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# The Role of Politics in a Deliberative Model of the Administrative State

Mark Seidenfeld

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# The Role of Politics in a Deliberative Model of the Administrative State

Mark Seidenfeld\*

## ABSTRACT

Since at least the mid-1980s, some scholars of United States administrative law have touted deliberative democracy as a promising theory to justify the modern administrative state. Those who advocate deliberative administration, however, have not easily incorporated the role of democratic politics into their models of that state.

This Article begins by reviewing the historical development of the most prevalent model of political influence on agencies—the presidential control model—and summarizes arguments supporting that model. It proceeds to criticize the presidential control model for failing to promote the goals of a deliberative regulatory state. It then presents deliberative justifications for the administrative state, but argues that agency rulemaking almost always involves value judgments that can be justified only by invocation of political control. Next, it reviews approaches to incorporating politics via public deliberation or agency expertise, but concludes that none set out a workable role for politics in the administrative state. Finally, the Article attempts to develop such a workable role, and ultimately suggests that, although political influence is essential, such influence must be structured and exercised carefully in order to maintain the deliberative advantages of administrative agencies.

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#### INTRODUCTION

Many students of government today believe that the American political system has become dysfunctional.<sup>1</sup> Congresspersons and Senators seem focused only on maintaining their party's control of their respective houses or on wresting control of those houses and the White House from the opposing party.<sup>2</sup> Members of Congress are not particularly motivated to further the interest of the country so long as they believe that the resulting harm will be attributable to their opponents across the aisle rather than to their own party.<sup>3</sup> Recent presidents have announced policies that some claim are motivated more by a desire to retain control over the White House than by a desire to implement programs that will truly benefit the nation.<sup>4</sup> The partisan divide that pervades the halls of Congress has extended to the polity

<sup>1</sup> See THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* xii (2012) (stating that “[p]ublic trust in the government’s capacity to solve the serious problems facing the country . . . hit record lows.”).

<sup>2</sup> See *id.* at 102 (explaining that Republicans obtained “immense electoral success in 2010 after voting in unison against virtually every Obama initiative and priority”).

<sup>3</sup> See, e.g., Jake Sherman, *Sequester Blame Game as Leaders Head to White House*, POLITICO (Feb. 28, 2013, 11:10 PM), <http://www.politico.com/story/2013/02/enough-sequester-blame-to-go-around-88275.html> (explaining how each party attempted to blame the other during sequester negotiations).

<sup>4</sup> See Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 101–02 (1994) [hereinafter Seidenfeld, *A Syncopated Chevron*] (suggesting the timing of Reagan’s announcement regarding the abortion counseling gag rule was intended to shore up the candidacy of George H.W. Bush by “appeasing the religious right”); Julia Preston & John H. Cushman, Jr., *Obama to Permit Young Migrants to Remain in the US*, N.Y. TIMES, June 16, 2012, at A1 (characterizing the President’s action as “a clear play for a crucial voting bloc in states that will decide whether he gets another term”).

itself,<sup>5</sup> which seems more divided and insistent on no compromises, leaving little middle ground for legislators to stake out and rendering meaningful responses to regulatory problems unlikely.<sup>6</sup>

Those on different sides of regulatory issues have recently tried to extend the dysfunction of America's political process to the administrative state. Groups fight for self-interested regulatory outcomes in every possible arena. This occurs in administrative hearing rooms, where agencies create a record for their actions, and in courtrooms, where the various stakeholders seek judicial review.<sup>7</sup> But groups also fight in the halls of Congress, at the White House, and even in the shops on Main Street and the banks on Wall Street,<sup>8</sup> all in an effort to dictate or undermine agency policy decisions meant to implement statutory schemes to protect the public interest.<sup>9</sup> It is not enough for a stakeholder group to convince the agency, via a deliberative process, that its position best serves the public interest.<sup>10</sup> Rather, groups seek legislation to change the administrative process or selection of agency heads to more securely benefit their own interests, without concern about what is good for the nation.<sup>11</sup> They also target campaign contributions to induce key congressional committee members to pressure agencies.<sup>12</sup> They have even gone so far as to coordinate media cam-

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<sup>5</sup> MANN & ORNSTEIN, *supra* note 1, at 45–46 (explaining that a significant portion of the electorate has “also been caught up in partisan polarization”).

<sup>6</sup> See MANN & ORNSTEIN, *supra* note 1, at 51 (explaining that representatives from homogeneously partisan areas are more likely to accept “strategic partisan team play” by their representatives because “[b]uilding and maintaining each party’s reputation dictate against splitting the difference in policy terms”).

<sup>7</sup> See Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1675–76 (2012).

<sup>8</sup> See *id.* at 1707–08.

<sup>9</sup> See *id.* at 1761–62. Many of these tactics are not entirely new. Historically, powerful members of Congress have weighed in on agency rulemakings in support of their constituents interests. See, e.g., D.C. Fed’n of Civic Ass’ns v. Volpe (*Three Sisters Bridge*), 459 F.2d 1231, 1235–36 (D.C. Cir. 1971) (discussing attempt by a House Committee Chairman to influence the Secretary of Transportation’s decision whether to authorize a bridge from Virginia to Washington, D.C., through park land on the Three Sisters Island in the Potomac); BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR: OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT 100–02 (1981) (describing Senator Byrd’s interaction with the White House and the EPA in support of a sulfur dioxide emission standard that would benefit the eastern United States coal industry).

<sup>10</sup> McGarity, *supra* note 7, at 1679.

<sup>11</sup> See *id.* at 1679–80 (explaining that success in the regulatory arena can be achieved through additional means, such as “preventing the confirmation of disfavored nominees” and “whittling away [the agency’s] regulatory authority through rifle-shot riders attached to must-pass legislation”).

<sup>12</sup> See *id.* at 1693 (explaining how lobbyists contributed to congressional campaigns in or-

paigns, often with claims of dubious veracity, to help increase political pressure on agencies to adopt rules of their liking.<sup>13</sup> In at least one instance, for example, the banking industry acted strategically to impose unjustified costs on their customers with the seeming intent of generating a political backlash against an agency rule it disliked.<sup>14</sup>

Despite laments about the dysfunction of politics, the leading justification for the administrative state over the past two decades remains the political control model.<sup>15</sup> This is the latest in a series of models that seek to legitimate agency authority to exercise discretion and make value judgments inherent in the adoption of binding legal rules.<sup>16</sup> The political control model relies on control over agency exercises of discretion by elected legislators and officials to warrant authorizing agencies to adopt rules.<sup>17</sup> Congress will delegate a regulatory matter to an agency when the cost of implementing the enacting coalition's preferred position by legislation exceeds the cost of agency drift from that position.<sup>18</sup> Congress can enact structural and procedural provisions which constrain such drift, but cannot eliminate it entirely.<sup>19</sup> Following statutory enactment, in which the preferences of both Congress and the agency model have been incorporated, each new Congress will take measures to monitor and constrain deviations from *its* preferred position.<sup>20</sup> Similarly, the President will have a polit-

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der to persuade bank regulators to pressure the Federal Reserve into implementing the Durbin Amendment in an industry-friendly manner).

<sup>13</sup> See, e.g., E-mail from Zen Magnets to Ed Richards (Nov. 18, 2012, 10:19 PM) (on file with author) (asking Ed Richards, as a customer who bought magnets from Zen before, to file comments opposing an FDA proposed rule banning small spherical magnets that could be swallowed by children).

<sup>14</sup> See McGarity, *supra* note 7, at 1702–03 (describing how Bank of America and Wells Fargo announced a charge to holders of debit cards in reaction to Federal Reserve rules limiting fees on debit card transactions, but abandoned imposing that fee when customers rebelled).

<sup>15</sup> See Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 48 (2006) (describing the presidential control model of agency decisionmaking as “dominant”); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 35 (2009) (stating that the political control model of agency decisionmaking has “gained widespread acceptance”).

<sup>16</sup> See Watts, *supra* note 15, at 35.

<sup>17</sup> See *id.*

<sup>18</sup> DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 7–9 (1999).

<sup>19</sup> See Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 273–74 (1987) [hereinafter McCubbins et al., *Administrative Procedures*].

<sup>20</sup> Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 791–92 (1983).

ically preferred outcome and he too will act to monitor agency implementation in order to bring rulemaking closer to his preferred outcome.<sup>21</sup> According to supporters of the political control model, such constraints can be sufficient to keep agency rules within bounds acceptable to elected legislators and the President; they further contend that the political accountability of these elected officials justifies granting agencies discretion to enact politically controversial rules.<sup>22</sup> To ensure sufficient political constraints, they advocate for increased political influence, especially presidential influence, over agency rulemaking.<sup>23</sup> Such a move, however, could exacerbate the dysfunction of agency decisionmaking.

Scholars have suggested alternatives to the political control model that seek to justify granting agencies rulemaking authority because of the potential for the administrative state to effectuate deliberative government.<sup>24</sup> These alternatives suggest that agencies are well suited to further the public good, determined by reasoned consideration that takes into account the interests of all stakeholders.<sup>25</sup> The failure of such models to gain traction among political actors is understandable, given that current deliberative models do not recognize the legitimacy of the roles of political institutions, at least as those institutions currently play their roles.<sup>26</sup> Deliberative models have also failed to attract serious attention from the courts and most scholars of administrative law, however, which is more surprising given the models'

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<sup>21</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2298–99 (2001); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 96 (1985).

<sup>22</sup> See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 567 (2003) (“[S]ome recent academic commentary relies heavily upon the President as a major source of democratic responsiveness and accountability for the . . . administrative state.”); see also Kagan, *supra* note 21, at 2334–39 (arguing that presidential control will provide superior accountability of agency action to preferences of the public).

<sup>23</sup> See, e.g., Watts, *supra* note 15, at 8 (arguing that “what count as ‘valid’ reasons under arbitrary and capricious review should be expanded to include certain political influences from the President, other executive officials, and members of Congress, so long as the political influences are openly and transparently disclosed in the agency’s rulemaking record”).

<sup>24</sup> See *infra* Part III.A. (describing and critiquing these alternatives).

<sup>25</sup> See *infra* Part III.A.

<sup>26</sup> See, e.g., David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1477–79 (2013) (questioning Congress’ fitness for agency oversight); Mendelson, *supra* note 22, at 663 (suggesting “the need to recognize more explicitly the President’s limitations as a courier of public preferences and to thoroughly consider links between the public and agencies, beyond the conventional path of voters to President to agency”).

promise of shielding agency rulemaking from the dysfunctional conduct that plagues the current American political system.<sup>27</sup>

As an early proponent of a deliberative model of the administrative state,<sup>28</sup> I am disappointed by their failure to attract a greater judicial and academic following. But upon careful reading of the recent work of advocates of deliberation, I believe that failure reflects problems with the various conceptions of the deliberative state recently proposed.<sup>29</sup> In particular, recent proposals are unrealistic in their optimism that the deliberative process can result in consensus among stakeholders or their representatives in the rulemaking process.<sup>30</sup> They also elevate deliberation over democracy to the extent that some invocations of the deliberative state seem to have written democratic influence out of their depictions of the administrative state entirely.<sup>31</sup>

Part I of this Article reviews the historical development of the presidential control model and summarizes arguments supporting that model. Part II proceeds to criticize the presidential control model, clarifying how it fails to promote the goals of a deliberative regulatory state. Part III of the Article presents the deliberative justifications for the administrative state and identifies incorporation of politics as a fundamental problem that deliberative models must solve. It also argues that attempts to incorporate politics into a deliberative state—

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<sup>27</sup> See *infra* notes 195–211 and accompanying text.

<sup>28</sup> See generally Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992) [hereinafter Seidenfeld, *A Civic Republican Justification*] (arguing for a civic republican understanding of the administrative state in which the government enables citizens to deliberate about proper methods of achieving the common good).

<sup>29</sup> See *infra* Part III.

<sup>30</sup> See *infra* Part III.A. In this Article, I focus primarily on policymaking via agency adoption of legislative rules. Rulemaking is the paradigmatic means by which agencies adopt policy. See Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 73 (2001) (“The principal procedure for formulating agency regulations is notice and comment rulemaking . . .”); see also Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 409–11 (1981) (describing the ascendancy of rulemaking as the prevalent means for agencies to make policy). In some ways, however, one can more easily justify a deliberative rather than political rationale for policy made via adjudication because politics is less appropriate as a basis for decisions in particular cases. See Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 467 (1999) [hereinafter Seidenfeld, *Bending the Rules*]; Watts, *supra* note 15, at 8 n.14. But there are also aspects of the rulemaking process that make it easier to argue for a deliberative rationale for policy made using this mode of agency action rather than adjudication. Ultimately, for this Article, my focus on rulemaking is pragmatic; I have not thought through all the implications of relying on deliberation to justify policymaking outside the rulemaking process and hence do not opine on that issue here.

<sup>31</sup> See *infra* Part III.C.

whether via public or interest group deliberation or agency expertise—are bound to fail. Finally, in Part IV, the Article presents an ideal role for political influence that helps legitimate the deliberative administrative state. It contends that, unfortunately, such a role cannot be directly implemented in any legally enforceable manner. The Article, however, suggests some improvements in administrative law doctrine—such as increasing the transparency of presidential influence on agency rulemaking and calibrating the rigor of judicial review to the likelihood of presidential interference with agency deliberative processes—that may help to reinforce agency rulemaking by deliberation while allowing political influences to resolve value judgments underlying such rulemaking.

## I. DEVELOPMENT OF THE PRESIDENTIAL CONTROL MODEL

### A. *Justifications for Agency Discretion Prior to the Political Control Model*

A brief historical account of justifications for the modern administrative state helps to illuminate the attraction of the political control model, and ultimately, some problems with recent proposals for deliberative approaches to rulemaking. At the turn of the 20th century, the Progressive Movement and an increased presence of federal regulation prompted questions about the administrative exercise of policymaking discretion.<sup>32</sup> The initial justification for grants of such discretion—known as the transmission belt theory—asserted that agency decisions merely implement policies that Congress dictates in statutes authorizing agency action.<sup>33</sup> This theory was reflected in judicial skepticism during the Progressive era about agency authority to choose policy, and in courts' characterization of agencies as similar to judicial special masters, finding facts in technical and complex contexts and then objectively applying statutory provisions to reach ultimate outcomes, subject to close judicial supervision.<sup>34</sup> According to this account, agency policymaking was legitimate because it did not involve significant exercises of policy discretion.<sup>35</sup>

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<sup>32</sup> See Lisa Schlutz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1759–60 (2007) [hereinafter Bressman, *Procedures as Politics*].

<sup>33</sup> See *id.* at 1758; Mendelson, *supra* note 22, at 580; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

<sup>34</sup> See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1213 (1986) (noting that the judiciary conceived of the Interstate Commerce Commission as an investigatory body “akin to . . . a court-appointed master or referee—a preliminary factfinder”).

<sup>35</sup> See Seidenfeld, *A Civic Republican Justification*, *supra* note 28 at 1516–17.

The transmission belt theory may have been problematic even within the context of delegated agency authority early in the 20th century.<sup>36</sup> In any case, that model's claim to any degree of persuasiveness vanished with the advent of the New Deal.<sup>37</sup> By the mid-1930s, Congress had authorized agency action to exercise discretion under broad and imprecise statutory directives, such as to further "the public interest, convenience, and necessity."<sup>38</sup> To justify broad and unstructured delegations to agencies under the New Deal, supporters of the expanded administrative state proposed the expertise model.<sup>39</sup>

According to the expertise model, although agencies exercise policymaking discretion when adopting rules, that discretion is not controversial because it does not involve the kind of subjective value judgments that belong in the political realm.<sup>40</sup> Instead, agencies' discretionary decisions are dictated by their expertise.<sup>41</sup> If only everyone knew as much about the regulatory problem as the expert agency, all would agree with the agency's solution.<sup>42</sup>

Essentially, the model viewed agencies as politically disinterested entities comprised of professionals whose decisions are driven by their professional knowledge and training. The idea was very much the way people used to think of doctors in a much simpler and more trusting time. If you were sick, you went to the doctor; he examined you, figured out what was wrong, and prescribed the cure. No one ques-

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<sup>36</sup> See *id.* at 1517.

<sup>37</sup> See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 471 (2003) [hereinafter Bressman, *Beyond Accountability*] (the transmission belt theory "simply did not describe the government we had after about 1930"); Stewart, *supra* note 33, at 1677 ("[A]fter the delegation by New Deal Congresses of sweeping powers . . . the broad and novel character of agency discretion could no longer be concealed behind such labels.").

<sup>38</sup> See Jim Chen, *The Death of the Regulatory Compact: Adjusting Prices and Expectations in the Law of Regulated Industries*, 67 OHIO ST. L.J. 1265, 1332 (2006) (noting that the Natural Gas Act, the Federal Power Act, and the Federal Communications Act, all passed between 1934 and 1938, specified that agency action was to further "the public interest, convenience, and necessity").

<sup>39</sup> See Bressman, *Beyond Accountability*, *supra* note 37, at 471 (stating that the expertise model "soon arose to describe the virtues of bureaucratic government and to legitimate that government in the absence of legislative directives").

<sup>40</sup> See Bressman, *Procedures as Politics*, *supra* note 32, at 1759 (explaining that under the expertise model, the experts' "professionalism would sufficiently discipline agency behavior and allow them to deploy science and economics to produce sound policy").

<sup>41</sup> See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 10–24, 46, 91–100 (1938); PRESIDENT'S COMM. ON ADMIN. MGMT., *ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES* 324 (1937).

<sup>42</sup> See Stewart, *supra* note 33, at 1678 (explaining that under the expertise model the analysis conducted by the agencies had an objective basis).

tioned whether there was a better treatment, let alone whether the doctor's actions were motivated by some interest he might have outside of the patient's welfare.<sup>43</sup>

Not only were agencies' policy decisions viewed as non-political in nature, politics was seen as a corrupting influence on the agencies' exercise of its expert judgment—something to be avoided to the extent constitutionally possible.<sup>44</sup> New Deal agencies therefore were “independent”—they were structured to insulate them from political influence.<sup>45</sup>

The Administrative Procedure Act (“APA”)<sup>46</sup> reflected a compromise between the traditional and expertise models.<sup>47</sup> Agency adjudication was seen as involving the finding of “adjudicative” facts and applying law to those facts, and thus was judicial in nature.<sup>48</sup> Agency rulemaking was seen as legislative in nature, but involved determining facts and addressing problems, and the appropriate solutions flowed from the technical knowledge and experience of the agency rather

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<sup>43</sup> Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 151–52 (2012) [hereinafter Seidenfeld, *The Irrelevance of Politics*]; see also Stewart, *supra* note 33, at 1678 (stating that according to the expertise model, “persons subject to the administrator's control are no more liable to his arbitrary will than are patients remitted to the care of a skilled doctor”).

<sup>44</sup> JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 59–60 (1978) (reporting that political scientists had called for political independence of agencies prior to the New Deal); LANDIS, *supra* note 41, at 113–14; SELECTED PAPERS AND ADDRESSES OF JOSEPH B. EASTMAN 1942–1944, at 375 (G. Lloyd Wilson ed., 1948); cf. MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 51–52 (1955) (describing the relationship of the Progressive call for administrative independence to the New Deal administrative state).

<sup>45</sup> See Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 600, 610–11 (2010) (identifying limitations on presidential appointments, and dismissal of agency members of “[i]ndependent agencies, including New Deal stalwarts such as the Federal Communications Commission (‘FCC’), the National Labor Relations Board (‘NLRB’), and the Securities and Exchange Commission (‘SEC’)”); Daniel J. Gifford, *The Emerging Outlines of a Revised Chevron Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 791 (2007) (stating that Progressives believed the independent agency model “could incorporate nonpartisan technical expertise”).

<sup>46</sup> Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2006).

<sup>47</sup> Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 477–78 (1986) (explaining that the APA was a “compromise between those on the New Deal left desiring the dominance of administrative discretion and expertise and those on the New Deal right seeking to rein in the administrative state”).

<sup>48</sup> See Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 98 (1996) (stating that the compromise leading to the APA rejected reliance in expertise “where it ma[de] the least sense—concerning ‘adjudicative’ facts that typify adjudication”).

than from political accountability.<sup>49</sup> Hence, under the APA, the political branches were not envisioned as playing a direct role in agency action—even in rulemaking.

By the 1950s and 1960s, scholars of administrative regulation began to question the assumption that agencies did not exercise political discretion. These scholars admitted that technical knowledge and experience were relevant to identifying and understanding the consequences of agency policymaking, but they recognized that ultimate decisions between policy choices depended on judgments about the value of the trade-offs inherent in those decisions.<sup>50</sup> Those value choices do not flow from agency expertise, but rather are fundamental choices about benefits and detriments that usually lie along incommensurate dimensions.<sup>51</sup> For example, the FCC policy preferring local control over radio stations probably sacrificed greater quantities of high quality programming in return for airing of issues unique to the station's locale.<sup>52</sup> Additionally, except in rare cases, there is simply no objective measure to compare the value of one versus the other.<sup>53</sup> In short, these scholars realized that agencies exercise discretion that reflects political choices.<sup>54</sup>

There were two reactions to this realization: pluralism and public choice theory. According to pluralism, the interests of the public are best served by resolving conflicts between interest groups about policy choices.<sup>55</sup> The preferences of the polity are reflected by individual

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<sup>49</sup> See *id.* at 98 (explaining that the APA allowed the expert's professional judgment concerning "legislative facts" that typify rulemaking").

<sup>50</sup> See MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION* 4–5 (1988); Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 *WAKE FOREST L. REV.* 745, 755–56 (1996) (noting "a general social trend that came to view agencies less as apolitical 'experts' administering a strictly rational process, and more as political bodies making choices among alternatives in response to social needs and political inputs").

<sup>51</sup> See Bressman, *Procedures as Politics*, *supra* note 32, at 1761 (stating that the expertise model was criticized due to new views of social policies as not "amenable to correct solutions").

<sup>52</sup> See generally Policy Statement on Comparative Broadcast Hearings, 1 *F.C.C.2d* 393 (1965) (emphasizing local ownership and control over factors such as efficiency of operation and quality of programming).

<sup>53</sup> See Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 *ADMIN. L. REV.* 567, 584 (1992).

<sup>54</sup> See *id.* at 583–84 (describing the shift to a political conception of the administrative agency); Stewart, *supra* note 33, at 1683–84 (noting that agency decisionmaking came to be seen as more political than technical as the interest group model replaced the APA compromise between the transmission belt and expertise models of administrative law).

<sup>55</sup> See ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* 450–57 (1967); DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 533–36 (1951).

membership in various interest groups and by the resources that individuals provide to such groups to pursue their desired policies.<sup>56</sup> Competition between groups provides a mechanism to allocate government benefits “efficiently,” that is, in a manner that grants the benefits to those who value them most.<sup>57</sup> Pluralists see within the administrative state a means of registering the preferences of the various interest groups with a stake in a rulemaking.<sup>58</sup> They view rulemaking proceedings as forums for bargaining between these groups for the benefits that government can provide.<sup>59</sup> The intensity of an interest group’s participation in the administrative process signals the value of the benefit to its members, measuring the sum of the strength of the interest to each of its members.<sup>60</sup>

Public choice theorists, however, see interest group representation as broken. Government, having a monopoly over regulation, can provide rents to interest groups by granting advantages to those groups over their competitors.<sup>61</sup> The administrative state, in their eyes, merely facilitates such rent seeking.<sup>62</sup> Moreover, focused inter-

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<sup>56</sup> See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 36–38 (1957) (explaining how rational voters are guided by the benefits that they receive from the government); SHAPIRO, *supra* note 50, at 4–5 (explaining that interest groups were defined by a shared “particular set of preferences”).

<sup>57</sup> DOWNS, *supra* note 56, at 36–39.

<sup>58</sup> See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 32 (1998) (describing pluralist theory and its application to the administrative state); Seidenfeld, *A Civic Republican Justification*, *supra* note 28, at 1520–22 (explaining how the administrative state was viewed as more capable than Congress to allocate regulatory benefits in accordance with interest group preferences). For an example of an attempt to justify administrative power by appeal to the political theory of pluralistic democracy, see SAMUEL KRISLOV & DAVID H. ROSENBLUM, *REPRESENTATIVE BUREAUCRACY AND THE AMERICAN POLITICAL SYSTEM* 24–25 (1981). See also STEPHEN BREYER, *REGULATION AND ITS REFORM* 351–52 (1982) (explaining that interest group representation is a justification for administrative policymaking discretion).

<sup>59</sup> See SHAPIRO, *supra* note 50, at 45 (describing how pluralism theory influenced the development of rulemaking under the APA).

<sup>60</sup> See Dorothy A. Brown, *The Invisibility Factor: The Limits of Public Choice Theory and Public Institutions*, 74 WASH. U. L.Q. 179, 182 (1996) (explaining that the interest group will seek a legislative change when its costs amount to “one dollar less than the expected benefits from the legislation”).

<sup>61</sup> See Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 809–12 (1975) (modeling efforts to obtain government licenses as competition to secure a monopoly); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3–6 (1971) (arguing that regulation can provide benefits that only the government can supply, such as legal restrictions on entry into the industry); see also DENNIS C. MUELLER, *PUBLIC CHOICE II: A REVISED EDITION OF PUBLIC CHOICE* 229–46 (1989) (describing the theory of rent-seeking behavior and its application to the political process).

<sup>62</sup> See Kagan, *supra* note 21, at 2265.

est groups, such as industry, have great advantages in the competition for such rents because they have lower costs of organizing and greater access to relevant information,<sup>63</sup> rendering their costs of participating in rulemaking much lower than the costs borne by groups whose members share diffuse interests. The informational advantage of focused interest groups, especially repeat players like industry groups, creates another advantage for them: the experts who make up the agency staff often come from the industry, or go from the agency to work for the industry, giving rise to allegations that agencies are captured by these groups.<sup>64</sup> Given their outlook, not surprisingly, public choice theorists expressed doubt that interest group representation could be harnessed to force agencies to regulate in the public interest.<sup>65</sup>

Courts responded to these two schools of thought on the interest group model by liberally construing the APA's rulemaking provisions to equalize the playing field between the various groups. Courts liberalized standing<sup>66</sup> and held that agencies must provide broad access to their proceedings.<sup>67</sup> They also developed doctrines of meaningful notice within informal rulemaking and reasoned decisionmaking under arbitrary and capricious review, which mandates that agencies seriously consider all relevant rulemaking comments, even those submitted by people without detailed information regarding a proposed rule.<sup>68</sup> At the same time, interest group entrepreneurs began to or-

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<sup>63</sup> MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 48 (rev. ed. 1971) (describing the factors that disfavor larger groups from furthering their interests).

<sup>64</sup> See David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 497 (1999) (describing how agencies can be captured to facilitate the provision of monopoly rents to well-organized interest groups).

<sup>65</sup> *Id.* at 497–98.

<sup>66</sup> SHAPIRO, *supra* note 50, at 45–46; Stewart, *supra* note 33, at 1725–34 (explaining that “extension of standing to an increased range of affected interests is a judicial reaction to the agencies’ perceived failure to represent such interests fairly”).

<sup>67</sup> See *Office of Commc’n of the United Church of Christ v. FCC*, 359 F.2d 994, 1009 (D.C. Cir. 1966) (finding appellants had a right to access proceedings for renewal of a one-year television license).

<sup>68</sup> See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 50 (1983) (holding that agency must consider plausible alternatives to a rule and explain its decision in terms of relevant factors); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (holding that agency must provide information on which it relies to develop a rule sufficient to allow meaningful comments on that information); see also SHAPIRO, *supra* note 50, at 46–49 (describing the judicial creation of the idea of the rulemaking record, requiring opportunities for interest groups to raise issues, and forcing courts to consider all such issues on judicial review).

ganize “public interest groups,”<sup>69</sup> which represent those with diffuse interests in rulemaking proceedings. Even with these judicial “fixes,” however, the administrative state fails to provide a mechanism by which interest groups accurately signal the strength of support for their preferred outcomes.<sup>70</sup> Rulemaking continues to favor focused interest groups that are repeat players in an agency’s proceedings.<sup>71</sup> In addition, representation by interest group entrepreneurs raises questions about agency costs between the leaders of such groups and the members they purport to represent.<sup>72</sup> By the start of President Reagan’s administration, the time had come for a new justification for the administrative state.

## B. Political Control Models

### 1. Congressional Control

The political control model contends that electorally accountable branches retain sufficient control over agency action to justify broad statutory grants of policymaking discretion.<sup>73</sup> Some scholars, most notably positive political theorists (“PPT”), contend that Congress structures agencies and requires them to follow procedures that give enacting coalitions advantages in administrative implementation of regulatory statutes.<sup>74</sup> Rulemaking procedures, judicial review, and the

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<sup>69</sup> See RUSSELL HARDIN, *COLLECTIVE ACTION* 35–37 (1982) (describing the significance of “political entrepreneurs” in group coordination); JACK L. WALKER, JR., *MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS* 41–55 (1991) (describing the role of policy entrepreneurs in mobilizing those with diffuse interests on questions of policy); Robert H. Salisbury, *An Exchange Theory of Interest Groups*, 13 *MIDWEST J. POL. SCI.* 1, 11–15 (1969) (explaining how “entrepreneurs/organizers” invest the initial capital needed to overcome barriers to collective action).

<sup>70</sup> See, e.g., Bressman, *Procedures as Politics*, *supra* note 32, at 1762 (stating that the interest group approach was criticized because “some groups appeared to have more say in the administrative process than others”); Stewart, *supra* note 33, at 1771 (explaining that “unorganized interests may remain at a considerable disadvantage . . . because their comparative lack of cohesion and financial resources prevents them from having as effective representation as organized concerns”).

<sup>71</sup> See Stewart, *supra* note 33, at 1786.

<sup>72</sup> See Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 *WM. & MARY L. REV.* 411, 434–39 (2000) [hereinafter Seidenfeld, *Empowering Stakeholders*].

<sup>73</sup> See Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 *DUKE L.J.* 1811, 1814 (2012) (noting “a gathering movement to reconceptualize the legitimacy of administrative agencies in terms of their political—and specifically, their presidential—accountability as opposed to their expertise”); Kathryn A. Watts, *Regulatory Moratoria*, 61 *DUKE L.J.* 1883, 1937–38 (2012) (stating that political control models “legitimiz[e] federal agency action by stressing that agencies are subject to political control”).

<sup>74</sup> Fundamental PPT work developing this thesis was done by Matthew McCubbins, Roger

need to implement rules via costly licensing and enforcement proceedings can be seen as means of providing such advantages, making it difficult for agencies to act to the detriment of these coalitions.<sup>75</sup> By this argument, what some might characterize as capture may instead be seen as intended interest group influence built into agencies' authorizing statutes.<sup>76</sup> In addition, PPT scholars believe that Congress retains significant control over agency policy via committee oversight, the budget process, and even substantive legislation, which Congress can use to overrule or otherwise penalize the agency if it adopts rules that displease Congress.<sup>77</sup> The desire to avoid the time commitment and potential for bad press from an oversight hearing or a legislative budget battle encourages agencies to act consistently with the preferences of the members of the oversight committee.<sup>78</sup> The mere threat of oversight hearings or budget cuts thus enables a fire alarm mechanism, whereby the constituents and campaign contributors to influential committee members can complain to those members if the agency adopts rules that adversely affect their regulatory interests.<sup>79</sup>

Congressional control as a justification for agency discretion, however, is both positively and normatively contested. Holding oversight hearings on regulatory matters is time consuming, and agencies hold an advantage over Congress in terms of their knowledge about

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Noll, and Barry Weingast. See, e.g., McCubbins et al., *Administrative Procedures as Instruments of Political Control*, *supra* note 19, at 253–71; Matthew D. McCubbins, Roger B. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 468–81 (1989) [hereinafter McCubbins et al., *Structure and Process*].

<sup>75</sup> See WILLIAM F. WEST, *ADMINISTRATIVE RULEMAKING: POLITICS AND PROCESSES* 188 (1985) (noting that the potential drain on agency resources of defending against a judicial challenge can give industry a lever to force concessions from the agency); McCubbins et al., *Structure and Process*, *supra* note 74, at 442.

<sup>76</sup> See Weingast & Moran, *supra* note 20, at 777–84 (explaining how FTC withdrawal from aggressive regulatory positions reflected the influence of powerful congressional committee members).

<sup>77</sup> See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 121–44 (2006) (detailing congressional oversight of agencies); Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 767–70 (2010) (reporting the common use of appropriations riders to negate agency policy decisions).

<sup>78</sup> See Beermann, *supra* note 77, at 70 (citing “adverse publicity” as an informal mechanism through which Congress, or some of its members, influence agency decisionmaking).

<sup>79</sup> See Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (explaining how “fire-alarm oversight” enables interest groups to signal when agencies have deviated from congressional goals, reducing the cost of congressional control over agency policy).

the matters about which they testify.<sup>80</sup> In addition, passing statutes to reverse agency policy is difficult, especially if the policy is supported by the President.<sup>81</sup> Thus, there is debate about the potential for significant congressional control over agency policy.

Normative questions arise because Congress exercises much of its oversight via committees responsible for particular substantive regulatory areas.<sup>82</sup> Unfortunately, there is no guaranty that the committee shares the preferences of the entire chamber from which it hails. Legislators are members of committees in which their constituents and those who fund their campaigns have a special interest.<sup>83</sup> They therefore have a different incentive than legislators who are not on that committee to encourage regulation that generates benefits for these constituents and financial supporters.<sup>84</sup> In essence, ceding policymaking authority to agencies may enable committee members to use the influence of oversight to exacerbate agency generation of monopoly rents for their constituents rather than to constrain rent seeking.<sup>85</sup>

## 2. Presidential Control

In the mid-1980s legal scholars began to suggest presidential control over agency rulemaking as a justification for the administrative state.<sup>86</sup> Presidential control advocates essentially argue that such control will result in more transparent and accountable rules that are

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<sup>80</sup> See Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1323–24 (2012); Glen O. Robinson, *Commentary on “Administrative Arrangements and the Political Control of Agencies”: Political Uses of Structure and Process*, 75 VA. L. REV. 483, 483–84 (1989) (arguing that it is extremely difficult for Congress to use agency procedures and structure to “stack the deck” in favor of the enacting coalition); see also Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 33–34 (2000) (arguing that standardized agency procedures might give a comparative advantage to “public interest law firms, the media, the public, [and] government watchdog groups” vis-à-vis Congress).

<sup>81</sup> See Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2167 (2009) (“No President would, under ordinary circumstances, sign a disapproval resolution disavowing a regulation that his own government had just enacted.”).

<sup>82</sup> See Beermann, *supra* note 77, at 122 (explaining how oversight has “mushroomed” since the development of subcommittees).

<sup>83</sup> See Kagan, *supra* note 21, at 2260–61.

<sup>84</sup> See J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1444–46 (2003).

<sup>85</sup> *Id.* at 1449. Each house of Congress, however, does have some mechanisms to ensure committee fidelity to the preferences of the chamber as a whole, but exercising these mechanisms is itself costly. See Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 763–64 (2005). As a result, committee members will have some slack to pursue their individual interests at the expense of the body as a whole.

<sup>86</sup> See, e.g., Mashaw, *supra* note 21, at 95–96; see also Bressman, *Beyond Accountability*, *supra* note 37 at 485–91 (describing the rise of the presidential control model).

more likely to serve the public interest rather than the preferences of repeat players with focused interests.<sup>87</sup>

A strong argument for presidential control is political accountability. Justice Elena Kagan, in an article written while still a professor at Harvard Law School, claims that administrative officials, permanent staffs of the bureaucracy, members of congressional committees, and leaders of interest groups that “represent select and often small constituencies” are “almost guaranteed by their composition and associated incentive structure to be unrepresentative of national interests.”<sup>88</sup> The President, in contrast, is accountable to all the voters and hence is more likely to represent the national interest.<sup>89</sup> Accountability, however, is an imprecise term, and it pays to unpack its different meanings.

One meaning is majoritarian accountability—that is, ensuring that agency rules are consistent with the preferences of a majority of the polity.<sup>90</sup> Because the President answers to the entire electorate, to be reelected or to ensure the political capital to carry out his more general agenda, the President has an incentive to “consider carefully the public’s views as to all manner of issues.”<sup>91</sup> Those who advocate presidential influence assert that although the President will not necessarily act in accordance with the public’s preferences on any particular issue, and in many instances “may assign overriding weight to the views of more particular, focused constituencies,” agency rules are more likely to comport with broadly held public preferences if rulemaking is subject to presidential control than otherwise.<sup>92</sup>

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<sup>87</sup> See Bressman, *Beyond Accountability*, *supra* note 37, at 490. This Article does not address constitutional arguments that the unitary executive requires that the President have full control over agency rulemaking. That question has been written on extensively. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L.J.* 541, 570–99 (1994). For convincing textual, structural, and precedential arguments that the Constitution does not mandate such control, see Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 *GEO. WASH. L. REV.* 696, 702–04 (2007).

<sup>88</sup> Kagan, *supra* note 21, at 2336 (emphasis removed). Although Justice Kagan uses the phrase only to describe members of congressional committees and subcommittees, it is an apt description of all of the other contributors to the administrative process that she lists.

<sup>89</sup> *Id.* at 2333–35; Mashaw, *supra* note 21, at 95–96.

<sup>90</sup> Kagan, *supra* note 21, at 2335.

<sup>91</sup> *Id.*; see also Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 *TEX. L. REV.* 469, 507–08 (1985) (“[T]here is every reason to expect that Presidential policy decisions will reflect majoritarian political preferences. . . . Presidents are elected presumably because they share the policy preferences of a majority of citizens.”).

<sup>92</sup> Kagan, *supra* note 21, at 2336; see also Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 *MICH. L. REV.* 53, 59 (2008) (“Scholars with diverse ideological and methodological commitments have asserted that . . . bureaucratic policy should track

Alternatively, the president might be accountable to interest groups in a manner that is normatively desirable. Recall that the pluralist ideal is an allocation of regulatory benefits in accordance with the number of people who have an interest in the allocation weighted by the strength of each person's interest.<sup>93</sup> Because the President is the sole executive branch officer who oversees all regulatory programs, he has an incentive to allocate the net benefits from all programs in a manner that maximizes the sum of those benefits.<sup>94</sup> Essentially, his central position allows him to rationalize regulatory goals across programs, taking into account the impacts of that agenda generally on interest groups of all types throughout the nation.<sup>95</sup>

Yet another conception of accountability that presidential influence might further is what I call "representative accountability." By some accounts, the electorate is extremely uninformed about the precise regulatory issues that might arise during a President's term.<sup>96</sup> A presidential election is not a referendum on the public's preferences on particular regulatory matters, but rather a selection of the person who the electorate believes likely to make the best choices on such matters.<sup>97</sup> The electorate does not focus on predictions of how a can-

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majoritarian values and that this goal is best advanced by giving decision-making authority to the most politically accountable officials, [which] impl[ies] the need for presidential control over bureaucratic policymaking, because the president is the institutional actor most responsive to the preferences of a national majority.").

<sup>93</sup> See *supra* notes 55–60 and accompanying text.

<sup>94</sup> See Kagan, *supra* note 21, at 2339.

<sup>95</sup> See *id.*

<sup>96</sup> See ARTHUR LUPA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 17 (1998); see also Jane S. Schacter, *Political Accountability, Proxy Accountability, and the Democratic Legitimacy of Legislatures*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 45, 47 (Richard W. Bauman & Tsvi Kahana eds., 2006); Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1304–06 (2004).

<sup>97</sup> Cynthia Farina describes this view of the President as "Representative-in-Chief," but she does not believe that the President can fulfill the role that this conception demands of him. Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 359–60 (2010). The personal nature of representative accountability does not render Congress irrelevant to regulatory value choices. The domain of value choices open to the President is established in the first instance by statutes authorizing regulation. See Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777, 791–92 (2012) (book review). Moreover, in areas where further appropriations are necessary, Congress can influence how the President exercises the regulatory value choices open to him. *Id.* at 798–99; Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1360 (1988) ("Appropriations limitations constrain every government action and activity and, assuming general compliance with legislative prescriptions, constitute a low-cost vehicle for effective legislative control over executive activity.").

didate will vote on particular policy matters, but instead relies on proxies, such as the candidate's party, that indicate whether voters generally can trust the candidate to vote as they would prefer when policy choices present themselves.<sup>98</sup> Voters may also rely on personal traits, such as a candidate's beliefs and integrity, as an indication of whom they should trust to make regulatory decisions.<sup>99</sup> The polity need not know anything about those decisions or even envision that any particular issue will arise.<sup>100</sup> As the President's term progresses, the voting public will register favorable or unfavorable views of the President as the totality of all of the President's actions affect the views of groups to which voters belong and voters' own impressions of whether the President remains worthy of trust as their designated representative in the regulatory process.<sup>101</sup> A President who seeks reelection or support for particular programs thus will choose rules with the interests of the general public in mind.<sup>102</sup>

Representative accountability is not a precise mechanism for ensuring that the President's decisions will accord with the preferences of the polity.<sup>103</sup> Presidential control advocates do not contend that the President will act strictly in accordance with his prediction of the preferences of the voters on particular rulemaking controversies, or even that he should.<sup>104</sup> Rather, representative accountability simply acknowledges that, in this age of candidate-centered politics, the President is chosen as the person that the polity has entrusted to use his judgment to make choices of values underlying regulatory policy.<sup>105</sup> It

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<sup>98</sup> LUPIA & McCUBBINS, *supra* note 96, at 64 (explaining when candidates can use proxies like reputation, party, or ideology to convince voters that they can be trusted).

<sup>99</sup> See Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1852 (2010) (lamenting that Presidents seem to get elected by "personal and charismatic appeals"); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH L. REV. 2073, 2078–81 (2005) (noting that people vote for a candidate for president who shares their background and perspective, but arguing that this counsels against presidential control of agencies).

<sup>100</sup> See Rubin, *supra* note 99, at 2080 (noting that even Congress' delegation to the FCC, as broad and powerful as it is, would be unlikely to be a significant factor in a presidential election).

<sup>101</sup> See Kagan, *supra* note 21, at 2335 (explaining why presidents still care about their public perception even after they have been elected).

<sup>102</sup> See *id.*

<sup>103</sup> See *id.* at 2334.

<sup>104</sup> See *id.* at 2334–36.

<sup>105</sup> "Speaking directly to the people, and enlisting their support in what thereby becomes the uniquely presidential enterprise of leading the country to safety and prosperity, modern Presidents have emerged as 'the single head of the government and moral leader of the nation who speaks for and may be taken as equivalent to all the people.'" Farina, *supra* note 97, at 359 (quoting BARBARA HINCKLEY, *THE SYMBOLIC PRESIDENCY: HOW PRESIDENTS PORTRAY THEMSELVES* 134 (1990)).

also asserts that elections—including elections other than those for President<sup>106</sup>—provide a mechanism to encourage the President to take into account his estimation of “voter sensibilities” when making judgments about which rules are best for the nation.<sup>107</sup> In terms of legitimating executive action, representative accountability is weak in the sense that it provides a limited constraint on Presidential conduct, but powerful in its assertion that there is no government institution that has a stronger claim to make regulatory judgments that are inherently political.

In addition to accountability, a second argument for presidential control is that centralization can overcome regulatory inertia and coordination problems.<sup>108</sup> The President, a political actor with a desire to get reelected or create a historical legacy, has an agenda that he will work to implement.<sup>109</sup> Individual agencies have incentives and authority only to resolve regulatory issues within their statutorily assigned jurisdiction.<sup>110</sup> Congressional committees will have the same limited domain and parochial interests that undermine coordination of the nation’s regulatory agenda.<sup>111</sup> The President, by contrast, being responsible for all regulatory programs, has the incentive and the authority to ensure that various agencies’ regulatory programs do not work at cross purposes.<sup>112</sup> Although Congress as a whole has universal jurisdiction over federal programs—so one might suspect that congressional control too would ensure consistency of programs across agencies<sup>113</sup>—Congress is made up of many members with differing incentives, and must overcome coordination problems to act centrally.<sup>114</sup>

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<sup>106</sup> Congressional elections affect the ability of the President to implement his agenda, which may reflect a myriad of factors including the prospect of his reelection, his historical legacy, and his commitment to a particular ideology. See Kagan, *supra* note 21, at 2334–35.

<sup>107</sup> Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 845–46 (2011).

<sup>108</sup> See Kagan, *supra* note 21, at 2340–41.

<sup>109</sup> See *id.* at 2335.

<sup>110</sup> See Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 4 (2007); see also Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1405–06 (1975); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986).

<sup>111</sup> See Ronald M. Levin, *Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith*, 1986 DUKE L.J. 258, 270; Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 15 (1994).

<sup>112</sup> See Kagan, *supra* note 21, at 2340; Sargentich, *supra* note 110, at 4.

<sup>113</sup> See Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1250–53 (2006) (arguing that the collective nature of congressional action increases its ability to evaluate competing claims of interest groups).

<sup>114</sup> See Adrian Vermeule, *The Invisible Hand in Legal and Political Theory*, 96 VA. L. REV.

The President, being a single individual, does not have to overcome coordination problems to act.<sup>115</sup> The President is thus uniquely situated not only to coordinate rulemaking activity, but also overcome inertia that might otherwise interfere with such coordination.<sup>116</sup>

## II. PROBLEMS WITH THE PRESIDENTIAL CONTROL MODEL

### A. Accountability

As noted previously, accountability is susceptible to several meanings, and presidential control poses different problems for the different notions of accountability.

#### 1. Majoritarian Accountability

Supporters of the presidential control model are overly confident in the electoral process's ability to cabin the President's policy choices.<sup>117</sup> Most voters are unaware of regulatory issues, even those of significant import,<sup>118</sup> and even voters who are aware may not be knowledgeable enough to understand the trade-offs inherent in one choice of a rule versus another.<sup>119</sup> Moreover, these voters are subject to being misled about the implications of potential rules by presidential "spin."<sup>120</sup> The mix of potential regulatory issues also is too com-

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1417, 1428–29 (2010); see also Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 829 (1996) (“[P]roponents of a strong president argue that a government more directly controlled by a single decisionmaker—that is, a strong unitary executive—frequently avoids many of the collective action problems endemic to legislative bodies or dispersed government organizations, such as Congress or a plural executive.”).

<sup>115</sup> See Kagan, *supra* note 21, at 2341.

<sup>116</sup> See *id.*

<sup>117</sup> See Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1352–54 (2011).

<sup>118</sup> See MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 79–82 (1996) (explaining results of surveys showing that large portions of the public are often unaware of several relevant legal and regulatory issues); Nzalibe, *supra* note 113, at 1254; cf. Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1267 (2009) [hereinafter Staszewski, *Reason-Giving*] (“If citizens do not know about the existence of a policy issue, they will probably not have formed any meaningful preferences on its most desirable resolution.”).

<sup>119</sup> Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 448 (2010); cf. Craig M. Burnett, Elizabeth Garrett & Matthew D. McCubbins, *The Dilemma of Direct Democracy*, 9 ELECTION L.J. 305, 320 (2010) (noting that voters do not have a full sense of tradeoffs involved in ballot initiatives).

<sup>120</sup> See Neal Devins, *Signing Statements and Divided Government*, 16 WM. & MARY BILL RTS. J. 63, 76–79 (2007) (contending that during times of divided government, the President should act unilaterally to implement his policy agenda, which requires that he spin legislation by a signing statement or executive order); see also Adam M. Samaha, *Government Secrets, Consti-*

plex for elections to hold the President directly accountable for any single decision except potentially the most salient political controversy.<sup>121</sup> Perhaps most damning, voters do not seem to vote for presidential candidates based on the issues at all, but rather engage in candidate-centered politics.<sup>122</sup> It is therefore overly optimistic to expect electoral politics to force the President to choose the rule preferred by a majority of voters.

In addition, the President has significant ability to maintain public support even if he does not comply with the preferences of the majority. “Policy preferences are necessarily bundled in a single vote, ‘preclud[ing] any facile translation of election results into ‘the people’s will’ on specific policy issues.’”<sup>123</sup> For example, most people do not decide for whom to vote for President based on any single issue even if they have preferences about that issue.<sup>124</sup> Because the President maintains authority over all regulatory matters, he therefore need only please a majority of the electorate on average to maintain political support.<sup>125</sup> That is, on any particular issue, he can deviate greatly from what an informed public would find to be the best policy so long as on other issues he deviates in ways that will placate those dissatisfied with his policy on the first issue.<sup>126</sup> As Matthew Stephenson nicely modeled, it is possible that more insulated decisionmakers,

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*tional Law, and Platforms For Judicial Intervention*, 53 *UCLA L. REV.* 909, 919 (2006) (mentioning President Lyndon Johnson’s positive spin on military progress in Vietnam); Maura Reynolds & James Gerstenzang, *Updating His Spin on Climate Change*, *L.A. TIMES*, Feb. 11, 2007, at A30 (reporting that President George W. Bush spun the Kyoto Protocol as “fatally flawed in fundamental ways”).

<sup>121</sup> See Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 *CHL-KENT L. REV.* 987, 997–98 (1997) (noting that there is a “bundling problem” in that voters have to accept or reject all of the President’s policies when they vote); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 *MICH. L. REV.* 1127, 1160 (2010) (“[H]olding a President accountable for particular agency decisions is hard . . . given the infrequency of elections, the number of issues typically on the agenda at the time of a presidential election, presidencies that only last two terms, and presidential candidates who are vague about how the administrative state would run.”).

<sup>122</sup> See Francis Rourke, *Presidentializing the Bureaucracy: From Kennedy to Reagan*, in *THE MANAGERIAL PRESIDENCY* 123, 126 (James P. Pfiffner ed., 1991) (remarking that the candidate-centered nature of politics undermines a President’s claim to an electoral mandate); see also Criddle, *supra* note 119 at 457–60 (identifying other problems with a President translating an electoral victory as support for his policies).

<sup>123</sup> Note, *Deweyan Democracy and the Administrative State*, 125 *HARV. L. REV.* 580, 592 (2011) (quoting Farina, *supra* note 121, at 998).

<sup>124</sup> See Kagan, *supra* note 21, at 2334 (“[B]are election results rarely provide conclusive grounds to infer . . . support for even that candidate’s most important positions, much less the sometimes arcane aspects of regulatory policy.”).

<sup>125</sup> Stephenson, *supra* note 92, at 77–79.

<sup>126</sup> Cf. Kagan, *supra* note 21, at 2334–36 (explaining that elected presidents engage in a

whose support depends on outcomes to policy decisions within a narrow ambit of issues, will perform better than the President will.<sup>127</sup> Essentially, the President is like an archer aiming at a target whose bull's-eye represents the majoritarian preferences of the voters. His arrows may scatter widely but not systematically around the bull's-eye of a target, while those of the agencies may consistently come closer to the bull's-eye, albeit missing in one particular direction.<sup>128</sup> The President will not pay a price for his imprecision so long as the center of the placement of arrows is fairly close to the bull's-eye.<sup>129</sup>

## 2. *Interest Group Accountability*

Although the President has universal regulatory jurisdiction, and answers to the entire electorate, our political system biases even the President towards focused interest groups.<sup>130</sup> The criticism leveled by public choice theorists is not limited to agencies or Congress. The truth about current electoral politics is that the President has great incentives to please powerful interest groups<sup>131</sup> that can deliver large blocks of voters, either by their members' identification with the group and hence the members propensity to vote as group leaders tell them, or by the group's ability to contribute generously to the presidential candidate's campaign.<sup>132</sup> This is true even for a second term President who does not face reelection.<sup>133</sup> A second term President

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“permanent presidential campaign” in which they must carefully weigh the policy preferences of the electorate).

<sup>127</sup> Stephenson, *supra* note 92, at 73–74.

<sup>128</sup> *Id.*

<sup>129</sup> *See id.*

<sup>130</sup> *See* Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 870 (2012) [hereinafter Staszewski, *Political Reasons*].

<sup>131</sup> *See id.* (asserting that public choice theory suggests that the President will favor special interest groups).

<sup>132</sup> Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 373 (2009) (“[E]lectorate considerations may cause members of Congress and the President to pressure agencies into adopting policies favorable to powerful special interest groups.”); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 564–65 (2002) (arguing that interest groups “can finance [a legislator’s] reelection bid and, possibly, mobilize a bloc of voters by alerting them to the legislator’s efforts on their behalf”); *see also* Ciara Torres-Spelliscy, *How Much Is an Ambassadorship? And the Tale of How Watergate Led to a Strong Foreign Corrupt Practices Act and a Weak Federal Election Campaign Act*, 16 CHAP. L. REV. 71, 102–05 (2012) (arguing that problems of quid pro quo bargains for campaign contributions were revealed by Watergate tapes, and that more forgiving legal constraints on such contributions to promote presidential candidates today suggest the need for reform of campaign contribution laws).

<sup>133</sup> *See* Kagan, *supra* note 21, at 2235.

usually wishes to implement signature programs or desires to secure a place in history.<sup>134</sup> Neither is easily accomplished without gaining support of key players in Congress, which in turn will encourage the President to provide regulatory benefits to groups preferred by those key members.<sup>135</sup>

Even if the President was not motivated to placate focused interest groups, he would have a hard time resisting their influence.<sup>136</sup> To create and implement many administrative rules, one needs a huge quantity of information about how the activity to be regulated operates.<sup>137</sup> Generally, regulated entities can obtain such information more easily than both the public and regulators.<sup>138</sup> Manufacturers have superior information about their products and methods of production, making it likely that they know better than anyone else the direct costs of complying with particular regulatory requirements in areas such as the environment and maybe even about the impacts of failing to comply.<sup>139</sup> Agencies at least have staffs of professionals who can obtain such information from stakeholders and understand its technical significance.<sup>140</sup> Those in the White House and the Executive Office of the President (“EOP”) who engage in regulatory review, although politically astute and trained in policy analysis, depend on the agency and stakeholders with whom they interact for specific informa-

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<sup>134</sup> See *id.*

<sup>135</sup> See Huq, *supra* note 97, at 794–95, 798–99 (concluding that Congress plays a robust role in delimiting presidential discretion and impeding presidential agendas); see also Jide O. Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 HARV. L. REV. 617, 631–36, 649–50 (2010) (modeling how the President may prefer to seek congressional support for a policy to avoid voter backlash).

<sup>136</sup> See Richard J. Pierce, Jr., Response, *Presidential Control Is Better than the Alternatives*, 88 TEX. L. REV. See Also 113, 119 (2009), (asserting that “government can do nothing important unless the President makes deals with special interests”).

<sup>137</sup> See, e.g., John S. Applegate, *Bridging the Data Gap: Balancing the Supply and Demand for Chemical Information*, 86 TEX. L. REV. 1365, 1365 (2008) (noting that the informational demands of risk regulation of toxic chemicals exceeds the available information); Bradley C. Karkkainen, *Bottlenecks and Baselines: Tackling Information Deficits in Environmental Regulation*, 86 TEX. L. REV. 1409, 1421–22 (2008) (describing the enormous “informational demands placed upon agencies seeking to establish health-based regulatory standards”).

<sup>138</sup> See Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 138 (noting that agencies “depend[ ] on industry to provide information about” the workings and capabilities of the industry); Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. 569, 596 (2012) (“[O]ften the best information about what is going on in a given industry is in the hands of members of that industry.”).

<sup>139</sup> Karkkainen, *supra* note 137, at 1412 (noting the information advantage of industry about production processes and pollution control technologies); Reiss, *supra* note 138, at 596–98.

<sup>140</sup> Reiss, *supra* note 138, at 597–98.

tion about agency rules.<sup>141</sup> As such, they might be susceptible to selective revelation and manipulation of data by interest groups that can obtain and analyze information at relatively little cost.<sup>142</sup>

The fact that the President answers to the entire electorate will not significantly constrain bias toward special interest groups for the same reason it will not induce the President to choose those regulatory outcomes preferred by a majority of voters.<sup>143</sup> One might posit that the ignorance of the electorate can be overcome when one considers interest groups because voters will use the position of interest groups in which they are members as proxies for deciding for whom to vote for President.<sup>144</sup> The influence of interest groups, however, is insufficiently precise for the positions of such groups to provide accurate signals to voters.<sup>145</sup> Assuming that most people are not single issue voters, each must weigh the input of interest groups in her calculus of deciding for whom to vote. But an interest group generally just signals whether it supports or opposes a candidate based on whether that candidate supports the group's interest.<sup>146</sup> Such signals are insufficiently nuanced to allow an individual voter to obtain an accurate signal of how she should vote. To understand why, consider a two-issue voter who is most concerned with reducing the federal debt, but is also almost as interested in protecting the environment.

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<sup>141</sup> See S. COMM. ON ENV'T AND PUB. WORKS, 99TH CONG., OFFICE OF MANAGEMENT AND BUDGET INFLUENCE ON AGENCY REGULATIONS 19 (Comm. Print 1986) (explaining that the Office of Management and Budget ("OMB") does not have the resources to generate data needed to analyze EPA rules); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1785–86, 1806–07 (2013) (noting that the Office of Information and Regulatory Affairs ("OIRA") coordinates review of the agency's cost-benefit analysis and stating that presidential review is meant in part to mitigate information asymmetries between the agency and the President). See generally Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001) (modeling cost-benefit analysis as an information-forcing mechanism).

<sup>142</sup> See Reiss, *supra* note 138, at 597–98.

<sup>143</sup> See *supra* notes 123–29, and accompanying text.

<sup>144</sup> Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1979 n.194 (2008) ("Political parties and special interest groups provide information about candidates that help voters reduce information costs, but do not provide a perfect proxy for knowledge of candidates' true position on policy issues."); Rachlinski & Farina, *supra* note 132, at 565 (discussing interest group influence).

<sup>145</sup> See Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1159 (2003) (explaining situations in which interest groups have an interest in not disclosing their positions to the voters).

<sup>146</sup> See John Ferejohn, *Playing with House Money: Patriot Dollars Considered*, 91 CALIF. L. REV. 685, 702–03 (2003) (noting that "single-interest groups" provide signals for voters about candidates, but that voters would have a hard time "sorting them out" without political parties as guidance).

Suppose Tax Watch decides that it prefers candidate A over candidate B very slightly on the prospect of reducing the debt. It announces, therefore, that it supports candidate A and opposes candidate B. Meanwhile, Sierra Club determines that the position of candidate B on environmental issues is far superior to candidate A on environmental issues. It announces that it supports candidate B. Our two-issue voter will vote for candidate A because she values debt reduction more highly than environmental protection. But this is probably the incorrect conclusion for this voter, because the difference between the candidates on debt reduction is small compared to their differences on the environment.

### 3. *Representative Accountability*

Although this notion of accountability supports the President as having the strongest claim to make political value judgments inherent in regulation, there are some limitations to this notion as a justification for the current extensive federal administrative state.

As a preliminary matter, representative accountability alone cannot justify the administrative state because the President can personally exercise judgment in only a small proportion of agency policymaking.<sup>147</sup> In other cases, White House influence on rulemaking either does not occur, or it is dictated by the “institutional president”—that is, staff members in offices in the White House or the EOP (including OIRA) acting in accordance with their beliefs about the President’s preferences.<sup>148</sup>

Of course, the President has plenary power to choose White House staff,<sup>149</sup> while appointment of senior agency staff depends on Senate confirmation<sup>150</sup> and that of career staff depends on requirements of the civil service system.<sup>151</sup> And, presumably the President

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<sup>147</sup> GLEN O. ROBINSON, *AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW* 103 (1991); see also Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491, 509 (1987); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 14 (1994) [hereinafter Seidenfeld, *A Big Picture Approach*].

<sup>148</sup> See Nou, *supra* note 141, at 1761 (“Presidents delegate regulatory review to a number of agents, mostly within the Executive Office of the President, who themselves disagree and conflict over what the President desires.”).

<sup>149</sup> Seidenfeld, *A Big Picture Approach*, *supra* note 147, at 14.

<sup>150</sup> *Id.* at 39 n.203.

<sup>151</sup> See Michael K. Grimaldi, *Abolishing the Prohibition on Personal Service Contracts*, 38 J. LEGIS. 71, 77–78 (2012) (explaining the limitations on employment of civil servants and how these limitations are sometimes circumvented through contractors).

chooses White House staff to implement his vision of what is best.<sup>152</sup> But other than direct monitoring of staff decisions by the President, there is no mechanism to ensure the fidelity of staff members to what the President would dictate.<sup>153</sup> In most cases, when there is no strong evidence of the President's preference, an EOP or White House staff member with the technical background to oversee a particular agency action will exercise her own judgment in predicting his preference.<sup>154</sup> Thus, influence on agency action by "presidential review" often will not reflect the judgment of the President himself.<sup>155</sup> This lack of personal presidential involvement undermines the argument that representative accountability legitimates allowing the White House to make ultimate choices of regulatory policy.

Even when the President does take personal responsibility for an agency rule, there are normative questions about the merits of representative accountability, given that it seems to require recognition that the President can exercise stronger control over agency action than has been countenanced in the past. The President personally does not have the technical expertise to identify and understand the trade-offs predicated by an agency rulemaking.<sup>156</sup> He can surround himself with experts to instruct him on such matters, but even their access to information and expertise will not compare favorably with that of the agency staff.<sup>157</sup> He would have no way of knowing whether his staff's predictions and analyses were accurate,<sup>158</sup> and even experts are prone to overconfidence that their perspective is best.<sup>159</sup> In addition, as a

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<sup>152</sup> See Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1845–46 (2013) [hereinafter Sunstein, *Myths and Realities*]. This presumption, however, does not extend to any but the top staff members in the EOP. Others working in EOP are career staff who remain in their jobs even when the President leaves office. *Id.* at 1845.

<sup>153</sup> See ROBINSON, *supra* note 147, at 102 (noting that deviations between executive overseers and the President "present the same type of monitoring and control problems . . . as the agencies they seek to influence").

<sup>154</sup> Nou provides an enlightening description of the interaction between agencies and offices in EOP and among those offices, which illustrates how presidential review reflects the judgment of staff members and the relationships between them. Nou, *supra* note 141, at 1793–97.

<sup>155</sup> See ROBINSON, *supra* note 147, at 102–03.

<sup>156</sup> See Kagan, *supra* note 21, at 2355–56 (recognizing that technical decisions by agencies are not commonly reversed by the President or his staff).

<sup>157</sup> See *supra* note 141 and accompanying text.

<sup>158</sup> See Rachlinski & Farina, *supra* note 132, at 601 ("The President is the most overworked and underinformed decisionmaker in the American policymaking system.").

<sup>159</sup> Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, 24 COGNITIVE PSYCHOL. 411, 412 (1992); Rachlinski & Farina, *supra* note 132, at 560. The entire effort of presidential review may decrease errors from agency overconfidence, Rachlinski & Farina, *supra* note 132, at 590, although perhaps at the expense of other cognitive limita-

political actor, the President is likely to evaluate rules from a political perspective—gauging the likely reaction of not only the electorate, but also of his supporters and campaign contributors.<sup>160</sup> In that sense, presidential decisionmaking is inherently non-deliberative.<sup>161</sup> Finally, the President brings his own values to bear on issues, but may not be aware of competing perspectives.<sup>162</sup> One antidote to this lack of inherent deliberation would be to require the President to consult experts with different experiences and viewpoints and to give reasons for the rule he ultimately chooses. It seems that some of the presidents whom history regards most highly did engage in deliberative decisionmaking, at least on the most important issues confronting them.<sup>163</sup> But such presidents appear the exception, not the rule—perhaps because deliberation is demanding, time consuming, and does not necessarily pay political dividends.<sup>164</sup> Whatever the reason, the lack of expertise and deliberation calls into question the value of direct presidential control over rulemaking.

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tions on decisionmaking, *id.* at 601 (“Attempting to involve [the President] significantly in the range of policy decisions that can be more deliberative is likely to be inefficiently distracting and substantively counterproductive.”).

<sup>160</sup> See Bressman, *Beyond Accountability*, *supra* note 37, at 504.

<sup>161</sup> See *id.*

<sup>162</sup> See Mendelson, *supra* note 117, at 1353–54 (“[T]he electoral process and the necessity of negotiating with Congress are likely to provide the President with only a partial incentive to consult the wide range of views one might think necessary for ‘democratic responsiveness’ under either a pluralist or civic republican view.”).

<sup>163</sup> See generally DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* xvi–xvii (2005) (describing President Lincoln surrounding himself with a cabinet of highly regarded individuals who did not share his background or perspective on slavery and the union, and in fact were his political rivals).

<sup>164</sup> A more accurate picture of the barriers to the President’s ability to act deliberatively is captured by the portrait painted by presidential scholar Hugh Heclo:

Our most familiar image of the presidency finds a man, sitting alone, in the dimly lit Oval Office. Against this shadowy background the familiar face ponders that ultimate expression of power, a presidential decision.

It is a compelling and profoundly misleading picture. Presidential decisions are obviously important. But a more accurate image would show a presidency composed of at least a thousand people—a jumble of personal loyalists, professional technocrats, and bureaucratic staff with one man struggling, often vainly, to stay abreast of it all. What that familiar face ponders in the Oval Office is likely to be a series of conversations with advisers or a few pages of paper containing several options. These represent the last distillates produced from immense rivers of information flowing from sources—and condensed in ways—about which the president probably knows little.

Hugh Heclo, *The Changing Presidential Office*, in *THE MANAGERIAL PRESIDENCY*, *supra* note 122, at 34.

### B. *Centralization of Control*

Concentration of power in a single individual, responsible for all the regulatory policies of the nation, facilitates coordination of various regulatory programs and can help overcome barriers to rulemaking. Supporters of presidential control, however, may underestimate the ability of agencies to overcome inertia and coordination problems. For example, Justice Kagan describes the Food and Drug Administration's ("FDA") promulgation of rules governing the sale of cigarettes as President Clinton's program.<sup>165</sup> The impetus for the rule, however, came from the agency itself, which invested its resources heavily to establish that cigarette manufacturers manipulated the dose of nicotine delivered by each cigarette—the factual premise that it believed justified FDA jurisdiction over such sales—well before Clinton had signed on to the project.<sup>166</sup> Perhaps a more plausible argument is that the President may enable an agency to overcome congressional opposition to a rule that reflects special interest influence on Capitol Hill by taking personal responsibility for the rule.<sup>167</sup>

Moreover, overcoming barriers to coordination by concentrating power in the President comes at the price of potentially upsetting the balance of power between the branches of government that was intended to slow down the legislative process and discourage unwise and short-sighted legislation.<sup>168</sup> The bicameralism and presentment

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<sup>165</sup> Kagan, *supra* note 21, at 2282–83.

<sup>166</sup> See DAVID KESSLER, *A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY* 331–33 (2001). At times, an agency may even be too eager to regulate a matter that is not politically supported, as appeared to be the case when the National Highway Traffic Safety Administration ("NHTSA") required automobile manufacturers to install ignition interlocks that prevented a driver from starting her car unless the seatbelt was fastened. After great public outcry, Congress overruled that rule and prohibited NHTSA from using an ignition interlock as part of any future rule. See *Taylor v. Gen. Motors Corp.*, 875 F.2d 816, 823 (11th Cir. 1989) (summarizing the history of the ignition interlock system).

<sup>167</sup> Kagan, *supra* note 21, at 2307.

<sup>168</sup> As John Manning explains, the cumbersome process of bicameralism and presentment serves several related interests: It makes it more difficult for 'factions' to capture the legislative process; it restrains passion and promotes deliberation . . . and it creates a bias in favor of filtering out bad laws by raising the decision costs of passing any law.

John F. Manning, *Nonlegislative Rules*, 72 *GEO. WASH. L. REV.* 893, 899 (2004); see also John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 *WM. & MARY L. REV.* 365, 387–88 (1999) (explaining that bicameralism discourages rent seeking because "those seeking private interest spending have to obtain a majority in not one but two legislative bodies"). John Manning has suggested that notice and comment procedures serve these same interests. Manning, *supra*, at 944 ("[L]awmaking processes such as bicameralism and presentment or notice-and-comment rulemaking promote caution, deliberation, and accountability.").

process laid out in the Constitution recognizes that electoral accountability alone is not a sufficient protection against bad government.<sup>169</sup> One may argue that agency rulemaking does not side-step that constraint because agencies can act only within the authority granted to them by duly enacted statutes.<sup>170</sup> But that argument has little purchase because, by necessity, such grants of authority tend to be virtually unbounded. The complexity of the modern world essentially requires that government regulate broadly with flexibility and speed that pragmatically requires delegation of policymaking discretion to agencies.<sup>171</sup> Thus, once delegation occurs, a theory of strong presidential control raises the question of how the system should be structured to filter good exercises of presidential discretion from bad ones, in light of the weakness of electoral accountability.

Centralization of power to control agency rulemaking may also exacerbate the problem of special interest influence. Proponents of presidential control contend that the President will be less susceptible than agencies to such influence because he is responsible to a national constituency and hence will not be beholden to any particular interest group.<sup>172</sup> Given the President's universal authority, the cost of capturing him will be great.<sup>173</sup> But the relevant question is how that cost compares to that of capturing all the institutions that influence rulemaking in a decentralized system in which outcomes depend on inputs of multiple actors.<sup>174</sup> The answer to that question is not obvious. Moreover, the value of garnering the President's support increases as his power to control regulatory outcomes increases,

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<sup>169</sup> See McGinnis & Rappaport, *supra* note 168, at 460 (interpreting the bicameralism requirement as a way of imposing a supermajority requirement and thereby preventing the influence of special interest groups).

<sup>170</sup> See Manning, *supra* note 168, at 899–900 (explaining courts' acceptance of delegations despite bicameralism requirements when the statute provides an "intelligible principle" for agencies to implement).

<sup>171</sup> See Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2153–54 (2004) (explaining that the scale of modern government makes delegations necessary); Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 404 (1987) ("Congress . . . could not possibly make the hundreds, or perhaps thousands, of important policy decisions that agencies make annually.").

<sup>172</sup> See Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 MICH. L. REV. 877, 902 (2010) (book review).

<sup>173</sup> Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1305 (2006) (summarizing the arguments of proponents of presidential control).

<sup>174</sup> Kagan admits that this is the appropriate question, but answers it by asserting that increasing presidential control will never imbue the President with sufficient control to replace the "pluralist administrative system" in which we live. Kagan, *supra* note 21, at 2337 n.347.

encouraging rent-seeking interest groups to pay the higher cost of capture.<sup>175</sup> There may be great competition to develop a close relationship with the President, but the promise of being able to obtain one's preferred regulatory outcome by developing a relationship with a single person makes that prospect attractive to those with the means to compete.<sup>176</sup> In addition, the susceptibility of the President to influence from special interest groups may be greater today than previously due to the enormous cost of running for President.<sup>177</sup>

### III. DELIBERATIVE JUSTIFICATIONS FOR THE ADMINISTRATIVE STATE

In light of the problems with the presidential control model, it is not surprising that scholars have sought an alternative justification for the administrative state. Within the bounds set by the legislation authorizing an agency to adopt rules, the nature of agency decisionmaking provides optimism that policy will best serve the interests of the nation as a whole.<sup>178</sup> The deliberative promise of the administrative state stems from the fact that agency decisionmaking can be inclusive, knowledgeable, reasoned, and transformative.<sup>179</sup>

The paradigm for agency setting of policy, at least for policies that generate political controversy or significant economic impact, is notice and comment rulemaking.<sup>180</sup> The notice and comment process requires an agency seeking to adopt a rule to publish a notice of proposed rulemaking ("NOPR") in the Federal Register, which must include either the text of the proposed rule or a description of the subject of the rulemaking.<sup>181</sup> The NOPR must alert the public to the potential outcomes that might result from the rulemaking and must even provide the information on which the agency relied to generate

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<sup>175</sup> See Bagley & Revesz, *supra* note 173, at 1306.

<sup>176</sup> See *id.* (reasoning that special interest groups will have an equal advantage in providing needed support to the President as they would to agencies, despite the higher cost of capturing the President); Sargentich, *supra* note 110, at 27 ("[M]uch experience confirms that presidents do respond directly to narrow, sub-national political interests.").

<sup>177</sup> In the 2012 presidential election, each candidate spent just shy of one billion dollars directly on their campaigns. Jeremy Ashkenas et. al., *The 2012 Money Race: Compare the Candidates*, N.Y. TIMES, <http://elections.nytimes.com/2012/campaign-finance> (last visited July 27, 2013). In addition, outside groups spent over \$282 million against President Obama or for Mitt Romney, and over \$68 million against Romney or for Obama. *Id.*

<sup>178</sup> See Seidenfeld, *A Civic Republican Justification*, *supra* note 28, at 1559–60.

<sup>179</sup> See *id.*

<sup>180</sup> See *id.*

<sup>181</sup> 5 U.S.C. § 553(b) (2006).

the rulemaking proposal.<sup>182</sup> Once the agency has published the NOPR, all interested persons are entitled to comment on the rule.<sup>183</sup> Essentially, the class of interested persons includes any entity that wishes to comment on the rules.<sup>184</sup> Moreover, the comments can serve any of several functions, including: contesting analyses in the NOPR and predictions of the likely effects of the proposed rule; providing information about the impact of the rule on subclasses of the public; informing the agency whether the commenter favors or opposes the proposed rule; and creating a record for judicial challenge to agency findings and analyses.<sup>185</sup> Thus the notice and comment procedure, coupled with judicial review mandating agency explanation in light of the comments it receives, is often held up as providing the meaningful opportunities for public participation in the regulatory process.<sup>186</sup>

Usually agencies employ a rulemaking team to develop rules. That team often consists of members from various offices within the agency, each with its own expertise and professional outlook.<sup>187</sup> Although regulated entities often have the most knowledge about their businesses and thus have an advantage in the regulatory process, the professional training of agency staff members—together with their ability to obtain information from regulated entities—allows the agency to obtain and understand the information it needs to know

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<sup>182</sup> See Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213, 219–20 (1996) (noting that courts require that the NOPR provide an opportunity for meaningful comment, which in turn requires “adequate time, the disclosure of data and law the agency is relying on, and the rationale the agency is applying to connect the data and law to the regulation it is promulgating”).

<sup>183</sup> See *id.*

<sup>184</sup> See Thomas O. McGarity, *The Courts, the Agencies, and NEPA Threshold Issues*, 55 TEX. L. REV. 801, 817 (1977) (remarking that any environmentally concerned citizen would have standing to file comments on a rule that affects the environment).

<sup>185</sup> Cf. Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 420 (2005) (noting that notice and comment can provide agencies with information about the consequences of particular proposals and of the strength of public approval of certain policies).

<sup>186</sup> See *id.* at 425 (explaining the effects of notice and comment procedures and their limitations in influencing agency policy); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 316–18 (2010) (extolling the virtues of notice and comment procedures for allowing members of the public to “mak[e] comments, rais[e] objections, and suggest[ ] alternatives to proposed” agency action, as well as create a record for judicial challenge).

<sup>187</sup> See Galle & Seidenfeld, *supra* note 144, at 1957 (describing how members of the rulemaking team come from different professional backgrounds and communicate with professionals outside the agency); Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57, 90–91 (1991) (noting that a “team model” for rulemaking provides the advantage of “bring[ing] multiple professional perspectives” to complex problems).

about what regulations should be imposed to minimize harm to those affected by the conduct of regulated entities.<sup>188</sup> In addition, the fact that rulemaking teams often include professionals with different knowledge sets and perspectives on regulatory alternatives fosters agency regulation that takes into account the interests of the various stakeholders in any regulatory matter.

Under current doctrines of judicial review, an agency that adopts a rule must provide reasons why it believes that the rule promotes the agency's statutory responsibility.<sup>189</sup> As the Supreme Court has made clear, an agency must explain how relevant factors led it to believe that the rule serves statutory goals, how its predictions for the impact of the rule and the alternatives the agency considers follow from the information available to the agency when it acted, and why it prefers the adopted rule to plausible alternatives.<sup>190</sup> Because the agency must give reasons, and because the rulemaking team approaches issues from a professional rather than a political perspective, there is reason to be optimistic that the agency adopts rules that provide more than mere deals between those groups with political power.<sup>191</sup> More generally, proponents of deliberative justifications for the administrative state find within that conception the possibility that participants, by virtue of being sensitive to different values and perspectives, will be willing to modify their own values opening up a richer set of outcomes than those that might result from bargaining from fixed preferences.<sup>192</sup>

There is one overriding question that is problematic for proponents of any deliberative conception of the administrative state: How can they justify having an expert and rational but nonpolitical agency choose an ultimate rule when that choice depends to a large degree on value judgments? By value judgments, I mean the weighing of the

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<sup>188</sup> Agencies can obtain information from regulated entities in several ways. Most significantly for developing rules, statutes grant most agencies broad authority to require such entities to report specific information to the agency. 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 276 (5th ed. 2010). In addition, many agencies have been given subpoena power by statute. Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 116–17 (2012) (reporting that in 2012, Congress had passed over 300 statutes giving agencies some sort of subpoena authority). Both regulatory requirements and subpoenas for information are valid if the information requested is sufficiently definite and reasonably relevant to the regulatory program of the agency. *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 208 (1946) (establishing the standard for subpoenas); *see also* *United States v. Morton Salt Co.*, 338 U.S. 632, 642–43 (1950) (establishing the standard for regulations requesting information).

<sup>189</sup> *See* *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1971).

<sup>190</sup> *See* *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43–44 (1983); *Overton Park*, 401 U.S. at 416–17.

<sup>191</sup> *See* Seidenfeld, *A Civic Republican Justification*, *supra* note 28 at 1537–38.

<sup>192</sup> *See id.*

impacts or trade-offs that would result from adopting one particular rule instead of various alternatives when the weight to be assigned to those impacts cannot be derived from objective factors. A value judgment depends on the importance that particular individuals subjectively assign to an impact or outcome. In short, they are inherently political decisions. Thus, the question for proponents of a deliberative administrative state is how to factor political influence into the rulemaking process.

Since the rise of the presidential control model, there have been several defenses of some form of deliberative administration that seek to provide different answers to this question.<sup>193</sup> Unfortunately, as detailed below, none of them provides a satisfactory answer, either because each is unrealistically optimistic in its assumptions about the potential for stakeholders to deliberate and reach consensus or because it simply fails to recognize the political nature of the decisions facing agencies engaged in rulemaking.

#### A. *Empowering the Public*

One means of providing political influence in a deliberative model of administrative law is to empower stakeholders or the public directly to provide necessary input into agency rulemaking in such a way that the agency will act in accordance with the values held by the polity as a whole.<sup>194</sup> For example, Nina Mendelson, in the foreword to *The George Washington Law Review's Annual Review of Administrative Law* two years ago, addressed e-rulemaking as a potential means of implementing online deliberative democracy.<sup>195</sup> As she put it:

Public comments filed with an agency in reaction to a concrete proposal would seem to have considerable potential as a source of information on citizen values and preferences. The presence of significant and numerous public comments in a rulemaking might at least trigger further investigation and deliberation by an agency.<sup>196</sup>

Mendelson is not naïve; she does not think that public comments reflect a full understanding of the issues facing agencies when they make rules. Rather, she contends that although mass comments from the public reflect a fairly unsophisticated understanding of the matters at issue, they do provide some indication of the values the public holds

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<sup>193</sup> See *infra* Part III.A.

<sup>194</sup> See Mendelson, *supra* note 117, at 1343.

<sup>195</sup> *Id.* at 1344–45.

<sup>196</sup> See *id.* at 1346.

with respect to these issues.<sup>197</sup> As such, they should be taken into account by the agency. She understands that the agency may have superior information to that of the masses who file such comments, but nonetheless believes that an agency should take into account such comments when it is resolving necessarily value-laden issues and when a supermajority of comments point in a direction different from that which the agency would take.<sup>198</sup> Mendelson is also sensitive to the possibility that mass comments may reflect the influence of an interest group and that the numbers of comments on each side of an issue may reflect the relative ease with which focused groups can organize their members to press the send button in response to emails asking them to file pre-composed comments.<sup>199</sup> She contends, however, that people will not press the send button unless they agree with the comments.<sup>200</sup>

Mendelson does not see judicial enforcement of a requirement that an agency consider mass public comments as feasible.<sup>201</sup> She suggests that judicial review of agencies for failure to address such comments is problematic because it will involve judges in evaluating support for value judgments,<sup>202</sup> an endeavor that she argues is inappropriate for the judiciary—an argument with which I wholeheartedly agree.<sup>203</sup> She instead proposes self-policing by an agency to acknowledge at least that its decision is contrary to the weight of such comments, and perhaps to engage in additional procedures in the face of such comments, though to what end she does not specify.<sup>204</sup>

Some other scholars have gone beyond suggesting improvements in greater agency consideration of public input, recommending the use of a civil jury in rulemaking to deliberate and provide input to the agency on the public's values.<sup>205</sup> Although the jury would be randomly selected to make it representative of the public's views, the small size of any deliberative jury would compromise its representa-

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<sup>197</sup> See *id.* at 1362; see also Cuéllar, *supra* note 185, at 414, 460–61, 468–69 (noting comments by the public are less sophisticated, but still should be considered by agencies, as they are highly relevant).

<sup>198</sup> See Mendelson, *supra* note 117, at 1371–75.

<sup>199</sup> See *id.* at 1375–76.

<sup>200</sup> *Id.*

<sup>201</sup> See *id.* at 1378–79.

<sup>202</sup> *Id.*

<sup>203</sup> See Seidenfeld, *The Irrelevance of Politics*, *supra* note 43, at 159–60.

<sup>204</sup> See Mendelson, *supra* note 117, at 1379.

<sup>205</sup> See BETH SIMONE NOVECK, *WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL* 152–53 (2009); Cuéllar, *supra* note 185, at 491.

tiveness.<sup>206</sup> In this Issue of *The George Washington Law Review*, David Arkush seeks to overcome the small size problem, proposing instead what he terms “‘direct republicanism,’ in which large panels of randomly selected citizens decide narrow, discrete questions of regulatory policy.”<sup>207</sup> Although in the abstract he seems to favor deliberation by stakeholders or the public, he does not advocate direct deliberation by these juries because he claims such processes are too resource intensive.<sup>208</sup> Instead he would have the agency present to these “administrative juries” discrete questions on regulatory matters, such as an up-down vote on whether a rule should be adopted, along with information that lay people could easily understand.<sup>209</sup> After the presentation, Arkush would allow the jury vote to dictate the outcome on the question presented.<sup>210</sup> He envisions this as a means of allowing public input on values into the otherwise deliberative regulatory system.<sup>211</sup>

All of these proposals, viewed as attempts to incorporate democracy into the deliberative administrative state, fail because public comments submitted to the agency do not—and I contend cannot—reflect deliberation about questions of value raised by the rulemaking.<sup>212</sup> Direct input from stakeholders has limited worth as a signal of deliberatively determined popularity and intensity of the values between which the regulatory decisionmaker must choose.<sup>213</sup> The first problem with direct input from stakeholders is that policy preferences involve both values and knowledge about the impacts of the regulatory choices.<sup>214</sup> A stakeholder may prefer one value to another, but if she

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<sup>206</sup> See Arkush, *supra* note 26, at 1521–22.

<sup>207</sup> *Id.* at 137.

<sup>208</sup> See *id.* at 145.

<sup>209</sup> See *id.* at 137–38.

<sup>210</sup> See *id.* at 138.

<sup>211</sup> See *id.* at 137.

<sup>212</sup> See Jonathan Weinberg, *The Right To Be Taken Seriously*, 67 *MIAMI L. REV.* 149, 185–90 (2012) (arguing that notice and comment rulemaking does not involve a deliberative dialog among members of the public, and that e-rulemaking will not enable it to do so).

<sup>213</sup> To be fair to both Arkush and Mendelson, they do not claim to be seeking to justify a deliberative model of administrative law, but rather to propose mechanisms that would improve the extent to which agency rules comport with the values of the polity while maintaining deliberative ideals. See Arkush, *supra* note 26, at 1462–63; Mendelson, *supra* note 117, at 1346–47. In fact, to the extent that Mendelson’s proposal merely sees e-rulemaking as providing information that agencies should consider in their rulemaking, see *infra* notes 217–29 and accompanying text, it essentially places the locus of deliberation with the agency, which I explicitly advocate in this Article, see *infra* notes 316–21 and accompanying text.

<sup>214</sup> Arkush recognizes that knowledge of the issues is an important point, and suggests “testing juror’s knowledge or comprehension before accepting their input.” Arkush, *supra* note 26, at 1501.

is faced with a rulemaking choice that significantly interferes with the second value but avoids only a minor interference with the first, she may well prefer that choice.<sup>215</sup> In other words, in order to make an informed choice based on values, the stakeholder must understand in some detail the trade-offs inherent in the regulatory choices. And if there is one thing on which most scholars agree, it is that individual putative beneficiaries of agency rules and general members of the public do not have the knowledge, resources, or incentives to learn enough to comprehend those trade-offs, let alone to deliberate about which trade-offs are warranted.<sup>216</sup>

Consider Mendelson's example of the National Park Service ("NPS") rulemaking allowing the use of jet skis in two areas of the Assateague National Seashore nearest the population centers of Chincoteague Island, Virginia, and Ocean City, Maryland.<sup>217</sup> She noted that of the 7600 comments that the NPS received, 7264 favored maintaining the complete ban on jet skis.<sup>218</sup> The overall message of her article essentially chides the agency for not engaging those comments.<sup>219</sup> Yet if those comments merely indicated opposition to jet ski use without any statement of why the commenter opposed the use, the agency cannot reliably read commenters' values into them. Perhaps, for example, these comments reflected the views of environmentalists who simply assume that the use of jet skis would harm the environment or disturb the peace and quiet in the area. But the facts might have indicated that there would be no noticeable effect on the environment and that traffic in the area already compromised its tranquility. The agency simply cannot know if those commenters would still oppose the use of jet skis if they were knowledgeable about such facts.

Mendelson seems to signal her own opposition to an agency simply acquiescing to the preferences expressed by a supermajority of comments when she discusses "a 1997 National Highway Traffic Safety Administration ('NHTSA') rulemaking regarding whether to

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<sup>215</sup> See *supra* text accompanying notes 143–46.

<sup>216</sup> See Nzelibe, *supra* note 113, at 1254 (noting citizens are rationally ignorant as "the consumer who does not work in the steel industry will have very little incentive to invest in acquiring knowledge on all the vagaries of the steel industry tariff"); see also STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 33–39 (1993) (noting in the context of evaluation of risk problems, the public's evaluation of risk differs significantly from experts). While the electoral process is different from the regulatory process, there is a common problem in the electoral process of unsophisticated voters, who are ignorant about politics. See Kang, *supra* note 145, at 1143.

<sup>217</sup> Mendelson, *supra* note 117, at 1364.

<sup>218</sup> *Id.*

<sup>219</sup> See *id.* at 1364, 1367–69.

permit [automobile] dealerships to install on-off switches for airbags.”<sup>220</sup> In that rulemaking, virtually all of the 600 comments from the public favored allowing the installation of such switches for anyone who wanted one as a matter of personal choice.<sup>221</sup> The Agency reasoned, however, that the public did not understand the costs and benefits of airbags.<sup>222</sup> It convened study groups to investigate whether education of the public could quell their mistaken fears.<sup>223</sup> After convening these study groups, NHTSA “sharply restricted the availability of on-off switches—but added a ‘public education information campaign to put air bag risks and benefits into proper perspective.’”<sup>224</sup> Mendelson characterized NHTSA’s response as “[a]n impressive counterexample to the pattern of agency dismissiveness of public comments.”<sup>225</sup> Certainly, in terms of placating opponents to the rule by making them feel that the agency listened to their views, it probably was a wise response.<sup>226</sup> Nevertheless, the key point is that the Agency maintained its position that there were few instances in which a switch to turn off airbags was warranted despite the overwhelming comments preferring otherwise, and there was no indication that the education program altered the public’s objection to the ultimate rule.<sup>227</sup>

Arkush might respond to the objection that members of the public do not have the incentives or means to become sufficiently informed to provide reliable signals of public values by contending that his approach does not require a significant investment by members of his administrative jury because the agency would present the information it has developed to them at the end of its rulemaking process.<sup>228</sup> Arkush, however, overestimates the ability of the agency to adequately educate the public, as well as the potential for interest groups to spin information to their advantage. Most significant regulatory matters are sufficiently complex that the agency could not simply inform members of Arkush’s jury of certain trade-offs. There is much uncertainty that has to be communicated and I suspect that arbitrarily

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<sup>220</sup> *Id.* at 1366.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *See id.*

<sup>224</sup> *Id.* at 1366 (quoting Air Bag On-Off Switches, 62 Fed. Reg. 62,406, 62,423 (Nov. 21, 1997)).

<sup>225</sup> *Id.* at 1366.

<sup>226</sup> Perhaps the Agency learned a lesson from its failed attempt early on to require an ignition interlock in cars that would prevent them from being driven unless seat belts were fastened. *See supra* note 166.

<sup>227</sup> *See Mendelson, supra* note 117, at 1366.

<sup>228</sup> *See Arkush, supra* note 26, at 1494–95.

chosen members of the public will not have the ability or inclination to understand the implications of these uncertainties. Outcomes are likely to be based on gross values rather than on a true evaluation of trade-offs.

For example, consider climate change regulation by the EPA. To truly evaluate the trade-offs of such regulation, one would need to appreciate the uncertainty of the likely effects on global warming, which would require some evaluation of alternatives such as the costs of adaptation and the potential for it to avoid these harms.<sup>229</sup> Jurors would also have to grapple with uncertainties in the cost of regulation and the likely impact it will have on the problem.<sup>230</sup> Even if provided technical information by the agency, it seems unlikely that “John Q. Public” would devote the time and effort to grapple with these issues when he could vote based simply on whether he generally favors environmental regulation as opposed to seeing regulation as government overreaching.

A second problem with both Mendelson’s and Arkush’s proposals is that neither public comments nor votes of administrative juries adequately signal the intensity of values; they only signal the number of individuals who hold those values. Again, consider jet skis in Assateague.<sup>231</sup> The opponents may be environmentalists who live far from the area and whose values are based on their principles about human interaction with nature. Although they might prefer banning jet skis, that preference is likely not a major consideration in their lives. On the other side, those who favor jet skis may be individuals who summer in Ocean City every year, and who strongly prefer to be able to jet ski in Assateague. The cost of commenting assures that the preferences expressed to the agency at least meet some threshold level.<sup>232</sup> But as the cost of commenting decreases—reflecting both electronic rulemaking and efforts by interest groups to email prepared

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<sup>229</sup> See Lakshman D. Guruswamy, *Global Warming: Integrating United States and International Law*, 32 ARIZ. L. REV. 221, 224 (1990) (noting there are objections concerning “the scientific uncertainties surrounding the existence, the effects, the consequences and the implications of global warming”). See also generally J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENVTL. L. 363 (2010);

<sup>230</sup> See Guruswamy, *supra* note 229, at 251–53 (discussing the trade-offs of combating causes or effects of global warming).

<sup>231</sup> See Mendelson, *supra* note 117, at 1364.

<sup>232</sup> Commenting is costly because the commenter must become aware of the rulemaking, educate herself about the issues and how they will affect her, and take the effort to write and submit comments. A rational person thus will comment only if the rule affects their interests sufficiently to warrant incurring these costs. See *id.* at 1357–58 (discussing the impediments to commenting by individuals).

comments that individuals can forward to the agency with the click of a mouse or a tap of the screen—the chance that public comments will not reflect deeply held preferences increases.<sup>233</sup>

Finally, neither e-rulemaking nor administrative juries provide a means to resolve highly contested debates about value. Mendelson's mechanism only provides information when there is a sufficient supermajority regarding the preferred value, and hence the value is not really contested.<sup>234</sup> Arkush's mechanism merely registers existing values, which means that the result for truly contested values is likely to reflect the make-up of the particular jury or, at the very best, grant victory to one side in the debate because its preference enjoys a slim advantage among the polity.<sup>235</sup> Under Mendelson's proposal, an agency might engage in proceedings that involve the public beyond notice and comment<sup>236</sup> and these might foster some deliberation among stakeholders. Nonetheless, the prospect of true deliberation by the general public is unlikely.<sup>237</sup> Arkush's proposal entirely forfeits the possibility of public deliberation by jurors that might help change preferences to encourage a consensus on the best ultimate decision.<sup>238</sup>

### B. Collaborative Governance

Collaborative governance, as most notably developed by Jody Freeman,<sup>239</sup> provides a second possible approach for transcending the debate about deliberation and democratic accountability.<sup>240</sup> The workings of this approach are difficult to pin down, because its demands vary with context, but the fundamental idea of collaborative

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<sup>233</sup> Cf. Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 931–34 (2006) (discussing a user-based rating system of comments to ease the agency burden of evaluating the value of specific comments in a world of torrents of electronic comments, and the impact of electronic commenting on quantity and quality of comments).

<sup>234</sup> See Mendelson, *supra* note 117, at 1375.

<sup>235</sup> See Arkush, *supra* note 26, at 1526 (stating that “whether administrative jurors merely vote their preexisting preferences or have their views shaped through the proceeding, and whether they assume a spirit of public-interestedness” is a matter still to be tested).

<sup>236</sup> Mendelson, *supra* note 117, at 1376–77.

<sup>237</sup> See Benjamin, *supra* note 233, at 933–35 (explaining that the use of the internet has not increased the overall quantity or quality of comments).

<sup>238</sup> See Arkush, *supra* note 26, at 1502–03.

<sup>239</sup> See generally Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 21–31 (1997).

<sup>240</sup> Others who similarly advocate allowing stakeholder representatives to negotiate rules or norms of conduct include advocates of “new governance.” See, e.g., Orly Lobel, *The Renew Deal: The Fall of Regulation and The Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 376–79 (2004).

governance is to encourage stakeholder representatives to interact directly in a problem-solving mode about matters that call for regulatory solutions.<sup>241</sup> The goal is for these interactions to allow participants to overcome traditional adversarial postures, and ultimately to arrive at consensus win-win solutions.<sup>242</sup> In the context of agency regulation, Freeman discusses negotiated rulemaking as a promising vehicle for implementing collaborative governance in appropriate contexts.<sup>243</sup>

Although Freeman developed collaborative governance as a means to alter the usual criteria for accountability and legitimacy, at least in the context of rulemaking,<sup>244</sup> the approach can be characterized as an attempt to import democratic influence into regulatory decisions via deliberation by representatives selected by each stakeholder group. As James Madison recognized and our Constitution reflects,<sup>245</sup> there are distinct advantages in relying on chosen representatives of the people rather than the people themselves to make the value choices embedded in regulation.<sup>246</sup> Representatives will be chosen for their knowledge about and dedication to addressing issues that affect their stakeholder groups.<sup>247</sup> They are therefore capable of assessing the trade-offs that result from available regulatory choices and are motivated to do so.<sup>248</sup> Reliance on representatives can also keep the individuals who have to interact in the deliberative process to a manageable number. Though it would be ludicrous to think that the thousands or sometimes millions of direct stakeholders in a rulemaking will ever reach consensus on what action is appropriate, it is at least possible that twenty or so representatives could actually agree on a best rule.<sup>249</sup>

Unfortunately, there are still reasons to remain extremely skeptical that collaborative governance can provide the legitimating input

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<sup>241</sup> See Freeman, *supra* note 239, at 22.

<sup>242</sup> See *id.* at 24.

<sup>243</sup> *Id.* at 35–36; see also Lobel, *supra* note 240, at 344 (characterizing negotiated rulemaking as a form of new governance).

<sup>244</sup> See Freeman, *supra* note 239, at 30–31.

<sup>245</sup> THE FEDERALIST NO. 10 (James Madison).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* (stating that the republican model leads to the election of candidates “who possess the most attractive merit,” among other qualities).

<sup>248</sup> *Id.* (explaining that in a republic, decisions are passed “through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations”).

<sup>249</sup> See *id.*

about public values that seems missing from deliberative models of the administrative state. The most fundamental problem is incompleteness of representation. Someone (in the negotiated rulemaking example, the agency) has to convene the representatives of those stakeholder groups sufficiently affected by the matter.<sup>250</sup> Invariably, representatives of some groups are excluded from the deliberations,<sup>251</sup> which transfers the controversial decision point from choosing the regulation to choosing the regulators.<sup>252</sup> Proponents of collaborative governance need some mechanism to guard against the idiosyncratic preferences of the agency or the influence of focused interest groups in restricting who gets to sit at the table. In her seminal article, Freeman recognizes this problem in the context of negotiated rulemaking.<sup>253</sup> She notes that it is therefore important to require the agency to go through the usual notice and comment process, as well as judicial review, to ensure that those who are not included in the negotiations get some chance to make their case.<sup>254</sup> It is also imperative to Freeman that the agency have discretion to reject the negotiated rule if it has reason to believe that the outcome of the negotiations do not best further the public interest.<sup>255</sup> What Freeman fails to recognize is that the need for such requirements to ensure sufficient input by all stakeholder groups makes manifest collaborative governance's inability to provide complete representation of stakeholders.

Yet another reason to be skeptical that collaborative governance can provide democratic legitimacy to deliberative administration stems from the improbability that interest group representatives will actually reach a consensus on values underlying rulemaking choices.<sup>256</sup> A representative of a stakeholder group often is the individual most

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<sup>250</sup> See Freeman, *supra* note 239, at 31.

<sup>251</sup> See *id.* at 79–81 (stressing the importance of broad participation, but recognizing that in some instances it may not be feasible, and proposing alternatives to reduce the impact of the absence of certain stakeholders).

<sup>252</sup> See Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. PUB. ADMIN. RES. & THEORY 599, 609 (2000) (reporting, based upon the result of a survey, that thirty-four percent of participants in negotiated rulemaking believed that some affected interests were not included on the negotiating committee).

<sup>253</sup> Freeman, *supra* note 239, at 77–78.

<sup>254</sup> *Id.* at 35.

<sup>255</sup> *Id.*

<sup>256</sup> See Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 674 (“[M]any advocacy groups often have a strong ideological commitment to a cause; as a result, such groups may be more likely to fight for their preferred outcome as a matter of principle and less likely to accept compromise.”).

committed to the values underlying her group's interests.<sup>257</sup> She is not like an elected official, who is voted on by constituents to represent their interests, but does not have a direct interest in the matter herself.<sup>258</sup> Instead, interest group leaders are policy entrepreneurs who often have created the groups that they represent.<sup>259</sup> Given the time and energy it takes to organize such a group, especially one whose members share a diffuse interest in a regulatory matter, these representatives are less likely than individual stakeholders to compromise or change their values. Moreover, the mechanisms by which some interest groups maintain their viability create agency costs that reinforce group leaders' propensity not to amend their positions in light of deliberation.<sup>260</sup> A group, especially one that represents extreme preferences in heated controversies, may lose its *raison d'être* if those controversies are resolved.<sup>261</sup> Intransigence and extreme stances often generate publicity that increases group membership, even when the true interests of group members might be better served in the long run by compromise and more moderate positions.<sup>262</sup>

In light of these observations, it is not surprising that experiments with collaborative governance have rarely succeeded, or have succeeded only by abandonment of the principles of collaboration. First, it has remained relatively rare for agencies even to attempt negotiated rulemaking.<sup>263</sup> Among those agencies that have tried, only a few have succeeded.<sup>264</sup> Many attempted negotiated rulemakings stalled be-

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<sup>257</sup> See David C. King & Jack L. Walker, Jr., *The Origins and Maintenance of Groups*, in *MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS* 75, 99–100 (Jack L. Walker, Jr. et al. eds., 1991) (positing that if the interest group were to change their position in a way that shifted from a donor's position funding would vanish, resulting in dire consequences for the group's existence).

<sup>258</sup> See *supra* note 69 and accompanying text.

<sup>259</sup> See *supra* note 69 and accompanying text.

<sup>260</sup> See Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 *GEO. L.J.* 1625, 1641 (1986) (noting that public interest groups do not have an incentive to compromise, but do have an incentive to litigate because "publicity associated with a dramatic victory and extreme statements made in litigation tend to facilitate fund raising and other facets of membership support").

<sup>261</sup> See Seidenfeld, *Empowering Stakeholders*, *supra* note 72, at 436 ("[G]roups that provide mostly expressive and solidary benefits may not have incentives to accommodate welfare-increasing regulatory programs reasonably. Such groups generate and maintain support by adhering to ideological positions.").

<sup>262</sup> See *id.* at 439 ("Reports of strong stances taken against adversaries may attract more attention, and therefore more money, than reports of negotiated accommodations that actually provide group members a modicum of tangible benefits."); Perritt, Jr., *supra* note 260, at 1641.

<sup>263</sup> Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 *DUKE L.J.* 1255, 1276–77 (1997).

<sup>264</sup> See *id.* at 1275.

cause of a lack of consensus among members of the negotiating committee;<sup>265</sup> at least one failed upon implementation because, although the proposed rule seemed to reflect consensus, it left contentious issues unresolved.<sup>266</sup> Other experiments such as the EPA's "Project XL" have achieved consensus only in select contexts, and then usually only because the Agency explicitly excluded hardline groups in the process of developing XL plans.<sup>267</sup>

### C. *Impropriety of Electoral Politics*

Variants on a third approach for resolving questions of the democratic legitimacy of deliberative models of the administrative state can be found in the works of Glen Staszewski<sup>268</sup> and Evan Criddle.<sup>269</sup> Both of these scholars are skeptical that the political system holds lawmakers publicly accountable in a meaningful way. Hence, both suggest that attributes of agency decisionmaking other than the influence of Congress or the President provide the democratic accountability that legitimates the deliberative model.

For Staszewski, the key element that provides accountability is the requirement that agencies give reasons for their decisions.<sup>270</sup> He argues that reason-giving fosters accountability in several ways. First, it limits the scope of agencies' policymaking discretion.<sup>271</sup> Second, it facilitates transparency, allowing for more meaningful public discussion, evaluation, and criticism of government action.<sup>272</sup> Third, it "fosters democratic legitimacy because it both embodies, and provides the preconditions for, deliberative democracy that seeks to achieve consensus on ways of promoting the public good that take the views of political minorities into account."<sup>273</sup> According to Staszewski, reason-giving is such a powerful palliative for the failures of electoral politics that he claims it is a "viable alternative to elections for purposes of holding public officials democratically accountable."<sup>274</sup> Thus, for him, politics should be irrelevant to agency setting of policy.

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<sup>265</sup> *Id.* at 1274.

<sup>266</sup> *Id.* at 1304–05.

<sup>267</sup> See Seidenfeld, *Empowering Stakeholders*, *supra* note 72, at 474 n.279.

<sup>268</sup> See generally Staszewski, *supra* note 118.

<sup>269</sup> See generally Criddle, *supra* note 119.

<sup>270</sup> Staszewski, *supra* note 118, at 1279–80.

<sup>271</sup> *Id.* at 1279.

<sup>272</sup> *Id.* at 1281–82.

<sup>273</sup> *Id.* at 1278.

<sup>274</sup> *Id.* at 1284.

I am on record arguing that judicial review of agencies' reasons for rulemaking serves many of the goals that Staszewski identifies. For example, I have written that requiring reasons restricts the available regulatory choices open to an agency by ferreting out pretexts for prohibited or politically unpopular considerations,<sup>275</sup> encourages more careful agency consideration of regulatory problems,<sup>276</sup> and increases transparency and hence the potential for electoral accountability of the impacts of agency rules.<sup>277</sup> Unfortunately, Staszewski's assertion that reason-giving can replace political accountability, in my mind, strains credulity.

Staszewski's reliance on reason-giving suffers from the same criticism that prompted the rejection of the expertise model in the 1950s and 60s.<sup>278</sup> This reliance only makes sense if reason-giving entirely eliminates the need for value judgments to resolve agency policymaking.<sup>279</sup> Just as the expertise model assumed that controversy over the wisdom of policy would vanish if everyone had the knowledge and experience of the expert,<sup>280</sup> Staszewski assumes that policy controversy is entirely resolvable by objectively accepted reasons.<sup>281</sup>

Essentially, this assumption implies that Staszewski believes that, at the conclusion of the rulemaking process, deliberation will lead to a single "best" rule rather than a choice of reasonable rules that depends on value judgments.<sup>282</sup> Otherwise, his statement that reason-giving provides a substitute for elections cannot be true because it would give no mechanism for reaching the ultimate outcome on a regulatory matter.<sup>283</sup> Staszewski does, at one point, seem to admit that politics is appropriate for resolving value-laden choices, but he sees reason-giving as leaving room for such choices so infrequently that he sees politics as, at best, a "tie breaker" in the unusual case when deliberation does not lead to a single best outcome.<sup>284</sup>

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<sup>275</sup> Seidenfeld, *Bending the Rules*, *supra* note 30, at 491.

<sup>276</sup> Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 491 (2002) [hereinafter Seidenfeld, *Cognitive Loafing*].

<sup>277</sup> Seidenfeld, *The Irrelevance of Politics*, *supra* note 43, at 178–79.

<sup>278</sup> See *supra* notes 50–54 and accompanying text (discussing problems with the expertise model).

<sup>279</sup> See *supra* note 50–53 and accompanying text.

<sup>280</sup> See *supra* note 42 and accompanying text.

<sup>281</sup> See Staszewski, *Reason-Giving*, *supra* note 118, at 1286.

<sup>282</sup> See Staszewski, *Political Reasons*, *supra* note 130, at 898–99 (explaining why deliberative decisionmaking should precede political considerations).

<sup>283</sup> See *id.*

<sup>284</sup> *Id.* at 899–900.

Staszewski's belief that agencies can resolve policy questions by purely objective reasoning seems unduly optimistic. First, there is the problem that agency knowledge is incomplete so that decisions must be made based on much uncertainty about their likely impacts.<sup>285</sup> Resolution of policy under such uncertainty depends not only on technical decisions, but also on value judgments, such as desired attitudes towards risk and ethical considerations.<sup>286</sup> More significantly, even when the agency can predict the outcomes of possible regulatory choices with certainty, evaluation of the trade-offs between those outcomes often still requires value judgments.<sup>287</sup> Consider, for example, the FCC change in policy to prohibit fleeting expletives on the public airwaves that the Supreme Court considered in *FCC v. Fox Television Stations, Inc.*<sup>288</sup> When all was said and done, the agency decision weighed the costs of implementing a system to bleep out such words against the discomfort that some parents feel when their children are exposed to curse words.<sup>289</sup> I cannot think of any reasoned basis that definitively shows one harm to be less than the other. Similarly, consider the gag rule that the Court considered in *Rust v. Sullivan*.<sup>290</sup> Suppose that the Department of Health and Human Services had responded to comments expressing concern over the effects on women for whom pregnancy posed a significant health risk by determining

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<sup>285</sup> See Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1618–28 (1995).

<sup>286</sup> See *id.* at 1620 n.22; Robert L. Glicksman, *Bridging Data Gaps Through Modeling and Evaluation of Surrogates: Use of the Best Available Science to Protect Biological Diversity Under the National Forest Management Act*, 83 IND. L.J. 465, 471 (2008); Guruswamy, *supra* note 229229, at 224; see also HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION* 47–51 (3d ed. 1976) (noting that choices of intermediate ends by agencies involve both factual judgments and value choices).

<sup>287</sup> See Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 281 (1986) (noting that technical information “will rarely be conclusive, however, and its usefulness will often depend upon value judgments, which must be made in accordance with the governing statute”); see also Thomas O. McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729, 743 (1979) (“Situations occasionally arise, however, when even after distilling out the pure scientific judgment question, eminent scientists still disagree over how to interpret the data, and the regulator’s resolution of the issue once again must be policy-dominated.”).

<sup>288</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 508–10 (2009).

<sup>289</sup> See *id.* at 506–10. The trade-off inherent in the decision might also have included the possibility that some smaller broadcasters that could not afford such a system would choose not to air a program out of concern for potential liability. See *id.* at 557–62 (Breyer, J., dissenting) (arguing that the agency failed to consider this cost).

<sup>290</sup> *Rust v. Sullivan*, 500 U.S. 173, 175 (1991) (upholding limits on Title X funding for abortion-related activities).

that the gag rule would result in several thousand fewer abortions but an increase of several dozen women's deaths during delivery. Again, I do not know of any reasoned way to weigh those two outcomes against each other.<sup>291</sup>

Criddle's work advocates viewing regulatory decisionmakers as fiduciaries for the public.<sup>292</sup> He contends that ultimate decisionmakers in rulemaking proceedings should be representatives in the Madisonian sense, using their own judgment rather than simply implementing the preferences of the majority.<sup>293</sup> Criddle then argues that agencies are preferable to the President as fiduciaries because they are experts, their decisionmaking process is transparent and participatory, and they must provide reasons for their decisions.<sup>294</sup>

I am somewhat sympathetic to Criddle's argument to the extent that he suggests that judicial review encourages agencies to respect views of those with "diverse ideological commitments," and, in that sense, be representative.<sup>295</sup> But, ultimately, my critique of Criddle's work is somewhat similar to my critique of the work of Staszewski. Criddle's argument fails to acknowledge that the ultimate choice between rulemaking outcomes to a large extent reflects choices of values that are unlikely to be resolved by consensus. Although, unlike Staszewski, Criddle does not suggest that agency expertise and reasoning lead to unique best rules, his reliance on these factors is still problematic because neither factor is particularly useful for resolving questions of value.<sup>296</sup>

Criddle's reliance on the participatory nature of agency rulemaking is problematic for more subtle reasons.<sup>297</sup> Even granting that the public's rational ignorance of regulatory matters causes a disconnect between electoral politics and the preferences of the polity,<sup>298</sup> it seems

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<sup>291</sup> Note that there is still room for courts to require and review agency reasons under "hard look" review. As I have argued elsewhere, the agency in *Rust v. Sullivan* should have been reversed because it failed to even attempt to predict the effect of the gag rule on deaths during delivery. See Seidenfeld, *A Syncopated Chevron*, *supra* note 4, at 110–11.

<sup>292</sup> Criddle, *supra* note 119, at 448.

<sup>293</sup> THE FEDERALIST NO. 10 (James Madison); see also HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 192–96 (1967).

<sup>294</sup> See Criddle, *supra* note 119, at 448.

<sup>295</sup> See *id.* at 499.

<sup>296</sup> See *id.* at 503.

<sup>297</sup> See *id.* at 475–76.

<sup>298</sup> See Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFF. L. REV. 903, 909–10 (2006) ("[E]mpirical evidence also reveals that those who vote in ballot measure elections are older, more educated, richer, and more ideological than the general population."); see also Elizabeth Garrett & Mathew D. McCubbins, *When Voters Make Laws: How Direct Democracy Is Shaping American Cities*, 13 PUB. WORKS MGMT. & POL'Y 39, 39, 47 (2008) (revealing

likely that that disconnect is less than the disconnect caused by imperfections in agency participatory processes. Commenting on a proposed agency rule requires more detailed information, more work to understand that information, and more effort to register one's preferences than does voting. Therefore, although voters receive imperfect proxies about candidates from groups with whom they interact,<sup>299</sup> it is almost certain that very few individuals obtain sufficient information to participate meaningfully in rulemaking proceedings. More importantly, members of the public have little to no incentive to invest the time and effort to obtain and understand such information, let alone to submit comments in a rulemaking.<sup>300</sup>

Criddle himself seems to accept that the participation in rulemaking does not inform agencies about majoritarian preferences any more than a presidential election does.<sup>301</sup> He merely argues that the imperfections in electoral politics undermine majoritarian preferences as a legitimate basis for regulatory outcomes.<sup>302</sup> He therefore rejects majoritarian preferences as a basis for democratic legitimacy of agency policy.<sup>303</sup> Hence, by Criddle's own criteria, the comparative imperfections of elections and notice and comment proceedings for registering majoritarian preferences are irrelevant. Essentially the question is not which institution is more likely to be accountable in a majoritarian or interest group sense, but rather which is more accountable in a representative sense.<sup>304</sup>

The question becomes who has a more legitimate claim to act on behalf of the public—the President or the agency. On this question, I think agencies fare less well than the President. First, as apolitical experts, agencies are not trained in sorting out and evaluating the strength of the values of different groups within the polity, even with the help of rulemaking comments.<sup>305</sup> Moreover, agency incentives to

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that based upon their survey of exit poll voters in San Diego, a majority did not understand the ballot propositions and approximately half who did answer questions regarding the content of the propositions gave incorrect responses); Kang, *supra* note 145, at 1145–46 (discussing voter ignorance of ballot measures).

<sup>299</sup> See *supra* notes 70–72 and accompanying text (critique of pluralist theories).

<sup>300</sup> See Criddle, *supra* note 119, at 461 (“By all accounts, the vast majority of agency rulemaking actions simply fly under the public radar, eluding the attention of all but the most well-informed members of the electorate.”).

<sup>301</sup> See *id.* at 488–89.

<sup>302</sup> *Id.* at 457–64.

<sup>303</sup> See *id.* at 489.

<sup>304</sup> See *id.* at 488–91.

<sup>305</sup> See PETER L. STRAUSS, *ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 135 (2d ed. 2002) (“[T]he expert staff of all federal agencies, to a level that may reach as high as bureau

evaluate values of the polity are significantly driven by pressure that Congress and the President can bring to bear on them.<sup>306</sup> Otherwise, it is hard to see why agency career staff members, who are hired based on merit, or the agency head and his political assistants, who are appointed and not elected, would care about the values of the polity.<sup>307</sup> Hence, agency evaluation of public values derives from political processes. Finally, and most significantly, the President can claim that the electorate chose him to use his judgment to further what he considers to be the public interest.<sup>308</sup> The agency can make no such claim.

In short, those who have recently sought to defend a deliberative theory of the administrative state are unrealistically optimistic that agency decisionmaking processes and the requirement of reasoned decisionmaking enables stakeholders or their representatives to deliberate and reach consensus on what is best for the nation. Alternatively, they cannot explain why agencies are preferable to political actors—particularly the President—for resolving fundamental issues of values that are embedded in rulemaking decisions.

#### IV. INCORPORATING POLITICS INTO A MODEL OF DELIBERATIVE ADMINISTRATION

Thus far, I have painted a picture of political control models as imperfect because they forfeit some of the major advantages agencies have in setting public policy. In particular, they seek to strengthen political controls, which would interfere with the apolitical expert perspective through which agency staff members tend to approach rulemaking. They thereby threaten to skew agency staff's professional evaluation of trade-offs from potential rules. This is especially troubling in light of the increased partisanship of legislators and elected officials, and their tendency to spin issues and mislead the public about the implications of the regulatory actions they support.<sup>309</sup>

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head, is professional rather than political in character. Its tenure and conditions of employment are governed by the civil service laws, which in turn are administered by a somewhat complex arrangement of bureaucratic agencies.”).

<sup>306</sup> MARISSA MARTINO GOLDEN, *WHAT MOTIVATED BUREAUCRATS?: POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS* 23 (2000) (pointing out with regard to role perception, “[c]areerists expressed quite eloquently and consistently their view that their actions during the Reagan years were limited by their nonelected status, by the fact that they were and should be hierarchically subordinate to the appointed officials in their agencies, and by the legitimacy of those with an electoral mandate”).

<sup>307</sup> *See id.* at 24 (noting that many civil servants believed that following the President was “the right thing” to do).

<sup>308</sup> *See Kagan, supra* note 21, at 2335.

<sup>309</sup> *See supra* notes 1–6 and accompanying text.

At the same time, recognizing that policymaking ultimately requires value choices precludes simply rejecting politics as irrelevant to rulemaking.<sup>310</sup> Substituting direct agency discussion and evaluation of political support for various regulatory options is unlikely to register the values of the polity accurately or lead to consensus among stakeholders.<sup>311</sup> Therefore, the question for any deliberative model of the administrative state is how to incorporate politics into the workings of agencies in a manner that protects deliberative processes but still affords a democratically justified means of resolving ultimate disputes about values.

A. *Agency Staff as Republican Guardians*

For a deliberative model to include political influence on agency policymaking without retreating from its ideals, the model has to be honest in recognizing that the general public, direct stakeholders, or stakeholder group representatives are poor choices within which to expect deliberation to occur. The information costs of educating members of the public or direct stakeholders would be enormous, and these individuals do not have sufficient incentives to devote the time and resources necessary to be sufficiently informed and to deliberate.<sup>312</sup> Agency costs between stakeholder group representatives and the members of their groups, along with the strong commitments of most group leaders to their groups' causes, make interest group representatives an unlikely body for deliberation in most rulemaking proceedings.<sup>313</sup> But not all is lost for deliberation, because agency staff—interacting with the public and others in the executive branch in a non-political manner—can serve as republican guardians of regulatory action, and that the aim of the administrative state should be to foster deliberation and consensus among staff members responsible for agency rulemaking.

Members of the agency rulemaking team are professionals. They are well-educated in fields relevant to agency policymaking.<sup>314</sup> Given the need for an agency to explain the factual predicates for its rules, rulemaking teams have to include professionals from different relevant disciplines.<sup>315</sup> Often these disciplines approach a particular pol-

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<sup>310</sup> See *supra* notes 50–54.

<sup>311</sup> See *supra* Part III.

<sup>312</sup> See *supra* note 228 and accompanying text.

<sup>313</sup> See *supra* note 69 and accompanying text.

<sup>314</sup> See *supra* notes 184–88 and accompanying text.

<sup>315</sup> See Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Mod-*

icy question with different perspectives and attitudes.<sup>316</sup> Thus, properly structured, administrative law can encourage rulemaking teams to reflect many of the values and perspectives of the various stakeholders affected by a regulatory matter and to gain valuable understanding from consideration of those various perspectives.<sup>317</sup>

Recognizing the agency staff as the locus of deliberation illuminates how that staff should fit into the rulemaking process. The role of the staff should be to make factual determinations and predictions. The staff also should identify plausible rulemaking alternatives and, by its findings and predictions, clarify the trade-offs inherent in choices between them. In essence, staff is to resolve matters within reason's domain by reasoned decisionmaking. In addition, agency staff can also play a role by filtering from the possible alternatives those that depend on extreme value choices that would so disrespect the interests of some significant stakeholder group that it could not be said to be the product of deliberation in which the views of all such stakeholders are taken seriously.<sup>318</sup> Independent of political influence, however, the rulemaking team should not be responsible for choosing between outcomes whose trade-offs reflect different reasonable valuations of impacts or regulatory perspectives.

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*ify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 493–94 (1997) [hereinafter Seidenfeld, *Demystifying Deossification*].

<sup>316</sup> See *id.*

<sup>317</sup> See McGarity, *supra* note 187, at 57, 90–91 (noting that a “team model” for rulemaking provides the advantage of “bring[ing] multiple professional perspectives” to complex problems); cf. Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 333 (2012) (critiquing “contemporary criminal justice . . . [for] privileg[ing] one culturally constructed perspective above all others—specifically, the perspective of the professional law-enforcement community”); Timothy W. Floyd, *The Lawyer Meets the Therapist, the Minister, and the Psychiatrist: Law School Cross-Professional Collaborations*, 63 MERCER L. REV. 959, 967 (2012) (describing how a course that included both law and theology allowed students to gain “a valuable understanding of how people in different professions often approach social problems from very different perspectives”); Charity Scott, *Collaborating With the Real World: Opportunities for Developing Skills and Values in Law Teaching*, 9 IND. HEALTH L. REV. 411, 432–33 (2012) (describing how, in classes with both law and medical students, students learned to appreciate the perspective of those from a different profession).

Centralized review by the EOP also requires the agency to address the concerns of sister agencies that often will have a different outlook and constituency with respect to a rulemaking matter. See Sunstein, *Myths and Realities*, *supra* note 152, at 16–17. And, because agencies must report all planned rulemaking activity in the Annual Regulatory Plan and Unified Agenda of Regulatory and Deregulatory Actions, such interagency dialog can extend beyond rules subject to OIRA review. *Id.* at 11–12.

<sup>318</sup> See Weinberg, *supra* note 212, at 174–75 (describing agency rulemaking as reflecting a right to be taken seriously out of respect for all citizens).

These roles for agency staff, in turn, explain some important doctrines of administrative law and give some concreteness to what those doctrines entail. For example, recognizing that deliberation occurs within the agency staff deflects criticism of some otherwise troubling aspects of notice and comment rulemaking.<sup>319</sup> Often, the fundamental provisions of agency rules are solidified by the time the agency issues a notice of proposed rulemaking, well before rulemaking proceedings could be said to involve the public or direct stakeholders in any potential deliberative process.<sup>320</sup> Hence, notice and comment proceedings do not encourage the agency to adopt rules that reflect *public* deliberation.<sup>321</sup> Rulemaking staff, however, has usually already reached out to significantly affected stakeholders, collected information, and engaged in significant deliberation in structuring the notice of proposed rulemaking.<sup>322</sup> The purpose of notice and comment, under the staff deliberation model, is to ensure that the staff does not overlook significant interests of those whose perspective might not be represented by a member of the rulemaking team.<sup>323</sup> The fact that technical aspects of regulatory controversies are usually resolved prior to notice and comment does not interfere significantly with staff playing its deliberative role.

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<sup>319</sup> See Bradley Lipton, Note, *Accountability, Deference, and the Skidmore Doctrine*, 119 YALE L.J. 2096, 2113–14 (2010).

<sup>320</sup> See *id.* at 2114–16; Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 259 (1998); William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 74 (2004) (changes made in response to comments “seldom address the fundamental nature of the policy”).

<sup>321</sup> Weinberg, *supra* note 212, at 181–82 (noting that notice and comment comes after the agency has invested much time and effort in building consensus around its rule, and that by the time agencies receive comments, the agency is likely to be reluctant to change the rule in any fundamental way).

<sup>322</sup> E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492–93 (1992) (noting that agencies rely on more informal processes than notice and comment procedures to obtain information to develop rules); Kagan, *supra* note 21, at 2360 (“The President and his aides, no less than any agency, have reason and means to consult with interested parties prior to making regulatory decisions (or taking public actions that will foreordain them)—i.e., prior to the publication of the NOPR). For significant regulatory action even before an agency publishes a NOPR, OIRA will have coordinated an exchange of information and views between the agency proposing the rule and other agencies as well as interested offices in EOP. See Sunstein, *Myths and Realities*, *supra* note 152, at 7–12, 16–18.

<sup>323</sup> See Sunstein, *Myths and Realities*, *supra* note 152, at 17 (stating that “the governing idea” for the consultation of multiple agencies is that “relevant agencies have information and expertise, and the rulemaking agency should benefit from their perspectives before they finalize or even propose rules”).

Hard look judicial review is perhaps the most important requirement under the staff deliberation model. By requiring the agency to consider all relevant factors, hard look review encourages the staff, who analyze any rule prior to its being adopted, to identify and consider the perspectives of all who submit comments.<sup>324</sup> According to the psychological literature on accountability, because hard look review focuses on the agency decisionmaking process, it encourages careful analysis that reduces biases introduced by many decisionmaking heuristics.<sup>325</sup> Finally, the fact that agency staff plays a role in filtering extreme rulemaking alternatives from consideration justifies the uncertainty created by hard look review's relevant factors test.<sup>326</sup> Because the agency does not know the preferences of any panel that might review a rule, it must consider all factors that any potential reviewing judge might find relevant.<sup>327</sup> To do so, the agency staff must have members with training and expertise in all the professions whose knowledge may bear on a policy matter.<sup>328</sup> The staff is thus more capable of seeing a regulatory issue from the perspective of the multitude of stakeholders, and is unlikely to propose an alternative that fails to pay serious consideration to the interests of any mainstream interest group.

### B. *Politics and Agency Policymaking*

The fact that agency staff tends to reflect various professional perspectives, however, does not provide a sufficient guaranty of diversity or a mechanism to ensure sufficient consideration of the public's values to claim that the rulemaking process inherently provides sufficient democratic bona fides to justify agencies otherwise ignoring political influences. Thus, additional mechanisms for political control are needed. Fortuitously, as those who promote the political control model point out, both Congress and the President already exert great influence over agency policymaking.<sup>329</sup>

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<sup>324</sup> See Seidenfeld, *Demystifying Deossification*, *supra* note 315, at 493–94.

<sup>325</sup> See Seidenfeld, *Cognitive Loafing*, *supra* note 276, at 517–18.

<sup>326</sup> See Seidenfeld, *Demystifying Deossification*, *supra* note 315, at 496–97.

<sup>327</sup> See *id.* at 496–97.

<sup>328</sup> See *id.* at 493–94.

<sup>329</sup> See, e.g., Kagan, *supra* note 21, at 2281–2319 (describing in detail how President Clinton controlled much agency rulemaking); Watts, *supra* note 15, at 35 (asserting that “[t]he political control model of agency decisionmaking . . . legitimizes agency decisionmaking by stressing that agencies are subject to political control”); see also Matthew C. Stephenson, *Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies*, 56 ADMIN. L. REV. 657, 667 (2004) (reporting “strong evidence of presidential influence over agency policy”).

Agencies are not free to make policy entirely as they see fit. First, although it is almost so obvious that it is often neglected as a means of political control, agencies cannot act beyond the authority that statutes grant them or otherwise contrary to statutory direction.<sup>330</sup> Second, the President can exert great influence over agencies by appointing agency heads who agree with his political perspectives, subject to Senate confirmation and other political constraints on his appointments.<sup>331</sup> The President can also fire at-will high ranking members of “executive” agencies (as opposed to “independent” agencies).<sup>332</sup> Currently, the President also exercises significant influence over agency rulemaking via OIRA review.<sup>333</sup> Although OIRA’s positions on rules may not track those of the President with complete accuracy, the interaction between OIRA and the White House makes it likely that such review will protect against significant agency drift from a position that the President supports.<sup>334</sup> Third, the President and both houses of Congress have the ability to call attention to aspects of agency decisions in a manner that can bolster or hurt the reputation of the agency head and the agency as a whole. For example, congressional committees hold hearings to focus attention on agency decisions that have not worked out well.<sup>335</sup> Presidents can use the bully pulpit to shore up support for agency policies that they sup-

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<sup>330</sup> See Kagan, *supra* note 21, at 2255.

<sup>331</sup> See Bagley & Revesz, *supra* note 173, at 1302 (asserting that numerous studies show that “presidents exert considerable power over agency action through their power to appoint loyalists to influential administrative posts”); Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1834–35 (2012) (explaining the significance of the President’s appointment power).

<sup>332</sup> See Cristina M. Rodriguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787, 1822 (2010) (“Though no single definition of an independent agency exists, such agencies tend to be defined by restraints on the president’s authority to hire and fire their members.”).

<sup>333</sup> See Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended at* 5 U.S.C. § 601 (Supp. I 2009); see also Sunstein, *Myths and Realities*, *supra* note 152, at 8–10 (summarizing OIRA review under these executive orders).

<sup>334</sup> Sunstein, *Myths and Realities*, *supra* note 152, at 34 (“Insofar as the President and his closest advisers are clear on their priorities, OIRA will of course be made aware of their views and act accordingly. Those involved in the OIRA process are alert to the concerns and priorities of the President himself, and they take direction from him.”).

<sup>335</sup> See Beermann, *supra* note 77, at 124–25 (describing committee oversight of agency action); Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, 54 LAW & CONTEMP. PROBS. 205, 208 (1991).

port.<sup>336</sup> Perhaps most significantly, especially in the current climate opposing tax increases and unnecessary government spending, an agency needs the support of both the President and members of congressional committees who oversee it in order to secure appropriations that will allow it to implement its preferred programs.<sup>337</sup> Thus, these political players wield significant power to limit agency funds either for particular programs with which they disagree, or even to limit the agency budget in general if the agency consistently ignores their policy preferences.

I do not mean to suggest that political influence will dictate precise agency outcomes in most or even many agency rulemakings. But they do constrain agency policies so that the deviation from the preferences of its political principals is not so great as to trigger a reaction that will negatively affect the head of the agency or the workings of the agency overall.<sup>338</sup> The extent of leeway an agency has in any particular rulemaking depends on the relative preferences of its overseers and the importance of the matter to them.<sup>339</sup>

Some have argued that the agency can play one overseer against the others to increase the range of its stable policy outcomes.<sup>340</sup> Thus, according to a now well-known positive political theory analysis done by McCubbins, Noll, and Weingast, agencies can change policy outcomes from the status quo as long as they remain within their statutory authority and the change is preferred by the House of Representatives, the Senate, or the President.<sup>341</sup> Their argument is that if any of these institutions is better off after the agency policy change, it will resist efforts by the other institutions to force the agency to return to its original policy.<sup>342</sup> Though this analysis is illumi-

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<sup>336</sup> See Galle & Seidenfeld, *supra* note 144, at 1982–83; Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 638 (2009).

<sup>337</sup> See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 42–43 (2010); Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119, 124 (1996) (reporting that many studies support the theory that the President plays “an agenda-setting role for congressional deliberations on agency appropriations”).

<sup>338</sup> See Seidenfeld, *A Civic Republican Justification*, *supra* note 28, at 1551.

<sup>339</sup> See Nou, *supra* note 141, at 1781 (“As the preference divergence [between the agency and President] grows and the costs of reversal diminish, the President will be more likely to reverse the agency.”).

<sup>340</sup> See McCubbins et al., *Administrative Procedures*, *supra* note 19, at 260–61 (“This may come about when conflicting interests among the political overseers creates conflicting pressures on the agency.”).

<sup>341</sup> See *id.* at 248–53.

<sup>342</sup> See *id.* at 252.

nating, it treats each regulatory issue as a one-time game. In reality, however, the agency's political principals—the House, the Senate, and the President—interact repeatedly over policy, and often will trade off deviations from their ideal positions that they care about only moderately to minimize deviations on issues they care about more deeply. The influence exerted by political actors is thus more complex, and the space left open to agencies is likely less broad than the authors predict. What is most compelling about their work, however, is the broader point that agencies operate in the shadow of political influence, and therefore that agencies generally will avoid outcomes that will likely prove unstable or will harm the agency's programs overall.<sup>343</sup> The implication of such influence is that even for rulemaking about which the political principals have not communicated their preferences, the agency outcome likely deviates from the preferences of each principal insufficiently to qualify as a significant deviation from the widely shared values of the politically accountable branches.<sup>344</sup>

To be clear, I am not arguing that political controls are entirely sufficient to justify the administrative state. Unlike those who advocate for a political control model, I believe that there are limits to the extent that political influence should dictate outcomes. In particular, political influence should not undermine the deliberative benefits that agency rulemaking delivers. At the same time, unlike others who advocate for a deliberative model of rulemaking, I am not arguing that agencies should be free from all external political control. Hence, unlike those other advocates, I do not find political influence inherently suspect. If elections are to mean something, political influence must be part of the deliberative process.<sup>345</sup>

This still leaves questions about the appropriate nature of political influence in those cases where political principals do communicate their preferences. First, I am convinced that direct presidential influence on agency rulemaking should take primacy over that of Congress. Pragmatically, no individual can speak for Congress as a whole, opening up the possibility of obfuscation about precisely which policies Congress supports and who is responsible for influence on regulation.<sup>346</sup> Lack of centralization of congressional influence would also

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<sup>343</sup> See generally *id.* at 243–44.

<sup>344</sup> See *id.* at 274.

<sup>345</sup> See Ronald M. Levin, *Hard Look Review, Policy Change, and Fox Television*, 65 U. MIAMI L. REV. 555, 561 (2011) (opining that “elections should have consequences”).

<sup>346</sup> See Arkush, *supra* note 26, at 1478 (explaining that “the notion of ‘congressional’ oversight, in the sense of the whole Congress watching over regulators, is rarely more than a metaphor”).

forfeit opportunities for consistency and coherence of policies that cut across programs.<sup>347</sup> Perhaps most importantly in today's world of dysfunctional politics, some members of Congress seem willing to do whatever they can to undermine agency implementation of policy with which they do not agree, or even that with which they might agree but for which members of the other party might claim credit.<sup>348</sup> Granting primacy to congressional influence would allow those who lost at the statutory enactment stage to throw wrenches into the workings of agencies to disable them from carrying out their authorized mandates or even to disable government entirely. The President, who is likely to be evaluated by the success of agencies in implementing his policies, may try to influence agency implementation of statutory mandates, but is unlikely to try to disable them entirely.<sup>349</sup> Hence, for those rulemaking matters about which the President has taken a public stance in a way that respects the deliberative processes of the agency, the agency should choose the deliberatively justifiable rule that best reflects that stance.<sup>350</sup>

Presidential involvement, in an institutional sense, actually can facilitate deliberation by establishing a centralized process for agencies to learn about and coordinate their rulemaking with the concerns of other agencies and various offices within the EOP.<sup>351</sup> This can expand the diversity of perspectives considered during deliberation beyond those directly represented by agency staff. In large part, coordinating such a process seems to be a major role of OIRA when it reviews agency rulemaking.<sup>352</sup> Beyond this function, the President

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<sup>347</sup> See Kagan, *supra* note 21, at 2255 (stating that often Congress "could not reach agreement on specifics, given limited time and diverse interests").

<sup>348</sup> According to Thomas Mann & Norman Ornstein's evaluation of Congress: "The single-minded focus on scoring political points over solving problems . . . has reached a level of such intensity and bitterness that the government seems incapable of taking and sustaining public decisions responsive to the existential challenges facing the country." MANN & ORNSTEIN, *supra* note 1, at 101.

<sup>349</sup> See Kagan, *supra* note 21, at 2335 (explaining why presidents have an interest in ensuring success of their policies even after reelection).

<sup>350</sup> This does not mean that congressional influence is illegitimate. It is legitimate for congressional input to influence agency deliberation about value choices with respect to the vast majority of rules that do not prompt personal involvement by the President. For those rules that do prompt presidential involvement, Congress can use threats of legislative battles and oversight as means of influencing the President's evaluation of the pros and cons of a rule. On such matters, the President's position as national representative of the people and responsibility to oversee all administration puts him in a better position to weigh the significance of the preferences of members of Congress, and whether a fight with them is worth the political costs.

<sup>351</sup> See Kagan, *supra* note 21, at 2340-41.

<sup>352</sup> Nou, *supra* note 141, at 1802 ("OIRA then coordinates a process whereby it attempts to help refine and resolve arising issues through multiple rounds of comments and questions, fol-

should be able to provide input into the value choices made by agencies, so long as he does so without forfeiting the deliberative nature of the rulemaking process. Once an agency identifies the impacts of a rule and filters out extreme alternatives, the ultimate choice of the rule adopted reflects a value judgment that is appropriately left to the President in his representative capacity.<sup>353</sup> Ideally, the President's role in agency rulemaking, when he opts to get involved personally, should therefore focus on choosing the final rule from those alternatives that the agency has identified as plausible in light of statutory constraints and predicted effects. In addition, as the person chosen to exercise discretion over regulatory values,<sup>354</sup> the President should be free to identify regulatory problems that he believes might warrant regulatory change. In order for the polity to evaluate the President's performance as its regulatory representative, the President should publicly reveal his personal involvement in agency policy-setting rather than influencing rulemaking choices behind closed doors.<sup>355</sup>

Beyond these functions, presidential influence threatens to undermine the professional and deliberate approach that agencies are so well-suited to bring to regulatory problems. If the President expresses his preference for one rule over another prior to the agency completing its consideration of factual predicates and trade-offs, that expression is likely to bias the agency's analysis to favor the President's preferred outcome, even to the point of the agency deciding technical matters in a way that paints that outcome in a better light than it deserves.<sup>356</sup> Worse yet, if the President communicates preferences be-

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lowed by possible revisions and responses by the agency."); Sunstein, *Myths and Realities supra* note 152, at 34–35 (“[T]he OIRA [review] process helps to ensure that what [various federal officials] know is incorporated in agency rulemakings.”).

<sup>353</sup> See *supra* notes 96–107 and accompanying text; see also Seidenfeld, *The Irrelevance of Politics, supra* note 43, at 193 (explaining that once an agency identifies the impacts of a rule, the political branches appropriately decide “whether the value judgments underlying the regulation were warranted”).

<sup>354</sup> See *supra* notes 96–107 and accompanying text (describing how representative accountability justifies allowing the President to make value judgments).

<sup>355</sup> See Mendelson, *supra* note 121, at 1163 (explaining that submerged presidential influence may undercut responsiveness to national issues).

<sup>356</sup> “When individuals are accountable to an audience whose own preferences are revealed, these individuals . . . alter the outcome of their decisions to come closer to an outcome that would satisfy their audience.” Seidenfeld, *Cognitive Loafing, supra* note 276, at 516 (citing Richard Klimoski & Lawrence Inks, *Accountability Forces in Performance Appraisal*, 45 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 194, 202–03 (1990) and Philip E. Tetlock, *Accountability and Complexity of Thought*, 45 J. PERSONALITY & SOC. PSYCHOL. 74, 80–81 (1983)); Philip E. Tetlock, Linda Skitka & Richard Boettger, *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. PERSONALITY & SOC. PSYCHOL. 632, 638 (1989)).

hind closed doors, neither the courts nor the public will be alerted to the potential bias such communications can cause.

Unfortunately, maintaining this ideal presidential role is virtually impossible to implement in any legally enforceable manner. The President can interact with agencies through many different mechanisms. He can speak publicly about an issue, in essence using the press to communicate with those in the agency. He can speak directly with political appointees within the agency or direct political appointees in the White House or EOP about how he wants a particular rulemaking to proceed. Were courts directly to monitor these interactions to ensure the President does not deviate from the ideal role, they would have to distinguish between deliberation-enhancing interactions and those that are likely to stifle deliberation. For example, on one hand, an OIRA return letter or communication of concern about how an agency performed its cost-benefit analysis of a major rule can be a valuable check on a sloppy or agenda-driven decision. On the other hand, if the President has privately instructed OIRA about his choice for a rule under review, such a letter might be a pretext for White House opposition to an agency's proposed rule for what Kathryn Watts calls "raw" political reasons.<sup>357</sup> Drawing such distinctions would require mandating disclosure of all conversations between the White House, EOP, and administrative agencies. This likely would interfere with the President's constitutional authority to consult with executive branch officials, even if that authority is seen as one of oversight rather than direct control.<sup>358</sup> Nonetheless, small in-roads into making presidential influence more transparent might be possible. For example, Nina Mendelson's proposal<sup>359</sup>—that each agency summarize White House influence on rulemaking as part of its "concise

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<sup>357</sup> Watts, *supra* note 15, at 9 (defining "raw" politics as influence "unconnected in any way to the statutory scheme being implemented").

<sup>358</sup> Although executive privilege is not absolute, communications from the President or his close advisors about his positions on executive matters that do not reflect on any executive wrongdoing are likely to be protected from a statute mandating disclosure. *See In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997) (finding that "communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President"); Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690, 692 n.6 (1984) (describing an "internal deliberation" privilege that "presumptively protects presidential conversations and correspondence"); *see also* Farina, *supra* note 97, at 421 (noting that "the George W. Bush Administration routinely refused congressional requests for information relevant to agency and program oversight").

<sup>359</sup> Mendelson, *supra* note 121, at 1163–64.

general statement of . . . basis and purpose”<sup>360</sup>—would help identify whether the President communicated a preference for a particular outcome in a manner and at a time that was likely to affect staff deliberation about the rule.<sup>361</sup>

There is also a problem that, once the President makes a communication that might adversely affect agency deliberation, there is no satisfactory remedy to correct that effect. The cat will be out of the bag once the agency learns of the President’s preferences, and prohibiting the agency from acting in accordance with such preferences might perversely take the most attractive policy alternatives off the regulatory table. Once again, I return to judicial review as a possible bromide for improper presidential influence. Hard look review focuses on those aspects of a rulemaking decision that are based on objective evaluations and the agency reasoning process.<sup>362</sup> As such, it sometimes illuminates technical assumptions, informational assertions, and leaps of logic that the agency cannot support. By doing so, it can catch such problematic reasoning that may result from a desire, whether conscious or not, to reach what the rulemaking team perceives to be the President’s preferred outcome.<sup>363</sup> In fact, if agency staff believes that the rule stands a significant probability of an arbitrary and capricious challenge, it has an incentive to use greater efforts to avoid such problems than it would absent judicial review.<sup>364</sup> Additionally, the agency can use the prospect of judicial reversal to resist political pressures from the White House.<sup>365</sup> Hence, judicial review will deter raw political decisions and biased or sloppy agency analysis, as well as occasionally catch such analysis when it occurs.

The deliberative model’s requirement that judicial review encourage careful and reasoned agency analysis informs the nature of

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<sup>360</sup> 5 U.S.C. § 553(c) (2006).

<sup>361</sup> See Mendelson, *supra* note 121, at 1163–64.

<sup>362</sup> See Seidenfeld, *The Irrelevance of Politics*, *supra* note 43, at 148 (“[H]ard-look review is structured to separate agency value judgments . . . from the empirical predicates that underlie any particular rule, which should be based on objective analysis.”); Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753, 758 (2006) (describing hard look review as “an evaluation of the government’s explanation of the reasoning supporting that decision”).

<sup>363</sup> See Levin, *supra* note 345, at 570 (stating that judicial review can promote political accountability by debunking “insupportable explanations that agencies sometimes advance in order to conceal politically charged value judgments”); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61 (1985) (explaining that hard look review can flush out “impermissible bases for regulatory action”).

<sup>364</sup> See *supra* notes 324–28 and accompanying text.

<sup>365</sup> Cf. Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 889 (2009) (noting that an agency can resist future political influence by adopting legally binding rules).

such review. It highlights that judicial review should not simply affirm a rule solely because it is supported by the President, even if the President gives seemingly public interest-oriented justifications for his support.<sup>366</sup> Politicians can give public interest justifications for virtually any policy they prefer by spinning facts and analyses.<sup>367</sup> Thus, judicial review must focus on the objective reasoning of the agency decision and not substitute statements of support by the President, or any other political actor, for such analysis. It is well understood that courts vary the effort they use and the rigor they apply to hard look review,<sup>368</sup> depending on such factors as the importance of the decision and the judges' evaluation of the trustworthiness of the agency involved to provide careful and unbiased analyses.<sup>369</sup> The deliberative model of administration suggests that courts should increase the rigor with which they evaluate agency analyses when they suspect that the agency deliberations were short-changed or biased. In particular, this would counsel that, contrary to Kathryn Watts' recent proposal advocating that courts apply less rigor when an agency adopts a rule that the President has publicly supported,<sup>370</sup> courts should apply more

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<sup>366</sup> Seidenfeld, *The Irrelevance of Politics*, *supra* note 43, at 197 (“[P]roperly understood, judicial review under the reasoned decision-making standard precludes a court from considering political influence as a basis for an agency rule, but nonetheless allows an agency to consider such influence in rulemaking.”).

<sup>367</sup> GUIDO PINCIONE & FERNANDO R. TESÓN, RATIONAL CHOICE AND DEMOCRATIC DELIBERATION: A THEORY OF DISCOURSE FAILURE 18, 217 (2006) (noting “the incentive of politicians and lobbyists to spread inaccurate views” and of “vote-seeking politicians” to engage in “posturing”).

<sup>368</sup> See Seidenfeld, *The Irrelevance of Politics*, *supra* note 43, at 196–97.

<sup>369</sup> Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583, 596 (2011) (“Empirical studies support the observation that, despite Congress’s deliberate and well-considered decision to subject all agency action that is reviewable under the APA to the same standard of review, the courts continue to apply different standards of review to different agencies.”); see also Bradley C. Canon & Michael Giles, *Recurring Litigants: Federal Agencies Before the Supreme Court*, 25 W. POL. Q. 183, 190 (1972); Donald W. Crowley, *Judicial Review of Administrative Agencies: Does the Type of Agency Matter?*, 40 W. POL. Q. 265, 267 (1987); Roger Handberg, *The Supreme Court and Administrative Agencies: 1965-1978*, 6 J. CONTEMP. L. 161, 167, 173 (1979); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 778 n.86 (2008). Both scholars and judges have recognized that courts apply a different level of deference under arbitrary and capricious review according to the importance of the issues involved. See Richard J. Pierce, Jr., *Paul Verkuil: An Outstanding Scholar in His Spare Time*, 32 CARDOZO L. REV. 2445, 2446 (2011) (remarking on Verkuil’s prescience for predicting, among other things, “that courts would change their method of applying the arbitrary and capricious test to reflect the importance of the issues agencies were addressing in informal rulemakings”); Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 235 (1996) (“[T]here is certainly some merit in the oft-heard complaint that different judges consider different factors significant or important enough to corrode a rationale.”).

<sup>370</sup> Watts, *supra* note 15, at 8.

rigor in those situations where the President has supported or called for the particular rule while the agency staff was still engaged in deliberation.<sup>371</sup>

#### CONCLUSION

The structure and decisionmaking processes of administrative agencies hold great promise for implementing deliberative government. Ultimately, however, agency rulemaking requires value judgments underlying plausible choices of rules that the agency can identify through its deliberative processes. This Article contends that agencies cannot directly register the values held by the polity necessary to inform the ultimate choice between these alternative rules. They must depend on political oversight to justify allowing them to make such ultimate choices. It further contends that, for rulemaking in which the President personally dictates his preference for an outcome at the end of the deliberative process, presidential preference has greater legitimacy than the independent choice of the agency. The Article points out, however, that Presidential influence often occurs before agency deliberation and hence biases the deliberative process. The Article suggests that courts take this bias into account by increasing the rigor of hard look review in the face of presidential expression for a regulatory outcome prior to the agency completing its consideration of a proposed rule.

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<sup>371</sup> Cf. Mark Seidenfeld, *Strategic Interactions Between Administrative Agencies and the White House: A Welcome Look into the Black Box of the Executive Branch*, JOTWELL, (Mar. 6, 2013), <http://adlaw.jotwell.com/strategic-interactions-between-administrative-agencies-and-the-white-house-a-welcome-look-into-the-black-box-of-the-executive-branch/> (suggesting that evidence of failed agency self-insulation from Presidential review might warrant more rigorous hard look review from courts).