

ARTICLES

Legitimizing Agencies

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The project of bolstering the administrative state’s perceived legitimacy is central to administrative law. To enhance agencies’ legitimacy with the public, generations of judges and scholars have variously called for changes designed to insulate technocrats from political influence, involve interested members of the public, and subject agencies to greater political control. Despite the pitch of debate in elite legal circles, however, little is known about the views of ordinary citizens—the very people whose beliefs constitute popular legitimacy.

This Article provides evidence of Americans’ actual views concerning what features contribute to agencies’ perceived legitimacy. It presents the results of a set of experiments in which each participant views a policy vignette with varied information concerning the structures and procedures involved in generating the policy. Participants are then asked to assess, by their own lights, the policy’s legitimacy.

The results support the century-old idea that empowering politically insulated, expert decision-makers legitimizes agencies. With the insulation of civil servants from appointees and the independent-agency form under strain, this finding implies that, for proponents of a robust administrative state, an independent and technocratic civil service is worth defending. There also is some evidence that public participation in agency decision-making bolsters agencies’ perceived legitimacy. By contrast, the theory—influential on the Supreme Court—that greater presidential involvement enhances legitimacy receives no support.

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INTRODUCTION

The concept of legitimacy exerts a talismanic pull in administrative law.¹ Law students learn of claims that the field “suffers from a near-perpetual crisis of legitimacy” from a leading casebook.² Prominent scholars agree. Four decades ago, Professor

¹ See BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 150 (2019) [hereinafter EMERSON, *THE PUBLIC’S LAW*] (“[The] problem of legitimacy has been a central preoccupation of administrative law scholarship for generations.”); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 552 (2015) [hereinafter Michaels, *Enduring*]; Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1722 (2012); Peter L. Strauss, *Legislation That Isn’t—Attending to Rulemaking’s “Democracy Deficit,”* 98 CALIF. L. REV. 1351, 1351 (2010); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1670–71 (1975).

² STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN, ADRIAN VERMEULE & MICHAEL E. HERZ, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 186 (7th ed. 2011); see also LISA SCHULTZ BRESSMAN, EDWARD L. RUBIN & KEVIN M. STACK, *THE REGULATORY*

James Freedman famously declared that administrative agencies face a “recurrent sense of crisis” that calls for “developing a theory of the legitimacy of the administrative process.”³ The drumbeat has only gotten louder in recent years.⁴ Incredibly, approximately 25–30% of administrative law scholarship published in the 2000s discusses the legitimacy of administrative agencies—a roughly threefold increase since the 1940s.⁵

There is good reason for this emphasis. The New Deal consensus—under which opposing interests skirmish over specific regulations, and the political branches and courts occasionally modify or add procedural requirements, but do not challenge the fundamental premise that agencies validly exercise authority—has shattered.⁶ A major political party asserts that policymaking by regulatory agencies contributes to a constitutional “crisis” that “undermines” self-governance.⁷ Supreme Court Justices decry “a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure”⁸ and warn

STATE 11 (2d ed. 2013) (asserting that whether agencies are “legitimate” is “a persistent normative question”).

³ JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT*, at ix (1978).

⁴ See, e.g., Ryan Calo & Danielle Keats Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L.J. 797, 845 (2021) (claiming a “pending legitimacy crisis within the administrative state”); Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1543 (2018) (stating, in the article’s first sentence, that “[o]ur government is suffering from a crisis of legitimacy”); K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1698–1703 (2018) (book review) (decrying “a spiraling crisis of administrative legitimacy”); Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 719 (2016) (book review) (recognizing “the American people’s ‘uneasiness’ about [the administrative state’s] legitimacy”); PHILIP WALLACH, *CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS, THE ADMINISTRATIVE STATE’S LEGITIMACY CRISIS 2* (2016) (noting “trust in our governing institutions has been on a steady downward trend for decades”); Jed Handelsman Shugerman, *The Legitimacy of Administrative Law*, 50 TULSA L. REV. 301, 315 (2015) (book review) (suggesting “mutual attacks on each [political] party’s legitimacy has in turn opened up new fronts in the battle over the modern administrative state’s legitimacy”).

⁵ See Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633, 680–82 (2018).

⁶ See Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 5 (2022) [hereinafter Walters, *Agon*] (“[T]he administrative state finds itself under immense, perhaps even existential, political stress.”); McGarity, *supra* note 1, at 1721 (describing the status quo ante, under which political actors across the ideological spectrum rarely challenged agencies’ basic missions).

⁷ REPUBLICAN NAT’L COMM., *REPUBLICAN PLATFORM 2016*, at 9–10 (2016).

⁸ *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 91 (2015) (Thomas, J., concurring).

against “the danger posed by the growing power of the administrative state.”⁹ These concerns motivate, in part, the Court’s recent holdings that have eroded the power and independence of regulatory agencies.¹⁰ In this climate, the stakes for understanding how to buttress agencies’ legitimacy are considerable.

Confronted with a perceived imperative to legitimize the administrative state, a wide array of judges and scholars look to agency structures and processes. While these actors agree that legitimizing administrative agencies is a worthy objective, their favored means to further this goal differ markedly.¹¹ Their prescriptions generally can be classified into one of three distinct camps.¹² One prominent paradigm considers agencies to be legitimate when they marshal their expertise.¹³ A second perspective holds that avenues for public participation legitimize decisions made by otherwise cloistered agencies.¹⁴ A third view, closely associated with Justice Elena Kagan and reiterated recently in Chief Justice John Roberts’s majority opinion in *United States v. Arthrex, Inc.*,¹⁵ advocates for greater presidential control of agencies on the grounds that control by a democratically accountable president legitimates administrative decision-making.¹⁶

⁹ *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting); see also Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 3 (1998) (“The sheer power wielded by the administrative state . . . raises questions about . . . its political legitimacy.”).

¹⁰ See Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 38–42 (2017) (discussing Article III courts’ “efforts to replace interpretive deference with independent judicial judgment” to challenge administrative adjudication).

¹¹ See Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2035 (2005) (“Administrative law scholars have sought to ground the legitimacy of agency actions in a variety of theories.”); Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2464 (2017) (asserting that “attempts to legitimate the administrative state hover or cycle restlessly” because they are grounded in “ideals . . . [that] are not mutually compatible”).

¹² Other perspectives that do not fall into one of these three paradigms emphasize agencies’ adherence to valid delegations from Congress; responsiveness to the current Congress; or commitment to due process, transparency, or other values as indispensable to administrative legitimacy. For an accounting of these other prescriptions, see *infra* Part IV.D.2.d.

¹³ See *infra* Part I.B.1.

¹⁴ See *infra* Part I.B.2.

¹⁵ 141 S. Ct. 1970 (2021).

¹⁶ See *id.* at 1979 (asserting that agencies’ “power acquires its legitimacy . . . through a clear and effective chain of command down from the President” (quotation marks omitted) (quoting Free Enter. Fund. v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 498 (2010))); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2341 (2001) (arguing that the presidency “most possesses the legitimacy that [] administration requires”); *infra* Part I.B.3.

Judges and scholars, claiming that their favored structures enhance agencies' legitimacy, presumably invoke that term to mean something beyond baseline legality and distinct from simply agreeing with the policies that agencies with these structures ultimately produce. When the term is defined, the definition often maps on sociologist Max Weber's concept of sociological legitimacy: the public's belief that power is exercised in a manner that is justified, leading people to accept even those outcomes with which they disagree.¹⁷ But does the public actually think in this way? What administrative structures and procedures, if any, do Americans actually associate with administrative legitimacy?

This Article brings empirical evidence to bear on this debate. It presents a set of online experiments involving over nine thousand participants, in which each participant views a vignette concerning policymaking at an administrative agency. Each vignette emphasizes a different aspect of the policymaking process that influential actors claim enhances legitimacy. Participants are then asked to rate how legitimate they believe the agency's decision to be. If the randomly assigned set of participants who view a vignette with information about a particular element rate the agency's decision as more legitimate than the randomly assigned participants who view an otherwise identical vignette without this information, that finding would suggest that this element enhances the agency's perceived legitimacy.

Importantly, the experiments do not define legitimacy for participants. For some people, information concerning administrative structures and processes may influence their view of the agency's legitimacy. Others may simply consider outcomes with which they agree to be legitimate and those with which they disagree illegitimate.

Regardless of how participants conceptualize legitimacy, however, these experiments enable testing of the myriad claims that administrative lawyers make concerning how particular structures affect agencies' legitimacy. In other words, they offer a

¹⁷ See *infra* notes 35–40 and accompanying text (defining sociological legitimacy); notes 5863 and accompanying text (providing examples of administrative lawyers' arguments concerning legitimacy adopting a sociological definition). Sociological legitimacy is distinct from conceptions of legitimacy involving moral or legal considerations. See *infra* notes 41–48 and accompanying text. There are, however, notable exceptions to legal scholars' tendency to conceive of legitimacy as sociological. See, e.g., Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. 749, 764–67 (2023) [hereinafter Havasy, *Relational Fairness*] (discussing the administrative state's descriptive, normative, and legal legitimacy, with an emphasis on normative legitimacy).

means of shedding light on which doctrinal strand of administrative law, if any, has the better of the argument concerning how to bolster agency legitimacy in the eyes of ordinary Americans—under whatever vision of legitimacy those individuals adopt.¹⁸

This Article proceeds in four parts. Part I sets the scene by collecting and categorizing the literature’s myriad claims on how to increase agencies’ legitimacy. The Part begins by discussing how influential social theorists and legal scholars outside of administrative law consider popular acceptance as fundamental to legitimacy. It then presents a typology of the major legitimacy claims in administrative law scholarship. The Part classifies these claims into three broad paradigms: agency legitimacy is enhanced through empowering politically insulated technocrats, promoting public involvement, or strengthening the president’s role in agencies’ decision-making.

Part II presents the research design of the experiments used to assess the three paradigms. Part III reports the results. One headline from these experiments is that structures designed to elevate technocratic civil servants are associated with greater perceived legitimacy across the board (although the size of the bump is modest). Mechanisms designed to enable public participation in agency decision-making also may be associated with greater legitimacy, although here many results fall short of conventionally accepted levels of statistical significance. By contrast, increased White House involvement yields no consistent effect. That finding is at odds with the view, which influential judges and scholars adopt, that greater presidential control enhances the administrative state’s legitimacy. Part III also shows that Americans can distinguish between whether a policy is legitimate and whether they personally support that policy.

Part IV offers a prescriptive blueprint for institutional designers. Whereas some commentators claim that an empowered, politically insulated civil service detracts from government’s legitimacy,¹⁹ the public appears to believe the opposite. Therefore, proponents of administrative governance ought to strengthen civil service protections—which have been under threat in recent

¹⁸ This goal has parallels in studies in experimental philosophy to elicit ordinary people’s views concerning the objectivity of moral claims. See Jeroen Hopster, *The Meta-ethical Significance of Experiments About Folk Moral Objectivism*, 32 PHIL. PSYCH. 831, 833–39 (2019) (discussing this literature and its critics).

¹⁹ See, e.g., Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1443 (1983) (asserting that elected officials “derive their legitimacy from their responsiveness to popular will, and bureaucratization acts as a screen that impairs [agencies’] responsiveness”).

years²⁰—as a means of buttressing an administrative state under strain.²¹ These proponents also should consider expanding avenues for public participation in agency decision-making, as public involvement also *may* bolster agencies' perceived legitimacy.

As importantly, Part IV casts cold water on the dominant presidential administration paradigm. Judges and scholars who argue that greater presidential control—often at the expense of civil servants—increases legitimacy appear to have gotten it exactly backward. Instead, empowering expert decision-makers and shielding them from political actors may enhance legitimacy. At a time when courts and political leaders challenge the power and independence of the civil service, this finding provides a firm rejoinder.

The Article ends with a call for future experimental research on agency design. Essentially, this study provides a proof of concept; claims concerning how specific administrative structures and judicial doctrine change the public's perceptions of agencies are testable. Of course, there are other important values in addition to legitimacy; other design features aside from those related to expertise, participation, and presidential administration; and other administrative functions and subjects apart from those described in these vignettes. Accordingly, future research in the vein of this Article could mark a trail to enable leaders to optimize the design of administrative institutions in the public's eyes.

I. ADMINISTRATIVE LAW'S IDÉE FIXE

It is difficult to overstate the importance of legitimacy to administrative law.²² According to Professor Jody Freeman, the field is “organized [] largely around the need to defend the administrative state against accusations of illegitimacy.”²³ Professor

²⁰ See, e.g., Jonathan Swan, Charlie Savage & Maggie Haberman, *Trump and Allies Forge Plans to Increase Presidential Power in 2025*, N.Y. TIMES (July 17, 2023), <https://www.nytimes.com/2023/07/17/us/politics/trump-plans-2025.html> (detailing some of these challenges).

²¹ See *infra* notes 254–59 and accompanying text.

²² See Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 930 (2016) (“[A]dministrative law must seek to ensure that *its* [] evolution is legitimate.” (emphasis in original)); Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1347–52 (2011) [hereinafter Mendelson, *Rulemaking*]; McGarity, *supra* note 1, at 1722; Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 696–97 (2000); Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 218–25 (2000).

²³ Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 546 (2000) [hereinafter Freeman, *Private Role*]; see also Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 463 (2012) (“The history of administrative law

Jerry Mashaw agreed, writing, “administrative procedural requirements embedded in law shape administrative decision-making in accordance with our fundamental (but perhaps malleable) images of the legitimacy of state action.”²⁴ That legitimating function, he continued, “is administrative procedure’s purpose and its explanation.”²⁵

Generations of administrative law scholars have devoted themselves to the project of enhancing the administrative state’s legitimacy.²⁶ This project, according to Professor Jon Michaels, is “nothing short of a legal and academic obsession, passed down from generation to generation.”²⁷ When scholars deem this legitimizing project to have fallen short, they declare that administration suffers a “crisis of legitimacy.”²⁸

For all of the ink spilled on agency legitimacy, the concept is rarely defined in administrative law scholarship.²⁹ Further, authors offering one type of solution to agencies’ supposed legitimacy deficit rarely engage with scholarship presenting alternative proposals. As a result, readers are left in the dark concerning both what authors mean by legitimacy in the administrative context and how their proposals build upon, challenge, or otherwise relate to other work on the subject.

... constitutes a series of ongoing attempts to legitimize unelected public administration in a constitutional liberal democracy.”).

²⁴ Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. 267, 268 (1990).

²⁵ *Id.*

²⁶ See, e.g., Freeman, *Private Role*, *supra* note 23, at 545–46; Strauss, *supra* note 1, at 1351; Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 7–11 (1995); Colin S. Diver, *The Wrath of Roth*, 94 YALE L.J. 1529, 1531 (1985) (book review); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1282–84 (1984) (summarizing the primary models legitimizing the administrative state and the academics associated with each model); FREEDMAN, *supra* note 3, at 266.

²⁷ Michaels, *Enduring*, *supra* note 1, at 552.

²⁸ Freeman, *Private Role*, *supra* note 23, at 545; see also Weinberg, *supra* note 22, at 218 (claiming the “legitimacy crisis” results from the “exercise [of] public power” with “questionable democratic credentials and no direct political accountability”); BREYER ET AL., *supra* note 2, at 186 (“It is sometimes said that the administrative process . . . suffers from a near-perpetual crisis of legitimacy.”); William H. Allen, *The Administrative Process: Which Crisis?*, 32 STAN. L. REV. 207, 208 (1979) (book review) (“[S]o constant has been the sense of crisis attending the agencies that the problem probably transcends the specific concerns that successive generations have voiced.”); FREEDMAN, *supra* note 3, at ix (stating that the book’s purpose is to further understanding of “the recurrent sense of crisis attending the federal administrative agencies and of the necessity of developing a theory of the legitimacy of the administrative process”); *id.* at 6–12 (similar).

²⁹ See Havasy, *Relational Fairness*, *supra* note 17, at 764–67 (presenting theories of administrative legitimacy).

This Part provides a corrective. Part I.A explains how scholars outside of administrative law conceive of legitimacy, highlighting the importance of the public's perceptions and beliefs as sources of legitimacy. Part I.B presents a guide to administrative law's myriad assertions concerning legitimacy. In so doing, it develops a comprehensive typology of legitimacy claims in administrative law. Essentially, most of these claims emphasize one of three paradigms: that agency action is legitimized through technocratic expertise, public participation in agency decision-making, or greater accountability to elected officials, primarily the president.³⁰

A. The Importance of Public Beliefs to Legitimacy

The concept of legitimacy, as used in administrative law scholarship, is notoriously protean.³¹ From conclusory statements that particular design features would enhance agencies' legitimacy, the reader can infer little more than that the concept is a normative good.³² Until recently, administrative law scholarship has tended not to focus on definitions.³³ Scholars outside of administrative law, however, outline three broad conceptions of legitimacy: sociological, legal, and moral legitimacy.³⁴

³⁰ For other legitimacy claims that do not fit neatly into these paradigms, see *infra* Part IV.D.2.d.

³¹ See Amanda R. Greene, *Is Political Legitimacy Worth Promoting?*, in 61 POLITICAL LEGITIMACY 65, 66 (Jack Knight & Melissa Schwartzberg eds., 2019) (“[L]egal and political philosophers have not yet offered a clear enough definition of [] legitimacy.”). That the concept is an uneasy fit in the modern era is unsurprising given the term's medieval origins in describing the right to rule in hereditary monarchies. See EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 144–45 (2005). The epithet “illegitimate”—dated, but still in use—to describe the status of a child born out of wedlock reflects this medieval usage. See JENNY TEICHMAN, *ILLEGITIMACY: AN EXAMINATION OF BASTARDY* 1–4 (1982).

³² See Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 371 (2019) (“Legitimacy has become an all-purpose justification to defend all manner of proceduralism. But what does it even mean? Too often, legitimacy is little more than shorthand for the judgment that it's always best to be procedurally scrupulous.”).

³³ *But see* Havasy, *Relational Fairness*, *supra* note 17, at 764–65 (distinguishing between normative, legal, and descriptive legitimacy); Walters, *Agon*, *supra* note 6, at 46–47 (analyzing several theories of administrative legitimacy); Bagley, *supra* note 32, at 372–89 (discussing legal and sociological legitimacy).

³⁴ See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794 (2005) [hereinafter Fallon, *Legitimacy*] (providing this typology). Although some authors adopt a different nomenclature, all appear to consider public attitudes toward an institution as one form of legitimacy. See, e.g., Havasy, *Relational Fairness*, *supra* note 17, at 764–65 (referring to these concepts as normative, legal, and descriptive legitimacy, with descriptive legitimacy standing in for sociological legitimacy); Carola C. Binder & Christina P. Skinner, *The Legitimacy of the Federal Reserve*, 28 STAN. J.L. BUS. & FIN. 1, 10–11 (2023) (distinguishing between formal and popular legitimacy, with the latter

Sociological legitimacy refers to the beliefs of a relevant population that an authority or decision is acceptable.³⁵ According to Professor Richard Fallon, an institution possesses this form of legitimacy if “the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.”³⁶ The concept is descriptive rather than normative; people may ground their views concerning an institution’s legitimacy on whatever criteria they prefer.³⁷ For Max Weber, an institution possesses this form of legitimacy to an actor if “it is in some appreciable way *regarded by the actor* as in some way obligatory or exemplary.”³⁸ Stated plainly, an institution is legitimate if people believe it is worthy to possess its authority.³⁹ In the Weberian conception, the procedures, norms, and decisions of legal institutions bear on the public’s beliefs in those institutions’ legitimacy.⁴⁰

“refer[ring] to an institution’s ability to maintain diffuse support, long-term loyalty, social trust, support, and favorable attitudes”) (quotation marks and citations omitted); Eric W. Orts, *Supreme Illegitimacy*, 11 REG. REV. 21, 22 (2022) (labeling these concepts substantive political legitimacy, legal legitimacy, and empirical political legitimacy, with the final category having conceptual overlap with sociological legitimacy).

³⁵ See Havasy, *Relational Fairness*, *supra* note 17, at 764 (using the term “descriptive legitimacy” rather than “sociological legitimacy”); see also DAVID BEETHAM, *THE LEGITIMATION OF POWER* 15–19 (1991) (viewing “evidence of consent” as important to the legitimate exercise of power); SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 77 (1960) (“Legitimacy involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society.”).

³⁶ Fallon, *Legitimacy*, *supra* note 34, at 1795; see also RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 21 (2018) (“Sociological legitimacy involves prevailing public attitudes towards government, institutions, or decisions.”).

³⁷ See Havasy, *Relational Fairness*, *supra* note 17, at 761 (“Descriptive [or sociological] legitimacy is subjectively expressed by citizens on their own terms, meaning the legitimacy of an institution is never secure.”).

³⁸ 3 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY*, at 31 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968) [hereinafter WEBER, *ECONOMY AND SOCIETY*] (emphasis added). Weber identifies “belief in the existence of a legitimate order,” along with habit and expediency, as a basis for obedience to authority. *Id.*

³⁹ See MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 382 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1964) [hereinafter WEBER, *THEORY*] (“[T]he basis for every system of authority . . . is [] *belief*.” (emphasis in original)).

⁴⁰ See WEBER, *ECONOMY AND SOCIETY*, *supra* note 38, at 37 (noting that “the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner” is today “the most common form of legitimacy” (emphasis in original)). Elsewhere, Weber asserted that legitimacy also can be rooted in traditional or charismatic authority, although these bases are less common in a modern democratic-bureaucratic state. See WEBER, *THEORY*, *supra* note 39, at 130. Weber listed four bases for the legitimacy of an order:

- (a) By tradition; a belief in the legitimacy of what has always existed; (b) by virtue of affectual attitudes, especially emotional, legitimizing the validity of what

Legal legitimacy is rooted in adherence to legal norms.⁴¹ “That which is lawful is also legitimate,” Fallon declared.⁴² Government action can be legally erroneous without being illegitimate, however, because “illegitimacy typically implies a strong condemnation not warranted by all legal errors.”⁴³ Deciding whether challenged statutes or regulations possess legal legitimacy is a workaday task of courts, performed by consulting legal texts.⁴⁴

Finally, *moral legitimacy* holds that an institution’s legitimacy is grounded in the extent to which it is morally justifiable or worthy of recognition.⁴⁵ According to Professor Randy Barnett, an institution possesses moral legitimacy “if it creates commands that citizens have a moral duty to obey.”⁴⁶ Although direct appeals to moral legitimacy remain relatively uncommon among administrative lawyers,⁴⁷ recent scholarship by Professor Blake Emerson, Professor Christopher Havasy, and others suggests that the tide may be turning.⁴⁸

For some, an institution’s moral legitimacy hinges on the extent to which it is committed to particular substantive values.⁴⁹ For

is newly revealed or a model to imitate; (c) by virtue of a rational belief in its absolute value . . . ; (d) because it has been established in a manner which is recognized to be *legal*.

Id. (emphasis in original). All four bases involve people’s beliefs. *See generally* Martin E. Spencer, *Weber on Legitimate Norms and Authority*, 21 BRITISH J. SOCIO. 123 (1970) (summarizing Weber’s claims regarding legitimacy).

⁴¹ *See* Leslie Green, *Law, Legitimacy, and Consent*, 62 S. CAL. L. REV. 795, 796–97 (1989) (“[L]aw claims authority and [] its subjects owe a correlative duty of obedience.”).

⁴² Fallon, *Legitimacy*, *supra* note 34, at 1794; *see also* McKinley, *supra* note 4, at 1607–09 (summarizing legal scholars Henry Hart and Albert Sacks’s legal process claim that the structures and processes used to generate laws is what endows those laws with legitimacy).

⁴³ Fallon, *supra* note 34, at 1794.

⁴⁴ *See id.* at 1842–43.

⁴⁵ *See id.* at 1796; JÜRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 178 (Thomas McCarthy trans., 1979) (“Legitimacy means a political order’s worthiness to be recognized.” (emphasis omitted)).

⁴⁶ Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 116 (2003).

⁴⁷ *Cf.* Bagley, *supra* note 32, at 371.

⁴⁸ *See* Havasy, *Relational Fairness*, *supra* note 17, at 764–67; Blake Emerson, *Public Care in Public Law: Structure, Procedure, and Purpose*, 16 HARV. L. & POL’Y REV. 35, 66 (2021) (“Administrative reasoning should (re)learn to incorporate . . . a pluralistic understanding of moral and political values.”); EMERSON, THE PUBLIC’S LAW, *supra* note 1, at 150 (presenting, approvingly, an intellectual history of Progressive Era scholars’ views on legitimacy, including that “administrative power is legitimate to the extent that it enables us to be free, in the sense of determining our commitments and plans”).

⁴⁹ *See* Joachim J. Savelsberg, *Cultures of Control in Contemporary Societies*, 27 LAW & SOC. INQUIRY 685, 705–06 (2002) (book review); William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 747 (1991) (discussing the view that “the legitimacy of government rests primarily upon the values it represents, and not upon its procedural pedigree”).

instance, Barnett's conception of moral legitimacy centers around individual liberty. For him, a legal system possesses legitimacy "only if the constitutional processes used to enact laws provide good reasons to think that a law restricting freedom is necessary to protect the rights of others without improperly infringing the rights of those whose liberty is being restricted."⁵⁰ By contrast, Progressive Era thinkers' conceptions of administrative legitimacy emphasize the administrative state's ability to "guarantee individual *and collective* freedom."⁵¹ For others, adherence to procedures that promote favored values contributes to moral legitimacy.⁵²

In some respects, the categories of sociological, legal, and moral legitimacy are distinct. For instance, a decision's sociological legitimacy cannot cure a deficit of moral or legal legitimacy; something can be popular but morally wrong or unlawful. Further, that many lawful acts throughout history have been deeply immoral instantiates that legal and moral legitimacy are discrete concepts.

In other ways, however, the categories are intertwined.⁵³ Consider sociological legitimacy. On its surface, that concept focuses on the beliefs of relevant members of the public, not normative ideals (as with moral legitimacy) or legal-positive formalisms (legal legitimacy) to justify government power. But from where do members of the public derive their beliefs? In answering that question, some theorists bridge sociological and moral legitimacy.⁵⁴ After all, a person's endorsement of an authority as legitimacy may be rooted in that person's values.

⁵⁰ Barnett, *supra* note 46, at 146.

⁵¹ EMERSON, *supra* note 1, at 21 (emphasis added).

⁵² See Eric W. Orts, *Positive Law and Systemic Legitimacy: A Comment on Hart and Habermas*, 6 *RATIO JURIS* 245, 267–68 (1993) (summarizing philosopher Jürgen Habermas's view). Professor Eric Orts provided several examples of procedures that can confer moral legitimacy: a deliberative process, fair legislative voting rules, due process in adjudications, and well-reasoned judicial opinions. See *id.* at 268. Admittedly, connecting liberal-legalistic procedural measures to moral legitimacy can introduce some conceptual slippage. To the extent that these procedures are legally required or perceived by a segment of the public as legitimacy-enhancing, they also sound in legal and sociological legitimacy. In addition, when these procedures generate normatively bad outcomes, their normative legitimacy is called into question. See Havasy, *Relational Fairness*, *supra* note 17, at 761; RONALD DWORKIN, *LAW'S EMPIRE* 190–92 (1986).

⁵³ See BEETHAM, *supra* note 35, at 15 (asserting that the concept of legitimacy "is multi-dimensional in character").

⁵⁴ See, e.g., Greene, *supra* note 31, at 69 (proposing a "quality assent" theory of legitimacy that blends sociological and moral conceptions); BEETHAM, *supra* note 35, at 11 (contending that a "power relationship is not legitimate because people believe in its legitimacy, but because it can be justified in terms of their beliefs" (emphasis in original)); ROD-

Others connect sociological legitimacy to legal legitimacy. When lawyers challenge the legality of the administrative state,⁵⁵ their pronouncements may erode support for administrative agencies among the broader public.⁵⁶ In this way, challenges to an institution's legal legitimacy have the potential to strain its sociological legitimacy.

Just as legal legitimacy can influence sociological legitimacy, so too can sociological legitimacy affect the extent to which arguments concerning legal legitimacy gain traction. As Professor Nicholas Bagley explained, "an agency's widespread public acceptance tends to deflate objections to an agency's legal legitimacy."⁵⁷ Conversely, efforts to boost agencies' legitimacy among the public may lessen the rhetorical force of challenges to those agencies' legal legitimacy.

Although sociological legitimacy shares the stage with other theories of legitimacy, legal scholars tend to view legitimacy through a sociological lens.⁵⁸ When theorists in the administrative

NEY BARKER, POLITICAL LEGITIMACY AND THE STATE 11 (1990) (asserting that people consider a decision to be legitimate when the decision-maker is "believed in some sense to have moral authority").

⁵⁵ See Metzger, *supra* note 10, at 17–33 (cataloging these challenges).

⁵⁶ See *id.* at 5 (arguing that these challenges from legal elites "can have an outsized effect by sowing doubts about administrative legitimacy"); Bagley, *supra* note 32, at 379 ("Sociological legitimacy turns in part on whether lawyers avow that it is legally legitimate, at least to the extent that the broader public cares what lawyers think."); see also Richard Lowenthal, *Political Legitimacy and Cultural Change in West and East*, 46 SOC. RSCH. 401, 404 (1979) (discussing the claim that people's beliefs concerning a government decision's legitimacy depend in part on whether they consider the decision to have been made in the proper legal form); WEBER, THEORY, *supra* note 40, at 130 (defining formal legitimation to hold that people believe an enactment to be legitimate when they consider the enactment "ha[ving] been established in a manner which is recognized to be *legal*" (emphasis in original)).

⁵⁷ Bagley, *supra* note 32, at 379.

⁵⁸ See, e.g., EDWARD H. STIGLITZ, THE REASONING STATE 196 (2022) [hereinafter STIGLITZ, THE REASONING STATE] (stating that "the key [to the concept of legitimacy] to many scholars is the acceptance of or acquiescence to decisions made by others"); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1387 (2001) (asserting, in discussing the legitimacy of judicial decisions, that social legitimacy "asks whether those decisions are widely understood to be the correct ones," and that "those concerned with [] legitimacy . . . cannot ignore . . . public reaction"); Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87, 101 (2016) (defining legitimacy as "recognition that . . . [an] authority to govern is appropriate, proper, and just," with Professor Chen concurring with Weber's focus on the perceptions of "everyday citizens"); Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 859–60 (1996) (emphasizing designing processes that "the public considers legitimate"); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1625 (1985) (explaining that "legitimiz[ing] administrative decisions" entails "inspir[ing] confidence among citizens"); see also Cynthia R. Farina, *The Consent of*

law canon—for example, Professor James Landis,⁵⁹ Professor Louis Jaffe,⁶⁰ and Justice Elena Kagan⁶¹—advance their respective visions of agency legitimacy, they mostly eschew moral and legal-positivist arguments.⁶² Instead, according to Professor Adrian Vermeule, this “mainstream of the theoretical discourse” emphasizes “sociological legitimacy, acceptance by the broad mass of the public.”⁶³ For instance, Jaffe asserted that “[t]he availability of judicial review is the necessary condition, *psychologically if not logically*, of a system of administrative power which purports to be legitimate.”⁶⁴ This emphasis on psychology—on people’s perceptions and beliefs—sounds in the register of sociological legitimacy.⁶⁵

Contemporary legal scholars also focus on sociological legitimacy. Nicholas Bagley viewed legitimacy as “aris[ing] . . . from the *perception* that an agency” possesses good qualities.⁶⁶ As such, its audience includes “those subject to the agency’s commands, those whose interests the agency protects, and the public at large.”⁶⁷ For Professor Tom Tyler, “unlike influence based upon the influencer’s possession of power or resources, the influence motivated by legitimacy develops from within the person who is being influenced.”⁶⁸ Many other legal scholars agree that an institution’s legitimacy is rooted, in substantial part, in the public’s views of it.⁶⁹

the Governed: Against Simple Rules for a Complex World, 72 CHI.-KENT L. REV. 987, 989 (1997) [hereinafter Farina, *Consent*] (summarizing, without endorsing, “recent legitimation literature [in which] the will of the people plays a central role”); FREEDMAN, *supra* note 3, at 10 (asserting that legitimacy “is concerned [in part] with popular attitudes toward the exercise of governmental power,” while also discussing other bases of legitimacy).

⁵⁹ See generally JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

⁶⁰ See generally LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965).

⁶¹ See generally Kagan, *supra* note 16.

⁶² See Vermeule, *supra* note 11, at 2463 n.1 (asserting that these scholars “self-consciously attempt[] to explain, and to understand, sociological legitimacy as a crucial political-psychology precondition for the administrative state’s success”). *But see id.* (recognizing that these scholars may “also address the legal (and to some extent moral) legitimacy of the administrative state”); Havasy, *Relational Fairness*, *supra* note 17, at 772 (noting that the president’s democratic pedigree provides “the only normative component” of then-professor Kagan’s theory).

⁶³ Vermeule, *supra* note 11, at 2488.

⁶⁴ JAFFE, *supra* note 60, at 320 (1965) (emphasis added).

⁶⁵ See Vermeule, *supra* note 11, at 2472. That Jaffe viewed legality as a “premise[]” for legitimacy further indicates that his use of the term goes beyond legal legitimacy. See JAFFE, *supra* note 60, at 324.

⁶⁶ Bagley, *supra* note 32, at 379 (emphasis added).

⁶⁷ *Id.*

⁶⁸ Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 378 (2006) [hereinafter Tyler, *Psychological Perspectives*].

⁶⁹ See *supra* note 58.

The importance of public beliefs to legitimacy—at least, in its sociological conception—implies that whether an institution is legitimate is in part an empirical question. To date, however, legal scholars have not grounded their claims concerning the administrative state's legitimacy in evidence of the public's actual views.⁷⁰ That is a substantial oversight. Without evidence of a broad cross section of Americans' views, claims regarding the sociological legitimacy of various administrative structures are unavailing.

Relatedly, virtually all participants in administrative law's legitimacy discourse are elite legal academics, judges, and other elites.⁷¹ That so many of the claims concerning administrative legitimacy emanating from such a narrow stratum heightens the prospect that these speakers occupy an echo chamber.⁷² Essentially, participants in the discourse may accept that a given structure enhances legitimacy because other elite actors—possessing similar backgrounds and, again, without evidence from those outside of elite circles—also accept it.⁷³

By examining what agency structures nonelite actors associate with legitimacy, this Article offers a course correction. The following Section outlines the three major paradigms concerning administrative legitimacy that scholars and judges deploy. After laying this foundation, the next Part presents a set of large-scale experiments aimed at determining which of these paradigms, if any, Americans associate with greater legitimacy.

B. Legitimacy Paradigms

Claims regarding how to enhance the legitimacy of the administrative state are a leitmotif in administrative law scholarship. A substantial fraction of these claims can be classified into

⁷⁰ See, e.g., Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 126–27 (2000) (“It is difficult to know what the ‘general public’ or median voter thinks of the regulatory process, given that most complaints about its legitimacy or illegitimacy come from either insiders, like lawyers, regulators, and politicians, or from academics, who represent only a narrow class of outsiders.”).

⁷¹ See Vermeule, *supra* note 11, at 2463 (“In American legal theory there is a rich intellectual tradition . . . that attempts to answer . . . questions about the administrative state, and the Harvard Law School has historically been central to the enterprise.”).

⁷² See Wallach, *supra* note 4, at 17 (“[T]he kind of lawyerly steps taken to secure legitimacy among the community of elite American lawyers were always rejected as overly sterile by other important communities.”).

⁷³ See Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 389 (1983) (stating that “find[ing] evidence of legitimacy in the public rhetoric of political elites . . . is extremely common among scholars”).

one of three categories.⁷⁴ First, the *expertise paradigm* emphasizes, inter alia, civil service protections that insulate civil servants from political principals. Second, the *participation paradigm* spotlights notice-and-comment rulemaking, among other measures opening the door to interested parties to participate in agency decision-making. Finally, the *presidential administration paradigm* focuses on greater presidential control over appointments and removals, along with centralized White House review of agencies' proposals.

To be sure, these three paradigms are not the only possible bases for agency legitimacy. Part IV.D.2.d discusses other potential founts of agency legitimacy, including judicial review, fidelity to valid statutory delegations, and responsiveness to the current Congress. Nonetheless, the competing claims that expertise, public participation, and presidential involvement serve to legitimize administration have predominated over a century of administrative law. This Section expands on each paradigm in turn.

1. Expertise.

Legal scholars' search to legitimate the administrative state began in nineteenth century Europe,⁷⁵ then crossed the pond and gained steam during the Progressive and New Deal eras.⁷⁶ Max Weber, James Landis, and other luminaries celebrated the legitimizing effect of expert-driven, politically insulated agencies.⁷⁷

⁷⁴ For an alternative, albeit partially overlapping, classification of legitimacy theories in administrative law, see Havasy, *Relational Fairness*, *supra* note 17, at 767–74. See also Shoba Sivaprasad Wadhia & Christopher J. Walker, *Assessing Visions of Democracy in Regulatory Policymaking*, 21 GEO. J.L. & PUB. POL'Y 389, 393–99 (2023) (classifying theories of democratic accountability in administrative law).

⁷⁵ See generally Christopher S. Havasy, *Radical Administrative Law*, 77 VAND. L. REV. (2024) [hereinafter Havasy, *Radical Administrative Law*].

⁷⁶ See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 33 (2009) [hereinafter Watts, *Proposing a Place*] (“During the Progressive Era through the New Deal period, agencies derived their legitimacy from the notion that they were made up of professional and capable government ‘experts’ pursuing the ‘public interest.’” (citation omitted)); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 443 (1987) (stating that the New Deal Era belief in, inter alia, “insulation of public officials . . . legitimated a new set of institutional understandings”).

⁷⁷ See WEBER, *ECONOMY AND SOCIETY*, *supra* note 38, at 956–1003; LANDIS, *supra* note 59, at 154–55 (1938). For a review of Landis's views on the legitimating function of expert, independent agency personnel, see Vermeule, *supra* note 11, at 2466–72. This paradigm also appealed to President Woodrow Wilson, although with greater accommodation of popular influence on agency decision-making. Compare Woodrow Wilson, *Democracy and Efficiency*, 87 ATL. MONTHLY, March 1901, at 298–99 (favoring technocratic governance), with Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 216 (1887) (arguing that “administration . . . must be at all points sensitive to public opinion”).

Although these thinkers' views were more nuanced than the expertise-obsessed caricature of the early twentieth century that remains a conventional wisdom,⁷⁸ the claim that deploying expertise legitimizes administrative agencies nonetheless was central to their thought. As Professor Kathryn Watts summarized this period's dominant perspective, "agencies derived their legitimacy from the notion that they were made up of professional and capable government 'experts' pursuing the 'public interest.'"⁷⁹

Late twentieth- and twenty-first-century jurists and scholars agree. In a dissent joined by three of his colleagues, Justice Stephen Breyer noted that the Supreme Court "has recognized the constitutional legitimacy of a justification that rests agency independence upon the need for technical expertise."⁸⁰ Scholars Elizabeth Fisher and Sidney Shapiro contended that "[t]he legitimacy of public administration depends on its capacity to deliver on the statutory mandates assigned to it."⁸¹ (In their view, capacity is intimately tied to their "[t]hicker [u]nderstanding of [e]xpertise," which includes not only technical knowledge but also "the use of practical reason, informed by experience, to evaluate" evidence and arguments, and "explain how these various considerations have been merged and resolved."⁸²) Other scholars—even those not closely associated with the expertise paradigm—agree that expertise is viewed as an important pillar of administrative legitimacy.⁸³

⁷⁸ See Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2025–28 (2018) [hereinafter Emerson, *Administrative Answers*] (resurfacing a participation-promoting facet of American Progressivism); JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 166–71, 203–19 (1927) (arguing, also from a progressive perspective, that on its own expert-driven governance lacks legitimacy).

⁷⁹ Watts, *Proposing a Place*, *supra* note 76, at 33.

⁸⁰ *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 531 (2010) (Breyer, J., dissenting).

⁸¹ ELIZABETH FISHER & SIDNEY A. SHAPIRO, *ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW* 296 (2020).

⁸² *Id.* at 276.

⁸³ Some of these scholars are closely associated with the expertise paradigm, whereas others are not. See, e.g., Katharine Jackson, *The Public Trust: Administrative Legitimacy and Democratic Lawmaking*, 56 CONN. L. REV. 1, 32–49 (2023) (arguing that agencies' "decision-making autonomy" and, for some agencies, "statutory mandate[s] to regulate in the public interest" show that agency personnel follow the "trustee model of democratic representation," which "lends legitimacy" to their decisions); Sidney A. Shapiro, *Law, Expertise, and Rulemaking Legitimacy: Revisiting the Reformation*, 49 ENVTL. L. 661, 682 (2019) ("Rulemaking is legitimate . . . [inter alia] when an agency has relied on its expertise and expert judgment."); K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 141–42 (2016) [hereinafter RAHMAN, *DEMOCRACY*] ("Regulation is insulated, expert-driven, drawing its legitimacy in part from its very opposition to . . . irrational democratic politics."); Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 117

The expertise paradigm emphasizes two legitimacy-enhancing features of agencies: employment protections for civil servants and reason-giving requirements. First, empowering professional agency staff increases legitimacy by ensuring that decisions are grounded in objective criteria. Appointment to civil service positions must be made based on the merits.⁸⁴ This requirement helps to ensure that the civil service is stocked with subject-matter experts, not appointees' ideological facsimiles.⁸⁵ Further, civil servants cannot be fired or disciplined for political disagreements with their principals.⁸⁶ When supervisors seek to punish civil servants, they must adhere to detailed procedural requirements, which provide civil servants additional protections against political encroachment.⁸⁷ These personnel protections also may contribute to the public's perception of agency personnel as merit-selected, politically insulated, and objective, which in turn can enhance the agencies' legitimacy.⁸⁸

(2007) [hereinafter Mashaw, *Reasoned Administration*] (asserting that “the legitimacy of bureaucratic action resides in its promise to exercise power on the basis of knowledge”); *id.* (“Administrative legitimacy flows primarily from a belief in the specialized knowledge that administrative decisionmakers can bring to bear.”); Sidney Shapiro et al., *supra* note 23, at 465 (arguing that “[e]nlightenment requires recognition of the role of expertise and discursive decision making in the legitimization of administrative discretion”); Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1325 n.126 (2016) (noting, without endorsing, that “scholars have recognized—while also criticizing it as unrealistic—an expertise-based model of legitimacy, in which the dispassionate knowledge of professional bureaucrats was sufficient to constrain agency discretion”); Farina, *Consent*, *supra* note 58, at 1034 (summarizing literature concluding that “[l]egitimacy resides in people's beliefs that their leaders are competent (experts),” among other factors (citation omitted)); Frug, *supra* note 26, at 1278–79, 1318–22 (presenting an “expertise model” of “bureaucratic legitimacy”); Stewart, *supra* note 1, at 1678 (“[E]xpertise’ could plausibly be advocated as a solution to the problem of discretion.”).

⁸⁴ 5 U.S.C. § 3304(a)(1) (providing that applicants gain entry to the competitive service based on a “practical” exam that “fairly test[s] the relative capacity and fitness of applicants”); *id.* at § 3320 (“The nominating or appointing authority shall select for appointment to each vacancy in the excepted service . . . from the qualified applicants in the same manner and under the same conditions required for the competitive service.”). Many agency lawyers, policy analysts, scientists, engineers, and others intimately involved in agency policymaking are in the excepted service. See JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R45635, CATEGORIES OF FEDERAL CIVIL SERVICE EMPLOYMENT: A SNAPSHOT 4–5 (2019).

⁸⁵ See generally Brian D. Feinstein & Jennifer Nou, *Strategic Subdelegation*, 20 J. EMPIRICAL LEGAL STUD. 746 (2023) [hereinafter Feinstein & Nou, *Strategic Subdelegation*].

⁸⁶ See 5 U.S.C. § 7513(a) (providing that agencies can take action against employees “only for such cause as will promote the efficiency of the service”).

⁸⁷ See *id.* § 7513(b)–(e).

⁸⁸ See Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1659 (2019) (“Agencies [] build their own legitimacy from within, for example, by developing cultures of professionalism and expertise.”); RAHMAN, DEMOCRACY, *supra* note 83, at 145; DANIEL CARPENTER, REPUTATION

Agency design features intended to buttress politically insulated experts' role in decision-making also are seen as legitimizing. For instance, writing in dissent in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,⁸⁹ Justice Breyer asserted that independent agencies' for-cause removal protections, which "free a technical decisionmaker from the fear of removal without cause," can "create legitimacy . . . [by] insulat[ing] [] technical decisions from nontechnical political pressure."⁹⁰

Second, reason-giving requirements legitimize agencies' decisions because they demonstrate that the agency brought its expertise to bear on the matter.⁹¹ Congress and the courts recognize the importance of ensuring that agencies' decisions are the products of expertise. The Administrative Procedure Act of 1946⁹² (APA) directs courts to "hold unlawful" agency action that is "arbitrary [or] capricious"—in other words, actions for which the agency did not act rationally.⁹³ The judicial hard look doctrine requires agencies to justify their decisions. In *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,⁹⁴ that entailed "examin[ing] the relevant data" and providing "an adequate basis and explanation" for their rules.⁹⁵ Essentially, hard look review seeks to ensure that agencies "bring [their] expertise to bear" when making policy decisions.⁹⁶

By compelling agencies to provide evidence and explanations to support their decisions, these requirements encourage agencies to act thoughtfully, basing decisions on objective criteria grounded in reasonable assumptions.⁹⁷ When coupled with civil-service protections that empower expert decision-makers, the expertise-promoting effects of reason-giving requirements are

AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 623–24 (2010).

⁸⁹ 561 U.S. 477 (2010).

⁹⁰ *Id.* at 522 (Breyer, J., dissenting); *see also id.* at 498 (summarizing the dissent's argument that an independent-agency feature justified based on "the need for technical expertise" is constitutionally legitimate).

⁹¹ *See* Josh Chafetz, *Constitutional Maturity, or Reading Weber in the Age of Trump*, 34 CONST. COMMENT. 17, 20 (2019) (stating, in summarizing Weber's view of the centrality of reason-giving in bureaucracies, that "bureaucratic action is illegitimate without some statement of reasons").

⁹² Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

⁹³ 5 U.S.C. § 706(2)(A).

⁹⁴ 463 U.S. 29 (1983).

⁹⁵ *Id.* at 34, 43.

⁹⁶ *Id.* at 54.

⁹⁷ *See* Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 325–26 (2013).

amplified. In combination, this push toward technocratic decision-making, the argument goes, bolsters agencies' legitimacy.⁹⁸ Indeed, APA requirements and judicial doctrine designed to steer agencies away from arbitrary action and toward rationality and objectivity are central to the expertise paradigm's conception of administrative legitimacy.⁹⁹

2. Participation.

A second legitimacy paradigm emphasizes avenues for public involvement in agency decision-making.¹⁰⁰ For some, public involvement legitimizes agency action because it enables competing interests to jockey for power as they would in Congress.¹⁰¹ Others consider how providing opportunities to participate advances citizens' dignitary interests, thus boosting agencies' legitimacy.¹⁰² Still others posit that public participation legitimizes agency decisions by encouraging them to better reflect public preferences.¹⁰³

⁹⁸ See Chafetz, *supra* note 91, at 21 (“The rationality of bureaucracy [] serves a legitimating function.”); JERRY MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 180 (2018) (“[R]easoned administration represents a triumph of legitimate, liberal administrative governance.”); Hammond & Markell, *supra* note 97, at 349 (asserting that reason-giving “does heavy lifting for legitimacy”); *id.* at 322–23 (noting that reasoned decision-making is “one of administrative law’s ultimate legitimizers”); Louis J. Virelli III, *Scientific Peer Review and Administrative Legitimacy*, 61 ADMIN. L. REV. 723, 727 (2009); (arguing that “administrative peer review” enhances “the legitimacy of administrative decisions based on scientific information”); 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.”); Mashaw, *Reasoned Administration*, *supra* note 83, at 116 (observing that reason-giving requirements are “fundamental to [agencies] moral and political legitimacy”); Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 240 (1984) (asserting that the requirement that agencies provide factual support for their regulations “can convey upon them “a kind of legitimacy that the legislative process cannot”).

⁹⁹ See Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1820 (2012) (summarizing this view as claiming “reason-giving requirement[s] . . . enhance[] the legitimacy of agency decisions by rationalizing them”); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 464 (2003) [hereinafter Bressman, *Beyond Accountability*] (stating that this emphasis “lies at the core of [] a theoretical justification of administrative legitimacy”); Bruff, *supra* note 98, at 238 (asserting that hard look review can play a “legitimizing role”).

¹⁰⁰ See Stewart, *supra* note 1, at 1712; Frug, *supra* note 26, at 1283–84.

¹⁰¹ See Croley, *supra* note 9, at 31–34; Frug, *supra* note 26, at 1374.

¹⁰² See Freeman & Langbein, *supra* note 70, at 67 (asserting, in a discussion of negotiated rulemaking, that “involvement in a process enhances perceptions of legitimacy among participants, independently of whether outcomes ultimately favor [them]”).

¹⁰³ See Michael Sant’Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 843 (2021) (“Enhancing public engagement with agenda setting

The unifying feature of all these views is a belief that allowing broad and meaningful participation in agency decision-making legitimizes the agencies' eventual decisions.¹⁰⁴

Notice-and-comment rulemaking is a primary extant mechanism for this paradigm.¹⁰⁵ The APA—a statute “credited with broadly legitimizing administrative governance,” per Professor Gillian Metzger¹⁰⁶—generally requires that an agency aiming to promulgate a rule provide public notice of the proposed rule and give “interested persons an opportunity to participate . . . through submission of written data, views, or arguments.”¹⁰⁷ Only “[a]fter consideration of the relevant matter presented” may the agency issue a final rule.¹⁰⁸

According to Professor Bruce Ackerman, the notice-and-comment requirement “recognizes that regulatory decisionmaking

and rule development will lend greater democratic accountability and legitimacy to policymaking than other remedies for the administrative state’s ‘democracy deficit.’”); Seifter, *supra* note 83, at 1322 (summarizing this view); Mendelson, *Rulemaking*, *supra* note 22, at 1343 (“An agency’s public proposal of a rule and acceptance of public comment prior to issuing the final rule can help us view the agency decision as democratic and thus essentially self-legitimizing.”); *cf.* McKinley, *supra* note 4, at 1609 (arguing that the right to petition legislatures bolsters legitimacy).

¹⁰⁴ See Stewart, *supra* note 1, at 1712 (“Agency decisions made after adequate consideration of all affected interests would have, in microcosm, legitimacy based on the same principle as legislation.”).

¹⁰⁵ See *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981) (stating, while declining to limit *ex parte* communications in informal rulemaking beyond the limitations in the APA, that “[u]nder our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public”); *Citizens to Save Spencer Cnty. v. EPA*, 600 F.2d 844, 873 (D.C. Cir. 1979) (“Without rulemaking or some comparable procedure, the [decision] . . . would have lost the ‘saving grace’ of notice, public participation, and comment by affected parties, and as a result would also have lost [its] legislative legitimacy.”); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978) (grounding the legitimacy of the rulemaking process in the APA’s mandate of “openness, explanation, and participatory democracy”); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 451 (2010) (describing this model as considering “the public’s direct participation in notice-and-comment rulemaking proceedings under the APA” as “a source of democratic legitimacy”); Seifter, *supra* note 83, at 1308 (labeling notice-and-comment “the most well-known and heralded form of administrative participation”).

¹⁰⁶ Metzger, *supra* note 10, at 62; see also Sohoni, *supra* note 22, at 938–39 (“The APA’s safeguards and restrictions on agency action are widely accepted as playing a critical role in . . . legitimating administrative decision making.”).

¹⁰⁷ 5 U.S.C. § 553(c). The APA is a transsubstantive “superstatute” governing the procedures by which agencies make policy. Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1209–10 (2015).

¹⁰⁸ 5 U.S.C. § 553(c).

needs special forms of legitimation that enhance popular participation.”¹⁰⁹ An open notice-and-comment process, coupled with careful study of the comments received and publication of a report with fulsome responses to major comments, serves that need.¹¹⁰ Conversely, when agencies do not utilize notice-and-comment procedures—for instance, when they issue nonlegislative rules or publish guidance documents that are not subject to the APA—their decision to forgo notice-and-comment “jeopardizes administrative legitimacy,” according to Professor Lisa Schultz Bressman.¹¹¹ Other scholars urge agencies to go beyond the APA’s notice-and-comment requirement and implement innovative ways for members of the public to participate in rulemakings in the name of bolstering legitimacy.¹¹²

The participation paradigm also bears on adjudications. The APA provides opportunities for interested parties to submit facts and arguments,¹¹³ and, in some circumstances, participate in a hearing before independent adjudicators and involving court-like procedural rights.¹¹⁴ Courts in the 1960s and 1970s layered new public-participation requirements on agency adjudications. For instance, courts interpreted statutes that require a “public hearing” to mandate that regulated interests and public interest groups be able to provide statements and ask written questions,

¹⁰⁹ Ackerman, *supra* note 22, at 697; *accord* Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 20 (2012) (calling notice-and-comment rulemaking “a crucial way to ensure that agency decisions are legitimate, accountable, and just”).

¹¹⁰ See Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 139 (2016); JOHN A. ROHR, *TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE* 167 (1986).

¹¹¹ Bressman, *Beyond Accountability*, *supra* note 99, at 546; *accord* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 9–10 (1997) [hereinafter Freeman, *Collaborative Governance*] (asserting that guidance documents and other regulatory instruments not subject to notice and comment “threaten to [] undermine the legitimacy of the rules produced by removing even the pretense of public access and participation”). By contrast, when an agency is not required to engage in notice-and-comment, its discretionary decision to “listen and respond to parties’ arguments should bolster [its] legitimacy.” Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. 1497, 1505 (1992).

¹¹² See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 440 (2004) (claiming that greater use of “e-rulemaking” would “increase[] public participation and democratic legitimacy”); Freeman, *Collaborative Governance*, *supra* note 111, at 96–97 (arguing that “government should cultivate the capacity of nongovernmental groups” to boost “direct participation in governance” and “increase[] legitimacy”); Hammond & Markell, *supra* note 97, at 330–50 (analyzing the legitimizing effects of the EPA’s procedure allowing citizens to file petitions to withdraw).

¹¹³ See 5 U.S.C. § 554(c).

¹¹⁴ See *id.* §§ 556–557.

finding that these participation-enhancing procedures provide “a meaningful opportunity to be heard.”¹¹⁵ These adjudicatory procedures, like the rulemaking procedures discussed *supra*, are largely designed to ensure that outside parties can participate in agency decision-making.

For proponents of the participation paradigm, these measures to expand participatory opportunities in adjudications also can boost agencies’ perceived legitimacy.¹¹⁶ This idea connects to Professor Tom Tyler’s work linking procedural rigor with sociological legitimacy.¹¹⁷ Although Professor Tyler wrote largely in the context of judicial proceedings, his core finding that granting process rights to parties boosts their perceptions of a tribunal’s legitimacy should apply to agency adjudications as well. Indeed, a sizable administrative law literature links procedural rigor with agency legitimacy.¹¹⁸

In summary, notice-and-comment rulemaking, procedural rights for parties in adjudications, and other participation-enhancing mechanisms are linchpins of administrative law. Administrative lawyers assert that their presence legitimizes agency action. Their absence, by contrast, “has consequences for the legitimacy . . . of the federal bureaucracy,” according to Professors Daniel Farber and Anne Joseph O’Connell.¹¹⁹

3. Presidential administration.

White House control over agencies offers a third legitimacy paradigm. On this view, greater presidential involvement bolsters agency legitimacy because the president is accountable to the people via elections, and electoral accountability is the ultimate source of government’s legitimacy in a democracy.¹²⁰ As Professor Owen Fiss wrote in the early 1980s, the formative years for

¹¹⁵ See, e.g., *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 630–31 (D.C. Cir. 1973).

¹¹⁶ See Seifter, *supra* note 83, at 1302 (“[C]ourts and commentators celebrate participation as a crucial way to help legitimate the administrative state.”); *id.* at 1318–19; Stewart, *supra* note 1, at 1670–71 (“The traditional conception of administrative law . . . bespeak[s] a common social value in legitimating, through controlling rules and procedures, the exercise of power.”).

¹¹⁷ See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 115–24 (1990) [hereinafter TYLER, *WHY PEOPLE OBEY THE LAW*].

¹¹⁸ See Bagley, *supra* note 32, at 369–89 (providing a critical overview of this literature).

¹¹⁹ Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014) (asserting that these consequences arise from a divergence between the “actual workings of the administrative state [and] . . . the assumptions animating the APA and classic judicial decisions that followed”).

¹²⁰ See Mashaw, *Reasoned Administration*, *supra* note 83, at 116 (“[A]dministrative legitimacy lies in tracing administrative authority to the mandate of democratically

this theory, elected officials “derive their legitimacy from their responsiveness to popular will, and bureaucratization acts as a screen that impairs [agencies’] responsiveness.”¹²¹

In theory, the notion that a democratic link to the people—“the only legitimate fountain of power,” in President James Madison’s words¹²²—legitimizes agencies should apply equally to congressional and presidential control. Both are democratically elected branches, and thus presumably both are capable of injecting a measure of democratic legitimacy into the administrative state. This paradigm’s proponents, however, tend to focus on the president as the deliverer of democratic legitimacy to the administrative state, with Congress’s ongoing, post-enactment role being reduced to that of a bit player at best.¹²³

Today, the presidential administration model is the dominant paradigm for legitimating agency action.¹²⁴ The paradigm constitutes a cross-ideological project, containing both conservative “unitary executive” theorists and at least some liberal adherents of “presidential administration.”¹²⁵ This project goes beyond

elected institutions.”); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 150–56 (1997).

¹²¹ Fiss, *supra* note 19, at 1443.

¹²² THE FEDERALIST NO. 49, at 339 (James Madison) (Jacob E. Cooke ed., 1961).

¹²³ See Farina, *Consent*, *supra* note 58, at 988 (recognizing that courts and commentators increasingly look to “the President alone” to “supply the elusive essence of democratic legitimation” to agencies). *But see* Watts, *Proposing a Place*, *supra* note 76, at 63–65 (noting that congressional oversight promotes legitimacy); Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1048–49 (2015) [hereinafter Watts, *Rulemaking*] (“[M]any have come to see the legitimacy of the administrative state as hinging on the notion that agencies are politically accountable because of their relationship with Congress and the President.” (emphasis added)); Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 728 (2009) (explaining that *Massachusetts v. EPA*, 549 U.S. 417 (2007), and other contemporaneous Supreme Court cases “reviewing administrative action and reinforcing Congress’s primacy” as “best explained as a continuing . . . reaffirmation of the superior legitimacy of Congress as policymaker”).

¹²⁴ See Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 53 (2006) (noting that “legal scholars . . . give[] [the presidential administration model] more credence for enhancing agency legitimacy than previous theories”); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1676 (2004) [hereinafter Bressman, *Judicial Review*] (referring to “presidential control” as the “prevailing [] theory” regarding how “agency legitimacy is best achieved”). Nonetheless, the model has its share of critics. See Bressman, *Beyond Accountability*, *supra* note 99, at 463 n.3 (collecting citations).

¹²⁵ See Kagan, *supra* note 16, at 2319–63 (articulating the latter view); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58–59 (1995) (articulating the former view); see also Bressman & Vandenbergh, *supra* note 124, at 53 (noting that the model has “bipartisan political appeal”); Bressman, *Judicial Review*, *supra* note 124, at 1677 (“All or nearly all scholars—whether originalists or pragmatists, Democrats or Republicans—now endorse the presidential control model as a critical means for enhancing agency legitimacy.”).

assertions that presidential control is constitutionally required (although many proponents do make that claim¹²⁶) to also sound in the register of legitimacy. According to conservative legal scholar Steven Calabresi, the president's accountability to a national electorate provides her with a "unique claim to legitimacy," and thus a directorial role in the administrative state.¹²⁷ Judge Laurence Silberman, a leader in the conservative legal movement for decades,¹²⁸ goes even further; he claims that even independent agencies derive a measure of legitimacy from the president's appointment, with the Senate's consent, of these agencies' leaders.¹²⁹ On the left, Professor (now Justice) Elena Kagan authored perhaps the definitive brief in favor of presidential control, arguing that "electorally accountable institutions"—she means the presidency—"most possess the legitimacy that [] administration requires."¹³⁰ By contrast, "relying on internal expertise" from a cloistered agency bureaucracy "provoke[s] serious questions about . . . the legitimacy [] of agency action."¹³¹ A wide array of legal scholars agree.¹³²

Further, the *Chevron* doctrine, which guided the Supreme Court's analysis of agency decisions for nearly four decades and still endures in the circuit courts,¹³³ also is grounded in the notion that control by a politically accountable president legitimates agency actions.¹³⁴ In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹³⁵ the Court held that courts should defer to

¹²⁶ See, e.g., *Free Enter. Fund*, 561 U.S. at 492; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 581–82 (1994).

¹²⁷ Calabresi, *supra* note 125, at 59.

¹²⁸ See Jean McElwee Cannon, *Papers of Influential Conservative Judge Laurence Silberman Arrive at Hoover*, HOOVER INST. LIBR. & ARCHIVES (Feb. 17, 2023), <https://perma.cc/3PSW-ZEUZ>.

¹²⁹ See Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823–24 (1990) (claiming that the political branches' mechanisms for influencing independent agencies grant "political legitimacy" to those agencies).

¹³⁰ Kagan, *supra* note 16, at 2341; see also Short, *supra* note 99, at 1814 (referring to Justice Kagan's account as "the signal case for 'presidential administration'").

¹³¹ Kagan, *supra* note 16, at 2264. Professor Nina Mendelson turned that argument on its head, positing that since the institutional presidency is its own bureaucracy—and a particularly opaque one at that—increased White House control could reduce agency legitimacy. See Nina A. Mendelson, *Another Word on the President's Statutory Authority over Agency Action*, 79 FORDHAM L. REV. 2455, 2479–80 (2011).

¹³² See Bressman, *Judicial Review*, *supra* note 124, at 1675–77 nn.96–100 (collecting citations).

¹³³ See Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits Are Still Two-Stepping by Themselves*, YALE J. ON REGUL.: NOTICE & COMMENT (Dec. 18, 2022), <https://perma.cc/4BCP-CAHX> (describing the circuit courts' continued application of the *Chevron* framework and the Supreme Court's silence).

¹³⁴ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

¹³⁵ 467 U.S. 837 (1984).

agencies' reasonable interpretation of ambiguous statutes because judges, "who have no constituency [] have a duty to respect legitimate policy choices made by those who do."¹³⁶ In other words, courts should defer to agencies because, "[w]hile agencies are not directly accountable to the people, the Chief Executive is."¹³⁷ Essentially, the Court tethered agencies' legitimacy to presidential control.¹³⁸

The presidential administration framework emphasizes two broad presidential authorities. First, the president's power to appoint and remove (without qualification) agency officials enhances agencies' legitimacy.¹³⁹ For instance, in *Arthrex*, a leading separation-of-powers case, the Supreme Court held that certain patent officials' exercise of unreviewable authority is unconstitutional because it is not "subject to the direction and supervision" of a political appointee.¹⁴⁰ As the *Arthrex* Court explained, when officers in administrative agencies "wield executive power . . . [t]hat power acquires its legitimacy . . . through a clear and effective chain of command down from the President, on whom all the people vote."¹⁴¹

Second, White House review of proposed rules from executive agencies tethers those agencies more closely to the president, thus boosting their legitimacy.¹⁴² This review occurs

¹³⁶ *Id.* at 866.

¹³⁷ *Id.* at 865.

¹³⁸ See Emily Hammond, *Chevron's Generality Principles*, 83 FORDHAM L. REV. 655, 657 (2014) (asserting that *Chevron* "suggests that administrative expertise and superior political accountability . . . promote legitimacy"); Nina A. Mendelson, *Disclosing 'Political' Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1138 (2010) [hereinafter Mendelson, *Disclosing*] ("When judges review agency action [under *Chevron*] [] the backdrop of potential presidential influence seems to confer greater legitimacy on an agency decision." (emphasis in original)); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 112 n.60 (2000) (noting that *Chevron* and other judicial decisions "tie the legitimacy of agency decisionmaking to agencies' accountability to elected politicians").

¹³⁹ See Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 54, 68 (2008) (summarizing, but not endorsing, the view that greater presidential control enhances agencies' legitimacy, and identifying appointment and removal as tools to effectuate presidential control).

¹⁴⁰ *Arthrex*, 141 S. Ct. at 1988.

¹⁴¹ *Id.* at 1979 (quotation marks omitted) (quoting *Free Enter. Fund*, 561 U.S. at 498); see also *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020) ("Through the President's oversight, 'the chain of dependence [is] preserved,' so that 'the lowest officers, the middle grade, and the highest' all 'depend, as they ought, on the President, and the President on the community.'" (citation omitted)); Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 630 (2021) (characterizing the *Seila Law* Court as "suggesting that, absent [] pervasive executive control [over agencies], the constitutional legitimacy of administrative governance is in doubt").

¹⁴² See Bressman & Vandenberg, *supra* note 124, at 52–53.

through cost-benefit analysis conducted by the White House's Office of Information and Regulatory Affairs (OIRA).¹⁴³ In brief, OIRA reviews economically and politically significant proposed regulations and rejects those for which expected costs exceed expected benefits.¹⁴⁴ OIRA review also enables presidential advisors from, for example, the White House Counsel's Office, Domestic Policy Council, and National Economic Council to shape regulations.¹⁴⁵ According to Judge (and former OIRA director) Neomi Rao, by "checking . . . the particular and narrow interests of a single agency," OIRA review "improv[es] the legitimacy of the ultimate regulatory decision."¹⁴⁶

Although presidential administration has been the dominant administrative legitimacy paradigm in recent decades, it is important to acknowledge that specific judges and scholars rarely endorse its full slate of features. Yet many of these actors nonetheless find something to like in this paradigm. Consider legal actors' positions on *Chevron* deference versus presidential control of executive branch personnel. Today, legal elites' views on the propriety of applying *Chevron* evince an ideological divide, with critiques of the doctrine—including those based in part on the claim that it grants the White House an improper role in administration¹⁴⁷—emanating mainly from the right.¹⁴⁸ The ideological valence of the Court's recent appointments and removals jurisprudence is essentially the mirror image of the *Chevron* battle lines, with conservative Justices tending to favor greater presidential control over agencies and liberal ones often favoring greater insulation.¹⁴⁹ Conservative jurists' embrace of greater presidential control

¹⁴³ See Croley, *supra* note 9, at 109–10.

¹⁴⁴ See Neomi Rao, *The Hedgehog & the Fox in Administrative Law*, 150 DAEDALUS 220, 225 (2021).

¹⁴⁵ See *id.*

¹⁴⁶ *Id.* at 227.

¹⁴⁷ Compare *West Virginia v. EPA*, 142 S. Ct. 2587, 2617–18 (2022) (Gorsuch, J., concurring) (asserting that granting agencies broad deference on statutory interpretation matters involving "major questions" unduly elevates "the will of the current President" and leads to "laws [] more often bear[ing] the support only of the party currently in power"), *with id.* at 2634–35 (Kagan, J., dissenting) (contending, approvingly, that a leading case concerning the "major questions doctrine" fits within the *Chevron* framework).

¹⁴⁸ See Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 523–34 (2022) (describing this ideological cleavage among contemporary legal actors' views concerning *Chevron*).

¹⁴⁹ See, e.g., *Arthrex*, 141 S. Ct. at 1970 (five out of six conservative Justices in the majority, with three liberal Justices joining the sixth conservative Justice in dissent); *Seila Law*, 140 S. Ct. at 2183 (all five conservatives in the majority, and all four liberals in dissent); *Lucia v. SEC*, 138 S. Ct. 2044, 2044 (2018) (all five conservatives in the majority, joined by two of four liberals); *Free Enter. Fund*, 561 U.S. at 482 (all five conservatives

over personnel means that, in the event that the Court overrules *Chevron*,¹⁵⁰ or merely continues to ignore it,¹⁵¹ judicial support for the presidential administration paradigm will endure.

C. Related Literature

Thus far, this Part has detailed the importance to administrative law of sociological legitimacy, which involves the beliefs of those outside of government regarding the acceptability of a government institution or action. It then classifies the claims that scholars and judges make concerning administrative legitimacy into three paradigms, grounded in expertise, public participation, and presidential administration. The next Part presents a set of experiments to assess the extent to which these paradigms actually change Americans' views regarding the legitimacy of agency decisions.

Imported largely from social psychology, survey experiments have arrived in legal scholarship.¹⁵² Researchers utilize them to probe people's intuitions about a wide variety of legal concepts, from public perceptions of consent in tort and criminal law,¹⁵³ to whether inclusion of certain contractual provisions alters people's views on the propriety of breaching contracts,¹⁵⁴ to how the content of political demonstrations influences whether people view the demonstrations as constitutionally protected speech.¹⁵⁵

Further, survey experiments have arrived in administrative law.¹⁵⁶ In the work that is most similar to this Article, Professor

in the majority, and all four liberals in dissent). Following convention, I label Democrat-appointed Justices as liberal and Republican-appointed ones as conservative.

¹⁵⁰ See *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429, 2429 (2023) (granting certiorari on the question of whether to expressly overrule *Chevron* or limit its scope).

¹⁵¹ See generally Gary Lawson, *The Ghosts of Chevron Present and Future*, 103 B.U. L. REV. 1647 (2023) (noting that the Court last applied *Chevron* to uphold an agency action in 2016).

¹⁵² See Adriana Z. Robertson & Albert H. Yoon, *You Get What You Pay For: An Empirical Examination of the Use of MTurk in Legal Scholarship*, 72 VAND. L. REV. 1633, 1638–44 (2019) (providing an overview of the literature); Lawrence Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464, 2464–65 (2014) (book review) (referring to “the nascent emergence of experimental jurisprudence”).

¹⁵³ See generally Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232 (2020).

¹⁵⁴ See generally Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633 (2010).

¹⁵⁵ See generally Dan M. Kahan, David A. Hoffman, Donald Braman, Danieli Evans & Jeffrey J. Rachlinski, *“They Saw a Protest”: Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012).

¹⁵⁶ See STIGLITZ, THE REASONING STATE, *supra* note 58, 189–242 (presenting experimental results showing that participants in the roles of regulated parties and members of the public tend to rate stylized policy decisions as higher in terms of satisfaction, fairness, and honesty when they are informed of the decision-maker's reasons for its

Edward Stiglitz probed participants' views regarding another party's decision to apportion a resource, a common task in administrative agencies.¹⁵⁷ Among other findings, he reported that when the decision-maker is compelled to supply a reason to justify its decision, participants are more likely to deem that decision satisfactory, fair, and honest.¹⁵⁸ Separate from the substance of the allocative decision, a signal that the decision-maker engaged in credible reasoning bolsters trust in that decision.¹⁵⁹

Other scholars use the method to examine how agency- or topic-specific design features connect to public perceptions of those agencies. For instance, Professors Carola Binder and Christina Skinner conducted an experiment probing how the scope of the Federal Reserve's portfolio bears on the public's confidence in the central bank.¹⁶⁰ Political scientist Eileen Braman found that the president's compliance with constitutional rules is a significant factor in experiment participants' views regarding the legitimacy of unilateral executive action.¹⁶¹ Other experiments suggest that the extent to which the use of procedures that are viewed as fair can bolster the perceived legitimacy of government actions is context dependent.¹⁶²

decisions). *See generally* Benjamin M. Chen & Brian Libgober, *Do Administrative Procedures Fix Cognitive Biases?*, 34 J. PUB. ADMIN. RSCH. & THEORY 105 (2024) (presenting survey experiments showing that the use of cost-benefit analysis and reason-giving requirements reduce participants' cognitive biases in limited circumstances); Edward H. Stiglitz, *Cost-Benefit Analysis and Public Sector Trust*, 24 SUP. CT. ECON. REV. 169 (2016).

¹⁵⁷ *See* STIGLITZ, THE REASONING STATE, *supra* note 58, at 189–242.

¹⁵⁸ *See id.* at 204–05.

¹⁵⁹ For the most part, Stiglitz did not assess which types of administrative structures and processes enhance credibility. *But see id.* at 226–28 (presenting a vignette that includes a cost-benefit analysis). Instead, the “reasons” that participants read serve as conceptual stand-ins for a wide variety of administrative procedures, including that parties receive notice and an opportunity to participate; that the decision be grounded substantially on an administrative record; that the agency provide reasons for its decisions; and that some parties hold a right to appeal the decision. *Id.* at 91. By contrast, this Article presents participants with stylized descriptions of multiple agency features, all of which are grounded in one of the three main legitimacy paradigms, with a reason-giving component included in the vignettes concerning the expertise and participation paradigms.

¹⁶⁰ Binder & Skinner, *supra* note 34, at 29–31, 34. With respect to institutional design questions, Binder and Skinner reported a “connection between support for the President and support for an expanded Fed role,” which “might suggest that those who support the President today may also favor a less presidentially independent Fed.” *Id.* at 37–38.

¹⁶¹ *See* Eileen Braman, *Exploring Citizen Assessments of Unilateral Executive Authority*, 50 LAW & SOC. REV. 189, 214–16 (2016).

¹⁶² *Compare* Aaron Martin, Gosia Mikołajczak & Raymond Orr, *Does Process Matter? Experimental Evidence on the Effect of Procedural Fairness on Citizens' Evaluations of Policy Outcomes*, 43 INT'L POL. SCI. REV. 103, 110–12 (2020) (reporting that procedural fairness enhances the perceived legitimacy of a local transit project in Australia), *with* Peter Esaiasson, Mikael Persson, Mikael Gilljam & Torun Lindholm, *Reconsidering the*

Finally, the topic of how structures and procedures bear on sociological legitimacy has been well studied experimentally in contexts outside of U.S. administrative law. For instance, social psychological research reports that, when actors utilize procedures that people experience as being fair, people are more willing to see those actors as legitimate and thus more willing to accept their decisions.¹⁶³ Researchers have empirically examined the extent to which procedural fairness and other considerations contribute to the perceived legitimacy of, inter alia, specific adjudications, legislative enactments, and human-resource decisions; the Supreme Court and other government and private sector institutions; and entire systems of government and societies.¹⁶⁴

The method is appropriate here. As Part I.A details, judges' and scholars' arguments regarding legitimacy sound largely in the register of public acceptance.¹⁶⁵ Therefore, experiments designed to elicit the public's views offer a useful tool for evaluating the legitimacy paradigms. Indeed, as commentators have cast doubt on the Supreme Court's legitimacy in recent years,¹⁶⁶ judicial scholars have applied similar experimental methods to assess the inputs into the perceived legitimacy of that institution.¹⁶⁷

II. RESEARCH DESIGN

To investigate whether each paradigm enhances agencies' perceived legitimacy, I conduct a series of between-subjects online

Role of Procedures for Decision Acceptance, 49 BRIT. J. POL. SCI. 291, 296–307 (2016) (finding that procedural fairness plays a smaller role in people's willingness to accept decisions of local school administrators in Europe than their personal preferred outcome). A rich qualitative, historical-institutional literature also probes how agency structures affect perceived legitimacy. See generally, e.g., CARPENTER, *supra* note 88.

¹⁶³ See Tyler, *Psychological Perspectives*, *supra* note 68, at 379–80 (summarizing this literature).

¹⁶⁴ See *id.* at 380–81 (providing examples); Tom R. Tyler, *Governing amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 LAW & SOC. REV. 809, 810–12 (1994) [hereinafter Tyler, *Governing amid Diversity*] (same).

¹⁶⁵ See *supra* notes 58–69 and accompanying text.

¹⁶⁶ See Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240 n.1 (2019) (book review) (providing examples of commentators questioning the Court's legitimacy).

¹⁶⁷ See, e.g., David Glick, *Is the Supreme Court's Legitimacy Vulnerable to Intense Appointment Politics? Democrats' Changed Views Around Justice Ginsburg's Death*, 11 J.L. & CTS. 104, 106–12 (2023); Logan Strother & Shana Kushner Gadarian, *Public Perceptions of the Supreme Court: How Policy Disagreement Affects Legitimacy*, 20 THE FORUM 87, 94–103 (2022); Michael J. Nelson & James L. Gibson, *How Does Hyperpoliticized Rhetoric Affect the US Supreme Court's Legitimacy?*, 81 J. POL. 1512, 1513–15 (2019).

experiments.¹⁶⁸ To begin, each participant reads a short, randomly assigned vignette concerning a hypothetical policy decision that an agency faces and announces the agency's eventual decision. After reading the vignette, participants are asked to rate the extent to which they "believe the agency's decision is legitimate" on a seven-point scale, from "strongly agree" to "strongly disagree." They also are asked to rate, on the same scale, the extent to which they "support the agency's decision."¹⁶⁹

These vignettes differ on three dimensions: the features of the agency's decision-making process that participants view, the agency that is the subject of the vignette, and the presidential administration at the time of the agency's decision. Specifically, each participant views a vignette that includes:

- One of five randomly assigned conditions containing features of the agency policymaking process, including three treatment conditions that emphasize elements that scholars claim enhance agency legitimacy: expertise, public participation, and presidential involvement;¹⁷⁰
- One of three agency decisions: a Consumer Financial Protection Bureau (CFPB) payday-lending regulation, a limitation on truckers' work hours by the Department of Transportation (DOT), and an Environmental Protection Agency (EPA) decision to relax pollution controls;
- One of two randomly assigned presidential administrations (President Donald Trump and President Joe Biden) under which the decision was identified as being made.

Parts II.A and II.B describe these manipulations in greater detail and explain the importance of each to the research design. Part II.C concludes with additional information concerning the construction of these survey experiments, including participant recruitment and demographics.

¹⁶⁸ These experiments received an exemption from the University of Pennsylvania Institutional Review Board.

¹⁶⁹ See Stefanie Stantcheva, *How to Run Surveys: A Guide to Creating Your Own Identifying Variation and Revealing the Invisible*, 15 ANN. REV. ECON. 205, 219–20 (2023) (discussing the suitability of a balanced scale with equal numbers of positive and negative answer categories for bipolar ordinal scales like these). The order in which participants view the statements varies randomly.

¹⁷⁰ The other two conditions are a baseline control condition and an active control condition.

A. Operationalizing the Paradigms

The vignettes vary randomly by participant in terms of what features of the agency's decision-making process are included. For some participants, the vignette highlights the involvement of politically insulated, technocratic civil servants in the decision; this text operationalizes the expertise paradigm and is termed the *expertise condition*. Other participants read vignettes that emphasize opportunities for public participation (the *participation condition*) or White House influence (the *presidential administration condition*). Still others read a *baseline control condition*, viz. a bare-bones description of the agency's decision without reference to any paradigms.¹⁷¹ If participants exposed to one of the three treatment conditions—expertise, participation, and presidential administration—provide higher ratings on average than those exposed to the baseline control condition, and the difference is statistically significant, that finding would suggest that the corresponding paradigm bolsters agencies' perceived legitimacy.

This research design assumes that differences in legitimacy scores among participants who view the baseline control condition versus one of the treatment conditions are attributable to the value that participants place on the underlying concepts. As an alternative explanation, however, it is possible that the treatment conditions' greater length—irrespective of their content—influences participants. For instance, participants could infer from a longer condition that the agency was more methodical or thorough in its approach.

To address this concern, I include an *active control condition* that contains a more detailed description of the regulatory process, making this condition's length roughly equivalent to that of the treatment conditions.¹⁷² The substance of this new, low-value text is unlikely to sway participants regarding the merits of the agency action. Importantly, however, because the active control condition and treatment conditions are roughly of equal length, one can compare participants' mean legitimacy scores among these conditions with less concern that each condition's relative length is driving any observed differences in legitimacy scores.

¹⁷¹ See Part I.B for a summary of the primary legitimacy paradigms. For the text of these conditions, see the Appendix.

¹⁷² See *infra* tbl.1 (providing the text of the active control condition). This condition was added to the research design post hoc. Whereas experiments involving all other vignettes were conducted in 2022, the experiments with vignettes containing the active control condition were run in 2023.

1. Expertise.

Table 1 presents the expertise condition for the CFPB vignettes, along with a side-by-side comparison of this condition and the baseline- and active-control conditions. This Article's Appendix contains the text of the DOT and EPA vignettes, which are substantially similar to the CFPB vignettes.

TABLE 1: CONTROL AND EXPERTISE CONDITIONS FOR CFPB
VIGNETTES

Control Conditions (Baseline Control Condition = nonitalicized text; Active Control Condition = all text)	Expertise Condition
<p>The CFPB is a federal agency that regulates lenders.</p> <p><i>One of the ways in which federal agencies like the CFPB make policy is by writing new regulations. Regulations are rules or orders issued by government agencies that have the force of law. After the agency announces a proposed regulation, it may make revisions. Then, the final regulation is published in the Code of Federal Regulations.</i></p> <p>Several years ago, during the [Biden / Trump administration], the agency announced that “high-cost, short-term ‘payday’ loans are unfair because many borrowers aren’t able to pay off the loans on-time. Lenders then charge these borrowers large late fees. Therefore, we are considering new limits on payday loans.”</p> <p>Later, the agency banned most loans with annual interest rates over 36%. <i>The agency enacted this ban by issuing a regulation, taking the steps described above.</i></p> <p>The agency said that banning most high-interest loans will prevent people from having to pay back a loan for longer and at greater cost than they originally expected. But critics say that the ban prevents people from taking out loans that they believe are right for them.</p>	<p>The CFPB is a federal agency that regulates lenders.</p> <p><i>The law requires that the agency’s employees be hired based on their professional training and expertise. The agency cannot hire employees based on their political views. Employees cannot be punished or fired for disagreeing with political leaders.</i></p> <p>[Last year, during the Biden administration] / [Two years ago, during the Trump administration], the agency announced that “high-cost, short-term ‘payday’ loans are unfair because many borrowers aren’t able to pay off the loans on-time. Lenders then charge these borrowers large late fees. Therefore, we are considering new limits on payday loans.”</p> <p>Later, the agency banned most loans with annual interest rates over 36%. <i>The agency’s expert employees wrote the policy banning these loans. They also wrote a technical report explaining the reasons for the ban.</i></p> <p>The agency said that banning most high-interest loans will prevent people from having to pay back a loan for longer and at greater cost than they originally expected. But critics say that the ban prevents people from taking out loans that they believe are right for them.</p>

Aside from the presence or absence of the italicized text, vignettes that include the expertise condition are identical to those concerning the control conditions. Participants read a vignette

concerning a CFPB, DOT, or EPA policy; learn that the policy was promulgated during either President Trump or President Biden's time in office; respond to four attention checks interspersed in the vignette;¹⁷³ and rate the decision's legitimacy on a seven-point Likert scale.

Each element in the expertise condition, which appears in italics in the right column of Table 1,¹⁷⁴ is rooted in a legal requirement. The overwhelming majority of agency employees enjoy civil service protections.¹⁷⁵ These employees must be hired based on objective criteria, namely, their training and expertise, not their political views,¹⁷⁶ and they cannot be fired or disciplined for political disagreements.¹⁷⁷ Civil servants play an instrumental role in policymaking, particularly concerning the provision of information used to craft rules on technical subjects.¹⁷⁸ Finally, agencies typically must provide explanations for their rules, often in technical terms.¹⁷⁹

2. Participation.

To assess whether opportunities for public involvement boost agencies' perceived legitimacy, a nonoverlapping set of participants read a policy vignette that emphasizes public participation in the decision-making process.¹⁸⁰ Table 2 provides the text included in this condition for the CFPB vignettes.

¹⁷³ Three are factual manipulation checks; the fourth is an instructional manipulation check. See *infra* note 211; app. (providing the text of these checks); see also John V. Kane & Jason Barabas, *No Harm in Checking: Using Factual Manipulation Checks to Assess Attentiveness in Experiments*, 63 AM. J. POL. SCI. 234, 237–38 (2019) (discussing the advantages of factual manipulation checks over instructional manipulation checks).

¹⁷⁴ This text does not appear italicized in the experiments; it is italicized in the table to highlight it for the reader.

¹⁷⁵ See generally SHIMABUKURO & STAMAN, *supra* note 84.

¹⁷⁶ See 5 U.S.C. § 3304 (providing employment criteria for competitive service); *id.* § 3320 (providing criteria for excepted service).

¹⁷⁷ See *id.* § 7513(a) (providing that agencies can take action against employees “only for such cause as will promote the efficiency of the service”).

¹⁷⁸ See Brian D. Feinstein & Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 GEO. L.J. 1139, 1159 (2020).

¹⁷⁹ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto, Ins.*, 463 U.S. 29, at 34, 43; see also 5 U.S.C. § 706(2)(A).

¹⁸⁰ See *infra* app. A (providing the CFPB vignettes that include the participation condition); app. B (DOT vignettes); app. C (EPA vignettes).

TABLE 2: CONTROL AND PARTICIPATION CONDITIONS FOR CFPB VIGNETTES

Control Conditions (Baseline Control Condition = nonitalicized text; Active Control Condition = all text)	Participation Condition
<p>The CFPB is a federal agency that regulates lenders.</p> <p><i>One of the ways in which federal agencies like the CFPB make policy is by writing new regulations. Regulations are rules or orders issued by government agencies that have the force of law. After the agency announces a proposed regulation, it may make revisions. Then, the final regulation is published in the Code of Federal Regulations.</i></p> <p>Several years ago, during the [Biden / Trump administration], the agency announced that “high-cost, short-term ‘payday’ loans are unfair because many borrowers aren’t able to pay off the loans on-time. Lenders then charge these borrowers large late fees. Therefore, we are considering new limits on payday loans.”</p> <p>Later, the agency banned most loans with annual interest rates over 36%. <i>The agency enacted this ban by issuing a regulation, taking the steps described above.</i></p>	<p>The CFPB is a federal agency that regulates lenders.</p> <p><i>When it proposes a new policy, the agency must invite comments from the public concerning the proposal. Only after the agency has thought about the comments that it received can it enact the new policy.</i></p> <p>[Last year, during the Biden administration] / [Two years ago, during the Trump administration], the agency announced that “high-cost, short-term ‘payday’ loans are unfair because many borrowers aren’t able to pay off the loans on-time. Lenders then charge these borrowers large late fees. Therefore, we are considering new limits on payday loans.”</p> <p><i>The agency then invited any interested members of the public to submit comments regarding whether, and if so, how to regulate these loans. Many organizations and people—including lenders, consumer groups, civic and religious groups, and business leaders—submitted comments. The agency spent months reading and thinking about their views.</i></p> <p><i>After doing so, the agency banned most loans with annual interest rates over 36%. The agency wrote a report responding to the comments that it received from the public. For the comments that the agency did not agree with, the report explained the agency’s reasons why.</i></p>

<p>The agency said that banning most high-interest loans will prevent people from having to pay back a loan for longer and at greater cost than they originally expected. But critics say that the ban prevents people from taking out loans that they believe are right for them.</p>	<p>The agency said that banning most high-interest loans will prevent people from having to pay back a loan for longer and at greater cost than they originally expected. But critics say that the ban prevents people from taking out loans that they believe are right for them.</p>
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As Table 2 shows, the participation condition focuses on notice-and-comment rulemaking, which is a hallmark of the participation paradigm. Specifically, the condition informs participants of several important elements of this process, beginning with the APA's requirement that the agency "give interested persons an opportunity to participate."¹⁸¹ The statement that the agency published a report responding to comments conveys that it met its statutory obligation to "consider[] [] the relevant matter presented" before finalizing the rule.¹⁸² That requirement is important to the participation paradigm because it shifts the notice-and-comment process from merely a right to speak to a right to be heard.

Participants who read the payday-lending vignette were informed that "many organizations and people, including lenders, consumer groups, civic and religious groups, and business leaders" provided comments to the CFPB. Those that read the trucker work hours vignette learned that the DOT heard from "road safety groups, trucking companies, truck drivers, business owners, and many other people." The air pollution vignette announced that the EPA received comments from "environmental groups, power companies, business owners, and many other people."

3. Presidential administration.

To examine whether greater presidential control over agency personnel and decision-making processes affects agencies' perceived legitimacy, a final nonoverlapping group of participants reads a vignette that emphasizes presidential influence in the agency. Table 3 provides the presidential administration condition's text for the CFPB vignettes. As before, the Appendix provides the corresponding text for the DOT and EPA vignettes.

¹⁸¹ 5 U.S.C. § 553(c).

¹⁸² *Id.*

TABLE 3: CONTROL AND PRESIDENTIAL ADMINISTRATION
CONDITIONS FOR CFPB VIGNETTES

Control Conditions (Baseline Control Condition = nonitalicized text; Active Control Condition = all text)	Presidential Administration Condition
<p>The CFPB is a federal agency that regulates lenders.</p> <p><i>One of the ways in which federal agencies like the CFPB make policy is by writing new regulations. Regulations are rules or orders issued by government agencies that have the force of law. After the agency announces a proposed regulation, it may make revisions. Then, the final regulation is published in the Code of Federal Regulations.</i></p> <p>Several years ago, during the [Biden / Trump administration], the agency announced that “high-cost, short-term ‘payday’ loans are unfair because many borrowers aren’t able to pay off the loans on-time. Lenders then charge these borrowers large late fees. Therefore, we are considering new limits on payday loans.”</p> <p>Later, the agency banned most loans with annual interest rates over 36%. <i>The agency enacted this ban by issuing a regulation, taking the steps described above.</i></p>	<p>The CFPB is a federal agency that regulates lenders.</p> <p><i>The president appoints the leader of the agency. When selecting a new leader, the president makes sure that this person reflects his views and priorities. The president may fire the agency’s leader at any time and for any reason.</i></p> <p>[Last year, President Biden / Two years ago, President Trump] <i>gave a speech calling on the agency to limit high-cost, short-term “payday” loans. He argued that these loans are unfair because many borrowers aren’t able to pay off the loans on-time. Lenders then charge these borrowers large late fees. Therefore, the agency should consider new limits on payday loans.</i></p> <p><i>After the president’s speech, the agency proposed banning most loans with annual interest rates over 36%. The agency sent its proposal to the White House for its review. White House aides agreed with the proposal, because they determined that its benefits would exceed its costs. After receiving the White House’s approval, the agency enacted the ban.</i></p>

The agency said that banning most high-interest loans will prevent people from having to pay back a loan for longer and at greater cost than they originally expected. But critics say that the ban prevents people from taking out loans that they believe are right for them.

The agency said that banning most high-interest loans will prevent people from having to pay back a loan for longer and at greater cost than they originally expected. But critics say that the ban prevents people from taking out loans that they believe are right for them.

This condition highlights key elements of the presidential administration paradigm. First, it conveys that, with the president playing a role in appointments and controlling removals, the agency head's position is contingent on her support of the president's agenda.¹⁸³ Second, it describes how the president made a public statement encouraging the agency to promulgate a certain policy, which the agency then in fact did issue.¹⁸⁴ Third, it states that the proposed policy was submitted to the White House for cost-benefit analysis; the agency announced the new policy only after it received White House approval.¹⁸⁵

B. Agency and Trump/Biden Conditions

In addition to variation in the agencies' decision-making processes keyed to the legitimacy paradigms, the vignettes also vary in two other respects: (1) the agency that is the subject of the vignette and (2) the presidential administration during which the vignette occurs.

First, variation in the agency described in the vignette is important because, if all vignettes concern the same agency, people's idiosyncratic views of that agency or its policy domain may drive the results.¹⁸⁶ Running the experiments for disparate agencies, each with a different regulatory portfolio and mix of structural features, militates against this concern. Accordingly, some participants read about a ban on short-term, high-interest "payday loans" by the CFPB. Others consider a DOT rule setting a ten-hour limit

¹⁸³ See *supra* notes 139–41 and accompanying text.

¹⁸⁴ See Kagan, *supra* note 16, at 2290–99 (discussing the White House's practice of issuing directives to agencies as legitimizing agency action).

¹⁸⁵ See *supra* notes 142–46 and accompanying text.

¹⁸⁶ Studies on the sociological legitimacy of Supreme Court decisions find that the baseline level of public support for that institution affects the perceived legitimacy of Court decisions. See Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 188–93 (2013). Participants' legitimacy ratings are likely to differ, assuming the same is true for administrative institutions' perceived legitimacy.

on truckers' daily work hours. Still others read about an EPA decision to relax controls on air pollution from power plants in an effort to reduce energy prices for consumers.

These three agencies perform important regulatory functions. The CFPB is charged with implementing and enforcing eighteen consumer protection statutes,¹⁸⁷ as well as a blanket ban on “any unfair, deceptive, or abusive act or practice” for mortgages, credit cards, auto loans, payday loans, and a host of other financial products.¹⁸⁸ The DOT regulates all major modes of transportation and funds transportation infrastructure projects, among other activities.¹⁸⁹ A DOT subunit, the Federal Motor Carrier Safety Administration, sets maximum work hours for drivers of commercial vehicles.¹⁹⁰ The EPA develops and enforces regulations concerning a host of environmental matters,¹⁹¹ including establishing limits on air pollutants emitted by power plants and other stationary sources.¹⁹²

These agencies' decisions are highly consequential. Consider that, among the twenty-four highest cost rules promulgated by executive agencies between 2001 and 2018, the EPA issued ten, the DOT issued eight, and the EPA and DOT jointly issued another two.¹⁹³ OIRA values the total societal benefits of these rules to be at least \$138 billion and their total costs be at least \$43 billion.¹⁹⁴ Although independent agencies like the CFPB are not subject to OIRA cost-benefit analysis,¹⁹⁵ they conduct similar analyses pursuant to statutory and judicial requirements.¹⁹⁶ A study

¹⁸⁷ See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2193 (2020).

¹⁸⁸ 12 U.S.C. § 5536(a)(1)(B); see also *Seila Law*, 140 S. Ct. at 2200 (providing examples of products within the agency's purview).

¹⁸⁹ Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (1966).

¹⁹⁰ See, e.g., 49 C.F.R. § 395 (2022) (providing the current hours-of-service regulations); see also Motor Carrier Act of 1935, 49 U.S.C. § 31502 (authorizing the predecessor agency to promulgate these regulations).

¹⁹¹ See *Laws and Executive Orders*, EPA (July 3, 2023), <https://perma.cc/5HPG-G2J5> (listing the statutes that grant authority to the EPA).

¹⁹² See Clean Air Act of 1970 § 4, 42 U.S.C. § 7412 et seq. (requiring the EPA to promulgate National Emissions Standards for Hazardous Air Pollutants).

¹⁹³ See Daniel Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 U. CHI. L. REV. 649, 666–68 (2022).

¹⁹⁴ See *id.*

¹⁹⁵ See Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (excepting under §§ 1(d), 2(b)–(e) independent agencies from OIRA review). But see Exec. Order No. 13,579, 3 C.F.R. 256 (2012), reprinted in 5 U.S.C. § 601 (2012) (mandating under § 1(c) that “independent regulatory agencies . . . comply with” executive orders mandating cost-benefit analysis “[t]o the extent permitted by law”).

¹⁹⁶ See *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (holding that the SEC “acted arbitrarily and capriciously for having failed . . . [to] adequately [] assess the economic effects of a new rule”); 12 U.S.C. § 5512(d) (requiring that the CFPB conduct retrospective reviews of “significant rule[s] or order[s]” within five years of their effective date).

comparing CFPB rules issued in the early 2010s to a sample of executive agency rules that underwent OIRA review during the same period reveals that the CFPB rules bring a larger-than-average number of distinct benefits.¹⁹⁷

The three agencies also vary in terms of their institutional design. The CFPB is among the most politically insulated agencies.¹⁹⁸ It is funded outside of the normal appropriations process, bypassing the White House and Congress; its director serves a fixed term; and it may pursue litigation without seeking approval from or coordinating with the Justice Department.¹⁹⁹ Although the DOT and EPA are both conventionally labeled executive agencies,²⁰⁰ important differences exist between them. For one, the DOT is among the most active agencies in terms of subdelegations of governmental authority to civil servants, which insulate agency decision-makers from political control.²⁰¹ In addition, the Federal Aviation Administration, an important DOT subunit, may bypass White House review of its budget submissions and interactions with Congress, and is headed by an administrator serving a fixed term.²⁰²

Second, variation in the presidential administration in which the vignette occurs also may be important to control. If all vignettes occur, or are assumed to occur, during the same presidential administration, participants' views of that administration may influence their judgments. That prospect threatens both the internal and external validity of the study.

¹⁹⁷ Howell E. Jackson & Paul Rothstein, *The Analysis of Benefits in Consumer Protection Regulations*, 9 HARV. BUS. L. REV. 197, 243–44 (2019) (reporting the CFPB rules have a higher number of reported benefits, with these benefits tending to have greater-than-average “intensity”).

¹⁹⁸ See *Seila Law*, 140 S. Ct. at 2192. A more nuanced understanding of agency independence would note that the heads of the CFPB and DOT both possess at least partial authority to bypass the White House and submit their own budget proposals to Congress—a key form of insulation from presidential control—whereas the EPA does not. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 804 (2013).

¹⁹⁹ See Datla & Revesz, *supra* note 198, at 784–812. Until 2020, the CFPB's director was only removable for-cause. See *Seila Law*, 140 S. Ct. at 2197.

²⁰⁰ See JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 31, 42 (2d ed. 2018). By some definitions, the EPA technically is not an executive department, *id.* at 42, as its structure “remains largely unspecified by statute,” *id.* at 38 n.138.

²⁰¹ See Feinstein & Nou, *Strategic Subdelegation*, *supra* note 85, at 793 (reporting that the DOT is the third most-active subdelegator, after the Departments of Agriculture and Health & Human Services).

²⁰² See Datla & Revesz, *supra* note 198, at 789–90, 804–05.

Accordingly, the presidential administration presented in the vignettes varies by participant. Most participants are informed, by random assignment, either that the policy was developed either “last year, during the Biden administration” or “two years ago, during the Trump administration.”²⁰³ When combined with data on participants’ political preferences, this condition allows for the identification of any partisan tilt in participants’ responses.

C. Additional Information

Participants were recruited via Prolific, an online academic research recruitment platform, and administered a survey on Qualtrics survey software.²⁰⁴ Participants received a small payment for their participation.²⁰⁵

²⁰³ These participants’ involvement occurred in 2022. Participants who viewed a vignette with an active control condition, however, did so in mid-2023. See *supra* note 172. For the 2023 participants, the relevant text is “several years ago, during the Biden administration” or “several years ago, during the Trump administration.”

²⁰⁴ Recruitment via online platforms like Prolific tends to produce samples that are more nationally representative than many in-person recruitment efforts. See Adam J. Berninsky, Gregory A. Huber & Gabriel S. Lenz, *Evaluating Online Labor Markets for Experimental Research: Amazon.com’s Mechanical Turk*, 20 POL. ANALYSIS 351, 355–56 (2012). As a related point, online recruitment platforms also tend to yield similar results as nationally representative samples. See Alexander Coppock, *Generalizing from Survey Experiments Conducted on Mechanical Turk: A Replication Approach*, 7 POL. SCI. RSCH. & METHODS 613, 620 (2019).

Among online platforms, Prolific’s users are more diverse and exhibit greater attention, comprehension, and reliability than users of competing platforms. See Eyal Peer, David Rothschild, Andrew Gordon, Zak Evernden & Ekaterina Damer, *Data Quality of Platforms and Panels for Online Behavioral Research*, 54 BEHAV. RSCH. METHODS 1643, 1647–49 (2022); Eyal Peer, Laura Brandimarte, Sonam Samat & Alessandro Acquisti, *Beyond the Turk: Alternative Platforms for Crowdsourcing Behavioral Research*, 70 J. EXPERIMENTAL SOC. PSYCH. 153, 159 (2017). Further, industry leader Mechanical Turk included insufficient male Trump voters for my purposes. For recent examples of academic studies using Prolific, see, for example, T. Bradford Bitterly, Eric M. VanEpps & Maurice E. Schweitzer, *The Predictive Power of Exponential Numeracy*, 101 J. EXPERIMENTAL SOC. PSYCH. 1, 3–6, 8 (2022); Katherine L. Milkman, Dena Gromet, Hung Ho, Joseph S. Kay, Timothy W. Lee, Pepi Pandiloski, Yeji Park, Aneesh Rai, Max Bazerman, John Beshears, Lauri Bonacorsi, Colin Camerer, Edward Chang, Gretchen Chapman, Robert Cialdini, Hengchen Dai, Lauren Eskreis-Winkler, Ayelet Fishbach, James J. Gross, Samantha Horn, Alexa Hubbard, Steven J. Jones, Dean Karlan, Tim Kautz, Erika Kirgios, Joowon Klusowski, Ariella Kristal, Rahul Ladhania, George Loewenstein, Jens Ludwig, Barbara Mellers, Sendhil Mullainathan, Silvia Saccardo, Jann Spiess, Gaurav Suri, Joachim H. Talloen, Jamie Taxer, Yaacov Trope, Lyle Ungar, Kevin G. Volpp, Ashley Whillans, Jonathan Zinman & Angela L. Duckworth, *Megastudies Improve the Impact of Applied Behavioral Science*, 600 NATURE 478, 482 (2021).

²⁰⁵ For most vignettes and conditions, participants received \$1 for a study estimated to take four minutes to complete, for an estimated hourly rate of \$15. The median time to completion was 2.72 minutes. That pro rata hourly rate exceeds the rate found to induce attentive participation. See Robertson & Yoon, *supra* note 152, at 1645–46, 1650, 1665–67

Equal numbers of Trump and Biden voters view vignettes concerning each agency. With the presidential administration presented in the vignettes varying randomly by participant, the study contains roughly equal numbers of the following: Trump voters who read a vignette concerning a Trump-era policy, Trump voters presented with a Biden-era policy, Biden voters presented with a Biden-era policy, and Biden voters presented with a Trump-era policy. Each participant was exposed to a single vignette in this between-subjects research design.

Table 4 contains demographic information concerning the 9,078 participants who passed all four attention checks and thus were included in these experiments.²⁰⁶

TABLE 4: SUMMARY STATISTICS, PARTICIPANT DEMOGRAPHICS

	Mean	Std. Dev.	Min.	Max.
Age	38.46	13.55	19	93
Female	0.52	0.50	0	1
Black	0.05	0.20	0	1
Hispanic/Latino	0.06	0.21	0	1

Overall, participants in the sample used in these experiments tend to be younger, higher-income, and more highly educated than the U.S. population.²⁰⁷ The overrepresentation of participants with these traits is common when using online recruitment platforms.²⁰⁸ The sample also exhibits skew toward women, non-Hispanic whites, and Asian Americans relative to the U.S. adult

(finding that “above market” base compensation of \$9 an hour results in respondents exerting more effort answering subjective questions than respondents receiving \$3 an hour).

²⁰⁶ Demographic information was obtained from two sources. First, Prolific provides researchers with each participant’s gender, age, 2020 presidential vote choice, and other demographic information. Second, I asked participants about their race/ethnicity, education level, household income, and political affiliation, if any. These questions appeared after participants answered the principal questions concerning legitimacy and support for the agency’s policy.

²⁰⁷ Regarding education levels, 0.9% of participants report some high school, no diploma or GED; 36.8% high school diploma or GED; and 62.3% bachelor’s degree or higher. Regarding income, 18.0% report an annual household income <\$30,000, 41.2% between \$30,000 and \$75,000, and 40.8% >\$75,000.

²⁰⁸ See, e.g., STIGLITZ, *THE REASONING STATE*, *supra* note 58, at 196–97; Nicholas A. Valentino, Carly Wayne & Marzia Oceno, *Mobilizing Sexism: The Interaction of Emotion and Gender Attitudes in the 2016 US Presidential Election*, 82 *PUB. OP. Q.* 799, 813 (2018).

population.²⁰⁹ Self-identified Democrats and those “leaning” Democratic comprise 49% of the sample, and Republicans and Republican-leaning are 45%. In comparison, the U.S. population around the time of the experiments exhibited a 44–45 split.²¹⁰ By construction, participants are evenly split between Trump and Biden voters.

Finally, each vignette is interspersed with four attention checks designed to identify participants who fail to comprehend what they have read.²¹¹ Participants who have failed at least one attention check were excluded from the analysis.²¹²

To assess whether the expertise, participation, and presidential administration conditions align with lay understanding of these concepts, I administer a version of the experiment that substitutes the questions concerning legitimacy and support with questions concerning expertise, participation, and presidential

²⁰⁹ See *QuickFacts*, U.S. CENSUS BUREAU (last updated July 1, 2022), <https://perma.cc/FEA3-EJDP>.

²¹⁰ See Jeffrey M. Jones, *U.S. Party Preferences Evenly Split in 2022 After Shift to GOP*, GALLUP (Jan. 12, 2023), <https://perma.cc/QL5-7REQ>.

²¹¹ Three of these attention checks ask participants to recall basic features of the vignettes. For instance, participants assigned the EPA Policy Condition are asked “which type of pollution was mentioned on the previous screen” and must choose from a list of four possibilities. For the full text of these factual manipulation checks, see the Appendix.

The final attention check, an instructional manipulation check, involves a paragraph of text followed by a question; buried in the paragraph is an instruction to ignore the subsequent question and simply check a particular response. See Tobias Gummer, Joss Rossmann & Henning Silber, *Using Instructed Response Items as Attention Checks in Web Surveys: Properties and Implementation*, 50 SOCIO. METHODS & RSCH. 238, 239 (2021). Specifically, participants view the following instructional manipulation check. *Infra* app.:

Research shows that people’s state of mind affects their views about government decisions. Accordingly, we are interested in understanding your state of mind. Specifically, we want to determine whether you take the time to read directions. Please ignore the question below and instead select “all of the above” as your answer. Yes, that’s right: ignore the question and just check “all of the above.”

Which of the following best describes how you are currently feeling? (a) Sad, (b) Alert, (c) Distracted, (d) All of the above, (e) None of the above.

²¹² Including participants who failed at least one attention check involving factual recall does not materially change the results. Including participants who failed the instructional manipulation check, however, produces larger standard errors and, hence, a greater proportion of null results. For each vignette, a slightly greater number of Trump voters than Biden voters fails the attention checks. To equalize the number of Trump and Biden voters exposed to each vignette, I therefore exclude some Biden voters from the analyses reported *infra*. Exclusion decisions are made via a random number generator. Alternatively, retaining these Biden voters in the analyses (and thus having these voters disproportionately represented) changes the reported results only trivially.

In addition, seven participants who reported at the time of their participation in 2022 or 2023 that they were an age that would have necessarily implied that they were under eighteen years old on Election Day 2020 also were excluded.

administration.²¹³ Specifically, a nonoverlapping group of participants read a DOT vignette containing one of the treatment or control conditions, and then rated their level of agreement with statements concerning the extent to which the agency's decision-making process involved the application of expertise, public participation, or presidential influence. Participants who viewed a vignette with the expertise condition exhibited greater agreement with statements concerning the agency's application of expertise in making the policy.²¹⁴ Likewise, participants associated the participation condition with greater opportunities for public involvement in decision-making,²¹⁵ and associated the presidential administration condition with greater presidential involvement.²¹⁶

III. LEGITIMACY EXPERIMENTS

This Part reports the results from studies that seek to assess the extent to which the expertise, participation, and presidential administration paradigms influence popular perceptions of agencies' legitimacy. It also details how a subset of participants are

²¹³ Note that these studies do not require the expertise, participation, and presidential administration conditions to align with participants' understandings of the underlying concepts. This Article tests whether measures that *legal elites* associate with expertise, participation, and presidential involvement enhance agencies' sociological legitimacy, as these legal elites claim. See *supra* Part I.B. Whether ordinary people associate these measures with expertise, participation, or presidential influence is not relevant to this test; what matters is whether ordinary people associate these measures with legitimacy.

²¹⁴ Participants who viewed the expertise condition rated their level of agreement, on a seven-point scale, with the statement "*The agency used its expertise in making this policy*" 0.297 points higher than did other participants ($SE = 0.114$, $t(319) = 2.606$, $p = 0.010$). These participants rated the statement "*The agency used its special skill or knowledge in making this policy*" 0.353 points higher than did other participants ($SE = 0.126$, $t(311) = 2.795$, $p = 0.006$).

²¹⁵ Participants who viewed the participation condition rated their agreement with the statement "*The agency provided opportunities for members of the public to participate in making this policy*" 3.286 points higher than did other participants ($SE = 0.126$, $t(363) = 25.983$, $p < 0.001$). These participants rated the statement "*The agency provided ways for people to get involved in making this policy*" 3.095 points higher than did other participants ($SE = 0.135$, $t(309) = 22.845$, $p < 0.001$).

²¹⁶ Participants who viewed the presidential administration condition rated their agreement with the statement "*The President influenced this policy*" 3.617 points higher than did other participants ($SE = 0.114$, $t(390) = 31.761$, $p < 0.001$). These participants rated the statement "*The White House played a significant role in making this policy*" 3.614 points higher than did other participants ($SE = 0.120$, $t(320) = 30.033$, $p < 0.001$).

Strikingly, the difference in mean expertise rating for participants who viewed the expertise condition—although positive and statistically significant, see *supra* note 214—is substantially smaller than the difference in mean participation rating for those that viewed the participation condition and the difference in mean presidential administration rating for those that viewed the presidential administration rating. See *infra* Part IV.A (discussing these differences).

able to distinguish between their views on an agency's legitimacy and their level of support for the merits of that agency's policies.

A. Study 1: Marshalling Expertise Bolsters Legitimacy

The first study compares responses from participants who were randomly assigned to read a vignette with or without a description of the role of politically insulated technocrats in formulating a policy. Recall from Table 1 that the expertise condition describes several legal requirements that connect to the expertise paradigm of agency legitimacy: the agency's employees must be hired based on their training and expertise, not their political views, and cannot be reprimanded for disagreeing with political appointees.²¹⁷ The expertise condition further states that these employees wrote both the policy described in the vignette and "a technical report explaining the reasons" for the policy.²¹⁸

After reading the vignettes and completing several attention checks, participants rated their perception of the agency's legitimacy on a seven-point Likert scale. Table 5 reports the mean legitimacy scores that participants assigned, along with the corresponding standard deviations.

²¹⁷ See *supra* notes 175–79 and accompanying text.

²¹⁸ See *supra* notes 175–79 and accompanying text. The Appendix provides the full text of these vignettes.

TABLE 5: MEAN LEGITIMACY SCORES, EXPERTISE VS. CONTROL CONDITIONS

Agency	Structure Condition	N	Agency's Decision Is Legitimate?	
			(1 = strongly disagree; 7 = strongly agree)	
			Mean	Std. Dev.
CFPB	Baseline Control	614	5.31	1.61
	Active Control	654	5.44	1.57
	Expertise	608	5.66	1.42
DOT	Baseline Control	610	5.52	1.48
	Active Control	597	5.57	1.59
	Expertise	598	5.76	1.38
EPA	Baseline Control	617	3.39	1.85
	Active Control	591	3.42	1.96
	Expertise	590	3.65	1.96

As Table 5 shows, inclusion of the expertise condition boosts perceived legitimacy above the levels for the control conditions for all three agencies. Specifically:

- Participants assigned a CFPB vignette offer a mean legitimacy rating of 5.66 for those that viewed the expertise condition versus 5.44 for those that viewed the active control condition, a difference of 0.22.²¹⁹
- For participants who read a DOT vignette, the mean legitimacy rating for those that viewed the expertise condition is

²¹⁹ For the expertise condition, $M = 5.66$, $SD = 1.42$; for the active control condition, $M = 5.44$, $SD = 1.57$. For the difference of means, $(b) = 0.22$, $SE = 0.084$, $t(1261) = 2.627$, $p = 0.009$. All differences in means reported in this Article are calculated via two-tailed Welch's t-tests.

0.19 points higher than the mean rating for those assigned the active control condition.²²⁰

- For those assigned an EPA vignette, the mean rating for the expertise condition is 0.23 points higher than that for the active control condition.²²¹
- For all three agency vignettes, the differences between the expertise condition and baseline control condition are even larger.²²²
- All of these differences in means are statistically significant at the $p < 0.05$ level.²²³

For another perspective on these differences, Figure 1 visually displays the mean legitimacy ratings for participants who viewed the expertise condition versus one of the control conditions.

²²⁰ Expertise condition: $M = 5.76$, $SD = 1.38$; active control condition: $M = 5.57$, $SD = 1.59$; $b = 0.19$, $SE = 0.086$, $t(1170) = 2.228$, $p = 0.026$.

²²¹ Expertise condition: $M = 3.65$, $SD = 1.96$; active control condition: $M = 3.42$, $SD = 1.96$; $b = 0.23$, $SE = 0.114$, $t(1181) = 1.978$, $p = 0.048$.

²²² For the CFPB, 0.35 points separate the mean legitimacy ratings for participants who viewed the expertise condition versus the baseline control condition ($SE = 0.087$, $t(1205) = 2.627$, $p < 0.001$). For the DOT, the difference in means is 0.24 ($SE = 0.082$, $t(1205) = 2.896$, $p = 0.004$). For the EPA, the difference is 0.26 ($SE = 0.110$, $t(1194) = 2.426$, $p = 0.015$).

²²³ See *supra* notes 219–22.

FIGURE 1: PERCEIVED AGENCY LEGITIMACY, EXPERTISE CONDITION VS. CONTROL CONDITIONS

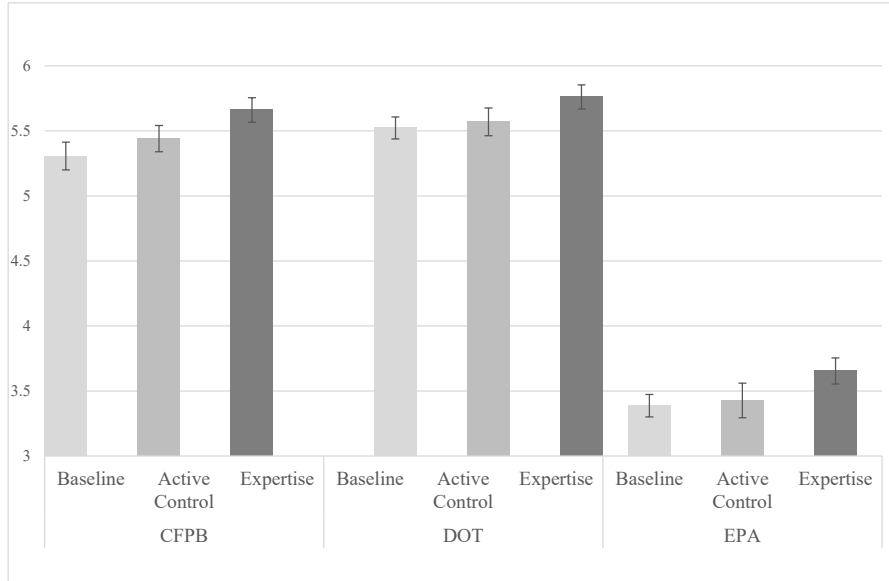


Figure 1 identifies participants' mean legitimacy scores on a seven-point scale, by agency and condition. Whiskers around each mean denote 95% confidence intervals.

To be sure, these effect sizes are modest.²²⁴ Concerning their substantive magnitude, for the expertise condition versus active control condition, the effect size is approximately one-seventh of one standard deviation in legitimacy scores for the CFPB, one-eighth of a standard deviation for the DOT, and one-ninth of a standard deviation for the EPA.²²⁵ Another way to assess these effect sizes is to consider that approximately two-thirds of participants assigned to an active control condition provided a rating between 4.0 and 7.0 on the seven-point Likert scale. By comparison, the mean differences between the expertise and active control

²²⁴ For the expertise condition versus the active control condition, Cohen's $d = 0.15$ for the CFPB vignettes (with a 95% confidence interval of 0.04, 0.26), 0.13 for the DOT (95% *C.I.*: 0.02, 0.24), and 0.12 for the EPA (0.00, 0.23). For the expertise condition versus the baseline condition, Cohen's $d = 0.23$ for the CFPB (95% *C.I.*: 0.12, 0.35), 0.17 for the DOT (0.05, 0.28), and 0.14 for the EPA (0.03, 0.25).

²²⁵ See *supra* tbl. 5 (reporting the standard deviations in legitimacy scores for participants viewing a vignette that includes an active control condition). I adopt the conventional assumption that participants treat the seven-point Likert scale linearly, viz. that an increase from 1 to 2 is equivalent to an increase from 6 to 7. See STIGLITZ, THE REASONING STATE, *supra* note 58, at 197–98 (discussing this assumption).

conditions—which range from 0.19 points for the DOT vignette to 0.23 points for the EPA—are not trivial.

As an aside, readers may note that legitimacy scores across all conditions are markedly lower for the EPA vignettes versus the CFPB and DOT vignettes. Indeed, as reported *infra*, legitimacy scores also are lower for EPA vignettes that include the participation or presidential administration conditions. These substantially lower scores for the EPA vignettes are present both for the subset of participants who voted for Trump and for those that voted for Biden; they also are present among participants who self-identify as Republicans as well as Democrats.

These discrepancies may be attributable to the unpopularity of the policy in these vignettes: relaxing power plants' air pollution limits.²²⁶ Given that a recent public opinion poll shows that 80% of Americans favor stricter emissions limits on power plants,²²⁷ the low legitimacy scores for the EPA vignettes may be capturing public antipathy for this proposal. Although interesting, these low scores for the EPA vignettes are irrelevant for this Article's purposes; what matters here is the *difference* between scores for vignettes involving the same agency but different legitimacy-related conditions.²²⁸ Again, that these differences are positive and statistically significant at conventionally accepted levels suggests that when people learn that politically insulated experts contributed to a decision, they tend to deem that decision to be more legitimate.

Multivariate regression models confirm these results. Table 6 reports the results of a set of models regressing participants' legitimacy ratings on whether they viewed the expertise condition (or the active control condition), their 2020 presidential vote choice, which presidential administration condition they viewed,

²²⁶ Participants are informed that the agency “will allow power plants to release 10% more pollution into the air than before.” The policy is framed as “mak[ing] energy cheaper to produce, which means customers will end up paying less,” although “critics say that [the policy] . . . will harm the environment and people’s health.” See *infra* app. B (providing the full text of this vignette).

²²⁷ Alec Tyson & Brian Kennedy, *Two-Thirds of Americans Think Government Should Do More on Climate*, PEW RSCH. CTR. (June 23, 2020), <https://perma.cc/Z85E-TTS9> (reporting that 80% of survey respondents favor “[t]ougher restrictions on power plant carbon emissions”).

²²⁸ One possible inference from these lower scores for the EPA is that agencies interested in boosting their perceived legitimacy ought to undertake actions that the public favors. As Professor Abbe Gluck, Professor Anne Joseph O’Connell, and scholar Rosa Po have written, there is a “legitimacy of government getting its work done.” Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1842 (2015).

and which of the three agency vignettes they viewed. Only participants who viewed the expertise condition or active control condition are included in these models, with the active control condition being the omitted category in these models.

TABLE 6: REGRESSION ANALYSIS OF PERCEIVED LEGITIMACY ON ASSIGNMENT TO EXPERTISE CONDITION VS. ACTIVE CONTROL CONDITION

	(1)	(2)	(3)	(4)
(Intercept)	2.323 *** (0.066)	2.434 *** (0.082)	3.317 *** (0.087)	3.471 *** (0.099)
Expertise Condition	0.161 ** (0.059)	0.164 ** (0.059)	0.196 ** (0.059)	0.200 ** (0.059)
Trump Voter	—	-0.285 *** (0.081)	—	-0.340 *** (0.085)
Pres. Trump	—	-0.140 (0.091)	—	-0.235 ** (0.079)
Pres. Trump * Trump Voter	—	0.406 ** (0.117)	—	0.558 *** (0.119)
Agency Fixed Effects?	N	N	Y	Y
Observations	3,629	3,629	3,629	3,629

Coefficient estimates and robust standard errors (in parentheses) were obtained via ordered logit models. The ordered dependent variable is participants' legitimacy rating on an ordinal seven-point scale. Coefficient estimates for cuts are not reported. Omitted condition: active control condition. Each observation is an experiment participant who viewed a vignette with the expertise condition or active control condition. Model 1: $\chi^2 = 7.5$ ($p = 0.006$); Model 2: $\chi^2 = 24.4$ ($p = 0.001$); Model 3: $\chi^2 = 776.3$ ($p < 0.001$); Model 4: $\chi^2 = 777.8$ ($p < 0.001$). *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$.

As Table 5 shows, the correlation between the expertise condition and participants' legitimacy ratings is positive and statistically significant across model specifications.²²⁹ These results are robust to a variety of model specifications, including the presence or absence of variables capturing whether the participant voted for President Trump in 2020, the identification in the vignette of Trump or Biden as president at the time of the agency's decision, and agency fixed effects.²³⁰

B. Study 2: Public Participation May Increase Legitimacy

The next study evaluates the participation paradigm. Recall that this study involves a separate group of participants reading a policy vignette that emphasizes public participation in the decision-making process.²³¹ As before, participants read a vignette concerning one of three agencies; learn that the agency made its decision during either the Trump or Biden administration; respond to attention checks; and then rate the decision's legitimacy.

Table 7 and Figure 2 convey the mean legitimacy ratings assigned by participants who viewed the participation condition versus the baseline and active control conditions.

²²⁹ Further, the coefficient estimates for the political variables in Models 2 and 4 are as expected. The positive and statistically significant estimates for the *Pres. Trump * Trump Voter* interaction indicate that Trump voters who learned that the agency decision occurred in the Trump administration tend to find that decision to be more legitimate. Regarding the components of this interaction term, the negative and statistically significant estimates for *Trump Voter* indicate that Trump voters who learned that the decision occurred in the Biden administration find the decision less legitimate; and the negative and statistically significant estimates for *Pres. Trump* indicate that Biden voters who learned that the decision occurred in the Trump administration also tend to find the decision to be less legitimate.

²³⁰ Alternative ordered probit and OLS models yield similar results to the reported ordered logistic regression models. Concerning participant demographics, the random assignment of large numbers of participants to vignettes should eliminate the possibility that omitted demographic variables drive these results. Nonetheless, to address the concern that differences between participants who view one condition versus those that view another may influence their legitimacy scores, I also run models that include key demographic variables: gender, age, race/ethnicity, and income. Again, the results are robust to the inclusion of these condition variables.

²³¹ See *supra* Part II.A; app. (providing the full text of these vignettes).

TABLE 7: MEAN LEGITIMACY SCORES, PARTICIPATION VS. CONTROL CONDITIONS

Agency	Structure Condition	N	Agency's Decision Is Legitimate?	
			Mean	Std. Dev.
CFPB	Baseline Control	614	5.31	1.61
	Active Control	654	5.44	1.57
	Participation	601	5.59	1.43
DOT	Baseline Control	610	5.52	1.48
	Active Control	597	5.57	1.59
	Participation	548	5.68	1.48
EPA	Baseline Control	617	3.39	1.85
	Active Control	591	3.43	1.96
	Participation	597	3.56	1.96

FIGURE 2: PERCEIVED AGENCY LEGITIMACY, PARTICIPATION CONDITION VS. CONTROL CONDITIONS

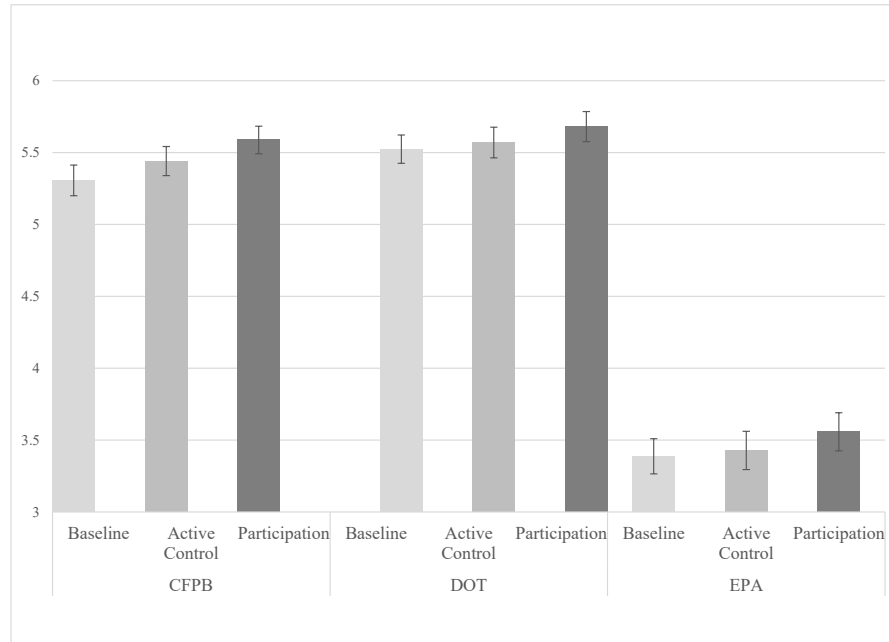


Figure 2 identifies participants' mean legitimacy scores on a seven-point scale, by agency and condition. The whiskers denote 95% confidence intervals.

Table 7 and Figure 2 show that the point estimates for mean legitimacy ratings all are higher for the participation condition than for the control conditions. For the CFPB vignettes, the difference in mean legitimacy rating between the participation and active control condition is 0.15 (statistically significant at the $p < 0.10$ level).²³² The difference in means between these conditions for the DOT and EPA vignettes are also positive, but fall far short of conventionally accepted levels of statistical significance.²³³ Differences in means between the participation and baseline control conditions fair somewhat better; they are larger in size and reach or approach conventionally accepted levels of statistical significance for the three agencies.²³⁴

²³² $SE = 0.085$, $t(1255) = 1.737$, $p = 0.083$.

²³³ For the DOT, the difference (b) is 0.111, $SE = 0.091$, $t(1145) = 1.225$, $p = 0.221$. For the EPA, $b = 0.130$, $SE = 0.114$, $t(1188) = 1.139$, $p = 0.255$.

²³⁴ For the CFPB, the difference in mean legitimacy scores (b) between the participation condition and baseline control condition is 0.281, $SE = 0.087$, $t(1203) = 3.317$, $p = 0.001$. For the DOT, $b = 0.158$, $SE = 0.087$, $t(1144) = 1.809$, $p = 0.071$. For the EPA, $b = 0.170$, $SE = 0.109$, $t(1204) = 1.557$, $p = 0.120$.

Next, I regress participants' legitimacy ratings on whether they viewed the participation condition or active control condition. Table 8 reports the results.²³⁵

TABLE 8: REGRESSION ANALYSIS OF PERCEIVED LEGITIMACY ON ASSIGNMENT TO PARTICIPATION CONDITION VS. ACTIVE CONTROL CONDITION

	(1)	(2)	(3)	(4)
(Intercept)	2.364 *** (0.067)	2.519 *** (0.083)	3.345 *** (0.086)	3.578 *** (0.100)
Participation Condition	0.064 (0.059)	0.069 (0.059)	0.116 † (0.059)	0.124 * (0.059)
Trump Voter	—	-0.245 ** (0.083)	—	-0.346 *** (0.086)
Pres. Trump	—	-0.305 *** (0.084)	—	-0.414 *** (0.079)
Pres. Trump * Trump Voter	—	0.494 *** (0.118)	—	0.665 *** (0.120)
Agency Fixed Effects?	N	N	Y	Y
Observations	3,579	3,579	3,579	3,579

Coefficient estimates and robust standard errors (in parentheses) were obtained via ordered logit models. The ordered dependent variable is participants' legitimacy rating on an ordinal seven-point scale. Coefficient estimates for cuts are not reported. Omitted condition: active control condition. Each observation is an experiment participant who viewed a vignette with the participation condition or active control condition. Model 1: $\chi^2 = 1.2$ ($p = 0.278$); Model 2: $\chi^2 = 18.7$ ($p = 0.041$); Model 3: $\chi^2 = 761.6$ ($p < 0.001$); Model 4: $\chi^2 = 779.3$ ($p < 0.001$). *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$.

²³⁵ Similar to Table 6, *supra*, this Table 8 reports the results of models regressing participants' legitimacy ratings on whether they viewed the participation condition (or the active control condition); whether they voted for Trump or Biden in the 2020 presidential election; which presidential administration condition they viewed; and whether they viewed a CFPB, DOT, or EPA vignette. Only participants who viewed the participation condition or active control condition are included in these models, with the active control condition being the omitted category in these models.

As Table 8 shows, the coefficient estimates for the participation condition covariate are positively signed in all models. These estimates reach conventionally accepted levels of statistical significance in Models 3 and 4 ($p = 0.052$ and $p = 0.038$, respectively).²³⁶

C. Study 3: Presidential Involvement Has No Consistent Effect

Evaluating whether greater presidential involvement in agency decision-making enhances agencies' perceived legitimacy involves a now-familiar research design. As before, participants read one of three policy vignettes concerning the CFPB, EPA, or DOT, with the presidential administration in which the vignette occurs varying randomly by participant. For some participants, the vignette emphasizes ways in which the president can influence agencies' decisions.²³⁷ Table 9 and Figure 3 display the now-familiar mean legitimacy ratings.

²³⁶ As before, alternative ordered probit and OLS models, along with models that include participant demographic variables, yield similar results. *See supra* note 230 (describing these alternative specifications).

²³⁷ *See supra* Part II.A; app. (providing the full text of the presidential administration condition).

TABLE 9: MEAN LEGITIMACY SCORES, PRESIDENTIAL ADMINISTRATION CONDITION VS. CONTROL CONDITIONS

Age ncy	Structure Condi- tion	N	Agency's Decision Is Legitimate? (1 = strongly disa- gree; 7 = strongly agree)	
			Mean	Std. Dev.
CFPB	Baseline Control	614	5.31	1.61
	Active Control	654	5.44	1.57
	Presidential Ad- ministration	699	5.17	1.59
DOT	Baseline Control	610	5.52	1.48
	Active Control	597	5.57	1.59
	Presidential Ad- ministration	577	5.53	1.56
EPA	Baseline Control	617	3.39	1.85
	Active Control	591	3.42	1.96
	Presidential Ad- ministration	577	3.59	1.56

FIGURE 3: PERCEIVED AGENCY LEGITIMACY, PRESIDENTIAL ADMINISTRATION CONDITION VS. CONTROL CONDITIONS

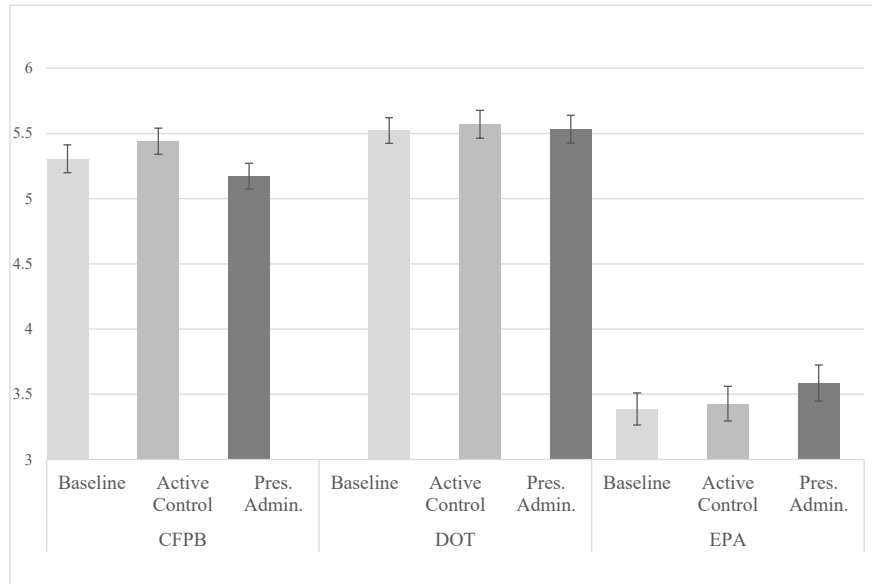


Figure 3 identifies participants' mean legitimacy scores on a seven-point scale, by agency and condition. The whiskers denote 95% confidence intervals.

These results are considerably more muddled than other in the previous studies. For the CFPB, mean legitimacy ratings are substantially *lower* among participants who viewed the presidential administration condition than for people that viewed the active control condition. This difference in means is statistically significant at $p < 0.01$.²³⁸ By contrast, null results are obtained for the DOT and EPA vignettes.²³⁹

As before, regression provides another perspective on these results. Table 10 documents the results of models regressing participants' legitimacy ratings on whether they viewed the presidential administration condition (or the active control condition); whether they voted for President Trump (or President Biden) in 2020; whether their vignette mentioned President Trump (or President Biden); and whether it pertained to the CFPB, DOT, or EPA. Across all four models, as the table reports, one cannot reject the null hypothesis that increased presidential control has no connection to perceived legitimacy.

²³⁸ $b = -0.267$, $SE = 0.085$, $t(1349) = 3.115$, $p = 0.002$.

²³⁹ For the DOT, $b = -0.037$, $SE = 0.092$, $t(1174) = 0.408$, $p = 0.683$. For the EPA, $b = 0.158$, $SE = 0.116$, $t(1133) = 1.356$, $p = 0.176$.

TABLE 10: REGRESSION ANALYSIS OF PERCEIVED LEGITIMACY ON ASSIGNMENT TO PRESIDENTIAL ADMINISTRATION CONDITION VS. ACTIVE CONTROL CONDITION

	(1)	(2)	(3)	(4)
(Intercept)	2.383 *** (0.066)	2.565 *** (0.085)	3.162 *** (0.080)	3.419 *** (0.096)
Pres. Admin. Con- dition	-0.064 (0.058)	-0.058 (0.059)	-0.093 (0.059)	-0.088 (0.059)
Trump Voter	—	-0.458 *** (0.081)	—	-0.590 *** (0.084)
Pres. Trump	—	-0.286 ** (0.089)	—	-0.378 *** (0.080)
Pres. Trump * Trump Voter	—	0.817 *** (0.117)	—	1.052 *** (0.119)
Agency Fixed Ef- fects?	N	N	Y	Y
Observations	3,656	3,656	3,656	3,656

Coefficient estimates and robust standard errors (in parentheses) are obtained via ordered logit models. The ordered dependent variable is participants' legitimacy rating on an ordinal seven-point scale. Coefficient estimates for cuts are not reported. Omitted condition: active control condition. Each observation is an experiment participant who viewed a vignette with the presidential administration condition or active control condition. Model 1: $\chi^2 = 1.2$ ($p = 0.278$); Model 2: $\chi^2 = 62.5$ ($p = 0.004$); Model 3: $\chi^2 = 677.5$ ($p < 0.001$); Model 4: $\chi^2 = 714.9$ ($p < 0.001$). *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$.

Perhaps the most obvious potential explanation for these null results is that presidential administration pulls participants in opposite directions based on whether or not they support the president.²⁴⁰ Here, that means that supporters of President Biden would tend to find a policy to be more legitimate if they learned that President Biden had a hand in its development, and tend to find it to be less legitimate if they learned of President Trump's

²⁴⁰ Recall that half of the experiments' participants are randomly assigned a vignette stating that the decision was made during the Trump administration, the other half read that it was made during the Biden administration, and the sample is evenly divided between Trump and Biden voters.

involvement. The converse naturally would apply to President Trump's supporters.²⁴¹ In the aggregate, therefore, these potential crosscutting effects may cancel out.

To probe this theory, I add to the previous models a three-way interaction: *Presidential Administration Condition * President Trump * Trump Voter*. The coefficient estimates for this interaction term show that presidential involvement during the Trump administration is associated with greater perceived legitimacy among Trump voters.²⁴² This estimated boost in perceived legitimacy achieves conventionally accepted levels of statistical significance.²⁴³ However, for every other combination of voter and presidential administration, one cannot reject the null hypothesis that presidential involvement has no relationship with perceived legitimacy.²⁴⁴ In other words, only Trump voters appear to view presidential control as legitimizing—and they see it that way only when President Trump is in the White House.

Finally, to assess whether these differences vary across agencies, I calculate the mean legitimacy scores for participants who viewed the presidential administration condition versus the active control condition separately for each agency. Figure 4 reports these agency-specific differences in means for four subgroups: (1) Biden voters who are informed that the policy was issued during the Biden administration, (2) Trump voters who are told the

²⁴¹ Indeed, social science research demonstrates that people view their co-partisans' positions positively and those of out-party members negatively in part based simply on their shared membership in the same party. See Brian D. Feinstein, William R. Heaston & Guilherme Siqueira de Carvalho, *In-Group Favoritism as Legal Strategy: Evidence from FCPA Settlements*, 60 AM. BUS. L.J. 5, 29–34 (2023) (summarizing this literature).

²⁴² For a model that adds this three-way interaction term along with its component parts to Model 2 in Table 10: $\beta = 0.068$, $SE = 0.234$, $z\text{-score} = 2.92$, $p = 0.004$. For a model that adds the interaction term and its component parts to Model 4 in Table 10: $\beta = 0.829$, $SE = 0.236$, $z\text{-score} = 3.51$, $p < 0.001$.

²⁴³ See *supra* note 242 and accompanying text.

²⁴⁴ Specifically, null results obtain concerning legitimacy and presidential control for the following groups:

- Trump voters who read a Biden administration vignette. Model 2: $\beta = -0.163$, $SE = 0.164$, $z\text{-score} = -1.00$, $p = 0.319$. Model 4: $\beta = -0.164$, $SE = 0.166$, $z\text{-score} = -0.99$, $p = 0.324$.
- Biden voters who read a Trump administration vignette. Model 2: $\beta = -0.124$, $SE = 0.166$, $z\text{-score} = -0.75$, $p = 0.455$. Model 4: $\beta = -0.111$, $SE = 0.163$, $z\text{-score} = -0.68$, $p = 0.494$.
- Biden voters who read a Biden administration vignette. Model 2: $\beta = -0.085$, $SE = 0.116$, $z\text{-score} = -0.73$, $p = 0.465$. Model 4: $\beta = -0.152$, $SE = 0.114$, $z\text{-score} = -1.33$, $p = 0.183$.

These estimates are obtained by examining the coefficient estimates for the various component parts of the *Presidential Administration Condition * President Trump * Trump Voter* interaction term.

same, (3) Biden voters who are informed that the policy was issued during the Trump administration, and (4) Trump voters who are told the same.

FIGURE 4: DIFFERENCES IN PERCEIVED LEGITIMACY, PRESIDENTIAL ADMINISTRATIVE VS. ACTIVE CONTROL CONDITION, BY PRESIDENT AND PARTICIPANTS' 2020 VOTE

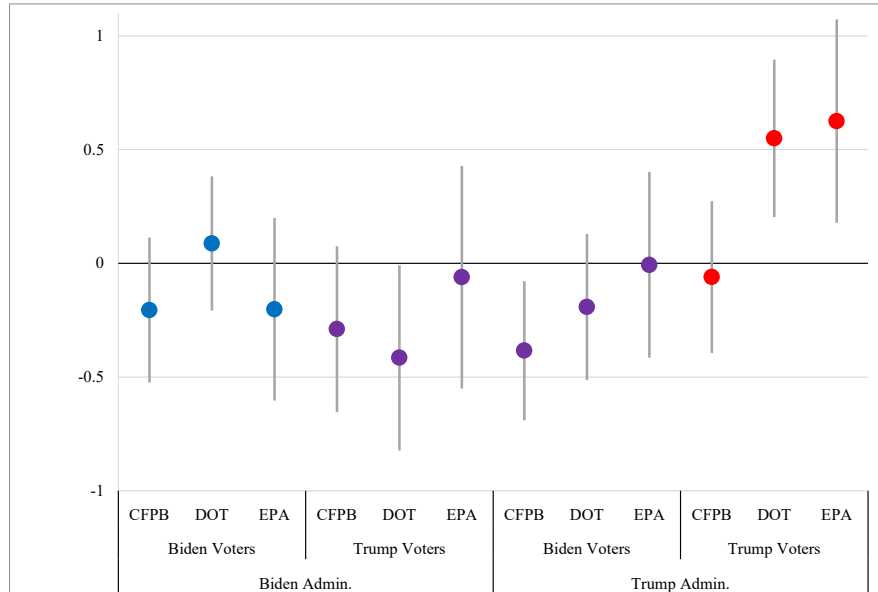


Figure 4 identifies the difference in mean legitimacy scores, on a seven-point scale, for participants who view the presidential administration condition versus active control condition, by agency, presidency condition (Trump or Biden), and participant's 2020 vote choice. Dots denote estimated differences in means. Lines emanating from means show 95% confidence intervals. For ease of interpretation, estimates for subsamples of Biden voters who are informed that President Biden was in office at the time of the policy decision are shaded blue; subsamples of Trump voters informed that President Trump held office are shaded red; and subsamples of voters informed that the candidate for whom they did not vote held office appear in purple.

As before, Figure 4 provides scant support for the presidential administration paradigm. Although Trump voters consider DOT and EPA decisions to be more legitimate when informed that President Trump influenced those decisions,²⁴⁵ they also consider

²⁴⁵ For Trump voters viewing the DOT vignette and Trump administration condition, the difference in means (b) = 0.549, SE = 0.176, $t(253)$ = 3.125, p = 0.002. For Trump voters viewing the EPA vignette and Trump administration condition, b = 0.625, SE = 0.227, $t(254)$ = 2.753, p = 0.006.

DOT decisions to be less legitimate when informed that President Biden had a hand in them.²⁴⁶ Similarly, Biden voters view the CFPB action to be less legitimate when they read that President Trump influenced it.²⁴⁷ Incredibly, presidential administration is associated with statistically significant reductions in perceived legitimacy for as many subgroups in Figure 4 as it is linked to statistically significant increases.

As notably, most of these differences in means fall far short of conventionally accepted levels of statistical significance. Whether positive or negative, the impact of presidential administration on legitimacy, if any, appears to be highly contingent.

* * *

To summarize, Study 1 reveals that an agency's marshalling of technocratic expertise is associated with higher perceived legitimacy for that agency's decision. This statistically significant result endures across all three agencies and all model specifications. Per Study 2, enabling public participation also is associated with greater perceived legitimacy, although in some models these results fall short of conventionally accepted levels of statistical significance. By contrast, the headline from Study 3 is that, for most models, one cannot reject the null hypothesis that presidential involvement is divorced from perceived legitimacy. Further, for those models in Study 3 that do return statistically significant results, the direction of the coefficient estimates is not consistent. Additionally, unreported models that include all three treatment conditions—in other words, expertise, participation, and presidential administration conditions—as covariates in the same regression equation yield similar results.²⁴⁸

²⁴⁶ $b = -0.415$, $SE = 0.206$, $t(286) = 2.008$, $p = 0.046$.

²⁴⁷ $b = -0.384$, $SE = 0.115$, $t(327) = 2.471$, $p = 0.014$.

²⁴⁸ These models are essentially identical to those reported in Tables 4, 6, 8, except that each model includes all three treatment conditions as covariates. The results of these models are as follows:

- Expertise Condition: consistent support. Model 1: $\beta_{\text{expertise}} = 0.164$, $SE = 0.060$, $z\text{-score} = 2.75$, $p = 0.006$. Model 2: $\beta_{\text{expertise}} = 0.162$, $SE = 0.060$, $z\text{-score} = 2.70$, $p = 0.007$. Model 3: $\beta_{\text{expertise}} = 0.196$, $SE = 0.059$, $z\text{-score} = 3.32$, $p = 0.001$. Model 4: $\beta_{\text{expertise}} = 0.194$, $SE = 0.059$, $z\text{-score} = 3.26$, $p = 0.001$.
- Participation Condition: less definitive but still suggestive support. Model 1: $\beta_{\text{participation}} = 0.067$, $SE = 0.60$, $z\text{-score} = 1.12$, $p = 0.264$. Model 2: $\beta_{\text{participation}} = 0.071$, $SE = 0.061$, $z\text{-score} = 1.17$, $p = 0.243$. Model 3: $\beta_{\text{participation}} = 0.116$, $SE = 0.059$, $z\text{-score} = 1.96$, $p = 0.050$. Model 4: $\beta_{\text{participation}} = 0.120$, $SE = 0.060$, $z\text{-score} = 2.00$, $p = 0.045$.
- Presidential Administration Condition: no support. Indeed, the coefficient estimates for the presidential control condition are negatively signed and, in two of

D. Addendum: People Understand Legitimacy as a Distinct Concept

A final element of this experimental research deserves mention. In addition to probing participants' views on legitimacy, these experiments also ask them to rate on a seven-point scale their level of agreement with the following statement: "I support the agency's decision." Although participants' legitimacy and support ratings are closely correlated,²⁴⁹ mean legitimacy scores are higher than the mean support scores for all vignettes.²⁵⁰ For instance, across the three treatment conditions, participants' legitimacy ratings were on average 0.35 points higher than their support ratings.²⁵¹ Although not large on a seven-point scale in which both ratings cluster in the upper half, neither is that difference trivial.²⁵²

That the distributions of participants' legitimacy and support ratings are different suggests that a subset of participants conceptualize support for a decision and that decision's legitimacy as distinct concepts. As importantly, mean legitimacy ratings are higher than mean support ratings for all vignettes. This across-the-board difference suggests that a subset of participants considers outcomes with which they disagree to nonetheless be legitimate.

Finally, to assess whether participants are more likely to support decisions when they learn that the decision-making process involved the application of expertise, public participation, or presidential influence, I rerun all of the regression analyses in Tables 6, 8, and 10 with participants' support ratings as the dependent variable (instead of participants' legitimacy ratings). Across

the four models, statistically significant at the $p < 0.10$ level. These estimates at least raise the possibility that greater presidential influence is associated with lower perceived legitimacy. Model 1: $\beta_{\text{president}} = -0.066$, $SE = 0.059$, $z\text{-score} = -1.13$, $p = 0.258$. Model 2: $\beta_{\text{president}} = -0.064$, $SE = 0.059$, $z\text{-score} = -1.09$, $p = 0.274$. Model 3: $\beta_{\text{president}} = -0.101$, $SE = 0.060$, $z\text{-score} = -1.68$, $p = 0.094$. Model 4: $\beta_{\text{president}} = -0.101$, $SE = 0.060$, $z\text{-score} = -1.68$, $p = 0.093$.

²⁴⁹ Increases in participants' support ratings closely track increases in their legitimacy ratings. The correlation coefficient between the two variables is 0.834. The bivariate regression of a support rating on a legitimacy rating produces a coefficient estimate of 0.903 ($SE = 0.007$, $R^2 = 0.69$).

²⁵⁰ Differences in means between legitimacy ratings and support ratings for all combinations of treatment and control conditions, agency conditions, and Trump/Biden administration conditions are statistically significant at least at the $p < 0.05$ level. As throughout this Article, all differences in means are calculated via Welch's two-sample t-test. In addition, two-sample Kolmogorov-Smirnov tests reveal that the differences in the distributions also are statistically significant at conventionally accepted levels.

²⁵¹ $M_{\text{legitimacy}} = 4.922$, $SD_{\text{legitimacy}} = 1.893$; $M_{\text{support}} = 4.568$, $SD_{\text{support}} = 2.051$. $b = 0.354$, $SE = 0.038$, $t(10712) = 9.286$, $p < 0.001$.

²⁵² Cohen's $d = 0.179$ (95% *C.I.*: 0.141, 0.217).

all models, one cannot reject the null hypothesis that the expertise and participation paradigms have no bearing on people's support for the policy at issue.²⁵³ Whereas the expertise and, in some analyses, participation conditions appear to enhance the perceived legitimacy of agency decisions, they do not seem to move the needle on people's support for those decisions.

IV. PRESCRIPTIONS

Trust and confidence in government institutions have declined markedly in recent decades.²⁵⁴ That is troubling, because public acceptance that government institutions are legitimate is necessary for liberal democracy to flourish.²⁵⁵ In light of concerns that U.S. democracy is backsliding, the project of shoring up confidence in government institutions should be seen as an imperative.²⁵⁶

The findings in this Article can contribute to that project. For proponents of the administrative state, the Article's centerpiece—in other words, that certain administrative structures and processes are correlated with the public's support for agencies' legitimacy—should be cause for optimism. That some participants recognize policies that they do not support to nonetheless be legitimate provides additional encouragement.²⁵⁷ Essentially, these results imply that thoughtful agency design can bolster people's confidence in their government.

²⁵³ By contrast, presidential administration matters in the predictable way; participants who voted for (against) the president identified in the vignette show increased (decreased) support for the policy when they learn that the president played a role in its creation. These crosscutting effects essentially cancel out in the aggregate.

²⁵⁴ See Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 546 (2018).

²⁵⁵ See Tyler, *Governing amid Diversity*, *supra* note 164, at 809; ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 129–40 (1971) (arguing that the greater the belief in the legitimacy of institutions the higher likelihood of “polyarchy,” which the author defined as a governing regime that allows for public contestation and expansive suffrage).

²⁵⁶ On the phenomenon of backsliding, see generally, for example, Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018).

²⁵⁷ In distinguishing between their views of the merits of an agency action and their views on that agency's legitimacy, these participants exhibit greater sophistication than some scholars that conflate opposition to an agency's policy with challenges to the agency's legitimacy. See Metzger, *supra* note 10, at 49–50 (listing examples); BARKER, *supra* note 54, at 23–24 (critiquing political theorist Robert Rogowski's conception of legitimacy on this ground); see also Vermeule, *supra* note 11, at 2465 (recognizing that “[i]t is a conceptual mistake to think that complaints about the administrative state . . . are necessarily sociological evidence of the illegitimacy of the regime”). Social psychologists are split regarding the relative importance to an institution's sociological legitimacy of the public's agreement with the institution's substantive decisions versus its assessment that the procedures used were fair. See Tyler, *Governing amid Diversity*, *supra* note 164, at 810 (summarizing this literature).

That is good news for political actors seeking to defend an administrative state under strain.²⁵⁸ In an era in which agencies' legitimacy is challenged, political leaders seeking to buttress it ought to consider elevating civil servants, expanding avenues for public participation, and reducing the president's role in agency decision-making.²⁵⁹ Further, that participants' differences in mean legitimacy ratings vary, albeit modestly, across agency vignettes suggests that views on what measures boost legitimacy depend in part on the agency or issue area. That finding counsels in favor of bespoke agency structures.

This Part discusses these implications in turn.

A. Trust the Experts

Expertise is the clear winner among the three paradigms.²⁶⁰ Across all three agencies, participants were most likely to view decisions as more legitimate after they learned about the role of politically insulated, expert civil servants in formulating that decision.

Remarkably, both the president's political opponents and supporters value expertise in some vignettes. That expertise is legitimacy boosting among the former group is unsurprising. After all, opposition party voters should be expected to feel more comfortable with decisions for which a disfavored president remains at arm's length. More notably, the president's own voters also value expert-driven policymaking in some situations. Further, for no subgroups does expertise reduce an agency's perceived legitimacy.²⁶¹

These findings are even more striking in light of the possibility that participants assigned to view a control condition may nonetheless assume that experts formulated the policy. If participants assigned to the expertise condition and control conditions both make this assumption, then the difference in mean legitimacy score between participants assigned to these conditions, while directionally correct, will underestimate the effect size.

²⁵⁸ See Metzger, *supra* note 10, at 8–51 (cataloging challenges to administrative governance).

²⁵⁹ These three prescriptions mirror several of the key proposals in Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104, 117–33 (2021).

²⁶⁰ See *supra* Part III.A.

²⁶¹ Even for those president/voter dyads for which one cannot reject the null hypothesis that expertise has no bearing on perceived legitimacy, the coefficient estimates for the expertise condition are positively signed.

Of course, a similar logic also could apply to the public participation and presidential administration conditions. There is, however, reason to think it may be particularly acute concerning expertise. Recall that Part II.C discussed a version of this experiment designed to assess whether the expertise, participation, and presidential administration conditions are aligned with lay understandings of these concepts. In this study, a nonoverlapping group of participants read a vignette with the now-familiar features, but instead of rating their level of agreement with a statement concerning legitimacy, they rate their agreement with statements concerning whether the agency used expertise, involved the public, or was subject to presidential influence.²⁶² As expected, participants who viewed the expertise condition reported greater agreement with the statement concerning expertise, and those that viewed the participation or presidential administration condition reported greater agreement with the statements concerning participation and presidential administration, respectively.²⁶³ These differences, however, are smallest for the expertise condition. In other words, the increased perception of agency expertise exhibited by participants who view the expertise condition is smaller than the increased perception of public involvement and presidential influence exhibited by participants who view, respectively, the participation and presidential administration conditions.

These relative differences suggest the possibility that participants are more likely to assume (pretreatment) that agencies marshal expertise than they are to assume that agencies involve the public or are subject to presidential influence. That possibility, in turn, suggests that the reported effect size for the expertise condition, while directionally correct, may underestimate the actual effect size—and that this underestimate may be larger than any similar potential underestimates for the other treatment conditions. Essentially, Study 1 provides evidence that expertise matters for perceived legitimacy—but on the question of *how much* it matters, the study merely establishes a floor.

²⁶² See *supra* notes 214–16 (providing the text of these six statements, two for each treatment condition).

²⁶³ See *supra* notes 214–16 (reporting differences in means). All differences are statistically significant at $p = 0.010$ or lower.

1. Lessons for supporters and critics of the administrative state.

These results should motivate institutional designers endeavoring to create durable, popular administrative structures to empower politically insulated, expert civil servants. For instance, Congress can place limits on the president's ability to reclassify executive branch personnel from the competitive service, which holds civil service protections, to politically appointed positions.²⁶⁴ Further, agency heads can expand on the practice of subdelegating binding authority on consequential matters to civil servants.²⁶⁵

Naturally, the conclusion that expertise and political insulation boost legitimacy has a converse: those desiring to erode public support for agencies ought to consider weakening the civil service. That statement sheds light on recent efforts to curtail civil servants' political independence. Consider the following examples:

- During his first fourteen months in office, President Trump declined to make nominations for the three vacancies on the five-member Merit Systems Protection Board (MSPB). Without a quorum, the Board lacked authority to enforce civil servants' legal protections.²⁶⁶
- Later in his term, President Trump established a new category of civil servants, labeled Schedule F, who were to be exempt from some merit-based job protections.²⁶⁷ Presumably, those personnel would have faced strong incentives to either

²⁶⁴ See Erich Wagner, *Lawmakers Are Doubling Down on the Effort to Prevent the Next Schedule F*, GOV'T EXEC. (Feb. 14, 2023), <https://perma.cc/R2TE-FTNY>.

²⁶⁵ See generally Brian D. Feinstein & Jennifer Nou, *Submerged Independent Agencies*, 171 U. PA. L. REV. 945 (2023) (describing and quantifying this practice). In addition to these legal changes, advocates of a robust administrative state should not countenance unwarranted disparagement of civil servants. See, e.g., Adela Suliman, *Fauci Slams "Low-life" Trolls Harassing His Wife, Children over COVID*, WASH. POST (Dec. 9, 2022), <https://www.washingtonpost.com/nation/2022/12/09/anthony-fauci-harassment-coronavirus/>; Michael M. Grynbaum & Davey Alba, *After Vindman's Testimony Went Public, Right-Wing Conspiracies Fired Up*, N.Y. TIMES (Oct. 29, 2019), <https://www.nytimes.com/2019/10/29/business/media/fox-news-alexander-vindman.html>. By offering concrete examples of how those announcing "I'm from the government and I'm here to help" provide needed assistance, they can turn President Ronald Reagan's famous quip on its head. Ronald Reagan, President of the United States, The President's News Conference (Aug. 12, 1986) (available at <https://perma.cc/L6RY-FVEF>) ("The nine most terrifying words in the English language are: I'm from the Government, and I'm here to help.").

²⁶⁶ See David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753, 789–90 (2022).

²⁶⁷ Exec. Order No. 13,957, 3 C.F.R. 466 (2021), *reprinted in* 5 U.S.C. § 3301 (2021).

conform to the president's agenda or risk removal and replacement with White House loyalists.²⁶⁸ President Biden later rescinded Schedule F.²⁶⁹ Yet the proposal remains a live political issue; if a candidate with similar commitments as President Trump is elected president in the foreseeable future, Schedule F likely will be revived.²⁷⁰

- In January 2023, the House of Representatives reinstated a procedural measure known as the Holman Rule, which allows legislators to introduce amendments on the House floor to reduce the salaries of specifically named executive branch employees.²⁷¹

This Article's results imply that, by chipping away at civil servants' insulation from political principals, these and other measures can reduce agencies' perceived legitimacy. Indeed, it is possible that a negative feedback loop could develop concerning agencies' legitimacy and civil service protections. In this telling, lawmakers first express concerns that power exercised by democratically unaccountable civil servants is illegitimate.²⁷² As a solution, they roll back laws designed to protect civil servants' political independence. That turn away from the expertise paradigm erodes agencies' perceived legitimacy. The public's lower view of agencies' legitimacy makes additional rollbacks of civil service protections more politically palatable. The cycle repeats.

2. A paradox of popular technocracy?

The recommendation that those seeking to bolster agencies' perceived legitimacy defend civil service protections and promote additional measures that insulate decision-makers from political influence raises several questions. For one, does this prescription contain a paradox? After all, bureaucracy and democracy are

²⁶⁸ See Erich Wagner, *As White House Steps Up Schedule F Implementation, 'Lawmakers Don't Get It'*, GOV'T EXEC. (Dec. 14, 2020), <https://perma.cc/2K3V-SGVW>.

²⁶⁹ Exec. Order No. 14,003, 3 C.F.R. 464 (2022) (order issued Jan. 22, 2021).

²⁷⁰ See Nicole Ogrysko, *Schedule F Is Gone, but the Debate Continues in Congress*, FED. NEWS NETWORK (Feb. 24, 2021), <https://perma.cc/69EW-HHKE>.

²⁷¹ See Mychael Schnell, *This Week: House Begins Legislative Business After Speaker Spectacle*, THE HILL (Jan. 9, 2023), <https://perma.cc/W9Z3-L26Z>.

²⁷² See David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611, 612 (2012) (summarizing this argument).

sometimes viewed as antonyms.²⁷³ Why, then, does insulating decisions from popular control appear to have popular support? I offer three possibilities.

First, people may recognize the limits of their own expertise. Going further, they may acknowledge their own uncertainty regarding the conflict in values inherent in policy decisions. We may be able to recognize the competing values inherent in, say, delimiting truckers' work hours, but how many of us have strongly held views on how to reconcile these competing values?²⁷⁴ People may recognize their uncertainty regarding not only the technical aspects of policy decisions, but also concerning how to resolve the values conflicts that often are inherent in these decisions, and thus willingly cede the terrain to those who have considered the issues deeply.

Second, people may prefer, all else equal, that the administrative process be open to *their* views, whether directly through the participation paradigm or indirectly via the presidential administration paradigm, but recognize that these paradigms also would enable those with *opposing* views to similarly influence agencies. Thus, tying one's own hands—along with the hands of one's ideological opponents—may be optimal. This strategy arguably is particularly advantageous for a risk-averse citizen in a polarized nation. Even for people who consider themselves to be very liberal or very conservative, the thinking goes, it is better to empower a relatively moderate civil service than to allow decision-making to toggle between very liberal and very conservative actors as partisan control of government changes.²⁷⁵

²⁷³ See Anya Bernstein, *Porous Bureaucracy: Legitimizing the Administrative State in Taiwan*. 45 LAW & SOC. INQUIRY 28, 28 (2020) ("Scholars and politicians have sometimes presented bureaucracy as inherently conflicting with democracy."); B. Guy Peters, *Bureaucracy and Democracy*, 10 PUB. ORG. REV. 209, 209 (2010) ("The terms bureaucracy and democracy are usually thought of . . . as antithetical approaches to providing governance for a society."); CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA* 57 (rev. ed. 1950) (challenging "[t]he popular antithesis between bureaucracy and democracy").

²⁷⁴ See JOHN ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* 308 (1992) (positing, in a leading theory on public opinion, that people "do not possess 'true attitudes,' . . . but a series of considerations that are typically rather poorly integrated").

²⁷⁵ See Stephenson, *supra* note 139, at 79 n.77:

[R]isk aversion might supply a separate reason why a voter might prefer a more biased expected policy outcome with lower variance [which is achievable via some degree of insulating agency decision-makers from political influence] to a less biased policy outcome with higher variance [when agencies are subject to greater political control].

Third, people may exhibit a preference for both empowering technocrats *and* increasing opportunities for public participation—with agencies acquiring their democratic bona fides from these participatory channels rather than presidential control. Tapping into a centuries-old intellectual movement, Christopher Havasy argued that citizen involvement in agencies that are insulated from elected officials engenders direct democratic accountability in the administrative state.²⁷⁶ That direct participation in agency decision-making, Havasy continued, is preferable to the more attenuated democratic accountability that the presidential administration paradigm provides.²⁷⁷

That Part III reports some level of popular support for both the expertise and participation paradigms provides evidence in favor of this claim, in other words, that there is nothing paradoxical about popular support for insulating decisions from the control of a democratically elected president because the participation paradigm offers a better way to provide democratic accountability to the bureaucracy. That Part III shows much more tepid support for the participation paradigm, with coefficient estimates falling short of conventionally accepted levels of statistical significance in some models, tempers this support, however.²⁷⁸

Nonetheless, there is little downside to expanding opportunities for public participation—regardless of how one interprets the results in Part III concerning the participation paradigm. Whereas some consider the expertise and participation paradigms as substitutes,²⁷⁹ with greater consideration of the public's perspective necessarily diluting civil servants' influence, I argue that pitting the two paradigms against each other presents a false choice. For one, the mere existence of public involvement could serve a legitimating function regardless of whether decision-makers bend to members of the public's views. Saying one's piece can be palliative, even if it does not change minds.²⁸⁰

²⁷⁶ See generally Havasy, *Radical Administrative Law*, *supra* note 75.

²⁷⁷ *Id.*

²⁷⁸ See *supra* Part III.B.

²⁷⁹ See Vermeule, *supra* note 11, at 2464 (asserting that “attempts to legitimate the administrative state hover or cycle restlessly” because they are grounded in “ideals . . . [that] are not mutually compatible”).

²⁸⁰ Cf. Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 CRIM L. REV. 545, 550–53 (advancing a similar argument regarding the use of victim impact statements in criminal cases).

Further, participation in public deliberation can alter participants' views, leading participants to converge around a proposal.²⁸¹ Progressive Era and New Deal Era figures like philosopher John Dewey, social theorist Mary Follett, and Justice Felix Frankfurter viewed expertise and public deliberation as symbiotic inputs into administrative legitimacy.²⁸² Carrying this torch, contemporary public intellectual K. Sabeel Rahman considered the New Deal state's focus on expertise and the midcentury APA's emphasis on participatory mechanisms as working in tandem to "legitimate administrative authority."²⁸³

Similarly, Professor Katharine Jackson considered elements of both the expertise and participation paradigms as *jointly* legitimizing agencies. According to Professor Jackson, agency personnel should see themselves as trustees; they hold decision-making autonomy, subject to the requirements that their decisions be grounded in good faith application of expertise and that they be open to input and objection from the public.²⁸⁴ In other words, this theory "lets experts be experts," but also requires them to "face and respond to the crucible of citizen objection" through procedures like notice-and-comment rulemaking.²⁸⁵

B. Explore New Avenues for Public Involvement

The findings regarding the participation condition do not close the book concerning the promise of public involvement. Recall that this condition yields positive coefficient estimates, albeit only achieving conventionally accepted levels of statistical significance in some models. Thus, where a resource-constrained institutional

²⁸¹ See AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 13–21 (2004).

²⁸² See DEWEY, *supra* note 78, at 208 ("No government by experts in which the masses do not have the chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few."); FELIX FRANKFURTER, THE PUBLIC & ITS GOVERNMENT 159 (1930) (urging administrative "safeguards" based, inter alia, "on very high standards of professional service[,] . . . easy access to public scrutiny[,] and a constant play of alert public criticism"); MARY PARKER FOLLETT, THE NEW STATE: GROUP ORGANIZATION THE SOLUTION OF POPULAR GOVERNMENT 174–75 (1918) ("The tendency to transfer power to the American citizenship; and the tendency towards efficient government by the employment of experts and the concentration of administrative authority, are working side by side. . . . These two tendencies are not opposed."). For an intellectual history of these ideas, see EMERSON, THE PUBLIC'S LAW, *supra* note 1, at 61–112.

²⁸³ RAHMAN, DEMOCRACY, *supra* note 83, at 39.

²⁸⁴ Jackson, *supra* note 83, at 33–36, 59–61.

²⁸⁵ *Id.* at 37; see also *id.* at 75–76 (discussing notice-and-comment rulemaking). Professor Jackson's theory finds support in both this Article's experiments and in survey and focus-group studies conducted by political scientists John Hibbing and Elizabeth Theiss-Morse. See *infra* notes 306–14 and accompanying text.

designer must choose between adding new expertise- or participation-enhancing mechanisms, this Article counsels in favor of the former.

As a caveat, it may be that participation serves a legitimizing function *for those individuals that participate*—which is something that this Article’s research design cannot assess. Through the act of public deliberation, people may feel heard, respected, and may even change their own views as a consequence of two-way communications with policymakers and their fellow citizens.²⁸⁶ On this view, merely informing an experiment participant that a notice-and-comment process occurred fails to capture the sentiment that actual people feel when they engage in dialogue with an agency through that process.

It also is important to note that the participation condition gestures only to currently existing participatory mechanisms, namely, the APA’s notice-and-comment procedure. For proponents of robust public participation in agency policymaking, that mechanism offers thin gruel.²⁸⁷ One such proponent, Emerson, argued that notice-and-comment “does not go nearly far enough in the extent of participation it affords, in its sensitivity to problems of unequal power, or in surfacing moral rather than merely technical questions.”²⁸⁸ Where well-heeled interests dominate the notice-and-comment process,²⁸⁹ expanded avenues for these interests’ participation could even erode agencies’ perceived legitimacy.

For this reason, a set of scholars urges the government to address power imbalances concerning participatory mechanisms as a means of boosting administrative legitimacy.²⁹⁰ I count myself

²⁸⁶ See EMERSON, *THE PUBLIC’S LAW*, *supra* note 1, at 98–102 (presenting this view).

²⁸⁷ See Havasy, *Relational Fairness*, *supra* note 17, at 820–21 (critiquing notice-and-comment rulemaking based on its placing the burden to participate on affected parties and ignoring inequalities of access); EMERSON, *THE PUBLIC’S LAW*, *supra* note 1, at 21 (referring to the APA’s notice-and-comment requirement for rulemaking as “a thin form” of deliberative process).

²⁸⁸ EMERSON, *THE PUBLIC’S LAW*, *supra* note 1, at 21.

²⁸⁹ See Daniel E. Walters, *Capturing the Regulatory Agenda: An Empirical Study of Agency Responsiveness to Rulemaking Petitions*, 43 HARV. ENVTL. L. REV. 175, 183–86 (2019) (concluding that this influence is particularly apparent in notice-and-comment rulemaking, although it often falls short of the “regulatory capture” label).

²⁹⁰ See, e.g., Jim Rossi & Kevin M. Stack, *Representative Rulemaking*, 109 IOWA L. REV. 1, 8 (2023) (“[A]ttention to representative rulemaking can improve the legitimacy and substantive outcomes of agency policymaking more effectively than reforms that focus on increasing participation.”); Havasy, *Relational Fairness*, *supra* note 17, at 801–18 (urging changes to judicial review, new limits on ex part communications, and a stricter test for whether an agency action qualifies for an APA exemption, all to encourage agencies to seek input on proposed actions from affected parties); Sant’Ambrogio & Staszewski, *supra* note 103, at 831–54; K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315, 360–66 (2018); Kate Andrias, *Separations of Wealth: Inequality and the*

among this group. In other work, I advocate for “identity-conscious” measures designed to elevate the views of undervoiced groups in agency decision-making.²⁹¹ These measures include reserved seats for underpowered groups on multimember bodies and greater consultation with agency advisory committees that spotlight these groups.²⁹²

For these scholars, the APA’s notice-and-comment procedure and similar participation-fostering requirements constitute a floor upon which institutional designers ought to build. From this perspective, that the participation condition yields a smaller, less certain increase in perceived legitimacy than the expertise condition is not an indictment of the participation paradigm. Instead, that administrative law’s modest participatory mechanisms produce modest increases in perceived legitimacy suggests that more robust measures may generate stronger effects. Accordingly, the results concerning the participation condition point to a fruitful direction for future research: testing the myriad participation-enhancing proposals that scholars posit would bolster agencies’ legitimacy.

C. Challenge the President

These experiments call into question the presidential administration paradigm. None of the results concerning this condition achieve statistical significance. Further, even if one ignores statistical significance and focuses solely on the coefficient estimates, these results do not lead to any natural inference. Indeed, they are puzzling: a negative relationship between presidential administration and legitimacy for the CFPB, no relationship for the DOT, and a positive relationship for the EPA. Whatever one’s preferred interpretation of these unusual results, it is clear that the straightforward claim that greater presidential involvement legitimates agency decisions is not supported.

If presidential involvement were to ever affect agencies’ perceived legitimacy, presumably it would be among the president’s

Erosion of Checks and Balances, 18 J. CONST. L. 419, 499–500 (2015); Richard Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking via Pre-Notice Transparency*, 47 WAKE FOREST L. REV. 681, 691–703 (2012); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 490–97 (2005); Lobel, *supra* note 112, at 440; Freeman, *Collaborative Governance*, *supra* note 111, at 96–97; Hammond & Markell, *supra* note 97, 360–61.

²⁹¹ See Brian D. Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, 90 GEO. WASH. L. REV. 1, 64–71 (2022).

²⁹² See *id.* at 19.

supporters.²⁹³ Even here, however, the results show that skepticism is warranted. Participants who voted for President Trump tend to consider the decisions in the DOT and EPA vignettes to be more legitimate when they learn of President Trump's involvement. For Trump voters who viewed the CFPB vignette and Biden voters who viewed all three vignettes when told of President Biden's involvement, however, the experiments produce null results.²⁹⁴ These tepid results fly in the face of claims, made most recently by the *Arthrex* Court, that agencies "acquire[] [their] legitimacy" from "the President, on whom all the people vote."²⁹⁵ That is plainly not the case, at least with respect to sociological legitimacy.

In one sense, that people disfavor presidential administration may be an inevitable corollary to their demonstrated preference for technocratic governance. Even if one does not view civil servants and appointees as natural rivals,²⁹⁶ that power is zero-sum implies that strengthening one group's role in administration necessarily weakens the other. It is therefore possible that on some level participants recognize the tradeoffs inherent in empowering civil servants versus presidential personnel²⁹⁷—and affirmatively choose the former.

Nonetheless, participants' rejection of the presidential administration paradigm suggests a puzzle. Why is it that so many scholars and judges—including scholars-turned-judges Elena Kagan and Neomi Rao—consider presidential administration to be a wellspring of legitimacy for the administrative state,²⁹⁸ while few members of the broader public appear to agree? I offer three possibilities.

First, legal elites' support for the presidential administration paradigm may be grounded in a belief that greater presidential influence enhances agencies' legal or moral legitimacy, not their sociological legitimacy. This response is unsatisfying. Recall that

²⁹³ See Luke Keele, *The Authorities Really Do Matter: Party Control and Trust in Government*, 67 J. POL. 873, 881–82 (2005) (finding that people exhibit greater trust in government when their favored party holds power).

²⁹⁴ See *supra* Figure 4.

²⁹⁵ *Arthrex*, 141 S. Ct. at 1979.

²⁹⁶ Compare Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016) [hereinafter Michaels, *Of Constitutional Custodians*] (adopting this perspective), with Feinstein & Nou, *Strategic Subdelegation*, *supra* note 85 (challenging it).

²⁹⁷ See Emerson & Michaels, *supra* note 259, at 111 (claiming that the presidential administration has "undermined the professional civil service").

²⁹⁸ See *supra* notes 124–32 and accompanying text; Rao, *supra* note 144, at 226–27.

moral legitimacy involves whether an institution is morally justifiable or worthy or recognition.²⁹⁹ Arguments that a presidential administration acts as a legitimizing force on the administrative state, however, rarely involve these types of direct appeals. Although the administrative state's legal legitimacy is hotly contested,³⁰⁰ critics of agencies' legitimacy rarely limit their critiques to legal legitimacy; they also argue that the administrative state lacks sociological legitimacy.³⁰¹ In other words, sociological legitimacy plays a major role in the presidential administration paradigm, notwithstanding the fact that it shares the stage with claims concerning legal legitimacy.³⁰²

Second, people may in fact evince a general preference for empowering the president, but once they are compelled to consider the nitty-gritty of what such power entails—for example, in these vignettes, learning that the president may remove the agency head “at any time and for any reason”—their support curdles. In other words, people favor a robust presidency at a high level of abstraction, but express discomfort when faced with specific legal authorities that particular occupants of that office use to wield power over other government actors.³⁰³

Third, elite proponents of presidential administration as a legitimizing force may have misread the room. They may think that greater White House involvement changes societal beliefs concerning agencies, leading to greater public endorsement or acceptance—but they are mistaken.³⁰⁴ Their error may stem from a tendency for legal elites to occupy different spaces than other people, distorting their ability to understand what

²⁹⁹ See Fallon, *Legitimacy*, *supra* note 34, at 1796.

³⁰⁰ See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1188 (1992) (stating that the Constitution's vesting clauses, including the Article II Vesting Clause placing the executive power with the president, “describ[e] the entities that may legitimately exercise the powers subsequently granted by the Constitution”).

³⁰¹ See, e.g., Calabresi, *supra* note 125, at 58–59 (favoring the presidential administration paradigm based on the claim that the president's accountability to a national electorate provides the president with a “unique claim to legitimacy”).

³⁰² See *supra* Part I.B.3 (summarizing the paradigm's claims concerning sociological legitimacy).

³⁰³ Cf. JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* 125 (2002) (finding the source of support to be high-level concepts such as “involve[ment] in the political system”).

³⁰⁴ Indeed, if the legal-elites-misread-the-room explanation is accurate, it would not be the first time that an important jurisprudential position relied on an erroneous assumption about public beliefs. See Kevin Tobia, Daniel E. Walters & Brian Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. (forthcoming 2024) (presenting experimental evidence that Justice Amy Coney Barrett's “common sense” example of how people interpret instructions nonliterally conflicts with ordinary Americans' views).

measures will appeal to their fellow citizens.³⁰⁵ Regardless of its explanation, however, it is worth highlighting the irony here: elite lawyers favor greater presidential administration based on the presumed legitimating effects of the president's democratic connection to the people, whereas ordinary people view empowering elite technocrats as legitimizing.

That Americans appear to find greater legitimacy in technocracy than in presidential administration is consistent with an insight from political scientists John Hibbing and Elizabeth Theiss-Morse.³⁰⁶ Drawing on a national survey and a set of focus groups, Professors Hibbing and Theiss-Morse observed that people tend to be disinterested in policy, actively avoid politics, and “not eager to hold government accountable for the policies it produces.”³⁰⁷ That statement cuts against the presidential administration paradigm, which rests on assumptions about the president's democratic responsiveness or accountability to the voters' preferences.³⁰⁸ Instead, Hibbing and Theiss-Morse found that “people are surprisingly smitten with the notion of elite experts making choices.”³⁰⁹ Score one for the expertise paradigm.

But there is a twist. Although “[t]he last thing people want is to be more involved in political decision making,”³¹⁰ they nonetheless want to retain the *option* to get involved “in unusual circumstances,” for instance, if they think that policymakers are engaged in self-serving behavior.³¹¹ The participation paradigm provides this

³⁰⁵ Cf. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 307 (Pa. St. Univ. ed., Henry Reeve trans., 2002) (labeling “the judicial bench and the bar” as “the American aristocracy”).

³⁰⁶ See generally Hibbing & Theiss-Morse, *supra* note 303. I thank Dan Walters for this point.

³⁰⁷ *Id.* at 2.

³⁰⁸ See Jackson, *supra* note 83, at 13–21 (arguing that the “principal-agent transmission belt model of popular sovereignty,” in which preferences are transmitted from voters to elected officials to ultimate decision-makers in government rests on flawed assumptions).

³⁰⁹ Hibbing & Theiss-Morse, *supra* note 303, at 86.

³¹⁰ *Id.* at 1.

³¹¹ *Id.* at 2. It is worth quoting this point at length. *Id.* (emphasis in original):

The people as a whole tend to be quite indifferent to policies and therefore are not eager to hold government accountable for the policies it produces. This does not mean people think no mechanism for government accountability is necessary; they just do not want the mechanism to come into play except in unusual circumstances. The people want to be able to make democracy visible and accountable on those rare occasions when they *are* motivated to be involved. They want to know that the opportunity will be there for them even though they probably have no current intention of getting involved in government or even of paying attention to it.

option. The overwhelming majority of Americans do not utilize these participatory mechanisms.³¹² Yet the option is there.

Thus, the results reported in Part III fit neatly with Hibbing and Theiss-Morse's thesis. That this Article finds support for the expertise and participation paradigms is consonant with their core insight that people prefer ceding policy decisions to experts while retaining the option to participate in these decisions if needed. Their thesis also explains the inconsistent results regarding the presidential administration paradigm, which holds that the president's democratic accountability legitimizes agencies. That view is grounded in the assumption that people want or endeavor to use presidential elections to hold government accountable³¹³—a dubious proposition given Hibbing and Theiss-Morse's findings.³¹⁴ Small wonder, then, that this Article's experiments cast further doubt on the presidential administration paradigm.

D. Pursue Evidence-Based Agency Design

The results presented in Part III offer a roadmap to institutional designers. To bolster agencies' perceived legitimacy, one should emphasize expertise and, perhaps, public participation, and de-emphasize presidential administration. Ongoing efforts to strip away agencies' political insulation and place it with greater White House direction should be resisted.

This basic charge, however, glosses over a great deal of nuance. This Section presents two additional insights: First, institutional designs should consider bespoke agency designs. Second, additional experimental work is needed to test scholars' and judges' myriad other claims concerning structures that promote

³¹² See Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 950 (2006) (reporting that agencies on average receive between six and thirty-three comments during the notice-and-comment period for the typical rulemaking). The highest-profile proposed rules receive hundreds of thousands or even millions of comments (many of which are duplicative). See *id.* at 959; Steven Balla, *Fake Comments Flooded in When the FCC Repealed Net Neutrality. They May Count Less Than You Think.*, WASH. POST (Dec. 14, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/14/there-was-a-flood-of-fake-comments-on-the-fccs-repeal-of-net-neutrality-they-may-count-less-than-you-think/>. That's a lot, but still a far cry from a plebiscite in a country of over three hundred million people.

³¹³ See *supra* Part I.B.3.

³¹⁴ See Hibbing & Theiss-Morse, *supra* note 303, at 216:

[P]eople are willing to sacrifice democratic accountability to obtain rule by those they believe would not be self-interested and [] when people appear to want to empower ordinary people it is usually because they have been forced into a situation in which ordinary people are held up as the only alternative to rule by self-interested elites.

legitimacy, beyond those that fit neatly into the expertise, participation, and presidential administration paradigms.

1. Bespoke agencies.

These results suggest that there may not be any one-size-fits-all approach to increasing agencies' perceived legitimacy. Consider that the participation condition is associated with greater perceived legitimacy for the CFPB, but one cannot reject the null hypothesis concerning the other two agencies.³¹⁵ Or take the presidential administration condition, which is associated with diminished perceived legitimacy for the CFPB, roughly equivalent levels for the DOT, and greater perceived legitimacy for the EPA (setting aside statistical significance levels for DOT and EPA).³¹⁶ These agency-by-agency differences at least raise the possibility that the foundations of administrative legitimacy may be agency- or issue-specific, rather than inhering in the government as a whole.

That prospect calls for humility. Scholars and judges should think carefully before making grand statements about how their preferred structure bolsters legitimacy in the administrative state writ large.³¹⁷ Instead, the administrative state's legitimacy could be optimized with an agency-specific approach, in which the paradigm that is best suited for, say, a financial regulator may be distinct from the ideal paradigm for a grant-making agency.

This sort of bespoke agency design would be a departure from the status quo. Administrative law as a field aspires largely toward universality, with the transsubstantive APA as its lodestar.³¹⁸ It also is a field in which structures, processes, and judicial doctrine elevating various groups have been layered on top of each other over generations, with little testing to understand the effects of each component, let alone how they interact in combination within different agencies.

³¹⁵ See *supra* notes 232–34 (reporting differences in means and associated uncertainty measures for the participation condition across the three agencies).

³¹⁶ See *supra* notes 238–39 (reporting these figures for the three agencies).

³¹⁷ Cf. Farina, *Consent*, *supra* note 58, at 1037 (urging administrative lawyers to “forego the drama of discovering a single legitimating savior, in favor of incremental experimentation and improvement in the multitude of ‘ordinary’ political and administrative processes and structures”).

³¹⁸ See *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999) (“The APA was meant to bring uniformity to a field full of variation and diversity.”); Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 500 (2011) (asserting that “the universality of administrative law doctrine . . . is commonly assumed,” and challenging this assumption).

This Article offers a proof of concept for an alternative approach. Experiments across various agencies and issue areas, which include conditions that cover the waterfront in terms of purportedly legitimacy-enhancing design features,³¹⁹ would allow for a data-driven, inductive approach to institutional design. Admittedly, calibrating the roles of expert technocrats, public participants, and the White House on an agency-by-agency basis would be a considerable undertaking. If doing so generates greater perceived legitimacy at a time when the administrative state is under strain, however, the task would be worthwhile.

2. Extensions.

The above recommendation to explore bespoke agency structures suggests that more experimental work is needed to understand the various ways in which these structures affect agencies' perceived legitimacy. In that spirit, I offer four questions for future research concerning the relationship between agency structures and legitimacy.

a) *To what extent do these findings translate to other agencies, issues, and methods of policymaking?* Notably, the vignettes do not specify the policymaking forms of the agency actions.³²⁰ Agencies set policy in several ways, including via rulemakings, adjudications with precedential value, and the publication of guidance documents.³²¹ Enforcement decisions—and decisions *not* to enforce, for example, through issuing no-action letters or conveying that personnel will exercise prosecutorial discretion—can function as policy setting, to the extent that they influence private actors' future behavior.³²² Indeed, because *any* signal that bears on an agency's likelihood of future action can influence outside parties' ex ante behavior, many agency actions can be functionally equivalent to setting policy. These soft law measures range from speeches telegraphing future action to acting as dealmaker between private

³¹⁹ See app.

³²⁰ The Article's text refers to these payday-lending, trucker work hours, and pollution control policies as "rules," and knowledgeable readers will assume that agencies likely would use informal rulemaking procedures to promulgate these policies. See 5 U.S.C. § 553. I do not include this information in the vignettes based on a desire to simplify them for a non-specialist audience.

³²¹ See 5 U.S.C. §§ 553–554.

³²² See Chris Brummer, Yesha Yadav & David Zaring, *Regulation by Enforcement*, 97 S. CAL. L. REV. (forthcoming 2024).

parties to further a policy goal during a crisis.³²³ Accordingly, a natural extension of this project would be to examine whether policy-making form influences perceptions of legitimacy.³²⁴

That the CFPB, DOT, and EPA all are regulatory agencies also is notable. Administrative agencies engage in a host of other functions, including licensing, benefits administration, and grant making. Extending this project to settings beyond rulemaking would provide a more complete picture of Americans' views of the legitimacy of their government.

What's more, the CFPB and DOT rarely make headlines, and as a general matter none of the three agencies is deeply associated with "culture war" issues. According to Judge Rao, agencies looking to preserve their legitimacy ought to shy away from "regulation on hot-button moral, ethical, and social issues."³²⁵ Although these three agencies are hardly immune from political controversy,³²⁶ the issues in the vignettes arguably are less value-laden than others. Consider, for instance, Department of Education guidance prohibiting schools from discriminating based on gender identity or Food & Drug Administration restrictions on access to the abortion pill mifepristone.³²⁷ There is reason to think that people may respond differently to these issues, as a study on procedures and legitimacy in Congress finds that people place less weight on fair procedures as contributing to legitimate outcomes for highly charged issues.³²⁸ Thus, a more complete picture of how agency design features connect to perceived legitimacy ought to include these types of hot button issues alongside the payday-lending, truckers' work hours, and air pollution vignettes.

b) Do Americans connect agency structures to other values?

Future extensions of this project also could go beyond probing

³²³ See Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841, 1844–45 (2011); Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 465–67 (2009). For a discussion of the concept of soft law, see Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 606 (2008).

³²⁴ See Bressman, *Beyond Accountability*, *supra* note 99, at 546 (claiming that forgoing notice-and-comment rulemaking "jeopardizes administrative legitimacy"); Freeman, *Collaborative Governance*, *supra* note 111, at 10 (asserting that guidance documents "threaten to [] undermine the legitimacy of the rules produced by removing even the pretense of public access and participation").

³²⁵ Rao, *supra* note 144, at 232.

³²⁶ See, e.g., Noll, *supra* note 266, at 756–57 (CFPB); *id.* at 782 n.174 (EPA).

³²⁷ See Talal Ansari, *States Sue FDA over Access to Abortion Pill*, WALL ST. J. (Feb. 24, 2023), <https://www.wsj.com/articles/states-sue-fda-over-access-to-abortion-pill-f9f6b691>; Bianca Quilantan, *Federal Judge Blocks Education Department's Title IX Guidance That Protects Transgender Students*, POLITICO (July 16, 2022), <https://perma.cc/V6WY-F3HV>.

³²⁸ See Amy Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*, 25 POL. BEHAV. 119, 133–34 (2003).

views on legitimacy. Agency structures and processes may influence people's views on agencies' competence, trustworthiness, and other values. Indeed, as previously discussed, past work has found that reason-giving and review requirements are associated with higher scores on metrics that measure satisfaction, perceived fairness, and perceived honesty.³²⁹

Relatedly, that this Article does not define the term legitimacy for participants means that one cannot be confident about what facets of the concept drive the results. There are good reasons for allowing participants to define the term by their own lights. Sociological legitimacy is grounded in public perceptions. Thus, prompting people regarding *how* they ought to conceptualize legitimacy would be self-defeating. The downside of this approach is that we cannot know what people intend when they rate a decision's legitimacy. To address this limitation, future research could include additional questions concerning concepts that theorists consider to be components of legitimacy. Alternatively, enabling participants to articulate their reasons for their responses could shed light on how they think about the concept.

c) How do people respond to more fine-grained structural differences? This study could be extended to probe whether specific, individual design features influence participants' perceptions of agency legitimacy. Note that the research design in this Article does not do that. For instance, the expertise condition discusses (1) apolitical hiring of civil servants based on training and expertise; (2) employment protections against being fired for political reasons; (3) the role of civil servants in drafting the policy; (4) and their role in drafting an explanatory report.³³⁰ The participation and presidential administration conditions also lump together multiple design features associated with these respective paradigms.³³¹

Given that this Article's objective is to assess the three legitimacy paradigms, the inclusion of multiple design features in each condition is sensible. Proponents of each of the three legitimacy paradigms generally do not focus on any single feature at the expense of all others in making their claims. Rather, they make reference to a set of features.³³²

Going beyond the scope of this Article, however, it would be useful to assess the independent effect of each individual feature.

³²⁹ STIGLITZ, *THE REASONING STATE*, *supra* note 58, at 189–242.

³³⁰ *See supra* Part III.A.

³³¹ *See supra* Parts III.B–C.

³³² *See supra* Part I.B.

For instance, how much of the legitimacy boost concerning the expertise condition is attributable to the apolitical hiring of civil servant versus their protections against removal?

d) What other institutional features do people value? Beyond the expertise, participation, and presidential administration paradigms, there is no shortage of other agency structures and processes that scholars and judges claim enhance administrative legitimacy. Although the number of potential design features is essentially limitless, I identify six broad categories of features—beyond the expertise, participation, and presidential administration paradigms that are this Article’s focus—that commentators assert contribute to agencies’ legitimacy.

First, judicial review may legitimize agencies’ decisions. Prominent midcentury legal scholar Louis Jaffe contended that the availability of a judicial check on agency decisions is no less than “*the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate.*”³³³ Many judges and scholars agree.³³⁴

Second, some claim that legitimacy hinges on faithful adherence to valid delegations from Congress. Chief Justice John Roberts endorsed this view, writing in dissent that an agency “acquires its legitimacy from a delegation of lawmaking power from Congress.”³³⁵ Again, the list of endorsers of this basic claim is long and distinguished.³³⁶

³³³ JAFFE, *supra* note 60, at 320 (emphasis added); *see also id.* at 372.

³³⁴ *See Saylor v. Dep’t of Agric.*, 723 F.2d 581, 582 (7th Cir. 1983) (“The legitimacy of an adjudication by an administrative agency depends to a great extent on the availability of effective judicial review.”); Watts, *Rulemaking*, *supra* note 123, at 1043; M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1413 (2014); Hammond, *supra* note 138, at 656; Bressman, *Judicial Review*, *supra* note 124, at 1716; Strauss, *supra* note 1, at 1357; Hammond & Markell, *supra* note 97, at 314; Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1302 (1994); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1517 (1992); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 742 (1990); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 429; Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 1 (1983) (“[A] conception of public administration free from judicial oversight would . . . undermine[] . . . a principal buttress for the legitimacy of the modern ‘administrative state.’” (citations omitted)).

³³⁵ *City of Arlington v. FCC*, 569 U.S. 290, 327 (Roberts, C.J., dissenting).

³³⁶ *See* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1002 (2015) (“[T]he legitimacy of delegating expansive lawmaking authority to unelected regulators may well depend on whether those regulators are faithful agents of Congress.”); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 511 (1989) [hereinafter Farina, *Statutory Interpretation*] (referring to a “legitimacy ideal” under which policymaking is tethered to

Third, agencies may acquire legitimacy from their responsiveness to the *current* Congress. Some see committee oversight hearings and other methods for ongoing, post-enactment congressional supervision as providing a dose of legitimacy to agencies.³³⁷ Others are skeptical.³³⁸ As before, experimental studies—here, with text regarding the views of congressional overseers—could shed further light on the matter.

Fourth, other internal structures, beyond those discussed *supra*, may legitimize agencies. Scholars adopting this approach focus on internal norms and structures,³³⁹ a commitment to due

“the people’s elected representatives”); Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1401 (1975) (“[T]he necessity of delegation should not disguise the fact that whatever legitimacy inheres in agency action stems from a delegation of politically based power.”). Relatedly, the transmission-belt model of agency legitimacy holds that agency action is “legitimate because Congress, not the unelected administrators, was prescribing the policies.” McGarity, *supra* note 1, at 1722–23; *see also* Jackson, *supra* note 83, at 7–8 (connecting the major questions and nondelegation doctrines to the transmission-belt model, a “way of thinking about administrative legitimacy”); Criddle, *supra* note 105, at 451 (describing the transmission-belt model as “focus[ed] on Congress’s statutory instructions as a source of democratic legitimacy”); Stewart, *supra* note 1, at 1675 (summarizing conventional administrative law theory as “legitimat[ing] 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”). For the related claim that adherence to separation-of-powers principles bolsters legitimacy, *see* Kristen E. Hickman, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1137 (2021) (“[F]ormal adherence to separation of powers principles . . . hits many ordinary people at a visceral level and contributes to perceptions of the fairness and legitimacy of government.”); THE FEDERALIST NO. 49, *supra* note 122, at 339 (“[T]he people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived.”).

³³⁷ *See* Sean Farhang, *Legislative Capacity & Administrative Power Under Divided Polarization*, 150 DAEDALUS 49, 50–51 (2021) (asserting that the “administrative state’s legitimacy hinges on meaningful congressional oversight”); Bernard W. Bell, *Replacing Bureaucrats with Automated Sorcerers?*, 150 DAEDALUS 89, 95 (2021) (“Agencies’ legitimacy rests upon their responsiveness to . . . the president and Congress.”); Farina, *Statutory Interpretation*, *supra* note 336, at 514 (“The creation of the administrative state was thus legitimated by moving from a model in which the legislature controls policy making through initiation to a model in which it controls policy making through supervision and reaction.”); *see also* Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1189, 1245–48 (2018) (arguing that *ex post* congressional oversight contributes to “administrative democracy”); Beermann, *supra* note 123, at 728, 758–61 (asserting the “superior legitimacy of Congress as policymaker,” and arguing for fast-track congressional review of agency regulations to bolster Congress’s role in policymaking).

³³⁸ *See* Vermeule, *supra* note 11, at 2465 (“Congress’s *de facto* abdication blocks any simpleminded appeal to legislative oversight as the source of legitimation for the administrative state.”); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1254 n.253 (1982) (arguing that in practice the “legitimacy that Congress might lend to agency actions through close legislative attention has not been forthcoming”).

³³⁹ *See* Glicksman & Hammond, *supra* note 88, at 1659; Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1262, 1266 (2017).

process,³⁴⁰ transparency measures,³⁴¹ the balancing of rivalrous subgroups within agencies,³⁴² and the related abilities of agencies to provide fora for ongoing political contestation³⁴³ or for deliberation.³⁴⁴ Measures to empower extra-agency groups in the regulatory process—for example, the use of negotiated rulemakings,³⁴⁵ advisory committees,³⁴⁶ independent scientific peer reviewers,³⁴⁷ and collaborative governance initiatives³⁴⁸—also are claimed to legitimize agency decision-making. So are measures designed to overcome unequal access and ensure that agencies hear from affected parties.³⁴⁹

Fifth, an agency’s perceived legitimacy may be grounded in its track record. Professors Peter Conti-Brown and David Wishnick connected one agency’s legitimacy with its ability to experiment

³⁴⁰ See JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 142–44 (1983); JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 168–69, 173 (1985); cf. TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 117, at 115–24 (noting that procedural fairness promotes legitimacy in judicial proceedings).

³⁴¹ See William H. Simon, *The Organizational Premises of Administrative Law*, 78 LAW & CONTEMP. PROBS. 61, 64–65 (2015); Mendelson, *Disclosing*, *supra* note 138, at 1159; McGarity, *supra* note 1, at 1755–56.

³⁴² See Michaels, *Of Constitutional Custodians*, *supra* note 296, at 256 (“[C]ultivating and safeguarding robust administrative rivalries contributes strongly to a legitimate administrative sphere.”); Michaels, *Enduring*, *supra* note 1, at 551–53 (“[A]dministrative separation of powers is [] an affirmative source of administrative legitimacy.”).

³⁴³ See generally Walters, *Agon*, *supra* note 6; Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. 1763 (2023).

³⁴⁴ See EMERSON, THE PUBLIC’S LAW, *supra* note 1, at 150 (emphasis in original):

[A]dministrative power is legitimate to the extent that it enables us to be free, in the sense of determining our own commitments and plans. In a context of deep social interdependency, such freedom requires jointly authoring shared norms, and turning these shared norms into shared social conditions. The *structure* of administrative power is then to be judged by its ability to facilitate rational deliberation over the meaning of public norms that are presumptively valid, yet not fully specified. The *purpose* of administrative power is to make these norms efficacious elements of the social world.

See also WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 27–28, 103–04 (2010) (noting that agency-centered deliberation has “legitimizing value”); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1255 (2009) (claiming that “deliberative democratic theory” offers “an alternative means of legitimizing governmental authority”); *id.* at 1278 (observing that expertise-based reason-giving fosters citizen deliberation, thus legitimizing agency action); Seidenfeld, *supra* note 334, at 1528–41 (“Particular governmental decisions[.] . . . to be legitimate, must[] conform to [civic-republican] principles [emphasizing deliberation].”); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 41 (1996) (“Deliberation contributes to the legitimacy of decisions made under conditions of scarcity.”).

³⁴⁵ See Freeman & Langbein, *supra* note 70, at 63, 109–10, 121, 137–38.

³⁴⁶ See Ass’n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 913–14 (D.C. Cir. 1993); Feinstein & Hemel, *supra* note 178, at 1147.

³⁴⁷ See generally Virelli, *supra* note 98.

³⁴⁸ See Freeman, *Collaborative Governance*, *supra* note 111, at 22.

³⁴⁹ See Havasy, *Relational Fairness*, *supra* note 17, at 801–18.

and address emergent problems.³⁵⁰ For Gluck, O’Connell, and Po, an agency’s legitimacy in the public’s estimation may hinge on the success of the agency’s policies more than any procedural fine-tuning.³⁵¹ Simply put, there is a “legitimacy of government getting its work done.”³⁵²

Sixth, and finally, legal scholar Philip Hamburger, among the most resolute critics of the administrative state, considered agencies’ exercise of discretionary authority, or “administrative lawmaking,” to be illegitimate.³⁵³ A hard-line reading of Professor Hamburger’s thesis is that, because the administrative is at its core unlawful, no paradigm that accepts the premise of administrative governance can legitimize these institutions. A slightly more conciliatory interpretation is that agencies’ discretionary authority and legitimacy are inversely related. In this telling, an agency’s legitimacy declines—albeit perhaps not to the point of extinguishment—as it moves away from purely ministerial functions and into policymaking. Professor Hamburger’s legitimacy claims, grounded as they are in legal history and doctrine, bear mostly on legal legitimacy. Yet, to the extent that he sought to change public attitudes toward the administrative state, agencies’ sociological legitimacy is implicated as well.³⁵⁴

³⁵⁰ See Peter Conti-Brown & David A. Wishnick, *Technocratic Pragmatism, Bureaucratic Expertise, and the Federal Reserve*, 130 YALE L.J. 636, 666 (2021) (“[P]ragmatic experimentation”—subject to several pragmatic, socio-legal guardrails—“should ultimately bolster the Fed’s legitimacy.”).

³⁵¹ See Gluck et al., *supra* note 228, at 1842; see also Bagley, *supra* note 32, at 350 (offering “a positive vision of the administrative state” in which “its legitimacy is measured . . . by how well it advances our collective goals”); FRITZ SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 6 (1999) (defining “output legitimacy” as involving “effectively promot[ing] the common welfare of the constituency in question”).

³⁵² Gluck et al., *supra* note 228, at 1842.

³⁵³ See PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 504 (2014) (“[I]t is profoundly disturbing that [legal elites] . . . shifted the power of the people and their representatives to the courts and the executive, and that it then relied on judicial lawmaking to legitimize the executive’s administrative lawmaking. Whatever one might conclude from this, it is not legitimacy.”); *id.* at 509 (“Although administrative power presents itself in the legitimizing vocabulary of law, scholars and judges should not dignify extralegal power in this way.”).

³⁵⁴ See generally PHILIP HAMBURGER, THE ADMINISTRATIVE THREAT (2017) (reflecting a shorter, more accessible work by Hamburger, presumably intended for a wider audience); Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1554 (2015) (reviewing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014)) (“The effect of [Hamburger’s] book[,], if accepted, is to quietly delegitimize the administrative state The indirect and long-run effect . . . on the intellectual culture of the legal profession, and perhaps even of the broader public, might be pernicious and worth opposing, even if there are no direct and short-run effects.”).

In summary, these additional paradigms emphasize judicial review, adherence to valid delegations from Congress, responsiveness to the current Congress, intra-agency features, consequentialism, and not straying from ministerial tasks into policymaking. All of these paradigms could be tested using the experimental approach that this Article presents. For instance, the adherence-to-delegation paradigm could be assessed with vignettes that inform participants in future experiments that the agency's action is "permitted but not required by statute," "neither expressly allowed nor prohibited by statute," and so on.³⁵⁵ In a nod to the ascendant major questions doctrine, the vignettes could even vary concerning whether their subject matter involves "an agency decision[] of vast economic and political significance," for which the Supreme Court requires a "clear statement of congressional intent to delegate such power."³⁵⁶

CONCLUSION

For over one hundred years, administrative lawyers have endeavored to legitimize administrative agencies within the constitutional order. This project has progressed largely without evidence of what factors nonelite actors believe contribute to agencies' legitimacy. That oversight is glaring, particularly because, for many participants in this discourse, popular acceptance is foundational to legitimacy.

This Article presents experiments designed to elicit ordinary people's views on what structures and processes contribute to administrative agencies' legitimacy. From studying the responses of participants in these experiments, several noteworthy findings emerge.

For one, elevating the role of politically insulated technocrats in agency decision-making is correlated with an increase in those decisions' legitimacy with the public. For proponents of a robust administrative state, this finding shows that a politically insulated civil service—which has been challenged in recent years—is worth defending. Further, affording opportunities for public participation also may serve a legitimizing function, albeit with some uncertainty around this conclusion. By contrast, increased presidential involvement—which an ascendant set of scholars

³⁵⁵ I thank Blake Emerson for this point.

³⁵⁶ *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022) (quotation marks omitted) (quoting *Util. Air. Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

and judges claim legitimizes administration—has a mixed, seemingly vignette- and participant-dependent relationship with perceived legitimacy.

For supporters of administrative governance, these findings should engender optimism. In the current political climate, a degree of cynicism about both experts and fellow citizens is common. Nonetheless, people appear to value the former group's involvement in governance, and may value the latter group's role as well. Accordingly, a turn away from presidential administration and toward expert-driven and participatory legitimation paradigms could improve confidence in administrative governance at a time when it is in short supply.

APPENDIX

This Appendix provides the full text of the experiments' vignettes and questions asked of all participants. For each agency, participants are randomly assigned to one of three treatment conditions (expertise, participation, or presidential administration) or one of two control conditions.

I. CFPB, PAYDAY-LENDING VIGNETTES

Expertise Condition	Participation Condition	Presidential Admin. Condition
The CFPB is a federal agency that regulates lenders.	The CFPB is a federal agency that regulates lenders.	The CFPB is a federal agency that regulates lenders.
<i>The law requires that the agency's employees be hired based on their professional training and expertise. The agency cannot hire employees based on their political views. Employees cannot be punished or fired for disagreeing with political leaders.</i>	<i>When it proposes a new policy, the agency must invite comments from the public concerning the proposal. Only after the agency has thought about the comments that it received can it enact the new policy.</i>	<i>The president appoints the leader of the agency. When selecting a new leader, the president makes sure that this person reflects his views and priorities. The president may fire the agency's leader at any time and for any reason.</i>
[Last year, during the Biden administration] / [Two years ago, during the Trump administration], the agency announced that "high-cost, short-term 'payday' loans are unfair because many borrowers aren't able to pay off the loans on-time. Lenders then charge these borrowers large late fees. Therefore, we are considering new limits on payday loans."	[Last year, during the Biden administration] / [Two years ago, during the Trump administration], the agency announced that "high-cost, short-term 'payday' loans are unfair because many borrowers aren't able to pay off the loans on-time. Lenders then charge these borrowers large late fees. Therefore, we are considering new limits on payday loans."	[Last year, President Biden / Two years ago, President Trump] gave a speech calling on the agency to limit high-cost, short-term "payday" loans. He argued that these loans are unfair because many borrowers aren't able to pay off the loans on-time. Lenders then charge these borrowers large late fees. Therefore, the agency should consider new limits on payday loans."
Later, the agency banned most loans with annual interest rates over 36%. <i>The</i>	The agency then invited any interested members of the public	<i>After the president's speech, the agency proposed banning most</i>

Expertise Condition	Participation Condition	Presidential Admin. Condition
<p><i>agency's expert employees wrote the policy banning these loans. They also wrote a technical report explaining the reasons for the ban.</i></p>	<p>to submit comments regarding whether, and if so, how to regulate these loans. Many organizations and people—including lenders, consumer groups, civic and religious groups, and business leaders—submitted comments. The agency spent months reading and thinking about their views.</p> <p><i>After doing so, the agency banned most loans with annual interest rates over 36%. The agency wrote a report responding to the comments that it received from the public. For the comments that the agency did not agree with, the report explained the agency's reasons why.</i></p>	<p>loans with annual interest rates over 36%. <i>The agency sent its proposal to the White House for its review. White House aides agreed with the proposal, because they determined that its benefits would exceed its costs. After receiving the White House's approval, the agency enacted the ban.</i></p>
<p>The agency said that banning most high-interest loans will prevent people from having to pay back a loan for longer and at greater cost than they originally expected. But critics say that the ban prevents people from taking out loans that they believe are right for them.</p>	<p>The agency said that banning most high-interest loans will prevent people from having to pay back a loan for longer and at greater cost than they originally expected. But critics say that the ban prevents people from taking out loans that they believe are right for them.</p>	<p>The agency said that banning most high-interest loans will prevent people from having to pay back a loan for longer and at greater cost than they originally expected. But critics say that the ban prevents people from taking out loans that they believe are right for them.</p>

Baseline Control Condition	Active Control Condition
The CFPB is a federal agency that regulates lenders.	The CFPB is a federal agency that regulates lenders.
	<p><i>One of the ways in which federal agencies like the CFPB make policy is by writing new regulations. Regulations are rules or orders issued by government agencies that have the force of law. After the agency announces a proposed regulation, it may make revisions. Then, the final regulation is published in the Code of Federal Regulations.</i></p>
<p>[Last year, during the Biden administration] / [Two years ago, during the Trump administration], the agency announced that “high-cost, short-term ‘payday’ loans are unfair because many borrowers aren’t able to pay off the loans on-time. Lenders then charge these borrowers large late fees. Therefore, we are considering new limits on payday loans.”</p>	<p>Several years ago, during the [Biden / Trump] administration, the agency announced that “high-cost, short-term ‘payday’ loans are unfair because many borrowers aren’t able to pay off the loans on-time. Lenders then charge these borrowers large late fees. Therefore, we are considering new limits on payday loans.”</p>
<p>Later, the agency banned most loans with annual interest rates over 36%.</p>	<p>Later, the agency banned most loans with annual interest rates over 36%. <i>The agency enacted this ban by issuing a regulation, taking the steps described above.</i></p>
<p>The agency said that banning most high-interest loans will prevent people from having to pay back a loan for longer and at greater cost than they originally expected. But critics say that the ban prevents people from taking out loans that they believe are right for them.</p>	<p>The agency said that banning most high-interest loans will prevent people from having to pay back a loan for longer and at greater cost than they originally expected. But critics say that the ban prevents people from taking out loans that they believe are right for them.</p>

Participants responded to an instructional manipulation check (#1) before reading the vignette and three factual manipulation checks (#2–4) interspersed within the vignette:

1. Research shows that people's state of mind affects their views about government decisions. Accordingly, we are interested in understanding your state of mind. Specifically, we want to determine whether you take the time to read directions. Please ignore the question below and instead select "all of the above" as your answer. Yes, that's right: ignore the question and just check "all of the above."

Which of the following best describes how you are currently feeling?

- (a) Sad, (b) Alert, (c) Distracted, (d) All of the above, (e) None of the above.

2. *Which of the following businesses does the CFPB regulate?*

- (a) Factories, (b) Farms, (c) Lenders, (d) Hospitals

3. *High-cost, short-term loans are referred to as:*

- (a) Workers' loans, (b) Payday loans, (c) Bonus loans, (d) Nontraditional loans

4. *What aspect of lending does the agency's policy address?*

- (a) Repayment period, (b) Purpose of the loan, (c) Borrower characteristics, (d) Annual interest rate

II. DOT, TRUCKER WORK HOURS VIGNETTES

Expertise Condition	Participation Condition	Presidential Admin. Condition
The Department of Transportation is a federal agency that regulates long-distance trucking, among other things.	The Department of Transportation is a federal agency that regulates long-distance trucking, among other things.	The Department of Transportation is a federal agency that regulates long-distance trucking, among other things.
<i>The law requires that the agency's employees be hired based on their professional training and expertise. The agency cannot hire employees based on their political views. Employees cannot be punished or fired for disagreeing with political leaders.</i>	<i>When it proposes a new policy, the agency must invite comments from the public concerning the proposal. Only after the agency has thought about the comments that it received can it enact the new policy.</i>	<i>The president appoints the leader of the agency. When selecting a new leader, the president makes sure that this person reflects his views and priorities. The president may fire the agency's leader at any time and for any reason.</i>
[Last year, during the Biden administration] / [Two years ago, during the Trump administration], the agency announced that "tired or overworked truck drivers are more likely to cause accidents. Therefore, we are considering new limits on how many hours truck drivers can work in a day."	[Last year, during the Biden administration] / [Two years ago, during the Trump administration], the agency announced that "tired or overworked truck drivers are more likely to cause accidents. Therefore, we are considering new limits on how many hours truck drivers can work in a day."	[Last year, President Biden / Two years ago, President Trump] <i>gave a speech calling on the agency to limit truck drivers' work hours. He argued that "tired or overworked truck drivers are more likely to cause accidents. Therefore, the agency should consider new limits on how many hours truck drivers can work in a day."</i>
Later, the agency said it will prohibit truck drivers from working more than 10 hours per day. <i>The agency's expert employees wrote the policy limiting truckers' time driving. They also wrote a technical report</i>	<i>The agency then invited the public to share its thoughts regarding what to do about truckers' time on the road and highway safety. Road safety groups, trucking companies, truck drivers, business owners, and</i>	<i>After President Biden/Trump's speech, the agency proposed prohibiting truck drivers from working more than 10 hours per day. The agency sent its proposal to the White House for its review. White House aides agreed with the proposal, because they determined that its benefits would exceed its</i>

Expertise Condition	Participation Condition	Presidential Admin. Condition
<p><i>explaining the reasons for it.</i></p>	<p><i>many other people responded. The agency spent months reading and thinking about their ideas.</i></p> <p><i>After doing so, the agency announced a new policy that prohibits truck drivers from working more than 10 hours per day. The agency wrote a report responding to the comments that it received from the public. For the comments that the agency did not agree with, the report explained the agency's reasons why.</i></p>	<p><i>costs. After receiving the White House's approval, the agency announced the new policy.</i></p>
<p>The agency said this stricter limit on driving time will encourage truckers to get enough rest between shifts, which will keep them alert and reduce the number of accidents. But critics say the policy will raise the cost of moving goods on trucks, which means customers will end up paying more for these goods.</p>	<p>The agency said this stricter limit on driving time will encourage truckers to get enough rest between shifts, which will keep them alert and reduce the number of accidents. But critics say the policy will raise the cost of moving goods on trucks, which means customers will end up paying more for these goods.</p>	<p>The agency said this stricter limit on driving time will encourage truckers to get enough rest between shifts, which will keep them alert and reduce the number of accidents. But critics say the policy will raise the cost of moving goods on trucks, which means customers will end up paying more for these goods.</p>

Baseline Control Condition	Active Control Condition
The Department of Transportation is a federal agency that regulates long-distance trucking, among other things.	The Department of Transportation is a federal agency that regulates long-distance trucking, among other things.
	<i>One of the ways in which federal agencies like the Department of Transportation make policy is by writing new regulations. Regulations are rules or orders issued by government agencies that have the force of law. After the agency announces a proposed regulation, it may make revisions. Then, the final regulation is published in the Code of Federal Regulations.</i>
[Last year, during the Biden administration] / [Two years ago, during the Trump administration], the agency announced that “tired or overworked truck drivers are more likely to cause accidents. Therefore, we are considering new limits on how many hours truck drivers can work in a day.”	Several years ago, during the [Biden / Trump] administration], the agency announced that “tired or overworked truck drivers are more likely to cause accidents. Therefore, we are considering new limits on how many hours truck drivers can work in a day.”
Later, the agency said it will prohibit truck drivers from working more than 10 hours per day.	Later, the agency said it will prohibit truck drivers from working more than 10 hours per day. <i>The agency enacted this ban by issuing a regulation, taking the steps described above.</i>
The agency said this stricter limit on driving time will encourage truckers to get enough rest between shifts, which will keep them alert and reduce the number of accidents. But critics say the policy will raise the cost of moving goods on trucks, which means customers will end up paying more for these goods.	The agency said this stricter limit on driving time will encourage truckers to get enough rest between shifts, which will keep them alert and reduce the number of accidents. But critics say the policy will raise the cost of moving goods on trucks, which means customers will end up paying more for these goods.

Participants responded to an instructional manipulation check (#1) before reading the vignette and three factual manipulation checks (#2–4) interspersed within the vignette:

1. Research shows that people's state of mind affects their views about government decisions. Accordingly, we are interested in understanding your state of mind. Specifically, we want to determine whether you take the time to read directions. Please ignore the question below and instead select "all of the above" as your answer. Yes, that's right: ignore the question and just check "all of the above.

Which of the following best describes how you are currently feeling?

- (a) Sad, (b) Alert, (c) Distracted, (d) All of the above, (e) None of the above.

2. *What job of the Department of Transportation was mentioned on the previous screen?*

- (a) Regulating long-distance trucking, (b) Building highways, (c) Promoting air travel, (d) Improving railroad safety

3. *What problem does the agency want to address?*

- (a) Traffic jams, (b) Crumbling roadways, (c) Accidents, (d) Drunk driving

4. *What change in policy did the agency announce?*

- (a) Truck drivers must take breaks, (b) Truck drivers can work no more than 10 hours per day, (c) Truck drivers can work no more than 5 days per week, (d) Truck drivers must renew their license every year.

III. EPA, AIR POLLUTION VIGNETTES

Expertise Condition	Participation Condition	Presidential Admin. Condition
The EPA is a federal agency that regulates many forms of pollution. One of the	The EPA is a federal agency that regulates many forms of pollution. One of the	The EPA is a federal agency that regulates many forms of pollution. One of the

Expertise Condition	Participation Condition	Presidential Admin. Condition
agency's jobs is to decide how much pollution power plants can release into the air.	agency's jobs is to decide how much pollution power plants can release into the air.	agency's jobs is to decide how much pollution power plants can release into the air.
<i>The law requires that the agency's employees be hired based on their professional training and expertise. The agency cannot hire employees based on their political views. Employees cannot be punished or fired for disagreeing with political leaders.</i>	<i>When it proposes a new policy, the agency must invite comments from the public concerning the proposal. Only after the agency has thought about the comments that it received can it enact the new policy.</i>	<i>The president appoints the leader of the agency. When selecting a new leader, the president makes sure that this person reflects his views and priorities. The president may fire the agency's leader at any time and for any reason.</i>
[Last year, during the Biden administration] / [Two years ago, during the Trump administration], the agency announced that "controlling pollution is expensive, and power companies pass on some of these costs by charging customers more for electricity. Therefore, we are considering relaxing limits on air pollution."	[Last year, during the Biden administration] / [Two years ago, during the Trump administration], the agency announced that "controlling pollution is expensive, and power companies pass on some of these costs by charging customers more for electricity. Therefore, we are considering relaxing limits on air pollution."	[Last year, President Biden / Two years ago, President Trump] gave a speech calling on the agency to relax its limits on air pollution. He argued that "controlling pollution is expensive, and power companies pass on some of these costs by charging customers more for electricity. Therefore, the agency should consider relaxing limits on air pollution."
Later, the agency said it will allow power plants to release 10% more pollution into the air than before. <i>The agency's expert employees wrote the policy allowing this increase. They also wrote a technical report explaining the reasons for it.</i>	<i>The agency then invited the public to share its thoughts regarding what to do about air pollution from power plants. Environmental groups, power companies, business owners, and many other people responded. The agency spent months reading and thinking about their ideas.</i> <i>After doing so, the agency announced a</i>	<i>After the president's speech, the agency proposed allowing power plants to release 10% more air pollution. The agency sent its proposal to the White House for its review. White House aides agreed with the proposal, because they determined that its benefits would exceed its costs. After receiving</i>

Expertise Condition	Participation Condition	Presidential Admin. Condition
	new policy that allows power plants to release 10% more air pollution than before. <i>The agency wrote a report responding to the comments that it received from the public. For the comments that the agency did not agree with, the report explained the agency's reasons why.</i>	<i>the White House's approval, the agency announced the new policy.</i>
The agency said that relaxing pollution standards will make energy cheaper to produce, which means customers will end up paying less. But critics say that allowing more pollution will harm the environment and people's health.	The agency said that relaxing pollution standards will make energy cheaper to produce, which means customers will end up paying less. But critics say that allowing more pollution will harm the environment and people's health.	The agency said that relaxing pollution standards will make energy cheaper to produce, which means customers will end up paying less. But critics say that allowing more pollution will harm the environment and people's health.

Baseline Control Condition	Active Control Condition
The EPA is a federal agency that regulates many forms of pollution. One of the agency's jobs is to decide how much pollution power plants can release into the air.	The EPA is a federal agency that regulates many forms of pollution. One of the agency's jobs is to decide how much pollution power plants can release into the air.
	<i>One of the ways in which federal agencies like the EPA make policy is by writing new regulations. Regulations are rules or orders issued by government agencies that have the force of law. After the agency announces a proposed regulation, it may make revisions. Then, the final regulation is published in the Code of Federal Regulations.</i>
[Last year, during the Biden administration] / [Two years ago, during the Trump administration], the agency announced that "controlling pollution is expensive, and power companies pass on some of these	Several years ago, during the [Biden / Trump] administration, the agency announced that "controlling pollution is expensive, and power companies pass on some of these costs by

Baseline Control Condition	Active Control Condition
costs by charging customers more for electricity. Therefore, we are considering relaxing limits on air pollution.”	charging customers more for electricity. Therefore, we are considering relaxing limits on air pollution.”
Later, the agency said it will allow power plants to release 10% more pollution into the air than before.	Later, the agency said it will allow power plants to release 10% more pollution into the air than before. <i>The agency enacted this ban by issuing a regulation, taking the steps described above.</i>
The agency said that relaxing pollution standards will make energy cheaper to produce, which means customers will end up paying less. But critics say that allowing more pollution will harm the environment and people’s health.	The agency said that relaxing pollution standards will make energy cheaper to produce, which means customers will end up paying less. But critics say that allowing more pollution will harm the environment and people’s health.

Participants responded to an instructional manipulation check (#1) before reading the vignette and three factual manipulation checks (#2–4) interspersed within the vignette:

1. Research shows that people’s state of mind affects their views about government decisions. Accordingly, we are interested in understanding your state of mind. Specifically, we want to determine whether you take the time to read directions. Please ignore the question below and instead select “all of the above” as your answer. Yes, that’s right: ignore the question and just check “all of the above.

Which of the following best describes how you are currently feeling?

- (a) Sad, (b) Alert, (c) Distracted, (d) All of the above, (e) None of the above.

2. *Which type of pollution was mentioned on the previous screen?*

(a) Air pollution, (b) Ground pollution, (c) Water pollution, (d) Noise pollution

3. *Which source of pollution was mentioned on the previous screen?*

(a) Factories, (b) Cars and trucks, (c) Power plants, (d) Farms

4. *What change in policy did the agency announce?*

(a) It will require power plants to pollute less, (b) It will allow power plants to pollute more, (c) It will not change pollution levels, (d) It will transition to green energy.

i. Questions (All Vignettes)

Participants began the exercise by reading a short description of the study's purpose, compensation, eligibility, and confidentiality policies, along with my contact information. After reading a vignette and completing the interspersed attention checks, all participants were asked to respond to the following questions. Questions 1–3 appear in random order. In addition, Prolific provides researchers with each participant's gender, age, 2020 presidential vote choice, and other demographic information.

1. Please rate the following statement on a scale of 1–7 (strongly disagree – strongly agree): I support the agency's decision.
2. Please rate the following statement on a scale of 1–7 (strongly disagree – strongly agree): I believe the agency's decision is legitimate.
3. Please rate the following statement on a scale of 1–7 (strongly disagree – strongly agree): The agency's decision is unlawful.
4. What is your race? Check all that apply. Non-Hispanic White, Black or African American, Hispanic or Latino/a, Asian, Other.
5. What is the highest degree or level of school you have completed? Some high school, no diploma or GED, High school diploma or GED, Bachelor's degree, Graduate or professional degree (after bachelor's degree)
6. Which of the following categories matches your household income last year? Less than \$30,000, Between \$30,000 and \$75,000, More than \$75,000

7. Generally speaking, do you usually think of yourself as a Republican, a Democrat, or neither? Republican, Democrat, Neither
 - ➔ 7a. If neither: Do you generally think of yourself as closer to the Republican or Democratic Party? Republican Party, Democratic Party, Neither