberative democrats emphasize reason-giving as critical to democratic legitimacy. For them, administrative policymaking, like all government action, is legitimate just to the extent that it can be justified by reasons.

Id. at 157-58.

In particular, we think it appropriate to characterize the accountability produced by the web of agency action as democratic and public-regarding because the web facilitates administrators' ongoing consideration of the diverse views and interests of the polity. The institutional actors described in Part I bring their distinct epistemic commitments to bear on agency decisions through the web of agency action – commitments integrally connected to factors outside of government, from the interests of constituencies to the realities of social practice. The web of agency action also creates conduits for the views and needs of affected publics to influence agency decisions – a dynamic we detail in Part III. In other words, the web channels the more directly democratic influences we describe elsewhere, keeping officials accountable not just to one another and to a norm of reasoned decision-making, but also to the public their work affects. The structures for deliberation within the state thus complement the legitimating power of elections by deepening democratic possibilities within government.¹³⁴

A. *Multilateral Accounting*

In the cultures of administration our interviewees described, individual decisions without clearly articulated rationales appeared rarely. Rather, our interviewees' work was permeated with norms of justification, explanation, and persuasion, even when their job descriptions may have suggested opportunities for unilateral action or cog-in-machine obedience. The kinds of justifications our subjects described included economic feasibility, statutory authorization, normative attractiveness, and technical ease. Public acceptance, including as expressed through litigation risk, figured prominently as well. That is, accountability norms did not just characterize specific relationships but were built into the everyday life of the organization.

Hierarchy was not absent, but it was neither the sole nor even the primary structure that produced reasoned deliberation within the agencies we studied.

¹³⁴. Our findings thus add to work on the internal law of administration and agency-accountability networks. See, e.g., BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW: GOVERNING THE RELATIONS OF PUBLIC OFFICERS* § 4, at 14 (The Lawbook Exch. 2014) (1903); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314 (2006); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 *YALE L.J.* 1362, 1470-71 (2010); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 *MICH. L. REV.* 1239, 1249-50, 1263-66 (2017); Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 *YALE L.J.* 378, 394-405 (2019); Bignami, *supra* note 16, at 861-82. This literature tends to focus on formal structures as designed by Congress or the President, such as overlapping jurisdictions, Inspectors General, robust civil service protections, reporting requirements, and separation of enforcement, adjudication, and rule-making functions. We do not dismiss any of these as useful for promoting accountability. But we illuminate instead phenomena that are likely the product of organizational sociology as it has evolved within the formal parameters Congresses and Presidents have created.

Instead, our interviewees generally described agency decision-making as involving a great number of people who occupied a range of institutional positions and brought to bear different kinds of expertise and experience. The precise constellation of participants depended on the agency and the topic, but it might have included experts on the regulated subject matter (e.g., outpatient medical care or business immigration); lawyers; economists; general policy staff; and others with specific technical expertise. These people also, of course, had their own loyalties, convictions, and relationships, which can affect the policymaking process. For instance, career civil servants may have deep commitments to their agency's mission, as well as to maintaining work relationships built up over many years.

Agency decision-making can look from the outside like a clean, sequential vector moving from a Notice of Proposed Rulemaking (NPRM) to a final rule. But inside the agency, the process is usually complex by design, with overlapping steps, iterative considerations, and multilateral negotiations among teams of officials with diverse roles and levels of seniority. Internally, the process can look less like a vector and more like the web our interviewee invoked. This image encapsulates how agency officials sit in relation to one another—not so much in a linear hierarchy but in concentric circles and on different rings. The policymaking process, in turn, involves complex collaboration across many different strands, each feeding into and also dependent upon the others.¹³⁵ Some directionality and hierarchy did appear in the processes we heard about; policy ideas do get developed and handed on in a fairly predictable sequence. But each moment of development incorporates myriad sources of influence, and sequencing involves a lot of recursion, as proposals make their way again and again in different forms through the relevant groups.

For example, to decide whether to draft an NPRM, one agency would first “basically have a research process” to “determine whether there was a way to move [a policy idea] forward.”¹³⁶ That initial stage would involve “policy people, program implementers, [and a] legal team,” who would also have “some discussion with the relevant policy people at the White House . . . [and] OMB” to see whether there was “a way to move this forward that is legal and operationally

135. Our interviewee used the spiderweb metaphor to describe this complex, interactive decision-making structure, not to focus on the sovereignty of the spider within it. See Interview Comment No. 1642 (“The spider web of all of this is the interplay between career staff and political staff”).

136. Interview Comment No. 498. For further exploration of the work that precedes an NPRM, see generally Michael Sant’Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793 (2021).

practicable[.]” a “threshold decision” that would “tak[e] into account legal, policy, operational, practical, et cetera” concerns.¹³⁷ If department leadership decided to pursue the policy, “then basically it would get thrown back to the relevant policy, program and legal team,” which would “stand up a work team on that, and they would start to flesh out the policy direction, and . . . tee[] up what we wanted to do.”¹³⁸ That team’s products, and their disagreements, would “bubble up . . . to the appropriate level” of agency leadership, depending on “the importance of the thing” produced and the kind of “controversy” involved.¹³⁹ Disagreements and uncertainties were resolved at various levels: “[U]sually our . . . senior leader policy committee, sometimes below, sometimes above, . . . would give input [and] weigh in on the final policy direction,” though not at a “regulatory drafting level of detail.”¹⁴⁰ After one trip through the agency to decide whether to make policy at all and another to map out the policy’s outlines, a regulatory idea would return to “the same working team,” which would only then “start drafting different components” of the NPRM.¹⁴¹ That NPRM itself, of course, would subsequently move through the “regular inter- and then intra-agency review process” before being published in the *Federal Register* with an invitation for public comment.¹⁴² And it would then return yet again for participants to address comments and formulate a final rule, which would go through another interagency review. This painstakingly recursive process was typical.¹⁴³

137. Interview Comment No. 498.

138. Interview Comment No. 499.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. In another typical description, an appointee from a large agency told us

the workup of [the] regulations starts at the division level, . . . the lowest organizational level. . . . It would come up to the analysts, each analyst would have an area of subject matter expertise where they would analyze the statute, they would write up the issues, what issues are involved in implementing this particular subject, they would develop options, pros and cons, then it would be put together with all of the other subject matter analyst issues.

Interview Comment No. 115. This analysis would then “go through the bureaucracy,” with review and input from each level, where “[t]he policy could change all along the way.” *Id.* In addition, the

Office of General Counsel . . . would be reviewing the regulation for legal sufficiency, consistency with the statute. You’d have budget people who could potentially be concerned about the budget implications, . . . operational people who are concerned about whether you could implement the provisions, . . . political and policy people

Each agency has its way of moving through the many stages of policymaking. Some have a more formalized, relatively hierarchical process: “[W]e had a checkbox [where] certain people need[ed] to sign off on certain things and we just had a very regimented process . . . because our administrator cared very much about everything running correctly.”¹⁴⁴ Others rested more on collaboration: “Just everybody sort of always knew what was going on, and so it wasn’t like the Administrator made a decision, and then [the] Secretary made a decision, and then the White House made a decision. . . . [E]veryone was involved the whole time.”¹⁴⁵ Yet others were prone to inefficiency and dysfunction. One political appointee complained that colleagues “found [making decisions] very hard, because . . . the [agency] corporate culture is . . . very respectful, everybody is in their lane, . . . they want there to *be* consensus [but] they don’t want to *build* consensus. They want it to magically appear.”¹⁴⁶ That meant that people “don’t join the issues very early on in the process” and might wait months before getting input from “anybody else in the other lanes.”¹⁴⁷

Agencies also distribute their work differently. In some settings, subject-matter experts take the lead: “[W]hen there is a statute that affects the agency . . . what you will immediately see is . . . various memos or recommendations from staff saying, ‘Let’s do this because.’”¹⁴⁸ Other agencies “rely on . . . attorneys to begin the [rule] drafting process.”¹⁴⁹ When “[a] law gets passed with a bunch of things in it . . . you have to summarize what that law says . . . you have to deal with . . . [the regulatory] impact analysis and all the executive orders.”¹⁵⁰ In other situations, political appointees’ views and priorities could shape the agency’s focus: “[W]hat happens in taking [a] statute and turning it

who are concerned about whatever the political ramifications were of the rule, so you have a variety of different interests around every rule and regulation, as it went through that clearance process.

Interview Comment No. 116.

144. Interview Comment No. 1683.

145. Interview Comment No. 52; *see* Interview Comment No. 1483 (“There’s a tradition here of working toward some sort of an acceptable consensus.”).

146. Interview Comment No. 1792.

147. Interview Comment Nos. 1741, 1744. At other agencies, in contrast, “if something was hard and people had different perspectives on it, it just got a lot of discussion with a lot of people.” Interview Comment No. 55.

148. Interview Comment No. 1453; *see* Interview Comment No. 117 (“If you were an expert on disproportionate share hospitals, you would know all about that section of the Medicare statute, and then if Congress passed a law that had to do with disproportionate share hospitals, you would look at what the law required. You would figure out what the objective is. You would write up those issues . . . and bring it to your supervisor.”).

149. Interview Comment No. 1309.

150. *Id.*

into regulations, programs, processes is entirely dependent on who happens to be sitting in those seats at that time.”¹⁵¹ But often career staff took the lead in exploring options and presenting ideas.¹⁵²

Agencies also frequently gather information about realities on the ground to inform policy development.¹⁵³ For instance, a political appointee in an agency that dealt with health insurance described making policy around a legal provision requiring “insurers . . . to treat services provided to treat gender dysphoria the same way they would treat those services if provided for another medical condition.”¹⁵⁴ The team “talked to a lot of medical professionals” about how to make such analogies: “[I]s there a difference between doing a hysterectomy to treat uterine cancer and a hysterectomy to treat gender dysphoria? . . . Because we lacked real-world understanding of some of the things we were regulating.”¹⁵⁵

Reflecting their iterative development process, policies do not come prefabricated; they are formed through the combination of different choices about their component parts and objectives. Achieving any one policy outcome requires selecting among many possible options with many features, options that themselves can be combined in different ways. Determining how to measure dust in coal mines, for instance, might involve scientific choices among measurement techniques; health-policy decisions about danger thresholds; technical decisions

151. Interview Comment No. 1307; accord Matthew C. Stephenson, *The Qualities of Public Servants Determine the Quality of Public Service*, 2019 MICH. ST. L. REV. 1177, 1179. (“[T]he performance of our public bureaucracies depends in significant part on the characteristics (skills, capacities, values, etc.) of the individuals who staff those bureaucracies.”).

152. See Interview Comment No. 1351 (“[T]he political does have to sign off on what we’re doing . . . and so someone in [the agency head’s] office will be briefed even if [the political appointee is] not necessarily up to speed on all the . . . regulations.”). This accords with others’ findings that rulemaking impetus goes beyond direct commands from Congress. See Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183 (2017).

Some agencies set their overarching agendas through strategic planning processes in which both careers and politicals participate. See, e.g., Interview Comment No. 895 (“[F]rom the ground up, the teams survey the trends in the marketplace and figure out where they propose to deploy their limited resources and what are the real problems out there that need to be tackled.”). See generally Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93 (2016) (explaining the importance of agenda-setting and arguing that it should be a more prominent focus of scholarly research); Sant’Ambrogio & Staszewski, *supra* note 136 (describing the agenda-setting process that precedes an NPRM).

153. For further discussion, see *infra* Part III.

154. Interview Comment No. 1587.

155. *Id.* (“We did have lots of conversations and particularly in an area where I didn’t have inherent expertise in how the insurance world works or what’s involved in providing medical care.”).

about mechanical-device characteristics; industry-practice-based decisions regarding device placement and usage; behavioral considerations based on typical mining practices; economic considerations about safety measure feasibility, and more. Deciding how to reimburse a new invention like bifocal contact lenses might involve considering the extent to which they improve quality of life; the likelihood of medical harm; the expense of a new technology; their fit with Medicare's mission; and how a new reimbursement may affect the rest of the program, among other things. Addressing each aspect of this policy formulation requires a decision of its own, but each decision must be made in the context of other decisions.

Such complexities highlight the *dynamic* nature of policy preference formation. "You're hearing other perspectives, which could potentially influence your view on something," one political appointee told us.¹⁵⁶ "[A] variety of different people" from the team of around seventy this appointee managed regularly engaged in "discussions about regulations and a big part of my job was to try to manage those discussions so they wouldn't become so unwieldy that we never made decisions, but [still] . . . just allowed, essentially, the free flow of thought to come to a decision on" policies, taking into account "what the statutory language said, what we thought our policy objectives were."¹⁵⁷ Such discussions "would happen within my group as well as outside of my group, so . . . it could be very much influenced by the views and opinions of others as that gives you different perspectives."¹⁵⁸ In other words, people's views do not just influence the policy development process – they develop through it. The agency practices our interviewees described were thus deliberative: they pushed agency personnel to be informed about and carefully consider different views and options.¹⁵⁹

Our interviews underscored how these deliberative practices help guide the exercise of agency discretion, which comes in different amounts and different

¹⁵⁶. Interview Comment No. 146.

¹⁵⁷. *Id.*

¹⁵⁸. *Id.*

¹⁵⁹. Shalev Roisman has argued persuasively that the President has a legal "duty to deliberate," based on both statutory and constitutional text. Shalev Roisman, *Presidential Law*, 105 MINN. L. REV. 1269, 1271 (2021) ("[To] exercise substantive power delegated directly to her, the President . . . must gather relevant information and make a considered judgment based on that information. If she does not do so, she has acted unlawfully . . ."). Unfortunately, elections themselves can do little to enforce this duty or facilitate its fulfillment.

kinds.¹⁶⁰ For instance, some regulations – like Medicare reimbursement schedules and visa allocations – must be revised annually, not through new policy principles but through new applications of existing principles to regulated entities.¹⁶¹ Even with no discretion on timing or policy substance, such rules could have significant effects: they were routine in the sense of regular¹⁶² but not in the sense of obvious or nonconflictual.¹⁶³ “The real work was in terms of inter-agency negotiations on who should [be eligible for benefits]. There was a lot of lobbying by members of Congress . . .”¹⁶⁴ Some recurring rules are mandated by statute, others by agency policy; our interviewees did not generally distinguish such rules by their origin but by their yearly cycles, which required career staff to continually complete relevant research and analysis.¹⁶⁵ Even routinized actions thus involved different sources and decision-making modalities.

At the other extreme, “There [are] clear examples where Congress is vague, purposely vague, because Congress didn’t know what the right answer was, so the statute really gave a lot of discretion.”¹⁶⁶ As one interviewee quipped, “If you look at the statute, it really is simply just an order to the [agency] saying, ‘Go write a rule and make America a better place.’”¹⁶⁷ Such broad discretion about policy contents did not necessarily make things easy: “[T]hat then led to sort of an incredibly elaborate process with multiple drafts going out there,” in which the agency reviewed its historical experience with the problem Congress had

160. Agency discretion, a matter of statutory specifics, implicates agency relations to Congress, an issue we will address in future work. Here, we merely point out the influence that different kinds and amounts of discretion can have on agency practices.

161. See Interview Comment No. 331 (“We tried to get [a particular regulation] out in a timely fashion every January.”); Interview Comment No. 14 (describing important regulations that the relevant agency was required by statute to promulgate every year).

162. Interview Comment No. 14 (observing that such rules are “always in preparation. There was never an interim when they weren’t being prepared”).

163. Indeed, because stakeholders are often significantly affected by these annual rulemakings and care deeply about things like reimbursement formulae, these yearly decisions easily became topics of controversy, with members of Congress, other agencies, and the White House sometimes weighing in. See Interview Comment No. 14.

164. Interview Comment No. 331. At the same time, annual rules might also be less “contentious” than nonrecurring regulations, which “live practically forever” and could dramatically alter an “entire business model.” Interview Comment No. 341. “[E]verybody knew that it would come up the next year, and so you could improve upon it, and not to take things too hard.” Interview Comment No. 341.

165. Interview Comment No. 31; Interview Comment No. 1356 (“I do have a political side signing off on this, but really dealing usually directly with career people, only when there’s a problem will there have to be an elevation between politicals, where there’s a disagreement.”).

166. Interview Comment No. 222.

167. Interview Comment No. 979.

identified to help construct a rule.¹⁶⁸ In the absence of congressional guidance, greater discretion could thus lead to more agency process.¹⁶⁹

Policymaking could thus be recurring or unique; mandated or discretionary; led by subject-matter experts, career lawyers, or political appointees. But in each case, our interviewees described a multilateral, recursive process of developing options and coming to decisions in which many differently situated people had to account for their positions to many differently situated others. This ongoing interactional accountability formed the background of our interviewees' work lives. This multilateral accounting-to is no free-for-all. There are veto points and hierarchies both within and among agencies that empower some voices and drown out others. There are decision makers who bear responsibility for moving a process forward at any given step. Within these structures, however, mutual accounting is the norm: a veto-holding decision maker rarely makes a decision on a blank slate or on her own.

The internal discussions we heard about, moreover, were often focused and substantive – not mere watercooler chat. Because the interaction of multiple perspectives was built into agency decision-making as a practice and an ethos, compromise and deliberation fundamentally characterized the process: “[N]obody ever agreed . . . with every decision that was made.”¹⁷⁰ As one political appointee described it, “[Y]ou’re constantly in this balancing act. You have your own thoughts and ideas, you have the ideas that are given to you by your superiors, you’ve got input coming from the public, . . . from outside policy experts, . . . [and] from members of Congress.”¹⁷¹ These practices may never appear in the *Federal Register*, but they create channels for deliberation about values and outcomes in which agency employees must justify their positions and hold each other to account to produce a result attributable to the agency as a whole. As one interviewee put it, “[T]here was no . . . single point of failure It was very hard for any one person to say, ‘I am making a decision, and this policy process is over.’”¹⁷²

This complex, deliberative arena has advantages over a system that strives to be either merely expert or merely majoritarian. The decisions agencies must make require officials to employ well-founded judgment, integrating political

168. See Interview Comment No. 980.

169. A single agency could have different discretion types simultaneously, depending on the statutory specifics. The same interviewee who worked on the “make America a better place” rule also noted that “a lot of our work is not discretionary. If there’s [a real-world event that triggers agency responsibility], we have to investigate it.” Interview Comment No. 914.

170. Interview Comment No. 57.

171. Interview Comment No. 219. We discuss agencies’ engagement with the public more fully in Part III.

172. Interview Comment No. 55.

and technocratic considerations.¹⁷³ As our description shows, agencies do not elevate subject-matter expertise over every other consideration. Nor can they fall back on majoritarian views as expressed by voters in the most recent election. Given the complexity and specificity of policy development, no clear majority view will exist on most issues: people in a large, diverse polity will often have many different viewpoints on any given policy issue and no viewpoint at all on many of them. Even if election results suggest high-level values that might inform decisions about worker safety or healthcare accessibility, determining which method for measuring coal mine dust to use or how to reimburse bifocal contact-lens costs requires judgment by those responsible for effectuating statutory regimes.

At the same time, as we discuss further in Part III, agency personnel utilize numerous avenues to incorporate the views of their affected publics into the regulatory process. Policymaking happens within an administration, but that does not mean that only a unified administration view is expressed within any given policy. This is both because agencies respond to their publics and because the administration itself is not a monolith but rather a diversified field where many different perspectives are represented, as this Part and Part I show. The diversity of perspectives that shape the policymaking process helps ensure that administrators are not just accountable to one another in a hermetic or hierarchical way. They are also broadly accountable to the polity they help regulate. The sorts of ongoing negotiations among different approaches to particular policy questions that we have described ultimately provide a framework for the contestatory practices that make democracy real.¹⁷⁴

B. *Principals, Agents, and Accountability*

Our findings concerning the structures of agency decision-making add complexity to scholarly work that posits simplified principal-agent relations as the

173. See, e.g., Spence & Cross, *supra* note 22, at 101 (“[A]gency policymaking is often desirable – and often desired by voters – irrespective of the ability of elected politicians to control what agencies do.”); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992) (“[C]ivic republicanism is consistent with broad delegations of political decisionmaking authority to officials with greater expertise and fewer immediate political pressures than directly elected officials or legislators.”).

174. See Rodríguez, *supra* note 25, at 63–70. See generally Walters, *supra* note 10 (applying agonistic democratic theory to the administrative state and arguing that administrative law can incorporate conflict to serve democratic ends even if a consensus-based *dêmos* is a myth).

basis for administrative accountability.¹⁷⁵ Edward Rubin provides a useful image through which to elucidate the shift we suggest: an agency for “maintaining the lawns in front of the public buildings in a city,” composed of a “chief administrator” with a “subordinate . . . specifically charged with maintaining the lawns.”¹⁷⁶ A principal-agent approach locates accountability in the hierarchical relationship between chief and subordinate; the subordinate must obey the chief’s orders or risk his professional standing.¹⁷⁷

Yet, this kind of hierarchical relationship was not the norm in our interviewees’ descriptions. To carry Rubin’s metaphor further, consider what it might mean to “maintain” public lawns. Should lawns be kept neat with short grass? Should they be turned into meadows for pollinators? Be used for gardens to feed city residents? Hold playgrounds for the city’s children? Without a decision-making process, a supervisor might have few specific commands to make. Subordinates within such a process may thus be asked to determine the range of plausible approaches to lawn maintenance, the effects of each approach on different populations, their benefits and drawbacks according to various standards (which the subordinates themselves may produce), their implementation mechanisms, and so on. That process, moreover, would involve not one subordinate lawnmower but a range of people with different areas of expertise and experience – in horticulture and pesticide, say, or child development and food scarcity,

175. See, e.g., Tom Ginsburg, *Comparative Administrative Procedure: Evidence from Northeast Asia*, 13 CONST. POL. ECON. 247, 247-48 (2002) (“[T]he core problem of administrative law is the same as that in corporate law, namely one of principal and agent. Just as shareholders need a mechanism to discipline managers and employees, so do ‘owners’ of the government (citizens) need to control their managers (politicians), who in turn need to control employees (bureaucrats). . . . [Therefore, scholars may] assume that at the center of any given political system there is a single actor that can be characterized as sovereign at a particular point in time.”); Rubin, *supra* note 8, at 2073 (“Accountability can be roughly defined as the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation.”); see also Spence & Cross, *supra* note 22, at 105-06 (explaining that public choice and other economic theories have a penchant for principal-agent images because “[e]conomists value parsimony in model building,” which makes incorporating multiple features or relationships – in Spence and Cross’s case, voter preferences; in our case, intra-agency practices – difficult to capture). Theories focused on principal-agent relations have evolved to allow for greater complexity and multiplicity in their models. See, e.g., Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANN. REV. POL. SCI. 203 (2005); Martino Maggetti & Yanis Papadopoulos, *The Principal-Agent Framework and Independent Regulatory Agencies*, 16 POL. STUD. REV. 172 (2018). But the version of the theory that doctrine applies to the administrative state tends to remain relatively simple and static. See, e.g., *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2204-08 (2020).

176. Rubin, *supra* note 8, at 2120.

177. See *id.* at 2120-22.

or law and economics. These people must account to each other for their positions as well.¹⁷⁸ Coming to a decision involves much more than just mowing the grass. After all, “just following orders” is hardly a measure of democratic accountability.

While the simplified principal-agent model posits a superior whose preferences dictate the actions of a subordinate, we found that the preferences of superiors often get refined, or even constructed, in the decision-making process itself. Rather than merely obeying commands, subordinates often use resources such as public engagement, research, and interaction with other experts, to come up with information and ideas on which to base decisions, articulate the scope of options among which to decide, and even set the parameters along which decisions will be made.¹⁷⁹ The production of policy positions is itself a multiparty, deliberative effort.¹⁸⁰ The creativity and collaboration of this fleshed-out image disappear in the bilateral-hierarchy version of administrative action.

The principal-agent view might work at a very high level of generality: we could say that the chief has a preexisting policy preference for using lawns well and orders subordinates to further that mission. But this formulation renders much of the policy-production process invisible. We see little analytic benefit to choosing a descriptive frame that erases so much of the object of analysis and also fails to capture a lot of what makes accountability attractive. Government hierarchies exist, of course, but we would argue that they are not the only or even the primary places where accountability gets produced. Rather, it is the iterative, multinodal negotiations among administrators—working in different modalities, positioned at many hierarchical levels, engaged in ongoing deliberation with one another and the public, responding to the world around them—that create the conditions for accountability. In other words, in the administrative state described by our interviewees, accountability arises from a structured culture of

178. One can also imagine numerous nonhierarchical, yet accountable, relationships. Spouses, business partners, teammates, or coauthors might be accountable to one another without a hierarchical relation. The administrative state is, of course, organized hierarchically, and there are naturally some who have the authority, which others lack, to assign tasks or to make final decisions. But individual participants must often account for their decisions and preferences to multiple evaluators—not only to their direct superiors, but also to a multitude of others with whom they interact, including peers, subordinates, and outside publics.

179. See Harcourt, *supra* note 118, at 432 (“[T]he simple act of choosing [a] set of promising alternatives to compare, and excluding others, performs normative work . . .”).

180. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 159–73 (2015) (arguing that, even in a principal-agent model, agencies are agents of two principals: Congress and the President).

rational argumentation and ongoing engagement, not just from hierarchies and sanctions.¹⁸¹

By bringing this version of the administrative state to light, we do not mean to suggest that the interactional accountability our interviewees described is an indelible feature of the state. With enough determination, hard work, and time, these processes can certainly be weakened or eliminated, and in a given situation, decision makers can potentially evade them. Such risks attend any human endeavor. Nonetheless, in our research, agency action was typified by explanation, justification, and argumentation among many participants, iteratively and at different levels of the organization. This default structure, we suggest, provides scaffolds for accountability, encouraging deliberation, responsiveness, and inclusivity. Internal agency process often creates a marketplace of ideas tested by participants—with attendant opportunities to head off market failures. These accountability scaffolds contribute to the democratic quality of governance.

III. THE REGULATED WORLD

In the preceding Parts, we showed how networks of collaboration and supervision connect different categories of administrators. Actors who play different roles—political or career, policy expert or lawyer—respond to and check one another within what we have called a web of agency action or a scaffolding for accountability. Up to this point, then, we have focused on the structures and relationships that produce accountability within the executive branch itself.¹⁸²

But our research also brings to light a third pervasive form of accountability in agency policymaking: responsiveness to external publics, perspectives, and phenomena.¹⁸³ In our interviews, we identify two primary forms of responsiveness. One involves agency reaction to feedback from affected publics, the other,

181. Additionally, legal scholarship often concerns itself primarily with the “effects . . . of finding that [accountability] standards have been *breached*.” Mashaw, *supra* note 132, at 118 (second emphasis added). A focus on breach makes sense from the standpoint of litigation: to seek relief, one needs an injury. Yet as a sociological matter, the effects of *compliance* may be more telling. From the standpoint of public health, for instance, the *absence* of injury is just as meaningful as its presence. Our research aims to illuminate the normal conditions for everyday accountability, rather than the sanctions available for the more marked events of breach.

182. All of the officials whose roles we explore do, of course, have concerns beyond the executive branch itself: subject-matter experts consider a policy’s likely effects on relevant groups, lawyers evaluate the ramifications of statutes and judicial doctrine, and so on. Still, the accountability dynamics we have described thus far depend largely on internal relations.

183. See ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1 (1971) (“[A] key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals.”); ROSE-ACKERMAN, *supra* note 10, at 4.

officials' appreciation of the real-world contexts and consequences of agency action. Notice-and-comment requirements provide a clear and well-studied structure for feedback by affected publics, and our interviewees spoke about these processes in detail. But our interviewees also recounted their engagement in many more varied, less formal types of perspective gathering—practices only starting to be explored in existing literature and virtually absent from doctrinal debates. Interviewees across agencies also actively learned about the regulated world to ensure that their policies served their agency's mission.¹⁸⁴ This form of responsiveness, we contend, embodies a commitment to efficacy that comprises an important dimension of accountability to both the public and the statutes that govern agency action.

Our research thus casts light on underacknowledged and undertheorized realities of agency policymaking. What our interviewees described was neither the rule of experts operating independently of public opinion nor simple majoritarianism.¹⁸⁵ Competing public viewpoints were part of the deliberative process, and policy production often involved so many different factors that there was not necessarily a majoritarian position on any given question to begin with. In our research, agencies emerge as fields for negotiation and contestation among different values, interests, and visions.¹⁸⁶

We emphasize these findings because responsiveness is essential to ensuring that government actions take account of the interests of governed publics.¹⁸⁷ Responsiveness supports republican democratic freedom as nondomination—that is, not as freedom from all power, but as a reason-demanding freedom from a potentially arbitrary exercise of power that fails to take relevant interests into

184. We will explore the complex concept of agency mission in future work. One of the striking findings of our research is that many agency officials' primary fidelity is to what they understand to be the agency mission, brought into being by statute but also shaped by agency practice over time. This fidelity to mission shapes how agencies interpret and implement statutes, as well as how they assess litigation risk and respond to forms of pressure from members of Congress and the White House.

185. See Pettit, *supra* note 6, at 174-76 (noting the dangers of a "tyranny of the majority" or "elective despotism" (quoting THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961))). We agree with Pettit (and Madison) that a purely majoritarian approach lacks much of what makes democracy normatively attractive. Indeed, it resembles the attacks on democracy that Pettit attributes to theorists like Hobbes, who "defend[ed] the law of a more or less despotic *Leviathan*" by arguing that laws always violate people's freedom from interference anyway, making democratic rule as despotic as any other. *Id.* at 169.

186. See *id.* at 180; Walters, *supra* note 10, at 14-15.

187. See, e.g., Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OP. Q. 778, 779 (2005) ("[T]he connection between what citizens want and what government does is a central consideration in evaluating the quality of democratic governance.").

account.¹⁸⁸ On a thick, republican notion of democracy, accountability requires being *inclusive* of the views of a pluralistic populace.¹⁸⁹ These principles, as well as numerous statutes, require officials to govern in the public interest, implying that agencies have a responsibility to gauge *ex ante* how and whether a policy might serve those ends. Actually responsive government must incorporate a range of conflicting and sometimes incompatible interests – of different groups, of different types, of different urgencies – to produce negotiated outcomes.¹⁹⁰ As one of our interviewees put it,

I think one of the hardest jobs right now that I think that a person working in government . . . has, is trying to interpret multiple perspectives, both from the affected stakeholders that are being regulated, but also by the members of Congress, who oftentimes pass very complicated legislation that's based upon very sort of delicate compromises.¹⁹¹

The particular practices we describe might not fit well with conventional conceptions of democratic responsiveness, which generally focus on government responsiveness to the general electorate, secured through elections.¹⁹² In theory, elected representatives are quintessentially responsive because they take account of the interests of the constituents whose votes they need, allowing constituents

188. See Pettit, *supra* note 6, at 165-66.

189. See *id.* at 179 (describing a contestatory democracy as one in which the “avowable interests” of minorities and the nonpowerful “will be taken into account”).

190. See PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 96 (1978).

191. Interview Comment No. 215.

192. See G. Bingham Powell, Jr., *The Quality of Democracy: The Chain of Responsiveness*, 15 J. DEMOCRACY 91, 92 (2004) (“High-quality democracy is sustained . . . [by] the systematic eviction of unresponsive or inept policy makers, . . . the direct election of powerful, promise-keeping governments that are publicly committed to policies the citizens want[, and] . . . the election of multiple, representative parties that are committed to negotiating as agents . . .”); Seung-Hun Hong & Jong-sung You, *Limits of Regulatory Responsiveness: Democratic Credentials of Responsive Regulation*, 12 REGUL. & GOVERNANCE 413, 414 (2018) (“A government’s policy responsiveness offers a ground on which the electorate sanctions or rewards the government in the next election, which is an archetypal process of accountability.”); Jeff Manza & Fay Lomax Cook, *A Democratic Polity? Three Views of Policy Responsiveness to Public Opinion in the United States*, 30 AM. POL. RSCH. 630, 633 (2002) (“[P]oliticians and state managers may perceive it to be in their interests to minimize the distance between their own positions and that of the public because they periodically have to be elected or reelected.”).

to monitor their representatives and ultimately sanction or support them on election day.¹⁹³ Accounts of administration that emphasize presidential control or highlight agencies' relations with members of Congress, and Congress's oversight and appropriations committees, draw from this conception of accountability. These accounts assume the necessity of elected-official oversight of agency action to maintain a connection between government policy and the voters.

We highlight instead what these theories miss.¹⁹⁴ A critical time for responsiveness, we suggest, is *during* a decision-making process, when officials can learn about real-world situations and incorporate the views of people with different interests in the matter. Different, and even overlapping, constituencies may care about different aspects of a given policy in different ways, and each aspect can have different effects on the regulated world. But elections do not provide voters with a means to voice their objections to one decision while also voicing their support for another decision by the same representative or by the President.¹⁹⁵ The prospect of an election works in the background, at a very high

193. In *Presidential Administration*, for example, Kagan notes that while “responsiveness to the general electorate is not the sole criterion by which to assess administrative action . . . , the President holds the comparative advantage” as compared to Congress. Kagan, *supra* note 14, at 2336-37. In other words, the extent to which government action reflects and reacts to the preferences of the public as expressed through elections matters to our evaluation of how and by whom decisions get made. See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020) (“The . . . constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President.”); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 447, 497-98 (2010) (explaining that preserving the President’s removal power ensures that the public knows whom to blame for bad policy decisions during elections). *But see* Kitrosser, *supra* note 23, at 1742-43 (arguing that this model undermines the information flow necessary for voters to make informed decisions).

194. We save for another paper a discussion of the ways in which agencies interact with members of Congress during the policy-formation process. They do so not just through publicly visible oversight hearings and appropriations battles, but also through other less formal types of interaction. To preview our working conclusions, we find that administrators feel an overriding sense of responsibility to their statutory mandates and missions, not just as written, but as developed over time, whereas they regard the views of existing congressional representatives as relevant but far from dispositive.

195. See Staszewski, *supra* note 8, at 1268-70, 1313. Constituents “do not (and cannot) cast election ballots on a sufficiently finely tuned . . . issue-oriented basis” to ensure officials’ responsiveness. *Id.* at 1313. In addition, given the realities of gerrymandering and partisan polarization, many elected representatives now have the luxury of effectively choosing their constituents—or at least their majorities. As numerous scholars have detailed, most elected representatives occupy safe seats, and even those in competitive races are often not realistically vulnerable to electoral challenge based on some specific policy position. See, e.g., *id.*; Cynthia R. Farina,

level of generality, as elected representatives seek to predict what voters with highly imperfect information are likely to do at the ballot box at some future, prescribed moment in time.

In making these observations, we do not mean to suggest that elected officials cannot be responsive to voters other than at election time; elected officials can and do communicate with constituents and introduce and support legislation and other forms of action throughout their terms in an effort to be responsive to voters' (and others') ongoing concerns. Instead, we emphasize that elections in and of themselves are insufficient to ensure accountability in government and that an unelected bureaucracy is not necessarily unaccountable if we take responsiveness as a measure of accountability.

The question then becomes how to secure responsiveness in the day-to-day work of government. Our research reveals a number of agency practices that we would describe as demonstrating responsiveness because they are ongoing and iterative—practices that should be nurtured and perhaps even expanded. In this Part, we detail some of the myriad means that enable affected publics to shape, evaluate, dispute, and respond to officials' specific decisions, giving officials an opportunity to formulate and justify policies in light of facts and opinions relevant to those specific policy choices.¹⁹⁶ The requirement of rational justification set out by the Administrative Procedure Act and enforced through judicial review certainly pushes agencies to respond to the sorts of granular public concerns that

False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive, 12 U. PA. J. CONST. L. 357, 378-83 (2010) (discussing studies showing that voters often lack accurate understandings of presidential candidate policy positions, and that even well-informed voters often vote for candidates who share some of their policy preferences but not others). Partly for these reasons, "Political scientists have largely abandoned the simplistic account of presidential elections as national policy referenda that can be legitimately interpreted as issue mandates." Farina, *supra*, at 381 n.105. Some notions of electoral accountability put particular stock in the inclusivity of the President, the only official who stands for election by the whole nation and thus supposedly serves the whole people rather than just parts of it. See Calabresi, *supra* note 5, at 62 (claiming that Congress and federal courts "will carry out their duties with state and local political preferences as their main concern, when the true claimant to the executive throne would not do so"). Yet, since presidential elections are winnable with less than a majority of the popular vote, this account is nonmajoritarian; it gives little reason to expect a President to be accountable to the people as a whole. Nor does this theory posit any accountability-producing mechanism at all in a second term. The theory seems to work only when disconnected from the characteristics of the actual presidency.

196. The large number of decisions that any representative makes during their tenure and the limited number of candidate options in any given election mean that, even in an ideally competitive race with a maximally informed electorate, voters could not meaningfully respond to an elected representative's individual policy choices, much less to those of administrators under her purview.

would not affect an electoral outcome.¹⁹⁷ But the practices we discuss here extend well beyond those required by law. And while they are never optimal (like any human conduct), these practices ultimately promote deliberation and inclusivity without relinquishing technocratic expertise.¹⁹⁸ Our findings help show that democratic values can be furthered in administration—that the administrative state is, in fact, a central contestatory arena in our democracy.¹⁹⁹

A. *Affected Publics*

Agencies are embedded in political contexts, as the literature situating them between congressional and presidential control assumes.²⁰⁰ But more fundamentally, agencies bear responsibility for mediating and even resolving ongoing debates about the social and economic world.²⁰¹ As such, it should come as no surprise that external pressures get their attention. Our interviewees frequently articulated how other governing institutions and even direct political pressure informed or shaped their behavior. If “Congress is very agitated about [the] failings of this or that program . . . we’ll take a second look and see what we can do

197. See, e.g., EDWARD H. STIGLITZ, *THE REASONING STATE* 2-8, 47-55 (2022) (explaining that procedural requirements and judicial review constrain agency action in ways that make “credible reasoning” more likely, and concluding that, “[p]aradoxically, the very features that give rise to the American suspicion of agencies also make them effective and credible makers of policy”).

198. Cf. David B. Spence, *The Effects of Partisan Polarization on the Bureaucracy*, in *CAN AMERICA GOVERN ITSELF?* 271, 273 (Frances E. Lee & Nolan McCarty eds., 2019) (“Today nearly all scholars accept that the ‘execution of law cannot be meaningfully separated from politics [and that] administration itself is inherently a political action.’ It is neither the purely technical, apolitical enterprise of Wilson’s dreams, nor the purely cynical political exercise in rent-seeking described by public choice scholarship. Administration is instead a much more interesting amalgam of both political and technocratic problem solving . . .” (internal citations omitted)).

199. See Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. (forthcoming 2023) (manuscript at 15-19), <https://ssrn.com/abstract=4189747> [<https://perma.cc/C2XB-EBCP>].

200. For a discussion of the origins and trajectory of this literature, see Spence, *supra* note 198, at 275. *Id.* (“The congressional dominance thesis emphasized a suite of *ex ante* and *ex post* political controls available to Congress to steer administrative agency policy choices in Congress’s preferred direction The presidential control hypothesis . . . emphasized the president’s more flexible and omnipresent tools of influence over agencies, which emanate from the constitutional responsibility to supervise the executive branch”); see also Seidenfeld, *supra* note 173, at 1513 (“[I]n the modern state, many agency decisions involve political choices that ‘make law,’ even though agencies exist outside traditional conceptions of our tripartite national government.”).

201. See Walters, *supra* note 10, at 69-70.

consistent with our statutory authority.”²⁰² Foreign governments,²⁰³ state governors and other officials,²⁰⁴ Inspectors General,²⁰⁵ court decisions,²⁰⁶ and the White House²⁰⁷ all prompt agencies to return to their legal authorities to ask whether they have gone astray or to look for previously unacknowledged power to respond to external concerns. In addition, the administrators we interviewed showed an awareness of and sensitivity to matters that capture the public’s attention, at least as measured by what generates public outrage, frustration, or concern worthy of general commentary: “Media attention to an issue, I think, definitely can affect how an agency deals with a rule.”²⁰⁸

These responses undermine the caricature of the bureaucrat as an insulated technocrat. Moreover, aside from such reactive forms of responsiveness, interviewees also described agencies’ affirmative and proactive efforts to understand how regulated publics viewed potential policy options. Such forms of outreach are sometimes required by statute and the notice-and-comment process. But they also have become part of some agencies’ conventions.²⁰⁹ We heard examples

202. Interview Comment No. 429.

203. Interview Comment No. 363 (“[G]overnments routinely lobby us about how we set up our trade regulations and our security regulations to their own economic benefit or detriment or security benefit.”).

204. Interview Comment No. 311 (“[S]tates come in with some interesting ideas [on Medicaid waivers]. Clearly, they are trying to get as much of the federal treasury dollars as they can get. You’re trying to plug the dike with as many fingers as you can . . . I would say that the political pressures, because you got individual governors involved in different things on Medicaid, are an order of magnitude many times greater than what you see on the Medicare side.”).

205. Interview Comment No. 319 (“[I]f we accept [Inspector General] recommendations, we’ll go back and refine the rules. If we disagree, then we just go about our separate ways.”).

206. Interview Comment No. 616 (“[A] line of caselaw [is] developing that [is] very favorable to plaintiffs on the transgender issue.”).

207. See *supra* Part I.

208. Interview Comment No. 481 (“[N]o one really cared about it in terms of political coalitions that were in Congress or out [there] that were trying to put pressure on us, but somehow the editorial boards of the New York Times and the Washington Post [would draw attention to an issue.]”); Interview Comment No. 593 (“There’s a lot of media coverage of a topic and that might prompt us to write a rule.”).

209. See, e.g., Neil R. Eisner & Judith S. Kaleta, *Federal Agency Reviews of Existing Regulations*, 48 ADMIN. L. REV. 139, 147 (1996) (“Informal reviews are a routine, daily occurrence in which, during the general operations of the agency, problems with existing rules are identified that may warrant further action. Investigators and others who work with the regulated parties may note a continuing problem in implementing rules; attorneys may note problems in enforcing, interpreting, or litigating over rules; and accidents, congressional interest, media interest, and other events may result in discussions within an agency that may, in turn, result in a decision to change rules.”).

of agencies seeking industry assistance in the development of rules;²¹⁰ embedding personnel within regulated systems to better understand how they operated;²¹¹ and holding wide-ranging meetings with groups likely to be affected by agency action when shaping a policy idea.²¹² In some settings, these conventions also appeared to emerge as the result of demands from regulated interests. One official told us, for example,

[W]e literally got zillions of questions on a daily basis, like any agency, from people who are trying to interpret what they are supposed to do under the law. . . . [T]here are outside counsel who are telling them the most important thing in the world to do is mitigate risk [The agency] would be reactive . . . once . . . it [became] clear to you that . . . [i]t's not just that your guidance isn't good enough, it's actually unclear, and it's important enough that there might be a reason to . . . start [a] potential process [to change it].²¹³

Such efforts begin to approximate the ongoing responsiveness that we believe is necessary for government accountability.

Interviewees consistently found some kinds of public input more useful than others. Policymakers seemed most responsive to the concerns of what they referred to as “stakeholders,” meaning not the public generally but those parties whose own work and operations would be most affected by the policymaking under consideration.²¹⁴ In some instances, this concern radiated outward toward

210. Interview Comment No. 338 (describing how an agency sought assistance from cargo companies while developing a screening rule).

211. Interview Comment No. 28 (describing a program in which an agency embedded fellows in health-care systems to identify examples of innovation and pain control).

212. Interview Comment No. 534 (“Before we were going to undertake a regulatory process, we would go through all the input-gathering steps that are required, and often a bunch that were not. So like seeking out feedback on the terms, doing public meetings, seeking out feedback on whether to regulate, what to regulate, how to regulate, doing public meetings on whether to regulate, what to regulate, how to regulate.”); Interview Comment No. 270 (describing an agency as frequently “taking meetings with the regulated community [and] meet[ing] with all kinds of outside groups to help understand what their needs are”).

213. Interview Comment No. 502. *See* Interview Comment No. 614 (“We got lots and lots of inquiries [when a new statute was passed], lots and lots of lobbying from different employer groups, law enforcement groups, doctors, occupational doctors who just didn't know how to deal with this.”); *id.* (“[W]e always get a lot of inquiries when you go out and you talk to groups.”).

214. *See* Interview Comment No. 819 (“[S]o generally, . . . we try to be, and, and I don't want to sound jargony, but we try to be as transparent as possible. And so many times, we use a, a multilayered approach to rulemaking. We do an addition to the required notice and comment

a broader category that might map onto a general public—categories such as consumers.²¹⁵ Agencies often thought in terms of who would be most affected by the policies they were developing. So, officials in the Department of Education might solicit the perspectives of teachers, school districts, and educational associations. The Small Business Administration sought out organizations committed to expanding opportunities for minority-owned businesses, or small-business groups themselves. In some instances, policymakers were explicit about paying special attention to interests with significant clout (whether reputational, financial, or political).²¹⁶ Here, we see the supposedly expert agency looking for expertise and experience from outside its walls to calibrate its policies.²¹⁷

in the *Federal Register*. We may have a workshop. We may have a round table inviting in stakeholders from all elements. We do this as much to enlighten the staff that are working on this just to make it as open a process as possible.”); Interview Comment No. 466 (“The stakeholders were the folks you might imagine. They were people who [operated the facilities being regulated]. . . . We talked to civil rights groups. We talked to [those who suffered the harm being regulated.]”); Interview Comment No. 341 (noting that when drafting annual rules, the agency constantly received feedback from the regulated world: “Obviously you had some sour grapes from people who didn’t get what they wanted, but everybody knew that it would come up the next year, and so you could improve upon it, and not to take things too hard,” whereas for multiyear rules “those things live practically forever, and industry treated those as a fight to the death, because their entire business model could be put off”); Interview Comment No. 91 (“Well, honestly the most useful stuff was not sort of particular to statutory interpretation, but it was when someone in the regulated community would point out an impact that we hadn’t thought of. So ‘if you go in this direction, it will cause this unintended consequence,’ and sometimes that was a consequence we hadn’t thought of, and that was really useful and important.”).

215. Interview Comment No. 900 (“I was there for so long, and it tended to be very similar to what I discussed, which is a really, really good look at the complaints we were getting from consumers, inputs from the Bureau of Economics, from our commissioners, from partners in law-enforcement area, observations from all of the many organizations that we deal with on a regular basis: businesses, consumer groups, workshops that we convene . . . on various topics to explore and learn about them.”); Interview Comment No. 912 (“There are what we call conduct cases, and that’s more, we get a complaint or something like that. Somebody says Firm A is doing something anticompetitive. They’re doing something to harm competitors and exclude competitors. And that might be, somebody reads an article in a newspaper, we could get a letter.”).
216. See, e.g., Interview Comment No. 585 (“A set of incredibly experienced lobbyists on [the issues before our agency], and they’re called the Big Six of Associations who have a great deal of clout, so they would be major outside stakeholder types.”).
217. Cf. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 4 (1992) (“[Responsive regulation] suggest[s] that regulation be responsive to industry structure in that different structures will be conducive to different degrees and forms of regulation. Government should also be attuned to the differing motivations of regulated actors. Efficacious regulation should speak to the diverse objectives of regulated firms, industry associations, and individuals within them.”).

These concerns also seemed to shape notice-and-comment rulemakings.²¹⁸ Our interviews indicate that agencies use the notice-and-comment process strategically, including to test run theories about their legal authority or to send up trial balloons about policies to see how the interested and regulated world might react.²¹⁹ Our subjects also consistently emphasized that they learned from the notice-and-comment process.²²⁰ But as with more informal interactions with the public, numerous interviewees noted that the most useful comments came from the regulated world, especially trade associations, industry groups, and advocacy organizations. This form of feedback was especially valuable to agencies' weigh-

218. We did not set out to study the notice-and-comment process. But because our objective was to understand how agencies interpret statutes, we did inquire into how they utilized notice and comment to probe the limits of their statutory authorities, which in turn prompted wide-ranging observations from our interviewees about the role of public comments in informal rulemaking more generally. Nonetheless, a note of caution may be in order here: this part of our interview protocol may have been the most likely to elicit motivated answers, that is, responses that reflect what interviewees believed to be the right answer in light of their obligations under section 553 of the APA, as opposed to a self-critical account of whether they took public comments seriously. And yet, the fact that every interviewee who had been involved in notice-and-comment rulemaking contended that public input shaped regulatory outcomes is strongly suggestive of the procedure's relevance.

219. *See, e.g.*, Interview Comment No. 91 ("We had an interpretation that might be a little aggressive, and we would sort of use the proposed rule to kind of feel out the level of opposition, and that would be helpful to us in deciding what our risk tolerance was for an aggressive interpretation. So that happened a lot."); Interview Comment No. 221 ("One strategy that was used by the agency, particularly where it was unclear what the best course was, or what the Congress wanted, was to really be explicit in discussing different alternatives, and then letting the comment process help guide it. That was one strategy that we would use, particularly for those areas that were unclear or complicated or brand-new for the agency, to implement.").

220. *See, e.g.*, Interview Comment No. 169 ("[P]ublic comment . . . [would] provide thoughts that the agency or general counsel hadn't previously thought of, and suddenly the agency became convinced that there was another way to think about a particular issue. That could happen on legal issues, and it could happen on policy issues."); Interview Comment No. 440 ("So we published a proposed rule that did not include [a particular entity] . . . We got a lot of comments back saying this is stupid, you need to include them. And then we talked about it internally . . . and concluded that we felt [it] made sense to . . . reverse our initial position."); Interview Comment No. 222 ("Congress didn't know what the right answer was, so the statute really gave a lot of discretion, with provisions that the agency was kind of thinking about for the first time, where the agency decided to draft the proposed rules in a way that would give a clear roadmap to how the agency was thinking, and purposely trigger comments and . . . pathways for what w[ere] called logical outgrowths, where you could change the policy and the final regulation depending on the comment.").

ing of practical considerations: it illuminated potential unintended consequences and identified limitations or needs in the status quo.²²¹ And the (sometimes conflicting) comments from members of Congress also registered clearly with our subjects.²²²

Considering agency responsiveness to public views inevitably raises the specter of capture – when a regulated industry effectively controls the agency meant to regulate it.²²³ Some of our interviewees did express some skepticism and exasperation with attempts by industry to harness agency power for its own interests.²²⁴ In general, our materials do not support a strong conclusion about the

221. *See, e.g.*, Interview Comment No. 1376 (“[Trade groups and industry associations] are very influential because they know what they’re actually doing much better than we do so we need to understand that . . .”); Interview Comment No. 983 (“The [group of] people who are actually [going to] have useful things to say about a . . . rule [governing a specific commercial practice] is [going to] be pretty darn small.”); Interview Comment No. 1925 (noting that comments are not “prioritized or deprioritized” but that “comments from . . . state [education] chiefs and [subject-area membership organizations] . . . tended to be very well informed and very detailed”); *see also* Interview Comment Nos. 270, 271, 284, 285, 466, 522, 534, 576, 614, 615, 846, 896, 1376, 1575, 1578, 1853 (noting the influence of trade associations and industry groups).

222. *See, e.g.*, Interview Comment No. 206 (“Oftentimes, during the notice and comment process, the loudest voices of concerns about proposals came from members of Congress. Those were taken into consideration in making final decisions. It was often the case where the agency would propose something and you would get many comments from members of Congress . . . and those would be data points for the agency to make when doing final regulations.”); Interview Comment No. 218 (“But you would oftentimes hear multiple points of view from people that thought about the provisions, that worked in the Senate versus those that worked in the House, those that worked on different committees. That was just a balancing act that you would have to balance.”); Interview Comment No. 365 (“In situations where you’re going to put out a fairly rapid national security rule and you’re not doing public comment, the Congress serves as a good sounding board. Members of oversight committees, they’re not involved in drafting, but we might call them to say, ‘Hey, what do you think about this?’ Because they know their constituents, they might be able to provide some of the notice and comment to us of who’s going to be angry about it or who’s going to like it. I’m not saying that’s always done.”).

223. The fact that agency officials exercise judgment about the types of public input they find most useful underscores the discretion they have in any policymaking process and might also feed into concerns about agency capture or the antidemocratic nature of agency policymaking. But this form of judgment is inevitable in any complex policy process: officials are not mere conveyor belts. Judgment is also not necessarily inconsistent with inclusivity, since officials must mediate disagreement among publics interested in agency action. In other words, responsiveness itself entails judgment, which is in turn mediated by various reason-giving requirements, as well as expectations of openness to numerous forms of public participation.

224. *See, e.g.*, Interview Comment No. 91 (“I think the stuff that’s not useful that we would get a lot is when someone who has a really obvious financial interest in something would write a

conditions for or likelihood of capture, but they do cast a helpful light on the concept. Democratic accountability, in our view, requires agencies to be responsive to the needs and views of diverse affected publics – not just regulated industries but also those affected by such industries’ conduct.²²⁵ One can think of agency capture as a lack of pluralism in the decision-making process, a situation in which an agency limits its responsiveness to only one kind of interested party. No interviewee reported experiencing such an exclusion of interests. While such extremes are certainly possible, our research illuminates some of the protective structures that can help agencies avoid capture by staying connected and responsive to multiple publics and situations on the ground.

What we learned thus provides a valuable foundation on which to build more forms of public interaction and public expertise into policymaking at every stage²²⁶ and to diversify the types of interests that register as relevant – changes

comment saying that that thing was horrible, and illegal, and make a bunch of really transparent arguments that were just trying to dress up their own financial impact as legitimate as opposed to just their perspective and how they would make more money.”); Interview Comment No. 1402 (“[Lobbyists] came and talked to me without much data. . . . [T]his . . . lobbyist . . . came in representing the association and [I] asked her questions like, ‘Okay great, so you’ve shown me this graph with two lines, nothing is labeled and you’re trying to tell me that the slope of this one is higher, so therefore it’s worse,’ like great, ‘What’s on the Y axis and what’s on the X axis, I don’t know.’ . . . I also asked her like, ‘Really, honestly I don’t know much about the [specific] industry, so can you tell me like what kind of margins do you guys have?’ ‘That’s proprietary information.’ I’m like, ‘Don’t you represent some public companies?’ ‘Yes.’ ‘Okay, then that stuff should be in . . . their filings with the SEC.’”).

225. William J. Novak has offered a historically grounded critique of the discourse of agency capture, a public-choice bogeyman used by both the left and the right to criticize administration. William J. Novak, *A Revisionist History of Regulatory Capture*, in *PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT* 25 (Daniel Carpenter & David A. Moss eds., 2014). Novak explains that “capture theory’s original skepticism about the behavior of a certain set of administrative institutions morphed into a more general and ideological ‘pessimism about the capacity of *any* governmental institution’ to serve the ‘public interest.’” *Id.* at 31 (quoting Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 *CHI.-KENT L. REV.* 1039, 1053 (1997) (emphasis added)). This transformation, he argues, rationalized “counter-reform proposals in the name of deregulation, privatization, and neoliberalism.” *Id.* at 32.
226. See, e.g., Michael Sant’Ambrogio & Glen Staszewski, *Public Engagement with Agency Rulemaking*, *ADMIN. CONF. OF THE U.S.* 157-70 (Nov. 19, 2018), <https://www.acus.gov/sites/default/files/documents/Public%20Engagement%20in%20Rulemaking%20Final%20Report.pdf> [<https://perma.cc/KA2G-UWT6>] (delineating ways for agencies to obtain high-quality public information when setting agendas and developing rules; proposing policies governing public engagement in rulemaking; and advocating for agencies to proactively ensure that parties whose interests may be affected are properly represented in a rulemaking).

others have advocated.²²⁷ We think it is likely that the notice-and-comment requirement and the judiciary's expectations that agencies take comments into account and provide sound reasons for policy decisions (along with officials' professional incentives to produce effective policy) have helped generate the informal responsiveness we describe. The premise that public input is required to legitimate agency decision-making pushes toward expanding agencies' capacity to gather information about and respond to the interests of the general public.²²⁸ The extensive informal interactions revealed throughout our conversations certainly seemed to shape the policymaking of almost all of our subjects, and their development and expansion might be part of any project to enhance the responsiveness of administration.

But another form of responsiveness—to the regulated world—also played a big role in our subjects' decision-making. This tendency, we would argue, helped to produce a still more specific type of accountability: holding agencies accountable for regulating well. We therefore turn now to what our research shows about this form of agency responsiveness.

227. See K. SABEEL RAHMAN & HOLLIE RUSSON GILMAN, CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS 142 (2019) (“[B]uilding a new democracy will require that outsider, adversarial, and oppositional frame to be supplemented by a focus on the actual, day-to-day mechanics of governing.”); Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. DISCOURSE 418, 446 (2021) (“A Biden directive could specify that public engagement must be egalitarian and inclusive, ensuring that no major regulations are proposed without meaningful consultation with those whom the laws and regulations are designed to protect. It could, further, give preference to interest groups that engage their members in setting policy over those that claim to be representative without any real internal participatory procedures. To ensure meaningful and inclusive participation at the agency level, Biden could direct agencies to designate officials as ‘regulatory public defenders’ tasked with identifying absent stakeholders, translating their stated needs and values into applicable regulatory language, and certifying that rule-drafting processes have given a fair consideration to regulatory beneficiaries.” (footnotes omitted)); Matthew Cortland & Karen Tani, *Reclaiming Notice and Comment*, LAW & POL. ECON. PROJECT (July 31, 2019), <https://lpeproject.org/blog/reclaiming-notice-and-comment> [<https://perma.cc/2JU8-GPBC>] (“[N]otice-and-comment is more than just a tool in the battle over the administrative state. It is also an opportunity for marginalized people—people whose voices are often diluted or excluded in the realm of formal electoral politics—to call out the power dynamics they see operating in the world and to name the casualties.”).

228. See, e.g., Sant’Ambrogio & Staszewski, *supra* note 136, at 844 (“Democratic accountability . . . requires government officials to render a justifiable account of what they are doing on behalf of the public”); *id.* at 800 (“[O]pportunities for public input and the obligation of agencies to respond in a reasoned fashion and to justify their decisions in public-regarding terms enhance the democratic legitimacy and accountability of regulatory policymaking.”). In considering how to expand avenues for public input, it would be valuable to avoid some of the less constructive and even counterproductive features of existing processes, such as mass comment campaigns or the proliferation of duplicative or meaningless comments generated through algorithmic technology.

B. *Effective Policymaking*

Perhaps the most prominent and pervasive form of responsiveness in our subjects' accounts was to the world around them. Our interviewees consistently emphasized the importance of ensuring the effectiveness of rules or policies, and they linked efficacy to addressing the realities of the situations they regulated. Here, policymaking reflected not the preferences of congressional appropriators or political supervisors in the White House but administrators' own sense of what the realities on the ground required in order for them to realize their agency mission.²²⁹

Responsiveness to real-world circumstances took numerous forms in our interviews. Sometimes emergent problems or new technologies did not map clearly onto existing understandings of the agency's authority, which prompted creative interpretation and experimentation, motivated by a sense of responsibility for a domain of social life.²³⁰ On other occasions, existing regulatory frameworks produced inefficiencies, injustices, or unintended consequences, which officials sought to ameliorate by returning to their legal authorities to find ways to adapt.²³¹ And particularly from agencies with national-security remits,

229. Interview Comment No. 633 (discussing the development of enforcement guidance as responding to changes in regulated industries and locations, citing newspaper articles, reports from interest groups, and "a lot of non-legal stuff" as the "noise out there" from which the agency learned); Wagner et al., *supra* note 152, at 208-13 (explaining that revisions to rules and regulations often involve informal notice and comment or other methods of public engagement outside of the formal rulemaking process); Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Deliberative Rulemaking: An Empirical Study of Participation in Three Agency Programs*, 73 ADMIN. L. REV. 609, 674 (2021) (listing mechanisms by which agencies ensure public deliberation, including EPA's extensive, informal deliberations with manufacturers and scientifically knowledgeable trade associations; the Federal Communications Commission's post-comment reply-styled filings that allow for adversarial exchanges between interested parties; and the Occupational Safety and Health Administration's (OSHA's) "elaborate, trial-like public hearings that allowed . . . cross-examination of agency and stakeholder witnesses and rebuttal testimony").

230. Interview Comment No. 87 (describing an agency responding to the rise of out-of-network charges in medical billing by making them more transparent to consumers, noting that "Congress did not tell [the agency] to solve this problem, . . . but it was just a little component of the market that we can make function a little better"); Interview Comment No. 253 (describing the rise of new technology not accounted for in an existing statutory benefits framework and devising a new method whereby the government and the beneficiary share the cost).

231. Interview Comment No. 345 (discussing the difficulty of devising rules during a major transformation in foreign relations); Interview Comment No. 350 (discussing an attempt to alleviate work restrictions on visa-holder spouses); Interview Comment No. 357 ("Frankly, a lot of these security focused rulemakings are tailored toward specific problems that have come to light . . . It may be based on some other sensitive information that we have. It may be based

we heard confirmation of a justification often given, in scholarship and judicial opinions, for executive action: that dealing with emergent problems when “there’s [not] time for legislative action to take its course” can prompt creative statutory and legal interpretation.²³² Some interviewees explained this form of responsiveness—what we might call a mission-driven reaction to problems within the agency’s ambit—as reflective of a professional-role morality:

[P]eople come into government I think in most cases to try and make a positive impact, try to address some problem, try to find some public benefit, and frankly this sort of administrative lawmaking, rulemaking is where a lot of people in federal agencies that I know of feel that they make the biggest impact. . . . [E]very day we’re reacting to things and sometimes getting ahead of them if we’re lucky.²³³

Our interviews also revealed a related way of adapting agency policy to take into account its effects in the world: considering a policy’s enforceability. A growing literature on administrative enforcement highlights how decisions about whether to pursue sanctions *under* existing legal frameworks can function as vehicles for policymaking. Our subjects repeatedly identified not just that they had enforcement discretion, but also that fidelity to their statutory mandates or regulatory missions required exercising discretion to ensure that their policies were effective rather than feckless.²³⁴

in a change in how the public is using our legal framework.”); Interview Comment No. 362 (describing security rules addressing emerging problems and adapting policy to the unintended consequences of statutory regimes or new rules, noting, “[O]ur first effort would be to figure out how the statute allows us to address these things, and try to tailor that toward the current threat or risk, and our effort to do that would look at what statutory authorities we have available. If we’ve been pretty clever, there are a lot of things that come from [existing law] that have turned out to be very useful [in other contexts]”).

232. Interview Comment No. 402 (addressing both the necessity and potential “profanity” of this justification for agency action).

233. Interview Comment No. 424; *see also* Interview Comment No. 524 (“I think if also clearly there’s a burning policy problem in front of you that you believe this statute was meant to solve.”).

234. Interview Comment No. 102 (noting the relevance of what state government actors believed to be enforceable); Interview Comment No. 371 (observing that Congress passes laws impossible to implement, necessitating waivers and creative problem solving to achieve some of the benefit the statute is designed to achieve); Interview Comment No. 446 (describing the realization that a particular dimension of a problem could not be solved through direct regulation, which necessitated a turn to incentives instead).

Agencies routinely made efforts to determine how their rules and policies worked in practice, incorporating feedback from the regulated world.²³⁵ Like some other forms of responsiveness we have described, this pervasive impulse embodies one of the virtues sometimes associated with administration and executive governance – the dynamic implementation of laws through continual adjustments in light of how legal policies play out in the world itself.²³⁶ We heard the sentiment that “hearing from people doing the work, living under the statutes, regs, . . . dramatically informed our policy, including shifts we made in our own policy over time that were pretty visible and in response to what we were hearing and seeing.”²³⁷

This responsiveness to empirical and operational realities arguably helps to ensure the ongoing relevance of an agency’s work, including by ensuring that administrators serve the populations they are meant to.²³⁸ As one interviewee explained it, agencies keep track of what happens on the ground – “agencies themselves know what’s not working, and career staff and agencies are always

235. Interview Comment Nos. 329-330 (discussing the annual evaluation of the efficacy and circumstances of a program to determine if the recipient pool should change). Other scholarship supports the conclusion that agencies engage in ongoing review and revision of their rules with extensive public input. See Wagner et al., *supra* note 152, at 190 (“[O]ur findings reveal that, at least in some quarters of the administrative state, revisions [to regulations outside of statutorily mandated review] are the rule rather than the exception [and] regulated parties are instrumental in driving many of these adjustments.”).

236. Interview Comment No. 292 (agreeing with the proposition that agencies “look[] at what’s going on in the world, and think[] how can we change our behaviors, so that we get things on the right track”). This form of responsiveness confirms what many scholars have identified as a virtue of administration – the ability to adapt to changed circumstances. See, e.g., Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 7-17 (2014) (arguing that “agencies are better suited than courts to do that updating work [because] . . . the agency has the superior claim to interpret the statute’s application to new problems during periods of congressional quiescence” and comparing agency responsiveness to decline in Congress’s responsiveness due in part to political polarization); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2102-03 (1990) (noting agencies’ ability to “soften statutory rigidities” and to “adapt their terms to unanticipated conditions” in light of their “fact-finding capacities, electoral accountability, and continuing attention to changed circumstances”); COX & RODRÍGUEZ, *supra* note 30, at 207 (justifying agency policymaking by arguing that “[u]ncertainty inheres in the legislative act, and the concrete consequences and social meaning of the law will become apparent only through its implementation. . . . [W]e should want an Executive Branch with the power to manage a legal regime based on its own judgment, forged through its experience overseeing that regime,” and that informational advantage “can be acquired only in a dynamic way”).

237. Interview Comment No. 529.

238. Interview Comment No. 308 (describing an example of listening to the regulated community: “Oh my gosh, if you’re asking for IDs for these folks, they’re not going to come in [for services]”).

briefing up.”²³⁹ Such monitoring and adaptation can also help ensure that the programs agencies administer maintain their integrity by ensuring that the entities they regulate are themselves accountable to the public interest, as required by the statutory regime in question.²⁴⁰ This creativity and dynamism helps to keep statutes relevant to a changing world, too. In other words, these practices display agencies’ stewardship of and fidelity to their statutory missions.²⁴¹

* * *

Proceeding from our research findings, we contend that responsiveness should figure prominently in any conception of agency accountability, in the sense that we should both appreciate and nurture the forms and culture of responsiveness we found. In our view, the forms of responsiveness we have described serve some of the purposes frequently (and usually mistakenly) attributed to elections and political control: they keep agencies connected to both regulated parties and the real-world situations those parties inhabit. People in a democracy should be able to expect their government to take account of developments in the world and public opinion in ways reasonably designed actually to address the issues at hand; serving a statutory mission requires adaptation as well as efficacy.²⁴²

Of course, no branch of government can be expected to solve any serious social problem or dispute completely. Well-functioning democratic institutions

²³⁹ Interview Comment No. 395.

²⁴⁰ Interview Comment No. 290 (“So, you’re always . . . thinking [creatively] about, ‘Okay, how can we realign the payment incentives so that it really is focused on the individual patient and they’re getting the service that they need, whether it’s two therapy services, whether it’s twenty, or whatever the case may be.’”).

²⁴¹ The Supreme Court decision with which we began—*NFIB v. OSHA*—in fact represents a threat to this sort of agency policymaking, given the Court’s skepticism of OSHA’s application of its workplace safety statute, enacted in the 1970s, to circumstances (i.e., the pandemic) not contemplated by its drafters—a skepticism that led the Court to block the agency’s effort to secure workplace safety in light of the pandemic emergency. *Nat’l Fed’n of Indep. Bus. v. DOL (NFIB)*, 142 S. Ct. 661, 665-66 (2022); see also *id.* at 670-71 (Gorsuch, J., concurring).

²⁴² To describe something like the efficacious responsiveness we describe, Blake Emerson has articulated a principle of “public care,” which

requires . . . officials to attend to the needs and values of those who have a stake in law’s administration. Public care precludes purely hierarchical, unilateral, or instrumental forms of action, in which one leader dictates to followers or subjects what they must do. It instead requires that the President and administrative officials listen to one another and respond to the input of the private parties their acts and policies touch.

Blake Emerson, *Public Care in Public Law: Structure, Procedure, and Purpose*, 16 HARV. L. & POL’Y REV. 35, 38 (2021).

enable negotiation among views and interests to continue, even after policy decisions are made.²⁴³ But the provisional nature of any policy decision need not thwart the objective of efficacy and may instead enhance it by allowing for flexible and specifics-sensitive responses to emergent issues and concerns.²⁴⁴

In emphasizing their value, we do not purport to show that the forms of responsiveness we uncovered effectively identify the public interest or will. Some of what we describe resembles interest-group influence, which may or may not be malign. We also do not mean to suggest that events-driven responsiveness always embodies the democratic ideal; such reactive behavior can be inconsistent with democratic mandates reflected in statutes and could involve agency over- and underreach. But these elements of agency policymaking belie the insular, expertise-driven conception of agency action that often drives the critique of the unaccountable bureaucrat. The forms of responsiveness we identify, therefore, ought to be incorporated into our understanding of agency action.

CONCLUSIONS AND IMPLICATIONS

Our study surfaced three forms of accountability that characterized decision-making by the administrators we interviewed but that are curiously absent from much of the scholarship on agencies and the administrative state. First, the integration of political appointees among civil servants ensures that administration maintains a political connection, the primary contribution of which is not electoral but epistemic. Instead of being locked in the dichotomous, conflictual relationship often portrayed in the literature, politicals and careers serve their statutory missions through complementary approaches, the interpenetration of which helps to ensure that neither pure technocracy nor raw politics determine outcomes. Second, decision-making is marked less by hierarchy and principal-

243. See generally HONIG, *supra* note 10 (discussing the positive implications of agonistic conflict within government and politics).

244. This kind of responsive and interactive, yet somewhat insulated and removed, role for government actors was also contemplated in the constitutional design. See Spence & Cross, *supra* note 22, at 132-33 (“By insulating Senate decision makers from direct electoral pressure (through indirect election and six-year terms), the Founders sought to create an environment conducive to deliberation and the development of expertise . . . [A]dministrative agencies serve the deliberative function that the Senate once did.” (citing JOHN A. ROHR, *TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE* 171-94 (1986))); Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 *YALE L.J.* 1538, 1547 (2018) (arguing that the administrative state is “an outgrowth of the [congressional] petition process” because older forms of interaction between private parties and the federal government mediated through constitutionally recognized petitions have migrated to administrative procedures).

agent relationships and more by interactional accountability—processes of decision-making that require a great many people to develop, justify, defend, and negotiate their positions with a range of interlocutors. This multilateral, recursive way of developing policy options and coming to decisions means that many people must account for their positions to many others. Though this model surely produces inefficiency and redundancy, it also ensures that compromise and deliberation fundamentally characterize policymaking. And third, agencies affirmatively render themselves responsive to the publics they affect and the situations they regulate, a responsiveness that infuses deliberation with democratic characteristics and facilitates realistic and efficacious policies that can adjust to new conditions. Our work shows that agencies are constantly interacting with, learning from, and reacting to the world outside the government, actively allowing both emerging ideas and developing realities to influence their decisions.²⁴⁵

These findings do not necessarily exhaust all of the administrative state's means for promoting accountability, and our conclusions are subject to caveats. The practices we uncovered may not always be present or utilized; their structure and operation may differ by regulatory context; in any given situation, they may fail; and they remain amenable to fortification and improvement. Especially in contexts where legislators or political officials seek to undermine an agency's efficacy or counteract its mission, such practices may be the first on the chopping block. If anything, the possibility of administrative sabotage underscores the practices' importance to good governance. If what matters is effective government that serves the public interest—a normatively attractive vision, in our view—then the characteristics we identify are ones to nourish.

Our findings suggest two sets of implications—one theoretical and one doctrinal—for how we should think about the production of accountability in the administrative state. We consider each set in turn, emphasizing that accountability in administration is both more widespread and more difficult to produce than is often assumed.

On the theoretical side, our study underscores that considering how to produce accountability requires some articulation of what accountability consists of and what values it serves. Our view is that policymaking in a democratic polity requires that government actors provide reasoned justifications for their choices and that those choices take into account the needs and views of affected publics in ways that leave decisions open for evaluation, challenge, and change.²⁴⁶ Breaking this down a bit, we have suggested that accountability consists of a

245. Cf. ROSE-ACKERMAN, *supra* note 10, at 4 (defending “administrative procedures that require bureaucracies to reach beyond official circles and consult broadly with the public” since they “contribute to the democratic legitimacy of delegation”).

246. See *supra* notes 188–192 and accompanying text.

reasoned deliberation that considers many options; an inclusivity that takes into account a wide range of interests; and a responsiveness to both affected publics and conditions on the ground.²⁴⁷ We resist assuming that accountability emerges naturally from a particular mechanism or that any single mechanism suffices to produce it. Such assumptions about the empirical location of normatively desirable traits substitute red herrings for reality-based institutional design. We explore instead how the practices we uncover relate to the democracy-enhancing values of accountability we support—again, reasoned deliberation, inclusivity, and responsiveness. That is, we use our empirical findings to address our normative concerns.²⁴⁸ Our account is ultimately congenial to and builds upon the work of theorists who treat deliberation as legitimating of coercive government power. As Jerry L. Mashaw has put it, “All deliberative democrats emphasize reason-giving as critical to democratic legitimacy. For them, administrative policymaking, like all government action, is legitimate just to the extent that it can be justified by reasons.”²⁴⁹ Our empirical investigation helps to identify what deliberation might entail and the structures that help to produce it.

The diffused, variegated conception of accountability we uncover also provides a contrast to influential, top-down models, although we would not reject those models entirely. According to one prominent conception, accountability depends on strict hierarchies and principal-agent relations. For this model, accountability arises out of the obligations subordinates have to obey supervisors and is enforced through the concomitant sanctions supervisors can impose for failure to carry out their orders.²⁵⁰ Hierarchy, on this view, delivers transparency, clarifying where responsibility for any given decision lies. And it provides a mechanism to discipline wayward actors, allowing supervisors to impose consequences for failure to adhere to requirements. The fact that the ultimate principal is the elected President arguably gives this hierarchical conception a democratic connection. And yet, though hierarchy is not absent from our findings, it is not the dominant relationship among executive policymaking officials. More to the point, as the diffused decision-making we bring to light suggests, an emphasis

247. We derive these values from both scholarship on accountability and the term's use in broader academic and political discourse. Still, accountability may have somewhat different characteristics in different areas of social life, as Mashaw has posited. See Mashaw, *supra* note 7, at 5-10. We therefore confine our discussion to the regulatory arena our research has focused on. At the same time, we think our broad themes may be relevant to other areas of accountability as well, especially those concerning other kinds of government action.

248. That normative-empirical connection comes out clearly in our study's progression: we did not set out to research accountability and did not ask interview subjects about it, yet the practice-based image of agency policymaking our research yields speaks to the values that accountability serves.

249. See MASHAW, *supra* note 133, at 158.

250. See, e.g., Rubin, *supra* note 8, at 2085-86.

on hierarchy as a form of internal corporate accountability may not be the best means of producing accountability properly defined.

On the subject of presidential control, our work does not disprove its importance or potential utility. But we do show that its value is distinct and far more diffuse than typically understood. Many justifications for centralizing administrative power in the President rest on the assumption that elections make officials accountable by definition because they provide the public with an opportunity to express its views through the vote – to either put someone into office because of what they promise or to sanction them for disapproved action by electing someone else.²⁵¹ But as we have argued, elections in themselves do not produce an interactive, reasoned, dynamic construction of policy decisions that respond to ongoing public influence, nor is it conceivable that a single elected official in the executive branch will promote these values across the government.²⁵² Presidents do influence policy through their political appointees, who tend to share their general orientation to governance issues. But we found that a President's influence tends to be diffuse and atmospheric more than direct and specific. More often than not, presidential priorities do not have particular or concrete form, and the political influence of an administration arises from the sharing of high-level values and policy preferences by officials loosely affiliated with the reigning political party.

Our research also supports the conclusion that appointees rarely override complex policy processes with unilateral decisions. Where presidential priorities exist, they shape agency decision-making through the integration of political appointees in the operations of the career civil service. Political appointees work with career civil servants in dense, interdependent networks to produce policy outcomes. These networks have their hierarchies, and participants know what level they find themselves on. But the policymaking process does not happen along simple principal-agent lines. Policy ideas come from various places on the

251. See Staszewski, *supra* note 8, at 1254-56, 1266-69 (explaining why this assumption lacks an empirical basis). The electoral assumption also underlies the argument that political appointees ought to align completely with the Presidents who appoint them and, in turn, directly supervise civil servants who must obey their orders – beliefs that shape the judicial doctrines we explore in more detail below.

252. On the contrary, elections seem to serve somewhat different purposes, such as providing a peaceful succession in office and helping the government set broad, overarching, but vague goals. Rubin, *supra* note 8, at 2077. As various scholars have noted, elections give voters very limited candidate options and vanishingly few avenues for expressing views on any particular issue. They do not enable elected officials to consult with the public on any particular issue and especially not on those that are not highly salient – which is most issues. U.S. presidential elections in particular allow for candidates to win with a minority of the vote, and they pose no threat to a second-term President, undermining the notion that tight presidential control keeps agencies accountable to majorities or the public as a whole. See sources cited *supra* note 21 and accompanying text.

hierarchy, and a seriously considered proposal traverses multiple levels multiple times.²⁵³ Participants explain their positions to others at various hierarchical levels in ways that have real effects on the ultimate decisions. Perhaps most importantly, participants' views can change in the process: policy preferences often develop dynamically through policymaking.

Proponents of the presidential-control model might view these empirical findings with alarm or concern. But we think, perhaps counterintuitively, that diffused (rather than concentrated) political influence ultimately encourages and enables administrators to act accountably, ensuring the incorporation of diverse forms of knowledge and reasoning into decision-making. The disaggregated coordination of divergent interests and plans exemplifies a particularly democratic notion of accountability: one that engages and explains, recognizes its own provisional nature, and serves no single master. Whether through legally required procedures like notice-and-comment rulemaking, in standardized forms like workgroup interactions or public listening sessions, or in the informal communications with colleagues and members of the public that characterize government offices, this fragmentation entails far more accounting to colleagues and external publics than the unitary executive some theorists and courts strive to achieve.

On the doctrinal side, this diffused, multilateral picture of agency policymaking clarifies the stakes in some of today's major debates over Congress's authority to structure administrative decision-making and deflates certain accountability myths that underpin contemporary jurisprudence. Most obviously, given the account we have just given of presidential and political control, our research demonstrates the descriptive impossibility of the unitary executive and the limited reach of the major doctrine that seeks to safeguard it in the name of accountability—the jurisprudence of the removal power. Judicial and academic elaborations of the power emphasize that the prospect of being removed by the

253. Our work also provides a corrective to conceptions of bureaucratic legitimacy that rest on bureaucrats' apolitical expertise. Other common accounts of the administrative state reject the wisdom of political control in favor of a conception of accountability that depends on neutrality. Agencies and administrators, on this view, provide a nonpartisan arena in which policies can be chosen on their merits, with an eye to a larger public good. A related view puts great stock in agencies' subject-matter expertise. Somewhat like political neutrality, expertise is supposed to guide agencies to scientifically superior policy options, ones that yield the best outcomes for the nation irrespective of particular preferences. Both neutrality and expertise promise ways to render agencies accountable to a broader public than just their political masters, orienting them toward values that exceed any given legislative session or presidential administration. See, e.g., STIGLITZ, *supra* note 197, at 4-17 (discussing theories of agency neutrality and expertise, and their critics). Our account shows why this dichotomous conception of administration neither accurately describes what goes on inside the administrative state nor captures how best to produce democratic accountability.

President helps to ensure that lower-level officials adhere to presidential priorities, thus securing accountability to the voters through fidelity to the elected head of the executive branch.²⁵⁴ Congressional efforts to insulate officials from removal, as a result, disrupt the constitutionally specified mechanisms of accountability. But again, we have shown that presidential involvement in agency decision-making, in practice, is generally partial, episodic, and events-driven. Removal itself is exceedingly rare.²⁵⁵

In highlighting the semi-mythical quality of the removal power as an accountability-forcing device, we do not mean to suggest that the prospect of removal will never promote accountability, nor do we expect that our empirical observations will change the commitments of those who subscribe to the unitary model, in part because our research does not address the formal constitutional claims made on behalf of a robust removal power.²⁵⁶ But our findings ultimately underscore a point made more than a decade ago by Harold Bruff, that “constitutional definitions of the removal power simply do not matter very much to the conduct of our government. . . . [T]he constitutional power of removal, whatever its formal extent, dwells in the shadows of operational government.”²⁵⁷

254. See, e.g., *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021) (“[B]ecause the President, unlike agency officials, is elected, this control is essential to subject Executive Branch actions to a degree of electoral accountability.”); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1268 (2014) (“[P]residential control through removal provides a certain essential political accountability required by the constitutional structure and a republican form of government.”); Rao, *supra*, at 1227–28 (“The person that controls removal commands the subordinate’s loyalty—a simple truth of administration that an officer will seek to please the person that decides whether the officer stays or goes.”).

255. See, e.g., Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 412 n.132 (1987) (“Involuntary removal of an agency head is an extreme act that the President rarely would need to take to ensure that an independent agency acts in a manner consistent with the President’s policy preferences. Because the President appoints agency decision makers initially, differences in policy perspectives are likely to be modest. Agency heads are likely to acquiesce in the President’s preference in such cases. If sharp differences in views arise, an agency decision maker is far more likely to resign than to engage in a confrontation with the President. Thus, if the President communicates his policy preference to an agency decision maker, the agency is highly likely to defer to the President.”).

256. Compare Jed Handelsman Shugerman, *The Indecisions of 1789: Inconsistent Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. (forthcoming 2023), <https://ssrn.com/abstract=3596566> [<https://perma.cc/2GSW-XB7D>] (reviewing the historical evidence frequently used to support an originalist account of an unconditional presidential removal power and deciding that it is, at best, inconclusive), with Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (arguing that the text and history of the Constitution support a strong-form unitary executive theory).

257. Harold Bruff, *Presidential Power Meets Bureaucratic Expertise*, 12 U. PA. J. CONST. L. 461, 481–82 (2010); see also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV.

The removal power could conceivably be brought out of the shadows and given greater reach, in service of the ideological aims of the unitary executive's proponents, including by a Court committed to expanding political influence over government. Together with the proliferation of cases under the Appointments Clause that have led the Court to bring administrative law judges increasingly under political control, an expanded removal doctrine could mature into an attack on the civil service.²⁵⁸ This attack could also come much more quickly and directly from a presidential administration steeped in the view that the entire executive branch ought to bend to the President's will. The so-called "Schedule F" proposed during the Trump years – a plan to convert potentially hundreds of thousands of civil-service positions to at-will employment – could become a

1231, 1244-45 (1994) ("A presidential removal power, even an unlimited removal power, is thus either constitutionally superfluous or constitutionally inadequate. Congress, the President, and the courts have accordingly been spending a great deal of energy arguing about something of relatively little constitutional significance."); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 39 (2013) ("As a method of exercising control over an agent, removal is simply not all it is cracked up to be. Removal may not only be unnecessary given the extant instruments of agency control wielded by a supervising official; it may also be ineffectual because it is too costly, too clumsy, and too molar a tool for attaining desired policy results. As a result of these limitations, even a supervising official who has no other instruments of agency control will not necessarily find her ability to elicit desirable policy outcomes increased in any meaningful way by a judicial intervention reallocating removal power. Accordingly, for a court to treat removal as a unique Archimedean lever that can move the bureaucratic world would be quixotic. Again, where removal authority is a nugatory addition to the presidential arsenal because of its costs, judicial action in the vein of *Free Enterprise Fund* may have the perverse effect of creating a semblance of presidential control where little exists, thereby hindering, rather than advancing, democratic accountability."). Another, related critique emphasizes that the functional independence of an agency is not clearly determined by whether its head is insulated from removal by for-cause requirements. See, e.g., Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1163 (2013) ("Many important agencies whose heads lack for-cause tenure protection are conventionally treated as independent, while other agencies whose heads enjoy for-cause tenure protection are by all accounts thoroughly dependent upon organized interest groups, the White House, or legislators and legislative committees.").

258. See, e.g., *Lucia v. SEC*, 138 S. Ct. 2044, 2055-56 (2018) (holding that administrative law judges are inferior officers under the Constitution); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982-83 (2021) (requiring political supervision of patent judges under the Appointments Clause). The Court also continues its reliance on the removal power to check congressional design, most recently in *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021), where it noted, when declaring that insulating the single head of the Federal Housing Finance Agency from at-will removal violates the separation of powers, that

because the President, unlike agency officials, is elected, this control is essential to subject Executive Branch actions to a degree of electoral accountability. At-will removal ensures that "the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community."

(quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 498 (2010) (citations omitted)).

blueprint in the next Republican administration and expand removal's reach dramatically.²⁵⁹

In the face of these possibilities, our findings provide an empirical foundation for evaluating and ultimately resisting such developments. We have not shown, nor do we believe, that political influence over administration tends to be malign; we in fact hope our work helps to demonstrate why political influence over administration is not something to be feared and can operate in ways essential to democratic judgment.²⁶⁰ But our findings also underscore that such political influence works in combination with and as a complement to the distinct forms of reasoning and institutional orientations of the civil servant or career official who is neither put in place because of loyalty to a political regime nor depends on the good favor of political officials to continue in office.

By badly distorting the balance between these two types of officials' complementary policymaking modalities, ideas such as Schedule F, and the furthest-reaching implications of recent appointments and removal jurisprudence, threaten to enervate an essential form of reasoning from which political officials themselves benefit. For instance, the fact that career officials (as a group) know they will outlast any given administration ensures they have a different epistemic purview than political officials; they are more likely to be concerned for the reputation of their agency and show greater interest in the perpetuation of the agency's mission and culture. Career officials might also be more likely to be concerned with developing policy that "works" over time as opposed to with temporary political benefits that might result from a particular policy approach. If all or most decision-making officials operate with a single mindset, decision-making will involve less contestation and deliberation, a development we believe would compromise accountability and the related value of efficacy.

Our work also has doctrinal and theoretical implications for the Court's resurgent concern over the supposedly excessive and unconstitutional delegation of power by Congress to administrative agencies—concern that has produced

259. See Exec. Order No. 13957, 85 Fed. Reg. 67631, 67631 (Oct. 21, 2020) ("Pursuant to my authority under section 3302(1) of title 5, United States Code, I find that conditions of good administration make necessary an exception to the competitive hiring rules and examinations for career positions in the Federal service of a confidential, policy-determining, policy-making, or policy-advocating character."), *revoked by* Exec. Order No. 14003, 86 Fed. Reg. 7231 (Jan. 22, 2021); see also Loren DeJonge Schulman, *Schedule F: An Unwelcome Resurgence*, LAWFARE (Aug. 12, 2022, 8:01 AM), <https://www.lawfareblog.com/schedule-f-unwelcome-resurgence> [<https://perma.cc/T9GN-EVT2>] ("While some of the policy's supporters have described their interest as driven by a desire to 'hold the D.C. bureaucracy accountable,' others in the former president's camp are reportedly open about their desire to purge an estimated more than 50,000 civil servant positions and replace these career posts with party loyalists, consistent with the former president's long-standing frustrations with the career workforce.").

260. For a sustained argument along these lines, see Rodríguez, *supra* note 25, at 63-76.

calls for a revitalization of the nondelegation doctrine itself and driven recent expansions of the so-called major questions doctrine. Proponents of each justify their views as promoting the democratic accountability in government that the separation of powers was designed to ensure. Although the Court has never specified the nondelegation idea's precise requirements,²⁶¹ its purported limits on congressional power have been justified in terms of accountability.²⁶² Preventing Congress from delegating too much authority ensures that the public can assess congressional action and prevents agencies from usurping Congress's decision-making powers and "intru[ding] into the private lives and freedoms of Americans by bare edict."²⁶³ The major questions doctrine similarly acts as a limit on agency action in the name of democracy.²⁶⁴ Over time, a presumption that narrowly drafted statutory text should not be interpreted to grant sweeping powers of "vast 'economic and political significance'"²⁶⁵ has become a stringent clear statement rule requiring "explicit and specific congressional authorization

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261. See generally Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. ENV'T L.J. 379 (2021) (discussing the Supreme Court's nondelegation doctrine jurisprudence). Nondelegation has been heralded as enforcing a constitutionally mandated separation of powers, but its basis remains somewhat mysterious, as "[n]othing in the Constitution purports to limit Congress's authority to delegate to agencies." Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 374 (2019); see also Mortenson & Bagley, *supra* note 21, at 279-80 (calling the nondelegation doctrine "decidedly protean" and noting that, in various phrasings, it has been used to limit Congressional delegation of authority "to adopt generally applicable rules of conduct"; to "make rules for the governance of society"; to determine what constitutes unlawful conduct; or to make policy on particularly "important subjects" (quoting *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting))).
262. See, e.g., Nat'l Fed'n of Indep. Bus. v. DOL (*NFIB*), 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (arguing that the nondelegation doctrine "ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials"); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 14 (1995). While the nondelegation doctrine has been justified as a judicial enforcement of Congress's duty to do its job, the Supreme Court has declined a similar enforcement power over the executive. See, e.g., *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65-67 (2004); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571-73 (1992); *Heckler v. Chaney*, 470 U.S. 821, 827 (1985).
263. *NFIB*, 142 S. Ct. at 669 (Gorsuch, J., concurring).
264. Bernstein & Staszewski, *supra* note 199 (manuscript at 34-41).
265. *Ala. Ass'n. of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). In *Utility Air Regulatory Group v. Environmental Protection Agency*, the Court struck down an EPA interpretation of the Clean Air Act as allowing the agency to set emissions standards for greenhouse gases, reasoning that this interpretation would significantly enlarge EPA's jurisdiction "without clear congressional authorization." 573 U.S. 302, 324 (2014).

for . . . agency policies” that a Court majority “deems ‘major.’”²⁶⁶ Accountability claims underlie this idea too. Proponents argue that the major questions principle guards against “unlikely delegations of the legislative power” and prevents an agency from “exploit[ing] some gap, ambiguity, or doubtful expression in Congress’s statutes to assume responsibilities far beyond its initial assignment.”²⁶⁷

Our research suggests that, even were these doctrines to be applied consistently, they too reflect anemic conceptions of accountability. At the most basic level, by curtailing Congress’s authority to determine the best means by which to ensure that its legislative plans come to fruition, these doctrines are more likely to thwart Congress than to empower it. Equally important, as our research underscores, the portrayal of agency action as unaccountable overlooks the considerable procedural complexity, contestation, and deliberation that generally go into regulation.²⁶⁸ Agencies operate within a structure of ongoing accountability: they are required both by law and by the structure of their workplace to ground and justify their policy preferences to a range of other people who can influence final decisions. Given these and other practices, we should see agencies as accountable complements to Congress. Congress’s electoral accountability, which operates at discrete moments in time and concerns broad-gauged choices about candidates and platforms, operates in tandem with the daily and specific accountability that we demonstrate can govern agency policymaking, to provide a far more holistic version of accountability than the abstract and romanticized electoral story standing alone.²⁶⁹ By limiting agencies and thereby Congress, the nondelegation and major questions doctrines undermine democratic policymaking based on a mistaken conception of the unaccountable bureaucrat.²⁷⁰

266. Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 4), <https://ssrn.com/abstract=4165724> [<https://perma.cc/9PMG-ZZS9>] (“Even broadly worded, otherwise unambiguous statutes do not appear good enough when it comes to policies the Court deems ‘major.’”).

267. *NFIB*, 142 S. Ct. at 669 (Gorsuch, J., concurring).

268. See *supra* Parts I-III.

269. The range of concerns Congress must address, combined with the limited number of people who work there, inherently constrains how much attention Congress can give to any given policy choice. It is also worth noting that Congress is neither required to justify and account for its decisions, nor is it structurally capable of giving every issue sufficient attention to govern effectively, nor clairvoyant enough to predict every new situation that might come up in a given field. The claim that this setup gives voters sufficient power over government action runs similarly aground on the basic facts of how elections are run: as binary choices between candidates rather than ongoing deliberations over decisions.

270. As Daniel T. Deacon and Leah M. Litman note, the most recent version of the

In critiquing these doctrinal developments, we do not mean to suggest that the courts cannot promote accountability in government. As we will explore in other work, the prospects of judicial review and the courts' proceduralist engagement with agency decision-making likely have played important roles in helping to shape the accountability practices we bring to light, alongside organizational sociology and the imperatives of administration itself. Our story also suggests ways that administrative law has had systemic effects that go beyond its specific requirements. The notice-and-comment process, for instance, forces agencies to present regulatory ideas to the public in a reasoned and persuasive form and then to consider and address public responses. The possibility of litigation over a published rule—a persistent concern for our interviewees—pushes agencies to seriously consider strongly held views in order to rest their policy on the strongest possible foundations.²⁷¹ Procedural requirements and the possibility of judicial review, for all their shortcomings,²⁷² seem to have pushed agencies to develop durable accountability structures that have taken on a life of their own, coming to characterize large swaths of agency functioning.

A jurisprudence that sought to enhance real government accountability would reject the accountability myths that drive much of today's constitutional discourse in favor of review that supports the kinds of accountability we have uncovered in this Article. Courts should take seriously statutes that grant agencies broad authority to address emergent situations, recognizing Congress's authority to create efficacious governance structures. They should recognize that indicia of contestation and deliberation among multiple participants across and outside of the government demonstrate the accountability of agency decisions, and they might support accountability scaffolds more explicitly by extending

major questions doctrine operates as a clear statement rule that directs courts not to discern the plain meaning of a statute using the normal tools of statutory interpretation, but to require explicit and specific congressional authorization for certain agency policies . . . [It] allows political [actors] to effectively amend otherwise broad regulatory statutes outside of the formal legislative process . . . And it operates as a powerful deregulatory tool that limits or substantially nullifies congressional delegations to agencies in the circumstances where delegations are more likely to be used, and more likely to be effective.

Deacon & Litman, *supra* note 266 (manuscript at 1).

271. The virtues of molding policy around the private interests of those sufficiently resourced and motivated to litigate remain debatable; our point here is simply that the possibility of litigation pushes agencies to carefully consider public reactions.

272. See Bagley, *supra* note 261 (arguing that excessive proceduralism might exacerbate problems of legitimacy and accountability).

greater deference to decisions produced through the sort of broad-based, multi-lateral vetting that we have described.²⁷³ Courts might also seek to enhance these forms of accountability by ensuring agency deliberations are not squelched by overweening internal executive review or centralization.²⁷⁴ Of course, courts should continue to ensure that agencies stay within the broad ambit of the authorities that statutes grant them. But they should interpret that ambit with a realistic understanding of Congress's inherent limits and of agencies' robust accountability practices.

The features of agency decision-making we present ultimately reflect organizational dynamics that not only serve accountability as conventionally understood but also push us to update our conception of it. Laments about accountability are often used to undermine disfavored policy results—lip service to accountability paid to advance some other substantive goal.²⁷⁵ Instead of abandoning the term, however, we suggest that there are benefits to identifying the qualities or values that make accountability so intuitively attractive. Throughout this Article, we have contrasted two visions of accountability. In a *post facto* version, accountability involves sanctions for actions already taken, such as elections or a removal power that can depose political actors for the policy choices they have made. In a contrasting *in medias res* version, accountability influences the doing of deeds all along. Both versions have a place in democratic governance. But we have suggested that the *in medias res* forms of accountability, where policy ideas are submitted for multilateral judgment as they develop, has the better chance at producing those virtues that make accountability valuable to democracy: inclusive deliberation responsive to multiple situations and publics. These features do not arise naturally, nor are they inherent to administration. They may face concerted attack. And they must be created and nurtured by many participants over time. As scholars and stewards of the institutions of democratic government move to do both, the conditions we have identified as producing accountability in the administrative state should stay at the center of attention.

273. See *supra* note 106 and accompanying text (citing sources collecting agency losses in court during the Trump Administration that were attributable, in part, to failures in reason-giving). We address the influence of litigation risk and judicial review more fully in related work. For notes of caution and alarm concerning how procedural review can be used by courts to thwart responsible agency policymaking, see Rodríguez, *supra* note 25, at 91-110; and Cristina Rodríguez & Adam Cox, *The Fifth Circuit's Interventionist Administrative Law and the Misguided Reinstatement of Remain in Mexico*, JUST SEC. (Dec. 21, 2021), <https://www.justsecurity.org/79617/the-fifth-circuits-interventionist-administrative-law-and-the-misguided-reinstatement-of-remain-in-mexico> [<https://perma.cc/A2CY-MVFY>].

274. See generally Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L.J. 1097 (2006) (exploring ways that internal executive review can impose nondeliberative and noncontested views on agency action).

275. See Mashaw, *supra* note 132, at 115.

METHODS APPENDIX

This Appendix describes how we enrolled participants into the study, how we interviewed them, and how we addressed the resulting data. The interviews were oriented around investigating how agency personnel work with statutes, and our interview questions and coding reflect that interest.²⁷⁶ We asked no questions about accountability. Instead, the issue of accountability emerged for us as we reviewed the decision-making practices our interviewees described, practices integral to agencies' transformation of abstract statutes into concrete rules that govern conduct.²⁷⁷

A. Subject Population

Given the size of the federal government, the variety of agencies and agency roles, and the difficulty of enrolling subjects, we did not attempt to interview anything like a representative sample of government employees. Rather, we focused on conducting in-depth interviews that could reveal realities not easily captured by larger-scale methods. We conducted thirty-nine open-ended, semi-structured interviews with current and former agency employees, both political appointees and career civil servants, between July 2016 and May 2018. Our subjects came from eleven agencies, which included executive agencies, independent agencies, and the Executive Office of the President. Some were focused on benefits management, others on industry regulation, and a couple on the governance of the government itself. The majority of our interviewees were no longer serving in the government, though a handful still were.

The majority of the political appointees we interviewed served during the Obama Administration; several of those had also served during the Clinton Administration. Several served during the George W. Bush Administration, and one served in the Trump Administration. The significant representation by Obama-era officials was primarily due to the ease of enrolling subjects, but also

²⁷⁶. See *infra* Methods Appendix Sections C-D.

²⁷⁷. We think that this situation somewhat mitigates the danger of self-serving descriptions in which participants might strive to portray themselves as accountable in response to our questions about accountability. Moreover, our questions were largely practice-oriented rather than value-oriented, with conceptual questions clearly marked off as areas where we sought the interviewee's personal opinion. And our discussion in this Article rests on general trends we saw prevalent in the answers of different people in different positions. Of course, participants could still give self-serving accounts in many ways, and we assume that our subjects, like many people, might often like to portray themselves in a favorable light. This does not, we think, diminish the reliability of the mutually reinforcing descriptions subjects gave of the practices they engaged in, nor does it undermine the information they provided about their own insiders' views on their workplace.

to the recency of their experience, which made their accounts fresher and more specific.

The career civil servants we interviewed spanned the last four presidential administrations. The bulk of their experience was during the George W. Bush and Obama years. Figure 1 lists the agencies where our subjects worked over the course of their careers. Some subjects served in more than one administration, and some moved between career and political roles over their careers.

FIGURE 1. AGENCIES IN WHICH STUDY PARTICIPANTS WORKED

AGENCIES REPRESENTED ²⁷⁸
1. Centers for Medicare and Medicaid Services (CMS)
2. Department of Education
3. Department of Homeland Security (DHS)
4. Department of Justice (DOJ)
5. Environmental Protection Agency (EPA)
6. Equal Employment Opportunity Commission (EEOC)
7. Federal Trade Commission (FTC)
8. Health and Human Services (HHS)
9. Housing and Urban Development (HUD)
10. Mine Safety and Health Administration (MSHA)
11. Small Business Administration (SBA)

B. Enrolling Participants

To recruit subjects, we primarily relied on a “snowball” approach, in which we contacted acquaintances in our personal and professional networks who worked in agencies, requested interviews, and asked for recommendations of or introductions to others who might be interested in participating in the study. In a broader solicitation approach, two of our contacts who had worked in the Obama Administration published our project solicitation email on listservs for

²⁷⁸ We list the primary agency by which subjects were employed. For instance, the Centers for Medicare and Medicaid Services (CMS) is a component agency of HHS. If a subject was employed within CMS, we list CMS. If a subject worked in the HHS central department, we list HHS. To help protect subjects’ confidentiality, we do not list the number of interviewees in each agency.

former colleagues. We later learned that this email was republished on at least one other listserv.²⁷⁹

In addition, having drawn several participants from one specific agency through personal contacts and snowball methods, we sent personal solicitations to a number of other colleagues in that agency and followed up with phone calls. (We identified possible participants by looking at agency websites and *Federal Register* publications, as well as through the interviews we had already conducted.) Although a number of people initially responded to this solicitation, most cancelled before we could conduct the interviews after a department-wide email from a high-level career official prohibited employees from participating in our study.²⁸⁰ After this, we relied only on the first two, informal, methods to solicit subjects. Every person who agreed to participate was interviewed.

Our recruitment email read as follows:

We'd like to invite you to participate in a research project on statutory interpretation and policymaking in federal agencies. We are two law professors (Cristina Rodríguez at Yale Law School and Anya Bernstein at SUNY Buffalo Law School) who specialize in administrative law and statutory interpretation. For this project, we are conducting confidential interviews with current and former agency personnel. We would be grateful for the chance to interview you about your work.

Our interviews explore how agency employees interpret unclear statutory terms, and how they formulate policies in the face of multiple pressures and constraints. The point is not to expose deficiencies in the regulatory process, but to educate scholars, judges, and the public about how our government actually works. It has never been more important to understand and explain the complex and vital work that agencies do. We hope illuminating the agency's perspective will make an important contribution to the national conversation about regulation.

We are conducting interviews by phone, and can arrange to talk at a time convenient to you. Both the Yale and SUNY Buffalo Internal Review Boards have approved the project. (The attached "informed consent" document tells you more about the research and our strict confidentiality measures.) We plan to use material from these interviews in articles for publication in law reviews.

279. This is one reason Obama-era subjects are highly represented in our interviews.

280. One employee contacted the American Civil Liberties Union (ACLU), arguing that this instruction impinged on employees' speech rights. After some negotiation, the agency, months later, issued a letter to the ACLU modifying its instruction so that it only prohibited employees from participating in the project during work time. This letter, however, did not go out to the whole department the way the initial email prohibiting participation had.

If you would be interested in participating, please contact us. We'd also be happy to talk about the project further. Thanks for considering it, and we hope to talk to you soon.

[Signatures]

The informed consent document referenced in the recruitment email, which we sent to every prospective participant, included both an Institutional Review Board-mandated disclosure and a brief introduction to the study. It read as follows:

Research Study: Agency Statutory Interpretation and Policymaking

Thank you for agreeing to participate in the Agency Statutory Interpretation and Policymaking Study run by Cristina Rodríguez (Yale Law School) and Anya Bernstein (SUNY Buffalo Law School). For this study, we are conducting confidential interviews about rulemaking practices with current and former federal agency personnel. In particular, we hope to explore how agency employees interpret unclear terms in the statutes they implement, and how they formulate policies in the face of multiple pressures and constraints. We hope that our results will add to knowledge about how government functions and how statutes are implemented over time. We also anticipate that this research will illuminate how administrators' statutory interpretation practices differ from judges'. We believe the lack of attention to this topic has been detrimental both to legal scholarship and to public discourse, and we hope to make a contribution to both.

The human subjects research review boards at Yale University and SUNY Buffalo have approved this study. All of your responses will be held in the strictest confidence. Only the researchers involved in this study and those responsible for research oversight at Yale and SUNY will know your identity or have access to the information you provide. We plan to audio tape the interview. If you prefer not to be recorded, please advise us and we will note your responses by hand instead. Notes or transcripts of your interview will be numbered, and the code linking your number with your name will be stored in a separate file from the transcript, on a secure server and password protected computer. After publication of the study, transcripts will be stored on a secure server without any identifying information connected to them. In addition to avoiding any direct links between your identity and what you tell us, we will do our utmost to ensure that nothing we publish based on this study can be traced back to you individually.

Participation in this study will involve an interview, by phone or in person, of approximately one hour. There is no compensation for participation. There are no known or anticipated risks to you for participating. Participation in this study is completely voluntary. You are free to decline to participate, to end participation at any time for any reason, or to refuse to answer any individual questions. Your decision whether to participate in this study will not affect your relationship with Yale University or the State University of New York.

If you would like to speak with someone other than the researchers to discuss problems or concerns, to discuss situations in the event that a member of the research team is not available, or to discuss your rights as a research participant, you may contact the Yale University Human Subjects Committee. Additional information is available at <http://www.yale.edu/hrpp/participants/index.html>.

If you would like to speak with the researchers, please feel free to contact us.²⁸¹

Brief study synopsis

Modern government depends in large part on how agencies interpret statutory provisions and make policy, but legal scholarship generally focuses instead on judges and legislators. This study will be among the first to illuminate how agency personnel interpret statutory provisions. We hope to highlight the creativity and difficulty of making a statutory scheme work on the ground. We intend to interview a range of agency administrators about the tools, assumptions, approaches, methods, and reflections that guide administrators' interpretation and implementation of statutes. We hope to give the administrator's point of view a voice that is missing from scholarship and doctrine.

We will ask administrators to discuss, in their own words, what they do when confronted with a complex or ambiguous statute, how they formulate policy based on the statute, and what their work means to them. We will also ask how agencies structure the interpretive and policymaking process: what sorts of officials make which decisions during the different phases of developing a guidance or a rule?

We do not aim to expose inadequacies in agency practices, nor do we have a predetermined view about how agencies ought to do their work. On the contrary, we feel that the important work administrators do to bring statutes to life has been obscured by the scholarly focus on courts.

281. We have omitted the portion of the study's disclosure with our contact information and the contact information for the Yale University Human Subjects Committee.

We aim to inject a pragmatic, real-world understanding of agency practices into both scholarship and doctrine, to complement and perhaps change the theories on which courts rely when evaluating agency action.

C. *The Interviews*

A few interviews took place in person, but most were conducted over Zoom (usually using audio only). We conducted almost all interviews together, usually each asking about half of the questions. Sometimes, with participants' permission, we had research assistants listening on the line as well. Most interviews lasted between one and two hours, though several lasted longer or even spanned two separate calls, at the interviewee's request. Almost all interviewees agreed to record the interviews; for the few that declined, we took notes by hand. Recorded interviews were professionally transcribed.²⁸²

We developed an interview guide to structure the interviews. To develop our line of questioning, we considered our own primary areas of interest and reviewed scholarly literature to assess where we could add to existing knowledge. We also consulted with colleagues in academia and contacts with experience in the federal administration to ensure our questions were relevant and comprehensible. Because we were not aiming for a statistical comparison of participant answers, we did not treat the guide as a survey instrument. Rather, it provided a reminder of the topics we wanted to cover, while still encouraging participants to focus on the matters of greatest concern or interest to them. This guide did not exhaust the questions asked. We generally asked follow-up questions in each section to explore the interviewee's responses and experiences further.

Our interview protocol started with open-ended questions about the interviewee's main roles or projects in government and the normal process of producing policy (through rules or guidance) in their agency. We then asked about the role of Congress in policymaking (including congressional intent, legislative history, and consultation with Congress); other sources or methods for statutory interpretation; and the roles of other agencies, the White House, states, and the public. We also asked about the role of courts in policymaking (including prospective consideration of litigation risk, litigation practices and outcomes, judicial doctrines like *Chevron*, and interpretive theories like textualism and purposivism). We invited interviewees to explain in their own terms how they thought about statutory interpretation and implementation. We also asked whether our questions elicited what they thought was relevant about the work

282. The project was approved by the Institutional Review Board (IRB) at both Yale University and the State University of New York at Buffalo. All research assistants received IRB-provided confidentiality training. We used rev.com for interview transcription, with a nondisclosure agreement.

they did and whether there were other questions we should pose. Figure 2 depicts the overall organization of our interview guide.

FIGURE 2. INTERVIEW GUIDE OVERVIEW

I. OVERVIEW
1. Could you give us an overview of the kind of work you've done in government?
2. What is the normal process of producing a rule in your agency?
3. What is the normal process of producing guidance in your agency?
II. RELATIONS TO STATUTES, CONGRESS, AND CONGRESSIONAL INTENT
1. In what ways do you and your office work with statutes?
2. What is your approach to working with a statutory term or provision that is not clear?
3. Do you consider what Congress wanted when it enacted a statute? (How do you determine what it wanted?)
4. To what extent do you use legislative history? (What kinds do you find most helpful?)
5. Do you (or colleagues) consult with Congress about statutory meaning or policy? What happens if the agency's views differ?
6. Does it make a difference if the enacting Congress is not the same as the current one?
III. STATUTES AND INTERPRETATION
1. What sources help you work with unclear statutory terms?
2. What role does the Office of General Counsel play in that work?
3. Do you try to find a statute's best interpretation, to identify all defensible interpretations, or something else?
4. Is there a standard or usual way to address uncertainty about the meaning of a statutory term in your agency? (Is there training on it?)
5. Has your understanding of a statute's meaning ever changed over the course of producing a rule or guidance document?
IV. OTHER AGENCIES AND THE PRESIDENT
1. Do you work with other agencies to produce rules or policies?
2. Do you, or your office, interact with the White House?
3. Do presidential priorities affect how you approach policymaking? (How do you become aware of those priorities?)
V. FEDERALISM

1. Do states' views of statute meaning affect your understanding of the statutes you work with?

VI. COURTS

1. Are any judicial doctrines particularly important in your work? (What role does *Chevron* play?)

2. Do you consider litigation risk when formulating a policy? (And has active litigation spurred your agency to produce a new policy or interpretation?)

VII. CONCEPTS OF INTERPRETATION

1. What does the idea of interpreting a statute mean to you?

2. Is interpreting a statute separate from implementing a statute?

3. Are concepts like "textualism" and "purposivism" relevant to the work you do?

VIII. FINAL QUESTIONS

1. Are there other questions we should ask?

2. [Demographic information: work background, educational background, age range]

3. [Snowball suggestions: others who might be interested in participating]

Our aim was to encourage our subjects to discuss their particular experiences and views without confining them to a set of predetermined options or answers. We therefore adjusted the interview protocol somewhat for each interview, pursuing the leads interviewees offered and spending more or less time on particular topics depending on what interviewees regarded as important in their work. Where possible, we also tailored interviews to interviewees' particular backgrounds and the projects they had worked on (which we asked about when setting up interviews). This helped us ground our questions in specific interviewee experiences, which are often easier to talk about and more revealing of actual practices than abstract or conceptual discussions. Our interview protocol also developed over time as subjects suggested relevant questions or pointed us to more productive ways of pursuing an inquiry.

Framing questions in terms of an interviewee's specific background anchored the conversations in their personal experiences and created a specific joint object of focus for interviewees and interviewers. It allowed interviewees to focus on a particular experience they had gone through and describe it, then examine whether they felt it was unusual in the context of their broader experience. This approach took pressure off the interviewee to provide a neat or universal description of a process that may have been complex or variable, and it helped us get at the particularities of participants' experiences of working in their agencies. It

also laid the ground for follow-up questions that were easier to formulate and answer since we could ask about the particular experiences the interviewee had already described.²⁸³ Often, we would come back to particular situations an interviewee had discussed as we went through the interview, using interviewees' descriptions as a basis for further conversation.

D. Synthesizing the Data

Using both our interview protocol and our emerging sense of subject responses from both interviews and transcripts, we, along with our research assistants, developed a code book for coding responses.²⁸⁴ We had several aims in constructing the code book: to capture the key issues we asked about; to reflect the key themes emerging in interviewees' responses; and to create codes that were easily usable. Together with our research assistants, we developed codes, tested them on a few transcripts, and further refined them in subsequent discussions. Figure 3 presents the coding categories in our code book, along with the shorthanded explanations that we developed for all coders to use.

FIGURE 3. CODING CATEGORIES AND EXPLANATIONS (AS LISTED ON A "CHEAT SHEET" USED BY ALL CODERS)

HOW ARE DECISION MADE IN THE AGENCY?	
#AGENCY-STRUCTURE	Structure of decision-making within agency, including process; what steps do you take?

²⁸³. See Stanton Wortham, Katherine Mortimer, Kathy Lee, Elaine Allard & Kimberly Daniel White, *Interviews as Interactional Data*, 40 LANGUAGE SOC'Y 39, 42-43 (2011) (noting that interviews "often include positioning by the interviewee that reveals habitual social actions—sometimes actions that characterize the individual interviewee and sometimes actions typical of an interviewee's social group" and that interview narratives are "particularly rich vehicles for communicating social positions and enacting characteristic actions," in part because "[n]arrators always 'voice' narrated characters as having some recognizable social role, and they always evaluate those characters, taking their own position with respect to narrated characters and events").

²⁸⁴. See KATHY CHARMAZ, *CONSTRUCTING GROUNDED THEORY 3* (2d ed. 2014) (discussing the methods of the "grounded theory" approach in social science, in which "data form the foundation of our theory and our analysis of these data generates the concepts we construct. Grounded theorists collect data to develop theoretical analyses from the beginning of a project").

#POLITICAL/CAREER	Explicit discussion of role, either in insulation or relation to each other
#AGENCY-LAWYERS	(Includes OGC)
#AGENCY-EXPERTS	Nonlegal expertise (e.g., economists, policy people, scientists, including expert-based sources)
WHO IS PARTICIPATING OUTSIDE THE AGENCY?	
#INTERAGENCY	
#WH	[White House]
#CONGRESSIONAL-PARTICIPATION	Congress pressures agency to act in a certain way
#CONGRESSIONAL-CONSULTATION	Congress consults w/agency, or agency consults w/Congress, about policy, legislation, or interpretation, or provides technical assistance
#STATE-PARTICIPATION	Includes if agency looks to states or consults state interpretations/policies
#INTEREST-PARTICIPATION	Interest groups e.g., industry, NGOs, etc. (also through interpretive materials/guides)
#PUBLIC-PARTICIPATION	Notice and comment, listening tours, invited participation, media
HOW AND WHY ARE THEY MAKING DECISIONS?	
#AGENCY-MISSION	Thinking about actions/interpretations as furthering the basic goals of the agency—its overall purpose, why it exists. Can add “(culture)” after for things like agency atmosphere or ethos.
#POLITICAL-IDEOLOGY	Thinking about how an action affects relations among branches; relates to presidential priorities; relates to members of Congress’s political or policy concerns, or an agency official’s political ideology
#LAW-PURPOSE	Includes congressional intent, legislative history

THE ACCOUNTABLE BUREAUCRAT

#LAW-TEXT	References to text language, provisions, canons; residual for approach to interpretation generally
#LITIGATION-RISK	More explicit threat of litigation/judicial review than just working in the shadow of the law
#PRECEDENT	Includes <i>Chevron</i> and references to case law generally
#BEARVSBESTMEANING	Do you look for best interpretation, or one the statute allows as a way to further policy; discretion; relates to law's malleability
#IMPLEMENTVSIINTERPRET	Distinction/relations between implementation and interpretation (explicit mention or where speaker talks about them as wrapped up); law/policy divide; practical effects/considerations
#TRIGGER	What triggers a decision (policy or interpretation), what's the impetus for an agency action? (e.g., statutory mandate, internal directive, events in the world, political needs, etc.)
WHAT TYPE OF DECISION ARE THEY MAKING?	
#RM	[rulemaking]
#GUIDANCE	
#ENFORCEMENT	
#ADJUDICATION	
#OTHER	Includes what people do *in litigation* (not planning for litigation risk); APA, CRA, CBA
KEEPING-TRACK TAGS	
#ISMS	For answers to question about relevance of textualism/purposivism (or where clearly implied)
#EXAMPLE	For potentially useful specific cases or examples (not all examples)
#QUOTE	Particularly striking phrasing or explanation

#?	No hashtag seems to fit but I find this interesting/surprising/noteworthy
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Along with two research assistants per interview transcript, we each independently coded each transcript, then talked through discrepancies to come to a consensus on appropriate categories, creating a master-coded transcript for each interview. Research assistants then collated the coded text into spreadsheets showing all the text for each coding label. Each entry indicates the speaker (by pseudonym) and shows what other coding labels we applied to the same text passage (since a single text passage often fit several coding labels). Each text entry has a unique number; this Article cites interview quotations by reference to this number. The coding process also gave us an ambient sense of the material. It further confirmed our impression that, despite the variety of practices and structures respondents described, the interviews converged to reveal accountability practices that addressed pressing concerns about democratic legitimacy and executive functioning. Of course, no single methodology or study could reveal all that is important about administration. We hope our research spurs more empirical work, using diverse methodologies, to illuminate the complex operations of our government.