

Dear NYU readers: Thank you for your engagement with this project. I'm looking forward to your comments, both to improve this manuscript and with an eye towards future work, as I contemplate conducting future experiments along the lines described in Part IV.D.ii. – Best, bdf

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 presidential 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 replaces supposition and projection concerning what features contribute to agencies' perceived legitimacy with evidence of Americans' actual views. 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, seemingly shopworn idea that empowering politically insulated, expert decision-makers legitimizes agencies. With civil servants' insulation 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. By contrast, the theory—influential on the Supreme Court—that greater presidential involvement enhances legitimacy receives no support.

These findings open a new agenda for administrative law: to increase agencies' legitimacy at a time when the administrative state is challenged, institutional designers should elicit the views of a broad cross-section of society.

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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, 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 percent of administrative-law scholarship published in the 2000s discusses the legitimacy of administrative agencies—a 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 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

¹ See BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 150 (2019) (“[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 McGarity, *Administrative Law as Blood Sport*, 61 DUKE L.J. 1671, 1722 (2012); Peter Strauss, *Legislation that Isn’t—Attending to Rulemaking’s “Democracy Deficit”*, 98 CAL L. REV. 1351, 1351 (2010); Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670-71 (1975).

² STEPHEN BREYER, RICHARD STEWART, CASS SUNSTEIN, ADRIAN VERMEULE, AND MICHAEL HERZ, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 186 (7th ed. 2011); see also LISA SCHULTZ BRESSMAN, EDWARD RUBIN, & KEVIN STACK, *THE REGULATORY STATE* 11 (2d ed. 2013) (asserting that whether agencies are “legitimate” is “a persistent normative question”).

³ JAMES FREEDMAN, *CRISIS & LEGITIMACY: THE ADMINISTRATIVE PROCESS & AMERICAN GOVERNMENT* 9 (1978).

⁴ See, e.g., Ryan Calo and Danielle Keats Citron, *The Automated 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, 1698-1702 (2018) (decrying “a spiraling crisis of administrative legitimacy”); Jeremy Kessler, *Book Review: The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718 (2016); Philip Wallach, *The Administrative State’s Legitimacy Crisis*, BROOKINGS CTR. FOR EFFECTIVE PUB. MGMT. (Apr. 2016); Jed Shugerman, *The Legitimacy of Administrative Law*, 50 TULSA L. REV. 301 (2015).

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

⁶ See Daniel Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1 (2022) (“The administrative state is under immense—one might even say 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 National Committee, *Republican Platform*, 2016, at 9, 28.

decry “a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure”⁸ and warn 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 administrative structures and processes. While these actors agree on this goal, their favored means to achieve it 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. A second perspective holds that avenues for public participation legitimize decisions made by otherwise cloistered agencies. A third view, closely associated with Justice Elena Kagan and reiterated recently in Chief Justice John Roberts’ majority opinion in *United States v. Arthrex*,¹³ advocates for greater presidential control of agencies on the grounds that control by a democratically accountable president legitimates administrative decision-making.

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 onto Max Weber’s concept of sociological legitimacy: the public’s belief that power is exercised

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

⁹ *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting). *See also* Steven 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 Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 38-42 (2017)

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.”).

¹² *See* Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2464 (2017) (asserting that “attempts to legitimize the administrative state hover or cycle restlessly” because they are grounded in “ideals . . . [that] are not mutually compatible”). For an accounting of other prescriptions that do not fall into one of these three paradigms, see *infra* notes 254-270 and accompanying text.

¹³ 141 S. Ct. 1970, 1979 (2021) (asserting that agencies’ “power acquires its legitimacy . . . through a clear and effective chain of command down from the President”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (arguing that the presidency “most possesses the legitimacy that . . . administration requires”).

in a manner that is justified, leading people to accept even those outcomes with which they disagree.¹⁴

But does the public actually think in this way? Remarkably, little is known about what administrative structures and procedures, if any, Americans actually associate with administrative legitimacy.¹⁵ In light of the volumes written on the concept, that lacuna is surprising.¹⁶

This Article brings empirical evidence to bear on this hitherto almost entirely theoretical 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 that view a vignette with information about a particular element rate the agency's decision as more legitimate than the randomly assigned participants that 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 that with which disagree illegitimate.

¹⁴ See *infra* notes 34-36 and accompanying text (defining sociological legitimacy); notes 48-56 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 37-43 and accompanying text.

¹⁵ But see EDWARD H. STIGLITZ, *THE REASONING STATE* 189-242 (2022) (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 decisions); Carola Binder and Christina Parajon Skinner, *The Legitimacy of the Federal Reserve*, 78 STAN. J.L. BUS. & FIN. __ (2022) (conducting a survey experiment to elicit how, *inter alia*, the Federal Reserve's political independence bears on the public's confidence in the Fed and beliefs concerning its scope of responsibility).

¹⁶ In contexts *outside of* administrative law, social psychologists have demonstrated 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. See Tom Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 379-80 (2006) (summarizing this literature). 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. See *id.* at 380-81 (providing examples); Tom Tyler, *Governing amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 L. & SOC. REV. 809, 811 (1994) (same) [hereinafter Tyler, *Governing amid Diversity*].

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 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.

This Article proceeds in four parts. Part I sets the scene. Notwithstanding administrative-law scholars' sustained interest in legitimacy, scholars lack a comprehensive source collecting and categorizing the literature's myriad claims on how to increase agencies' legitimacy. Part I fills this gap. It 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: that agency legitimacy is enhanced via empowering politically insulated technocrats, through promoting public involvement, or via strengthening the President's role in agencies' decision-making.¹⁷

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 most results fall slightly short of conventionally accepted levels of statistical significance. By contrast, increased White House involvement yields no consistent effect. That finding at odds with the view, which influential judges and scholars adopt, that greater presidential control enhances the administrative state's legitimacy. This Part 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,¹⁸ the public appears to believe the opposite. Therefore, proponents of administrative governance ought to consider strengthening civil-service protections—which have been under threat in recent years¹⁹—as a means of bolstering an administrative state under strain.

¹⁷ For a discussion of claims that do not fit within these three paradigms, see *infra* notes 254-270 and accompanying text.

¹⁸ See, e.g., Owen Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1443 (1983).

¹⁹ See, e.g., Jonathan Swan, Charlie Savage, and Maggie Haberman, *Trump and Allies Forge Plans to Increase Presidential Power in 2025*, N.Y. TIMES, July 17, 2023 (detailing some of these challenges).

As importantly, this Part 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—bolsters legitimacy appear to have gotten it exactly backwards. 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.²⁰ According to Jody Freeman, the field is “organized . . . largely around the need to defend the administrative state against accusations of illegitimacy.”²¹ Jerry Mashaw agrees, writing, “administrative procedural requirements embedded in law shape administrative decision-making in accordance with our fundamental (but perhaps malleable) images of legitimacy of state action.”²² That legitimating function, he continues, “is administrative procedure’s purpose and its explanation.”²³

²⁰ See Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 927 (2016); Nina Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1347 (2011) [hereinafter Mendelson, *Rulemaking*]; McGarity, *supra* note 1, at 1722; Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 696 (2000); Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 219 (2000).

²¹ 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, and Wendy Wagner, *Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 463 (2012) (“The history of administrative law . . . constitutes a series of ongoing attempts to legitimize unelected public administration in a constitutional liberal democracy.”).

²² Jerry Mashaw, *Explaining Administrative Process*, 6 J.L. ECON. & ORG. 267, 268 (1990).

²³ *Id.*

Generations of administrative-law scholars have devoted themselves to the project of enhancing the administrative state’s legitimacy.²⁴ This project, according to Jon Michaels, is “nothing short of a legal and academic obsession, passed down from generation to generation.”²⁵ When scholars deem this legitimizing project to have fallen short, they declare that administration suffers a “crisis” of legitimacy.²⁶

For all of the ink spilled on agency legitimacy, the concept is typically undefined in administrative-law scholarship. 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.

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.

A. The Importance of Public Beliefs to Legitimacy

The concept of legitimacy, as used in administrative-law scholarship, is notoriously protean.²⁷ From conclusory statements that particular design features would enhance agencies’ legitimacy, the reader can infer little more than that the

²⁴ See, e.g., Freeman, *Private Role*, *supra* note 21, at 546; Strauss, *supra* note 1, at 1351; Richard Pildes and Cass Sunstein, *Reinventing the Regulatory State*, U. CHI. L. REV. 1, 8 (1995); Colin Diver, *The Wrath of Roth*, 94 YALE L.J. 1529, 1531 (1985); Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1284 (1984); FREEDMAN, *supra* note 3, at 266.

²⁵ Michaels, *Enduring*, *supra* note 1, at 552.

²⁶ See Freeman, *Private Role*, *supra* note 21, at 545 (“[A]dministrative law has been defined by a crisis of legitimacy.”); Weinberg, *supra* note 20, at 218 (similar); BREYER, ET AL., *supra* note 2, at 146 (“It is sometimes said that the administrative process . . . suffers from a near-perpetual crisis of legitimacy.”); William Allen, *The Administrative Process: Which Crisis?*, 32 STAN. L. REV. 207, 208 (1979) (“[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, at ix (stating that the book’s purpose is to further understanding of “the recurrent sense of crisis attending to the federal administrative agencies and . . . the necessity of developing a theory of the legitimacy of the administrative process”); *id.* at 6-14 (similar).

²⁷ See Amanda Greene, *Is Political Legitimacy Worth Promoting?*, in POLITICAL LEGITIMACY 66 (Jack Knight & Melissa Schwartzberg, eds., 2019).

concept is a normative good.²⁸ Although administrative-law scholarship on the subject tends not to focus on definitions,²⁹ scholars outside of administrative law outline three broad conceptions of legitimacy: sociological, legal, and moral legitimacy.³⁰

Sociological legitimacy refers to the beliefs of a relevant population that an authority or decision is acceptable.³¹ According to 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.”³² The concept is descriptive rather than normative; people may ground their views concerning an institution’s legitimacy on whatever criteria they prefer.³³ 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.”³⁴ Stated plainly, an institution is legitimate if people believe it is worthy to possess its authority.³⁵ In the Weberian conception, the procedures,

²⁸ See Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 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.”).

²⁹ *But see* Havasy, *supra* note __, at *11 (discussing normative, legal, and descriptive legitimacy); Walters, *supra* note __, at 47 (analyzing several theories of administrative legitimacy); Bagley, *supra* note 12, at 359-89 (discussing legal and sociological legitimacy).

³⁰ See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794 (2005) (providing this typology). Although some authors adopt a different nomenclature, all appear to consider public attitudes towards and institution as one form of legitimacy. See e.g., Christopher Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. __, *11 (2023) (referring to these concepts as normative, legal, and descriptive legitimacy, with descriptive legitimacy standing in for sociological legitimacy); Binder and Skinner, *supra* note 15, at *10-11 (distinguishing between formal and popular legitimacy, with the latter “refer[ing] to an institution’s ability to maintain diffuse support, long-term loyalty, social trust, support, and favorable attitudes”) (internal quotations and citations omitted); Eric Orts, *Supreme Illegitimacy*, 11 REG. REV. 21, 22 (2022) (labeling these concepts substantive political legitimacy or systemic legitimacy, legal legitimacy, and empirical political legitimacy, with the final category having conceptual overlap with sociological legitimacy).

³¹ See Havasy, *supra* note 30, at *9, *12. *see also* DAVID BEETHAM, *THE LEGITIMATION OF POWER* 3 (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.”).

³² Fallon, *supra* note 14, at 1975; *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.”).

³³ See Havasy, *supra* note 30, at *9.

³⁴ MAX WEBER, *ECONOMY AND SOCIETY*, vol. 3, 31 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968) (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.*

³⁵ MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 382 (1964) [hereinafter WEBER, THEORY].

norms, and decisions of legal institutions bear on the public’s beliefs in those institutions’ legitimacy.³⁶

Legal legitimacy is rooted in adherence to legal norms.³⁷ “That which is lawful is also legitimate,” Professor Fallon declares.³⁸ Deciding whether challenged statutes or regulations possess legal legitimacy is a workaday task of courts, performed by consulting legal texts.³⁹

Finally, *moral legitimacy* holds that an institution’s legitimacy is grounded in the extent to which it is morally justifiable or worthy of recognition.⁴⁰ According to Randy Barnett, an institution possesses moral legitimacy “if it creates commands that citizens have a moral duty to obey.”⁴¹ Although direct appeals to moral legitimacy remain relatively uncommon among administrative lawyers,⁴² recent scholarship by Blake Emerson, Chris Havasy, and others suggests that the tide may be turning.⁴³

For some, an institution’s moral legitimacy hinges on the extent to which it is committed to particular substantive values.⁴⁴ For instance, Professor Barnett’s

³⁶ See WEBER, *ECONOMY AND SOCIETY*, *supra* note 34, at 37 (“[T]he belief in legality, the readiness to conform with rules that are formally correct and that have been imposed by accepted procedure” is today “the most common form of legitimacy”). Elsewhere, Weber asserts 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, at 130 (listing 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 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”). All four bases involve people’s beliefs. See generally Martin Spencer, *Weber on Legitimate Norms and Authority*, 21 BRITISH J. SOC. 123 (1970) (summarizing Weber’s claims regarding legitimacy).

³⁷ See Leslie Green, *Law, Legitimacy, and Consent*, 62 S. CAL. L. REV. 795, 797 (1989).

³⁸ Fallon, *supra* note 14, at 1794; see also McKinley, *supra* note 4, at 1608 (summarizing Henry Hart and Albert Sacks’ legal-process claim that the structures and processes used to generate laws is what endows those laws with legitimacy).

³⁹ See Fallon, *supra* note, at 1842-43.

⁴⁰ 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.”).

⁴¹ Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 116 (2003).

⁴² See Bagley, *supra* note 12, at 371.

⁴³ See Havasy, *supra* note 30, at *13; 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, *supra* note __, 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”).

⁴⁴ See Joachim Savelsberg, *Cultures of Control in Contemporary Societies*, 27 L. & SOC. INQUIRY 685, 705-06 (2002); Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 162-63, 173 (Larry Alexander, ed., 1998); William Eskridge & Garry Peller, *The New Public Law Movement: Moderation as a Postmodern*

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.”⁴⁵ By contrast, Progressive-era thinkers’ conceptions of administrative legitimacy emphasizes the administrative state’s ability to “guarantee individual *and collective* freedom.”⁴⁶ For others, adherence to procedures that promote favored values contributes to moral legitimacy.⁴⁷

Although sociological legitimacy shares the stage with other theories of legitimacy, legal scholars tend to view legitimacy through a sociological lens.⁴⁸ When theorists in the administrative-law canon—e.g., James Landis, Louis Jaffe, and Elena Kagan—advance their respective visions of agency legitimacy, they mostly eschew moral and legal-positivist arguments.⁴⁹ Instead, according to Adrian Vermeule, this “mainstream of the theoretical discourse” emphasizes “sociological legitimacy, acceptance by the broad mass of the public.”⁵⁰ For instance, Professor Jaffe asserts that “the availability of judicial review is the necessary condition, *psychologically if*

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”).

⁴⁵ Barnett, *supra* note __, at 146.

⁴⁶ See EMERSON, *supra* note __, at 21 (emphasis added).

⁴⁷ See Eric Orts, *Positive Law and Systemic Legitimacy: A Comment on Hart and Habermas*, 6 RATIO JURIS 245, 267-68 (1993) (summarizing Habermas’s view).

⁴⁸ See, e.g., STIGLITZ, *supra* note 15, at 189-242 (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*, 76 N.Y.U.L. REV. 1383, 1387 (2021) (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 Chen, *Beyond Legality*, 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”); Cynthia Farina, *The Consent of the Governed*, 72 CHI.-KENT L. REV. 987, 989 (1997) [hereinafter Farina, *Consent*] (“In the most powerful of the recent legitimation literature, the will of the people plays a central role.”); Michael Fitts, *The Paradox of Power in the Modern State*, 144 U. PA. L. REV. 827, 859 (1996) (emphasizing designing processes that “the public considers legitimate”); Robert Reich, *Public Administration and Public Deliberation*, 94 YALE L.J. 1617, 1625 (1985) (explaining that “legitimizing administrative decisions” entails “inspir[ing] confidence among citizens”); FREEDMAN, *supra* note 3, at 10 (asserting that legitimacy “is concerned with popular attitudes towards the exercise of governmental power,” namely whether it is “exercised in accordance with a nation’s laws, values, traditions and customs”).

⁴⁹ See Vermeule, *supra* note 12, 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”). Nonetheless, Vermeule recognizes that these scholars “also address the legal (and to some extent moral) legitimacy of the administrative state.” *Id.*

⁵⁰ *Id.* at 2488.

not logically, of a system of administrative power which purports to be legitimate.”⁵¹ This emphasis on psychology—on people’s perceptions and beliefs—sounds in the register of sociological legitimacy.⁵²

Contemporary legal scholars also focus on sociological legitimacy. Nicholas Bagley views legitimacy as “aris[ing] . . . from the *perception* that an agency” possesses good qualities.⁵³ As such, its audience includes “those subject to the agency’s commands, those whose interests the agency protects, and the public at large.”⁵⁴ For Tom Tyler, “unlike influence based upon the influencer’s possess of power or resources, the influence motivated by legitimacy develops from within the person who is being influenced.”⁵⁵ Many other legal scholars agree that an institution’s legitimacy is rooted, in substantial part, in the public’s views of it.⁵⁶

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.⁵⁷ 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 and judges. 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. 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.⁵⁸

⁵¹ LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965) (emphasis added).

⁵² See Vermeule, *supra* note 12, at 2472. That Jaffe views legality as a “premise” for legitimacy further indicates that his use of the term goes beyond legal legitimacy. See JAFFE, *supra* note, at 324.

⁵³ Bagley, *supra* note 12, at 379 (emphasis added).

⁵⁴ Id.

⁵⁵ Tyler, *Psychological Perspectives*, *supra* note 15, at 378.

⁵⁶ See *supra* note 48.

⁵⁷ See Jody Freeman and Laura Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 127 (2000) (“It is difficult to know what the ‘general public’ or median voter thinks of the regulatory process, given that most complains about its legitimacy or illegitimacy come from either insiders, like lawyers, regulators, and politicians, or from academics, who present only a narrow class or outsiders”).

⁵⁸ See Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WISC. L. REV. 379, 389 (1983) (stating that “find[ing] evidence of [administrative] legitimacy in the public rhetoric of political elites . . . is extremely common among scholars”).

By examining what agency structures non-elite actors associate with legitimacy, this Article offers a course correction. The following Subpart 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 one of three categories. 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.⁵⁹ Nonetheless, it is no exaggeration to say that the competing claims that expertise, public participation, and presidential involvement serve to legitimize administration have predominated over a century-plus of administrative law. This Subpart expands on each paradigm in turn.

⁵⁹ See *infra* notes 254-270 and accompanying text (summarizing other proposals aimed at enhancing agency legitimacy).

i. Expertise

Legal scholars’ search to legitimate the administrative state begins in the Progressive and New Deal eras.⁶⁰ Max Weber, James Landis, and other luminaries celebrated the legitimizing effect of expert-driven, politically insulated agencies.⁶¹ As Kathryn Watts summarized the era’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.’”⁶²

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.”⁶³ Scholars Elizabeth Fisher and Sidney Shapiro contend that “the legitimacy of public administration depends on its capacity to deliver on the statutory mandates assigned to it.”⁶⁴ (In their view, capacity is intimately tied to their “thicker understanding of expertise,” 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.”⁶⁵) Other scholars—even those not closely associated with the expertise paradigm—agree that expertise is viewed as an important pillar of administrative legitimacy.⁶⁶

⁶⁰ See Cass 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”).

⁶¹ See WEBER, *ECONOMY AND SOCIETY*, *supra* note 34, at 956-1003; JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 23, 154-55 (1938). For a review of Landis’ views on the legitimating function of expert, independent agency personnel, see Vermeule, *supra* note __, at 2463, 2466-72. This paradigm also appealed to Woodrow Wilson, although with greater accommodation of popular influence on agency decision-making. Compare Woodrow Wilson, *Democracy and Efficiency*, 87 ATL. MONTHLY 289, 299 (1901) (favoring technocratic governance) with Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 199 (1887) (arguing that “administration . . . must be at all points sensitive to public opinion”).

⁶² Kathryn Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 33 (2009). But see Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2026 (2018) [hereinafter Emerson, *Administrative Answers*] (resurfacing a participation-promoting facet of American Progressivism); JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 148-49, 167-71, 203-19 (1927) (arguing, also from a progressive perspective, that on its own expert-driven governance lacks legitimacy).

⁶³ *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 531 (2010) (Breyer, J., dissenting).

⁶⁴ ELIZABETH FISHER AND SIDNEY A. SHAPIRO, *ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW* 296 (2020).

⁶⁵ *Id.* at 276.

⁶⁶ See, e.g., Katharine Jackson, *The Public Trust: Administrative Legitimacy and Democratic Lawmaking*, __ CONN. L. REV. __, *11-16 (forthcoming) (arguing that agencies’ “decision-making

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.⁶⁷ This requirement helps to ensure that the civil service is stocked with subject-matter experts, not appointees’ ideological facsimiles.⁶⁸ Further, civil servants cannot be fired or disciplined for political disagreements with their principals.⁶⁹ When supervisors seek to punish civil servants, they must adhere to detailed procedural requirements, which provide civil servants additional protections against political encroachment.⁷⁰ 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.⁷¹

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 Shapiro, *Law, Expertise, and Rulemaking Legitimacy*, 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 (2012) (“Regulation is insulated, expert-driven, drawing its legitimacy in part from its very opposition to . . . irrational democratic politics.”); Jerry Mashaw, *Reasoned Administration*, 76 GEO. WASH. L. REV. 99, 117 (2007) (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 decision-makers can bring to bear.”); Sidney Shapiro, Elizabeth Fisher, and Wendy Wagner, *supra* note 21, 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 (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 action”); Farina, *Consent*, *supra* note 48, at 1034 (summarizing literature concluding that “[l]egitimacy resides in people’s beliefs that their leaders are competent experts”), among other factors); Frug, *supra* note 24, at 1318-22 (presenting an “expertise model” of “bureaucratic legitimacy”); Stewart, *supra* note 1, at 1671-81 (similar).

⁶⁷ 5 U.S.C. § 3304(a)(1) (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 and Jennifer A. Staman, *Categories of Federal Civil Service Employment: A Snapshot*, CRS REP., Mar. 26, 2019, at 4-5.

⁶⁸ *See* Brian D. Feinstein and Jennifer Nou, *Strategic Subdelegation*, unpublished working paper (available from authors).

⁶⁹ *See* 5 U.S.C. § 7513(d).

⁷⁰ *See id.*

⁷¹ *See* Robert Glicksman and 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.”); Bagley, *supra* note 12, at 382; RAHMAN, *supra* note ___, at 145; *accord* DANIEL CARPENTER, *REPUTATION AND POWER*:

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*, 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.”⁷²

Second, reason-giving requirements legitimize agencies' decisions because they demonstrate that the agency brought its expertise to bear on the matter.⁷³ Congress and the courts recognize the importance of ensuring that agencies' decisions are the products of expertise. The Administrative Procedure Act of 1946 (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.⁷⁴ The judicial hard-look doctrine requires agencies to justify their decisions. In the *State Farm* case, that entails “examin[ing] the relevant data” and providing “an adequate basis and explanation” for their rules.⁷⁵ Essentially, hard-look review seeks to ensure that agencies “bring [their] expertise to bear” when making policy decisions.⁷⁶

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.⁷⁷ That push towards technocratic decision-making, the argument goes, bolsters agencies' legitimacy.⁷⁸

ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA (2010); DANIEL CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY* (2001).

⁷² 561 U.S. at 522. (Breyer, J., dissenting); *see also id.* at 498 (arguing that an independent-agency feature that is justified based on “the need for technical expertise” is “constitutionally legitimate”).

⁷³ *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”).

⁷⁴ 5 U.S.C. § 706(a)(A).

⁷⁵ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34, 43 (1983).

⁷⁶ *Id.* at 54.

⁷⁷ *See* Emily Hammond and David Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 325-26 (2013).

⁷⁸ *See* Chafetz, *supra* note 73, at 21 (“The rationality of bureaucracy . . . serves a legitimating function.”); JERRY MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY* (2018) (“[R]easoned administration represents a triumph of legitimate, liberal administrative governance.”); Hammond & Markell, *supra* note, at 349 (asserting that reason-giving “does heavy lifting for legitimacy”); *id.* at 322-23 (reasoned decisionmaking is “one of administrative law's ultimate legitimizers”); Louis Virelli, *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 Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17 (2001) (“The administrative state . . . is drowning in rationality requirements because it can legitimate itself only by appeals to rationality.”); Mashaw, *Reasoned Administration*, *supra* note 66, at 118 (reason-giving

Indeed, APA requirements and judicial doctrine designed to steer agencies away from arbitrary action and towards rationality and objectivity are central to the expertise paradigm’s conception of administrative legitimacy.⁷⁹

ii. Participation

A second legitimacy paradigm emphasizes avenues for public involvement in agency decision-making.⁸⁰ For some, public involvement legitimizes agency action because it enables competing interests to jockey for power as they would in Congress.⁸¹ Others consider how providing opportunities to participate advances citizens’ dignitary interests, thus boosting agencies’ legitimacy.⁸² Still others posit that public participation legitimizes agency decisions by encouraging them to better reflect public preferences.⁸³ 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.⁸⁴

requirements are “fundamental to [agencies’] moral and political legitimacy”); Harold Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 240 (1984) (That “agencies must provide factual support for their regulations” conveyed upon them “a kind of legitimacy that the legislative process cannot.”).

⁷⁹ See Jodi Short, *The Political Turn in American Administrative Law*, 61 DUKE L.J. 1811, 1820 (2012) (summarizing this view as claiming “reason-giving requirements . . . 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, at 238 (asserting that hard-look review can play a “legitimizing role”).

⁸⁰ See Stewart, *supra* note 1, at 1712; Frug, *supra* note 24, at 1282-84.

⁸¹ See Croley, *supra* note 9, at 31-34; Frug, *supra* note, at 1374.

⁸² See Freeman and Langbein, *supra* note 57, at 67 (asserting, in a discussion of notice-and-comment, that “involvement in a process enhances perceptions of legitimacy among participants, independent of whether outcomes ultimately favor [them]”).

⁸³ See Michael Sant’Ambrogio and Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 843 (2021) (“Enhancing public engagement with agenda setting 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 66, at 1322 (summarizing this view); Mendelson, *Rulemaking*, *supra* note 20, 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).

⁸⁴ See Stewart, *supra* note 1, at 1712 (“[This model] sought to legitimate agency action by opening administrative processes to all affected interests.”); *id.* (“Agency decisions made after adequate consideration of all affected interests would have, in microcosm, legitimacy based on the same principle as legislation.”).

Notice-and-comment rulemaking is a primary extant mechanism for this paradigm.⁸⁵ The APA—a statute “credited with broadly legitimizing administrative governance,” per Gillian Metzger⁸⁶—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 argument.”⁸⁷ Only “[a]fter consideration of the relevant matter presented” may the agency issue a final rule.⁸⁸

According to Bruce Ackerman, the notice-and-comment requirement “recognizes that regulatory decisionmaking needs special forms of legitimation that enhance popular participation.”⁸⁹ 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.⁹⁰ Conversely, when agencies do not utilize notice-and-comment procedures—for instance, when they issue non-legislative rules or publish guidance documents that are not subject to the APA—their decision to forgo notice-and-comment “jeopardizes administrative legitimacy,” according to Lisa Schultz Bressman.⁹¹ Other scholars urge agencies to go beyond the APA’s notice-

⁸⁵ 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 Cty. 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) (“By mandating ‘openness, explanation, and participatory democracy in the rulemaking process, [notice-and-comment] procedures assure the legitimacy of administrative norms.”); Even Criddle, *Fiduciary Administration*, 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 66, at 1308 (labeling notice-and-comment “the most well-known and heralded form of administrative participation”).

⁸⁶ Metzger, *supra* note 10, at 62; see also Sohoni, *supra* note 20, 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.”)

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

⁸⁸ *Id.*

⁸⁹ Ackerman, *supra* note 20, at 697; accord Richard Bierschbach and 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”).

⁹⁰ See Christopher DeMuth, *Can the Administrative State be Tamed?*, 8 J. LEGAL ANALYSIS 121, 139 (2016); JOHN ROHR, *TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE* 157 (1986).

⁹¹ Bressman, *Beyond Accountability*, *supra* note 79, at 546; accord Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 22 (1997) [hereinafter Freeman, *Collaborative Governance*] (asserting that guidance documents “threaten to . . . undermine the

and-comment requirement and implement innovative ways for members of the public to participate in rulemakings in the name of bolstering legitimacy.⁹²

The participation paradigm also bears on adjudications. The APA provides opportunities for interested parties to submit facts and arguments,⁹³ and, in some circumstances, participate in a hearing before independent adjudicators and involving court-like procedural rights.⁹⁴ 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, finding that these participation-enhancing procedures provide “a meaningful opportunity to be heard.”⁹⁵ 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.⁹⁶ This idea connects to Tom Tyler’s work linking procedural rigor with sociological legitimacy.⁹⁷ Although Professor Tyler writes 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.⁹⁸

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

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 Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. 1497, 1505 (1992).

⁹² See Orly Lobel, *The Renew Deal*, 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, at 96-97 (arguing that “government should cultivate the capacity of nongovernmental groups” to boost “direct participation in governance” and “increase[] legitimacy”); Hammond and Markell, *supra* note 77 (discussing citizen petitions).

⁹³ 5 U.S.C. § 554(c).

⁹⁴ *Id.* at § 556-57.

⁹⁵ See, e.g., *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 630-31 (D.C. Cir. 1973).

⁹⁶ See Seifter, *supra* note 66, at 1302 (“[C]ourts and commentators celebrate participation as a crucial way to help legitimate the administrative state.”); *id.* at 1319; 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.”).

⁹⁷ See, e.g., TOM TYLER, *WHY PEOPLE OBEY THE LAW* 57-62 (1990).

⁹⁸ See Bagley, *supra* note 12, at 369-89 (providing a critical overview of this literature).

agency action.⁹⁹ Their absence, by contrast, “has consequences for the legitimacy . . . of the federal bureaucracy,” according to Daniel Farber and Anne Joseph O’Connell.¹⁰⁰

iii. 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.¹⁰¹ As Owen Fiss wrote in the early 1980s, the formative years for this theory, elected officials “derive their legitimacy from their responsiveness to popular will, and bureaucratization acts as a screen that impairs [agencies’] responsiveness.”¹⁰²

In theory, the notion that a democratic link to the people—“the only legitimate fountain of power,” in James Madison’s words¹⁰³—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.¹⁰⁴

⁹⁹ See *supra* Part I.B.ii.

¹⁰⁰ Daniel Farber and 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”).

¹⁰¹ See Mashaw, *Reasoned Administration*, *supra* note 66, at 116 (“[A]dministrative legitimacy lies in tracing administrative authority to the mandate of democratically elected institutions.”); JERRY MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 140-57 (1998).

¹⁰² Fiss, *supra* note 18, at 1443.

¹⁰³ THE FEDERALIST 49, at 339 (James Madison) (Jacob E. Cooke, ed., 1961).

¹⁰⁴ See Farina, *Consent*, *supra* note 48, 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 62, at 35, 64 (congressional oversight promotes legitimacy); Kathryn Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1048-49 (2015) (“[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).

Today, the presidential administration model is the dominant paradigm for legitimating agency action.¹⁰⁵ The paradigm constitutes a cross-ideological project, containing both conservative “unitary executive” theorists and liberal adherents of “presidential administration.”¹⁰⁶ 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.¹⁰⁷ Judge Laurence Silberman, a leader in the conservative legal movement for decades, 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.¹⁰⁸ 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.”¹⁰⁹ By contrast, “relying on internal expertise” from a cloistered agency bureaucracy “provoke[s] serious questions about . . . the legitimacy of agency action.”¹¹⁰ A wide array of legal scholars agree.¹¹¹

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,¹¹² also

¹⁰⁵ See Lisa Schultz Bressman and Michael Vandenbergh, *Inside the Administrative State*, 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*, 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 79, at 463 n.3 (collecting citations).

¹⁰⁶ See Kagan, *supra* note 13 (latter view); Steven Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 59 (1994) (former view); see also Bressman and Vandenbergh, *supra* note 105, at 53 (noting that the model has “bipartisan political appeal”); Bressman, *Judicial Review*, *supra* note, 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.”).

¹⁰⁷ Calabresi, *supra* note, at 59.

¹⁰⁸ 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).

¹⁰⁹ Kagan, *supra* note 13, at 2341; see also Short, *supra* note 79, at 1814 (referring to Kagan’s account as “the signal case for ‘presidential administration’”).

¹¹⁰ Kagan, *supra* note, at 2264. Nina Mendelson turns that argument on its head, arguing 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 Mendelson, *Another Word on the President’s Statutory Authority Over Agency Action*, 79 FORDHAM L. REV. 2455, 2480 (2011).

¹¹¹ See Bressman, *Judicial Review*, *supra* note 105, at 1676 n.96-n.100 (collecting citations).

¹¹² See Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits are Still Two-Stepping by Themselves*, YALE J. ON REG.: NOTICE & COMMENT, Dec. 18, 2022, <https://www.yalejreg.com/nc/chevron-ended/> (describing the circuit courts’ continued application of the *Chevron* framework and the Supreme Court’s silence).

is grounded in the notion that control by a politically accountable President legitimates agency actions.¹¹³ The *Chevron* Court held that courts should defer to 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.”¹¹⁴ In other words, courts should defer to agencies because, “[w]hile agencies are not directly accountable to the people, the Chief Executive is.”¹¹⁵ Essentially, the Court tethered agencies’ legitimacy to presidential control.¹¹⁶

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.¹¹⁷ For instance, in *United States v. 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.¹¹⁸ 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.”¹¹⁹

Second, White House review of proposed rules from executive agencies tethers those agencies more closely to the President, thus boosting their legitimacy.¹²⁰ This review occurs through cost-benefit analysis conducted by the White House’s Office of

¹¹³ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)

¹¹⁴ *Id.* at 866.

¹¹⁵ *Id.*

¹¹⁶ See Emily Hammond, *Chevron’s Generality Principles*, 83 FORDHAM L. REV. 655 (2014) (asserting that *Chevron* “suggests that administrative expertise and superior political accountability . . . promote legitimacy”); Nina 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.”); David Spence and 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 decision making to agencies’ accountability to elected politicians”).

¹¹⁷ See Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 56, 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).

¹¹⁸ 141 S. Ct. at 1988.

¹¹⁹ *Id.* at 1979 (internal quotation omitted); see also *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (“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.’”) (citing 1 *Annals of Cong.* 499 (1789)); Jody Freeman and 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”).

¹²⁰ See Bressman and Vandenbergh, *supra* note 105, at 56.

Information and Regulatory Affairs (OIRA).¹²¹ In brief, OIRA reviews economically and politically significant proposed regulations and rejects those for which expected costs exceed expected benefits.¹²² OIRA review also enables presidential advisors from, e.g., the White House Counsel’s Office, Domestic Policy Council, and National Economic Council, to shape regulations.¹²³ 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.”¹²⁴

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 claim that it grants the White House an improper role in administration¹²⁵—emanating mainly from the right.¹²⁶ 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.¹²⁷ Conservative jurists’ embrace of greater presidential control over personnel means that, in the event that the Court

¹²¹ See Croley, *supra* note 9, at 831-32.

¹²² Neomi Rao, *The Hedgehog & the Fox in Administrative Law*, 150 DAEDALUS 220, 225 (2021).

¹²³ *Id.*

¹²⁴ *Id.* at 227.

¹²⁵ Compare *West Virginia v. EPA*, 142 S. Ct. 2587, 2618 (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 lead 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).

¹²⁶ See Gregory A. Elinson and 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*).

¹²⁷ See, e.g., *Arthrex*, 141 S. Ct. 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. 2183 (5-4 conservative-liberal split); *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (all five conservatives in the majority, joined by two of four liberals); *Free Enter. Fund*, 561 U.S. 477 (5-4 conservative-liberal split). Following convention, I label Democrat-appointed justices as liberal and Republican-appointed ones as conservative.

overrules *Chevron*, perhaps even this Term,¹²⁸ or merely continues to ignore it,¹²⁹ judicial support for the presidential administration paradigm will endure.

* * *

This Part 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.

II. RESEARCH DESIGN

Imported largely from social psychology, survey experiments have arrived in legal scholarship.¹³⁰ 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,¹³¹ to whether inclusion of certain contractual provisions alters people’s views on the propriety of breaching contracts,¹³² to how content of political demonstrations influences whether people view demonstrations as constitutionally protected speech.¹³³ among other topics. Recent scholarship by Jed Stiglitz and others has applied survey experiments to topics in administrative law.¹³⁴

¹²⁸ See *Loper Bright Enterprises v. Raimondo*, No. 21-5166 (granting cert on the question of whether to expressly overrule *Chevron* or limit its scope).

¹²⁹ See Gary Lawson, *The Ghosts of Chevron Present and Future*, __ B.U. L. REV. __, at *10 (noting that the Court last applied *Chevron* to uphold an agency action in 2016).

¹³⁰ See Adriana Robertson and Albert Yoon, *You Get What You Pay For: An Empirical Examination of the Use of MTurk in Legal Scholarship*, 72 VAND. L. REV. 1633, 164041 (2019) (providing an overview of the literature); Lawrence Solum, *The Positive Foundations of Formalism*, 127 HARV. L. REV. 2426, 2464-65 (2014) (referring to “the nascent emergence of experimental jurisprudence”).

¹³¹ Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232 (2020).

¹³² Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633 (2010).

¹³³ Dan Kahan, David Hoffman, Donald Braman, Danieli Evans, and Jeffrey Rachlinski, “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012).

¹³⁴ See STIGLITZ, *supra* note 15; Edward Stiglitz, *Cost-Benefit Analysis and Public Sector Trust*, 24 SUP. CT. ECON. REV. 169 (2016); see also Benjamin Minhao Chen and Brian Libgober, *Do Administrative Procedures Fix Cognitive Biases?*, __ J. PUB. ADMIN. RES. & THEORY __ (forthcoming). In the work that is most similar to this Article, Professor Stiglitz probes participants’ views regarding another party’s decision to apportion a resource, a common task in administrative agencies. See STIGLITZ, *supra*, at 189-242. Among other findings, he reports 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

The method is appropriate here. As Part I.A details, judges and scholars arguments regarding legitimacy sound largely in the register of public acceptance. 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,¹³⁵ judicial scholars have applied similar experimental methods to assess the inputs into the perceived legitimacy of that institution.¹³⁶

Accordingly, to investigate whether each paradigm enhances agencies’ perceived legitimacy, I conduct a series of between-subjects online experiments.¹³⁷ 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.” The order in which participants view the statements varies randomly.

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

honest. Separate from the substance of the allocative decision, a signal that the decision-maker engaged in credible reasoning bolsters trust in that decision.

For the most part, Professor Stiglitz does 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 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.

¹³⁵ See Tara Leigh Grove, *Book Review: The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240 n.1 (2019) (providing examples of commentators questioning the Court’s legitimacy).

¹³⁶ 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. & COURTS 104 (2023); Logan Strother and Shana Kushner Gadarian, *Public Perceptions of the Supreme Court: How Policy Disagreement Affects Legitimacy*, 20 THE FORUM 87 (2022); Michael J. Nelson and James L. Gibson, *How Does Hyperpolarized Rhetoric Affect the U.S. Supreme Court’s Legitimacy?*, 81 J. POL. 1512 (2019).

¹³⁷ These experiments received an exemption from the University of Pennsylvania Institutional Review Board.

elements that scholars claim enhance agency legitimacy: expertise, public participation, and presidential involvement;¹³⁸

- 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 (Trump and Biden) under which the decision was identified as being made.

This Part describes these manipulations in greater detail and explains the importance of each to the research design. The Part concludes with additional information concerning the construction of these survey experiments, including participant recruitment and demographics.

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, or an *active control condition* containing a more detailed description of the regulatory process, which makes this condition's length roughly equivalent to that of the treatment condition.

i. 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.

¹³⁸ The other two conditions are a baseline control condition and active control condition.

Table 1: Control and Expertise Conditions for CFPB Vignettes

Control Conditions (Baseline Control Condition = non-italicized 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;¹³⁹ 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 1,¹⁴⁰ is rooted in a legal requirement. The overwhelming majority of

¹³⁹ Three are factual manipulation checks; the fourth is an instructional manipulation check. *See infra* note 171 and Appendix (providing the text of these checks).

¹⁴⁰ This text does not appear italicized in the experiments; it is italicized in the table to highlight it for the reader.

agency employees enjoy civil-service protections.¹⁴¹ These employees must be hired based on objective criteria, namely, their training and expertise, not their political views,¹⁴² and they cannot be fired or disciplined for political disagreements.¹⁴³ Civil servants play an instrumental role in policymaking, particularly concerning the provision of information used to craft rules on technical subjects.¹⁴⁴ Finally, agencies typically must provide explanations for their rules, often in technical terms.¹⁴⁵

ii. Participation

To assess whether opportunities for public involvement boosts agencies' perceived legitimacy, a non-overlapping set of participants read a policy vignette that emphasizes public participation in the decision-making process.¹⁴⁶ This participation condition adds the following text to the baseline condition:

[Description of agency]

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.

[Argument regarding need for regulation and description of proposed rule]

The agency then invited any interested members of the public to submit comments regarding whether, and if so, how to regulate these loans. [A diverse set of interest groups, including examples] submitted comments. The agency spent months reading and thinking about their views.

¹⁴¹ See Fiona Hill, *Public service and the federal government*, BROOKINGS, May 27, 2020, <https://www.brookings.edu/policy2020/votervital/public-service-and-the-federal-government/> (reporting the size of the federal non-military, non-postal workforce and political appointees).

¹⁴² See 5 U.S.C. § 3304 (employment criteria for competitive service); § 3320 (criteria for excepted service).

¹⁴³ *Id.* at § 7513(d).

¹⁴⁴ See Brian D. Feinstein and Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 GEO. L.J. 1139, 1159 (2020).

¹⁴⁵ See *State Farm*, 463 U.S. at 34, 43; see also 5 U.S.C. § 706(a)(A).

¹⁴⁶ See *infra* Appendix A (providing the CFPB vignettes that include the participation condition); Appendix B (DOT vignettes); Appendix C (EPA).

After doing so, [description of final rule]. 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.

[Rationale for final rule]

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.”¹⁴⁷ 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.¹⁴⁸ 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 that 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.”

iii. Presidential Administration

To examine whether greater presidential control over agency personnel and decision-making processes affects agencies’ perceived legitimacy, a final non-overlapping group of participants reads a vignette that emphasizes presidential influence in the agency. this Presidential administration condition adds the following text to the baseline condition:

[Description of agency]

The President appoints the leader of the agency. When selecting a new leader, the President makes sure that this person reflected his views

¹⁴⁷ 5 U.S.C. § 553(b).

¹⁴⁸ 5 U.S.C. § 553.

and priorities. The President may fire the agency’s leader at any time and for any reason.

[Last year, President Biden / Two years ago, President Trump], *gave a speech calling on the agency to [description of proposed rule]. He argued that “[argument regarding need for regulation]. Therefore, the agency should consider [description of proposed rule].”*

After the President’s speech, the agency proposed [description of proposed rule]. 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.

[Rationale for final rule]

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. 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.¹⁴⁹ 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.

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. 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 10-hour limit on truckers’ daily work hours. Still others read about an EPA

¹⁴⁹ See Kagan, *supra* note 13, at 2290-99 (discussing the White House’s practice of issuing directives to agencies as legitimizing agency action).

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,¹⁵⁰ 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.¹⁵¹ The DOT regulates all major modes of transportation and funds transportation infrastructure projects, among other activities.¹⁵² A DOT subunit, the Federal Motor Carrier Safety Administration, sets maximum work-hours for drivers of commercial vehicles.¹⁵³ The EPA develops and enforces regulations concerning a host of environmental matters,¹⁵⁴ including establishing limits on air pollutants emitted by power plants and other stationary sources.¹⁵⁵

These agencies’ decisions are highly consequential. Consider that, among the 24 highest-cost rules promulgated by executive agencies between 2001 and 2018, EPA issued ten, DOT issued eight, and EPA and DOT jointly issued another two.¹⁵⁶ OIRA values the total societal benefits of these rules to be at least \$117 billion and their total costs be at least \$43 billion.¹⁵⁷ Although independent agencies like the CFPB are not subject to OIRA cost-benefit analysis,¹⁵⁸ they conduct similar analyses pursuant to statutory and judicial requirements.¹⁵⁹ A study comparing CFPB rules issued in the early 2010s to a sample of executive-agency rules that underwent OIRA review during

¹⁵⁰ *Seila Law*, 140 S. Ct. at 2193.

¹⁵¹ 12 U.S.C. § 5536(a)(1)(B); *see also Seila Law*, *supra* note, at 2200 (providing examples of products within the agency’s purview).

¹⁵² Department of Transportation Act, Pub. L. 89-670 (Oct. 15, 1966).

¹⁵³ *See, e.g.*, 85 Fed. Reg. 33,396 (June 1, 2020) (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).

¹⁵⁴ *See* EPA, Laws and Executive Orders, <https://www.epa.gov/laws-regulations/laws-and-executive-orders> (listing statutes that grant authority to the EPA).

¹⁵⁵ Clean Air Act of 1970, Pub. L. 91-604, § 4, 42 U.S.C. § 7412 et seq. (requiring EPA to promulgate National Emissions Standards for Hazardous Air Pollutants).

¹⁵⁶ *See* Daniel J. Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 U. CHI. L. REV. 649, 666-68 (2022).

¹⁵⁷ *See id.*

¹⁵⁸ *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193, §§ 1(d), 2(b)-(e) (Feb. 17, 1981) (excepting independent agencies from OIRA review); *but see* Exec. Order No. 13,579, 76 Fed. Reg. 41,587, § 1(c) (July 11, 2011) (mandating that “independent regulatory agencies . . . comply with” executive orders mandating cost-benefit analysis “[t]o the extent permitted by law”).

¹⁵⁹ *See* *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2010) (holding that the SEC “acted arbitrarily and capriciously in adopting a rule . . . [without] adequately assess[ing] [its] economic effects”); 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).

the same period reveals that the CFPB rules bring a larger-than-average number of distinct benefits.¹⁶⁰

The three agencies also vary in terms of their institutional design. The CFPB is among the most politically insulated agencies.¹⁶¹ 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.¹⁶² Although the DOT and EPA are both conventionally labeled executive agencies,¹⁶³ 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.¹⁶⁴ 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.¹⁶⁵

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.

Accordingly, the presidential administration presented in the vignettes vary 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.”¹⁶⁶ When combined with data on participants' political preferences, this condition allows for the identification of any partisan tilt in participants' responses.

¹⁶⁰ Howell 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”).

¹⁶¹ See *Seila Law*, 140 S. Ct. at 2192.

¹⁶² See Datla and Revesz, *supra* note 161, at 784-812. Until 2020, the CFPB's director was only removable for-cause. See *Seila Law*, 140 S. Ct. at 2197.

¹⁶³ See JENNIFER SELIN & DAVID LEWIS, SOURCEBOOK OF THE UNITED STATES EXECUTIVE AGENCIES, ADMIN. CONF. OF U.S. 31, 42 (2d ed. 2018).

¹⁶⁴ See Feinstein and Nou, *Strategic Subdelegation*, *supra* note 68 (reporting that DOT is the third most-active subdelegator, after the Departments of Agriculture and Health & Human Services).

¹⁶⁵ See Datla and Revesz, *supra* note 161, at 790, 804.

¹⁶⁶ These participants' involvement occurred in 2022. Participants that viewed a vignette with an active control condition, however, did so in mid-2023. For the 2023 participants, the relevant text is “several years ago, during the Biden administration” or “several years ago, during the Trump administration.”

C. Additional Information

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

Equal numbers of Trump and Biden voters view vignettes concerning each agency. With the presidential administration presented in the vignettes varying randomly by participant, that means that the study contains roughly equal numbers of the following: Trump voters that 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.

Overall, the 9,078 participants that passed all four attention checks and thus were included in these experiments tend to be younger, higher-income, and more highly educated than the U.S. population.¹⁶⁷ The overrepresentation of participants with these traits is common when using online recruitment platforms.¹⁶⁸ The sample also exhibits skew towards women, non-Hispanic whites, and Asian Americans relative to the U.S. adult population.¹⁶⁹ Self-identified Democrats and those “leaning” Democratic comprise 49 percent of the sample and Republicans and Republican-leaning are 45 percent, whereas the U.S. population around the time of the experiments exhibited a 44-45 split.¹⁷⁰ 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.¹⁷¹ Participants that

¹⁶⁷ 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 41.2% >\$75,000.

¹⁶⁸ See STIGLITZ, *supra* note __, at 197; Nicholas Valentino, Carly Wayne, and Marzia Ocen, *Mobilizing Sexism, The Interaction of Emotion and Gender Attitudes in the 2016 Presidential Election*, 82 PUB. OP. Q. 213, 227 (2018).

¹⁶⁹ Women constitute 52% of the survey, African Americans are 5%, and Hispanic/Latino participants are 6%. The average age is 38.

¹⁷⁰ See Jeffrey M. Jones, *U.S. Party Preferences Evenly Split in 2022 After Shift to GOP*, GALLUP, Jan. 12, 2023m <https://news.gallup.com/poll/467897/party-preferences-evenly-split-2022-shift-gop.aspx>.

¹⁷¹ 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, et al., *Using Instructed Response Items as*

failed at least one attention check were excluded from the analysis.

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 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 that 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. 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.

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 2 reports the mean legitimacy scores that participants assigned, along with the corresponding standard deviations.

Attention Checks in Web Surveys: Properties and Implementation, 50 SOC. METHODS & RES. 238, 239 (2021).

Table 2: Mean Legitimacy Scores – Expertise vs. Control Conditions

Agency	Structure Condition	<i>N</i>	Agency’s Decision Is Legitimate? (1 = strongly disagree; 7 = strongly agree)	
			Mean	Std. Dev.
CFPB	Baseline Control	614	5.31	1.51
	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 the table 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 0.22.¹⁷²
- For participants that read a DOT vignette, the mean legitimacy rating for those that viewed the expertise condition is 0.19 points higher than the mean rating for those assigned the active control condition.¹⁷³

¹⁷² For the expertise condition, $M = 5.66$, $SD = 1.42$; for the active control condition, $M = 5.44$, $SD = 1.57$. 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.

¹⁷³ Expertise condition: $M = 5.76$, $SD = 1.38$; active control condition: $M = 5.57$, $SD = 1.59$; $b = 0.19$, $SE = 0.086$, $t(1170) = 2.228$, $p = 0.026$.

- 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.¹⁷⁴
- For all three agency vignettes, the differences between the expertise condition and baseline control condition are even larger.¹⁷⁵
- All of these differences in means are statistically significant at the $p < 0.05$ level.

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

Figure 1: Perceived Agency Legitimacy – Expertise Condition vs. Control Conditions

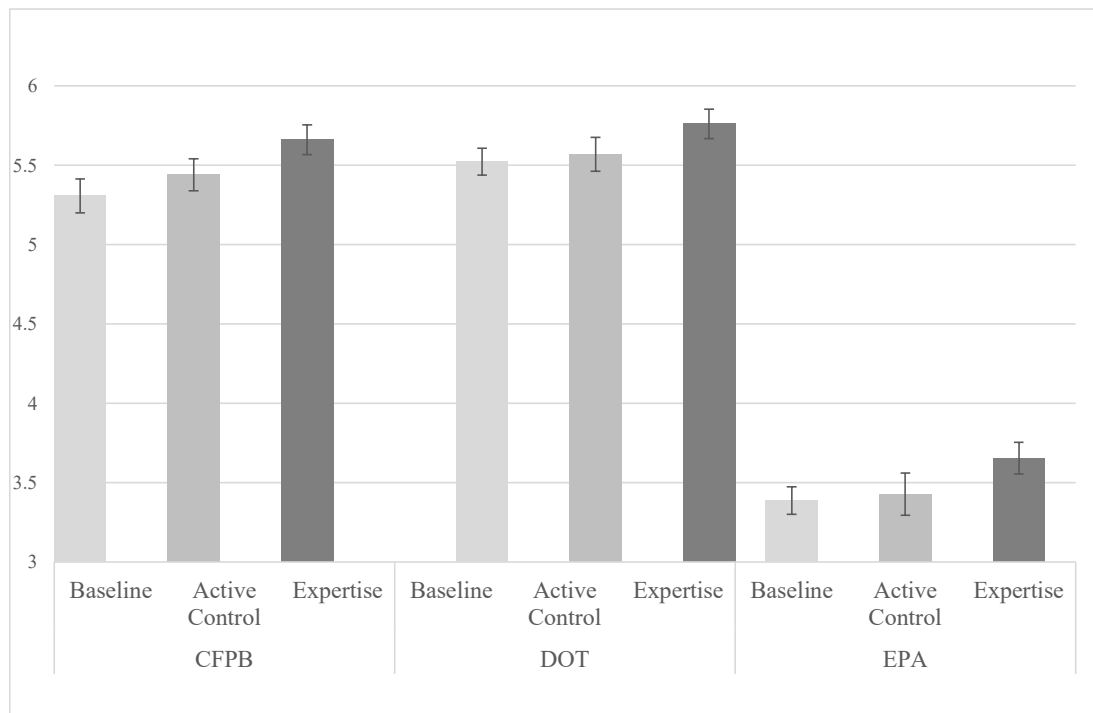


Figure identifies participants’ mean legitimacy scores on a 1-7 scale, by agency and condition. Whiskers around each mean denote 95 percent confidence intervals.

¹⁷⁴ Expertise condition: $M = 3.65$, $SD = 1.96$; active control condition: $M = 3.43$, $SD = 1.96$; $b = 0.23$, $SE = 0.114$, $t(1181) = 1.978$, $p = 0.048$.

¹⁷⁵ For the CFPB, 0.35 points separate the mean legitimacy ratings for participants that 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 0.73 ($SE = 0.110$, $t(1194) = 2.426$, $p = 0.015$).

To be sure, these effect sizes are modest.¹⁷⁶ 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. 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 scale. By comparison, the mean differences between the expertise and active control conditions—which range from 0.19 points for the DOT vignette to 0.23 points for the EPA—are not trivial.

Multivariate regression models confirm these results. Table 3 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, and which of the three agency vignettes they viewed. Only participants that 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.

¹⁷⁶ 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).

Table 3: Regression Analysis of Perceived Legitimacy on Assignment to Expertise Condition vs. Active Control Condition

	(1)	(2)	(3)	(4)
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) obtained via ordered logit models. Ordered dependent variable is participants' legitimacy rating on an ordinal 1-7 scale. Coefficient estimates for cuts not reported. Omitted condition: active control condition. Each observation is an experiment participant that 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 the table shows, the correlation between the expertise condition and participants' legitimacy ratings is positive and statistically significant across model specifications.¹⁷⁷ 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.¹⁷⁸

¹⁷⁷ 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 that learned that the agency decision occurred in the Trump administration tend to find that decision to be more legitimacy. Turning to the components of this interaction term, the negative and statistically significant estimates for *Trump Voter* indicate that Trump voter 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 voter learned that the decision occurred in the Trump administration also tend to find the decision to be less legitimate.

¹⁷⁸ 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 that view one condition versus those that view another may influence their legitimacy scores, I also run models that

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. As before, participants read a vignette concerning the CFPB, DOT, or EPA; 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 4 conveys the mean legitimacy ratings assigned by participants that viewed the participation condition versus the baseline and active control conditions.

Table 4: Mean Legitimacy Scores, Participation vs. Control Conditions

Agency	Structure Condition	<i>N</i>	Agency’s Decision Is Legitimate?	
			Mean	Std. Dev.
CFPB	Baseline Control	614	5.31	1.51
	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	3.42	1.96
	Participation	597	3.56	1.96

The table and figure show that the point estimates for mean legitimacy ratings all are higher for the participation condition than for the control conditions. For the

include key demographic variables: gender, age, race / ethnicity, and income. Again, the results are robust to the inclusion of these condition variables.

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).¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹

Next, I regress participants' legitimacy ratings on whether they viewed the participation condition or active control condition. Table 5 reports the results.

Table 5: Regression Analysis of Perceived Legitimacy on Assignment to Participation Condition vs. Active Control Condition

	(1)	(2)	(3)	(4)
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 FEs?	N	N	Y	Y
Observations	3,579	3,579	3,579	3,579

For model info, see note to Table 3. 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: $\chi^2 = 779.3$ ($p < 0.001$).

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

¹⁷⁹ $SE = 0.085$, $t(1255) = 1.737$, $p = 0.076$.

¹⁸⁰ For the DOT, the difference (b) is 0.111, $SE = 0.091$, $t(1145) = 1.225$, $p = 0.221$. For the EPA, $b = 0.130$, $SE = 0.114$, $t(1188) = 1.139$, $p = 0.255$.

¹⁸¹ 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, $b = 0.170$, $SE = 0.109$, $t(1204) = 1.557$, $p = 0.120$.

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. Table 6 displays the now-familiar mean legitimacy ratings.

Table 6: Mean Legitimacy Scores – Pres. Admin. vs. Control Conditions

Agency	Structure Condition	N	Agency's Decision Is Legitimate?	
			Mean	Std. Dev.
CFPB	Baseline Control	614	5.31	1.51
	Active Control	654	5.44	1.57
	Presidential Administration	699	5.17	1.59
DOT	Baseline Control	610	5.52	1.48
	Active Control	597	5.57	1.59
	Presidential Administration	577	5.53	1.56
EPA	Baseline Control	617	3.39	1.85
	Active Control	591	3.42	1.96
	Presidential Administration	577	5.53	1.56

These results are considerably more muddled than in the previous studies. For the CFPB, mean legitimacy ratings are substantially *lower* among participants that viewed the presidential administration condition than for people that viewed the active

control condition. This difference in means is statistically significant at $p < 0.01$.¹⁸² By contrast, null results obtain for the DOT and EPA.¹⁸³

As before, regression provides another perspective on these results. Table 7 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 Trump (or Biden) in 2020; whether their vignette mentioned Trump (or 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.

Table 7: Regression Analysis of Perceived Legitimacy on Assignment to Presidential Administration Condition vs. Active Control Condition

	(1)	(2)	(3)	(4)
Pres. Admin. Condition	-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 FEs?	N	N	Y	Y
Observations	3,656	3,656	3,656	3,656

For model info, see note to Table 3. 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: $\chi^2 = 714.9$ ($p < 0.001$).

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.¹⁸⁴ Here, that means that supporters of President Biden would tend to find a policy to be more legitimate if they learned that President

¹⁸² $b = -0.267$, $SE = 0.085$, $t(1349) = 3.115$, $p = 0.002$.

¹⁸³ For the DOT, $b = -0.037$, $SE = 0.092$, $t(1174) = 0.408$, $p = 0.683$. For the EPA, $b = 0.158$, $SE = 0.116$, $t(1133) = 1.356$, $p = 0.176$.

¹⁸⁴ 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.

Biden had a hand in its development, and to find it to be less legitimate if they learned of President Trump’s involvement. The converse naturally would apply to President Trump’s supporters. In the aggregate, therefore, these potential cross-cutting 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.¹⁸⁵ This estimated boost in perceived legitimacy achieves conventionally accepted levels of statistical significance.¹⁸⁶ 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.¹⁸⁷ 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.

* * *

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.

¹⁸⁵ For a model that adds this 3-way interaction term along with its component parts to Model 2 in Table 7: $\beta = 0.068$, $SE = 0.234$, $z\text{-score} = 2.92$, $p = 0.004$. For a model that adds the interaction term and its component parts to Model 4 in Table 7: $\beta = 0.829$, $SE = 0.236$, $z\text{-score} = 3.51$, $p < 0.001$.

¹⁸⁶ Id.

¹⁸⁷ 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: $\beta = -0.111$, $SE = 0.163$, $z\text{-score} = -0.68$, $p = 0.494$); and
- 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 component parts of the *Presidential Administration Condition * President Trump * Trump Voter* interaction term.

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 1-7 scale their level of agreement with the following statement: "I support the agency's decision." Although participants' legitimacy and support ratings are closely correlated,¹⁸⁸ mean legitimacy scores are higher than the mean support scores for all vignettes.¹⁸⁹ For instance, across the three treatment conditions, participants' legitimacy ratings were on average 0.35 points higher than their support ratings.¹⁹⁰ Although not large on a seven-point scale in which both ratings cluster in the upper half, neither is that difference trivial.¹⁹¹

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.

IV. PRESCRIPTIONS

Trust and confidence in government institutions have declined markedly in recent decades.¹⁹² That is troubling, because public acceptance that government institutions are legitimate is necessary for liberal democracy to flourish.¹⁹³ In light of

¹⁸⁸ Increases in participants' support ratings closely track increases in their legitimacy ratings. The correlation coefficient between the two variables is 0.834. Bivariate regression of support rating on legitimacy rating produces a coefficient estimate of 0.903 (SE = 0.007, $R^2 = 0.69$).

¹⁸⁹ Differences in means between legitimacy ratings and support ratings for all combinations of treatment & 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.

¹⁹⁰ $M_{legitimacy} = 4.922$, $SD_{legitimacy} = 1.893$; $M_{support} = 4.568$, $SD_{support} = 2.051$. $b = 0.354$, $SE = 0.038$, $t(10712) = 9.286$, $p < 0.001$.

¹⁹¹ Cohen's $d = 0.179$ (95% C.I.: 0.141, 0.217).

¹⁹² See Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 546 (2018).

¹⁹³ See Tyler, *Governing amid Diversity*, *supra* note 15, at 809; ROBERT DAHL, POLYARCHY (1971).

concerns that American democracy is backsliding, the project of shoring up confidence in government institutions should be seen as an imperative.¹⁹⁴

The findings in this Article can contribute to that project. For proponents of the administrative state, the Article’s centerpiece—i.e., 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. Essentially, these results imply that thoughtful agency design can bolster people’s confidence in their government.

That is good news for political actors seeking to defend an administrative state under strain.¹⁹⁵ In an era in which agencies’ legitimacy is challenged, political leaders seeking to buttress it ought to consider elevating civil servants, expand avenues for public participation, and reduce the President’s role in agency decision-making. 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. 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.¹⁹⁶

¹⁹⁴ On the phenomenon of backsliding, see, e.g., Aziz Huq and Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018).

¹⁹⁵ See Metzger, *supra* note 10 (cataloging challenges to administrative governance).

¹⁹⁶ 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.

i. 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.¹⁹⁷ Further, agency heads can expand on the practice of subdelegating binding authority on consequential matters to civil servants.¹⁹⁸

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.¹⁹⁹
- 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.²⁰⁰ Presumably, those personnel would have faced strong incentives to either conform to the President’s agenda or risk removal and replacement with White House loyalists.²⁰¹ President Biden later rescinded Schedule F.²⁰² Yet the proposal remains a live political issue; if a candidate with similar commitments as President Trump is

¹⁹⁷ See Erich Wagner, *Lawmakers Are Doubling Down on the Effort to Prevent the Next Schedule F*, GOV. EXEC., Feb. 14, 2023, <https://www.govexec.com/workforce/2023/02/senate-democrat-doubles-down-his-effort-prevent-next-schedule-f/382923/> (describing the proposed Saving the Civil Service Act, which would effectuate this change).

¹⁹⁸ See Brian D. Feinstein and Jennifer Nou, *Submerged Independent Agencies*, __ U. PENN. L. REV. __ (2023) (describing and quantifying this practice).

¹⁹⁹ See David Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753, 790 (2022).

²⁰⁰ Exec. Order No. 13,957, 85 Fed. Reg. 67631 (October 21, 2020).

²⁰¹ See Erich Wagner, *As White House Steps Up Schedule F Implementation, ‘Lawmakers Don’t Get It’*, GOV. EXEC., Dec. 14, 2020.

²⁰² Exec. Order No. 14,003, 86 Fed. Reg. 7231 (Jan. 27, 2021) (order issued Jan. 22, 2021).

elected President in the foreseeable future, Schedule F likely will be revived.²⁰³

- 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.²⁰⁴

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.²⁰⁵ 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.

ii. 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 sometimes viewed as antonyms.²⁰⁶ Why, then, does insulating decisions from popular control appear to have popular support?

²⁰³ See Nicole Ogrysko, *Schedule F is gone, but the debate continues in Congress*, FED. NEWS NETWORK, Feb. 24, 2021, <https://federalnewsnetwork.com/workforce/2021/02/schedule-f-is-gone-butthe-debate-continues-in-congress/>.

²⁰⁴ See Mychael Schnell, *House begins legislative business after Speaker spectacle*, THE HILL, Jan. 9, 2023, <https://thehill.com/homenews/house/3804864-this-week-house-begins-legislative-business-after-speaker-spectacle/>.

²⁰⁵ See David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611, 612 (2012) (summarizing this argument).

²⁰⁶ See Anya Bernstein, *Porous Bureaucracy*, 45 L. & SOC. INQUIRY 28, 28 (2019) (“Scholars and politicians have sometimes presented bureaucracy and inherently conflicting with democracy.”); Guy Peters, *Bureaucracy and Democracy*, 10 PUB. ORG. BEHAVIOR 209, 209 (2010) (“The terms bureaucracy and democracy are usually thought of . . . as antithetical approaches to providing governance for a society.”); CARL FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY:

The answer may be that people recognize the limits of their own expertise. Going further, they may acknowledge their own uncertainty regarding the values conflicts 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?²⁰⁷ 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.

Alternatively, 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.²⁰⁸

A second question is whether institutional designers should privilege expert-enhancing structures over those that increase opportunities for public participation. For some, the answer would be yes. This response begins with the claim that the expertise and participation paradigms are substitutes.²⁰⁹ On this view, greater consideration of the public’s perspective necessarily dilutes civil servants’ influence.²¹⁰ If one accepts the premise that one must choose between the two

THEORY AND PRACTICE IN EUROPE AND AMERICA 57 (rev. ed. 1950) (challenging “[t]he popular antithesis between bureaucracy and democracy”).

²⁰⁷ 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”).

²⁰⁸ See Stephenson, *supra* note 117 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].”).

²⁰⁹ See Vermeule, *supra* note 12, 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”).

²¹⁰ See Brian D. Feinstein & Abby K. Wood, *Divided Agencies*, 95 S. CAL. L. REV. 731, 763 (2022) (finding that agencies where appointees and civil servants are at loggerheads are more likely to extend the length of notice-and-comment periods and allow late-filed comments); Feinstein & Hemel, *supra* note 144, at 1171-74 (finding that agency leaders tend to consult outside advisory committees more in agencies where appointees and civil servants hold divergent views). One interpretation of these dynamics is that they suggest that appointees emphasize extra-agency views as a check on, or counterweight to, technocratic civil servants.

paradigms, the results presented in Part III counsel in favor of expertise, given the generally larger coefficient estimates and statistical significance.

This is arguably a false choice, however, as the claim that expertise and participation are in tension is contested. 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.²¹¹

Further, participation in public deliberation can alter participants' views, leading participants to converge around a proposal.²¹² Progressive- and New Deal-era figures like John Dewey, Mary Follett, and Felix Frankfurter viewed expertise and public deliberation as symbiotic inputs into administrative legitimacy.²¹³ Carrying this torch, contemporary public intellectual K. Sabeel Rahman considers 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."²¹⁴

Similarly, Katharine Jackson's new theory of administrative legitimacy considers 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.²¹⁵ 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.²¹⁶

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

²¹¹ Cf. Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM L. REV. 545, 550-53 (1999) (advancing a similar argument regarding the use of victim impact statements in criminal cases).

²¹² See AMY GUTMANN AND DENNIS F. THOMPSON, WHY DELIBERATIVE DEMOCRACY? 13-21 (2009).

²¹³ See JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 206 (1954); FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 159 (1930); MARY PARKER FOLLETT, THE NEW STATE: GROUP ORGANIZATION THE SOLUTION OF POPULAR GOVERNMENT 174-75 (1918).

²¹⁴ RAHMAN, *supra* note 66, at 39.

²¹⁵ Jackson, *supra* note __, at *33-34, *48-49.

²¹⁶ *Id.* at *34; *see also id.* at 53 (discussing notice-and-comment rulemaking).

statistical significant for one of three agencies. Thus, where a resource-constrained institutional 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.²¹⁷ 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.²¹⁸ One such proponent, Blake Emerson, argues 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.”²¹⁹ Where well-heeled interests dominate the notice-and-comment process,²²⁰ expanded avenues for these interests’ participation could even erode agencies’ perceived legitimacy.

For this reason, a set of scholars urges government to address power imbalances concerning participatory mechanisms as a means of boosting administrative legitimacy.²²¹ I count myself among this group. In other work, I advocate for “identity-conscious” measures designed to elevate the views of under-

²¹⁷ See EMERSON, *supra* note __, at 61-112 (presenting this view).

²¹⁸ See *id.* at 21 (referring to the APA’s notice-and-comment requirement for rulemaking as “a thin form” of deliberative process).

²¹⁹ *Id.*

²²⁰ See Daniel E. Walters, *Capturing the Regulatory Agenda: An Empirical Study of Agency Responsiveness to Rulemaking Petitions*, 43 HARV. ENV’T L. REV. 175, 184 (2019) (concluding that this influence is particularly apparent in notice-and-comment rulemaking, although it often falls short of the “regulatory capture” label).

²²¹ See, e.g., Jim Rossi and Kevin M. Stack, *Representative Rulemaking*, 109 IOWA L. REV. __ *8 (forthcoming 2023); Sant’Ambrogio and Staszewski, *supra* note __; Emerson, *Administrative Answers*, *supra* note __, at 2093; 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 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 (2012); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 441, 490-97 (2005); Lobel, *supra* note __, at 440; Freeman, *Collaborative Governance*, *supra* note __, at 96-97; Hammond and Markell, *supra* note 77; Farina, *Consent*, *supra* note __.

voiced groups in agency decision-making.²²² These measures include reserved seats for underpowered groups on multi-member bodies and greater consultation with agency advisory committees that spotlight these groups.²²³

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 supporters. Even here, however, the results show that skepticism is warranted. Participants that 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 that viewed the CFPB vignette and Biden voters that viewed all three vignettes, however, the experiments produce null results. 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.”²²⁴ That is plainly not the case, at least with respect to sociological legitimacy.

²²² See Brian D. Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, 90 GEO. WASH. L. REV. 1, 64-71 (2022).

²²³ *Id.* at 7.

²²⁴ *Arthrex*, 141 S. Ct. at 1979.

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,²²⁵ 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 personnel²²⁶—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,²²⁷ 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. Legal legitimacy is grounded in adherence to legal requirements.²²⁸ Given the extensive judicial scrutiny to which the administrative state is subject, the very fact that a particular administrative structure exists is *prima facie* evidence of its legal legitimacy. Moral legitimacy, by contrast, involves whether an institution is morally justifiable or worthy of recognition.²²⁹ Arguments that presidential administration acts as a legitimizing force on the administrative state, however, rarely involve these types of appeals.

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—e.g., 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 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.

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

²²⁵ 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 Rivals*] (adopting this perspective); with Feinstein and Nou, *supra* note __ (challenging it).

²²⁶ See Emerson and Michaels, *supra* note __ at 111.

²²⁷ See *supra* notes 105-111 and accompanying text.

²²⁸ See Fallon, *supra* note 14, at 1794.

²²⁹ *Id.* at 1796.

acceptance—but they are mistaken.²³⁰ Their error may stem from a tendency for legal elites to occupy different spaces than other Americans, distorting their ability to understand what measures will appeal to their fellow citizens.²³¹

Regardless of its explanation, 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.²³² Drawing on a national survey and a set of focus groups, Professors Hibbing and Theiss-Morse observe that people tend to be disinterested in policy, actively avoid politics, and “not eager to hold government accountable for the policies it produces.”²³³ That statement cuts against the presidential administration paradigm, which rests on assumptions about the President’s democratic responsiveness or accountability to the voters’ preferences.²³⁴

Instead, Professors Hibbing and Theiss-Morse find that “people are surprisingly smitten with the notion of elite experts making choices.”²³⁵ 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,”²³⁶ 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.²³⁷

²³⁰ Cf. Kevin Tobia, Daniel E. Walters, and Brian Slocum, *Major Questions, Common Sense?*, unpublished working paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4520697 (presenting experimental evidence that Justice Amy Coney Barrett’s “common sense” example of how people interpret instructions non-literally conflicts with ordinary Americans’ views).

²³¹ Cf. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 514 (1840) [2009] (labeling “the judicial bench and the bar” as “the American aristocracy”).

²³² JOHN HIBBING AND ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY* (2002).

²³³ *Id.* at 2-3.

²³⁴ See Jackson, *supra* note __, at *11-16 (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).

²³⁵ Hibbing and Theiss-Morse, *supra* note __, at 86.

²³⁶ *Id.* at 2.

²³⁷ *Id.* at 2, 6.

The participation paradigm provides this option. The overwhelming majority of Americans do not utilize these participatory mechanisms.²³⁸ 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 accountable²³⁹—a dubious proposition given Hibbing and Theiss-Morse’s findings.²⁴⁰ 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 deemphasize 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 Subpart present two additional insights: first, institutional designs should consider bespoke agency designs; and second, additional experimental work is needed to test scholars and judges’ myriad other claims concerning structures that promote legitimacy, beyond those that fit neatly into the expertise, participation, and presidential administration paradigms.

i. 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

²³⁸ 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).

²³⁹ See *supra* Part I.B.iii.

²⁴⁰ See Hibbing and Theiss-Morse, *supra* note __, 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.”).

associated with greater perceived legitimacy for the CFPB but one cannot reject the null hypothesis concerning the other two agencies.²⁴¹ 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).²⁴² 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.²⁴³ 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 to universality, with the trans-substantive APA as its lodestar.²⁴⁴ 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.

This Article offers a proof of concept for an alternative approach. Experiments across various agencies and issue areas, that include conditions that cover the waterfront in terms of purportedly legitimacy-enhancing design features,²⁴⁵ 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.

²⁴¹ See *supra* note 179-181 (reporting differences in means and associated uncertainty measures for the participation condition across the three agencies).

²⁴² See *supra* notes 182-183 (reporting these figures for the DOT and EPA).

²⁴³ Cf. Farina, *Consent*, *supra* note 48, 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”).

²⁴⁴ 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.”).

²⁴⁵ See *infra* Part IV.D.ii.

ii. 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.

1. To what extent do these findings translate to other agencies, issues, and methods of policymaking? Agencies set policy in several ways, including via rulemakings, adjudications with precedential value, and the publication of guidance documents.²⁴⁶ Enforcement decisions—and decisions *not* to enforce, e.g., 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.²⁴⁷ 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 parties to further a policy goal during a crisis.²⁴⁸ Accordingly, a natural extension of this project would be to examine whether policymaking form influences perceptions of legitimacy.²⁴⁹

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, DOT, and EPA generally are not 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

²⁴⁶ 5 U.S.C. §§ 553-554.

²⁴⁷ See Chris Brummer, Yesha Yadav, and David Zaring, *Regulation by Enforcement*, __ S. CAL. L. REV. __, *9-10 (forthcoming).

²⁴⁸ See Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841, 1844-45 (2011); Steven M. Davidoff and David Zaring, *Regulation by Deal: The Government’s Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 466-67 (2009). For a discussion of the concept of soft law, see generally Jacob E. Gersen and Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 606 (2008).

²⁴⁹ See Bressman, *Beyond Accountability*, *supra* note 79, at 546 (claiming that forgoing notice-and-comment rulemaking “jeopardizes administrative legitimacy”); Freeman, *Collaborative Governance*, *supra* note __, at 22 (asserting that guidance documents “threaten to . . . undermine the legitimacy of the rules produced by removing even the pretense of public access and participation”).

issues.”²⁵⁰ Although these three agencies are hardly immune from political controversy,²⁵¹ 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. A more complete picture of how agency design features connect to perceived legitimacy ought to include these types of hot-button issues as well.

2. Do Americans connect agency structures to other values? Future extensions of this project also could go beyond probing 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.²⁵²

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.

3. 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. The participation and presidential administration conditions also lump together multiple design features associated with these respective paradigms.

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

²⁵⁰ Rao, *supra* note 122, at 232.

²⁵¹ See, e.g., Noll, *supra* note __, at 756 (CFPB); id. at 782 n.174 (EPA).

²⁵² STIGLITZ, *supra* note 15, at 189-242.

the 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.

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

4. What other design 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 contends 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 that purports to be legitimate.”²⁵³ Many judges and scholars agree.²⁵⁴

Second, some claim that legitimacy hinges on faithful adherence to valid delegations from Congress. Chief Justice John Roberts endorses this view, writing in dissent that an agency “acquires its legitimacy from a delegation of lawmaking power from Congress.”²⁵⁵ Again, the list of endorsers of this basic claim is long and distinguished.²⁵⁶

²⁵³ JAFFE, *supra* note 51, at 320 (emphasis added); *see also id.* at 372.

²⁵⁴ *See Saylor v. Dep’t of Agric.*, 723 F.2d 581 (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 as Legislating*, *supra* note 104, at 1043; M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1413 (2014); Hammond, *supra* note 116, at 656; Bressman, *Judicial Review*, *supra* note 105, at 1716; Strauss, *supra* note 1, at 1357; Hammond and Markell, *supra* note 77, 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 Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 742 (1990); Sidney Shapiro & Richard Levy, *Heightened Scrutiny of the Fourth Branch*, 1987 DUKE L.J. 387, 429 (1987); Henry 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.”).

²⁵⁵ *See City of Arlington*, 133 S. Ct. at 1886 (Roberts, C.J., dissenting).

²⁵⁶ *See* Christopher 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 Farina, *Statutory*

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 as dose of legitimacy to agencies.²⁵⁷ Others are skeptical.²⁵⁸ As before, experimental studies—here, with text regarding the views of congressional overseers—could shed light.

Fourth, other internal structures, beyond those discussed *supra*, may legitimize agencies. Scholars adopting this approach focus on internal norms and structures,²⁵⁹ a commitment to due process,²⁶⁰ transparency measures,²⁶¹ the balancing of rivalrous subgroups within agencies,²⁶² and the related abilities of agencies to provide fora for

Interpretation and the Balance of Power in the Administrative State, 89 COLUM. L. REV. 452, 511 (1989) (referring to a “legitimacy ideal” under which policymaking is tethered to “the people’s elected representatives”) [hereinafter Farina, *Statutory Interpretation*]; Lloyd Cutler and David 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 __, at *4-5 (connecting the major-questions and nondelegation doctrines to the transmission-belt model, a “way of thinking about administrative legitimacy”); Criddle, *supra* note 85, at 451 (describing the transmission-belt model as “focused 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.”).

²⁵⁷ *See* Sean Farhang, *Legislative Capacity & Administrative Power under Divided Polarization*, 150 DAEDALUS 49, 50 (2021) (asserting that the “administrative state’s legitimacy hinges on meaningful congressional oversight”); Bernard Bell, *Replacing Bureaucrats with Automated Sorcerers?*, 150 DAEDALUS 89, 95 (2021) (“Agencies’ legitimacy rests upon their responsive to . . . the president and Congress.”); Farina, *Statutory Interpretation*, *supra* note __, 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.”).

²⁵⁸ *See* Vermeule, *supra* note 12, at 2465 (“Congress’s de facto abdication blocks any simpleminded appeal to legislative oversight as the source of legitimation for the administrative state.”); Cass Sunstein and Richard Stewart, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1254 (1981) (arguing that in practice the “legitimacy that Congress might lend to agency action through close legislative attention has not been forthcoming”).

²⁵⁹ *See* Robert Glicksman and Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1659 (2019); Gillian Metzger and Kevin Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1262, 1266 (2017).

²⁶⁰ *See* JERRY MASHAW, BUREAUCRATIC JUSTICE 143 (1985); JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 169, 173 (1985). *Cf.* TYLER, *supra* note 97, at 22-27 (1990) (procedural fairness promotes legitimacy in judicial proceedings).

²⁶¹ *See* William Simon, *The Organizational Premises of Administrative Law*, 78 L. & CONTEMP. PROBS. 61, 62 (2015); Mendelson, *Disclosing*, *supra* note 116, at 1159; McGarity, *supra* note 1, at 1755-56; *but see* DIRK KASLER, MAX WEBER: AN INTRODUCTION TO HIS LIFE AND WORK 161-68 (summarizing Weber’s view that secrecy promotes legitimacy).

²⁶² *See* Michaels, *Of Constitutional Custodians*, *supra* note __, at 256 (“[C]ultivating and safeguarding robust administrative rivalries contributes strongly to a legitimate administrative sphere.”); Michaels,

ongoing political contestation²⁶³ or for deliberation.²⁶⁴ Measures to empower extra-agency groups in the regulatory process—e.g., the use of negotiated rulemakings,²⁶⁵ advisory committees,²⁶⁶ independent scientific peer reviewers,²⁶⁷ and collaborative governance initiatives²⁶⁸—also are claimed to legitimize agency decision-making.

Fifth, an agency’s perceived legitimacy may be grounded in its track record. Peter Conti-Brown and David Wishnick connect one agency’s legitimacy with its ability to experiment and address emergent problems.²⁶⁹ For Abbe Gluck, Anne Joseph O’Connell, and Rosa 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. Simply put, there is a “legitimacy of government getting its work done.”²⁷⁰

Finally, Philip Hamburger, among the most resolute critics of the administrative state, considers agencies’ exercise of discretionary authority, or “administrative lawmaking,” to be illegitimate.²⁷¹ 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

Enduring, *supra* note 1, at 551-53, 561 (“[A]dministrative separation of powers is . . . an affirmative source of administrative legitimacy.”).

²⁶³ See Walters, *supra* note 6; Anya Bernstein and Glen Staszewski, *Populist Constitutionalism and the Regulatory State* (2022 working paper).

²⁶⁴ WILLIAM ESKRIDGE AND JOHN FERREJOHN, *A REPUBLIC OF STATUTES* 27, 103-4 (2010) (agency-centered deliberation has “legitimizing value”); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1254, 1255 (2009) (claiming that “deliberative democratic theory” offers “an alternative means of legitimizing governmental authority”); *id.* at 1278 (expertise-based reason-giving fosters citizen deliberation, thus legitimizing agency action); Seidenfeld, *supra* note 254, at 1528-39 (“Particular governmental decisions . . . to be legitimate must conform to [civic-republican] principles [emphasizing deliberation.]”); AMY GUTMANN AND DENNIS F. THOMPSON, *DEMOCRACY AND DISAGREEMENT* 41 (1996) (“[D]eliberation contributes to the legitimacy of decisions made under conditions of scarcity.”).

²⁶⁵ See Freeman and Langbein, *supra* note 57, at 63, 110, 121, 137-38.

²⁶⁶ See *Ass’n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913-14 (D.C. Cir. 1993); Feinstein and Hemel, *supra* note 144, at 1147.

²⁶⁷ See Louis J. Virelli III, *Scientific Peer Review and Administrative Legitimacy*, 61 ADMIN. L. REV. 723 (2009).

²⁶⁸ See Freeman, *Collaborative Governance*, *supra* note 91, at 22.

²⁶⁹ See Peter Conti-Brown and 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 independence.”).

²⁷⁰ Gluck, et al., *supra* note __, at 1842.

²⁷¹ 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.”).

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 to set policy. 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 seeks to change public attitudes towards the administrative state, agencies' sociological legitimacy is implicated as well.²⁷²

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. 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.”²⁷³

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 non-elite 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

²⁷² See PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* (2017) (shorter, more accessible work by Hamburger, presumably intended for a wider audience); Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1554 (2015) (“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.”).

²⁷³ *West Virginia*, 142 S. Ct. at 2594 (citation omitted).

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 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 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 towards 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, <i>the agency should consider new limits on payday loans.</i> ”
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>	<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> <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>	<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>
The agency said that banning most high-interest loans will prevent people from having to pay back a	The agency said that banning most high-interest loans will prevent people from having to pay back a	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.	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.	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.
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Baseline Control Condition	Active Control Condition
The CFPB is a federal agency that regulates lenders.	The CFPB is a federal agency that regulates lenders.
	<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>
[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.”	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.”
Later, the agency banned most loans with annual interest rates over 36%.	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>
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.

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] 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.”
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 explaining the reasons for it.</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 many other people responded. The agency spent months reading and thinking about their ideas.</i> <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>	<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 costs. After receiving the White House’s approval, the agency announced the new policy.</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.	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.

Baseline Control Condition	Active Control Condition
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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 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.	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>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 new policy that allows power plants to release 10% more air pollution than before. 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>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 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
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<p>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.</p>	<p>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.</p>
	<p><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></p>
<p>[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.”</p>	<p>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 charging customers more for electricity. Therefore, we are considering relaxing limits on air pollution.”</p>
<p>Later, the agency said it will allow power plants to release 10% more pollution into the air than before.</p>	<p>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></p>
<p>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.</p>	<p>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.</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 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.

iv. 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