# PROCEDURAL SAFEGUARDS FOR AGENCY GUIDANCE: A SOURCE OF LEGITIMACY FOR THE ADMINISTRATIVE STATE

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## INTRODUCTION

Imagine that you are the owner of a small business operating private charter flights. The Federal Aviation Administration (FAA) regulates your conduct, not only through its regulations, but also through guidance documents that interpret, clarify, or explain the statutes and regulations applicable to your business. Because the procedural protections under the Fifth Amendment's Due Process Clause[1] and the Administrative Procedure Act (APA)[2] do not apply to agencies' interpretive guidance,[3] the FAA has no constitutional or statutory obligation to allow you to participate in the development of its guidance. Consequently, prior to the FAA's reliance on its guidance in an enforcement action against you, you have no right to challenge the FAA's interpretive guidance. Nor must the FAA share with you the data, studies, or other information it considered in developing its guidance; respond to any comments you or others raise concerning the guidance; or offer a supporting statement setting forth the basis for its guidance policies. If the FAA issues interpretive guidance stating that your current business practices fail to comply with applicable legal standards, you could elect to disobey the FAA's guidance and challenge its policies during any enforcement proceeding against you. However, doing so may result in the FAA temporarily seizing your aircraft or suspending your FAA certification pending the outcome of the proceeding.[4] Moreover, the likelihood of persuading an agency hearing officer or a court that your actions comply with the applicable legal standards appears slim, as both will accord the FAA's interpretive guidance a high degree of deference.[5] You therefore decide to comply with the FAA's guidance rather than endure the expense of—and potentially suffer the FAA's ill will from—disobeying the guidance.

As this hypothetical illustrates, agencies' guidance (also called "nonlegislative rules") can have a profound impact on individuals'

1. U.S. CONST. amend. V.
2. 5 U.S.C. §§ 500–596 (2006).
3. *See infra* notes 17 and 28 and accompanying text (providing a brief overview of Supreme Court cases that establish and develop the distinctions between those administrative actions that are subject to procedural due process protections and those that are not, and noting that there is no requirement that agencies go through the notice-and-comment process for interpretive rules).
4. 14 C.F.R. §§ 13.17(a), 13.20 (2008).
5. *See infra* note 38 (explaining the different levels of deference that courts give to various types of administrative actions).

behavior. Agency guidance thus can have similar effect to an enforcement action or regulation—imposing norms on regulated entities or the beneficiaries of regulatory programs. Moreover, the individual interests subject to agency guidance frequently are no less important than those interests regulated through administrative enforcement actions and regulations. Yet those whose interests are the subject of an administrative enforcement action or regulation generally are entitled to various procedural protections under the Due Process Clause and the APA,[6] while those whose same interests are impacted by agency guidance often receive no procedural protections whatsoever. The impression of the modern administrative state informally adopting important policies through a decisionmaking process lacking adequate procedural protections has troubled many legal scholars and public officials.

Whether agencies should be constrained by procedural requirements when issuing guidance (and if so, which procedural safeguards) has inspired vigorous debate.[7] Thus far, this debate primarily has focused on practical policy considerations. For example, those favoring some form of process to discipline agencies' promulgation of guidance argue that public input would promote more accurate and rational agency guidance policies.[8]

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6. For a discussion of the procedural rights granted to individuals subject to an administrative hearing, see *infra* notes 18–20 and accompanying text. For a discussion of the procedural requirements imposed on agencies when issuing regulations, see *infra* notes 25–27 and accompanying text.

7. *See, e.g.*, Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1372–80 (1992) (advocating that agencies use notice-and-comment rulemaking for policies intended to establish mandatory standards or binding obligations); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 421–22 (advocating that agencies allow postadoption public participation for nonlegislative rulemaking); Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 697 (2007) (arguing that Congress should amend the APA to require agencies to provide opportunities for timely and meaningful public participation prior to publication of agency guidance to the extent practicable, necessary, and in the public interest, with the judicial deference afforded an agency's guidance tied to the procedures used in adopting the guidance); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 438–52 (2007) (advocating for one or more of the following process rights for agency guidance: granting citizens the right to petition the agency to repeal or revise the guidance, implementing notice-and-comment rulemaking for guidance that establishes "important" policy decisions, allowing courts to treat agency guidance as precedent, permitting public comments on draft guidance, and expanding citizen suits or other private enforcement suits to obtain judicial review of agency guidance); Paul R. Noe & John D. Graham, *Due Process and Management for Guidance Documents: Good Governance Long Overdue*, 25 YALE J. ON REG. 103, 103–04 (2008) (arguing in support of extending the Office of Management and Budget regulatory review process to significant agency guidance); *cf.* Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1488–89 (1992) (arguing against notice-and-comment rulemaking for nonlegislative rules).

8. *See infra* Part IV.A.

Those wary of doing so express concern over whether such procedural requirements will deter agencies from issuing guidance or hinder their flexibility to respond quickly to changing circumstances.[9] Largely unacknowledged, however, is the administrative processes' fundamental role in furthering the legitimacy of the administrative state[10] and, ultimately, ensuring the success of our implied "social contract."[11]

The success of our social contract depends first on those entrusted with governmental powers exercising their discretion for the benefit of "we the people," and second on citizens' acceptance of and obedience to the state's rules for organizing societal functioning and its allocation of public resources. Process plays a fundamental role in reinforcing both obligations. In shaping agencies' decisionmaking, procedures promote the legitimacy of administrative policies and protect against violations of the public trust by agency officials. Social psychology also has shown that fair procedures that reinforce the legitimacy of the administrative state strengthen individuals' normative commitment to obey the law.[12] For these reasons, the wholesale absence of process requirements for agencies' nonlegislative rulemaking cannot stand. Agency guidance documents, carrying as they do the imprimatur of the state, must be legitimated through

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9. *See infra* Part IV.A.

10. At best, most scholars make passing reference to the possibility that procedural requirements governing agencies' issuance of guidance will enhance the legitimacy of agency guidance. *See, e.g.*, Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 529 (1977) (commenting that greater public involvement in the nonlegislative rulemaking process "enhances the acceptability of the rules"); *id.* at 574 ("[T]he public may be more likely to accept and less likely to sabotage a rule if it has been allowed to participate in its formulation."); Johnson, *supra* note 7, at 702–03 ("Public participation is vital to the development of an agency's policies because . . . it instills a sense of legitimacy in the public regarding the agency's decisions." (internal citation omitted)); Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. 1497, 1505 (1992) ("[A]n agency's willingness to listen and respond to parties' arguments [concerning the agency's nonlegislative rules] should bolster the legitimacy of its ultimate stances.").

11. The theory of the social contract starts with the assumption that individuals desire the freedom to pursue their vision of the good life. A natural state in which individuals possess unlimited freedoms would include the freedom to harm those who threaten your pursuit of self-fulfillment, with the corresponding threat that others will do the same to you. Consequently, this state of nature—where individuals, bound only by their conscience, inevitably trespass on each other's rights—is one of tremendous insecurity. In the long run, individuals may best pursue their vision of the good life through cooperation, even with the compromises inherent in such cooperation. A paramount function of the state then is to secure these conditions of cooperation. *See generally* Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189 (1991).

12. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 38 (2006). Tyler's theories draw on the results of interviews with a random sample of citizens of Chicago in 1984 and 1985. The interviews inquired into citizens' experiences, attitudes, and behavior, including their interactions with legal authorities such as the police and the courts. *Id.* at 8. The Chicago study's results showed a strong positive relationship between people's views of the legitimacy of legal authorities and the frequency of their compliance with the law. *Id.* at 64.

a process that comports with our ideas of fair government.

Part I provides a brief overview of existing procedural requirements that govern agencies' development, implementation, and enforcement of regulatory policies. Part I also discusses agency guidance and its role in ensuring the successful functioning of the administrative state.

Part II discusses competing visions of democratic legitimacy that guide the evaluation and design of administrative procedures. The first, majoritarianism, bases legitimacy on the extent to which government officials' policy decisions express the popular will. Supporters of majoritarianism also assert that political accountability through the electoral process is a necessary condition for ensuring that government officials honor majority preferences.[13] The second, what I call the "trustee paradigm," finds legitimacy in government processes that are deliberative and justify policy choices with reference to the common good.[14] This view of legitimacy conceives of democratic government as a trust between the people and those vested with the power to govern. The trustee paradigm requires agencies to act as stewards of the people and to exercise their powers consistent with existing laws, exercising care and loyalty toward the public interest.

Part II concludes that the trustee paradigm, as compared to majoritarianism, rests on stronger normative justifications and accords more closely with empirical research on individuals' judgments on the legitimacy of authorities. In equating the majority will with the public interest, majoritarianism fails to acknowledge the potential for fallacies in citizens' reasoning and the importance of moral values such as justice, fairness, equality, individual liberty, and concern for future generations. Sociological research also suggests that individuals' assessments of the legitimacy of government authorities' decisions are based on factors reflected in the trustee paradigm and not on whether government policies mirror majority preferences. In addition, questions regarding whether our political system can achieve true majoritarianism suggest that the

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13. *See* Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 578 (2003) ("[U]nder a more pluralistic conception of democracy, an institution, such as Congress or an agency, might be characterized as democratic to the extent its policy decisions can be seen as expressions of the popular will."); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1533 (1992) (characterizing pluralism theories as "defin[ing] the public interest as an aggregation of private values").

14. *See* Mendelson, *supra* note 13, at 579 ("On this more republican view, . . . an institution like Congress might be perceived as democratically legitimate to the extent its process is deliberative and proposed decisions are justified with publicly articulated reasons."); Seidenfeld, *supra* note 13, at 1514 (describing the civic republican theory as viewing the Constitution "as an attempt to ensure that government decisions are a product of deliberation that respects and reflects the values of all members of society").

majoritarian conception of legitimacy is not a feasible one. Procedural requirements therefore should shape agency decisionmaking to accord with the image of legitimacy reflected in the trustee paradigm.

Part III illustrates that ensuring that our government meets the public's needs depends on not only promoting the legitimacy of the administrative state, but also preserving the administrative state's ability to effectively exercise its powers. Process, no matter how fair, cannot be tolerated when it becomes so cumbersome as to hinder efficient governance. The success of our social contract, therefore, depends on reaching a delicate balance between administrative processes that advance the legitimacy of the regulatory state while preserving its effectiveness.

Finally, Part IV applies this conceptual framework to agencies' nonlegislative rulemaking and argues that although the procedural reforms for agency guidance that dominate the academic literature would enhance the legitimacy of the administrative state, they impose too great a cost on government efficiency. This Article proposes an alternative administrative process that supplies democratic legitimization to agency guidance consistent with the trustee paradigm without causing undue harm to administrative efficiency. Specifically, agencies should be required to offer the public an opportunity to comment on guidance prior to its adoption or, when there is a compelling need for timely final guidance, after its adoption. Agencies also should provide a concise statement of the legal and policy rationale for a nonlegislative rule when issued in final form but need not specifically respond to public comments.

## I. AGENCY GUIDANCE

Agencies employ various means for establishing and implementing federal regulatory policy, including administrative adjudications, informal rulemaking, and guidance documents. Administrative procedures derived from the Constitution's Due Process Clause, the APA, and other statutes and regulations[15] generally control the manner in which agencies make decisions in each of these settings but for one—guidance documents.

The Supreme Court has long held that the protections of procedural due process under the Fifth and Fourteenth Amendments of the

15. A statute may set forth additional or alternative administrative procedures applicable to specific agencies or programs. *See* 5 U.S.C. § 559 (2006) (providing that the APA does not "limit or repeal additional requirements imposed by statute or otherwise recognized by law"). In addition, agencies often grant process rights applicable to administrative adjudications through regulation. *See, e.g.*, 14 C.F.R. §§ 13.1–.401 (2008) (setting forth the administrative procedures applicable to investigative and enforcement actions instigated by the FAA); 42 C.F.R. §§ 422.641–.698 (2007) (setting forth administrative procedures applicable to reconsiderations and appeals of Medicare contract determinations under the Medicare Advantage program).

U.S. Constitution[16] apply only to individuals whose interests are the subject of an administrative adjudication.[17] In addition, the APA sets forth specific procedural requirements governing administrative adjudications required by statute to be made "on the record," including notice of the proposed action and the grounds asserted, the right to submit evidence and receive notice of opposing evidence, an opportunity to present arguments against the agency's proposed action, and a prohibition against ex parte communications by the individual presiding over the matter.[18] The presiding individual also must include in the record a statement of his or her findings of fact and law, and the rationale in support of the decision.[19] Finally, the APA authorizes courts to review the agency's adjudicatory decision to determine whether it is supported by "substantial evidence."[20] Although the APA exempts from its protections administrative adjudications not required by statute to be made on the record, the statute or regulations governing specific regulatory programs often grant individuals various process rights.[21]

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16. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

17. In *Londoner v. City and County of Denver*, 210 U.S. 373 (1908), the Court held that a tax assessment against an individual landowner without prior notice and hearing violated procedural due process. In contrast, in *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915), the Court held that procedural due process did not require prior notice and a hearing when a tax increase applied across-the-board to all city landowners. In distinguishing the two cases, the *Bi-Metallic* opinion explained that "[w]here a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption," and that the interests of affected parties may be protected only through the exercise of "their power . . . over those who make the rule." *Bi-Metallic*, 239 U.S. at 445. While *Londoner* and *Bi-Metallic* are not necessarily binding precedent today, the distinction they articulate between rulemaking and adjudication has been carried forward into modern due process jurisprudence.

Procedural due process applies only when the state seeks to deprive an individual of "life, liberty, or property." The Court has held that the individual possesses a property interest protected by procedural due process only if state law or administrative rules contain substantive standards that constrain the discretion of the government official, thereby creating a "legitimate claim of entitlement." Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577–78 (1972). Similarly, the Court's current procedural due process jurisprudence recognizes only those liberty interests created by statute or regulation unless clearly found within the four corners of the Constitution. *See, e.g.*, Sandin v. Conner, 515 U.S. 472, 485–86 (1995) (holding that in the prison context, the states create a liberty interest protected by the Due Process Clause only when the interest created under state law also presents a "type of atypical, significant deprivation" that is a "dramatic departure from the basic conditions" of an inmate's confinement); Meachum v. Fano, 427 U.S. 215, 228–29 (1976) (holding that state prisoners have no cognizable liberty interest entitled to procedural due process protection in connection with their transfer from one state prison to another because under state law the transfers were subject to the discretion of prison officials).

18. 5 U.S.C. §§ 554, 556, 557(c), 557(d) (2006).

19. *Id.* § 557(c)(3).

20. *Id.* § 706(2)(E).

21. *See supra* note 15.

Although those whose interests are the subject of administrative rulemaking have no right to procedural due process under the Constitution, Congress partially filled this void by imposing various procedural requirements on certain forms of administrative rulemaking. Administrative rulemaking involves the creation and application of rules that affect an entire class of individuals.[22] The APA requires agencies to engage in a public notice-and-comment process when issuing generally applicable rules that are substantive—or legislative rules.[23] Legislative rules implement a statute by creating new laws, rights, duties, or all three.[24] The notice-and-comment process consists of three steps. First, the agency issues a notice of proposed rulemaking that either sets forth the terms or substance of the rule under consideration or describes the subjects and issues involved.[25] Second, the agency solicits, receives, and reviews public comments on the proposed rule.[26] Third, the agency issues the final rule, which must include a statement of basis and purpose that adequately articulates the legal authority and policy reasons for the agency's rule.[27]

A wide range of agency rulemaking, however, is exempt from the APA's notice-and-comment requirements.[28] These exempt rules, known as nonlegislative rules, include policy statements and interpretative rules that clarify or explain existing laws, or advise the public and agency personnel as to an agency's construction of the statute and the rules it administers. In addition, nonlegislative rules indicate how the agency intends to implement

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22. In contrast, administrative adjudications involve the creation and application of the law in the course of resolving individual cases. *See* Ernest Gellhorn & Glen O. Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201, 201 (1981).

23. If the governing statute requires an agency to make determinations "on the record after opportunity for an agency hearing," then the agency must promulgate its rules through a trial-type or adversarial process known as "formal rulemaking." 5 U.S.C. § 554. Formal rulemaking is governed by §§ 554, 556, and 557 of the APA. *Id.* §§ 554, 556, 557. Agencies rarely engage in formal rulemaking.

24. *See, e.g.*, Chao v. Rothermel, 327 F.3d 223, 227 (3d Cir. 2003); Hemp Indus. Ass'n v. Drug Enforcement Admin., 333 F.3d 1082, 1087 (9th Cir. 2003); N.Y. State Elec. & Gas Corp. v. Saranac Power Partners, L.P., 267 F.3d 128, 131 (2d Cir. 2001).

25. 5 U.S.C. § 553(b).

26. *Id.* § 553(c).

27. *See id.* (describing the notice-and-comment procedures and agency duties for rulemaking). Legislative rules, when properly promulgated through notice-and-comment rulemaking, have the force and effect of law, meaning they are binding on all persons, the agency, and the courts. *See* United States v. Mead, 533 U.S. 218, 227 (2001) (explaining that where Congress has delegated to an agency the authority to elucidate a specific statutory provision by regulation, the agency's regulation is binding unless procedurally defective, otherwise arbitrary and capricious, or contrary to the statute).

28. *See* 5 U.S.C. § 553(b)(3)(A) (addressing certain rules and statements exempt from notice-and-comment rulemaking requirements). In addition, the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* bars the courts from invoking their common law authority to add procedural requirements to agency rulemaking, including agencies' promulgation of guidance materials, beyond those prescribed by the legislature. 435 U.S. 519, 524 (1978).

a particular statutory or regulatory regime.[29] Nonlegislative rules often are announced through agency manuals, advisory notices, internal guidance to agency field inspectors, and letters from government officials to regulated entities, collectively referred to in this Article as "agency guidance" or "guidance materials." These guidance materials do not have the force of law, meaning they are not binding on all persons, the agency, and the courts.[30] Nonlegislative rules therefore may be subject to challenge in agency enforcement proceedings.[31]

Despite their lack of legally binding effect, agencies have strong incentives to issue their rules through guidance rather than through notice-and-comment rulemaking. Issuing a rule through guidance is less costly and time-consuming than notice-and-comment rulemaking.[32] Moreover, because agencies operate in a world of imperfect information where they cannot anticipate all scenarios that may arise in the course of implementing a statutory and regulatory scheme, an agency cannot define and set forth in its legislative rules every nuance of its policies.[33] Guidance materials offer agencies an efficient means for explaining and supplementing their legislative rules and may be modified quickly in response to emerging issues or changes in policy. In addition, agencies "use guidance documents to experiment with new approaches to implementing a program before committing the policies to the binding, less flexible form of the legislative rule."[34] Internal guidance materials such as handbooks and directives also

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29. *See* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 75 (4th ed. 2006) (explaining the confusion between legislative and nonlegislative rules); *see also* Mendelson, *supra* note 7, at 399–400 (discussing how agencies use nonlegislative rules to detail their regulatory implementation strategies). As used in this Article, the term "nonlegislative rules" does not include procedural rules—rules that relate to an agency's methods of operation and do not establish, clarify, or interpret substantive law, rights, or duties.

30. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) (holding that courts may give less weight to guidance materials than to binding regulations); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that courts may look to guidance materials as a source of "experience and informed judgment" that nonetheless are not binding on courts); Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (holding that guidance materials are not binding precedential rules, but are merely public proclamations of intended actions).

31. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1442 (1992) (stating that the legal and factual bases for nonlegislative rules usually can be challenged during judicial review of an enforcement action or a denial of a permit); *see also* Levin, *supra* note 10, at 1504 ("[I]nterpretive rules are nonbinding in a procedural sense: they cannot cut off the right of private parties to be heard in administrative proceedings.").

32. *See* Mendelson, *supra* note 7, at 408 (noting that issuing guidance is less resource-intensive than notice-and-comment rulemaking).

33. *See id.* at 410 (suggesting that the flexible nature of guidance documents makes them ideal for supplementing legislative rules in response to emerging and unforeseen issues).

34. *Id*. at 409–10.

provide an inexpensive means by which the agency can supervise its employees, thereby promoting more accurate, consistent, and predictable decisions by agency personnel.[35]

Perhaps most significantly, guidance documents provide an efficient means for agencies to establish rules governing the conduct of regulated parties and beneficiaries of government programs. Although not legally binding, agencies' nonlegislative rules often have rule-like effects on affected parties, who generally comply with these rules. Because nonlegislative rules are not legally binding, courts generally will not entertain a legal challenge to a nonlegislative rule prior to an agency's reliance on the rule in an administrative adjudication.[36] If the agency's guidance appears legally vulnerable, a regulated entity or applicant may elect to challenge the agency's enforcement of its policy, particularly if compliance would be costly.[37] However, in a closer case where the agency's guidance arguably has some merit, the likelihood of successfully challenging the agency's guidance may be low, as courts afford a high degree of deference to the statutory and regulatory interpretations, factual determinations, and policy choices underlying an agency's nonlegislative rules.[38] In addition to the costs of mounting a legal challenge, failure to comply with agencies' guidance may have immediate adverse consequences for regulated entities and applicants, such as imposition of sanctions, disapproval of an application, or revocation of prior government

35. *See* Mendelson, *supra* note 7, at 409 (noting that agencies use guidance materials such as handbooks and directives to supervise employees and streamline employee decisionmaking). Although legislative rules also could promote more accurate, consistent, and predictable decisionmaking among agency employees, "guidance documents allow the agency to supply information to lower-level employees more cheaply and without risking an outside suit based on later noncompliance with the legislative rule." *Id. See generally* Asimow, *supra* note 10, at 526, 529 (noting that guidance materials, in serving as staff regulations, are essential to the proper administration of day-to-day agency operations).

36. *See generally* Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997) (arguing that agencies can use nonlegislative rules to avoid the rigorous judicial and political oversight that accompany legislative rulemaking).

37. *See* Mendelson, *supra* note 7, at 412 (examining regulated entities' risks and costs of challenging agency guidance enforcement).

38. *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000) (holding that an agency's statutory interpretations announced in actions other than legislative rules or formal adjudications are due *Skidmore* deference; while not controlling, the agency's interpretation constitutes a body of experience and informed judgment to which the courts may resort for guidance); Williams v. United States, 503 U.S. 193, 201 (1992) (stating that an agency's general policy statement interpreting or explaining a legislative rule is an authoritative guide to the meaning of the applicable legislative rule); Mendelson, *supra* note 7, at 419 (arguing that the APA's "arbitrary and capricious" standard of review under § 706 of the APA is weak, with courts typically deferring to the agency's expertise with respect to the relevant evidence and policy considerations).

approvals.[39] Challenging an agency's guidance also risks damaging a regulated party's or applicant's long-term relationship with regulators and may bring unwelcome media attention.[40] Given the potentially steep costs of noncompliance with agency guidance, regulated parties and applicants frequently choose compliance over a challenge, especially if the costs of compliance are low.[41]

Not surprisingly, agencies increasingly are announcing far-reaching regulatory norms and expectations through guidance materials.[42] The volume of these guidance materials is massive and far exceeds the number of legislative rules promulgated through notice-and-comment rulemaking.[43] For example, the Centers for Medicare and Medicaid Services claims that it issues thousands of new or revised guidance documents annually, with "perhaps most" of the 37,000 documents on its website constituting guidance documents.[44] Its guidance manuals for plans participating in the Medicare Prescription Drug Program total over 884 pages, with additional manual chapters forthcoming, as compared to the 106 pages of regulations in the *Code of Federal Regulations* governing the plans' conduct.[45] Between 1996 and 1999, the Occupational Safety and Health

39. *See* Anthony, *supra* note 7, at 1328 (noting that guidance materials may have a binding effect if the regulated entities fear that agencies will take retributive actions); McGarity, *supra* note 31, at 1442 (arguing that the consequences of a failed challenge to agency guidance regulations may induce regulated parties to comply with nonlegislative rules).

40. *See* Mendelson, *supra* note 7, at 400 (noting that regulated entities may be unwilling to suffer the ill will of challenging an agency's guidance in court); *cf. id.* at 407 (noting that universities typically comply with the requirements of Title IX in the interest of maintaining a good long-term relationship with the Department of Education and avoiding negative media attention).

41. *See* Anthony, *supra* note 7, at 1327–32 (noting that guidance documents have a "practical binding effect" on regulated parties if the documents suggest a binding intent and the regulatees are reasonably led to believe that noncompliance carries consequences); Mendelson, *supra* note 7, at 407 (arguing that the rational regulatee will conform to guidance regulations if compliance is more cost effective than either refusing to comply with—or mounting a challenge to—guidance rules).

42. *See* Joel E. Hoffman, *Public Participation and Binding Effect in the Promulgation of Nonlegislative Rules: Current Developments at FDA*, 22 ADMIN. & REG. L. NEWS 1, 1 (1997) (arguing that agencies have responded to increasingly complex legislative rulemaking procedures with more nonlegislative rulemaking).

43. *See* Mendelson, *supra* note 7, at 398 (noting that agencies have issued far more guidance documents than formal or informal rules); Johnson, *supra* note 7, at 701 (arguing that agencies have increasingly turned to nonlegislative rulemaking because of its time and resource management advantages).

44. *See* Centers for Medicare & Medicaid Services, Executive Order Guidance Overview, http://www.cms.hhs.gov/EOG/01_Overview.asp (last visited Apr. 14, 2009) (noting that many guidance documents that the Centers for Medicare & Medicaid Services issues annually make individual determinations of economic significance difficult).

45. Centers for Medicare and Medicaid Services Medicare Prescription Drug Benefit Manual, http://www.cms.hhs.gov/manuals/downloads/Pub100_18.pdf (last visited Apr. 14, 2009); Voluntary Medicare Prescription Drug Benefit, 42 C.F.R. pt. 423 (2006).

Administration of the Department of Labor (OSHA) issued over three thousand guidance documents whereas the entire Department of Labor, including OSHA, issued only twenty "significant" rules subject to review by the Office of Management and Budget (OMB).[46]

Guidance documents often have a substantial impact on regulated parties, beneficiaries of government programs, and the public. As noted above, guidance documents often affect the behavior of regulated entities and applicants for government programs even though they are not legally binding. These impacts can be as significant as the impact of legislative rules promulgated through notice-and-comment rulemaking.[47] For example, the Environmental Protection Agency currently identifies 204 of its guidance documents as "significant guidance documents,"[48] which include guidance documents likely to have an annual effect on the economy of at least $100 million or that materially alter the budgetary impact of entitlements, grants, user fees, or loan programs.[49] The Department of Labor has identified 47 significant guidance documents.[50]

Although agency guidance materials have considerable consequences for

46. *See* COMM. ON GOV'T REFORM, NON-BINDING LEGAL EFFECT OF AGENCY GUIDANCE DOCUMENTS, H.R. REP. NO. 106-1009, at 5 (2000) (noting that OSHA released 3,374 guidance documents from 1996 to 1999); Mendelson, *supra* note 7, at 399 (discussing the large number of guidance documents released by agencies relative to the number of legislative rules produced).

47. *See* OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3435 (Jan. 25, 2007) (noting that guidance documents may have a binding effect on regulated parties to the extent that they would alter their conduct in an economically significant way).

48. *See* Envtl. Prot. Agency, Significant Guidance Documents by Office, http://www.epa.gov/lawsregs/guidance/byoffice.html (last visited Apr. 14, 2009) (listing the available significant guidance documents according to EPA office).

49. The OMB Bulletin generally defines the term *significant guidance document* to mean a guidance document reasonably expected to

> i. [l]ead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
> ii. [c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
> iii. [m]aterially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
> iv. [r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12,866, as further amended.

OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007).

50. *See* Dep't of Labor, Department of Labor Significant Guidance Documents Subject to EO12866 and OMB's Bulletin for Agency Good Guidance Practices, http://www.dol.gov/asp/guidance/index.htm (last visited Apr. 14, 2009) (listing the Department of Labor's significant guidance documents according to division within the agency).

regulated entities, applicants for government programs, and the public, interested parties generally have no legal entitlement to participate in their development.[51] Agencies may provide some regulated entities and other groups limited opportunities to participate informally in the agency's development of its nonlegislative rules, but these opportunities for informal participation are not consistently available to all interested parties on an equal basis.[52] In addition, agencies are not legally obligated to offer a statement of the basis or purpose of a nonlegislative rule or to respond to public comments on the guidance.[53] Consequently, agencies issue, through guidance, a wide range of important policies unconstrained by any constitutional or statutory procedural requirements.

The reality of the modern administrative state informally adopting significant policies through a decisionmaking process lacking adequate procedural protections raises fundamental questions about the fairness and legitimacy of these policies. As the D.C. Circuit has observed,

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the [*Federal Register*] or the [*Code of Federal Regulations*].[54]

Our job then is to examine whether "the sorts of evils"[55] against which

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51. *See* 5 U.S.C. § 553(b)(A) (2006) (excepting interpretive rules and general statements of policy from the APA's notice-and-comment rulemaking requirements). However, Congress has directed that the FDA require public participation in the adoption of guidance documents. 21 U.S.C. § 371(h)(1).

52. *See infra* notes 224–25 and accompanying text (noting that agencies often restrict public participation and engage solely with familiar organizations, with limited opportunities for involvement by newly interested parties).

53. *See* 5 U.S.C. § 553(c) (requiring a statement of basis and purpose only for those rules subject to the notice requirements under 5 U.S.C. § 553(b)); *see also* Mendelson, *supra* note 7, at 410 (noting that nonlegislative rulemaking lacks the oversight and formal procedures of legislative rulemaking that require agencies to engage in public participation). The Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices requires agencies to solicit and respond to public comments on agency guidance documents deemed "economically significant"; however, the bulletin does not create any legal right of enforcement against agencies. OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3438–40 (Jan. 25, 2007) (outlining agency duties with regard to notice-and-comment procedures for economically significant guidance documents).

54. Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

55. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 13 (1980).

administrative procedures are directed arise in the context of agency guidance and, if so, to identify the appropriate mix of procedural safeguards designed to protect against these risks. In addressing these issues, I begin with an examination of which vision of government legitimacy should govern our evaluation and design of administrative procedures.

## II. EVALUATING THE LEGITIMACY OF THE ADMINISTRATIVE STATE

In shaping the manner in which agencies exercise the authority entrusted to them, administrative procedures are a source of legitimacy for the administrative state. The task of administrative law is to construct a legal regime of procedures that promotes administrative decisionmaking in a manner that accords with our image of a just and effective government. To perform this task, we must first identify which vision of legitimacy should guide us when evaluating administrative procedures.

Two major conceptions of democracy have dominated the various models for assessing the legitimacy of discretionary agency decisionmaking. The first, a pluralist conception of democracy, bases legitimacy on the extent to which policy decisions express the popular will.[56] Under this theory, majoritarianism is the hallmark of legitimate government, with political accountability through the electoral process as the primary device for protecting the majority will. The second, a republican view, finds democratic legitimacy in government processes that are deliberative and justify policy choices with reference to the common good. Under this conception, democratic legitimacy rests on the decisionmaking processes of the agencies themselves rather than on whether their policies reflect the majority will. Specifically, government policies are deemed legitimate when public officials exercise their powers consistent with existing laws, competently, and for the public interest. This Part describes these competing conceptions of legitimacy and illustrates their respective influence on theories of administrative law, and argues that republican norms provide a better metric than pluralist norms for assessing the legitimacy of agency decisionmaking.

### *A. The Dilemma of Agency Discretion*

Since the New Deal, Congress has delegated sweeping powers to the federal bureaucracy to implement the political choices reflected in the laws

56. Mendelson, *supra* note 13, at 578; *see also* Seidenfeld, *supra* note 13, at 1533 (explaining that pluralism defines the public interest as an aggregation of private values, and, therefore, considers debate about the legitimacy of values enhanced by government action unnecessary as long as the values reflect the bargain struck by the groups participating in the democratic process).

enacted by Congress.[57] To justify this delegation to unelected agency officials, scholars initially described the administrative state as "a mere transmission belt for implementing legislative directives in particular cases."[58] This traditional conception of the administrative state viewed agencies as merely bringing to fruition the wishes of Congress through objective and technical decisions that do not involve value judgments.[59] Agencies therefore did not engage in the legislative function,[60] and the legitimacy of their actions was tied to the narrow question of whether they faithfully implemented Congress's statutory plan.[61] The transmission belt model, however, proved an inadequate description of actual practice.

Regulatory statutes typically contain broad and vague delegations of authority to administrative agencies.[62] Rarely do statutes contain the type of specific legislative directives that would limit agency activity to within the identifiable and determinate bounds envisioned by the transmission belt model.[63] Instead, Congress generally authorizes agencies to make fundamental policy decisions that involve balancing social values such as efficiency, fairness, public health and safety, and cost.[64] The transmission

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57. *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW 49 (3d ed. 1991) (noting that, since 1935, the Supreme Court has used broad standards to uphold Congress's ability to delegate power).

58. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

59. *See* Mendelson, *supra* note 13, at 580 (explaining the "transmission belt" model through which "agencies merely carry out Congress's statutory plan and do not themselves exercise political judgment"); Seidenfeld, *supra* note 13, at 1516 ("[T]he federal bureaucracy is necessary to implement Congress's political decisions."); Stewart, *supra* note 58, at 1672–76 (explaining that under the traditional transmission belt model, agency procedures should simply promote the accurate and impartial application of legislative directives).

60. Seidenfeld, *supra* note 13, at 1517.

61. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 470 (2003) (explaining that under the transmission belt model, administrative action was legitimated with reference back to the authority of the legislature); Mendelson, *supra* note 13, at 580 ("The question of democratic responsiveness and accountability then becomes essentially a principal–agent problem. On such a view, the central question therefore is whether the administrative agency will be obligated to implement faithfully the congressionally chosen policies."); Stewart, *supra* note 58, at 1675 ("[The transmission belt model] legitimates intrusions into private liberties by agency officials not subject to electoral control by ensuring that such intrusions are commanded by a legitimate source of authority—the legislature.").

62. *See* Mendelson, *supra* note 13, at 580 (explaining that the literature has abandoned the transmission belt model "in recognition of the breadth and vagueness of congressional delegations of authority to administrative agencies"); Stewart, *supra* note 58, at 1676 (noting that vague statutes create discretion that threatens the legitimacy of agency action under the transmission belt model).

63. *See* Bressman, *supra* note 61, at 470–71 (describing the transmission belt model as conceiving of agencies "as merely implementing clear legislative directives").

64. *See* Mendelson, *supra* note 13, at 569 ("Since the New Deal, agencies have received congressional delegations to make countless key policy decisions balancing competing values such as efficiency, equity, health, and cost."); *see also* Seidenfeld, *supra*

belt model, therefore, fails to legitimize the vast range of agency actions not tied to specific legislative directives.[65]

Today, few question whether agencies' implementation of congressional delegations of authority invariably involves subjective, value-laden choices among competing interests.[66] This balancing of social concerns is inherently legislative in nature. Consequently, the broad discretion granted to unelected agency officials to "make law" raises fundamental concerns about the legitimacy of agency actions. Of particular concern is whether agency officials will use their powers to promote the public interest or to advance their own interests or those of particular groups or individuals. To this day, administrative law scholars continue to debate how to reconcile the realities of agency discretion with a theory that legitimates vesting

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note 13, at 1517–18 (stating that, when Congress fails to make hard political decisions, agencies must do so when implementing the law). Scholars have identified numerous motives for Congress's delegation of broad authority to agencies: Congress may lack the expertise or time to develop the comprehensive policies demanded of the regulatory state; its size, combined with constitutional constraints, may impede a timely consensus and thus limit Congress's ability to respond effectively in an era of rapidly changing circumstances; and Congress may wish to abdicate responsibility for hard policy choices. *E.g.*, Mendelson, *supra* note 13, at 569–70; Seidenfeld, *supra* note 13, at 1522. The Supreme Court has interpreted the Constitution as prohibiting Congress from delegating authority to administrative agencies in the absence of an "intelligible principle" guiding and limiting agencies' discretion. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). The nondelegation doctrine as applied has bowed to the practical realities of the modern regulatory state, necessitating broad delegation of the legislative function to agencies. The Court has consistently held that broad, ambiguous legislation that in reality provides little guidance to agencies nevertheless satisfies the intelligible principle requirement. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (affirming broad delegation to the EPA to set air quality standards); Loving v. United States, 517 U.S. 748 (1996) (upholding delegation to the President to determine when a court-martial should impose the death penalty). In fact, since 1935, only twice has the Court invoked the nondelegation principle to strike down broad congressional delegations of authority to agencies. *See* Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935) (invalidating a section of the National Industrial Recovery Act (NIRA) delegating to the President the power to prohibit shipment of "hot oil" in interstate commerce in order "to eliminate unfair competitive practices" and "to conserve natural resources"); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating the NIRA's delegation to the President the power to approve detailed codes to govern all business subject to federal authority).

65. *See* Bressman, *supra* note 61, at 471 (explaining that the transmission belt model failed to legitimate agency action because "[i]t could not tie administrative action to legislative directives as a means for protecting individual liberty from arbitrary intrusion"); Seidenfeld, *supra* note 13, at 1517–18 (stating that the transmission belt model does not legitimate delegating to agencies the discretion to render fundamental or politically charged policy decisions); Stewart, *supra* note 58, at 1676 ("Vague, general, or ambiguous statutes create discretion and threaten the legitimacy of agency action under the 'transmission belt' theory of administrative law . . . [because] major questions of social and economic policy are determined by officials who are not formally accountable to the electorate . . . .").

66. *See* Stewart, *supra* note 58, at 1683 ("Today, the exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy.").

important policy decisions in agency officials lacking the imprimatur of periodic election by voters.[67]

The debate over the legitimacy of agencies' exercise of their legislative powers is really three debates—one constitutional, one normative, and one descriptive. The constitutional debate focuses on the constitutional legitimacy of agencies' lawmaking activities in light of a Constitution which vests powers over domestic policymaking in Congress, subject to the President's veto. The normative debate considers whether the manner in which agencies exercise their discretion comports with the values underlying our collective system of governance. The descriptive debate centers on how realistic various theories of legitimacy can be given political and institutional limitations. While all three debates are of great importance, this Article focuses on normative and descriptive considerations and does not address the constitutional legitimacy of the administrative state.[68]

### *B. Theories of Legitimacy: Majoritarianism and the Trustee Paradigm*

In his book *The Least Dangerous Branch*, published in 1962, Alexander Bickel asserted the primacy of majoritarianism in conferring legitimacy to government policy choices.[69] For those embracing Bickel's pluralistic conception of democracy, the "will of the people," as expressed by voters through periodic elections, plays a central role. Majoritarianism assumes that majority preferences reflect the "right" or "correct" policy choice, or at least will be "more moderate, temperate, and just"[70] than a policy agenda contrary to the majority will. Societal preferences therefore do not need to

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67. *See* Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987 (1997) ("Like an intriguing but awkward family heirloom, the legitimacy problem is handed down from generation to generation of administrative law scholars.").

68. For a discussion of the constitutional legitimacy of agencies' policymaking activities, see, for example, Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491 (1987) (analyzing the administrative state in light of the Supreme Court's separation of powers jurisprudence); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 37–47 (1995) (arguing that a "unitary executive" is necessary to maintain the Constitution's separation of powers and to preserve the Framers' vision of an energetic and accountable president); David B. Rivkin, Jr., *The Unitary Executive and Presidential Control of Executive Branch Rulemaking*, 7 ADMIN. L.J. AM. U. 309, 317–20 (1993) (contending that an original understanding of the Constitution supports the "unitary executive" thesis because the Framers understood that "the Vesting Clause of Article II did place the totality of executive power with the President").

69. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962) (questioning the legitimacy of judicial review because it thwarts the choices of elected representatives who operate under public scrutiny and whose choices are assumed to reflect the will of a popular majority).

70. Farina, *supra* note 67, at 990 (quoting Calabresi, *supra* note 68, at 67).

be justified with reasons,[71] and the views of experts are afforded little weight. Accordingly, policy decisions reflecting the majority will are deemed legitimate, while those that do not are presumptively illegitimate. Elected officials, therefore, should faithfully translate the views of those who elected them into law, doing their best to approximate what the voters themselves would do if allowed to directly participate in the legislative process. The evil against which society must protect itself is public officials who ignore the popular will in favor of policy choices benefiting private interests.

Under majoritarianism, the question of democratic legitimacy becomes a principal–agent question of whether government officials demonstrate fidelity to the majority's will.[72] To address this principal–agent question, supporters of majoritarianism argue that decisions affecting society should be made by officials politically accountable to the people.[73] Political accountability—requiring public officials to stand periodically for election—ensures that public officials honor majority preferences because voters can turn out of office those who fail to do so.[74] When Congress delegates lawmaking power to unelected agency officials, however, it distances regulatory policymaking from the electorate.[75] For supporters of majoritarianism, this raises suspicions about the democratic legitimacy of the administrative state, particularly independent agencies.[76] As a remedy

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71. AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 15 (2004).

72. *See* Mendelson, *supra* note 13, at 580 (characterizing the question of democratic responsiveness and accountability under the pluralism view as essentially a principal–agent problem).

73. *See* BICKEL, *supra* note 69, at 19 (arguing that the judiciary works counter to the democratic theory of policymaking by publicly accountable institutions); *see also* Rebecca L. Brown, *Accountability, Liberty, and Constitution*, 98 COLUM. L. REV. 531, 539 (1998) (describing the majoritarian paradigm as adhering to the view that policy decisions must be made by politically accountable officials).

74. *See* Brown, *supra* note 73, at 534 (characterizing Bickel's theory as resting on the assumption that the purpose of political accountability is to effectuate majority will); Mendelson, *supra* note 13, at 578–79 (stating that the democratic character of an institution may be inferred if its membership is selected by the electorate, as those who fail to enact appropriate policies may be turned out of office).

75. *See* Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 166 (2006) ("When Congress delegates authority to an agency rather than resolve the disputed issue itself, it distances regulatory policy from majoritarian democratic processes.").

76. *See* Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 831 (2003) ("Agencies might advance their own visions of good regulatory policy, but, electorally unaccountable, those visions lack political legitimacy."); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 94 (1994) (arguing that the President should have control over agencies to preserve accountability). Bickel also questioned the legitimacy of judicial review by unelected judges empowered to overturn the legislative decisions of government officials who represent and answer to the people. *See* BICKEL, *supra* note 69, at 18

for these concerns, administrative law commentators increasingly advocate for greater control over agency decisionmaking by elected public officials, namely members of Congress and the President.

Supporters of majoritarianism generally embrace one of two types of administrative procedures, both of which aim to keep agencies' policies in line with popular preferences. The first consists of procedures that promote participatory bargaining among interested parties. Those advocating these administrative procedures seek to replicate at the administrative level the political negotiation that occurs at the legislative level.[77] Scholars who emphasize the legitimizing force of political accountability generally favor the second type of administrative procedures—those which promote greater control over agencies by public officials directly accountable to the electorate.[78]

In contrast to the majoritarian conception of democratic legitimacy, legal theorists embracing republican norms envision government decisionmaking as a process of "reflective deliberation on the 'common good.'"[79] Republican theories of legitimacy thus focus on the decisionmaking process itself, and not on whether public policies are made by politically accountable officials loyal to the popular will. In other words, while not denying that Congress and the President serve an important reviewing function over agencies, republican theorists find legitimacy within agencies themselves when their decisions are deliberate and "informed by the values of the entire polity."[80] Republican theories accordingly do not automatically deem policy choices that reflect majority will as right but instead recognize the legitimacy of policies that "invoke[] substantive moral claims" independent of popular preferences.[81] Government officials

(questioning the legitimacy of judicial review by unelected judges).

77. See *infra* Part II.C for a discussion of the interest group representation model—a model for the administrative state which reflects the pluralist's emphasis on participatory bargaining.

78. See *infra* Part II.C for a discussion of the presidential control model—a model for the administrative state which promotes procedures that enable the President to monitor and influence agency action.

79. Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795, 796–97 (1999).

80. Seidenfeld, *supra* note 13, at 1515. Civic republicans also advocate for deliberative processes that engage citizens themselves. In their view, public deliberations not only would produce decisions informed by the values of all citizens, but would enable citizens "to reach consensus on the common good." *Id.* at 1514. However, in our large, heterogeneous society, it is difficult to imagine that public debate on most issues will reveal a clear consensus to guide agencies' policy choices. *Cf.* Farina, *supra* note 67, at 995 (questioning whether, for most issues, the diversity of viewpoints will resolve itself into a consensus through public debate, with this consensus then available to the President).

81. GUTMANN & THOMPSON, *supra* note 71, at 19; *see also* Seidenfeld, *supra* note 13, at 1528–29 (arguing against "equat[ing] the public good that legitimates government action with majority rule" in favor of finding legitimacy in government action that reflects

thus must justify their policy choices, even when consistent with the popular will.[82]

Whereas for supporters of majoritarianism the question of democratic legitimacy is a principal–agent problem of whether government officials faithfully implement the majority will, republicans conceive of democratic government as a trust between the people and public officials. Under the terms of this trust, those entrusted with the power to govern have no inherent right to these powers but rather act as stewards for the people.[83] Government officials, therefore, abuse these powers, not when they fail to adhere to the majority will, but when they act opportunistically by serving their own or private interests, devote insufficient energy to the common good, or adopt policies lacking adequate moral justification. Legitimacy accordingly rests on whether government officials exercise their powers consistently with existing laws, competently, and for the public interest. I refer to this concept of legitimacy as the "trustee paradigm."

The trustee paradigm impresses upon agency officials specific duties consistent with their overarching duty to serve the public interest—a duty to obey the law, a duty of care, and a duty of loyalty. Agency officials who violate these fiduciary duties threaten to intrude upon personal liberties without a sufficient public purpose. For example, administrative action that impairs statutorily protected interests or targets an individual or group for unfavorable treatment without good reason unjustifiably encroaches upon individual rights.[84] In this sense, agency officials who discharge their

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thoughtful consideration "about what is best for the community as a community" (emphasis omitted)).

82. *See* GUTMANN & THOMPSON, *supra* note 71, at 13–14 (contrasting deliberative democracy, which asks for justifications and considers the reasons offered in support of a chosen policy, from the aggregative conception, which does not ask for justifications and seeks only an outcome that is fair and optimal).

83. The ABA Committee on Government Standards described this trust as follows:

> The fiduciary, or steward, is one to whom power is given in order that his knowledge and skill can be brought to bear for the benefit of another. This defining characteristic of stewardship illuminates the characteristic of government service that has definitive ethical significance: the entrusting of power by "We, the People" to those who govern for us.
>
> Because we understand ourselves to be a legitimately self-governing People, we recognize that this transfer of power is neither a desperate confession of inability to rule ourselves, nor an unconditional submission to some outsider's superior claim to rule us. Those who receive the power to govern have no inherent right to it. Rather, the power that a free and willing citizenry gives to those who govern comes indelibly impressed with the duty to serve the interests of that citizenry.

ABA Comm. on Gov't Standards, *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 ADMIN. L. REV. 287, 291–92 (1993) (Cynthia R. Farina, Reporter).

84. *See* Bressman, *supra* note 61, at 496 (arguing that arbitrary administrative decisionmaking may affect individual liberty in the personal sense, such as by "target[ing] a specific individual for unfavorable treatment without good reason," or in the collective sense, such as by "impair[ing] a statutorily protected public good . . . without a sufficient[]

responsibilities in a manner inconsistent with their fiduciary duties act arbitrarily or capriciously.

Under the trustee paradigm, the duty to obey the law demands that agencies implement the law consistent with Congress's legislative directives. Congress's legislative directives provide agencies with guidelines regarding a general conception of the public interest, with agency decisionmaking limited to policy choices falling within the boundaries established by these guidelines. Legislative directives thereby provide individuals some protection against arbitrary exercises of agency discretion that intrude upon personal liberties without a sufficient public purpose.[85] Agencies' actions accordingly must fall within the scope of their prescribed functions and the applicable law's stated objectives. In addition, agency officials may not indulge their own personal preferences but must pursue objectives consistent with the clear policy choices made by Congress.[86] Toward this end, agencies' policy decisions must be based on the reasonable belief that their decisions move us toward a goal consistent with the relevant law's criteria or purpose.[87]

When legislative directives leave gaps for agencies to fill, the trustee paradigm requires that agencies exercise their discretion with care and loyalty to the public interest. A familiar concept in corporate law, the duty of care requires that decisionmakers bring their knowledge and experience to bear upon an issue, with their actions legitimated by appeals to rationality.[88] We therefore require agencies to devote sufficient energy to the tasks delegated to them by Congress, and to competently exercise the expertise that warranted entrusting them with lawmaking powers in the first

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public purpose").

85. *Cf. id.* at 470 ("Legislative directives protect individual liberty by confining administrative decisionmaking within identifiable and determinate bounds. Simply put, they reduce opportunities for arbitrariness by providing agencies with specific instructions rather than general licenses.") (citation omitted).

86. *See* Farina, *supra* note 11, at 228 (noting that the doctrine of due process ignores the common understanding that public officials are given power to pursue "comprehensible, identifiable objectives" and not so "that they might indulge their personal predilection or caprice").

87. *See* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 225 (1976) ("[Agencies] are obliged to justify their actions in instrumentalist terms, as means toward a goal within the scope of their assignment."); *cf.* Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1158 (1984) ("[P]articular action should be allowed only insofar as it is necessary to carry out the state's established goal.").

88. *See* T.M. Scanlon, *Due Process*, *in* DUE PROCESS: NOMOS XVIII 94, 96 (J. Roland Pennock & John W. Chapman eds., 1977) (stating that we achieve "some assurance of nonarbitrariness by requiring those who exercise authority to justify their intended actions in a public proceeding by adducing reasons of the appropriate sort and defending these against critical attack"); Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 29 (2001) ("The administrative state . . . is drowning in rationality requirements because it can legitimate itself only by appeals to rationality.").

place. We expect that agencies' factfinding will be thorough and accurate, and that their conclusions follow logically from their factfinding.[89] Finally, the rationality requirement demands that administrative decisionmaking be consistent and predictable, with agencies required to justify any departures from past practice.[90]

The duty of loyalty ensures that agencies serve the polity in its entirety, taking into account moral principles, and not their own agendas or the interests of favored groups or individuals. At its most basic level, the duty of loyalty embraces basic principles of equal treatment. When agencies make substantive choices about how to best implement government programs, the equality principle requires that they consider and show equal regard for the interests of all individuals affected by their actions.[91] "Decisionmakers should evaluate the positions of participants in the political process by the persuasiveness of their arguments and not by the identity, status, or number of individuals supporting each position."[92] We therefore demand that when agencies target specific individuals or groups for unfavorable treatment, they defend their actions with public-regarding reasons and moral considerations. In other words, to guard against agency indifference or hostility toward the concerns of certain individuals or groups, agencies must demonstrate that their actions are reasonably intended to promote the public good or our collective moral values.

Under the trustee paradigm, administrative procedures should promote agencies' adherence to their fiduciary duties of obedience to the law, care, and loyalty. The trustee paradigm's emphasis on the manner in which

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89. *See* Bressman, *supra* note 61, at 496 (defining arbitrary administrative decisionmaking as "generat[ing] conclusions that do not follow logically from the evidence"); Mashaw, *supra* note 88, at 22 ("Authority [for administrative action] must be combined with reasons, which usually means accurate fact-finding and sound policy analysis.").

90. *See* Stewart, *supra* note 58, at 1679–80 (explaining that the doctrine of reasoned consistency in agency decisionmaking might require that agencies articulate reasons for their decisions and that they justify departures from established policies in order to "ensure that the agency's action is rationally related to . . . some permissible societal goal").

91. *See* ELY, *supra* note 55, at 100 (arguing that the pursuit of liberty entails an "elaborate scheme" that ensures that decisionmakers are "held to a duty to take into account the interests of all those their decisions affect"); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 899 (1981) (stating that the equality value demands that "the techniques for making collective decisions not imply that one person's or group's contribution (facts, interpretation, policy argument, etc.) is entitled to greater respect than another's merely because of the identity of the person or group"); Seidenfeld, *supra* note 13, at 1531 ("The civic republican condition that political participants not be subservient to one another mandates that government decisionmakers have equal regard for all interests."); *cf.* Criddle, *supra* note 75, at 131 ("Where a fiduciary relation involves multiple beneficiaries, the duty of loyalty takes on an antidiscrimination aspect: Unless otherwise provided for by contract, fiduciaries are bound to render an equal measure of fidelity to each beneficiary.").

92. Seidenfeld, *supra* note 13, at 1531.

agencies decide public policy, however, does not mean there exists no role for external oversight of the administrative state by the Congress, President, and courts. Because no bureaucratic organization can be self-policing, agencies should be monitored by those empowered to remedy an agency's breach of the public trust.[93] Therefore, the legal regime of administrative procedures also should include those procedures necessary to facilitate this external oversight. However, unlike majoritarianism, the trustee paradigm sees oversight of agencies by the politically accountable branches not as the central source of agency legitimacy, but as one part of a panoply of internal and external safeguards designed to limit agency malfeasance and negligence.[94] Consequently, the trustee paradigm calls for administrative procedures that facilitate external oversight of agencies only to the extent necessary for the Congress, President, and courts to ensure agencies' fidelity to their fiduciary obligations; the paradigm does not demand processes that enable politically accountable officials to dictate agencies' substantive policy decisions.

### *C. The Influence of Majoritarianism and the Trustee Paradigm on Administrative Law Developments*

Scholarly, statutory, and judicial developments in administrative law reflect the influence of both majoritarianism and the trustee paradigm. Republican normative values underlying the trustee paradigm made a greater contribution to earlier developments, with later developments emphasizing majoritarian norms. However, those falling in one camp do not entirely discount the other. For example, as discussed above, republican theories of agency legitimacy often afford politically accountable officials an important oversight role; they simply do not grant politically accountable officials the primary role for legitimizing the administrative state.[95] Similarly, few pluralists wholly disregard the contributions of agency expertise in favor of purely political administrative decisions. Nevertheless, developments in administrative law generally

93. *See* Criddle, *supra* note 75, at 121 ("To minimize the risk that agencies will abuse their discretion through opportunism or negligence, each political branch monitors agency activity and retains some residual control to correct agency mismanagement.").

94. *Cf*. Mendelson, *supra* note 13, at 586 (describing civic republican theories as seeing "presidential control not as the central source of legitimacy, but as a safeguard against poor outcomes or skewed deliberation").

95. *See, e.g.*, Seidenfeld, *supra* note 13, at 1515 (arguing that politically accountable institutions play a role under the republican conception of the administrative state by ensuring that the bureaucracy carries out its civic republican promise); *cf.* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1766–67 (2007) (explaining that legal scholars generally divide into two groups—those favoring procedures and those favoring political accountability—but that those in the former group do not say that political accountability is irrelevant).

recognize either majoritarianism or the trustee paradigm as making a greater contribution to the legitimization of the administrative state.

The trustee paradigm first revealed itself in the New Deal's expertise model, which replaced the transmission belt model following its abandonment by legal scholars.[96] The expertise model reflected the republican ideal of sound policy through deliberation, and assumed that the agency's superior information and technical capabilities would produce policy decisions that furthered the common good.[97] Supporters of the model de-emphasized the need for procedures in legitimizing the administrative state, believing bureaucrats' sense of professionalism alone would ensure impartial, unbiased decisionmaking.[98] Indeed, procedures could undermine the legitimacy of the administrative state by constraining agencies' expert judgments.[99]

From its inception, a chorus of critics rejected the expertise model's optimistic focus on agency professionalism to the exclusion of agency procedures. Despite their expertise, bureaucrats often fell subject to self-interest, corruption, factionalism, arbitrariness, and inefficiencies.[100] By

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96. *See* Daniel P. Rathbun, Note, *Irrelevant Oversight: "Presidential Administration" from the Standpoint of Arbitrary and Capricious Review*, 107 MICH. L. REV. 643, 650 (2009) (noting that the transmission belt model, the first model of the administrative state, lost its credibility "as agencies' independent discretion became clear").

97. *See* Seidenfeld, *supra* note 13, at 1519 (describing the expertise model as "a faith that the 'professional spirit' of New Deal regulators would deter them from setting unwise or excessively intrusive policy").

98. *See id.* at 1518–19 (stating that the expertise model envisioned that the application of regulators' knowledge and experience would yield successful solutions to regulatory problems, with regulators' "professional spirit" deterring them "from setting unwise or excessively intrusive policy"); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1320–21 (1984) (explaining that the expertise model depicts agency decisionmaking as trustworthy because the agency's purpose is to exercise its expertise for the common purpose, constrained only by "the limits of professionalism, expertise, and competence").

99. *See* Bressman, *supra* note 95, at 1759 ("By reducing discretion, more elaborate procedures would diminish room for expert judgment of the sort that the New Dealers preferred.").

100. *See* Criddle, *supra* note 75, at 147 ("[T]he delicate framework of regulatory governance can easily decay into corruption, cronyism, factionalism, capriciousness, and waste."). As Criddle further explains,

> As stewards over vast public resources and powerful regulatory regimes, administrative agencies face extraordinary pressures from both within and outside government—not all of which are conducive to conscientious administration, to put it mildly. For decades, political scientists have decried the so-called "iron triangles" between private industry, agency administrators, and congressional committees, which institutionalize factionalism, entrenching narrow interests in opposition to broad-based progressive reforms. Public resources pooled under agency control may also become breeding grounds for rent-seeking bureaucrats and unscrupulous lobbyists.
>
> Bureaucratic mismanagement can be equally insidious, leading to arbitrary, uninformed, and wasteful policies.

*Id.* at 147–48; *see also* Bressman, *supra* note 61, at 472 ("However expert administrators

deterring agencies from exercising their discretion competently, consistent with existing laws, and for the public interest, these questionable actions threatened to undermine the legitimacy of the administrative state. In response to these concerns, scholars, lawmakers, and the courts turned to a range of procedural safeguards designed to discourage arbitrary and capricious agency policies.

The trustee paradigm influenced Congress's initial solution to the problem of agency malfeasance and negligence—the APA. Enacted in 1946, the APA's safeguards include the notice-and-comment procedures and trial-like protections for agency adjudications discussed in Part I, as well as authority for the courts to set aside any agency action deemed "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[101] These requirements promote agency rationality in the legislative rulemaking and adjudicatory context by enabling interested parties to provide agencies with relevant information,[102] and requiring agencies to offer a defensible basis in support of their legislative rules and adjudicatory decisions required by statute to be made on the record. The APA, as interpreted by the courts, also reinforces agencies' duty of loyalty by requiring that a neutral party preside over administrative adjudications, and that agencies respond to public criticisms of their proposed legislative rules and proffer a public-regarding rationale in support of their final legislative rules.[103] Finally, the prospect of judicial review checks agency actions that violate the duty to obey the law by disobeying Congress's legislative directives. The APA thereby "reduc[es] agency discretion to satisfy private or selfish interest at public expense."[104]

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were, they too often decided matters without a hearing, on the basis of matters outside their purview, with preformed biases, and without regard to the combination of functions that might impugn their impartiality—such as the combination of rulemaking, investigation, and prosecution.").

101. 5 U.S.C. § 706(2)(A) (2006).

102. *See* Asimow, *supra* note 10, at 574 (noting that agency personnel attach practical value to public commentary); Farina, *supra* note 11, at 226 (suggesting that exchanges with affected individuals can be helpful to agencies); *see also* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 185–86 (1997) ("[A]s information makes its way inside the bureaucratic process to the actual decisionmakers, it contributes to the rationality of the final decision by improving the information base utilized in setting agendas, developing alternatives, and making final policy decisions.").

103. *See, e.g.*, Indep. U.S. Tanker Owners Comm. v. Lewis, 690 F.2d 908, 919 (D.C. Cir. 1982) (invalidating an agency rule because of the agency's inadequate response to comments); La. Fed. Land Bank Ass'n, FLCA v. Farm Credit Admin., 336 F.3d 1075, 1080 (D.C. Cir. 2003) (remanding a rule where the preamble to the final rule said "almost nothing" about comments received by the agency).

104. Bressman, *supra* note 61, at 473; *see also* Criddle, *supra* note 75, at 153 (describing the APA's notice-and-comment procedures as minimalist procedural safeguards intended to reinforce the fiduciary duties of care and loyalty).

The 1960s brought a shift away from the trustee paradigm toward majoritarian norms of legitimacy.[105] Contemporaneously with the introduction of Bickel's majoritarian paradigm, the "interest group representation" model elevated popular preferences to a primary role in the agency decisionmaking process.[106] The interest group representation model advocates an administrative decisionmaking process that replicates the legislative process, thereby ensuring the legitimacy of agency policies based on the same principles legitimizing legislative choices.[107] Specifically, the model envisions that interest groups representing various segments of the public convey to agencies their respective preferences through both formal and informal means. Agencies then aggregate these preferences so as to coincide with the popular will, thereby generating policies similar to those emerging from the political bargaining and compromises of the legislative process.[108]

The initial enthusiasm for the interest group representation model soon waned. Critics claimed agencies did not simply aggregate preferences, but were subject to "capture" by well-organized regulated interests at the expense of less-organized groups and the general public.[109] They argued that agencies' bias toward regulated interests stems in part from agencies'

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105. *See* Bressman, *supra* note 61, at 465 ("[T]he majoritarian premise almost intuitively explains the transition from the early models of administrative law to the most recent ones.").

106. *See id.* (arguing that the emerging interest group representation model was premised on majoritarian values and sought to ensure that administrative decisionmaking "reflected the policy preferences of participants in agency proceedings").

107. *See* Stewart, *supra* note 58, at 1712 (explaining that the interest group representation model seeks to replicate the legislative process, thereby affording agency decisions "legitimacy based on the same principle as legislation").

108. *See* Bressman, *supra* note 61, at 475 ("Through an interest group representation model, agencies' decisions would gather legitimacy 'based on the same principle as legislation.' In the absence of an objective basis for administrative judgment, such judgment would reflect the preferences of all affected parties."); Mendelson, *supra* note 13, at 587 (describing pluralist theories of interest group participation in agency decisions as a "microcosm of the legislative process, generating policies that coincide with the popular will" based on the aggregation of the preferences communicated to agencies by interest groups); Stewart, *supra* note 58, at 1712 (explaining that the interest group representation model has an implicit assumption that "legislation represents no more than compromises struck between competing interest groups" and, therefore, "if agencies were to function as a forum for all interests affected by agency decisionmaking, bargaining leading to compromises generally acceptable to all might result, thus replicating the process of legislation").

109. *See* Bressman, *supra* note 61, at 485 ("Critics claimed that agencies did not merely aggregate the preferences of the competing interests but served 'self-interests deeply entangled with narrow private interests.'" (quoting Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1498 (1983))); Stewart, *supra* note 58, at 1712 ("The viability in practice of such a pluralist theory of legitimacy is challenged at the outset by the predominant contemporary critique of the administrative process: that agencies are biased in favor of regulated and client groups, and are generally unresponsive to unorganized interests." (internal citation omitted)).

dependence on those groups for much of the information on which they base their regulatory policies.[110] Agency staff also may wish to curry favor with the regulated interests from which they may seek future employment.[111] In addition to the potential for agency capture by regulated interests, creating a microcosm of the legislative process in the administrative setting proved costly and complicated.[112] Given these problems with the interest group representation model, by the 1980s commentators had turned to an alternative model for the administrative state that reflects not only majoritarianism's emphasis on popular preferences, but also its embrace of political accountability—the presidential control model.

With limited prospects for close, systematic oversight of agencies by Congress,[113] supporters of the presidential control model argue that presidential control over the details of regulatory policy is necessary to ensure agencies' fidelity to majoritarian preferences.[114] The presidential control model purports to legitimate the decisions of the administrative state by bringing those decisions under the control of the one public official answerable to the entire nation.[115] Defenders of this model contend that because the electorate chooses the presidential candidate whose proposed policies better reflect the majority will, the President can best identify and aggregate competing preferences.[116] In addition to serving as a conduit for the will of the people, the President will be responsive to the majority view

110. *See* Croley, *supra* note 76, at 834 (stating that under one variation of the agency capture thesis, agencies may be "co-opted by interest groups because they depend on those groups for so much of the information on which their regulatory decisions rest"); Mendelson, *supra* note 13, at 587 (same); Stewart, *supra* note 58, at 1713 (same).

111. *See* Seidenfeld, *supra* note 13, at 1564 (noting that agency officials can use their regulatory power to trade benefits to interest groups in return for future jobs).

112. *See* Bressman, *supra* note 61, at 485 ("Creating an idealized legislative process was expensive and complicated, if done right.").

113. *See infra* Part II.D.3.b.

114. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–36 (2001) (arguing that the administrative state should be accountable to the public, and that if a model "[takes] the President out of the equation," "what remains are individuals and entities with a far more tenuous connection to national majoritarian preferences and interests"); *cf*. Croley, *supra* note 76, at 831 (stating that the unitary executive thesis contends that the absence of presidential control leaves insufficient checks on agency decisionmakers and thus allows unelected, and therefore politically unaccountable, decisionmakers to implement their own visions of good regulatory policy).

115. *See* Bressman, *supra* note 61, at 489 (describing the unitary executive theory as seeking to legitimate the administrative state by bringing its decisions under popular control through presidential control).

116. *See* Croley, *supra* note 76, at 831 ("Because the president's constituency is a national one, the president can best aggregate and balance competing interests in the course of developing sound regulatory policy."); Mendelson, *supra* note 13, at 582–83 (explaining that under the presidential control model, the electorate expresses its policy preferences when it elects a new president).

in order to increase his re-election prospects or to maintain his party's control of the White House.[117] Presidential control over unelected bureaucrats also promotes the constitutional commitment to policy decisionmaking by politically accountable public officials.[118] Under this view, a strong unitary executive thereby safeguards popular control of government decisions by ensuring that agencies answer to politically accountable President.

The presidential control model calls for those procedures that promote greater presidential control over agency decisionmaking. For example, beginning with the Reagan Administration, Executive Order 12,291 and its successors required agencies to submit their major rules for pre-publication review by OMB, the White House's policy-management arm.[119] President George W. Bush enlarged the scope of OMB review to include significant guidance documents.[120] Executive Order 12,866 also requires agencies to prepare a cost–benefit analysis of their rules.[121] While initially the Reagan Administration justified greater White House oversight of agencies' policymaking as necessary to improve the efficiency of agency rulemaking and interagency coordination, recent administrations increasingly have used executive directives and OMB review to influence agencies' substantive policy decisions.[122]

By the 1980s, the pluralist conception of democratic legitimacy through political accountability also found its way into the courts' administrative

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117. *See* Bressman, *supra* note 61, at 490–91 (describing the unitary executive theory as resting on the belief that the President's policies presumably represent the majority; if not, then the next election cycle will ensure that the new President's policies do); Kagan, *supra* note 114, at 2335 (arguing that the President is likely to consider the preferences of the general public given his desire for re-election in his first term and the election of a chosen successor in his second term, as well as his ambition for achievement and historical legacy); Mendelson, *supra* note 13, at 582–83 ("[The President] will remain responsive to electoral views through her term to increase the chances of her reelection or to maintain her party's continued control of the presidency.").

118. *See* Bressman, *supra* note 61, at 489 ("Once Congress relinquishes the power to determine the details of regulatory policy, the President should assume it because the Constitution requires an elected, focused governmental official to exercise that power rather than a bunch of bureaucrats."); *cf.* Croley, *supra* note 76, at 831–32 ("[B]ecause the Constitution contemplates that the executive power of the United States resides in the president, agencies not closely overseen by and answerable to the president lack constitutional moorings.").

119. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1994); Exec. Order No. 13,258, 3 C.F.R. 204 (2003); Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007) (amending Exec. Order No. 12,866), *revoked by* Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009). Within the Office of Management and Budget (OMB), the Office of Information and Regulatory Activities (OIRA) was responsible for review of agencies' major rules.

120. *See* Exec. Order No. 13,422, 72 Fed. Reg. at 2763–65.

121. *See* Exec. Order No. 12,866, 3 C.F.R. 638.

122. *See* Kagan, *supra* note 114, at 2281–99.

law decisions. Most prominently, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[123] the Supreme Court held that agency interpretations of ambiguous statutory provisions are entitled to judicial deference if reasonable.[124] The Court justified its holding on grounds that echo the political accountability theme of the presidential control model:

> [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[125]

The Court in *Chevron* thus recognized political accountability through presidential control of agencies as a legitimizing source for agency decisions.

Despite the Court's acceptance of the presidential control model of agency legitimacy, the trustee paradigm continued to influence the Court's standards for judicial deference to agency decisions. For example, in *United States v. Mead Corp.*,[126] the Court held that when an agency announces a statutory construction through ruling letters or similar interpretive guidance, the weight afforded the agency's interpretation depends on its "power to persuade" under the factors identified in *Skidmore v. Swift & Co.*[127]—"the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[128] Similarly, in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Corp.*,[129] the Court refused to uphold the Reagan Administration's rescission of an existing regulation in the absence of the agency articulating a satisfactory reasoned explanation for the rescission.[130] Relying on the APA's "arbitrary and capricious" standard, the Court

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123. 467 U.S. 837 (1984).

124. *See id.* at 843–44 ("In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

125. *Id.* at 865–66.

126. 533 U.S. 218 (2001).

127. *See id.* at 227–35 (explaining that agency rules that fall outside *Chevron*'s purview are still entitled to some levels of deference under *Skidmore* and clarifying that "*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form").

128. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

129. 463 U.S. 29 (1983).

130. *Id.* at 41–44.

explained that an agency must examine the relevant data, consider all important aspects of an issue, and offer a rational explanation for its decision in light of the information considered and facts found.[131] These decisions all reflect the trustee paradigm, finding legitimacy in the administrative decisionmaking processes themselves when deliberative, competent, and public-regarding.

In sum, developments in administrative law may be characterized by vacillation between the conceptions of democratic legitimacy reflected in majoritarianism and the trustee paradigm. Although some procedural rules can be characterized as protecting both pluralist and republican norms,[132] many legal scholars contend that this vacillation "has produced rules that reflect contradictory procedural and political impulses."[133] Resolution of this apparent tension requires determining which vision of democratic legitimacy should guide our design of administrative processes.

### *D. The Case for the Trustee Paradigm*

Relative to majoritarianism, the trustee paradigm rests on stronger normative justifications, is consistent with empirical research on individuals' judgments on the legitimacy of political officials and legal authorities, and reflects a more feasible conception of legitimate government. As an initial matter, majoritarianism rests on the questionable assumption that the majority will best reflects the public interest, with our representative government charged with simply aggregating popular preferences. Rather, public officials, including the experts comprising the government bureaucracy, should refine the actual opinions and preferences of voters to correct for fallacies in citizens' reasoning. In addition, officials should exercise moral powers of evaluation so as to protect collectively held values such as justice, fairness, equality, and individual liberty.

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131. *Id.* at 43.

132. *Cf.* Jerry Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, *in* FOUNDATIONS OF ADMINISTRATIVE LAW 77, 80 (Peter H. Schuck ed., 1994) (concluding that it may be possible to interpret every administrative process as furthering the liberal goal of rational decisionmaking or the pluralist goal of ensuring access and accommodation of all political interests). For example, greater transparency and participation in agency rulemaking arguably furthers both the republican goal of deliberative, rational decisionmaking and the pluralist goal of replicating the legislative process at the administrative level so as to ensure decisions that balance competing preferences. *Compare* Criddle, *supra* note 75, at 152–54 (characterizing the APA's notice-and-comment rulemaking process as procedural safeguards designed to ensure agencies' compliance with their duties of care and loyalty), *with* Bressman, *supra* note 95, at 1771–72 (characterizing the APA's notice-and-comment rulemaking procedures, as interpreted by the courts, as enhancing agency legitimacy on the same principle as legislation—ensuring that administrative decisionmaking reflects the preferences of all involved).

133. Bressman, *supra* note 95, at 1766.

Second, sociological research also suggests that in assessing the legitimacy of government authorities, individuals focus on procedural factors indicative of whether the authorities have honored their fiduciary obligations under the trustee paradigm, and not whether they simply respect the majority will. Third, apart from normative considerations, true majoritarianism under our contemporary political system may be unattainable. The Herculean task of identifying the "public will" in our diverse and dynamic society raises doubts about whether elected officials can translate that will into specific policy choices. Moreover, inherent institutional limitations prevent a politically accountable Congress and President from exercising effective oversight of the full range of agencies' regulatory activities. Finally, rather than promote regulatory policies that reflect popular preferences, electoral considerations may cause members of Congress and the President to pressure agencies into adopting policies favorable to powerful special interest groups.

### *1. Normative Considerations*

At the center of the debate between majoritarianism and the trustee paradigm lies the question as to what normative foundation administrative decisionmaking should be built on. Whereas majoritarianism gives primacy to the popular will, the trustee paradigm both recognizes potential fallacies in public opinion and adopts a broader conception of the "public interest" which considers moral principles in conjunction with the utility calculations that influence social preferences.

Many of those who support the underlying impulse of majoritarianism recognize that misinformation, faulty heuristics, and irrational reasoning may result in a popular will that actually fails to serve the majority's interests.[134] Few of us have informed opinions on the wide range of technically arcane issues our modern government must address.[135] For example, how many of us can determine whether the Environmental Protection Agency's rules for managing hazardous waste adequately protect the public's health or the environment? How many of us can assess whether the Social Security Administration's criteria for determining

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134. *See* GUTMANN & THOMPSON, *supra* note 71, at 14–15; *see also* Richard H. Fallon, Jr., *Should We All Be Welfare Economists?*, 101 MICH. L. REV. 979, 997–1001 (2003) (arguing that an individual's actual choice among competing policies may not reflect the choice the individual "would rationally choose for herself," particularly when individuals lack sufficient information to evaluate competing options and as questions about likely consequences grow more complex); Farina, *supra* note 67, at 1005 (arguing that government policymakers "need not accede to citizen preferences formed in ignorance of important information").

135. *Cf.* Farina, *supra* note 67, at 1005 ("Obviously, officials can legitimately discount public opinion on technically arcane issues . . . .").

eligibility for disability benefits correctly identifies those medical conditions that significantly limit an individual's ability to do basic work activities? In addition, citizens often fail "to come to terms with what they are willing to give up ('pay') to get the desired outcome."[136] Consequently, public officials, including the experts comprising the government bureaucracy, must put the actual opinions and preferences of voters "through an analytic filter"[137] in order to identify the policy choices that best enhance the public's welfare.

Additionally, in emphasizing the democratic ideal that public officials should implement the values and desires of the people, majoritarianism overlooks the often competing ideal that sometimes leaders should lead rather than simply follow the collective will. Although we do not have a clear theory as to when leaders should defy popular opinion, most of us expect government officials to consider moral concerns such as justice, equality, fairness, and respect for individual rights alongside social utility.[138] The impact of today's policies on the interests of future generations also deserves consideration.[139] Finally, we recognize that public policy not only should respond to citizens' existing values but also should play an important role in the shaping of those values.[140]

This mistrust of the majority will repeatedly emerges as a theme in the writings of the Constitutional Framers. Specifically, the Framers not only feared the abuse of government power in the form of laws that benefit private interests at public expense,[141] but also laws reflecting the majority will that trample upon the rights of the minority without adequate moral justification.[142] In other words, the Framers primarily were concerned, not

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136. *Id.*

137. GUTMANN & THOMPSON, *supra* note 71, at 14–15.

138. *See* Fallon, *supra* note 134, at 1017–18 (arguing that policy choices should involve "moral powers of valuation and choice" independent of individuals' well-being and interests); Farina, *supra* note 67, at 1006–07 (stating that part of the legitimate realm of democratic governance sometimes involves "the deliberate determination by our representatives to defy the will of the people in the interest of the community as a whole, or a vulnerable subsection of the community").

139. *See* Fallon, *supra* note 134, at 1018 (stating that current policy decisions may impact the "interests of unborn generations" by unfairly imposing current popular preferences).

140. *See* Farina, *supra* note 67, at 988, 1006 (arguing that "part of the legitimate realm of democratic governance" is the shaping of values and not simply "passive, mechanistic aggregation of citizen preferences").

141. *See* THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) (acknowledging the danger posed by factions "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community"); Bressman, *supra* note 61, at 478.

142. *See* Bressman, *supra* note 61, at 498 ("[E]lected officials, responsive to majority will, might enact a law oppressive to individual rights."); Brown, *supra* note 73, at 570 ("Tyranny was understood as the abuse of power by government—even by representative government acting on the basis of what a majority of its constituents wanted.").

with whether public officials would be responsive to the popular will, but rather with laws that encroached upon individual liberties in the absence of a sufficient public purpose. The concern that representative government itself could become an instrument of tyranny led to a constitutional design intended to protect individual liberty and not the promotion of "the collective happiness of the people."[143] Thus, as discussed below, the design of government itself became the people's principal defense against arbitrary government action, including tyranny in the form of majority rule.[144]

By the time of the American Revolution, the English presumption that popular sovereignty automatically produced just laws had been abandoned, replaced by an understanding that representative government was susceptible to corrupting forces that could threaten individual rights.[145] For the Framers, these corrupting forces included the tyranny of the majority—that elected officials might "sacrifice to [the majority's] ruling passion or interest both the public good and the rights of other citizens."[146] The Framers thus envisioned a legislature that would not simply champion the popular will but "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."[147] These republican ideals found their way into the Constitution in several respects. For example, in explaining why the Framers rejected shortening the term for congressional representatives from two years to one year, Madison explained in *Federalist No. 53* that a longer term would give representatives the time to acquire the knowledge and experience necessary to exercise sound judgment.[148] The Framers also empowered the unelected Judicial Branch to serve as a check against the

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143. Brown, *supra* note 73, at 570.

144. *See id.* at 570–71 (listing electoral accountability of government officers, separation of powers, federalism, and checks and balances as limiting structures of the governmental design).

145. *See id.* at 558–70 (tracing the evolution of political views on popular sovereignty from thirteenth-century England to the enactment of the Constitution).

146. THE FEDERALIST NO. 10 (James Madison), *supra* note 141, at 80.

147. *Id.* at 82; *see also* Brown, *supra* note 73, at 553 (explaining that the Framers intentionally "buffered majority will, insulated representatives from direct influence of majority factions, and provided checks on majority decisionmaking" (citations omitted)).

148. *See* THE FEDERALIST NO. 53, at 332–33 (James Madison) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 63, at 384 (probably James Madison) (Clinton Rossiter ed., 1961) (Madison advocated that, as "a defense to the people against their own temporary errors and delusions," senators should serve terms of six years and not be appointed directly by the people. Thus the Senate may serve as a "temperate and respectable body of citizens, in order to check the misguided career and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind.").

majority when "carried away by an impulse to tyrannize."[149] Consequently, rather than promote laws that simply reflect popular preferences, the constitutional design ensured that "[t]he actual policy decisions are made by agents of the people rather than by the people themselves—precisely so that raw popular desire will be buffered, civilized, guided, mediated by professionals and experts, and will be informed through deliberation."[150]

These few examples illustrate that for the Framers, majoritarianism and political accountability alone did not stand atop the pyramid of constitutional values.[151] Rather, the Framers' mistrust of the majority will—as well as concerns that government officials might favor narrow, private interests—were the foremost considerations influencing the constitutional structure. As with the other features of our constitutional system, the structural feature of political accountability should be understood, not as the means through which "the people" ensure that their government properly aggregates popular preferences, but as one of several means for protecting the public interest and individual liberty from government tyranny.[152] As explained by one constitutional theorist,

> [a]ccountability is the means by which the entire people stands apart from the government, in all its segments, and enforces the people's compact with its government. It is not designed solely as a means to implement popular preferences on points of ordinary governance, except in the roughest sense, nor is it designed to eliminate the judgment expected of elected representatives.[153]

In other words, those entrusted with the powers of government must act as stewards for the people, with political accountability as one means by which the people enforce this trust.

This view of the constitutional design—that its aim is preventing arbitrariness—accords with the conception of democratic legitimacy reflected in the trustee paradigm. Both the constitutional design and the trustee paradigm reject the majoritarian view that the primary concern of representative government is whether government officials faithfully implement the majority will. They instead conceive of democratic government as a trust between the people and public officials, with popular

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149. Brown, *supra* note 73, at 536.

150. Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1369 (1990).

151. *See generally* Bressman, *supra* note 61, at 493 (observing that constitutional theories have questioned "the idea of majoritarianism as the linchpin of legitimacy").

152. *See* Brown, *supra* note 73, at 536 ("[T]he structural feature of accountability for political actors can be understood, not as a means to maximize the preferences of the majority of the people on matters of routine governance, as it has been widely understood, . . . but rather as a means primarily to minimize the risk of tyranny in government . . . .").

153. *Id*. at 565.

preferences buffered and mediated by deliberative decisionmaking. For the Framers, the fear that the government could violate this trust by falling subject to the corrupting forces of the majority will, as well as narrow factions or self-interest, lies at the root of various constitutional checks and balances. These same concerns motivate holding agency officials to the rationality and equality principles underlying the trustee paradigm.

*2. Empirical Support for the Trustee Paradigm—What Makes Authorities Legitimate in the Eyes of Citizens*

If majoritarian norms dominate individuals' judgments regarding the legitimacy of the state, one would expect individuals to focus on whether government decisions reflect their personal preferences (or the preferences of the majority). Alternatively, individuals may focus on whether the procedures shaping the decisionmaking process afford them opportunities to influence authorities' actions. For example, if people believe the opportunity to present their concerns to government officials increases the likelihood of a decision favorable to their interests, majoritarianism would predict that opportunities to do so would enhance an individual's assessment of the legitimacy of the government decision. The trustee paradigm, on the other hand, would predict that individuals' legitimacy judgments are influenced primarily by their appraisal of the manner in which authorities make decisions. Specifically, the trustee paradigm would predict that individuals primarily would care not about outcomes or procedures that allow them to influence outcomes, but whether government authorities give thoughtful consideration to which actions best serve the public interest. Indicators suggesting that authorities make decisions consistent with these expectations would dominate individuals' generalizations from their own experience to their overarching views on the legitimacy of government authorities. The work of Tom R. Tyler and other sociologists and psychologists provides empirical support for this latter view.[154]

Tyler's studies found that individuals' judgments about the fairness of the government's decisionmaking process, rather than the decisions themselves, dominate how individuals generalize from their own experience to their overarching views on the legitimacy of government authorities.[155] This does not mean that individuals do not care about

154. Tyler's studies examine individuals' perceptions of not only of political authorities but also authorities in legal, industrial, educational, and interpersonal settings. His studies reveal similar effects across these settings. TYLER, *supra* note 12, at 82.

155. *See id.* at 84–106 (analyzing the roles that procedure and past experience assume in shaping individuals' perceptions of the legitimacy of authority and government).

outcomes, but they generally will accept unfavorable outcomes when produced through a process deemed fair.[156] In addition, Tyler found that, although people care about procedures associated with the ability to influence outcomes, these same procedures continue to affect individuals' judgments about the fairness of authorities' actions even when regression analysis controls for their influence on authorities' action.[157] These findings suggest that in judging the legitimacy of government authorities, individuals focus on procedural aspects other than whether the decisionmaking process afford them opportunities to influence policy decisions,[158] a finding that cannot be explained by the majoritarian view of legitimacy.

Tyler's findings on the specific dimensions of process that matter to individuals provide further support for the trustee paradigm. Specifically, individuals appear to focus on procedural factors indicative of whether government officials are trustworthy and exercise their powers in accordance with existing laws, capably, and for the common good. Consistent with the expectation that government authorities obey the law, individuals view authorities as more just and trustworthy when they comply with the principles of the rule of law.[159] For example, people are sensitive to whether authorities respect their rights as citizens.[160] They also value the opportunity to present evidence for decisionmakers' consideration and expect authorities to be neutral, with rules consistently applied and decisions based on objective information and not personal opinion or bias.[161] Finally, procedures allowing for the correction of errors also favorably influence individuals' judgments about the legitimacy of government authorities.[162]

Tyler's findings also provide empirical support for the view that democratic legitimacy rests in part on whether government officials exercise reasonable care and show equal fidelity to all members of society. With respect to the duty of care, Tyler found that individuals take into consideration procedural dimensions indicative of the quality of authorities' decisions,[163] and, most importantly, "how hard" the authorities

156. Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 663 (2007).

157. TYLER, *supra* note 12, at 130.

158. *Cf. id.* (concluding that the findings of his study of Chicago citizens' views of legal authorities suggest that "control models"—behavioral models predicting that individuals care about procedural dimensions that may influence outcomes—do not fully capture individuals' views on procedural justice).

159. Tyler, *supra* note 156, at 661.

160. *Id.* at 664; TYLER, *supra* note 12, at 138.

161. Tyler, *supra* note 156, at 664, 666; TYLER, *supra* note 12, at 163–64.

162. TYLER, *supra* note 12, at 137.

163. *See id.* (listing "the quality of the decisions" as one of "seven distinct aspects of

try to be fair.[164] Consistent with the equality principle underlying the duty of loyalty, people show sensitivity as to whether authorities respect them as individuals and treat them with dignity and politeness.[165] Individuals respond favorably to procedures communicating authorities' benevolence and concern for individuals' interests, such as when authorities listen to an individual's position or justify their decisions in a manner demonstrating the authorities' awareness of individuals' interests.[166] Finally, people seek signs that authorities sincerely are motivated "to do what is best for the public."[167]

### 3. *Limitations on Implementing Majoritarianism*

Even if majoritarianism could be defended on normative grounds as the preferable theory of democratic legitimacy, in practice, the theory proves infeasible. First, the "will of the people" on which the majoritarian theory depends lacks factual reality. Second, even if public officials could discern popular preferences, majoritarianism rests on a mistaken assumption about the sufficiency of political accountability in checking the full range of agency activity that may deviate from popular preferences.

#### a. *The Fiction that Elected Officials Speak for the Popular Will*

As discussed in Part II.B, majoritarianism finds legitimacy in policy choices that honor the popular will. Supporters of administrative models reflecting this conception of legitimacy argue that the electorate communicates its policy preferences to members of Congress and the President by choosing the candidate whose policy platform best reflects those preferences.[168] The winning candidate thus serves as a conduit for the popular views of his or her constituents, or, in the case of the President,

procedure" that citizens take into account when judging procedural justice).

164. *See id.* at 151 ("Judgments about 'how hard' the authorities try to be fair emerge as the key overall factor in assessing procedural justice.").

165. *See* Tyler, *supra* note 156, at 664, 667 (discussing "respect for persons" as one of three aspects of the rule of law by which citizens justify deference to agency authorities).

166. *See id.* at 664 (explaining that the authority's behavior toward the citizen serves as a "cue[] that communicates information about the intentions and character of the legal authorities with whom they are dealing"); *see also* TYLER, *supra* note 12, at 149 (arguing that citizens are more likely to "accept a lack of decision control" when they believe the authority is properly considering their interests, a belief heavily influenced by prior views of the authority).

167. Tyler, *supra* note 156, at 664.

168. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985) ("Citizens vote for a president based almost wholly on a perception of the difference that one or another candidate might make to general governmental policies.").

for the citizenry as a whole.[169] Moreover, elected officials are assumed to remain responsive to popular preferences in order to increase their chances of re-election or the election prospects of their party.[170] On examination, however, the proposition that members of Congress or the President can capture the popular will and translate that will into specific policy choices proves an unrealistic description of contemporary American politics.

Both the diversity and complexity of citizens' viewpoints and the manner in which voters choose among candidates creates formidable challenges for those seeking to identify the popular will. Our increasingly heterogeneous society reflects a wide range of religious, social, and political outlooks.[171] In addition, at an individual level, citizens often simultaneously embrace competing values that lead them to make contradictory demands to public officials.[172] Their opinions also are constantly evolving in response to social, economic, and political developments:[173] "An elected official surveying such a scene would require a godlike capacity for resolving complexity to be able to divine 'the preferences of the national majority' on [an] issue."[174] Moreover, when selecting among candidates for public office, citizens typically vote for the candidate whose package of policy platforms best reflects their preferences on the issues of utmost importance to them, and not based on the candidate's stand on any single issue. Citizens also may base their vote in part on a candidate's character or experience, independent of the

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169. *See* Mendelson, *supra* note 13, at 582–83 ("Some commentators go even further, arguing that the political accountability supplied by the President is not simply an adequate substitute for that flowing from Congress, but that the President will be a *better* conduit for public preferences because she will be better able to counteract narrow regional interests and the demands of small groups of constituents.").

170. *Cf.* Kagan, *supra* note 114, at 2335 (stating that presidents work to expand their base of support among the public due to their desire for re-election or their ambitions for their chosen successor).

171. *See* Farina, *supra* note 67, at 994–95 (noting that various voices of the electorate have proliferated significantly since the nation's founding, with contemporary public discourse reflecting a wide range of groups); *see also* Seidenfeld, *supra* note 13, at 1521 ("The number and specificity of individual interests at play in the national political arena make it impossible for members of Congress to assess each constituent's preferences regarding particular legislative choices.").

172. *See* Farina, *supra* note 67, at 999–1000 (explaining the mixed signals citizens often send their elected representatives). Farina explains that the phenomenon of conflicting preferences reflects problems of information, prediction, options, and "a desire to have one's cake and eat it too." *Id.* at 1000. For example, voters in the 1980s wanted less government but more environmental protection, while voters in the 1990s sought both more-affordable health care and a high degree of individual freedom of choice. *Id.* at 999.

173. *Cf. id.* at 1002–03 (arguing that a president's claim that "by virtue of his national electoral status, [he] uniquely represents the voice of the entire nation particularly ignores the evolutionary quality of the popular will").

174. *Id.* at 1002 (citation omitted).

candidate's policy positions. These voting patterns further preclude easy discernment of the "people's will" on any specific issue.[175]

*b. The Limitations of Congressional and Presidential Oversight*

Even if the Congress and President could divine the will of the people, various institutional limitations restrict their capacity to effectively check agency activity that deviates from the popular will, particularly in the nonlegislative rulemaking context. In addition, with a skepticism grounded in public choice theory, many commentators argue that members of Congress and the President may pressure agencies to adopt policies favoring politically powerful special interests at the expense of popular preferences.

Congress possesses several tools that, when used, may provide an effective safeguard against agency activity that strays from the popular will.[176] For example, Congress can exercise a "legislative veto" of an agency's rules by passing laws repealing those rules. Congress also uses its "power of the purse" by withholding or threatening to withhold program funding if agencies adopt policies not to Congress's liking.[177] Finally, Congress can withdraw its delegation of power to an agency or prescribe more specific legislative directives that narrow the agency's discretion. Congressional oversight of agencies, however, suffers from fundamental shortcomings that limit its effectiveness, particularly with respect to agencies' nonlegislative rules.

Congress generally cannot oversee the full range of agency decisionmaking. Effective monitoring of the administrative state's policies would require that Congress maintain day-to-day awareness of agencies'

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175. As explained by Farina,

> Whenever the object of the political exercise is adopting a package rather than resolving a single issue—as when citizens must choose among candidates who run on multi-faceted policy platforms—there is a bundling problem. In order to get the policy "sticks" they value most highly, voters have to take whatever other sticks come in the bundle. . . . The point is not that policy bundling is democratically illegitimate, but rather that it precludes any facile translation of election results into "the people's will" on specific policy issues.

*Id*. at 998.

176. *See* Mendelson, *supra* note 13, at 570 (noting that, while sometimes effective, congressional tools for oversight are limited); *see also* Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 9–10 (1994) ("[C]ongressional monitoring and after-the-fact restraints provide an important check on agency decision-making.").

177. *See* Seidenfeld, *supra* note 13, at 1551–52 ("Appropriations subcommittees frequently specify which programs are to receive funds. They also engage in non-statutory control over agency programs, for example, by requiring the agency to give the subcommittee advance notice of changes from the mutually understood allocation of appropriated funds.").

voluminous, often highly technical regulations, guidance, adjudications, and enforcement actions.[178] Given the demands on Congress to address problems throughout society, however, it simply cannot devote to any one regulatory scheme the time and effort necessary to supervise agency decisionmaking in this in-depth and systematic manner.[179] Consequently, congressional oversight of agencies tends to be fragmented, with legislators reacting to particular agency actions brought to their attention by constituents or the media.[180]

To the extent that Congress monitors an agency's exercise of its discretionary powers, it typically does so through congressional committees and subcommittees. Several factors limit the ability of these committees and subcommittees to ensure that agency policies respect popular preferences. First, the interests promoted by committees may not represent the full range of viewpoints reflected in the general public as a whole. A committee's legislators disproportionately represent constituents with a vested interest in the programs under the committee's jurisdiction.[181] In addition, they often develop strong ties to organized interests regulated by the agencies under the committee's jurisdiction[182] and may depend on these groups for campaign contributions.[183] Consequently, as public choice

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178. *See* Seidenfeld, *supra* note 176, at 11 (explaining that congressional committees generally monitor agencies because Congress, as a whole, cannot effectively maintain day-to-day awareness over the regulatory matters it is tasked with overseeing).

179. *Cf.* Seidenfeld, *supra* note 13, at 1522 (observing that Congress delegates certain policymaking decisions to agencies in part because it cannot devote sufficient attention to any one regulatory scheme).

180. *See* Mendelson, *supra* note 13, at 570–71 ("Congressional oversight efforts also tend to be fragmented and reactive to particular agency proposals . . . ."); *see also* Seidenfeld, *supra* note 13, at 1525 (noting that legislators generally do not monitor agency decisions but instead act "as ombudsmen in agency matters concerning constituent interests").

181. *See* Kagan, *supra* note 114, at 2259–60; *see also* Seidenfeld, *supra* note 176, at 11–12 ("[T]he committee system biases congressional responses toward acceding to special interest demands and reaffirming agency policy choices. In other words, the interdependence between congressional committees, regulated entities, and regulating agencies undercuts the ability of Congress as an institution to constrain agency policy to comport with generally held values." (internal citation omitted)). For example, congressional agriculture committees generally are comprised of members representing farming districts, while banking committees attract representatives from the urban districts where banks primarily are headquartered. Kagan, *supra* note 114, at 2259–60.

182. *See* Kagan, *supra* note 114, at 2259–60 (noting that the "iron triangle" formed between an agency, a committee, and an organized interest results in administrative policies that are not representative of the interests of the public or their representatives in Congress).

183. *See* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2145 (2004) (observing that elected officials depend on campaign contributions for their continued existence, and therefore may be more attentive to interest groups than agency officials); *see also* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1284 (2006) (explaining that capture theory contends that interest groups will "provide support, financial or otherwise, for the [congressional committee] members'

theorists have argued, congressional committees are more likely to promote the preferences of narrow groups over the popular will. Second, committees cannot independently override the decisions of an agency with which they disagree or punish an agency with budgetary cuts but must obtain the agreement of the entire Congress. Institutional inertia, however, severely limits the effectiveness of the threat of a legislative veto or budgetary punishment as a means of checking agency decisionmaking.[184] As a result, congressional control cannot provide an adequate check of agencies' activities, with most administrative policymaking, including nonlegislative rulemaking, occurring with little congressional supervision.[185]

The President also plays an important role in overseeing agencies. Recent administrations increasingly have influenced agency policymaking through directives, not only setting agencies' administrative agendas, but also directing "what they would (or would not) generate as [a] regulatory product."[186] In addition, presidents have previously affected agency policy by requiring agencies to submit to OMB for pre-publication review certain agency rules, including significant guidance.[187] Presidents also can shape the direction of regulatory policy through the appointment of agency officials sharing their policy priorities and perspective.[188] Despite these oversight measures, presidential control over agencies' activities does not adequately ensure that agencies' policies, including their guidance, reflect the popular will.

reelection" campaigns in an effort to secure "favorable regulations").

184. *See* Seidenfeld, *supra* note 13, at 1551 (detailing the costs and consequences that often prevent legislators from overriding agency decisions); Kagan, *supra* note 114, at 2259. Even if a majority of Congress supports legislation overriding an agency decision, to become law, the legislation must gain the approval of either the President or two-thirds of both houses. *Id.*

185. *Cf.* Asimow, *supra* note 10, at 574 (noting that while theoretically the actions of agencies are subject to legislative oversight, in practice most agency rulemaking occurs with little legislative supervision).

186. Kagan, *supra* note 114, at 2248.

187. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1994) (requiring agencies to submit to OMB for prepublication review any proposed rule constituting significant agency action); Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2763–65 (Jan. 23, 2007) (amending Exec. Order No. 12,866 to require agencies to submit to OMB for prepublication review significant guidance documents), *revoked by* Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009).

188. *See* Seidenfeld, *supra* note 13, at 1553, 1573 (suggesting that because the President represents the interests of the popular majority, so will an appointee who shares the President's policy goals and, moreover, that the President will choose agency appointments carefully because the process of appointment "attract[s] media attention"); *cf.* Kagan, *supra* note 114, at 2298 (observing that agency officials may accede to a president's preferences "because they feel a sense of personal loyalty and commitment to him; because they desire his assistance in budgetary, legislative, and appointments matters; or in extreme cases because they respect and fear his removal power"); Mendelson, *supra* note 13, at 581 (noting that the President can "[h]old an executive branch agency accountable through the power to replace top management of an agency").

Although in theory the President's desire to please a national constituency may provide him or her a reason to ensure that agencies consider the public will,[189] this incentive applies primarily to high-profile issues of concern to the electorate at-large.[190] On other administrative matters, presidents often have little incentive to monitor agency activity or, more troubling, may pressure agencies to prescribe regulatory decisions that favor special interest groups.[191] As explained by Elena Kagan,

> The resolution of each individual regulatory issue . . . probably will play a small role in the public's overall estimation of presidential performance, no less than in its prior electoral decisions. And on any given decision, the President accordingly may assign overriding weight to the views of more particular, focused constituencies or to a range of other considerations.[192]

Consequently, rather than safeguarding agencies' decisionmaking process against skewed deliberations, presidential involvement may encourage agencies to elevate the narrow interests of one or more groups over the public interest.[193]

Even if the President's involvement in a particular administrative matter encourages agencies to afford greater respect to popular preferences, the President and his close advisors cannot possibly monitor all agency guidance.[194] President Bush delegated this function to OMB.[195] Like the

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189. Presidents have an incentive to remain responsive to electoral views in order to increase their chances of re-election, maintain their party's continued control of the presidency, or enhance their standing among the general public in order to increase their ability to achieve their policy and political agenda. *See* Kagan, *supra* note 114, at 2335; Mendelson, *supra* note 13, at 582–83 (noting that the electorate shows its preferences through its vote for President); *see also* Kagan, *supra* note 114, at 2335 ("[B]ecause the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests."); Seidenfeld, *supra* note 13, at 1552 ("The President answers to the entire electorate and thus has an incentive to oppose policies that hurt the general public more than they help particular interest groups.").

190. *Cf.* Mendelson, *supra* note 13, at 617 ("[T]he electorate at large simply may lack, . . . well-developed or even informed preferences."); Seidenfeld, *supra* note 176, at 20, 30 (observing that "[w]hen voting for President, individuals are more likely to consider broad policy themes than to consider particular regulatory policy decisions," and that their influence on presidential involvement in administrative decisions "[is] not likely to protect the interest of the general public unless voters organize to react to such decisions at the ballot box").

191. *See* Seidenfeld, *supra* note 176, at 19 (discussing the disconnect between electoral incentives and regulatory policymaking).

192. Kagan, *supra* note 114, at 2335–36.

193. While judicial review plays an important check on agencies' ability to adopt policies that are inconsistent with the relevant statutory or regulatory provisions, agencies nevertheless may choose do so when they calculate that the risk of litigation challenging the legal basis for a policy is low.

194. *See* Seidenfeld, *supra* note 176, at 14 (highlighting the limitations of oversight, even where the President prioritizes a matter); *see also* McGarity, *supra* note 31, at 1431 (stating that the President and Vice President ordinarily are too busy to play a direct role in regulatory policymaking); Kagan, *supra* note 114, at 2250 (noting that President Clinton's

Congress and the President, however, OMB generally lacks the resources and expertise to fully evaluate whether agencies' policies reflect popular values.[196] Moreover, as an arm of the White House, OMB may share the President's bias in favor of certain interest groups. Finally, it is unclear how the President's delegation of his oversight function to the unelected officials of OMB addresses concerns about vesting administrative decisionmaking in bureaucrats lacking policy accountability.[197] The expectation that the President effectively will check agency policies that deviate from the majority will simply is not a feasible one.

In sum, the trustee paradigm provides a better metric than majoritarianism for assessing the legitimacy of agency decisionmaking. Administrative procedures, therefore, should consist of those procedures necessary to shape agency decisionmaking in accordance with the trustee paradigm. Specifically, administrative procedures should promote agencies' adherence to their fiduciary obligations to exercise their powers consistent with existing laws, with care, and with loyalty toward the public interest.

## III. AGENCY EFFICIENCY AND THE PROBLEM OF OSSIFICATION

As we have seen, administrative procedures promote agencies' faithful discharge of their fiduciary duties under the trustee paradigm by constraining the manner in which agencies exercise their discretion and by facilitating agency oversight by the Congress, President, and courts. Fair administrative procedures thereby advance the legitimacy of the administrative state by protecting citizens from arbitrary regulatory actions. Fair procedures also strengthen individuals' normative commitment to the law.[198] I refer to these fundamental objectives of administrative procedures as "process values" or "process concerns." Yet whether our government successfully meets our collective needs depends not only on ensuring the legitimacy of public officials' exercise of their powers but also on preserving an efficacious and efficient government. Consequently, we must promote not only competent agency decisionmaking that respects the

activity in the regulatory sphere "did not show itself in all, or even all important, regulation" because no president can supervise so "broad a swath of regulatory activity").

195. While in the past OMB focused on review of legislative rules, it also reviewed significant agency guidance under Executive Order 13,422. Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2763 (Jan. 23, 2007), *revoked by* Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009).

196. *Cf*. Seidenfeld, *supra* note 13, at 1552 (arguing that OMB may not have the expertise to make ultimate regulatory decisions).

197. *See* McGarity, *supra* note 31, at 1431 ("The accountability argument loses considerable force when it is understood that the President and Vice President . . . delegate the oversight function to unelected bureaucrats in OMB . . . .").

198. TYLER, *supra* note 12, at 38, 64.

public interest but also the ability of agencies to successfully fulfill the tasks entrusted to them.

Procedural safeguards initially may further both process values and government efficiency. At some point, however, an abundance of administrative procedures aimed at providing maximum protection for process values may hinder agencies' adaptive, resourceful pursuit and development of the common good.[199] As observed by one commentator, "[a] vigorous state and sensible resource allocation are jeopardized by excessive hand-wringing, all-inclusive roundtable deliberation, and unrealistic hopes for perfection."[200] Thus, procedural protections, no matter how fair, must be rejected when so cumbersome as to thwart the successful development and administration of regulatory programs.

For the past two decades, legal scholars have bemoaned the problem of ossification of the legislative rulemaking process.[201] The term *ossification* refers to alleged "inefficiencies that plague regulatory programs because of analytic hurdles that agencies must clear in order to adopt new rules."[202] These "hurdles" include procedural requirements imposed by the Congress, President, and Judiciary. For example, Congress requires agencies to prepare an environmental impact statement prior to adopting any action, including legislative rules, that may significantly affect any aspect of the human environment.[203] The Regulatory Flexibility Act requires agencies to prepare a Regulatory Flexibility Analysis (RIA) describing the impact of a significant proposed or final legislative rule on small businesses.[204] Presidents also have imposed analytical requirements on agency rulemaking. Beginning with the Reagan Administration, presidents have required agencies to prepare extensive RIAs for all legislative rules that will have a significant impact on the United States economy.[205] An RIA

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199. *See* Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 603 (2006) (noting that at some point government decisionmaking becomes "too tardy, or too inclusive, or too careful").

200. *Id.* at 603–04.

201. *See also* Johnson, *supra* note 7, at 700–02 (explaining that new procedural requirements result in the ossification of the rulemaking process). *See generally* McGarity, *supra* note 31 (arguing that democratic pressure on the three constitutional branches of government results in the ossification of the rulemaking process); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995) (evaluating recent changes in legal doctrine that have the potential to promote deossification in the rulemaking process); Seidenfeld, *supra* note 36 (arguing that courts should modify the hard look review doctrine); Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745 (1996) (discussing the history and political character of rulemaking in federal law since the enactment of the APA).

202. Seidenfeld, *supra* note 36, at 483.

203. 42 U.S.C. § 4332(2)(C) (2000).

204. 5 U.S.C. § 603 (2006).

205. Under Executive Order No. 12,866, a legislative rule is deemed to be a "significant regulatory action" for which an agency must prepare a Regulatory Flexibility Analysis

must evaluate the cost and benefits of the agency's proposal as well as alternative proposals.[206] The collection and analysis of the data necessary to satisfy these analytical requirements can be quite burdensome on agency staff.[207]

Scholars have saved their harshest criticisms for the courts' demand for exacting explanations for agencies' legislative rules. In its 1971 opinion *Citizens to Preserve Overton Park v. Volpe*,[208] the Supreme Court interpreted the APA's "arbitrary and capricious" standard as requiring a reviewing court to determine whether an agency's rule "was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[209] In applying this standard, the lower courts

> fashioned the "hard look" scope of review doctrine, under which a reviewing court was obliged to examine carefully the administrative record and the agency's explanation, to determine whether the agency applied the correct analytical methodology, applied the right criteria, considered the relevant factors, chose from among the available range of regulatory options, relied upon appropriate policies, and pointed to adequate support in the record for material empirical conclusions.[210]

The Supreme Court formally adopted the hard look doctrine in its 1983 *State Farm* decision[211] The courts' greater scrutiny of agencies' reasoning had the practical effect of causing agencies to draft statements of basis and purpose that are "comprehensive and encyclopedic,"[212] responding in detail

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(RIA) if the rule may

> (1) [h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
>
> (2) [c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
>
> (3) [m]aterially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or
>
> (4) [r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Exec. Order No. 12,866, 3 C.F.R. 638, 641–42 (1994).

206. *Id.*

207. *See* McGarity, *supra* note 31, at 1405 ("[T]he task of assembling the database and technical expertise necessary to meet statutory analytical requirements can be quite burdensome."); *id*. at 1406 (estimating that an agency typically must employ numerous consultants and devote one or more person-years of agency staff to the preparation of an RIA); Strauss, *supra* note 201, at 772 (noting that together with the impact of judicial review, requirements imposed on administrative legislative rulemaking by Congress and the President raise the costs of rulemaking and delay a rule's effective date).

208. 401 U.S. 402 (1971).

209. *Id.* at 416.

210. McGarity, *supra* note 31, at 1410.

211. 463 U.S. 29 (1983).

212. Richard J. Pierce, Jr., *Waiting for* Vermont Yankee III*,* IV*, and* V*? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 908 (2007).

to public comments "no matter how ridiculous they may appear to agency staff."[213] Today the typical "concise and general" statement of basis of purpose is 200 to 1000 pages.[214]

The procedural requirements imposed by the Congress, President, and Judiciary result in legislative-rulemaking endeavors that often are extremely resource-intensive and time-consuming, thereby diverting agencies from other administrative responsibilities. Several studies even suggest that agencies may refrain from beneficial rulemaking for fear that their rules will not pass judicial muster on review.[215] The burdens imposed by these various procedural requirements also reduce agency incentives to revise their rules to address any shortcomings or changed circumstances.[216] Agencies similarly shy away from experimentation in their rules given the barriers to revising an experimental rule that produces mixed results.[217] This inflexibility can result in outdated legislative rules lacking in innovation.[218] When agencies do engage in legislative rulemaking, the process often creeps along. In sum, these procedural requirements in the aggregate constrain agencies' capacity to address in a timely manner problems falling within their purview.

Similarly, increased public participation in agency decisions may promote the legitimacy of the administrative state at the expense of the quality of agency decisionmaking. Commentators generally recognize that public participation promotes process values by providing agencies with information that promotes more informed decisionmaking.[219] However, as Jim Rossi argued, at some point mass participation presents agencies with too much information, thereby overwhelming their ability for in-depth deliberations:

> Too much information is also likely to invite agency decisionmakers more readily to "satisfice"—to "look for *good enough* solutions rather than insisting that only the best solutions will do." As agency decisionmakers increase their usage of heuristic devices or shortcuts, rather than attempt to develop complete and accurate analytical tools, they also increase the potential for error in their decisions. Thus, in the absence of limitations on

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213. McGarity, *supra* note 31, at 1412.

214. Pierce, *supra* note 212, at 908.

215. Seidenfeld, *supra* note 36, at 486–87.

216. McGarity, *supra* note 31, at 1412 ("Having gone to the considerable effort of a successful rulemaking, the agencies are understandably reluctant to change their rules to adapt to experience with the rules or changed circumstances."); Pierce, *supra* note 198, at 61 (stating that although agencies should be reviewing and revising their rules on a regular basis, agencies rarely amend their rules because the amendment process is "daunting").

217. *See* McGarity, *supra* note 31, at 1392 ("[E]xperimentation is riskier in an atmosphere in which any change is likely to be irreversible.").

218. *See id.* (contending that inflexibility in the process leads quickly to outdated laws).

219. *See infra* note 236 and accompanying text (explaining how public participation assists lawmakers).

> the amount of information, decisionmakers suffer information overload and are forced to simplify their models, thwarting their ability to engage in complete and accurate rational analysis.[220]

In hampering the quality of agency decisionmaking, excessive public participation limits agencies' ability to competently fulfill their missions.

Federal open-meeting laws—which require certain agency deliberations be open to public observation—also may impair agency decisionmaking. Sponsors of these laws believed that greater transparency would enhance agency legitimacy by promoting greater understanding, and improving the outcomes, of agency decisions.[221] In practice, however, these laws may adversely impact the quality of agency decisions by chilling collegial deliberations, with some agencies relying on written communications rather than in-person meetings in order to avoid triggering the open-meeting laws' requirements.[222]

As these examples illustrate, our collective interest in advancing the legitimacy of the administrative state by imposing procedural safeguards on agencies' decisionmaking is not without limits. A vigorous administrative state that efficiently and effectively serves the public interest is jeopardized by excessive procedural requirements that consume significant agency resources and unnecessarily delay agency action. Accordingly, preserving the ability of government officials to meet society's needs depends on reaching a delicate balance between administrative processes that advance the legitimacy of the regulatory state while preserving its effectiveness. The challenge, then, is to construct administrative processes, including those for nonlegislative rules, that strike this balance.

## IV. AN ADMINISTRATIVE PROCESS FOR AGENCY GUIDANCE

A review of agencies' processes for promulgating guidance finds divergent practices among agencies. With no requirement under the APA that agencies allow for public participation and transparency in the development of their guidance,[223] the degree to which agencies do so varies widely. Some agencies forgo outside input altogether when developing guidance.[224] Those agencies that do consult with outside parties often limit

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220. Rossi, *supra* note 102, at 226 (internal quotation, citation, and emphasis omitted).

221. *See id.* at 229 ("Sponsors of sunshine acts claim that, when in the open and subject to passive participation by the public, decisionmaking process will enjoy an increase in public confidence, promote greater understanding of agency decisions, and improve outcomes.").

222. *Id.* at 233–34.

223. *See supra* note 28 and accompanying text (noting that there is no requirement that agencies go through the notice-and-comment process for interpretive rules).

224. *See* Mendelson, *supra* note 7, at 425 (explaining that the Wage and Hours Division of the Department of Labor forgoes outside comment when issuing opinion letters).

their communications to certain regulated parties, with other affected parties afforded little or no access to agency staff and political appointees.[225] Agencies also rarely offer reasoned explanations of their guidance that articulate the factual and analytical basis for their decisions.[226]

This lack of full participation and transparency suggests agencies may not consistently adhere to their fiduciary duties when developing guidance. Unequal access to agency staff and the absence of a public statement setting forth the basis for guidance policies may increase agencies' susceptibility to capture by the regulated community or other special interest groups, thereby undermining agencies' duty of loyalty.[227] In addition, the absence of full public participation may compromise agencies' duties of care and obedience to the law, as agencies often need outside information in order make sound, rational policy choices that are consistent with existing legal standards.[228] Limited transparency for agencies' reasoning also may hinder the Congress's, President's, and courts' capacity to ensure that agencies meet their fiduciary duties.[229] Finally, the public may question the legitimacy of agency decisions made behind closed doors.[230] In light of these concerns, many commentators have argued for procedural requirements applicable to agencies' nonlegislative rulemaking.

Scholars, courts, and public officials have vigorously debated which procedural protections, if any, would provide legitimacy to agencies' nonlegislative rulemaking without unduly hampering their flexible, competent administration of regulatory programs. Some commentators have called for broad use of notice-and-comment procedures for agency guidance. Those advocating notice and comment prior to an agency's issuing final guidance would require agencies to provide notice of their

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225. *See id.* at 424–27 (explaining that regulatory beneficiaries generally have less access to agency process for guidance than regulated entities and that agencies often do not solicit input widely on their guidance but instead limit their communications to organizations with whom they already frequently communicate).

226. *See id.* at 426 (noting that agencies that have committed to soliciting public comments on their nonlegislative rules generally have not committed to responding to the comments).

227. *See* Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 303–05 (1998) (speculating that public participation can ensure that people have a voice and agencies are not "captured" by the regulated community).

228. *See id.* at 303 (noting that some agencies use public participation in changing existing regulation).

229. *See* Pierce, *supra* note 201, at 59–60 (observing that notice of an agency's intent allows the general public, Congress and the President the opportunity to influence the policies that the agency ultimately adopts).

230. Johnson, *supra* note 227, at 278; *see* TYLER, *supra* note 12, at 163 (explaining that, when individuals have an opportunity to participate in the decisionmaking process, they feel that procedures are fair and outcomes are more legitimate).

proposed guidance, to solicit and review public comments on the proposed guidance, and to include with the final guidance a statement of basis and purpose that both articulates the legal and policy rationale supporting the final guidance and responds to public comments.[231] I refer to this process as "pre-adoption notice and comment." The recent OMB Bulletin for Agency Good Practices, effective July 24, 2007, adopts this approach for guidance considered "economically significant."[232] Others have promoted a process for agency guidance that would require agencies to invite comments on guidance materials after their promulgation[233] and then republish the guidance, with any revisions, in final form after consideration of any comments received.[234] The agency also must respond to any material public comments.[235] I refer to this process as "post-adoption

231. *See* Anthony, *supra* note 7, at 1313 (advocating notice-and-comment rulemaking for interpretive rules, with the limited exception of those interpretive rules that interpret statutory language with a "tangible" meaning); *cf.* Recommendations of the Administrative Conference of the United States, Section 305.76-5 Interpretive Rules of General Applicability and Statements of General Policy (ACUS Recommendation 76-5), 41 Fed. Reg. 56,767, 56,770 (Dec. 30, 1976) (encouraging agencies to voluntarily employ pre-adoption notice-and-comment procedures for interpretive rules and statements of general policy likely to have a substantial impact on the public).

232. *See* OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3437 (Jan. 25, 2007). The OMB Bulletin defines the term *significant guidance document* to generally mean a guidance document that reasonably may be anticipated to lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy or a sector of the economy. *Id.* at 3439. However, the OMB Bulletin does not create any substantive or procedural legal rights enforceable against an agency. *Id.* at 3440.

233. Unlike the proposed guidance published at the beginning of the pre-adoption notice-and-comment process, under the post-adoption process the initial guidance published by the agency would take effect immediately. *See* Asimow, *supra* note 7, at 422–24 (explaining the post-adoption process and discussing its advantages and disadvantages).

234. *See* Michael Asimow, *Guidance Documents in the States: Toward a Safe Harbor*, 54 ADMIN. L. REV. 631, 656–57 (2002) (detailing the steps agencies would take in post-adoption procedures); *cf.* ACUS Recommendation 76-5, 41 Fed. Reg. at 56,770 (recommending that in the absence of pre-adoption notice and comment, agencies voluntarily invite comments following publication of their interpretive rules and statements of general policy).

235. *See* Asimow, *supra* note 234, at 657; *cf.* ACUS Recommendation 76-5, 41 Fed. Reg. at 56,770 (suggesting that the agency respond to significant comments "as may be appropriate"). Similar to a post-adoption notice-and-comment process, at least one commentator has argued that individuals should have a right to petition an agency to revise or repeal its guidance. *See* Mendelson, *supra* note 7, at 438–44; *cf.* William V. Luneberg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1, 13–14 (arguing that § 553(e) of the APA grants a right to petition an agency to reconsider a nonlegislative rule, thereby requiring agencies to "receive, consider, and respond to the views and information of interested persons who may suggest the need for reconsideration"). As with post-adoption notice and comment, an agency would be required to respond in a reasoned manner to petitioners' significant facts and relevant arguments within a specified period. *See* Mendelson, *supra* note 7, at 439–40 ("As with other such petitions, the agency's response, or its failure to respond by a statutory deadline, would be subject to judicial review.").

notice and comment." Although both approaches would enhance the legitimacy of agency guidance, I believe they impose too great a cost on government efficiency. This Part instead argues that a more limited notice-and-comment process strikes a reasonable balance between process values and efficient government.

### *A. Pre-adoption Notice and Comment*

The opportunity for public participation prior to an agency's issuance of final guidance would promote agencies' adherence to their fiduciary duties. With respect to their duties of care and obedience to the law, public comments would provide agencies with information about the relevant facts, including the likely consequences that will flow from the agency's adoption of certain nonlegislative rules.[236] A pre-adoption comment period also would provide interested parties the opportunity to challenge the legal basis for an agency's nonlegislative rule before its adoption.[237] In addition, an agency's statement of basis and purpose in support of its guidance must demonstrate a rational connection between the agency's factual conclusions and its policy choices and that its policy choices serve the relevant statutory or regulatory objectives.[238] Pre-adoption notice and comment thus would protect the rule of law and advance agencies' competence by promoting more accurate and rational agency decisionmaking that correctly implements the relevant legal standards.

A pre-adoption notice-and-comment process for agency guidance also would encourage agency policies that recognize equality concerns and the public interest. Public comments would illuminate for agencies the full range of interests among those affected by its guidance.[239] Furthermore, the requirement that an agency respond in a meaningful manner to all significant public comments would increase the likelihood that the agency will consider the concerns of all individuals affected by its guidance. Moreover, public scrutiny and the prospect of judicial review of the

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236. *See* Asimow, *supra* note 10, at 574 (noting that agencies are "not omniscient and do not have all relevant economic and social data"); *see also* Farina, *supra* note 11, at 226 (opining that discussions with affected individuals can provide helpful insight into relevant facts and applications of policies); Rossi, *supra* note 102, at 185–86 ("[A]s information makes its way inside the bureaucratic process to the actual decisionmakers, it contributes to the rationality of the final decision by improving the information base utilized in setting agendas, developing alternatives, and making final policy decisions.").

237. *See* Asimow, *supra* note 10, at 574 (discussing the effect that public participation can have in shaping rules); Farina, *supra* note 11, at 226 (pointing out that public participation would allow affected parties to provide information to shape the regulation).

238. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (defining the scope of review under the arbitrary and capricious standard).

239. *See* Mendelson, *supra* note 7, at 419 (discussing the neopluralist model of the administrative state).

agency's responses may minimize the potential for powerful interest groups to capture the decisionmaking process.[240] Pre-adoption notice and comment thus encourages agencies to exercise their discretionary powers for the benefit of the public, thereby advancing the public's acceptance of the agency's guidance and generally enhancing the legitimacy of the administrative state.[241]

Despite the benefits of requiring pre-adoption notice-and-comment procedures for agency guidance, these benefits would mean little if the process deterred or unduly delayed the issuance of guidance. Agency guidance materials serve several important purposes. As discussed in Part I, internal guidance materials such as handbooks and directives provide an effective means by which agencies can ensure more accurate, consistent, and predictable decisions by agency personnel.[242] Guidance materials that clarify the rights and obligations of regulated parties also assist entities and individuals in determining their eligibility for government benefits and whether a course of action would comply with the law, as enforced by an agency.[243] This increased predictability and stability enables regulated parties to engage in more rational planning.[244] Guidance materials, by clarifying the law, also conserve agency resources by both limiting inquiries from regulated parties about the application of the relevant statutory or regulatory requirements and deterring conduct that would trigger an agency enforcement action.[245] Consequently, procedural requirements that deter agencies from issuing guidance materials would greatly impede the successful functioning of the administrative state.

Several commentators have argued that the cost and effort of a pre-adoption notice-and-comment process would deter agencies from issuing guidance on many issues.[246] With numerous demands placed on agencies'

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240. *See* Rossi, *supra* note 102, at 213 (describing how broad public participation will minimize the monopoly of interest groups over agencies).

241. Asimow, *supra* note 10, at 529, 574.

242. *See supra* note 35 and accompanying text.

243. *See* Asimow, *supra* note 10, at 529 (stating that interpretive material alerts the public as to an agency's position on substantive matters); *cf.* Mendelson, *supra* note 7, at 413 (discussing how a regulated entity uses interpretive guidance documents to make decisions regarding compliance).

244. *See* Mashaw, *supra* note 91, at 901–02 ("'Kafkaesque' procedures take away the participant's ability to engage in rational planning about their situation," whereas reason-giving "provide[s] guidance for the individual's future planning").

245. *Cf.* Asimow, *supra* note 10, at 526 (noting that IRS nonlegislative rules "reduce the number of inquiries from taxpayers to which the IRS must respond. . . . [and] conserve scarce IRS resources by deterring the very kinds of transactions that would most likely be audited and that would probably lead to litigation").

246. *See* Asimow, *supra* note 7, at 402–09 (stating that the cost to the agency of requesting public comments can be substantial and that the notice-and-comment process can interfere with the regulatory processes of the agency); Asimow, *supra* note 10, at 524–30 (noting that the Federal Trade Commission staff tended to draft interpretive rules that were

scarce resources, agencies reasonably may decide to forgo issuing guidance materials if the cost of producing these materials increases.[247] In interviews conducted by Michael Asimow, agency staff reported that this indeed would be the case.[248] Asimow also found that in response to court decisions and state legislation requiring them to follow pre-adoption notice-and-comment procedures for agency guidance, some California agencies responded by issuing little or no new guidance.[249] In place of generally applicable guidance, these agencies employ less efficient procedures, such as case-by-case adjudications or informal, individualized advice.[250] In addition, California agencies often fail to revise outdated guidance materials.[251]

Despite its obvious costs, a pre-adoption notice-and-comment process likely would not deter agencies from issuing guidance altogether. Agencies face significant incentives to make their policies known to the public.[252] An agency that fails to provide advance notice of its policies risks undermining its relations with regulated parties and beneficiaries of government programs, both of whom prefer a predictable system of rules.[253] In particular, agency officials may respond to pressure from regulated parties for clarity on the agency's position in order to keep relations cordial, as they not only frequently interact with regulated parties,

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intentionally vague); Strauss, *supra* note 7, at 1480–87 (noting that cost may discourage agencies from offering guidance documents on regulations); Mendelson, *supra* note 7, at 437 ("[R]ulemaking's cost and loss of administrative flexibility might lead an agency to publicly state its policies less often or in less detail.").

247. *See* Asimow, *supra* note 7, at 405–06 (describing the choices an agency might make in using its scarce resources); Strauss, *supra* note 7, at 1480–81 ("[C]ostly procedural requirements may encourage or even force the agency to act without rules.").

248. *See* Asimow, *supra* note 7, at 406 (explaining that agency staff repeatedly noted that agencies were concerned with the "bureaucratic costs" of adopting nonlegislative rules).

249. *See id.* at 407–08 (describing the response of some California agencies to a California Supreme Court case requiring that a notice-and-comment period precede the adoption of nonlegislative rules); Asimow, *supra* note 234, at 636 ("[S]ome agencies, respectful of the law but mindful of their own resource constraints, provide no guidance documents at all or fail to revise outdated material, thus depriving regulated parties and the staff of any guidance.").

250. *See* Asimow, *supra* note 234, at 636 ("Agencies employ case-by-case adjudication instead of rulemaking; adjudication operates retroactively rather than prospectively and does little to spread the word to parties byond those involved in the adjudication.").

251. *See id.* (explaining that some California agencies fail to provide guidance or revise outdated materials); Asimow, *supra* note 7, at 407–08.

252. *See* Johnson, *supra* note 7, at 728 (noting that some commentators believe that agencies have incentives to produce guidance documents notwithstanding costs to the agency); *see also* Mendelson, *supra* note 7, at 435–37 (suggesting that agencies may be motivated by "good-government concerns" as well as a desire to maintain relations with regulated entities).

253. *See* Mendelson, *supra* note 7, at 435 ("[A]n agency's failure to disclose its policy positions or interpretations would likely undermine its relations with regulated entities, which strongly prefer to operate in an atmosphere of certainty.").

but also rely on them as a critical source of information.[254] Good-government and fairness considerations also may motivate government officials to set forth their policies in guidance,[255] as a lack of information about an agency's interpretation of the relevant statutory or regulatory standards may thwart an individual's ability to take advantage of entitlements or a regulated party's compliance efforts.[256] In addition, a court may bar an agency from denying benefits or licenses, imposing penalties, or taking other enforcement action if the agency fails to provide affected parties clear notice of the agency's interpretation of the relevant statutory or regulatory provisions.[257] Finally, political pressure from members of Congress to address their concerns regarding compliance or the needs of program beneficiaries also serve as a powerful incentive for agencies to issue guidance.[258] Nevertheless, the costs of a pre-adoption notice-and-comment process likely would cause agencies to promulgate fewer guidance documents.[259]

Although agencies likely would continue to issue guidance on some issues despite the costs of a pre-adoption notice-and-comment process, the time and effort involved in doing so would impose significant costs on government efficiency. The demands of a pre-adoption process often would consume significant staff resources.[260] Not only would this delay the adoption of much-needed agency guidance, leaving regulated entities uncertain as to the agencies' views on the relevant legal standards,[261] but

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254. *Id.*

255. *See id.* (describing the motivations of agencies in issuing guidance).

256. *See* Rubin, *supra* note 87, at 1165 n.511 (explaining that in not issuing guidance, the government "denies itself an instrument for altering individual behavior to achieve a social policy objective" and may impair the individual's ability to take advantage of entitlements). For example, in the absence of guidance an individual may fill out a form incorrectly or fail to modify his or her behavior so as to become eligible for benefits. *See also* Asimow, *supra* note 10, at 529 ("Agencies cannot perform effectively unless they clarify the law through interpretive rules and . . . policy statements.").

257. *See* KPMG, LLP v. SEC, 289 F.3d 109, 116 (D.C. Cir. 2002) (setting aside an order of the SEC finding that an accounting firm had provided audit services based on an improper contingent fee arrangement when the order was based on a "novel" interpretation of a rule prohibiting contingent fee arrangements and when the accounting firm did not have fair notice); *see also* Mendelson, *supra* note 7, at 436 (stating that a number of circuit courts have barred agencies from enforcing their regulations in the absence of "clear notice of the conduct required").

258. *Cf.* Mendelson, *supra* note 7, at 435 ("[F]ailing to disclose policy positions in advance may alienate members of Congress concerned with compliance assistance.").

259. *See* Mendelson, *supra* note 7, at 437 (noting that rulemaking can be a costly process); Johnson, *supra* note 7, at 728 (suggesting that, despite incentives to issue guidance documents, agencies are likely to reduce their use of guidance documents).

260. *Cf.* McGarity, *supra* note 31, at 1443 (stating that preparing a reasoned explanation that responds to all significant comments is very resource-intensive and time-consuming).

261. *See* Asimow, *supra* note 7, at 404 ("During the rulemaking period, regulated entities remain uncertain about the ultimate course of regulation and thus are inhibited from making plans.").

the costs involved would divert agency resources and personnel from other important tasks.[262] In addition, the binding nature of rules produced through notice-and-comment procedures would hamper agencies' administration of their programs by limiting their flexibility to respond to unforeseen circumstances and adjust their policies accordingly.[263] These significant costs to government efficiency, coupled with the likely reduction in the quantity of agency guidance, would more than offset the advancement of process values that pre-adoption notice and comment would provide.

### *B. Post-adoption Notice and Comment*

Those advocating post-adoption notice and comment for agency guidance contend that their proposal would impose lower costs on agencies relative to pre-adoption notice and comment while still promoting process values. The costs and benefits of post-adoption notice and comment is an empirical question for which at present there exists little data.[264] Nonetheless, I believe post-adoption notice and comment would impose significant costs to government efficiency that would eclipse any furtherance of process values.

Similar to pre-adoption notice and comment for agency guidance, post-adoption notice and comment would further the trustee paradigm by affording the public the opportunity to participate in the development of agency guidance. Public participation would promote rule of law, rationality, and equality concerns by providing agencies with relevant information and highlighting for agencies the concerns of all groups affected by their guidance.[265] However, in many instances post-adoption public participation may be of limited value, as the thinking of agency staff typically becomes less flexible after an agency has issued final guidance.[266]

262. Asimow, *supra* note 10, at 576; *see also* Mendelson, *supra* note 7, at 437 (noting that the high cost of notice-and-comment rulemaking could lead to less guidance from the agency about its policies).

263. *See* Mendelson, *supra* note 7, at 437–48 (arguing that an agency "cannot and probably should not attempt to fully specify its policies" and that, "[f]or the unforeseen or unforeseeable case, it may be desirable for an agency to retain flexibility to design just results").

264. The OMB Bulletin requires agencies to permit the public to submit post-adoption comments on significant guidance documents but does not require agencies to provide a formal response to public comments unless economically significant. OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3437 (Jan. 25, 2007). Nevertheless, over time, agencies' compliance with the OMB Bulletin may provide useful data for researchers seeking to evaluate the costs and benefits of notice-and-comment procedures for agency guidance.

265. *See supra* notes 238–41 and accompanying text.

266. *See* Asimow, *supra* note 7, at 423 (suggesting that an agency may be less open to alternatives—and will have adopted a rigid position—after the rule has been published); *cf.*

Members of the public also may be disinclined to submit post-adoption comments if they believe an agency will be reluctant to reconsider policies to which it already has publicly committed.[267] Nevertheless, post-adoption comments likely would provide some protection against agencies' breach of their fiduciary duties, as comments sometimes will persuade agencies to revise or rescind their guidance as appropriate, particularly if agencies must draft a credible response to comments that may be scrutinized on judicial review.[268]

Despite assertions to the contrary, a post-adoption notice-and-comment process would entail costs to government efficiency similar to its pre-adoption cousin. Commentators supporting post-adoption notice and comment argue that the costs associated with their proposal would be lower because comments "would be unlikely for the vast number of truly routine guidance materials aimed at regulated entities and those that simply boil down statutory or regulatory requirements or give uncontroversial compliance examples."[269] The same could be said, however, for a pre-adoption notice-and-comment requirement. Routine and noncontroversial guidance is unlikely to engender significant comments regardless of whether agencies solicit comments before or after publication of final guidance.[270] Similarly, major guidance likely would generate significant public response regardless of whether the agency employs pre-adoption or post-adoption notice-and-comment procedures. Moreover, as both processes would require agencies to review and respond to comments, they would place similar demands on agency resources.[271] Finally, although a post-adoption process would cause fewer delays in the issuance or amendment of guidance, the public may hesitate to rely on so-called final guidance that may be revised or rescinded in response to public comments.

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Mendelson, *supra* note 7, at 442 (acknowledging that a potential concern with a process that allows citizens the right to petition an agency for review of its final guidance is that "by the time a petition is filed, the agency decision-making process would already have concluded" and "an agency might not be truly open-minded and willing to revisit its earlier decision").

267. *See* Asimow, *supra* note 7, at 423 (noting that, because comments made after a rule is adopted may be less effective in influencing the rulemaking process, "members of the public may be less willing to take the trouble to prepare comments").

268. *See id.* at 422 (concluding that post-adoption comments "can be quite effective," as they often will "identify shortcomings in the rule that can be swiftly repaired"); Asimow, *supra* note 10, at 579 (arguing that post-adoption comments may lead an agency to amend or repeal its guidance, or at least to defend its guidance in replying to comments).

269. Mendelson, *supra* note 7, at 442.

270. *See* Asimow, *supra* note 10, at 577 ("In all likelihood, the vast majority of interpretations and policy statements would elicit no public interest at all. They would be either obviously correct, trivial in importance, or utterly noncontroversial.").

271. *But see id.* at 581 (stating that the increase in agency costs under a post-adoption notice-and-comment process would be far less costly than pre-adoption notice and comment). Asimow does not explain the reasoning underlying his conclusion.

### C. Limited Notice and Comment

Both pre-adoption and post-adoption notice and comment fail to strike a reasonable balance between legitimacy and efficient government concerns. In contrast, I believe a more limited process of public participation would lessen the costs to government efficiency identified above while still promoting process values. As with pre-adoption notice and comment, a more limited process would involve agencies providing notice of their draft guidance, along with any supporting data, and soliciting and reviewing public comments. However, agencies would not be required to respond to specific public comments; rather, if they receive material comments, agencies need only issue with their final guidance a concise, supporting statement explaining the agency's legal and policy rationale for the guidance. I refer to this process as "limited notice and comment."[272] This process would be limited to agency guidance setting forth rules generally applicable to a class of individuals or entities and not to individualized advice or informal guidance provided on a case-by-case basis.

By allowing for public participation in the development of agency guidance, a limited notice-and-comment process would promote rule of law, rationality, and equality concerns by providing agencies with valuable inputs. As discussed above, comments would illuminate for agencies the public's concerns and provide them with information about relevant facts and the policy consequences of their proposed guidance.[273] Opportunities for public comment also would allow interested parties to question the legal basis for an agency's nonlegislative rule before its adoption.[274] In addition, soliciting comments prior to issuance of final guidance would avoid the problem that plagues post-adoption notice and comment: an agency's lacking an open mind and being unwilling to truly reconsider its guidance.

The absence, however, of a requirement that agencies specifically respond to material comments may limit the value of public participation, as agencies may have little incentive to engage in meaningful review of issues commenters raise.[275] The public also may be less willing to submit

272. My proposal would not restrict a limited notice-and-comment process to agency guidance deemed "significant." Critics may contend that the burdens of a limited notice-and-comment process outweigh its benefits when agencies issue trivial or noncontroversial guidance. However, these guidance materials are unlikely to generate much public interest, with agencies receiving few if any comments supported by meaningful and relevant facts or arguments. *See id.* at 579–80 ("If the rule is trivial or noncontroversial, nobody will comment on it."). In the absence of any significant public comments, the agency could finalize its guidance quickly with little expenditure in agency resources.

273. *See supra* notes 236, 238–39 and accompanying text.

274. *See supra* note 237 and accompanying text.

275. *See* Mendelson, *supra* note 7, at 448 (concluding that proposals such as the FDA's Good Guidance Practices and the OMB Bulletin for Good Guidance Practices "do not ensure that the agency will meaningfully engage the comments it receives" because agencies

comments without assurances that agencies will give them thoughtful consideration.[276] Although these concerns certainly have merit, I believe good-government and fairness considerations generally would motivate agency staff to consider comments even in the absence of an obligation to respond to them. In addition, agencies value public input on their proposed guidance, given their need for information from outside resources.[277] For this reason, several agencies have voluntarily employed a limited notice-and-comment process for important guidance.[278] The prospect of judicial review also necessitates that the agency's explanatory statement in support of its final guidance be defensible in light of public comments received. Finally, agencies are more likely to give fair consideration to comments as

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are not required to respond to comments). Agencies also may forgo careful review of comments in light of existing barriers to obtaining pre-enforcement judicial review of agency guidance. McGarity, *supra* note 31, at 1442. If in practice this concern proves valid, with agencies regularly avoiding meaningful review of comments, Congress could remedy the problem by creating a right to judicial review for agency guidance subject to a limited notice-and-comment process. A loosening of legal doctrines governing standing, ripeness, and final agency action also might allow for pre-enforcement challenge of agency guidance. *Cf.* William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1023, 1033–34, 1038–40 (2004) (advocating that the APA be amended so as to allow for judicial review of interpretive rules and general statements of policy by defining "final agency action" as including interpretive rules and general statements of policy and providing that interpretive rules and general statements of policy can be ripe for judicial review despite their not having binding legal effect).

276. *Cf.* Asimow, *supra* note 7, at 422 ("When members of the public know that their input must be read, considered, and commented upon, they will be more likely to take the trouble to make comments.").

277. *Cf.* Asimow, *supra* note 10, at 574 (reporting that interviews with agency personnel "indicated the practical value that agency personnel attach to public commentary, including that obtained in the course of adopting interpretive rules and policy statements").

278. For example, the Centers for Medicare and Medicaid Services (CMS) often posts on its website and invites public comment on significant draft guidance. *See, e.g.*, Quality Standards for Suppliers of Durable Medical Equipment, Prosthetics, Orthotics, Supplies (DMEPOS) and Other Items and Services: Draft of Proposed Recommendations (Sept. 26, 2005), http://www.cms.hhs.gov/CompetitiveAcqforDMEPOS/downloads/dmepos_qualitystandards.pdf (inviting public comments on document during a sixty-day public comment period); Memorandum to All Part D Plans re: Medicare Prescription Drug Benefit Manual—Draft of Chapter 5, from Cynthia Tudor, Director, Medicare Drug Benefit Group (Sept. 5, 2006), *available at* http://www.cms.hhs.gov/PrescriptionDrugCovContra/Downloads/PartDManualChapter5.pdf (announcing the posting on CMS's website the draft of Chapter 5 of CMS's Medicare Prescription Drug Benefit Manual and inviting public comments by September 18, 2006). Other agencies similarly have invited public comment on their draft guidance. *See, e.g.*, U.S. Dep't of Labor, Request for Comments on Draft Hazard Communication Guidance Documents, http://www.osha.gov/dsg/hazcom/hazcomcommentnotice.html (last visited Apr. 15, 2009) (inviting public comments by June 16, 2004); U.S. Dep't of Trans., Hazardous Materials: Reducing the Risk of Hazardous Materials Incidents During Loading and Unloading Operations, http://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=45 (last visited Apr. 15, 2009) (inviting written comments on draft operating procedures for review before public workshop).

the practice of posting comments online brings greater public scrutiny to their rulemaking process.[279]

Requiring agencies to offer concise explanatory statements in support of nonlegislative rules also would further constrain the arbitrary exercise of power by administrative officials, thereby reinforcing the administrative state's legitimacy.[280] An explanatory statement would consist of the following components: (1) identification of the statutory or regulatory rule the agency seeks to interpret or implement and (2) the grounds for the nonlegislative rule.[281] The latter would include, as appropriate, the factors or policy objectives the agency considered, a description of any supporting facts or data relied upon by the agency, and a rational explanation for how the nonlegislative rule serves the relevant statutory or regulatory objectives. By exposing the agency's justification for its nonlegislative rule to public and judicial scrutiny, an explanatory statement would encourage an agency to formulate guidance in a manner consistent with the rule of law and the principles of rationality and equality.[282] Specifically, the agency would have incentives to take into account the interests of all individuals affected by its guidance; exercise due care in its factfinding; make rational policy choices consistent with the law's criteria or purpose; and substantiate its policies with a public-regarding rationale. Requiring agencies to issue an explanatory statement in support of their nonlegislative rules would thus

279. *See* Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, 1 I/S: J.L. & POL'Y FOR INFO. SOC'Y 33, 55 (Winter 2004–2005) (stating that the use of e-rulemaking and its greater transparency "might lead political appointees and career public servants to make decisions that better serve the broad public interest over special private interests," as "public officials who know that the general public can easily see and hear everything they do will almost certainly act differently than they do now").

280. *See* McGarity, *supra* note 31, at 1444 ("The requirement that an agency explain itself . . . can be an effective and relatively inexpensive curb on arbitrariness and reliance upon extra-legal considerations."); Seidenfeld, *supra* note 13, at 1537–38 (arguing that requiring agencies to provide an explanation for their decisions will "sometimes prevent decisionmakers from crediting raw political power[, as s]ome political deals simply cannot be justified persuasively in principled terms"); *cf.* Scanlon, *supra* note 88, at 96 (arguing that requiring public authorities to justify their actions by adducing reasons of the appropriate sort and defending these against critical attack provides some assurance against nonarbitrariness).

281. *See* Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* DUE PROCESS: NOMOS XVIII 126, 126 (J. Roland Pennock & John W. Chapman eds., 1977).

282. *See* McGarity, *supra* note 31, at 1444 ("[A] reasoned explanation ensures that the range of agency action is bound by those options that are supportable by facts in the record, reasonable assumptions, and sound policy considerations . . . ."); *cf.* Rubin, *supra* note 87, at 1165 (stating that a requirement that the government give reasons for the denial of benefits "mean[s] that the administrators must be able to articulate in advance some respectable explanation for that action"); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1292 (1975) (observing that the requirement that the agency provide a statement of reasons "is a powerful preventive of wrong decisions" and is "almost essential if there is to be judicial review").

guard against imprudent administrative policies and political "deals" that advance narrow, private interests over the common good.[283]

The administrative burdens associated with a limited notice-and-comment process for nonlegislative rules likely would not be so far-reaching as to significantly deter agencies from issuing guidance. As previously noted, the vast number of routine and noncontroversial guidance documents would generate few if any material comments for agency review.[284] In addition, an agency need not draft an explanatory statement when it receives no material comments, as an explanatory statement likely would be of limited value in the absence of comments questioning the soundness of the agency's guidance. For draft guidance that elicits meaningful comments, a limited notice-and-comment process would place considerably lower demands on agency staff than pre-adoption and post-adoption notice and comment. Issuing a concise explanatory statement with final guidance would consume far fewer agency resources than a detailed statement of basis and purpose that sets forth in-depth the agency's reasoning and responds to all significant comments in a manner sufficient to pass judicial scrutiny.[285] It seems reasonable to assume, therefore, that the lower costs of a limited notice-and-comment process would deter fewer nonlegislative rules than a pre-adoption or post-adoption notice-and-comment process.[286]

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283. Requiring an agency to articulate the reasons for its nonlegislative rules does not guarantee that the true basis for the agency's actions will reflect some sufficiently public purpose, and not a nonpublic purpose. For example, when two or more explanations exist for a nonlegislative rule, one legitimate and one impermissible, "it will be difficult for anyone, including the actor, to be clear about what 'really' generated it, and it is simple human nature to want to believe that the more laudable purpose played a (the) significant role." ELY, *supra* note 55, at 128. Similarly, the prospect of public scrutiny does not ensure that the agency will fairly consider the concerns of all affected parties. *Cf.* Evelyn R. Sinaiko, *Due Process Rights of Participation in Administrative Rulemaking*, 63 CAL. L. REV. 886, 916 (1975) (noting that the submission of written comments to an agency on its proposed rule does not ensure that the agency will consider all viewpoints of those potentially affected by the rule). Nevertheless, requiring agencies to issue their final guidance and explanatory statement provides some protection for process values. At a minimum, the requirement ensures that agencies can articulate a legitimate explanation for their actions. *See supra* note 280. In addition, an explanatory statement promotes better decisionmaking by agencies, as transparency in the agency's decisionmaking process allows interested parties to identify any mistaken assumptions or concerns inadvertently neglected by the agency in developing its guidance.

284. *See supra* note 270 (arguing that the vast majority of interpretations and policy statements would elicit no public interest at all).

285. *See* McGarity, *supra* note 31, at 1443 ("[P]reparing a reasoned explanation can be very resource-intensive and time-consuming, and the prospect of having to respond to blunderbuss attacks by regulatees can be a significant disincentive to agency action."); *see also supra* Part III (discussing the hard look doctrine).

286. *Cf.* Asimow, *supra* note 7, at 405 (arguing that increasing the costs of producing nonlegislative rules likely will diminish their supply). The fact that several agencies voluntarily employ a limited notice-and-comment process for important guidance suggests

Some may argue that limited notice and comment would eliminate one of the central advantages of nonlegislative rules relative to legislative rules—an efficient means for modifying agency rules quickly in response to emerging issues or changes in agency policy. For routine, noncontroversial guidance that would produce few or no material comments, however, agencies could finalize their guidance promptly following the close of the comment period. Moreover, with no requirement to issue a detailed statement of basis and purpose that specifically responds to public comments, the delay in issuing most final agency guidance would be brief.[287] In those circumstances where there exists a pressing need to issue new or modified guidance without delay, agencies could implement final guidance and then allow for post-adoption comments. For example, similar to the APA's "good cause exception" for notice-and-comment rulemaking,[288] an agency could forgo prior public comment when issuing guidance to address an immediate threat to public health or safety or

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that the costs are not unduly burdensome; agencies soliciting comments on guidance, however, rarely respond to specific comments. *But see* Analysis of and Responses to Public Comments: Quality Standards (Aug. 14, 2006), http://www.cms.hhs.gov/CompetitiveAcqforDMEPOS/Downloads/Final_public_Responses 82506.pdf (responding to public comments on draft quality standards for Medicare suppliers of durable medical equipment, prosthetics, orthotics, and supplies). *See generally* Mendelson, *supra* note 7, at 426 (noting that among the agencies who have expressed a commitment to receive public comments on draft guidance, "none of the agencies thus far have committed to respond to public comments").

The amount of resources involved in limited notice and comment obviously is an empirical question for which at present there exists little data. Over time agency compliance with the recent OMB Bulletin should provide researchers with useful data on this issue. The OMB Bulletin requires agencies to permit the public to submit comments on significant guidance, but does not require agencies to provide a formal response to public comments unless the guidance is "economically significant." OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3437 (Jan. 25, 2007). Although the OMB Bulletin does not require agencies to solicit comments on significant guidance (other than economically significant guidance) *prior* to their adoption, it encourages agencies to do so when practical. *Id.* at 3438.

287. For example, CMS issued its 2009 Call Letter—a 267-page document providing guidance to sponsors of Medicare Advantage and prescription drug plans on existing and new policies under the Medicare Advantage and prescription drug programs for 2009—only two months after soliciting comments on the Draft 2009 Call Letter. Manatt Health Solutions, Key Elements of DRAFT 2009 Medicare Advantage (MA), Medicare Advantage-Prescription Drug (MA-PD), Cost-Based Plan, and Prescription Drug Plan (PDP) Sponsors Call Letter (Part D Section) (Jan. 17, 2008), http://www.manatthealthsolutions.com/publications/articles/Summary%20of%20Draft%202009%20Call%20Letter.pdf; 2009 Call Letter (Mar. 17, 2009), http://www.cms.hhs.gov/PrescriptionDrugCovContra/Downloads/CallLetter.pdf.

288. Section 553(b)(3)(B) of the APA provides that a legislative rule may be published as a final rule without prior publication of a proposed rule with opportunity for public comments for "good cause." Good cause exists if notice and comment would be impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. § 553(b)(3)(B) (2006).

implement a pending statutory deadline.[289] Limited notice and comment therefore would not hinder agencies' ability to issue or modify guidance in a timely manner as needed.

Although limited notice and comment places fewer demands on agency resources than pre-adoption or post-adoption notice and comment, the costs still could be substantial for important guidance that would generate significant public response. Reviewing comments on controversial guidance may be time-consuming for agency staff, as the comments will be more numerous and complex than those received on uncontroversial guidance. These costs potentially would deter agencies from issuing certain contentious guidance. Even if agencies would continue to issue controversial guidance, reviewing comments on such guidance could take months or longer, leaving the public uncertain as to the agencies' positions on important regulatory issues. In addition, the process would divert agency resources and personnel from other agency priorities.

Arguably the associated costs of limited notice and comment for important, complex guidance outweigh its promotion of process values. Although this is a close call, I reach the opposite conclusion. Though the costs of limited notice and comment are heightened when agencies issue major guidance, so too are the benefits of public participation. Agencies' need for relevant data, input on the likely consequences of proposed nonlegislative rules, and information on the concerns of interested parties is at its greatest when agencies address complex matters.[290] Similarly, the risk that an agency will be "captured" by special interest groups may be increased, as these groups likely exert intensified pressure on agencies to adopt policies favorable to their interests when the stakes are higher. Finally, individuals' judgments about the fairness of the process by which agency officials make decisions on consequential matters, including major guidance, may dominate individuals' views on the legitimacy of the administrative state, as they are more likely to focus on and care about the decisionmaking process for issues of utmost importance to them. For these reasons, I believe a limited notice-and-comment process for agency guidance strikes a reasonable balance between process values and the need for efficient government.

Astute scholars of administrative law will recognize that my proposed limited notice-and-comment process parallels the notice-and-comment

289. *Cf.* OMB Bulletin, *supra* note 47, at 3438, 3440 (permitting agencies to forgo the required prior notice and comment for economically significant guidance documents when "not feasible or appropriate," such as in response to a statutory requirement or court order or when there exists a threat to public health or safety or an emergency).

290. *Cf. id.* at 3438 (concluding that notice and solicitation of comments is most helpful for significant guidance documents that are "particularly complex, novel, consequential, or controversial").

process followed by agencies from enactment of the APA through the 1960s. The APA requires that agencies issue only a "concise general statement" of the basis and purpose underlying their legislative rules.[291] For the first two or so decades following implementation of the APA, agencies' statement of basis and purpose truly were "concise" and "general," typically consisting of one to three pages.[292] This all changed with the courts' adoption of the hard look doctrine in the 1970s.

As discussed in Part III, the APA's modest requirement that agencies issue a concise and general statement of basis of purpose in support of their legislative rules has been transformed by the courts into an obligation to provide a lengthy, comprehensive, reasoned explanation. To survive judicial review of their legislative rules under the hard look doctrine, agencies must assemble a detailed rulemaking record, complete with supporting data and analyses.[293] Agencies also must respond to all material public comments, as "agencies cannot afford to allow any of the multifaceted attacks to go unanswered for fear that courts will remand to them to respond to particular comments."[294] Legislative rulemaking thus has evolved under the hard look doctrine into a time-consuming and costly process.

Some may argue that courts similarly will ossify my limited notice-and-comment process for agency guidance. To prevent this from occurring, should Congress adopt my proposal, Congress must make clear its intent that agencies need not explain the factual and policy bases for their guidance to the degree of specificity required under the hard look doctrine. Statutory language specifically should indicate that an agency need not respond to specific public comments it receives but only must identify the factors or policy objectives it considered and facts found and provide a rational explanation for how the nonlegislative rule serves these policy objectives given the agency's factual conclusions.[295] This would allow agencies to issue guidance more quickly and to devote their limited

291. 5 U.S.C. § 553(c) (2006).

292. Pierce, *supra* note 212, at 908; *see also* JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, ADMINISTRATIVE LAW 511 (5th ed. 2003) (explaining that an agency's final regulation typically was accompanied by a brief explanation of the agency's rationale and general assurances that the agency had considered public comments).

293. *See* Seidenfeld, *supra* note 36, at 498–99 (noting that the hard look doctrine has imparted the message "that agencies must collect data and provide analyses to support their rejection of every reasonable alternative to the approach they took and to respond to every plausible argument against their approach").

294. McGarity, *supra* note 31, at 1400.

295. *Cf. id.* at 1443 (advocating that Congress amend the APA to make clear that its requirement that agencies support their legislative rules with a "concise general statement of basis and purpose" does not require agencies to "respond to every comment and criticism that accompanies a blunderbuss attack on the technical underpinnings for their rules").

resources to processing the information and public concerns relevant to their nonlegislative rulemaking, rather than to drafting lengthy statements of basis and purpose with an eye toward surviving judicial review.[296]

## CONCLUSION

The law of administrative procedure governs the administrative state's exercise of the authority entrusted to it. In shaping agencies' decisionmaking so as to more closely conform to our vision of legitimate government, administrative procedures help protect citizens against arbitrary and capricious regulatory actions. Fair administrative procedures that reinforce the legitimacy of the administrative state also promote citizens' acceptance of and obedience to regulatory policies. The absence of procedural requirements applicable to the wide range of regulatory policies announced in agency guidance thus raises serious concerns regarding the legitimacy of these policies. This Article has argued that agency guidance must be legitimated through a process that comports with our ideas of just government.

The republican conception of democratic legitimacy—rather than pluralist norms reflected in majoritarianism—finds stronger normative support, accords with empirical research on individuals' judgments on the legitimacy of government authorities, and provides a more feasible understanding of contemporary government. The republican conception of legitimacy therefore should guide the design of administrative procedures, including those applicable to agencies' promulgation of guidance. Whereas majoritarianism emphasizes the popular will and political accountability, the republican model of legitimacy conceives of the administrative state as a trustee for the people, with the administrative state expected to exercise its powers in a manner that is deliberative, rationale, consistent with existing laws, and for the public benefit. I call this concept of agency legitimacy the trustee paradigm. Accordingly, administrative procedures, including those applicable to agency guidance, should promote agency adherence to the fiduciary obligations reflected in the trustee paradigm.

Although administrative procedures ensure the legitimacy of agency actions, we must take care not to impose procedures so cumbersome as to prevent the administrative state from performing the tasks assigned to it. Rather, administrative procedures should afford democratic legitimization

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296. *Cf. id.* at 1443–44 (stating that amending the APA to permit a concise statement of basis and reason in support of agencies' legislative rules would allow agencies to focus their scarce resources on gathering data and responding to comments deemed especially relevant).

to agency guidance without causing undue harm to administrative efficiency. The following procedural requirements—offering the public an opportunity to comment on agency guidance prior to its adoption and issuing a concise explanatory statement of the rationale for final agency guidance—would strike a reasonable balance between administrative legitimacy and efficiency concerns.