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ARTICLES

RELATIONAL FAIRNESS IN THE ADMINISTRATIVE STATE

*Christopher S. Havasy**

The American administrative state suffers from widespread claims of normative illegitimacy because administrative agencies and their personnel are neither enshrined in the Constitution nor directly elected. As a result, Supreme Court Justices and commentators openly question whether agencies should be able to compel citizens to follow agency actions. Normative legitimacy is important to administrative agencies because it explains why people have moral duties to obey agency rules, including rules with which they may disagree, even though agencies lack the traditional hallmarks of democratic governance.

This Article answers the critics head-on by proposing a new theory of normative legitimacy for the administrative state called "relational fairness." Relational fairness states that all persons potentially affected by agency action must have the opportunity to deliberate with the agency during administrative decision-making according to certain

* Climenko Fellow and Lecturer in Law, Harvard Law School. For invaluable comments and discussion, I am grateful to Danielle Allen, Eric Beerbohm, Jacob Bronsther, Dan Carpenter, Cary Coglianese, Mariano-Florentino Cuéllar, Colin Doyle, Ben Eidelson, Greg Elinson, Blake Emerson, Richard Fallon, Tweedy Flanigan, Michael Francus, Owen Gallogly, Jacob Gersen, Jonathan Gould, Alex Gourevitch, Cody Gray, Hedayat Heikal, Michael Klarman, Spencer Livingstone, Josh Macey, Jenny Mansbridge, Martha Minow, Nicholas Parrillo, Francesca Procaccini, Sabeel Rahman, Arjun Ramamurti, Daphna Renan, Noah Rosenblum, Peter Salib, Peter Shane, Cass Sunstein, Susannah Barton Tobin, James Toomey, Richard Tuck, Wendy Wagner, Mark Warren, Sarah Winsberg, Bernardo Zacka, and Carly Zubrzycki. I thank Priya Menon for invaluable research assistance, as well as Regina Zeng, Hannah Genender, Lauren McNerney, and the rest of the Editors at the *Virginia Law Review* for all of their exceptional work.

procedural, relational, and substantive values. In contrast to previous theories that attempted to legitimate agencies by connecting them to other political institutions, relational fairness articulates how the administrative state can attain normative legitimacy in its own right by establishing a new democratic relationship between agencies and citizens.

Although some courts have shown implicit concern for relational fairness, fully adopting the theory would lead to important doctrinal and policy changes to improve the legitimacy of the American administrative state. Relational fairness leads to a deferential form of arbitrariness review that reduces the ability of judges to insert their own ideological ends, reintroduces the importance of regulating agency ex parte communications, and unifies legal rules on valid agency usage of guidance documents. The theory also argues notice-and-comment rulemaking is illegitimate and advocates for alternative informal rulemaking structures to improve the legitimacy of agencies.

INTRODUCTION

Since the New Deal ushered in the contemporary administrative state, lawyers and scholars have attempted to legitimate its place in our democratic government.[1] The task is difficult. Unlike Congress and the

[1] See, e.g., James O. Freedman, Crisis and Legitimacy: The Administrative Process and American Government 6 (1978) (discussing the longstanding crisis of legitimacy surrounding the administrative state); James M. Landis, The Administrative Process 1 (1938) (discussing how the administrative state can improve modern governance); Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2383–84 (2001) (endorsing the trend toward greater presidential control over administrative agencies); Mark Seidenfeld, A Civic Republican

President, agency staff are not elected.[2] Unlike the judiciary, the Constitution does not delineate the structure of agencies.[3] The fact that agencies express power through methods that span the branches makes things even more problematic for their legitimation.[4] Executing laws is the province of the executive, rulemaking looks like legislation, and adjudications mimic the work of the judiciary.[5] These features put the administrative state[6] in an uncomfortable position in our democratic system.[7]

Justification for the Bureaucratic State, 105 Harv. L. Rev. 1511, 1515 (1992) (arguing that civic republican theory provides legitimacy for the administrative state); Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1767, 1802 (1975) (arguing against the ability of the interest representation theory to legitimate the administrative state).

[2] Michael P. Vandenbergh, The Private Life of Public Law, 105 Colum. L. Rev. 2029, 2035 (2005) ("Agencies are neither mentioned in the Constitution nor directly responsive to the electorate, leaving their democratic legitimacy unclear.").

[3] U.S. Const. art. III. The Constitution does mention "[d]epartments" in the Opinions Clause, so the Framers perhaps contemplated the existence of some type of agency. Id. art. II, § 2, cl. 1. However, there is no substantive discussion of the form or structure such institutions should take.

[4] Edward H. Stiglitz, Delegating for Trust, 166 U. Pa. L. Rev. 633, 635 (2018) ("The administrative state is an awkward creature in our constitutional system—in the eyes of many, an unseemly chimera . . . .").

[5] Administrative Procedure Act, 5 U.S.C. §§ 553–554. Some administrative action falls under the Take Care Clause. U.S. Const. art. II, § 3. The constitutional derivation of the independent agency and "mixed" agencies, which perform both rulemaking and adjudication, is more complicated. See Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (holding that the President has limited removal power over agency officials acting in a "quasi-legislative and quasi-judicial" capacity).

[6] "Administrative state" comprises the group of political institutions in government not located in Congress or the Executive Office that therefore have some insulation from these branches. This being said, as Datla and Revesz show, the level of agency independence from the branches is a matter of degree and not a binary variable. Kirti Datla & Richard L. Revesz, Deconstructing Independent Agencies (and Executive Agencies), 98 Cornell L. Rev. 769, 772–73 (2013). "The administrative state" is commonly used to describe the post-New Deal conglomeration of independent and executive agencies and has its origin in nineteenth-century French and German writings on administration ("l'état administratif" and "die verwaltungsstaat," respectively). Mark Rutgers, Beyond Woodrow Wilson: The Identity of the Study of Public Administration in Historical Perspective, 29 Admin. & Soc'y 276, 285–90 (1997); see also Dwight Waldo, The Administrative State (1948) (popularizing the term "the administrative state" to American audiences).

[7] For examples, see infra note 18.

Despite this problem of administrative legitimation, agencies express power to regulate seemingly every aspect of modern life.[8] In 2013, administrative agencies finalized over 2,800 rules.[9] Fifty-one of those rules each had over $100 million in economic effects.[10] Agencies are also responsible for regulating and administrating important programs, such as Medicaid, Medicare, Social Security, and the Veterans Health Administration, that directly affect the lives of millions. Bureaucrats make crucial decisions that govern citizens across the country, including deciding who is eligible for public services and how much of these services they will receive.[11] In short, agencies are the primary site of policymaking in contemporary democratic governance.[12]

Do people who disagree with agency decisions still have moral duties to obey those actions? This is a question of normative legitimacy, which determines whether people have moral obligations to follow agency actions.[13] Normative legitimacy is different from descriptive legitimacy, which describes why people subjectively believe they should follow agency actions.[14] It is also different from legality: whether rules are validly generated through the rule-generating conventions of a polity.[15] Normative legitimacy requires the justification of agency power over citizens and organizations such that these persons have a moral duty to comply with agency actions, even if they disagree with particular agency decisions.[16] Legal commentators have previously proposed multiple theories to legitimate administrative agencies. Although these previous

[8] Cynthia R. Farina et al., Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking, 31 Pace L. Rev. 382, 385 (2011) [hereinafter Farina et al., Rulemaking in 140 Characters].

[9] John M. de Figueiredo & Edward H. Stiglitz, Democratic Rulemaking, *in* 3 The Oxford Handbook of Law and Economics 38 (Francesco Parisi ed., 2017).

[10] Regulatory Information Database, U.S. Gen. Servs. Admin., https://www.reginfo.gov [https://perma.cc/7VVD-2U6Z] (last visited Mar. 12, 2023).

[11] Bernardo Zacka, When the State Meets the Street 9 (2017).

[12] K. Sabeel Rahman, Democracy Against Domination 144 (2016) ("[A]gencies are, in practice, the primary sites of policymaking, giving specificity and concreteness to broad legislative directives.").

[13] Normative legitimacy is also called "moral legitimacy." Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 Harv. L. Rev. 1787, 1794–802 (2005).

[14] Descriptive legitimacy is also called "sociological legitimacy."

[15] Id.

[16] This definition is derived from John Rawls. John Rawls, Political Liberalism 224–26 (expanded ed. 2005) [hereinafter Rawls, Political Liberalism].

theories are intuitively attractive, they all run into well-known problems.[17]

The inability of lawyers and legal scholars to normatively legitimate agencies has led to fierce criticism that agencies conflict with our democratic government;[18] a view that is increasingly gaining traction on the Supreme Court.[19] In his recent majority opinion in *Seila Law LLC v. Consumer Financial Protection Bureau* ruling that the structure of the Consumer Financial Protection Bureau ("CFPB") violated the separation of powers,[20] Chief Justice Roberts wrote that the liberty of the citizenry was threatened by the Bureau's independent director because the CFPB Director could "bring the coercive power of the state to bear on millions of private citizens and businesses."[21] Other Justices have echoed the Chief Justice's concern in multiple recent administrative law cases.[22]

The longstanding inability to legitimate the administrative state has caused sweeping changes to administrative law as scholars and judges

[17] See infra Part II.

[18] See, e.g., Philip Hamburger, Is Administrative Law Unlawful? 355 (2014) ("[C]an the Secretary of the Department of Agriculture legislate? He is not a representative body, let alone the constitutionally established representative body. So how can he be assumed to legislate with consent of the people? And if without their consent . . . how can his commands have any legal obligation?"); R. Shep Melnick, The Transformation of Title IX 251 (2018) (criticizing court-agency "leapfrogging" that incrementally increases agencies' authority without requiring them to accumulate evidence, experience, or public input); Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1231 (1994) (arguing that the post-New Deal administrative state is unconstitutional); see also Gillian E. Metzger, The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 1, 8–33 (2017) (discussing the recent attacks on the administrative state).

[19] See, e.g., Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (stating that the major questions and nondelegation doctrines prevent "government by bureaucracy supplanting government by the people" (quoting Antonin Scalia, A Note on the Benzene Case, 4 Regulation 25, 27 (July/Aug. 1980))); Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 91 (2015) (Thomas, J., concurring) (referring to "an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure"); Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 108 (2015) (Alito, J., concurring in part) (describing a U.S. Court of Appeals for the D.C. Circuit procedural innovation as "prompted by an understandable concern about the aggrandizement of the power of administrative agencies"); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010) ("The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people.").

[20] 140 S. Ct. 2183, 2207 (2020).

[21] Id. at 2200.

[22] See supra note 19.

have searched for a theory to justify and structure agency policymaking.[23] The accumulation of these doctrinal changes over time has caused multiple areas of administrative law, including arbitrariness review and agency use of the Administrative Procedure Act's ("APA") exceptions to notice-and-comment rulemaking, to lack coherent organizing principles.[24] At worst, these doctrinal shifts have led to persistent circuit splits and left courts confused when attempting to determine the governing rules for the cases before them.[25]

While supporters of contemporary administrative governance have recently defended it on legal and policy grounds,[26] they have largely not addressed critics' attacks on the normative legitimacy of the administrative state.[27] The theoretical task is so daunting that some

[23] See Lisa Schultz Bressman, Procedures as Politics in Administrative Law, 107 Colum. L. Rev. 1749, 1758–66 (2007) (discussing shifts in administrative law doctrine as courts have shifted their operating theories of administrative legitimacy over the twentieth century).

[24] See Ronald M. Levin, Rulemaking and the Guidance Exemption, 70 Admin. L. Rev. 263, 268 (2018) ("[C]ourts have not developed a coherent theory as to what an interpretive rule *is*."); Sidney A. Shapiro & Richard E. Levy, Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions, 44 Duke L.J. 1051, 1065–66 (1995) ("[T]he arbitrary and capricious standard is relatively open-ended, and the Supreme Court has not given it more precise content."); Louis J. Virelli III, Deconstructing Arbitrary and Capricious Review, 92 N.C. L. Rev. 721, 750, 751 n.116 (2014) (noting "the apparent difficulty experienced by the Court in articulating a consistent, coherent framework for explaining its reasoning" during hard look review).

[25] See infra Subsection IV.A.2.ii (discussing persistent circuit splits and courts failing to provide a rule in cases regarding whether agencies correctly utilized APA exceptions to notice-and-comment).

[26] See Metzger, supra note 18, at 7 (arguing that the administrative state promotes good government and constrains executive power); Adrian Vermeule, Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State, 130 Harv. L. Rev. 2463, 2487–88 (2017) (endorsing a "pluralist" approach to legitimizing the administrative state and criticizing various "independence" theories); Cass R. Sunstein & Adrian Vermeule, The New Coke: On the Plural Aims of Administrative Law, 2015 Sup. Ct. Rev. 41, 44 (claiming that the administrative state provides benefits like government efficiency, coordinated policymaking, and energetic execution of the laws).

[27] See Blake Emerson, Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory, 73 Hastings L.J. 371, 375 (2022) [hereinafter Emerson, Liberty and Democracy Through the Administrative State] ("The Court's most vocal defenders of the administrative state, Justice Kagan and Justice Breyer, tend to wave away the conservatives' high-altitude critique of the regulatory state."); see also Vermeule, supra note 26, at 2463 (focusing on the descriptive legitimacy of the administrative state); Cass R. Sunstein & Adrian Vermeule, Law and Leviathan: Redeeming the Administrative State 3 n.5 (2020) (focusing on the legal legitimacy of the administrative state). But see Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy 165–75 (2019) [hereinafter Emerson, The Public's Law] (arguing for a democratization of agency policymaking partly on legitimacy grounds).

supporters of administrative governance argue that we should give up looking for a theory of normative administrative legitimacy.[28]

This concession is a mistake. The Chief Justice in *Seila Law* is correct to worry about the power of administrative agencies because they exert vast powers over citizens and organizations in our society.[29] Administrative power must be legitimated on normative grounds in democratic governance. The question is whether supporters of administrative governance can rise to this challenge to answer the Justices' concerns. This Article addresses the concerns of the Chief Justice and recent critics head-on to generate a theory of administrative legitimacy that gives the administrative state a proper place in our democratic government.

Most previous theories of administrative legitimacy attempted to legitimate agencies through a "derivative" method of legitimacy, linking agencies to other institutions, such as Congress, the president, or courts.[30] While intuitively appealing, legitimating agencies through other institutions runs into problems due to the distinctive structure and function of agencies.[31] Instead, this Article develops a "direct" theory of legitimacy that legitimates the administrative state on its own terms. Interestingly, one intuition underlying previous derivative theories is the belief that linking agencies to other institutions can indirectly connect agencies to citizens. Therefore, a promising route to directly legitimate agencies is to cut out the middle institution and focus on the structure of the actual relationship between agencies and citizens.

[28] See Jessica Bulman-Pozen, Administrative States: Beyond Presidential Administration, 98 Tex. L. Rev. 265, 271–72 (2019) (forgoing federal administrative legitimacy and looking to state administrative institutions for legitimacy); Cynthia R. Farina, The Consent of the Governed: Against Simple Rules for a Complex World, 72 Chi.-Kent L. Rev. 987, 989 (1997) (arguing there is no unified theory of democratic legitimation of the administrative state); Mark Seidenfeld, The Quixotic Quest for a "Unified" Theory of the Administrative State, *in* Issues in Legal Scholarship, 2005, at 15 (same); Gerald E. Frug, The Ideology of Bureaucracy in American Law, 97 Harv. L. Rev. 1276, 1381 (1984) (same).

[29] Camilla Stivers, Governance in Dark Times: Practical Philosophy for Public Service 10–11 (2008).

[30] See Richard H. Pildes, Romanticizing Democracy, Political Fragmentation, and the Decline of American Government, 124 Yale L.J. 804, 811 (2014) (arguing that administrative law has been dominated by concerns about democratic control of agencies by Congress or the President); Peter L. Strauss, Legislation That Isn't—Attending to Rulemaking's "Democracy Deficit", 98 Calif. L. Rev. 1351, 1357 (2010) (arguing that agency discretion is legitimated by judicial review).

[31] See infra Section II.E.

Surprisingly, lawyers and scholars have spent little time theoretically analyzing the direct relationships between agencies and persons when theorizing about the legitimacy of the administrative state.[32] This being said, recent empirical work has highlighted the role that deeply embedded relationships between agency officials and persons serve to substantiate important administrative values, such as agency effectiveness and democratic accountability, in practice.[33] The importance of the relationships between agencies and persons to our administrative state demands proper theorization.

This Article develops the theory of relational fairness to normatively legitimate administrative governance as part of our democratic government. Relational fairness states that all persons potentially affected by an agency action must have the opportunity to deliberate with the agency during administrative decision-making.[34] The theory reveals that agencies stand in different normative relationships with persons based on whether a person is potentially affected by a prospective agency action. Relational fairness articulates how the administrative state itself should be structured to attain normative legitimacy based on its own relationships with members of civil society, rather than derivatively through its connections to other institutions.

Relational fairness contains three components: procedural values, relational values, and substantive safeguards. The theory begins with familiar procedural values to structure agency deliberation with affected parties as open, voluntary, equal in access, and ongoing. It continues with substantive safeguards that limit the potential results of agency deliberations according to certain constitutional and deliberative requirements. However, relational fairness departs from existing theories by shaping the interpersonal relations between agencies and affected persons on the grounds of equal status, respect, and good faith. Practically, including relational values in the theory allows relational fairness to address persistent political inequalities between persons in

[32] Richard Stewart's interest representation and Mark Seidenfeld's civic republicanism are two notable exceptions. See infra Section II.D (critiquing civic republicanism); see infra Subsection III.A.1 (critiquing interest group representation). More recently, a few scholars, such as Blake Emerson, Sabeel Rahman, and Dan Walters, have also focused their analysis on agency structure and process. See infra Section III.D (discussing these recent theories).

[33] See Anya Bernstein & Cristina Rodríguez, The Accountable Bureaucrat, 132 Yale L.J. 1600, 1607–09 (2023); Nicholas R. Parrillo, Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries, 36 Yale J. on Regul. 165, 191–200 (2019).

[34] See infra Section III.C.

administrative policymaking that procedural and substantive reforms alone cannot solve.[35]

Although some courts have implicitly embraced relational fairness, fully adopting the theory would lead to important doctrinal and policy changes to improve the legitimacy of the American administrative state.[36] Importantly, relational fairness organizes the various parts of arbitrariness review based on whether a regulation is "arbitrary and capricious" from the perspective of affected persons. Surprisingly, focusing on the perspective of affected persons provides both justification and content for a deferential form of arbitrariness review that leaves less room for judges to insert their own ideological beliefs during judicial review.[37]

Relational fairness also demonstrates that the growing movement to improve administrative governance through a focus on internal administrative law has been hitherto blind to the profound effect that internal agency rules can have on the relationship between agencies and affected parties.[38] The doctrines of ex parte communications and the APA exceptions to informal rulemaking demonstrate this tension between relational fairness and internal administrative law. Instead of recent calls to enhance agency power in these areas, relational fairness advocates that Congress should require agency disclosure of ex parte communications to all affected parties and that federal courts should adopt a unified legal test to review whether agencies validly used an APA exception to notice-and-comment based on whether the agency action in question binds potentially affected parties.

Relational fairness reconceptualizes the value of public participation in administrative law.[39] The theory argues that members of civil society stand in distinct normative relationships with agencies, which should inform how we structure public participation during agency policymaking. When we view participation in this light, notice-and-comment rulemaking appears deficient on legitimacy grounds because of the political inequalities it generates for marginalized and geographically dispersed affected persons.[40] Some congressional and agency reforms to notice-and-comment, such as negotiated rulemaking, serve as helpful

[35] See infra Subsection III.C.3.
[36] See infra Part IV.
[37] See infra Subsection IV.A.1.
[38] See infra Subsection IV.A.2.
[39] See infra Subsection IV.B.1.
[40] See infra Subsection IV.B.1.

guides to improve informal rulemaking, while others, such as most e-rulemaking efforts, fail to eliminate the problems in notice-and-comment.[41]

Relational fairness resolves multiple problems endemic to administrative law. These problems include the ability of agencies to generate moral obligations on citizens to follow agency rules, the tension between democracy and administration, and the mood of agency distrust that permeates administrative law.[42] Relational fairness responds to Chief Justice Roberts and others concerned with agency power over citizens by showing how to properly structure the direct relationship between agencies and the persons they govern to legitimate agency power to govern. By normatively legitimating the administrative state, relational fairness allows agencies to take their place as part of our democratic government.

This Article unfolds as follows. Part I demonstrates the legal importance of normatively legitimating the administrative state and begins to construct a theory of administrative legitimacy. Part II contends that although previously proposed theories of administrative legitimacy are intuitively appealing, they each run into problems. Instead of seeking a pluralistic account of legitimacy that combines these theories, this Part identifies their underlying similarities to shape an alternative theory based on the direct relationship between agencies and persons. Part III creates the theory of relational fairness, which legitimates the administrative state from the bottom up by properly structuring the direct relationship between agencies and citizens based on the distinctive institutional features of agencies. Importantly, relational fairness can legitimate agencies as part of our democratic government once we embrace a conception of democratic participation that moves beyond merely viewing elections as sufficient for democratic governance.

Part IV discusses how some courts have already implicitly embraced relational fairness and demonstrates how to fully implement the theory in order to improve the legitimacy of the American administrative state. This Part explains how relational fairness should guide reform in multiple areas of administrative law, including arbitrariness review, ex parte communications, and the APA exceptions to informal rulemaking. It also argues that notice-and-comment rulemaking is deficient on legitimacy

[41] See infra Subsections IV.B.2, IV.B.3.
[42] See infra Section I.B.

grounds and proposes potential reforms to improve the legitimacy of informal rulemaking. Part V rebuts three criticisms to applying relational fairness: inefficiency, regulatory capture, and the implementation of the theory.

I. THE CONCEPT OF LEGITIMACY AND ITS IMPORTANCE TO THE ADMINISTRATIVE STATE

While legitimacy appears like solely a theoretical concern at first blush, the problem of legitimating agency actions has widespread effects across administrative law. The first Section of this Part explains the importance of normatively legitimating the administrative state by discussing how a successful theory of normative administrative legitimacy solves multiple problems that are pervasive in administrative law. The second Section begins to shape the theory of normative legitimacy that will be used in this Article by discussing the main theoretical debates of the concept.

A. The Importance of Legitimating the Administrative State

It is important to first crystallize the practical stakes that are involved in legitimating the administrative state. Legitimating the administrative state solves four daunting problems in administrative law and policy: (i) how agencies can generate moral obligations on citizens, (ii) the tension between democracy and administrative governance, (iii) lawyers and judges relying on external political institutions to soothe our anxieties about administrative power, and (iv) the distrust of agencies that permeates administrative law.[43]

A legitimate administrative state holds a right to rule over citizens to compel obedience from them.[44] This means that even citizens who disagree with a particular agency decision still have a moral duty to obey that decision.[45] This duty to obey holds even if the rule is, to a degree,

[43] This Article uses the terms "legitimacy" and "administrative legitimacy" to refer to "normative political legitimacy" unless otherwise indicated.

[44] John Locke, Two Treatises of Government 325, 329–30 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); Rawls, Political Liberalism, supra note 16, at 224–26; Joseph Raz, The Morality of Freedom 77 (1986).

[45] John Rawls, Collected Papers 578 (Samuel Freeman ed., 1999) ("[Legitimate law] may not be thought the most reasonable, or the most appropriate, by each, but it is politically (morally) binding on him or her as a citizen and is to be accepted as such.").

unjust.[46] Legal critics of the administrative state frequently question the ability of agencies to generate binding moral obligations on citizens.[47]

Normative legitimacy solves the problem of ethical pluralism, or citizens believing competing religious, ethical, and political beliefs that claim to be true.[48] Legitimate agencies generate duties for all citizens to obey rules regardless of these different beliefs. No other normative value can generate general and stable moral obligations on citizens to obey rules in a state with ethical pluralism. Normative legitimacy is particularly important at times when ethical pluralism leads to high political polarization so that citizens continue to feel a moral duty to obey laws about which they have strong and persistent disagreements with their fellow citizens.

Agencies have two alternative methods to compel obedience without normative legitimacy: descriptive legitimacy and coercion. However, each is problematic. Without normative legitimacy, any explanation of why citizens should obey a rule must be grounded in the specific agency action at a specific time. This situation is not stable. Descriptive legitimacy is subjectively expressed by citizens on their own terms, meaning the legitimacy of an institution is never secure.[49] A descriptively legitimate institution at Time *1* may become descriptively illegitimate at Time *2* solely due to changes in citizens' beliefs. Over the past few years, we have seen how quickly a political institution can lose descriptive legitimacy, as trust in the judiciary has dropped from sixty-seven percent to forty-seven percent over the past two years[50] and proposals to disobey Supreme Court decisions are being discussed again.[51] Even worse,

[46] Rawls, Political Liberalism, supra note 16, at 428 ("Legitimacy allows an undetermined range of injustice that justice might not permit.").

[47] See Hamburger, supra note 18, at 355.

[48] See Joshua Cohen, Philosophy, Politics, and Democracy: Selected Essays 43–44 (2009); see also Rawls, Political Liberalism, supra note 16, at xvi–xvii (defining the problem of ethical pluralism); Jeremy Waldron, Law and Disagreement 1–2 (1999) (tracing effects of the problem of ethical pluralism in political philosophy).

[49] See Stiglitz, supra note 4, at 680–82 (arguing that declining trust in the administrative state is fueling the legitimacy crisis over its role in government).

[50] Jeffrey M. Jones, Supreme Court Trust, Job Approval at Historical Lows, Gallup (Sept. 29, 2022), https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx [https://perma.cc/U4JR-XZAS].

[51] See, e.g., Jeannie Suk Gersen, The Conservative Who Wants to Bring Down the Supreme Court, New Yorker (Jan. 5, 2023), https://www.newyorker.com/news/annals-of-inquiry/the-conservative-who-wants-to-bring-down-the-supreme-court [https://perma.cc/L3NM-WWR6]; Ian Millhiser, 10 Ways to Fix a Broken Supreme Court, Vox (July 2, 2022),

compelling obedience through coercion places the government into a precarious Hobbesian position where it only rules through coercion. Theoretically, normative legitimacy can ameliorate these problems by creating a general and stable moral duty for citizens to obey agency action.

Judges and scholars often note that administrative governance appears in tension with democratic governance.[52] The lack of elections means there is no direct "electoral connection" between administrators and the citizenry.[53] This problem is compounded because agencies have significant policymaking authority and operate with discretion from other political institutions.[54] The result is that unelected agency officials make rules while insulated from democratic institutions.

The legitimation of the administrative state solves this tension between administration and democracy.[55] Normative legitimacy justifies agencies such that administrative governance is compatible with democratic rule. More ambitiously, if the administrative state can be democratically legitimated, as opposed to merely politically legitimated within a democratic state, then agencies can become part of democratic rule.[56]

This tension between administration and democracy has resulted in commentators anxiously tying agencies to other political institutions. As two legal scholars put it, "administrative law scholars treat agencies as a black box to be controlled from the outside."[57] Some maintain that

https://www.vox.com/23186373/supreme-court-packing-roe-wade-voting-rights-jurisdiction-stripping [https://perma.cc/LH7T-E89H]; David L. Sloss, The Right of State Governments to Defy the Supreme Court, Markkula Ctr. for Applied Ethics (Jul. 6, 2022), https://www.scu.edu/ethics-spotlight/the-ethics-of-guns/the-right-of-state-governments-to-defy-the-supreme-court/ [https://perma.cc/K3MK-9WA7].

[52] Chamber of Com. v. Occupational Safety & Health Admin., 636 F.2d 464, 470 (D.C. Cir. 1980) ("[H]ighhanded agency rulemaking is . . . offensive to our basic notions of democratic government."); Jud Mathews, Minimally Democratic Administrative Law, 68 Admin. L. Rev. 605, 606 (2016) ("The administrative state seems to have a democracy problem.").

[53] Mathews, supra note 52, at 606.

[54] See Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 Tex. L. Rev. 15, 26–41 (2010) (describing several features that insulate independent agencies from other political institutions); Adrian Vermeule, Conventions of Agency Independence, 113 Colum. L. Rev. 1163, 1166 (2013) (discussing how conventions protect agency independence and discretion).

[55] Henry S. Richardson, Democratic Autonomy: Public Reasoning About the Ends of Policy 7 (2002).

[56] See infra Sections III.C–D (arguing that relational fairness satisfies political and democratic legitimacy).

[57] Sidney A. Shapiro & Ronald F. Wright, The Future of the Administrative Presidency: Turning Administrative Law Inside-Out, 65 U. Mia. L. Rev. 577, 580 (2011).

judicial oversight ensures legitimacy,[58] whereas others connect agencies to Congress[59] or the President.[60]

While it is intuitively appealing to tie agencies to other institutions, the next Part argues that these theories run into problems.[61] These theories also risk transmuting the distinctive structure of agencies to eliminate their benefits.[62] As the Supreme Court has repeatedly recognized, despite its criticism of administrative governance, agency discretion is both inevitable and desired in our government.[63] The legitimation of the administrative state on its own terms will allow for the legal community to finally view administrative agencies as part of our democratic government.

Finally, there has been a general distrust of agencies in administrative law over the past century.[64] This attitude is often expressed by administrative critics,[65] but it also permeates the writing of its supporters.[66] As Nicholas Bagley notes, "[a] tacit presumption of agency distrust has all but displaced the presumption" that agencies dutifully

[58] Saylor v. Dep't of Agric., 723 F.2d 581, 582 (7th Cir. 1983); Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 1 (1983); Strauss, supra note 30, at 1357.

[59] See infra Section II.A.

[60] See infra Section II.C.

[61] See infra Part II.

[62] See Matthew C. Stephenson, Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies, 91 Va. L. Rev. 93, 126–43 (2005) (describing the benefits of the delegation of power to agencies).

[63] Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[I]n our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives."); Gundy v. United States, 139 S. Ct. 2116, 2130 (2019); Morton v. Ruiz, 415 U.S. 199, 231 (1974).

[64] See Daniel R. Ernst, Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940, at 5, 145–46 (2014) (noting distrust of the administrative state under the Franklin Delano Roosevelt Administration and the Obama Administration); see also President's Comm. on Admin. Mgmt., Administrative Management in the Government of the United States 30 (1937) (describing the executive agencies as a "headless 'fourth branch' of the Government").

[65] See supra note 18.

[66] See Nicholas Bagley, Remedial Restraint in Administrative Law, 117 Colum. L. Rev. 253, 312 (2017) ("[A] central tenet of American administrative law [is] that agencies cannot be trusted to responsibly wield their vast discretionary powers . . . ."); Joshua Ulan Galperin, The Life of Administrative Democracy, 108 Geo. L.J. 1213, 1216 (2020) (discussing the popular view that bureaucrats being "unelected and therefore unaccountable" is a "consistent feature of bureaucracy"); Stiglitz, supra note 4, at 638 ("Even those who defend the administrative state tend to view it as a distinct second-best, a necessary concession to the complex demands that our society places on government.").

administer their powers.[67] Most concerning, this distrust also increasingly permeates Supreme Court cases in administrative law.[68]

Legitimating administrative agencies reduces this distrust of agencies in administrative law. Once the legitimacy crisis is resolved, lawyers have less reason to be generally fearful of agencies in our democratic government. Instead, we can turn our attention to more productive questions, such as optimizing institutional design to instill the values that we deem important to administrative governance.

B. The Concept of Legitimacy

1. Descriptive, Normative, and Legal Legitimacy

Legitimacy has multiple different uses in academic and legal literatures. Descriptive legitimacy asks what people's subjective beliefs about political authority are.[69] It answers the questions of how a state can be seen as justified by the citizenry and how a state can impose political obligations on citizens that they will follow.[70] A state is descriptively legitimate when its citizens have certain subjective beliefs towards the state that compel them to obey the rules of the state.

Normative legitimacy explains if a state is objectively morally legitimate, or, in other words, how the state's use of its power on its citizens is justified. If a state has normative legitimacy, then it holds the "right to rule" to morally exercise its political authority, which imposes obligations on citizens to follow commands by the state.[71] The moral obligation on citizens to obey a legitimate state can hold regardless of the actual subjective beliefs of the citizenry. Therefore, it is possible for a state to hold normative legitimacy but not descriptive legitimacy, and vice versa.

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[67] Bagley, supra note 66, at 261.

[68] See supra notes 19–20.

[69] See Fallon, supra note 13, at 1795–96; see also David Beetham, Legitimacy, *in* 5 Routledge Encyclopedia of Philosophy 538–41 (Edward Craig ed., 1998) (describing different theories of legitimacy).

[70] Max Weber, The Theory of Social and Economic Organization 382 (Talcott Parsons ed., 1964).

[71] Richard E. Flathman, Legitimacy, *in* A Companion to Contemporary Political Philosophy 527 (Robert E. Goodin & Philip Pettit eds., 1993); Rawls, Political Liberalism, supra note 16, at 224–26. This definition is debated in the philosophical literature. For example, Dworkin held the narrower view that political legitimacy cannot impart moral obligations to citizens to obey commands. Ronald Dworkin, Law's Empire 190–91 (1986).

Legal scholars and judges also discuss legal legitimacy as a form of legitimacy.[72] Although legality is likely a component of normative legitimacy, it is not itself sufficient for normative legitimacy.[73] This is because there may be something normatively infirm about the process used to generate a valid law, such as excluding certain citizens from decision-making, or normatively infirm about the substance of a law, such as a law that discriminated against a group of persons in low-income housing based upon animus.

2. Potential Sources of Normative Legitimacy

There are two main potential sources for normative legitimacy.[74] The first source is actual consent. Early consent theories argued that the consent of those governed by the state was necessary for the state to legitimately express political power.[75] Some contemporary scholars argue only actual consent by citizens is morally sufficient for the state to override the presumption of individual liberty and impose obligations on citizens.[76] As will be discussed below, actual consent is an unappealing source of administrative legitimacy.[77]

Instead, this Article adopts a modified version of public reason to legitimate the administrative state. Public reason hinges the justifiability of political rules on those persons who will be affected by those rules.[78] Early public reason theorists grounded legitimacy in the hypothetical

[72] Fallon, supra note 13, at 1794–95; Sunstein & Vermeule, supra note 27, at 3 n.5.

[73] See Fallon, supra note 13, at 1803–13 (discussing the relationship between the legal and moral legitimacy of the Constitution).

[74] The absence of utilitarianism might be surprising. See generally John Stuart Mill, On Liberty, *in* On Liberty and Other Writings 1 (Stefan Collini ed., Cambridge Univ. Press 1989) (explaining his utilitarian theory of governance). Pure utility as a basis of legitimacy suffers from two problems. First, utility allows for the violation of rights and liberties that would be unacceptable to democratic states. Second, utility provides no stable moral motivation for those who lose on the utility calculus to abide by those decisions. See John Rawls, A Theory of Justice 175 (1971).

[75] Locke, supra note 44, at 324–25; see also Joseph Raz, Ethics in the Public Domain: Essays in the Morality of Law and Politics 356 (1994) (discussing different forms of consent theory).

[76] A. John Simmons, Justification and Legitimacy, 109 Ethics 739, 752 (1999); see also Robert Nozick, Anarchy, State, and Utopia, at ix (1974) (exploring potential moral constraints of the state in imposing obligations on citizens).

[77] See infra Subsection III.A.3.

[78] There is an ancillary debate concerning the universality of reasons within a process of justification. See Robert Justin Lipkin, Liberalism and the Possibility of Multicultural Constitutionalism: The Distinction Between Deliberative and Dedicated Cultures, 29 U. Rich. L. Rev. 1263, 1273–77 (1995).

social contract created during the formation of the state through a model of public reason.[79] In the contemporary form, a legitimate state is one that could be mutually acceptable to all citizens as reasonable based on our shared rationality.[80] On this account, normative legitimacy is achieved through the ability of citizens to hypothetically endorse the structure of the state.

3. Normative Legitimacy and Democracy

The final question is whether democracy is necessary for normative legitimacy. Theorists embrace three positions: democratic instrumentalism, pure proceduralism, or rational proceduralism. Democratic instrumentalists argue that beneficial outcomes of governmental structure determine legitimacy.[81] For instrumentalists, democracy is only required if it leads to better outcomes than other structures. The problems for democratic instrumentalists are to determine how to calculate better outcomes and to justify why those outcomes could potentially allow for diminishing rights that are associated with legitimate governance.

Pure proceduralists argue that state actions are legitimate if they result from proper democratic processes. Deliberative versions of pure proceduralism posit that legitimacy hinges on the deliberative process taking a certain form, rather than on the policymaking outcomes.[82] The difficulties for the deliberative pure proceduralist include an inability to describe the form of deliberative procedure that is legitimate, explain how

[79] Immanuel Kant, On the Proverb: That May Be True in Theory, but Is of No Practical Use, *in* Perpetual Peace and Other Essays 61, 77–78 (Ted Humphrey trans., Hackett Pub. Co. 1983) (1793).

[80] Id. at 79; see also John Rawls, Justice as Fairness: A Restatement 41 (Erin Kelly ed., 2001) (further explaining modern notions of public reasoning in the legitimacy of the state).

[81] See generally Richard Arneson, Defending the Purely Instrumental Account of Democratic Legitimacy, 11 J. Pol. Phil. 122, 122 (2003) ("[W]hat renders the democratic form of government for a nation morally legitimate (when it is) is that its operation over time produces better consequences for people than any feasible alternative mode of governance."); Steven Wall, Democracy and Equality, 57 Phil. Q. 416, 417 (2007) (critiquing an egalitarian theory of democracy from a democratic instrumentalist perspective).

[82] See generally James Bohman, Public Deliberation: Pluralism, Complexity, and Democracy 2 (1996) (arguing that better deliberative processes will lead to a stronger political order); Bernard Manin, On Legitimacy and Political Deliberation, 15 Pol. Theory 338, 351–52 (Elly Stein & Jane Mansbridge trans., 1987) (arguing that democratic legitimacy is generated through the process of individual will formation during political deliberation).

deliberative procedures can resolve specific political disputes, and justify situations where deliberation leads to immoral outcomes.

Instead, this Article adopts a form of rational proceduralism,[83] which improves upon pure proceduralism by requiring that the procedural outcome must meet some minimum standard of rationality to be legitimate. As John Rawls argues, "[o]ur exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions—were we to state them as government officials—are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons."[84] The questions for the rational proceduralist, which will be addressed below, are what the procedure-independent standard should be and how it interacts with the embraced procedure.[85]

II. PREVIOUS THEORIES OF ADMINISTRATIVE LEGITIMACY

Commentators have previously proposed four main theories of administrative legitimacy: delegation, expertise, presidential administration, and civic republicanism.[86] Although these theories are intuitively appealing, they each run into problems. However, underlying these theories is a concern about structuring institutions to indirectly link agencies to citizens, thereby establishing a derivative form of administrative legitimacy. Instead of trying to build a pluralistic theory of derivative legitimacy that combines these theories, as some have proposed,[87] we should first determine whether it is possible to directly

[83] See generally Amy Gutmann & Dennis Thompson, Democracy and Disagreement (1996) (proposing a theory of democratic legitimacy focused on properly structuring political deliberation, whereby the potential outcomes of that deliberation are substantively limited); Jürgen Habermas, Between Facts and Norms (William Rehg trans., 1996) (same); Rawls, Political Liberalism, supra note 16 (same).

[84] John Rawls, The Idea of Public Reason Revisited, 64 U. Chi. L. Rev. 765, 771 (1997). See also Habermas, supra note 83, at 304 (stating the deliberative process derives its legitimacy from citizen expectations of its results being reasonable).

[85] See infra Subsection III.C.2.

[86] One might be surprised to not see the interest representation theory. Stewart, supra note 1, at 1723. However, Stewart did not provide a normative theory of interest representation and he himself was critical of the descriptive interest representation theory that he argued the federal courts developed during the early 1970s. Id. at 1802. There are problems with Stewart's articulation of interest representation that make it inapplicable to the contemporary administrative state. See infra note 174.

[87] See infra Section II.E.

legitimate the administrative state by properly structuring the relationship between agencies and citizens.

A. Delegation

The theory that administrative governance can be legitimated because another political institution delegated powers to an agency is likely the oldest modern theory of administrative legitimacy.[88] Many progressives also adopted delegation theory when they began building administrative institutions to control industrialization in America.[89] Contemporary delegation theory argues a delegation of authority from Congress to an agency legitimates subsequent agency action.[90] If Congress has the power to legislate, then it is the natural progression of this power that Congress may delegate policymaking to other institutions, including agencies.[91]

Delegation is appealing as a theory of legitimacy because it uses the constitutional foundation of legislative power to indirectly tie agencies to the citizenry through Congress. However, delegation runs into complications. Delegation is grounded in the constitutionally permissible transfer of power from Congress to agencies. However, this transfer does not say anything about agency structure, nor does it necessarily contain procedural or substantive content for agency action.[92] Therefore, the act of delegation itself gives few normative reasons why subsequent agency actions are legitimate beyond legality.[93] This situation is difficult to justify given that agencies can deviate from legislative preferences.[94]

[88] See Thomas Hobbes, Leviathan 166–67 (Richard Tuck ed., Cambridge Univ. Press Rev. Student Ed. 1996) (1651); Locke, supra note 44, at 369.

[89] See Frank J. Goodnow, The Principles of the Administrative Law of the United States 325–26 (1905); Robert L. Rabin, Administrative Law in Transition: A Discipline in Search of an Organizing Principle, 72 Nw. U. L. Rev. 120, 124 (1977).

[90] See Jack M. Beermann, The Turn Toward Congress in Administrative Law, 89 B.U. L. Rev. 727, 731 (2009) (arguing that congressional will determines administrative legitimacy).

[91] Stewart, supra note 1, at 1672–76; J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409–10 (1928).

[92] Congress could attach conditions on a delegation to improve its legitimacy, but it would be the conditions providing the normativity rather than the act of delegation. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 532–34 (1935) (reading the constitutionality of the Federal Trade Commission Act favorably compared to the National Industry Recovery Act because the former provided the opportunity for notice and hearings, among other procedural requirements).

[93] See supra Subsection I.B.1.

[94] See de Figueiredo & Stiglitz, supra note 9, at 49–51 (discussing how congressional control of administration is weak); Connor Raso, Agency Avoidance of Rulemaking

The delegation proponent might respond that active congressional oversight could legitimate administrative actions. However, this runs into problems. First, delegation has trouble legitimating administrative discretion without a theory of collective legislative will to judge whether subsequent agency acts are in line with congressional preferences. Second, excessive congressional oversight raises separation of powers concerns.[95] Third, the normative desirability of Congress attempting to perfectly oversee administrative governance is questionable given the comparative expertise between Congress and agencies.[96] The result is that agencies will reach policy outcomes to govern citizens with questionable connection to congressional preferences.[97] Although delegation may legitimate the initial transfer of policymaking power from Congress to agencies, the theory runs into problems to legitimate subsequent agency actions.

B. Expertise

Expertise has been a popular theory of administrative legitimacy since the nineteenth century.[98] New Dealers also adopted expertise theory in the 1930s,[99] and it became dominant in the post-war period.[100] From *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense*

Procedures, 67 Admin. L. Rev. 65, 119–25 (2015) (discussing how agencies avoid legislative preferences).

[95] See, e.g., Bowsher v. Synar, 478 U.S. 714, 722 (1986) (establishing that "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts"); Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) (establishing that the legislative power is checked via the constitutionally set bicameralism and presentment requirements).

[96] See Stephenson, supra note 62, at 127.

[97] See Gillian E. Metzger, Agencies, Polarization, and the States, 115 Colum. L. Rev. 1739, 1748 (2015) (highlighting that agencies will deviate from congressional preferences in times of political polarization); Charles R. Shipan, Regulatory Regimes, Agency Actions, and the Conditional Nature of Congressional Influence, 98 Am. Poli. Sci. Rev. 467, 478 (2004) (demonstrating the situations in which the FDA acts autonomously from congressional influence).

[98] See, e.g., Elizabeth Fisher & Sidney A. Shapiro, Administrative Competence: Reimagining Administrative Law 280–81 (2020); John Stuart Mill, Considerations on Representative Government 266 (Gateway Editions 1962) (1861); Evan J. Criddle, Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking, 88 Tex. L. Rev. 441, 449 (2010); Edward Rubin, It's Time to Make the Administrative Procedure Act Administrative, 89 Cornell L. Rev. 95, 157–62 (2003).

[99] Landis, supra note 1, at 23–24; Freedman, supra note 1, at 44–46.

[100] See Robert B. Reich, Public Administration and Public Deliberation: An Interpretive Essay, 94 Yale L.J. 1617, 1618–19 (1985).

Council, Inc.[101] and *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance Co.*[102] to *Chevron U.S.A., Inc. v. Natural Resources Defense Council*[103] and *Barnhart v. Walton*,[104] the Supreme Court has continually adopted expertise-based reasons in the second half of the twentieth century to justify the expansion of agency powers across multiple areas of administrative law.

Expertise theory is appealing because it argues agencies are institutionally distinct with separate policy goals than other political institutions.[105] This recognition allows expertise to accept that agencies may deviate from legislative preferences on epistemic grounds.[106] Expertise therefore appeals to technical authority to justify agency actions based on the skills of agency staff.[107] However, an appeal to technical authority can legitimate only if there is some quality about the authority that gives it normativity. Expertise could be merged with an underlying normative theory, such as welfarism, to legitimate agency actions on the resulting beneficial outcomes.[108] However, the combination of expertise and welfarism is likely to be unstable and controversial in a democratic society.[109]

More fundamentally, the fit between expertise theory and democracy is difficult. The combination of expertise theory and agency discretion means agency outcomes appear disconnected from electoral democracy. It can give no account as to why the citizen should follow agency commands outside of paternalism regarding the best interests of the citizen. Therefore, expertise theory cannot justify agency policymaking

[101] 435 U.S. 519, 524–25 (1978).

[102] 463 U.S. 29, 53 (1983) (explaining that an agency's determination regarding the use of technical information during agency rulemaking, such as the generalizability of studies, should not be questioned by courts as it falls within the agency's realm of expertise).

[103] 467 U.S. 837, 865–66 (1984).

[104] 535 U.S. 212, 222 (2002).

[105] See Landis, supra note 1, at 142–43.

[106] Seidenfeld, supra note 1, at 1519–20.

[107] Landis, supra note 1, at 70.

[108] Adrian Vermeule and Cass Sunstein adopt similar theories. See Cass R. Sunstein, The Cost-Benefit Revolution 23, 63 (2018); Adrian Vermeule, Optimal Abuse of Power, 109 Nw. U. L. Rev. 673, 693 (2015).

[109] Combining expertise and welfarism is based on two assumptions: agencies must be exclusive in providing these benefits compared to democratic institutions and agencies must produce these benefits because of their institutional uniqueness relative to democratic institutions. This is unstable because agencies lose legitimacy if either assumption fails.

that involves important ethical, religious, or political values.[110] This concession of democratic legitimacy is a problematic sacrifice if we wish to view agencies as part of our democratic government.[111]

C. Presidential Administration

Put forth in its contemporary form by then-professor, now-Justice Kagan, presidential administration argues that the presidential direction of agencies justifies agency actions due to the presidential election, which indirectly connects agencies to citizens.[112] Unitary executive theorists use similar arguments to contend the President should have control over administration.[113] The Supreme Court has increasingly embraced presidential administration over the past decade in a string of cases that have expanded presidential supervisory powers over agencies,[114] including *Free Enterprise Fund v. Public Co. Accounting Oversight*

[110] See Blake Emerson, Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation, 102 Minn. L. Rev. 2019, 2074–76 (2018) [hereinafter Emerson, Administrative Answers] (establishing that value-laden questions frequently arise when agencies interpret and implement the law); see also Lisa Heinzerling, The FDA's Plan B Fiasco: Lessons for Administrative Law, 102 Geo. L.J. 927, 987 (2014) (discussing how technical and value-based judgements are intertwined during agency policymaking).

[111] See supra Section I.A.

[112] Kagan, supra note 1, at 2332, 2341. The theoretical foundations of presidential administration start earlier in the twentieth century. See Peter M. Shane, Democracy's Chief Executive: Interpreting the Constitution and Defining the Future of the Presidency, at xii–xiii (2022); Noah A. Rosenblum, The Antifascist Roots of Presidential Administration, 122 Colum. L. Rev. 1, 16–37 (2022). In her recent *Harvard Law Review* Foreword, Cristina Rodríguez appears to propose and defend a more nuanced form of presidential administration in which the President is a central actor in a political "regime" housed in the executive branch. See Cristina M. Rodríguez, The Supreme Court 2020 Term Foreword: Regime Change, 135 Harv. L. Rev. 1, 107–08 (2021). In contrast to other scholars who defend what Ash Ahmed and Karen Tani have called "presidential primacy" in administration, Rodríguez justifies her account on a plurality of normative values, including effectiveness and responsiveness, instead of simply the presidential election. Ashraf Ahmed & Karen M. Tani, Presidential Primacy Amidst Democratic Decline, 135 Harv. L. Rev. F. 39, 40–47 (2021).

[113] See Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23, 58–70 (1995) (arguing the President creates an electoral link between agencies and citizens).

[114] Jerry L. Mashaw & David Berke, Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience, 35 Yale J. on Regul. 549, 552 (2018); Metzger, supra note 18, at 37–38.

Board,[115] *Lucia v. Securities & Exchange Commission*,[116] and *Seila Law LLC v. Consumer Financial Protection Bureau*.[117]

Presidential administration is appealing because it indirectly connects agencies to citizens, but it also runs into problems. Presidential administration is possible only because the president has the power to exercise authority over some agencies.[118] Therefore, the only normative component of presidential administration is the presidential election. However, this connection is an exceptionally weak conception of democracy.[119] As legal scholars Anya Bernstein and Cristina Rodríguez adeptly put the problem of reducing democratic legitimacy to the presidential election, "[n]arrowing the notion of accountability to the electoral connection instantiates a peculiarly anemic notion of democracy that leaves out many of the traits that make democratic governance normatively attractive."[120] Further, presidential administration appears descriptively unable to indirectly link agencies to citizens because this representation comes apart in practice.[121] Presidential and agency priorities often misalign,[122] and national elections do not gauge citizen preferences on administration.[123] Finally, the president's political authority is itself derivative of delegation theory because, as Justice Kagan admits, the president can only operate within the space provided by Congress.[124] While intuitively appealing, presidential administration has difficulty legitimating the administrative state on its own.

[115] 561 U.S. 477, 499 (2010).

[116] 138 S. Ct. 2044, 2051, 2055 (2018).

[117] 140 S. Ct. 2183, 2191–92 (2020).

[118] Kagan, supra note 1, at 2251–52.

[119] See Jerry L. Mashaw, Reasoned Administration and Democratic Legitimacy: How Administrative Law Supports Democratic Government 171 (2018); Mathews, supra note 52, at 633–34.

[120] Bernstein & Rodríguez, supra note 33, at 1608–09.

[121] See de Figueiredo & Stiglitz, supra note 9, at 40–42.

[122] Kagan, supra note 1, at 2334; see also Lisa Schultz Bressman & Michael P. Vandenbergh, Inside the Administrative State: A Critical Look at the Practice of Presidential Control, 105 Mich. L. Rev. 47, 49–52 (2006) (finding White House involvement in agencies to be unsystematic and selective, with some White House offices taking combative positions toward agencies).

[123] Sidney A. Shapiro, Rulemaking Inaction and the Failure of Administrative Law, 68 Duke L.J. 1805, 1830–36 (2019); see also Christopher R. Berry & Jacob E. Gersen, The Unbundled Executive, 75 U. Chi. L. Rev. 1385, 1391 (2008) (deriving their argument in part from the failure of elections to translate popular preferences into public policy).

[124] Kagan, supra note 1, at 2326–27.

D. Civic Republicanism

Civic republicanism attempted to reframe public law in the 1980s to ensure laws were made through fair and open processes to counteract interest groups.[125] Mark Seidenfeld then adopted civic republicanism to legitimate the administrative state.[126] He argued administrative agencies were the only institutions that could achieve the goals of civic republicanism due to their staffing and structure.[127]

Seidenfeld's theory is appealing because it grounded administrative legitimacy in agency process and structure.[128] However, the theory runs into problems. As he points out,[129] civic republicanism is traditionally applied to legislatures because they are designed for open, broad, and public deliberation between citizens and their representatives.[130] He then transposes civic republicanism onto agencies only because of present congressional deficiencies.[131] However, Seidenfeld presents no normative reasons for why the administrative state is a *generally* superior institution to imbue with civic republicanism than other political institutions[132] given that agencies are not designed to encourage broad citizen deliberation required by civic republicanism.[133] Finally,

[125] Cass Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539, 1566–71 (1988); see also Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 10 (1988) ("The republican tradition, though quite different from liberalism in its origins and intentions, offered solutions to the related problems of potential legislative tyranny, potential paralysis, and potential judicial tyranny."). See generally Frank I. Michelman, The Supreme Court, 1985 Term Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4 (1986) (analyzing contemporary Supreme Court cases through a lens of self-government in the republican tradition).

[126] Seidenfeld, supra note 1, at 1514; see also Christopher Edley Jr., The Governance Crisis, Legal Theory, and Political Ideology, 1991 Duke L.J. 561, 589–98 (discussing the connections between his proposed "sound governance" theory and civic republicanism).

[127] Seidenfeld, supra note 1, at 1555, 1559–60.

[128] Id. at 1576.

[129] Id.

[130] See Habermas, supra note 83, at 299; cf. Beermann, supra note 90, at 728 (arguing that administrative law developments are "best explained as a continuing affirmation and reaffirmation of the superior legitimacy of Congress as policymaker").

[131] Seidenfeld, supra note 1, at 1521.

[132] See generally Alan B. Morrison, Administrative Agencies Are Just Like Legislatures and Courts—Except When They're Not, 59 Admin. L. Rev. 79 (2007) (discussing the institutional differences between the legislature and administrative agencies).

[133] Agencies are poor locations to situate broad and deep participation by the general citizenry because administrative staff are unelected and agency decisions unevenly affect members of civil society. The general citizenry also has low interest in participating in

Seidenfeld equivocates regarding the generality and structure of deliberation within his theory,[134] leaving the reader to wonder whether civic republicanism focuses on expanding citizen participation,[135] encouraging interest group participation,[136] or promoting deliberation between agency staffers in the administrative state.[137]

E. Noticing the Similarities of Previous Theories

Previous theories of administrative legitimacy are attractive, but they each run into difficulties. As a result, several legal scholars have argued that some combination of theories can legitimate the administrative state.[138] While a pluralist theory might be theoretically possible based upon the particular combination of theories used, there are good reasons to resist this suggestion. The first issue is determining which combination of theories can successfully legitimate agency power over citizens given agency insulation and discretion. The second issue is how a pluralistic account resolves internal tensions between individual theories. For example, a combination of presidential administration and expertise runs into the familiar problem of what to do when political actors intervene in agencies attempting to utilize their expertise to improve public welfare.[139] This problem is more difficult to solve once delegation is added to this pluralistic account, as proponents of presidential administration disagree on the degree to which the president can deviate from Congress during administrative policymaking.[140]

administrative policymaking. See Cary Coglianese, Citizen Participation in Rulemaking: Past, Present, and Future, 55 Duke L.J. 943, 951 (2006); Wendy Wagner, Katherine Barnes & Lisa Peters, Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards, 63 Admin. L. Rev. 99, 144 (2011).

[134] Seidenfeld, supra note 1, at 1539 ("The hope of civic republicanism . . . is that deliberation about a more abstract level of principles will yield consensus.").

[135] Id. at 1537–39 (stating the importance of citizen participation while arguing civic republicanism would transform citizen preferences).

[136] Id. at 1559.

[137] Id. at 1555 ("It is only through discussion among such [agency] offices that a policy emerges that can serve a more universal consensus of the common good.").

[138] See supra note 28.

[139] See generally Mark Seidenfeld, The Irrelevance of Politics for Arbitrary and Capricious Review, 90 Wash. U. L. Rev. 141 (2012) (discussing the use of political reasons during agency decision-making).

[140] Compare Kagan, supra note 1, at 2326 ("If Congress, in a particular statute, has stated its intent with respect to presidential involvement, then that is the end of the matter."), with Calabresi, supra note 113, at 51–55 (portraying congressional committees as a "rival" to the president's power to execute the laws).

Instead of adopting a pluralistic theory, one avenue of theorizing about administrative legitimacy is to notice whether there are similar underlying concerns in previous theories. One observation is that previous theories used political institutions to indirectly structure the relations between agencies and citizens. For delegation and presidential administration, this is done by drawing Congress or the president, respectively, closer to agencies so citizens are indirectly linked to administrative governance through elections.[141] For these theories, administrative legitimacy is satisfied derivatively through the legitimacy of the other political institution. In the case of civic republicanism, this is done by restructuring agencies to alter the relationship between agencies and the citizenry to look more like the ideal relations between Congress and the citizenry.[142] Similar to these theories is a concern that those who are affected by administrative actions must have some indirect avenue to have a say in administrative policymaking. Although expertise may appear in tension with this observation, scholars who support the theory embrace the importance of citizen participation to legitimating the outcomes of administrative policymaking.[143] Instead of using other political institutions as intermediaries to derivatively legitimate agencies, the question is whether a theory of legitimacy can be built that directly legitimates the administrative state on its own terms by shaping the relationship between agencies and citizens. The next Part takes on this task.

III. THE RELATIONAL FAIRNESS THEORY OF ADMINISTRATIVE LEGITIMACY

The previous Part showed that the unique structure and function of the administrative state make its legitimation difficult. The inability of previous theories to legitimate agencies on their own terms as a part of democratic governance has resulted in a perpetual "legitimacy crisis."[144] This Part argues that the administrative state can be directly legitimated by structuring the relationship between agencies and citizens. This

[141] See Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, A Theory of Legislative Delegation, 68 Cornell L. Rev. 1, 41–42 (1982); Kagan, supra note 1, at 2332.

[142] See supra Section II.D.

[143] See Edward L. Rubin, Getting Past Democracy, 149 U. Pa. L. Rev. 711, 783–84 (2001) (explaining the importance of citizen participation to administrative policymaking).

[144] James O. Freedman, Crisis and Legitimacy in the Administrative Process, 27 Stan. L. Rev. 1041, 1041–43 (1975).

analysis generates the relational fairness theory of administrative legitimacy.

The first Section evaluates whether it is possible to build a theory of legitimacy with the distinctive structure and function of the administrative state. This Section contends that the actual relationship between agencies and affected private persons is the normative source of administrative legitimacy. The second Section develops the potentially affected principle, which shapes the relationship between agencies and potentially affected persons during agency policymaking. The third Section generates the specific procedural, relational, and substantive parts of relational fairness. The final Section argues relational fairness can democratically legitimate the administrative state as part of our democratic government.

A. Institutional Features of the Administrative State

This Section designs a theory of administrative legitimacy based on the institutional features of administrative agencies. The first Subsection emphasizes three administrative features important for its legitimation. The next Subsection argues the relationships between agencies and private persons affected by administrative action are crucial to legitimate administrative governance. The final Subsection crafts the general structure of these relationships.

1. The Institutional Distinctiveness of Administration

At least three features of agencies are important to administrative legitimacy: (i) lack of elections, (ii) uneven agency power across private actors, and (iii) agency reliance on private actors.

The administrative state suffers from a widely perceived democratic deficit due to its non-electoral structure.[145] While electoral representation does some justificatory work to explain why Congress and the President can govern,[146] the administrative state does not contain elections.[147] In

[145] Bulman-Pozen, supra note 28, at 284–85; see also Mathews, supra note 52, at 606.

[146] It is theoretically controversial whether representation fully legitimates the actions of elected political representatives. See Jane Mansbridge, Rethinking Representation, 97 Am. Pol. Sci. Rev. 515, 526 (2003) (questioning whether the relationship between constituent-representative via electoral politics satisfies the various forms of representation in a democratic state).

[147] The Department of Agriculture Farm Service Agency's county farmer committees are elected through a limited electoral franchise. See Galperin, supra note 66, at 1235.

fact, many agencies are designed to be insulated from elections to improve agency decision-making.[148] Therefore, agencies likely cannot be legitimated by their ability to represent the general citizenry.[149]

Second, private actors are unevenly subject to administrative power. Congress and the president have the normative and legal power to generate rules of general applicability. For example, the Affordable Care Act ("ACA") applies to all citizens and other private actors in the nation on an equal basis, subject to any statutory exemptions.[150] However, agencies can only express power in limited, statutorily defined jurisdictions and that power is unevenly distributed among private actors.[151] This means that private actors are governed by administrative power to different degrees based upon the specific agency and action in question. For example, the Environmental Protection Agency ("EPA") can regulate air pollutants emitted from power plants under the Clean Air Act.[152] The EPA cannot regulate policy areas not conferred upon it by statute, such as determining the procedures for the workforce of a power plant to unionize.

Finally, Congress and the President can decide whether they wish to listen to interest groups during policymaking.[153] If they choose, legislators and the President can completely forsake interest groups in favor of other important considerations, such as their constituents, given their electoral mandate.[154] Yet, the relationship between agencies and private actors is more complex. New Dealers justified agency power on the belief that agencies would be insulated from interest groups when

[148] See supra note 54.

[149] It is theoretically possible for Congress to systematically restructure the administrative state to instill elections into administrative governance. However, this reorganization risks reducing many of the distinctive benefits of current administrative structure. See generally Stephenson, supra note 62 (describing the benefits of the delegation of power to agencies); Morrison, supra note 132 (discussing the institutional differences between the legislature and administrative agencies).

[150] Patient Protection and Affordable Care Act, 42 U.S.C. § 18001(d) et seq. (2010).

[151] But see City of Arlington v. FCC, 569 U.S. 290, 296–98 (2013) (holding that agencies receive *Chevron* deference when they interpret their own jurisdiction by statute). However, agency interpretations of their jurisdiction can be ruled invalid under either of *Chevron*'s steps. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[152] 42 U.S.C. § 7411(b) (1990).

[153] See William Alton Kelso, American Democratic Theory: Pluralism and Its Critics 7–10 (1978).

[154] See Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 Tex. L. Rev. 873, 900–01 (1987).

making policy.[155] Although federal courts previously shaped administrative law according to interest group pluralism for a short period,[156] this practice was sharply repudiated by the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc*.[157] The Court allows agency insulation,[158] but only up to a point.[159] This being said, agencies cannot regulate private actors in an information vacuum, which results in agencies relying on the same private actors who will be affected by agency action for information and expertise.[160] This desire for insulation, yet reliance on the same private actors who will be governed by subsequent agency actions, places agencies in a unique relational tension with private actors.[161]

2. Putting the Pieces Together

These three features direct attention to the relationship between agencies and those persons affected by agency actions as a potential source of administrative legitimacy. This fact creates an analogy for administrative legitimation: the relationship between agencies and affected persons[162] appears like that of the state and citizens. When theorizing state legitimacy, the question is what features of the state place obligations on the general citizenry to obey the state.[163] Analogously, the question of administrative legitimacy is why persons affected by agency

[155] Mark Seidenfeld, A Syncopated *Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes, 73 Tex. L. Rev. 83, 90 n.34 (1994).

[156] Bressman, supra note 23, at 1761–62 (discussing judicial embrace of interest group pluralism and subsequent criticism).

[157] 435 U.S. 519 (1978).

[158] See generally Morrison v. Olson, 487 U.S. 654 (1988) (upholding a removal restriction because it did not unduly restrict executive authority); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (holding that a good cause restriction was constitutional because the Federal Trade Commission engaged in quasi-legislative and quasi-judicial activities).

[159] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 478–79 (2010) (holding dual for cause limitations on the removal of Public Company Accounting Oversight Board members contravened the Constitution's separation of powers).

[160] See Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543, 673 (2000); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 431, 440–41 (1989); Richard H. Pildes & Cass R. Sunstein, Reinventing the Regulatory State, 62 U. Chi. L. Rev. 1, 19–20 (1995).

[161] See Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 62–64 (1985).

[162] This Article uses the terms "affected actors," "affected persons," and "affected parties" interchangeably to refer to citizens and organizations potentially affected by agency action.

[163] See Rawls, Political Liberalism, supra note 16, at 224; Simmons, supra note 76, at 752.

actions should have obligations to follow those actions. The persons affected by agency actions appear to be the persons for whom the agency must be legitimated.

Civic republicanism is intuitively appealing because it focuses attention to internal agency procedures, but it runs into problems because it places the citizen-state relationship of legitimating the state into administrative governance without considering the unique features of agencies. Agencies do not always have the power to affect the entire citizenry during policymaking. Citizens who are unaffected by an administrative action should be able to make few legitimacy demands on that agency because they lack the normative relationship with the agency that is necessary to make a legitimacy demand. The agency makes no claim of power over unaffected citizens, and so the agency does not need to justify its power to them.[164]

This does not mean unaffected citizens should be excluded from administrative governance. A citizen unaffected by agency action may still have other normative grounds to interact with the agency, such as principles of efficiency or justice. However, the unaffected citizen does not have a claim as to the agency satisfying some standard of legitimacy for the agency's expression of power because the agency does not claim any power over them. Where there is no power relationship, there is no legitimacy demand.

3. Building a Theory of Legitimacy for the Administrative State

The question is then what demands should be placed on agencies based on their relationship with affected persons that can generate legitimacy. One possibility is consent.[165] However, actual individual consent is too normatively demanding because of the complex relationship between agencies and affected parties.[166] Even if affected private actors removed self-interest when deciding whether to consent to agency actions, which is an unreasonable ask, they could still opt out for philosophical or economic reasons. This makes administrative legitimacy based on descriptive political and economic ideology. The likely result is an uneven and inefficient regulatory landscape with free-riding problems.

[164] See infra Section V.C.

[165] See supra Subsection I.B.2.

[166] This Article follows the dual-track model of political legitimacy, whereby a theory must be sensitive to the individual standpoint while retaining the moral primacy of justification. Thomas Nagel, Equality and Partiality 30 (1991).

The correctness of agency decisions is also a troublesome source for legitimacy given ethical pluralism.[167] A democratic state with ethical pluralism has an ex ante problem of coming to a decision on the correctness of administrative decisions. If a decision on the correct action is not reached, then there is an ex post problem of enforcing the obligation to obey on citizens who dissented from the decision. This problem becomes more troublesome if a policy area has multiple reasonable outcomes. These situations cannot be solved when agency legitimacy hinges on it finding, and citizens agreeing on, *the* correct outcome.

However, agencies must make controversial ethical decisions.[168] If regulatory action is commanded by statute, then the agency has little recourse to avoid making such decisions.[169] It is also normatively precarious to accept agency inaction when there is clear congressional intent for action. The question is how these controversial decisions can be acceptable to citizens who lost in the policymaking process, so they have moral obligations to follow the result.

Administrative decision-making procedures are the most promising answer. Procedural theories of legitimacy create a decision-making process so each citizen can accurately see themselves as both the author and the subject of the outcome.[170] Forcefully articulated by philosopher Jürgen Habermas, "the modern legal order can draw its legitimacy only from the idea of self-determination: citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees."[171] The question is how persons affected by agency actions can accurately see themselves in such a manner.

As previously discussed, the strength of the normative relationship between agencies and persons is based on the position that the person holds in civil society relative to the agency action. To legitimate the administrative state, a procedure must be devised so persons potentially affected by agency action may see themselves as members of a fair

[167] See supra Section II.B (criticizing outcome-based theories); supra note 48.

[168] See Emerson, Administrative Answers, supra note 110, at 2074–75; Heinzerling, supra note 110, at 987–88.

[169] See Cass R. Sunstein, Reviewing Agency Inaction After *Heckler v. Cheney*, 52 U. Chi L. Rev. 653, 656–57 (1985).

[170] Seyla Benhabib, Deliberative Rationality and Models of Democratic Legitimacy, 1 Constellations 26, 31 (1994).

[171] Habermas, supra note 83, at 449.

administrative decision-making process that generated the agency action that will subsequently govern them.[172]

To make administrative legitimacy hinge on the relation of agencies to affected parties does not make agencies captured by private actors. This criticism mistakes the nature of authorship.[173] Authorship is not derived from the affected party *qua* actual authorship, but through affected parties having the equal ability to enter deliberation, present reasons and receive justifications from other persons about their reasons, and potentially be the author if their reasons are decisive.

B. The Potentially Affected Principle

The first step is to determine the components of administrative decision-making that make the outcome legitimate to affected parties. The fundamental feature is that all private actors, including both natural and non-natural persons, potentially affected by agency action must have equal opportunity to deliberate with the agency during policymaking.[174] This feature is called the potentially affected principle. It serves as the meta-norm for relational fairness.[175]

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[172] Cf. Ian Shapiro, Democratic Justice 37 (1999) ("[E]veryone affected by the operation of a particular domain of civil society should be presumed to have a say in its governance.").

[173] See, e.g., Cohen, supra note 48, at 21 (arguing for a conception of democracy whereby "the terms and conditions of association proceeds through public argument and reasoning among equal citizens").

[174] Scholars have previously mentioned the benefits of including affected parties in administrative governance. See, e.g., Emerson, Liberty and Democracy Through the Administrative State, supra note 27, at 432 (asserting the importance of including affected parties in the administrative policymaking process); Freeman, supra note 160, at 548 (proposing to reframe administrative governance as "a set of negotiated relationships" between public and private actors). However, these discussions did not build a theory of legitimacy grounded in normatively structuring the relationship between agencies and affected parties.

Richard Stewart in The Reformation of American Administrative Law described the judicial expansion of participatory rights during formal adjudication in the 1970s and called this the interest representation theory, which involved the participation of affected interests. Stewart, supra note 1, at 1760–61. However, Stewart did not develop a normative theory of interest representation because he was critical of this judicial practice. Further, he equivocated regarding what interest representation means. See, e.g., id. (eliding between affected interests and general participation); id. at 1773 (equivocating between affected interest and public interest representation). Most worrisome, Stewart describes interest representation as a species of interest group pluralism, which relational fairness rejects. See id. at 1759.

[175] Relational fairness aligns with theories of interpersonal morality that view morality as a set of requirements that normatively connect moral agents to other persons. See generally T.M.

There are multiple difficulties in defining the potentially affected principle, such as defining who is potentially affected, limiting who is included, and including both natural and non-natural persons.

Relational fairness includes those *potentially* affected by administrative actions because those who are affected may change during policymaking. The inclusion of those potentially affected has two benefits. First, limiting deliberation to those affected at Time *1* (*T1*) may unjustifiably bias the result at Time *2* (*T2*) by not including parties who could contribute new information. Second, those who will be affected may change between *T1* and *T2*, and it would be unjustifiable to compel persons not included at *T1* to obey agency commands at *T2*. This is fundamental to the concept of democratic self-rule. Those excluded would be unable to see themselves as the authors of the administrative action if they were excluded from the deliberation of an action that subsequently governed them.

There must be a process to determine who is included. While this decision should be made prior to initial deliberation, the temporal nature of policymaking necessitates two requirements. First, if the focus of policymaking shifts those potentially affected, then those included in deliberation must be updated. Second, persons believed wrongfully excluded must be able to ex ante apply for inclusion and ex post appeal if they are denied inclusion. The boundaries of the persons potentially affected by administrative action will have an iterative quality as persons, agencies, and courts engage the issue. This iterative nature allows relational fairness to actively maintain the legitimacy of agency policymaking for issues that have long timelines, such as issues related to climate change.

There must be limits of inclusion to implement relational fairness. Although participation is important, it should not be absolute given the importance of other normative values in administration.[176] The most important limitation is what counts as "affected" by agency action.[177]

Scanlon, What We Owe to Each Other (1998) (arguing for contractualism, a moral theory in which the acceptability of actions is determined by whether there are reasons for the action that could not be reasonably rejected by others); R. Jay Wallace, The Moral Nexus (2019) (proposing an interpretive account for a theory of interpersonal morality grounded in relational requirements and duties).

[176] Jerry L. Mashaw, Administrative Due Process: The Quest for a Dignitary Theory, 61 B.U. L. Rev. 885, 922 (1981) (stating that the right to participation cannot be absolute).

[177] For further analysis to determine who is "affected" in interpersonal morality, see Wallace, supra note 175, at 146–89.

Inclusion into the category of persons potentially affected by a particular action should only occur if important moral or legal rights, liberties, or obligations of persons are potentially affected by the potential action. "Potentially affected" includes both potentially regulated parties and regulatory beneficiaries.[178]

This limitation is similar to, but more expansive than,[179] the current restriction in standing doctrine that only those plaintiffs who have suffered an "injury-in-fact" have standing.[180] In this sense, the determination of whether one is potentially affected is akin to a combination of the earlier standing test from *Association of Data Processing Service Organizations, Inc. v. Camp* (*ADAPSO*),[181] which decided standing should be granted when the complainant was, "within the zone of interests to be protected or regulated,"[182] with the current limitation that injury-in-fact should be "particularized," or affecting affected persons "in a personal and individual way."[183] Reciprocally, this limitation means that agency actions that do not potentially affect important rights, liberties, or obligations of parties do not generate legitimacy demands and therefore may be taken according to other normative and practical values. Though the specific contours of this

[178] Regulatory beneficiaries should be included because they have the potential to gain rights or liberties, or lose obligations. See generally Nina A. Mendelson, Regulatory Beneficiaries and Informal Agency Policymaking, 92 Cornell L. Rev. 397 (2007) (discussing the harms faced by regulatory beneficiaries when agencies engage in informal policymaking and outlining potential solutions). "Affected" does not include psychological or emotional affect unrelated to one's rights, liberties, or obligations except if such concerns have potential health ramifications.

[179] "Affected" is more expansive than injury in fact because it includes those potentially affected by agency action.

[180] Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016). The injury-in-fact component of constitutional standing doctrine has been extensively criticized for hiding normative judgments under claimed factual determinations. See Gene R. Nichol, Jr., Justice Scalia, Standing, and Public Law Litigation, 42 Duke L.J. 1141, 1154–60 (1993); Cass R. Sunstein, What's Standing After *Lujan*? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 186–91 (1992). In contrast, the potentially affected principle argues the determination of those potentially affected is a mixed factual and normative determination.

[181] 397 U.S. 150 (1970).

[182] Id. at 153; see also Rosado v. Wyman, 397 U.S. 397, 420 (1970); Jerry L. Mashaw, "Rights" in the Federal Administrative State, 92 Yale L.J. 1129, 1136 (1983) (stating that scholars believed *Data Processing Service* and *Rosado* encouraged "openness, participation, accountability, and the protection of individual rights").

[183] *Spokeo*, 578 U.S. at 339 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992)) (internal quotation marks omitted); see Rachel Bayefsky, Constitutional Injury and Tangibility, 59 Wm. & Mary L. Rev. 2285, 2360 (2018) ("[T]he idea that injury in fact must be particularized provides a way for courts to limit the circle of potential plaintiffs . . . .").

limiting principle must be worked out in application,[184] these limits should reduce the persons included to manageable numbers in its implementation.[185]

Some may object to including non-natural persons. However, excluding non-natural persons is practically impossible and normatively troubling. It is practically impossible because, as previously discussed, agencies must engage with organizations due to the information held by organizations and the complexity of regulatory structures.

It would also be normatively troubling if agencies could disregard non-natural persons. Citizens derive important representational and identity-based benefits from organizations in civil society.[186] These benefits are especially important for groups marginalized in geographically-based elections, such as minority groups and geographically dispersed interests like consumer protection groups.[187] While legislatures are often poor sites for these groups to engage in policymaking, the jurisdictionally focused and institutionally defined nature of administrative policymaking makes agencies good sites for coalitions of these groups to press their claims on the state.[188]

Agencies create rules that affect citizens both *qua* citizen and *qua* organization member. Take EPA efforts to regulate solid pollutant runoff

[184] Research on identifying stakeholders for public policy initiatives can help agencies determine potentially affected parties. See John M. Bryson, Gary L. Cunningham & Karen J. Lokkesmoe, What to Do When Stakeholders Matter: The Case of Problem Formulation for the African American Men Project of Hennepin County, Minnesota, 62 Pub. Admin. Rev. 568, 570–71, 573–74 (2002) (proposing a stakeholder influence diagram, among other analyses, for government agency initiatives); Vincent Luyet, Rodolphe Schlaepfer, Marc B. Parlange & Alexandre Buttler, A Framework to Implement Stakeholder Participation in Environmental Projects, 111 J. Env't Mgmt. 213, 214 (2012) (providing framework to implement stakeholder participation in environmental projects).

[185] See infra Section V.C.

[186] Michael A. Hogg & Scott A. Reid, Social Identity, Self-Categorization, and the Communication of Group Norms, 16 Comm. Theory 7, 18–21 (2006).

[187] See Mark E. Warren, Democracy and Association 85 (2001) (arguing associations provide people with the capacity to organize collective action beyond geographic elections); Joshua Cohen & Joel Rogers, Secondary Associations and Democratic Governance, 20 Pol. & Soc'y 393, 424 (1992) (arguing associations provide people with the opportunity to represent interests that are poorly organized through territorial politics).

[188] See Maraam A. Dwidar, Coalitional Lobbying and Intersectional Representation in American Rulemaking, 116 Am. Pol. Sci. Rev. 301, 301–02 (2022) (concluding that collaborative lobbying by marginalized groups can promote more pluralistic administrative policymaking).

from farms.[189] A citizen who is a farmer has an interest *qua* citizen in not being subject to pollutants that may harm their health, and *qua* farmer in the regulation not unjustly harming their economic activities. Including non-natural persons better represents affected citizens by allowing them to have multiple parts of their identities represented in administrative policymaking. This enables agencies to engage with the complex identities held by potentially affected citizens.

Finally, agencies can focus their powers on specific non-natural persons in ways disfavored for legislatures. A legislature's job is to pass statutes of general applicability.[190] These statutes may in practice affect smaller groups of persons, but they do not target, and in some situations cannot constitutionally target,[191] specific persons. However, the role of administrative governance is to apply general laws to discrete actors. For example, the Australian Parliament introduced a goods and services tax ("GST") to Australia in 2000 and delegated its administration to the Australian Tax Office ("ATO").[192] In 2015, the ATO issued a directive that drivers who generate income through a ride-sourcing network must be registered to pay the GST.[193] The ATO directive targeted Uber because it was the only ride-sourcing network operating in Australia in 2015.[194] Uber filed suit, arguing the directive "unfairly targets" Uber,[195] but the case was dismissed.[196]

[189] See J.B. Ruhl, Farms, Their Environmental Harms, and Environmental Law, 27 Ecology L.Q. 263, 285–91 (2000) (discussing the problems associated with farm runoff).

[190] Jean-Jacques Rousseau, On the Social Contract, *in* The Basic Political Writings 177, 179 (Donald A. Cress ed., Hackett Publ'g Co. 1987).

[191] U.S. Const. art. I, § 9, cl. 3.

[192] A New Tax System (Goods and Services Tax) Act 1999 (Cth) s 165 div 2 sub-div 30 (Austl.).

[193] Daniel Hurst, Uber Lashes Out at ATO Ruling, Saying It Deserves Different Tax Treatment to Taxis, Guardian (May 19, 2015), https://www.theguardian.com/technology/2015/may/20/uber-protests-against-tax-office-ruling-that-drivers-must-collect-gst [https://perma.cc/PU3E-HYCH].

[194] Reuters, Australia a Test Case for Uber's Bold Global Push, CNBC, https://www.cnbc.com/2015/10/06/uber-gains-popularity-in-australia-despite-criminal-cases-as-lobbying-pays-off.html [https://perma.cc/ZX9Y-5DDY] (last updated Oct. 6, 2015).

[195] David Lewis, Uber Launches Legal Challenge to Overturn ATO's Directive that Obliges to Pay GST, ABC News (July 31, 2015), https://www.abc.net.au/news/2015-07-31/uber-launches-legal-challenge-to-overturn-atos-directive/6664234 [https://perma.cc/ZV4S-AQN6].

[196] Michelle Brown & Riley Stuart, Uber Loses Federal Court Challenge in Bid to Avoid Paying GST, ABC News (Feb. 16, 2017), https://www.abc.net.au/news/2017-02-17/uber-loses-federal-court-tax-challenge/8279516 [https://perma.cc/PH9J-WL5C].

The ability of agencies to target non-natural persons means they must have the ability to engage with agencies when agencies craft regulations that potentially affect the organizations and their members. Excluding non-natural persons would harm the citizens who comprise their membership and mitigate the benefits of civic organizations in democratic governance.

C. The Structure of Relational Fairness

While the potentially affected principle is the normative core of the theory of relational fairness, the language of "equal opportunity to deliberate" produces a wide range of potential answers to how this principle should be normatively substantiated. Given this normative indeterminacy, relational fairness must be built out through developing a normatively richer account of what the potentially affected principle entails in structuring the relationships between agencies and potentially affected persons. As previously discussed, this account of democratic legitimacy adopts rational proceduralism, which entails both procedural values and substantive safeguards being present within the theory. However, relational fairness builds on prior work by also adding a third, distinct form of normative values—relational values—that speak to how agencies and potentially affected persons should go about institutionalizing their relationships with one another during agency policymaking.

1. Procedural Values

The next step in developing relational fairness is to structure the relationship between agencies and affected parties. Relational fairness begins by structuring agency decision-making procedures, which must be: (i) open, (ii) voluntary, (iii) equal access, and (iv) ongoing.[197]

Deliberation must be open so that all affected persons have the opportunity to engage the agency. This is fundamental to the ability of parties to claim authorship over the potential agency action. Excluded affected persons can rightfully argue the action is not legitimate to them based upon their exclusion.

[197] Cf. Wagner et al., supra note 133, at 100 (mentioning that "[o]pen government" and "equal access" are "cornerstones that ensure an accountable and democratically legitimate [administration]").

Affected persons must have the choice whether to engage in agency policymaking. Practically, parties must be able to decide how to spend their time and resources. Normatively, giving parties the choice whether to participate also respects their autonomy to decide on what terms to engage with the administrative state.[198] Parties may choose not to participate in a specific administrative action as a form of protest. This option should not be removed for them, but it also should not grant them standing to challenge the administrative outcome.

Affected persons must have equal access to agency decision-making. This assures them that no person has special access or ability to deliberate with the agency that they lack. Equality of access allows all affected actors to have an equal opportunity to influence the creation of administrative actions that affect their rights, liberties, and obligations.[199]

Finally, deliberation must be ongoing in the sense that the agency must be open to further deliberation after an action is implemented.[200] The weight of the reasons in favor of a rule may shift post-implementation, and agencies should be open to receiving information from affected parties on both participatory and epistemic grounds. Whether reasons are discussed between agencies and affected parties should not be based upon temporal luck or the ability to project future consequences of proposed agency actions.

2. Substantive Safeguards

Procedural values are necessary but not sufficient for administrative legitimacy. This runs against pure proceduralists who contend proper procedures alone legitimate political decisions. However, potential outcomes that undermine these procedures and the relationships within those procedures cannot be legitimate to affected parties whose statuses are changed by an outcome.[201]

Substantive safeguards to agency outcomes must also be included in relational fairness as safeguards to agency deliberation and decision-

[198] Cynthia R. Farina, Mary Newhart & Josiah Heidt, Cornell eRulemaking Initiative, Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts, 2 Mich. J. Env't & Admin. L. 123, 161 (2012) [hereinafter Farina et al., Rulemaking vs. Democracy].

[199] Niko Kolodny, Rule Over None II: Social Equality and the Justification of Democracy, 42 Phil. & Pub. Affs. 287, 309 (2014).

[200] See Wendy Wagner, William West, Thomas McGarity & Lisa Peters, Dynamic Rulemaking, 92 N.Y.U. L. Rev. 183, 227 (2017) (noting that administrative law often considers rulemaking a "static process").

[201] See supra Subsection I.B.3.

making.[202] First, the procedural and relational values of relational fairness also serve as substantive limits on the outcome. For example, the relational value of respect, which is discussed below, demands that agency outcomes cannot undermine the status of a citizen as a member of one of their cultural or ethnic communities.

Second, relational fairness requires First Amendment rights and liberties to ensure its function.[203] Freedom of the press is necessary to ensure communications regarding the activities of agencies and affected parties are disseminated. Freedom of association is required so citizens can join organizations that reflect their interests and identities. Freedom of assembly assures that organizational members can meet and discuss to determine their participation with agencies.

The final substantive safeguard is that the justification for the outcome must be considered reasonable, defined as rationally understandable, to all affected parties.[204] This is called the reasonableness proviso. It results from the equal-access and equal-status values because all parties must understand the agency's decision, and its justifications for the decision, before the agency governs them.[205] The proviso is necessary because agencies cannot use majoritarian voting procedures. At a minimum, all affected parties who do not get their preferred outcomes must understand the reasons chosen by the agency for its decision.[206] As will be discussed in the next Part, the reasonableness proviso theoretically justifies

[202] The background statutory and constitutional substantive limitations in each state also serve as substantive safeguards.

[203] U.S. Const. amend. I. For discussion on the importance of First Amendment associational rights to democratic government, see, e.g., Ashutosh Bhagwat, Associational Speech, 120 Yale L.J. 978, 980 (2011); Daniel A. Farber, Foreword: Speaking in the First Person Plural: Expressive Associations and the First Amendment, 85 Minn. L. Rev. 1483, 1503–11 (2000); Robert Post, Participatory Democracy and Free Speech, 97 Va. L. Rev. 477, 482–83 (2011).

[204] See Simone Chambers, Deliberative Democratic Theory, 6 Ann. Rev. Pol. Sci. 307, 308 (2003) ("A legitimate political order is one that could be *justified* to all those living under its laws.").

[205] Cf. Emily Hammond & David L. Markell, Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out, 37 Harv. Env't L. Rev. 313, 326 (2013) ("[R]eason-giving can promote the sense that individuals are treated with respect . . . .").

[206] The reasonableness proviso is weaker than deliberative democratic requirement, which is also in civic republicanism, that the outcome is rational to all citizens. See Gutmann & Thompson, supra note 83, at 1–2; Seidenfeld, supra note 1, at 1530; Staszewski, supra note 215, at 1255. The requirement of rationality unjustifiably privileges certain forms of discourse, which impoverishes deliberation and harms disadvantaged persons. Melvin L. Rogers & Jack Turner, Political Theorizing in Black: An Introduction, *in* African American Political Thought 1, 23 (Melvin L. Rogers & Jack Turner eds., 2021); Rahman, supra note 12, at 150–52.

arbitrariness review and provides substantive content for a deferential mode of arbitrariness review so long as the procedural and relational values of relational fairness are satisfied.[207]

The reasonableness proviso is not a requirement of rational agreement. Private parties may understand the reasons why the agency chose an outcome but disagree whether the chosen outcome was the best. As Jerry Mashaw says, "we can understand ourselves as members of an acceptable system for collective governance, bound together by authoritative rules and principles, only to the extent that we can explain why those rules and principles ought to be viewed as binding."[208] However, administrative legitimacy cannot be found in a stricter threshold of rationality based on the quality of agency reasoning.[209] Given ethical pluralism, administrative legitimation rests not in the correctness of agency reasons, but through the relational process of *reason giving* between affected parties and the administrative state, subject to the reasonableness proviso.[210]

3. Relational Values

Procedural and substantive values are necessary, but not sufficient, to structure agency policymaking. While procedures provide formalistic protections to ensure agencies interact with potentially affected persons during agency policymaking, procedures alone have limited means to structure the content and form of the relations between agencies and affected persons.[211] Given that, as previously discussed, the relationships

[207] See infra Subsection IV.A.1.

[208] Jerry Mashaw, Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State, 70 Fordham L. Rev. 17, 19 (2001).

[209] Mashaw proposed a "reasoned administration" theory of administrative legitimacy. Mashaw, supra note 119, at 168. It shares some affinity with relational fairness, but Mashaw equivocates whether reason or reason-giving is the normative grounding of reasoned administration. Compare id. at 175 (describing the theory as "privileg[ing] reason over will"), with id. at 177 (stating "reason-giving is critical" to legitimate coercion). This equivocation causes him to minimize the importance of the relationships between agencies and affected parties and instead focus on agency officials. Id. at 60–61.

[210] See Gutmann & Thompson, supra note 83, at 52 (arguing that public policy should be justified, "by giving reasons that can be accepted by those who are bound by it"); Jon Elster, Introduction, *in* Deliberative Democracy 1, 8 (Jon Elster ed., 1998).

[211] Bernstein & Rodríguez, supra note 33, at 1671–72 (arguing that judicial reliance on formal procedures undermines the accountability of administrative agencies); see also Neil R. Eisner & Judith S. Kaleta, Federal Agency Reviews of Existing Regulations, 48 Admin. L.

between agencies and affected persons is the normative locus through which agencies gain their legitimacy, any successful theory of administrative legitimacy must be able to meaningfully structure these relationships. In sum, administrative legitimacy must also be conceptualized as an ongoing and iterative *relationship* between agencies and affected parties. Therefore, relational fairness goes past procedures and into the actual form and content of interpersonal relations between agencies and affected parties.[212] Agencies and potentially affected persons involved in agency policymaking must adopt at least three relational values: equal status, respect, and good faith.

Equal status means agencies and affected persons must view other actors as holding an equal status as their own. Equal status denotes all affected parties are treated with equal regard relative to other parties during agency policymaking. Notions of inherent or applied superiority in social status, ability, or judgment must be removed because it would be a "disastrous loss of moral standing" if persons were unable to see they were treated as equals.[213] Over time, status inequalities could lead persons of lower status groups to question their relative moral worth compared to their fellow persons in civil society.[214]

This does not mean there must be some form of equality in agency outcomes. Parties hold equal status even if agency policymaking results in unequal outcomes if those outcomes are based on the quality of reasons given by actors or compromises made by the agency to reach consensus.

Rev. 139, 140 (1996) (noting that informal interactions between agencies and regulated parties are a daily occurrence during agency policymaking); Gillian E. Metzger, Appointments, Innovation, and the Judicial-Political Divide, 64 Duke L.J. 1607, 1616 (2015) (questioning whether the formal power of removal serves as a process that actually controls agency officials).

[212] This focus on the relationships between persons is shared with relational egalitarianism theories of political equality. See Elizabeth S. Anderson, What Is the Point of Equality?, 109 Ethics 287, 313 (1999) (describing a relational theory of political equality as one that views equality as a relationship); Kolodny, supra note 199, at 288 (explaining the importance of relations of social equality in a democracy); Daniel Viehoff, Democratic Equality and Political Authority, 42 Phil. & Pub. Affs. 337, 340 (2014) (arguing egalitarian procedures have authority in a democracy because they protect intrinsically valuable egalitarian relationships). Recent empirical scholarship on agency accountability has also highlighted the importance of the complex relationships between agencies and affected persons. See supra note 33 and accompanying text.

[213] Thomas Christiano, The Authority of Democracy, 12 J. Pol. Phil. 266, 273 (2004).

[214] Samuel Scheffler, Equality and Tradition: Questions of Value in Moral and Political Theory 225 (2012).

One important practical payoff of including relational values is that the equal-access and equal-status values combine to place a duty on agencies to reach out to affected parties traditionally excluded from administrative policymaking.[215] For example, the ability to attract those with financial resources is not a valid reason to deny groups the ability to deliberate with agencies because it systematically and unjustifiably discriminates against certain persons, such as consumer protection, minority rights, and economic justice organizations.[216] There are a number of measures agencies can adopt to minimize background financial inequality in natural and non-natural persons to affirm relational values during agency policymaking.[217]

Respect is derived from treating parties as ends unto themselves and speaks to how parties in agency policymaking must view each other.[218] Respect requires parties within policymaking processes to recognize and accept the variation in identities that other parties bring into

[215] Cf. Glen Staszewski, Reason-Giving and Accountability, 93 Minn. L. Rev. 1253, 1285 (2009) ("[P]ublic officials in a deliberative democracy also have an obligation to consider the interests and perspectives of everyone who will be bound by a decision . . . ."). The Administrative Conference of the United States ("ACUS") has recently recommended that agencies proactively engage with "affected groups that often are underrepresented in the administrative process." Admin. Conf. of the U.S., Administrative Conference Recommendation 2021-3: Early Input on Regulatory Alternatives (June 17, 2021), https://www.acus.gov/sites/default/files/documents/Early%20Input%20on%20Regulatory%20Alternatives%20FINAL.pdf [https://perma.cc/9FGA-XHGB].

[216] See Maureen L. Cropper, William N. Evans, Stephen J. Berardi, Maria M. Ducla-Soares & Paul R. Portney, The Determinants of Pesticide Regulation: A Statistical Analysis of EPA Decision Making, 100 J. Pol. Econ. 175, 177–78, 187 (1992); Nicholas R. Parrillo, Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study, 71 Admin. L. Rev. 57, 74–76 (2019). For further theoretical argumentation on why the financial resources of civil society groups are not a justifiable reason for exclusion in democratic policymaking, see Christopher S. Havasy, Interest Group Lobbying and Political Equality 14–28 (July 13, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4162073 [https://perma.cc/WFJ8-SWZN].

[217] See Farina et al., Rulemaking in 140 Characters, supra note 8, at 416 (describing how Regulation Room studies show social networks increase participation among individuals and groups unlikely to previously participate in rulemaking); Brian D. Feinstein, Identity-Conscious Administrative Law: Lessons from Financial Regulators, 90 Geo. Wash. L. Rev. 1, 20–41 (2022) (describing identity-conscious measures agencies can adopt to increase administrative participation of underrepresented identities); Michael Sant'Ambrogio & Glen Staszewski, Democratizing Rule Development, 98 Wash. U. L. Rev. 793, 836–40 (2021); Wendy E. Wagner, Administrative Law, Filter Failure, and Information Capture, 59 Duke L.J. 1321, 1416 (2010) (advocating for Congress to subsidize underrepresented group participation in informal rulemaking).

[218] Habermas, supra note 83, at 498.

policymaking.[219] Parties may hold different forms of expertise while still maintaining respect towards other parties. Respect entails acknowledging the epistemic strengths of other parties and recognizing one's own epistemic weaknesses.

Practically, respect is important due to agencies often privileging parties who provide technical information.[220] This violates the respect value by failing to recognize how affected parties with other forms of information, such as distributional concerns or how the policy will affect their organizational members, may contribute important perspectives to policymaking.[221] Favoring parties with technical information is also epistemically infirm because including affected parties with non-technical expertise improves even technical policymaking.[222] Favoring parties with technical expertise and minimizing the importance of non-technical information perversely incentivizes parties with technical expertise to deluge policymaking with information to gain control over agency decision-making.[223]

Finally, all parties must deliberate in good faith. Good faith means parties must enter policymaking with a genuine desire to discover the best outcome for all parties. This does not mean private or selfish interests

[219] Michael Walzer, Spheres of Justice 277 (1983).

[220] See Richard Stoll, Effective EPA Advocacy: Advancing and Protecting Your Client's Interests in the Decision-Making Process 94 (2010) (commenting that the EPA is eager to meet with directly affected parties who can share factual information); Nicolas Bagley, The Procedure Fetish, 118 Mich. L. Rev. 345, 394–95 (2019) [hereinafter Bagley, The Procedure Fetish]; Cynthia R. Farina, Dmitry Epstein, Josiah Heidt & Mary J. Newhart, Cornell eRulemaking Initiative, Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation, 47 Wake Forest L. Rev. 1185, 1187 (2012) (discussing how rulemaking emphasizes "empirical 'objective' evidence in the form of quantitative data and premise-argument-conclusion analytical reasoning").

[221] See Farina et al., supra note 198, at 145–49; Connie P. Ozawa & Lawrence Susskind, Mediating Science-Intensive Policy Disputes, 5 J. Pol'y Analysis & Mgmt. 23, 23 (1985).

[222] Multiple policymaking communities have found that including non-experts in policymaking improves policy. See generally Joseph L. Arvai, Tim McDaniels & Robin Gregory, Exploring a Structured Decision Approach as a Means of Fostering Participatory Space Policy at NASA, 18 Space Pol'y 221 (2002) (discussing how structured stakeholder engagement with non-experts can improve NASA's policymaking); Lala Muradova, Hayley Walker & Francesca Colli, Climate Change Communication and Public Engagement in Interpersonal Deliberative Settings: Evidence from the Irish Citizens' Assembly, 20 Climate Pol'y 1322 (2020) (discussing how the Irish Citizens' Assembly shifted the Irish Parliament's proposed climate policy); Mark S. Reed, Stakeholder Participation for Environmental Management: A Literature Review, 141 Biological Conservation 2417 (2008) (reviewing the literature on citizen participation in environmental policy and finding that their involvement improves policymaking outcomes).

[223] Wagner, supra note 217, at 1325.

must be eliminated.[224] It is essential for policymaking to seek resolution between private interests.[225] Contrary to previous deliberative and procedural theories, relational fairness does not hinge on a thick conception of the public good, which could cause the theory to falter in times of high polarization.[226] Under relational fairness, self-interested reasons are allowed, but they are not necessary or sufficient reasons for action.[227] Counterintuitively, embracing self-interested reasons means that parties may engage in some forms of "blood-sport" strategies to advocate for those positions.[228] Therefore, relational fairness can still be achieved under political polarization given its allowance of selfish reasons and some blood-sport tactics.[229]

However, parties should not enter only with the goal of naked self-interest to seek their ex ante preferred outcome without deliberating with other affected parties. Agencies cannot only engage parties "just to cover themselves" and "not actually pay attention to the input."[230] All parties, including agencies, should be receptive to better reasoned arguments from other parties. In times of strong political polarization, enforcement penalties could be introduced to ensure parties uphold these relational values. For example, parties who operate in bad faith or do not respect other parties on an ongoing or repetitive basis may be excluded from

[224] See generally Jane Mansbridge et al., The Place of Self-Interest and the Role of Power in Deliberative Democracy, 18 J. Pol. Phil. 64 (2010) (arguing self-interest, suitably constrained, ought to be part of deliberative democracy).

[225] The allowance of self-interested reasons distinguishes relational fairness from civic republicanism, which requires reasons based on the common good or the public interest. As Seidenfeld admits, this is an "optimistic assumption[]" of the motivation of political actors. Seidenfeld, supra note 1, at 1532. In contrast, relational fairness does not hinge on a notion of the common good, and therefore allows affected persons to make arguments grounded in self-interest during agency policymaking provided they satisfy its relational values and substantive safeguards. See infra note 228 and accompanying text.

[226] For criticism of theories of legitimacy based in a conception of the public good during times of polarization, see Daniel E. Walters, The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State, 132 Yale L.J. 1, 21–31 (2022).

[227] Dennis Thompson, Deliberative Democratic Theory and Empirical Political Science, 11 Ann. Rev. Pol. Sci. 497, 507 (2008).

[228] Thomas O. McGarity, Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age, 61 Duke L.J. 1671, 1712 (2012).

[229] Group polarization is difficult for pure deliberative democrats to address. See Cass R. Sunstein, The Law of Group Polarization, 10 J. Pol. Phil. 175, 178 (2002). However, the structure of deliberation can ameliorate the problems of polarization. See Chambers, supra note 204, at 320.

[230] Parrillo, supra note 216, at 92.

policymaking or be stripped of ex post standing to appeal the policy outcome.

The institutional nature of administration necessitates that one component of some legitimacy theories cannot be transposed onto administrative legitimation. The normative ideal in deliberation is for all parties to reach a consensus,[231] but the practical demands of governance necessitate that majority rule should be used to make timely political decisions.[232]

Consensus should remain the normative goal of administrative policymaking. However, if consensus cannot be reached, then agencies should not use majority rule among affected parties. Final authority should remain with the agency. The agency's decision remains subject to oversight from affected parties and other political institutions to ensure the decision accords with the procedural, relational, and substantive components of relational fairness.[233]

The agency should retain final authority for multiple reasons. First, it is problematic for an agency to transfer decision-making powers to private actors because of the resulting alienation of democratic self-rule.[234] Relatedly, as Justice Alito raised in *Department of Transportation v. Association of American Railroads*, it is legally questionable to delegate regulatory powers to private entities.[235] Further, it is not the purpose of administration to equally represent the wills of affected parties in the outcome through aggregative democracy.[236] This would transform

[231] John S. Dryzek, Legitimacy and Economy in Deliberative Democracy, 29 Pol. Theory 651, 660 (2001). For a recent descriptive critique of consensus serving as a normative value in contemporary administrative policymaking, see Walters, supra note 226, at 34–41 (arguing on descriptive grounds that the administrative state cannot engage in consensus-building given our current political polarization).

[232] See, e.g., Cohen, supra note 48, at 25; Habermas, supra note 83, at 179.

[233] This feature distinguishes relational fairness from interest group pluralism, which advocates for private parties to hold decision-making authority in bureaucratic policymaking. For criticism of interest group pluralism, see Frug, supra note 28, at 1368–77; Seidenfeld, supra note 1, at 1514–15.

[234] See Chiara Cordelli, The Privatized State 225–28 (2020).

[235] 575 U.S. 43, 60–62 (2015) (Alito, J., concurring); see also Carter v. Carter Coal Co., 298 U.S. 238, 310–11 (1936) ("This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.").

[236] See Nina A. Mendelson, Should Mass Comments Count?, 2 Mich. J. Env't & Admin. L. 173, 173 (2012) ("All agree that public comments cannot serve as a plebiscite on the issue

agencies into a pseudo-legislative body that implemented interest group pluralism.[237]

Maintaining agency decision-making authority allows relational fairness to embrace a reasonable and descriptively accurate view of the motivations of private parties that allows relational fairness to hold in times of political polarization. Previous interest group pluralism and deliberative theories were required to model unreasonably utopian views of private parties as selflessly motivated in search of the public interest because these theories directly represented private wills in administrative policymaking.[238] Instead, by maintaining agency decision-making authority, relational fairness allows most forms of self-interested reasoning and behavior into agency policymaking.[239]

D. Relational Fairness as a Theory of Democratic Legitimacy

Some commentators have minimized or rejected the importance of democratically legitimating the administrative state given the lack of elections in administrative agencies.[240] This position is troubling if we seek to legitimate the administrative state as part of our democratic government.

Relational fairness democratically legitimates the administrative state. So far, this Article has assumed that agencies are situated within a democratic state. Consider the United States, which has a legislature elected through geographic elections, a president elected in a national election, and a judiciary mandated by the Constitution, which was approved through a ratification process.

Administrative agencies sit within and adjacent to other political institutions in a democratic state. This generates two questions for their democratic legitimation. First, must agencies be democratically legitimated on the same grounds as other institutions? I contend no.

before the agency."); Cass R. Sunstein, Factions, Self-Interest, and the APA: Four Lessons Since 1946, 72 Va. L. Rev. 271, 283–84 (1986) (discussing the problems caused by agencies aggregating group preferences).

[237] For criticism of interest group pluralism, see supra note 233.

[238] Mansbridge et al., supra note 224, at 66–67; Sunstein, supra note 236, at 283–84.

[239] This explains how relational fairness allows for some characteristics of "blood-sport rulemaking." McGarity, supra note 228, at 1703–19.

[240] Mathews, supra note 52, at 641–42 (minimizing the importance of the split between political and democratic legitimacy); Rubin, supra note 143, at 791–92 (calling concerns with democracy "outmoded" and "emotionally resonant").

Second, can the administrative state be independently democratically legitimated as a political institution? I argue yes.

An administrative state that satisfies relational fairness is sufficiently democratic to be democratically legitimate considering the institutional features of agencies. The connection between relational fairness and democracy comes from establishing political equality through the equal ability of potentially affected actors to influence administrative decision-making.[241] The focus on participation to democratically structure administrative governance echoes nineteenth-century theorists who argued participation could control agency power in democratic governance.[242]

Relational fairness also aligns with contemporary democratic theorists who call for paying increased attention to the procedures beyond elections that compose democratic governance.[243] Elections are a necessary component of the legitimacy of some institutions based upon the purpose of those institutions, such as Congress, which seeks to represent particular geographically defined groups of citizens in legislative policymaking. However, electoral representation need not be the only design for democratic political institutions because it is merely one mechanism to generate outcomes based upon the equality of citizens.[244] Given the

[241] See Elster, supra note 210, at 8 (arguing that deliberative democracy is democratic because it "includes collective decision making with the participation of all who will be affected by the decision or their representatives"); Kolodny, supra note 199, at 309.

[242] See, e.g., Karl Marx, The Civil War in France 45 (E. Belfort Bax trans., 1900); Alexis De Tocqueville, Democracy in America 311 (Sanford Kessler ed., Stephen D. Grant trans., Hackett Publ'g Co. 2000) (1835). I engage with the intellectual history of these nineteenth-century legal and political theorists who called for increased citizen involvement in administrative policymaking elsewhere. See generally Christopher S. Havasy, Radical Administrative Law (unpublished manuscript) (on file with author) (exploring the nineteenth-century European intellectual history that argued for the democratization of the administrative state so that citizens could have direct relationships with agencies that had coercive power over them).

[243] See generally Carole Pateman, Participation and Democratic Theory (1970) (arguing that political participation should extend to areas beyond the electoral parts of the national government); Mansbridge, supra note 146 (describing deliberative forms of representation); Mark E. Warren, A Problem-Based Approach to Democratic Theory, 111 Am. Pol. Sci. Rev. 39 (2017) (arguing democratic theory should not focus on overgeneralizing about elections and instead focus on political systems' problems that must be solved in order to be considered democratic).

[244] See Rahman, supra note 12, at 15 ("Participation . . . need not mean mass plebiscitary or direct democracy . . . . While elections and legislatures have long had a pride of place in democratic theory, I suggest that thickening our democratic capacities and experience requires

institutional demands of agencies and the limited scope of affected private actors, it does not make sense to install electoral forms of democratic participation in agencies.[245] The procedural, relational, and substantive requirements of relational fairness ensure all affected parties can participate in decision-making on equal terms such that they can consider themselves as both the authors and subjects of the administrative outcome. This is the essence of democratic rule.

Relational fairness creates a new democratic relationship between citizens and their government. This idea of the administrative state as a unique site for democratic participation aligns with recent calls by Sabeel Rahman and Blake Emerson to reengage Progressive Era calls to create participatory democratic governance by increasing citizen participation in agency policymaking.[246] It also accords with Daniel Walters's recent proposal to embed "an 'administrative agon'" in administrative policymaking to make agencies more open to political and ideological deliberative conflict during policymaking.[247] By satisfying relational fairness, affected persons can equally participate in the creation of rules that will govern them. Democratic self-rule is thus ensured, even if the

that we turn instead to front-line institutions of governance such as regulatory agencies."); Edward L. Rubin, Beyond Camelot: Rethinking Politics and Law for the Modern State 121 (2005) (arguing that elections should be viewed as "one particular, albeit very important, type of signal between the government and citizens of a republic"); Bernstein & Rodríguez, supra note 33, at 1608–09 ("Narrowing the notion of accountability to the electoral connection instantiates a peculiarly anemic notion of democracy that leaves out many of the traits that make democratic governance normatively attractive."); Nikolas Bowie, The Supreme Court, 2020 Term—Comment: Antidemocracy, 135 Harv. L. Rev. 160, 168–69 (2021) ("[D]emocracy is not synonymous with majority rule or any other procedure. Rather, such procedures are democratic only to the extent that they pursue political equality.").

[245] See Post, supra note 203, at 482 ("Democracy involves far more than a method of decision making; at root democracy refers to the value of authorship . . . . Democracy is achieved when those who are subject to law believe that they are also potential authors of law."); Sant'Ambrogio & Staszewski, supra note 217, at 844.

[246] Rahman, supra note 12, at 15–16; Emerson, The Public's Law, supra note 27, at 1–73.

[247] Walters, supra note 226, at 58. Relational fairness and administrative agonism both encourage expansive participation between agencies and the citizenry during agency policymaking. Id. at 76–78 (proposing different mechanisms to enhance public participation during agency policymaking). This being said, relational fairness and administrative agonism depart on a few grounds, including the seriousness in which each theory takes the problem of agency coercion in democratic governance, as well as the importance of the normative values of political equality and consensus-building in democratic politics. Further, Walters acknowledges that administrative agonism is not a fundamental normative value of democratic governance, but rather one that is limited in temporality and scope. Id. at 92.

democratic form appears different from our common understanding of democracy.

IV. PUTTING THE RELATIONAL FAIRNESS THEORY INTO PRACTICE

It is one thing to create a theory of administrative legitimacy. It is another to put it into practice. Commentators have criticized previous theories of administrative legitimacy as being too abstract to structure legal doctrines and political institutions.[248] This Part shows how relational fairness can be implemented to improve the legitimacy of the American federal administrative state.[249] It focuses on legitimacy improvements to informal rulemaking and other forms of informal agency actions because these are both the dominant types of agency policymaking, as well as the most difficult forms of agency policymaking to legitimate.[250]

This Part is descriptive and normative. Descriptively, it shows that Congress, the courts, and administrative agencies have sometimes implicitly embraced relational fairness, but this embrace has been uneven. Normatively, it argues for doctrinal, statutory, and structural changes to better align informal rulemaking with relational fairness.

Administrative law has largely focused on the delegatory, interpretive, and substantive doctrines imposed upon agencies by Congress and the courts.[251] Much of this attention results from the anxieties surrounding

[248] See Bagley, supra note 220, at 369 (describing previous "legitimacy-and-accountability claims" as "too abstract and analytically muddled to be useful").

[249] There is debate regarding whether legitimacy is a binary or scalar concept. Compare Fabian Wendt, On Realist Legitimacy, 32 Soc. Phil. & Pol'y 227, 231 (2016) (stating legitimacy is binary), with Bernard Williams, In the Beginning Was the Deed 9 (Geoffrey Hawthorn ed., 2005) (stating legitimacy is scalar). This Article seeks the more modest task of determining whether agencies can "come closer" to or find a "reachable threshold" of legitimacy, which both sides agree is feasible. Wendt, supra, at 231; Edward Hall, Bernard Williams and the Basic Legitimation Demand: A Defence, 63 Pol. Stud. 466, 468 (2015).

[250] Bruce Ackerman, The New Separation of Powers, 113 Harv. L. Rev. 633, 697 (2000) (stating that regulatory policymaking requires "special forms of legitimation"); Mariano-Florentino Cuéllar, Rethinking Regulatory Democracy, 57 Admin. L. Rev. 411, 428–29 (2005) ("Notice and comment deserves close attention in a study of regulatory democracy because the bulk of regulation is crafted through that procedure today."); Mathews, supra note 52, at 642 (stating the need for democratic legitimation of agencies is highest for administrative policymaking).

[251] See Jeremy K. Kessler, The Struggle for Administrative Legitimacy, 129 Harv. L. Rev. 718, 771 (2016) (reviewing Daniel R. Ernst, Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940 (2014)) (describing post-New Deal federal judges as "heighten[ing judicial] review of agency factfinding," "impos[ing] a host of new procedural

the legitimacy of administrative policymaking and the desires to tie agencies to other institutions to generate derivative administrative legitimacy.[252] However, contemporary scholarship has paid less attention to analyzing administrative law based upon the direct relationships between agencies and potentially affected persons.[253] While these relationships are often hidden from view when considering the standard doctrines in administrative law, they are fundamental to actual agency policymaking in practice.[254]

There is a long history in administrative law of discussions regarding the general normative benefits of public participation in agency rulemaking,[255] but the contemporary conversation mostly considers public participation as an undifferentiated good.[256] The hope, as one commentator put it, is that by expanding participation, "[b]ureaucrats would become democrats."[257]

Instead of asking the binary question of whether there is too much or too little public participation, relational fairness reveals that members of civil society stand in different normative relationships with agencies.

and substantive constraints on agencies," and "overrid[ing] statutory preclusions of judicial review").

[252] See, e.g., Rabin, supra note 89, at 125.

[253] One exception is the discussion of administrative due process because the administrative due process test requires focus on procedures afforded to private parties that have been deprived of "life, liberty, or property." U.S. Const. amends. V, XIV; see also Adrian Vermeule, Deference and Due Process, 129 Harv. L. Rev. 1890, 1895–96 (2016) (including "life, liberty, or property" in his analysis of all administrative due process challenges).

[254] Cf. Bernstein & Rodríguez, supra note 33, at 1651 (describing how previous federal-agency-official interviewees "recounted their engagement in many more varied, less formal types of perspective gathering—practices only starting to be explored in existing literature and virtually absent from doctrinal debates").

[255] For early discussions, see generally Roger C. Crampton, The Why, Where and How of Broadened Public Participation in the Administrative Process, 60 Geo. L.J. 525 (1972) (arguing broadened public participation will give administrative decisions greater legitimacy); Ernest Gelhorn, Public Participation in Administrative Proceedings, 81 Yale L.J. 359 (1972) (arguing broadened citizen involvement can mitigate non-responsiveness by agencies to public needs).

[256] See, e.g., Cary Coglianese, Heather Kilmartin & Evan Mendelson, Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration, 77 Geo. Wash. L. Rev. 924, 930 (2009) (evaluating regulatory processes on whether they allow "too much or too little . . . participation"); Miriam Seifter, Second-Order Participation in Administrative Law, 63 UCLA L. Rev. 1300, 1302 & n.1 (2016) (collecting citations for the premise that commentators "celebrate participation" to legitimate agency actions).

[257] Martin Shapiro, Administrative Discretion: The Next Stage, 92 Yale L.J. 1487, 1497 (1983).

Public participation is therefore a temporally dependent, multivariate value in administrative law depending on who seeks to participate, in what context, and when during administrative policymaking.[258] In practice, agency officials already make such complex determinations between the various persons who seek to participate in administrative policymaking, but the scholarly discussion of the concept of participation has not caught up.[259] Thus, relational fairness also joins those scholars who have called on public law to generally pay particular attention when developing doctrine to those who will actually be affected by policy decisions.[260] If we seek to directly legitimate informal rulemaking based upon the relationship between agencies and potentially affected persons, then our conceptualization of the normative benefits of participation in administrative law needs refinement.

This Part proceeds in two Sections. The first Section implements relational fairness in multiple areas of administrative law. Although relational fairness calls for judicial deference to agencies during arbitrariness review, it advocates for congressional and judicial involvement on matters of internal administrative law that shape the relationship between agencies and affected parties, such as ex parte communications and APA exceptions to notice-and-comment.

The second Section applies relational fairness to notice-and-comment rulemaking to argue that notice-and-comment rulemaking is deficient on legitimacy grounds based on how it structures participation between agencies and potentially affected persons. The Section then evaluates recent congressional and agency attempts to alter informal rulemaking to determine whether these changes improve the legitimacy of administrative policymaking. While most e-rulemaking efforts come up short, other measures, such as negotiated rulemaking and agency adoption of alternative participatory measures, serve as illustrative examples of how to improve the legitimacy of informal rulemaking.

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[258] See Sant'Ambrogio & Staszewski, supra note 217, at 831 ("[T]he proper level and kind of public engagement with rulemaking *should* vary from rule to rule.").

[259] See Bernstein & Rodríguez, supra note 33, at 1657 ("Policymakers seemed most responsive to the concerns of what they referred to as 'stakeholders,' meaning not the public generally but those parties whose own work and operations would be most affected by the policymaking under consideration.").

[260] See, e.g., Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1310–11 (1976); Philip P. Frickey, The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere, 34 Willamette L. Rev. 421, 444 (1998); Staszewski, supra note 215, at 1285.

Two brief notes on the analytical scope of this Part before we progress. First, the first Section concerns existing legal doctrine and therefore it takes as given that notice-and-comment is the dominant mode of informal rulemaking. In contrast, the second Section evaluates whether notice-and-comment rulemaking itself aligns with relational fairness. Second, this Part focuses on proposed changes to administrative law to improve the legitimacy of the administrative state. It does not address how to analyze agency policymaking according to other first-order normative values, such as the justice of an institution.[261] While the proposals in this Part will improve the legitimacy of the administrative state, there may be other normative reasons to alter the implementation of these proposals.

A. Relational Fairness and Administrative Law

Federal courts have created a series of procedural and substantive constraints on agency rulemaking over the past fifty years due to their concerns about the legitimacy of agency rulemaking.[262] However, the rationales for these doctrinal constraints remain incongruous as the dominant theory of administrative legitimacy has shifted over time.[263] This situation has led to muddled and confused doctrine that lacks coherence. Relational fairness serves as an organizing principle to unify and structure areas of administrative law that concern the relationship between agencies and potentially affected parties, and provides substantive content to reform these areas of administrative law. This Section focuses on three doctrinal areas important to relational fairness: arbitrariness review, ex parte communications, and APA exceptions to notice-and-comment.

[261] There is theoretical disagreement concerning the relationship between legitimacy and justice. Compare Philip Pettit, On the People's Terms: A Republican Theory and Model of Democracy 130 (2012) (arguing legitimacy and justice are distinct concepts), with Allen Buchanan, Political Legitimacy and Democracy, 112 Ethics 689, 707–09 (2002) (arguing that legitimacy and justice are the same normative concept). I follow Rawls to argue that legitimacy and justice are related, yet distinct, normative values that are both fundamental to the political state. See Rawls, Political Liberalism, supra note 16, at 228.

[262] See Kessler, supra note 251, at 771.

[263] See Bressman, supra note 23, at 1758–67.

1. Arbitrariness Review

Relational fairness creates both an analytical framework and substantive content for how courts should conduct arbitrariness review.[264] In the decades after the APA's passage, arbitrariness review was highly deferential towards agencies on expertise grounds.[265] However, anxieties over agency legitimation led courts and commentators to argue for heightening arbitrariness review to monitor agency policymaking.[266] Courts subsequently added many procedural and substantive elements to arbitrariness review[267] without any organizing principles as to how judges should apply them.[268] The result is that federal courts have a wide amount of judicial discretion to invalidate agency regulations through the various procedural and substantive requirements of arbitrariness review. Some federal judges have embraced arbitrariness review to aggressively monitor agencies,[269] despite the occasional insistence from the Supreme Court not to overextend judicial review of agency actions.[270]

Relational fairness legitimates agency policymaking to calm the concerns of those who sought to strengthen arbitrariness review to tame administrative discretion. The theory also streamlines the framework and substance of arbitrariness review because relational fairness answers the question—*"arbitrary and capricious" in reference to whom?*—by answering that arbitrary and capricious refers to those potentially affected

[264] 5 U.S.C. § 706(2)(A) (2012) (calling for review of "agency action . . . found to be . . . arbitrary, capricious . . . or otherwise not in accordance with law").

[265] Robert L. Rabin, Federal Regulation in Historical Perspective, 38 Stan. L. Rev. 1189, 1252 (1986); Matthew Warren, Note, Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit, 90 Geo. L.J. 2599, 2601 (2002).

[266] See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1, 34–37 (D.C. Cir. 1976) (en banc); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973); Thomas J. Miles & Cass R. Sunstein, The Real World of Arbitrariness Review, 75 U. Chi. L. Rev. 761, 768 (2008).

[267] See, e.g., Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 42–43 (1983).

[268] See P.R. Sun Oil Co. v. EPA, 8 F.3d 73, 77 (1st Cir. 1993) ("The 'arbitrary or capricious' concept, needless to say, is not easy to encapsulate in a single list of rubrics because it embraces a myriad of possible faults and depends heavily upon the circumstances of the case."); Virelli, supra note 24, at 737–60 (deconstructing the various first-order and second-order components of arbitrariness review).

[269] Cass R. Sunstein & Adrian Vermeule, Libertarian Administrative Law, 82 U. Chi. L. Rev. 393, 434–40, 449–52 (2015) (describing the aggressive use of arbitrariness review to invalidate agency actions by some D.C. Circuit judges).

[270] See, e.g., FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009); Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 105–06 (1983); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).

by the agency action under review.[271] Under relational fairness, judges conducting arbitrariness review should focus on whether the agency followed the procedural and relational components of the theory during rulemaking. If so, then the agency need only satisfy the reasonableness proviso.[272]

The procedural and relational values of relational fairness coherently justify the first-order procedural elements of arbitrariness review.[273] For example, openness and equal-status values support judicial attempts to ensure agency decisions are made based upon material in the record.[274] This is because the generation of a record available to all equalizes available materials between all affected parties and provides a common basis for affected parties to deliberate.

Although some Justices have grounded the record-building requirement solely on the ability for courts to conduct judicial review,[275] the D.C. Circuit has been continuously attuned to the importance of record building to structuring the relationship between agencies and affected persons.[276] As the circuit stressed in *American Radio Relay League, Inc. v. FCC*, agencies must disclose the material they relied upon because notice-and-comment is only satisfied "if it affords interested parties a reasonable opportunity to participate in the rulemaking process, and if the parties have not been deprived of the opportunity to present relevant information by lack of notice that the issue was there."[277] Focusing on the importance of the record to maintain relational values, the circuit stressed that the disclosure of material "allow[s] for meaningful commentary so

[271] Some commentors propose using arbitrariness review to instill technocratic rationality in administrative decisions. See, e.g., Sunstein & Vermeule, supra note 269, at 441. Ironically, given ethical pluralism, rational objectivity is unlikely in most cases, meaning these proponents are demanding substantive and procedural requirements on agency policymaking that are not objective. See Christopher F. Edley, Jr., Administrative Law: Rethinking Judicial Control of Bureaucracy 193 (1990).

[272] See supra Subsection III.C.2 (examining the reasonableness proviso in-depth).

[273] These include the record-building and reason-giving requirements of arbitrariness review. See Virelli, supra note 24, at 741–44.

[274] See, e.g., Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); United States v. N.S. Food Prods. Corp., 568 F.2d 240, 251 (2d Cir. 1977).

[275] Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990).

[276] Flyers Rts. Educ. Fund, Inc. v. FAA, 864 F.3d 738, 747 (D.C. Cir. 2017); Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 239 (D.C. Cir. 2008); Chamber of Com. v. SEC, 443 F.3d 890, 902–03 (D.C. Cir. 2006); Conn. Light & Power Co. v. Nuclear Regul. Comm'n, 673 F.2d 525, 528 (D.C. Cir. 1982); WJG Tel. Co. v. FCC, 675 F.2d 386, 389 (D.C. Cir. 1982).

[277] 524 F.3d at 236 (internal quotation marks omitted).

that a genuine interchange occurs rather than" the agency "hiding or disguising the information that it employs."[278] The circuit then ordered the FCC to make the studies it relied upon available for notice-and-comment and add them to the record.[279]

The reasonableness proviso argues for deferential judicial posture when reviewing agency reasoning during arbitrariness review.[280] Recall that the proviso requires only that parties must be able to rationally understand why the agency reached its decision, even if the parties disagree with the quality of the outcome. The satisfaction of the reasonableness proviso means that the agency's decision-making was not arbitrary or capricious. This is because an agency decision that was both made in accordance with the procedural and relational values of relational fairness and is rationally understandable to all potentially affected parties was not made arbitrarily in procedure or substance.[281]

The reasonableness proviso accords with Jacob Gersen and Adrian Vermeule's account of thin rationality review during arbitrariness review.[282] Gersen and Vermeule argue courts should require that agencies must only "act based on reasons," but do not need to consider all potential policy rationales, nor transmit their full catalog of their reasoning to the reviewing court.[283] The reasonableness proviso is slightly more demanding, requiring that the reasons chosen by the agency are rationally understandable to all affected parties.[284] However, relational fairness aligns with their general point that courts should not closely scrutinize the quality of agency reasons.

Gersen and Vermeule justify thin rational basis review based upon agency expertise and epistemic capacity compared to reviewing courts.[285]

[278] Id. at 236–37 (internal quotation marks omitted).

[279] Id. at 240.

[280] See supra Subsection III.C.2.

[281] This is an argument regarding the content of the term "arbitrary and capricious" based upon the relationship of reason-giving by the agency and the understanding of those reasons by potentially affected parties. See Virelli, supra note 24, at 743–44.

[282] Jacob Gersen & Adrian Vermeule, Thin Rationality Review, 114 Mich. L. Rev. 1355, 1357–58 (2016).

[283] Id. at 1370; see also Nicholas Bagley, Remedial Restraint in Administrative Law, 117 Colum. L. Rev. 253, 264 (2017) (arguing that courts should only require agencies "to decide on the basis of reasons, not necessarily to examine the full range of feasible options and offer a convincing explanation for why the chosen policy is superior to alternatives").

[284] See supra Subsection III.C.2.

[285] Gersen & Vermeule, supra note 282, at 1357.

These are potentially unstable justifications.[286] For example, the "thinness" of thin rationality review could vacillate over time based upon the comparative epistemic capabilities of agencies and courts. Instead, the reasonableness proviso is generally justified by the agency satisfying the other components of relational fairness.

Grounding arbitrariness review in relational fairness has two benefits. First, the proviso holds regardless of institutional arrangements. If agency policymaking satisfies the procedural and relational values of relational fairness, then there is no reason for the court to disturb the agency's decision because the decision's legitimacy has already been secured (subject to the proviso being satisfied). Second, the proviso can be withheld as a deferential standard of review when administrative decision-making violates relational fairness. In this situation, a more searching standard of review is warranted during arbitrariness review.

The benefit of grounding arbitrariness review in relational fairness is evident in the Supreme Court's recent focus on pretextual reasons. In *Department of Commerce v. New York*, the Secretary of the Department of Commerce announced in a memo that Commerce would put a citizenship question back on the Census because the Department of Justice requested improved citizenship data to enforce the Voting Rights Act.[287] In the memo, the Secretary rejected some possible alternatives and explained his reason for making this decision, but he appeared to not examine the full range of feasible options.[288] As a result, it is debatable whether the chosen option was superior to alternatives. However, if his account of events in the memo was accurate, then his proffered reasoning could potentially prima facie satisfy both thin rationality review and the reasonableness proviso.

Nevertheless, relational fairness agrees with the Court that Commerce's decision was arbitrary and capricious due to its pretextual nature and explains why pretextual reasons should fail arbitrariness review.[289] By providing a pretextual reason for his decision, the Secretary violated the equal-status and good-faith values in relational fairness. Many different persons were potentially affected by the Secretary's decision, including the respondents in the case, who were states that could

[286] See supra Section II.B.

[287] 139 S. Ct. 2551, 2562 (2019).

[288] Id. at 2562–63.

[289] Gersen and Vermeule note the problem of pretextual reasons for thin rationality review but do not suggest a solution. Gersen & Vermeule, supra note 282, at 1398–1401.

lose seats in Congress and non-governmental organizations that worked with immigrant and minority communities.[290] By providing a pretextual reason for his decision, the Secretary failed to view affected parties as holding equal status to him because affected parties seeking to discuss his decision would not know the real reason for it.[291] The Secretary and his staff therefore would be unable to deliberate in good faith with affected parties who sought to discuss the proposed change with the agency.[292] The result is that potentially affected parties were cut off from understanding the real reason for the policy change and therefore cut off from deliberating with anyone at Commerce regarding the Secretary's actual reasoning. By violating these relational values, Commerce's decision-making was arbitrary and capricious from the perspective of parties potentially affected by the Secretary's decision.

The Court in *Department of Commerce v. New York* said little to explain when more searching review is warranted except noting that such review should be rare.[293] It simply cited *Citizens to Preserve Overton Park, Inc. v. Volpe* to establish that "bad faith or improper behavior" *may* warrant such review, without explanation of what this means or entails.[294] Relational fairness provides an explanation. Arbitrariness review should normally be deferential towards agencies simply to ensure the reasonableness proviso was satisfied.[295] However, a claimed violation of relational fairness's procedural or relational values, such as Commerce's use of pretextual reasons, should trigger a more searching arbitrariness review to ensure the agency did not make an arbitrary or capricious decision from the perspective of potentially affected persons.[296]

[290] *Dep't of Com. v. New York*, 139 S. Ct. at 2563, 2565.

[291] While the memo at issue did not go through notice-and-comment, affected parties could still attempt to deliberate with Commerce regarding the policy. Id. at 2588–89 (Breyer, J., concurring in part) (discussing how Secretary Ross received submissions by groups both for and against the citizenship question).

[292] Id. at 2575–76 (majority opinion) ("The reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public.").

[293] Id. at 2575.

[294] Id. at 2573–74. See Benjamin Eidelson, Reasoned Explanation and Political Accountability in the Roberts Court, 130 Yale L.J. 1748, 1791 (2021) (noting the Court's opaqueness on the rejection of pretextual reasons during arbitrariness review).

[295] See supra Subsection III.C.3.

[296] Benjamin Eidelson makes a related point regarding the Court rejecting pretextual reasons as part of a "reasoned explanation requirement" to protect the political accountability of agencies. Eidelson, supra note 294, at 1754–55. He does not address the implications that rejecting pretextual reasons has on the legitimacy of agency rulemaking.

2. The Limits of Internal Administrative Law

Legal scholars have recently argued that administrative law should pay more attention to internal agency rules, norms, and structures—also called internal administrative law—to improve administrative governance.[297] This important work has opened the black box of internal agency functions to demonstrate how internal administrative law advances the normative goals of administrative policymaking. Relational fairness is in broad agreement with these calls to increase our focus on internal administrative law to improve administrative governance. However, relational fairness also pushes this discussion to be aware that internal administrative law can affect the legitimacy of administrative policymaking by structuring the relationship between agencies and potentially affected parties. This Subsection discusses two doctrinal areas that address the limits of agency control over internal administrative law: ex parte communications and the APA exceptions to informal rulemaking.

i. Ex Parte Communications

Ex parte communications involve informal communications between agency staff and interested parties.[298] Both practitioner experience and multiple studies show that ex parte communications are arguably more important than notice-and-comment to influence the content of agency rulemaking.[299] Normatively, these forms of communications concern multiple values in relational fairness. Empirical work shows large and

[297] See Blake Emerson, The Claims of Official Reason: Administrative Guidance on Social Inclusion, 128 Yale L.J. 2122, 2134 (2019) (suggesting that the official guidance be viewed as internal administrative law) [hereinafter Emerson, Claims of Official Reason]; Hammond & Markell, supra note 205, at 316 (theoretically and empirically focusing on improving administrative legitimacy "from the inside-out"); Gillian E. Metzger & Kevin M. Stack, Internal Administrative Law, 115 Mich. L. Rev. 1239, 1245 (2017) (exploring the relationship between internal administrative law, the APA, and agency legitimacy); Christopher J. Walker & Rebecca Turnbull, Operationalizing Internal Administrative Law, 71 Hastings L.J. 1225, 1239 (2020) (concluding that innovations in internal administrative law should help legitimate "the *Chevron* policymaking space"); Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry L. Mashaw (Nicholas R. Parrillo ed., 2017) (compiling essays that explore the role of internal controls in the field of administrative law).

[298] See 16 C.F.R. § 4.7 (1995) (defining ex parte communications).

[299] Stoll, supra note 220, at 86–88; Brian Libgober, Meetings, Comments, and the Distributive Politics of Rulemaking, 15 Q.J. Pol. Sci. 449, 457–58 (2020); William F. West, Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls, 41 Admin. & Soc'y 576, 588–90 (2009).

persistent inequalities in ex parte communication engagement between different affected parties.[300] These inequalities are worrying because they point to relationships between agencies and affected parties that are closed, unequal in access, and lacking equal respect.

Neither Congress nor the Supreme Court has settled the legality of ex parte communications during informal rulemaking, so the D.C. Circuit has led its doctrinal development. Previously, the D.C. Circuit was intuitively sensitive to the relational fairness concerns implicated by ex parte communications. In *Home Box Office, Inc. v. FCC*, the circuit court stated it was ready to set aside an FCC regulation because FCC employees engaged in ex parte communications with affected parties after notice-and-comment during internal agency deliberations.[301] Demonstrating implicit concern with the lack of relational fairness in the FCC's processes, the circuit linked these ex parte communications to the agency's inability to guarantee the fairness and rational deliberation of the administrative process to affected parties.[302]

A few years later, in *Sierra Club v. Costle*,[303] the D.C. Circuit explicitly connected agency openness to administrative legitimacy. Speaking in similar language as relational fairness, the circuit court stated

> Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall.[304]

In *Costle*, the circuit court linked the values of equal access and respect to agency legitimacy but lacked any overarching theory to justify their concerns.[305]

[300] See, e.g., Bernstein & Rodríguez, supra note 33, at 1658–60; Wagner et al., supra note 133, at 123; William F. West, Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis, 64 Pub. Admin. Rev. 66, 69–70 (2004).

[301] 567 F.2d 9, 57 (D.C. Cir. 1977). The regulation was invalidated on unrelated First Amendment grounds. Id. at 43.

[302] Id. at 56.

[303] 657 F.2d 298 (D.C. Cir. 1981).

[304] Id. at 400–01.

[305] Id.

However, the circuit court quickly narrowed *Home Box Office*.[306] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* then hastened *Home Box Office*'s decline by ruling that courts could not require procedures other than those in the APA or other applicable statutes.[307] The circuit court subsequently continued to narrow *Home Box Office*[308] and now openly questions whether *Vermont Yankee* undermined *Home Box Office*.[309] Some commentators argue *Home Box Office* is de facto invalid law,[310] or should be explicitly overturned.[311]

As a result of this judicial withdrawal, ex parte communications are now largely governed by internal administrative law. Unless directed by statute, each agency decides whether to promulgate regulations or guidance regarding their use of ex parte communications.[312] This judicial withdrawal has not only ceded to agencies the threshold question of whether an agency should be bound by rules regarding ex parte communications, but also the procedural and substantive standards agencies chose to adopt. Surprisingly, internal administrative law discussions have not paid attention to how to structure ex parte communications.[313]

Ex parte communications strike at the heart of relational fairness because they concern the structure of relations between agencies and affected parties. Most obvious is the lack of equality in treatment between different agencies and affected parties. While such unequal treatment may

[306] Action for Child.'s Television v. FCC, 564 F.2d 458, 474 (D.C. Cir. 1977).

[307] Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 545 (1978).

[308] See Elcon Enters. v. Wash. Metro. Area Transit Auth., 977 F.2d 1472, 1481 (D.C. Cir. 1992); Pro. Air Traffic Controllers Org. v. Fed. Lab. Rels. Auth., 685 F.2d 547, 564–65 (D.C. Cir. 1982).

[309] Dist. No. 1, Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n v. Mar. Admin., 215 F.3d 37, 42–43 (D.C. Cir. 2000); Air Transp. Ass'n of Am. v. FAA, 169 F.3d 1, 7 n.5 (D.C. Cir. 1999).

[310] Cass R. Sunstein & Adrian Vermeule, The Morality of Administrative Law, 131 Harv. L. Rev. 1924, 1970 (2018).

[311] Kathryn E. Kovacs, Rules About Rulemaking and the Rise of the Unitary Executive, 70 Admin. L. Rev. 515, 536, 541–42 (2018); Jack M. Beermann & Gary Lawson, Reprocessing *Vermont Yankee*, 75 Geo. Wash. L. Rev. 856, 883–88 (2007).

[312] See, e.g., 16 C.F.R. § 4.7 (1995) (Federal Trade Commission rules on ex parte communications during informal rulemaking); 16 C.F.R. §§ 1012.1–1012.7 (2011) (same for Consumer Product Safety Commission); 47 C.F.R. §§ 1.1200–1.1216 (2011) (same for FCC); Guidance on Ex Parte Communications, 74 Fed. Reg. 52795–96 (Oct. 14, 2009) (same for Department of Energy).

[313] Walker and Turnbull's recent operationalization of internal administrative law does not mention ex parte communications. Walker & Turnbull, supra note 297.

be justifiable in discrete instances, there is little reason on legitimacy grounds for the administrative baseline to be for affected parties to be treated unequally solely by virtue of the specific agency governing them. For example, executive officials implementing the Volcker Rule of the Dodd-Frank Act met with financial services companies over 350 times before any agency issued a Notice of Proposed Rulemaking ("NPRM").[314] These officials did not engage in similar deliberation with other affected parties.[315] It is questionable whether these affected parties were treated with openness, equal status, or respect compared to financial services companies.

Congress and agencies should work together to craft general rules concerning ex parte communications between agencies and affected parties during informal rulemaking. There are multiple ways to create stable rules to govern ex parte communications. These methods include but are not limited to: (i) Congress revises the APA to explicitly address ex parte communications during informal rulemaking,[316] (ii) Congress adopts a default rule of including provisions concerning ex parte communications in new regulatory statutes, or (iii) Congress requires agencies to create their own internal regulations governing ex parte communications during informal rulemaking.[317]

In addition to improving agency legitimacy, standardized rules are preferable for multiple reasons. First, general rules would allow agencies across the federal government to ex ante streamline their procedures rather than the current regime of different statutes and agencies having different ex parte communications requirements. Second, agencies would become shielded from ex post litigation regarding their ex parte communications with affected persons. The fact that some agencies already self-bind through internal rules indicates such practices can be beneficial to agencies as well.[318] For courts, the creation of general rules to govern ex parte communications is preferable to the current regime of

[314] Jean Eaglesham & Victoria McGrane, Behind Scenes, Battle for Face Time as Regulators Craft Rule's Wording, Wall St. J. (Oct. 12, 2011), https://www.wsj.com/articles/SB10001424052970204450804576625432135278322 [https://perma.cc/8G6R-ZBAU].

[315] Agencies met with proponents of the Volcker Rule only twenty times. Id.

[316] Seidenfeld, supra note 1, at 1559.

[317] Richard Murphy, Enhancing the Role of Public Interest Organizations in Rulemaking via Pre-Notice Transparency, 47 Wake Forest L. Rev. 681, 698–702 (2012) (discussing how different agencies have utilized forms of internal regulation).

[318] See supra note 312 and accompanying text; Elizabeth Magill, Agency Self-Regulation, 77 Geo. Wash. L. Rev. 859, 883–84 (2009) (discussing agency self-regulation).

silence whereby they are left to interpret the APA and other governing statutes with unclear statutory evidence of whether they have the power to regulate ex parte communications.[319]

Agencies should be able to engage in ex parte communications with affected parties during all stages of informal rulemaking under conditions that satisfy relational fairness. For example, information from ex parte communications that an agency relies upon must be disseminated to other affected parties to satisfy the openness and equal-access values. Sometimes satisfying this requirement may require the agency to take proactive steps to reach out to affected parties that do not have the resources to initiate ex parte communications. Alternatively, the agency might have to reduce their interactions with well-resourced affected parties if other parties cannot be brought in to deliberate at adequate levels.

Some commentators argue for a ban on private ex parte communications.[320] This approach is too extreme. Proposals that eliminate deliberation between agencies and affected parties should be viewed as last-resort measures to be used only if the relationships between agencies and affected persons cannot be structured according to relational fairness. The fact that some agencies already self-implement ex parte communication rules suggests a ban is not necessary. Private ex parte communications may also sometimes be justifiable. A ban would therefore be overinclusive and deprive agencies of valuable information during deliberation.[321] Ideally, measures should be adopted such that other affected parties can be brought into such deliberation. However, certain information may be important enough to justify restrictions in its dissemination if the epistemic or welfare gains are high enough. When it comes to the regulation of ex parte communications, relational fairness demonstrates that internal rules are not necessarily enough to ensure the legitimacy of administrative policymaking.

[319] See infra note 320 and accompanying text (arguing courts have the legal authority to limit ex parte communications). But see supra notes 310–11 and accompanying text (arguing courts do not).

[320] See Criddle, supra note 98, at 485; Rubin, supra note 98, at 120; Seidenfeld, supra note 1, at 1575; Wagner, supra note 217, at 1368.

[321] See Ashley S. Deeks, Secret Reason-Giving, 129 Yale L.J. 612, 666–67 (2020) (discussing when secret reason-giving may be justified).

ii. APA Exceptions to Informal Rulemaking

Under the APA, there are four exemptions from informal rulemaking: general statements of policy, rules of agency organization, interpretive rules, and the good cause exception.[322] Rules created through these exceptions are nonlegislative because they are not supposed to change existing law.[323] Once exempt from notice-and-comment, agencies are not required to engage in any procedures to promulgate them.[324] In contrast, legislative rules must go through notice-and-comment because they create new rights or duties.[325] From the perspective of relational fairness, the distinction between nonlegislative and legislative rules is important because nonlegislative rules could be used to govern affected persons without their ability to deliberate with the agency during notice-and-comment rulemaking.[326]

However, the line between nonlegislative and legislative rules is murky.[327] In practice, a rule clarifying existing rights or obligations can appear as imposing new rights or duties.[328] Empirical work finds that agencies strategically avoid using notice-and-comment[329] and rigidly

[322] 5 U.S.C. § 553(b)(3) (2018).

[323] See Nat'l Fam. Plan. & Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 236–37 (D.C. Cir. 1992); William Funk, A Primer on Nonlegislative Rules, 53 Admin. L. Rev. 1321, 1322 (2001).

[324] Mendelson, supra note 178, at 401.

[325] Fertilizer Inst. v. EPA, 935 F.2d 1303, 1308 (D.C. Cir. 1991); see David L. Franklin, Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut, 120 Yale L.J. 276, 287–88 (2010).

[326] See Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000); Jennifer Nou, Regulatory Textualism, 65 Duke L.J. 81, 102 (2015); John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules, 96 Colum. L. Rev. 612, 655 (1996).

[327] Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1046 (D.C. Cir. 1987); Jacob E. Gersen, Legislative Rules Revisited, 74 U. Chi. L. Rev. 1705, 1705 (2007). For further discussion of how the rise of the use of guidance documents challenges the legitimacy of administrative policymaking, see generally Jeremy Kessler & Charles Sabel, The Uncertain Future of Administrative Law, 150 Daedalus 188 (2021).

[328] See *Appalachian Power Co.*, 208 F.3d at 1020 ("Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations.").

[329] Raso, supra note 94, at 68.

apply nonlegislative rules on affected parties.[330] In practice, affected parties are often confused whether nonlegislative rules alter their rights or obligations.[331]

This uncertainty led federal courts to create various legal tests to determine the valid use of these exceptions.[332] However, these tests have only brought further confusion because they vary both within and between circuits.[333] Some circuits disagree about which test to use for which exception.[334] Other circuits agree on which test to use for a specific exception, but disagree on the components of the test.[335] The doctrine is so muddled that sometimes courts refuse to mention a legal test to avoid wading into these disagreements.[336]

In response, many commentators advocate that the decision of whether a rule satisfies an APA exception should become part of internal administrative law. Some scholars argue courts should not police whether an agency correctly uses an exception.[337] Others propose that any rule that goes through notice-and-comment is legislative, while any rule that does not is automatically nonlegislative.[338] What links these commentators is

[330] Nicholas R. Parrillo, Admin. Conf. of the U.S., Federal Agency Guidance: An Institutional Perspective 90 (Oct. 12, 2017), https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf [https://perma.cc/7LNA-5MHC].

[331] Parrillo, supra note 216, at 109 (discussing the confusion of affected parties about whether they must comply with FDA draft guidance).

[332] Nadav D. Ben Zur, Note, Differentiating Legislative from Nonlegislative Rules: An Empirical and Qualitative Analysis, 87 Fordham L. Rev. 2125, 2136 (2019) (finding circuit courts use six different tests to evaluate guidance documents); see Levin, supra note 24, at 290–91, 294–97 (discussing the various different divergences among circuit courts regarding the legal tests for guidance documents).

[333] Circuit courts differ on the degree of deference to an agency's classification of their rule as legislative or nonlegislative. Compare Iowa League of Cities v. EPA, 711 F.3d 844, 872 (8th Cir. 2013) (arguing for de novo review of claimed APA exceptions), with SBC Inc. v. FCC, 414 F.3d 486, 495 (3d Cir. 2005) (stating agency determination is "entitled to a significant degree of deference").

[334] Levin, supra note 24, at 318–19 (discussing the different legal tests used for interpretive rules).

[335] See id. at 294, 301 (discussing the circuit divergence on applying parts of the binding norm test).

[336] United States v. Reynolds, 710 F.3d 498, 524 (3d Cir. 2013) (refusing to set the standard of review for agency classification of nonlegislative rules); United States v. Valverde, 628 F.3d 1159, 1162 (9th Cir. 2010) (same).

[337] Mark Seidenfeld, Substituting Substantive for Procedural Review of Guidance Documents, 90 Tex. L. Rev. 331, 373 (2011).

[338] See William Funk, When Is a "Rule" a Regulation?: Marking a Clear Line Between Nonlegislative Rules and Legislative Rules, 54 Admin. L. Rev. 659, 663 (2002); Gersen, supra

their desire to shift the locus of decision-making power away from courts and towards agencies.

Relational fairness rejects turning this area into a domain of internal administrative law because the improper use of nonlegislative rules has the potential to affect private parties without satisfying the potentially affected principle.[339] As an initial matter, how an agency initially labels an action is not dispositive of whether the action actually alters the rights and obligations of affected persons[340] because agencies strategically use these exceptions for their benefit.[341] Less nefariously, there can be unintended disjunctions between agency intentions when crafting an APA exception and how they implement it.

Instead of looking internally to govern the APA exceptions, judicial doctrine should be streamlined to analyze APA exceptions under a unified test of whether the proposed rule binds private parties to alter their legal rights or obligations.[342] "Bind" means the rule in question eliminates the discretion of affected parties to not conform with it such that noncompliance would cause parties to directly suffer adverse consequences.[343] Guidance is not binding if it changes a risk-benefit

note 327, at 1710; John F. Manning, Nonlegislative Rules, 72 Geo. Wash. L. Rev. 893, 945 (2004).

[339] In a recent article, Kessler and Sabel also identify the problem caused by the rise of guidance documents to administrative legitimacy and urge courts not to withdraw from reviewing the legality of such documents. See Kessler & Sabel, supra note 327, at 195, 201.

[340] See Hemp Indus. Ass'n v. DEA, 333 F.3d 1082, 1087 (9th Cir. 2003) ("[T]he court need not accept the agency characterization at face value.").

[341] See supra notes 330–31 and accompanying text.

[342] A few commentators have proposed similar rules for some of the APA exceptions focusing on whether the agency guidance is binding. See Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?, 41 Duke L.J. 1311, 1373–74 (1992) (proposing a similar rule for general statements of policy); Levin, supra note 24, at 268 (proposing general statements of policy and interpretive rules should be evaluated by a "binding norm" rule). However, neither proposed a rule to cover all APA exceptions nor justified their proposed rules based upon what is owed to affected parties. Anthony, supra, at 1376 (minimizing the interests of affected parties who may disagree with agencies' interpretations); Levin, supra note 24, at 346–47 (discussing policy rationales).

[343] Gen. Elec. Co. v. EPA, 290 F.3d 377, 383 (D.C. Cir. 2002) (stating guidance is impermissibly binding if "affected private parties are reasonably led to believe that failure to conform will bring adverse consequences"). A guidance document can bind private parties regardless of the agency's intention. Parrillo, supra note 33, at 170–71.

calculus in a non-decisive manner or provides additional reasons to adopt background norms.[344]

The unified test is generated from the potentially affected principle. An agency rule that binds private parties to alter their legal rights or obligations without utilizing notice-and-comment does not allow affected parties to deliberate with the agency on an equal basis before the agency changes their rights or obligations. When this occurs, affected parties are unable to view themselves as the authors of the agency rule in any manner and may validly question the legitimacy of the agency's power to govern them.[345] Therefore, the legitimacy of rulemaking is enhanced by aligning the nonlegislative rules test with relational fairness.

The unified test should apply to all four APA exceptions. For general statements of policy, interpretive rules, and rules of agency organization, the test is straightforward: if a proposed rule binds private parties to alter their rights or obligations, then the rule is legislative.[346] For the good cause exception, the unified test must be balanced against why the agency seeks the exception. If the rule alters the rights or obligations of private parties, then the rule should presumptively be legislative. This presumption may be overridden by reasons regarding the substance of the rule or statutory purpose, such as emergency situations or when notice-and-comment would frustrate the purpose of the regulation.[347]

The unified test will also improve the quality of judicial review. Courts will be able to step out of the messy business of attempting to determine

[344] Emerson, Claims of Official Reason, supra note 297, at 2157. Guidance is not binding if it is used as evidence to create or alter a legislative rule if the guidance itself does not alter any rights or obligations of affected parties because the legislative rule must go through notice-and-comment.

[345] See Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. Rev. 1, 10 (1997) (arguing that guidance documents "threaten to further undermine the legitimacy of the rules produced by removing even the pretense of public access and participation").

[346] The old legal test for interpretive rules said rules must use notice-and-comment if they substantially impact regulated parties, regardless of whether the rule had legal force. See Funk, supra note 323, at 1325–26. The second part of that test led federal courts to rightly jettison it after *Vermont Yankee*. See, e.g., Friedrich v. Sec'y of Health & Hum. Servs., 894 F.2d 829, 836 (6th Cir. 1990); Cabais v. Egger, 690 F.2d 234, 237 (D.C. Cir. 1982). The unified test is much narrower by focusing on whether the rule binds affected parties, rather than whether it impacts them. Energy Rsrvs. Grp., Inc. v. Dep't of Energy, 589 F.2d 1082, 1094–95 (Temp. Emer. Ct. App. 1978).

[347] See Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein, Adrian Vermeule & Michael E. Herz, Administrative Law and Regulatory Policy: Problems, Texts, and Cases 598–99 (7th ed. 2011).

which APA exception a rule falls under because it is irrelevant to the unified test. Courts will have a simplified legal test to develop and apply that is squarely within their expertise.[348] Litigants will therefore have ex ante fair notice about how courts will analyze a rule because the test is the same regardless of the claimed exception.

Relational fairness provides theoretical justification for the movement among scholars,[349] executive officials,[350] agencies,[351] and legal organizations[352] to analyze general statements of policy and interpretive rules under a single test. The unified test also aligns with how agency officials and affected parties already view agency guidance. In practice, these actors rarely distinguish between the APA exceptions and instead categorize guidance based upon whether it is "supposed to be nonbinding."[353] However, these advocates lack a normative justification for a single test.[354] Relational fairness both explains why the tests for APA exceptions should be unified and justifies practitioners' intuitions to adopt such a unified test.

The Supreme Court appears to be moving in this direction. In *Azar v. Allina Health Services*,[355] the Department of Health and Human Services

[348] See Ronald M. Levin, Identifying Questions of Law in Administrative Law, 74 Geo. L.J. 1, 59 (1985); Raso, supra note 94, at 118 ("[B]oth sides of the debate over the proper scope of judicial review of rulemaking procedure have accepted the premise that courts are well equipped to review agency avoidance of procedural requirements.").

[349] See Emerson, Claims of Official Reason, supra note 297, at 2173; Levin, supra note 24, at 351; Peter L. Strauss, Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element, 53 Admin. L. Rev. 803, 815–16 (2001).

[350] See Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432–33 (Jan. 25, 2007).

[351] Administrative Conference of the United States: Adoption of Recommendations, 82 Fed. Reg. 61736 (Dec. 29, 2017).

[352] See Letter from Anna Shavers, Chair, ABA Section of Admin. L. & Regul. Prac., to Thomas Carper, U.S. Sen., & Tom Coburn, U.S. Sen. 2 (Dec. 16, 2014), https://www.americanbar.org/content/dam/aba/administrative/administrative_law/s_1029_comments_dec_2014.authcheckdam.pdf [https://perma.cc/5GSJ-5HT4].

[353] Parrillo, supra note 33, at 168 n.6.

[354] Commentators often simply note the difficulties of current tests to justify adopting a single test. See Levin, supra note 24, at 351–53. Blake Emerson crafts a unified test based on the quality of the agency's reasons and whether the guidance allows the agency to retain discretion. Emerson, Claims of Official Reason, supra note 297, at 2135. However, administrative legitimation requires focus on affected parties and whether the guidance eliminates their discretion. Emerson responds that focusing on affected parties "sweeps far too broadly" because the APA allows the use of guidance documents as evidence in future legal proceedings. Id. at 2154. However, using guidance as support in a legal proceeding is not equivalent to the guidance itself binding private parties to suffer adverse consequences.

[355] 139 S. Ct. 1804 (2019).

("HHS") changed the Medicare formula for calculating additional payments to hospitals that serve a disproportionate number of low-income patients without notice-and-comment, which led to a reduction in payments to some hospitals.[356] To determine whether the change required notice-and-comment, the Court implicitly answered each step of its analysis by classifying the rule based on its effects on private parties in accordance with the unified test. The change in payment is a statement of policy because it publicly notified affected parties (hospitals) about a "critical question" that affected them.[357] The change is substantive because it altered their right to payment.[358] Finally, it is a substantive legal standard, not an interpretive rule, under the Medicare Act because the Act allows for statements of policy to alter substantive rules.[359] The Court examined each step according to whether the action bound affected parties to alter their rights or obligations and held the rule required notice-and-comment.[360]

The D.C. Circuit has also taken similar steps. In *American Hospital Ass'n v. Bowen*,[361] the circuit said concerns about binding changes to the rights or obligations of affected parties were their central motivating factor and "the only relevant points of reference" to determine whether the communication at issue required notice-and-comment.[362] Importantly, the circuit in *Bowen* linked the lack of representation in administrative governance with the need for fairness to affected parties to justify agency action.[363] More recently in *Association of Flight Attendants v. Huerta*, the circuit said, "it really does not matter whether [the agency guidance at issue] is viewed as a policy statement or an interpretive rule,"[364] because

[356] Id. at 1808, 1810.
[357] Id. at 1810.
[358] Id. at 1811.
[359] Id. at 1812–14.
[360] Id. at 1816. The Court also rhetorically frames the case based on the significant alterations to affected parties that resulted from changing the payment system without notice-and-comment. Id.
[361] 834 F.2d 1037 (D.C. Cir. 1987).
[362] Id. at 1048; see also id. at 1057.
[363] Id. at 1044.
[364] 785 F.3d 710, 716 (D.C. Cir. 2015); see also Elec. Priv. Info. Ctr. v. Dep't Homeland Sec., 653 F.3d 1, 6–7 (D.C. Cir. 2011) (examining the TSA's arguments that its proposed rule is either interpretative or a general statement of policy with reference to the binding nature of the rule); Gen. Elec. Co. v. EPA, 290 F.3d 377, 383 (D.C. Cir. 2002) ("Our cases likewise make clear that an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding . . . or is applied by the agency in a way that indicates it is binding.").

what really matters is whether the agency notice bound private parties to alter their rights or obligations.[365] Relational fairness explains movement towards the unified test, guides its development, and justifies why it should be adopted.

B. The Problems of Notice-and-Comment Rulemaking and Possible Alternatives

This Section takes a step back to analyze the structure of notice-and-comment rulemaking itself. Under relational fairness, notice-and-comment rulemaking is deficient on legitimacy grounds due to how it mis-structures participation and generates inequalities between affected parties. Previous congressional and agency changes to alter informal rulemaking have had mixed results. Some changes, such as e-rulemaking measures, do not improve the legitimacy of agency decisions. However, the Negotiated Rulemaking Act[366] and agency adoption of alternative informal rulemaking processes serve as illustrative examples of how administrative legitimacy can be improved through implementing relational fairness.[367]

1. The Problems of Notice-and-Comment Rulemaking

The APA discusses only formal and informal rulemaking. Formal rulemaking requires rules made on the record after an agency hearing[368] and affords parties numerous procedural guarantees.[369] Informal rulemaking, also known as notice-and-comment, affords parties fewer guarantees. It only requires agencies give notice of a prospective regulation and "give interested persons an opportunity to participate in the rule making" by submitting comments.[370] After comments are submitted, the agency must consider "the relevant matter presented" and

[365] *Ass'n of Flight Attendants*, 785 F.3d at 716–17.

[366] 5 U.S.C. §§ 561–570a (1992).

[367] These are not the only institutional structures that could be adopted to improve the legitimacy of agency policymaking. Relational fairness requires the satisfaction of its procedural, relational, and substantive values, which means any policymaking design that satisfies those values can improve the legitimacy of the administrative state.

[368] 5 U.S.C. § 553(c) (2011).

[369] Id. § 556(d)–(e).

[370] Id. § 553(c).

incorporate "a concise general statement of their basis and purpose" into the rule.[371]

Some commentators argue notice-and-comment can "self-legitimat[e]" agency action by making proposed rules public and forcing the agency to accept public comments before issuing final rules.[372] The Supreme Court recently endorsed a similar view regarding the ability of notice-and-comment to hold agencies accountable to the public[373] and generate a "surrogate political process"[374] to legitimate agency actions. This is part of a wider trend in administrative law for participation to be viewed as a binary variable for administrative design—there can be more or less of it.[375] More participation is often considered an unalloyed good until it impedes administrative efficiency.[376]

This view does not interrogate the complexities of public participation in administrative policymaking. Relational fairness is generated from the observation that different members of civil society stand in distinct normative relationships with agencies. Persons potentially affected by an

[371] Id.

[372] Nina A. Mendelson, Foreword: Rulemaking, Democracy, and Torrents of E-Mail, 79 Geo. Wash. L. Rev. 1343, 1343 (2011); cf. Richard A. Bierschbach & Stephanos Bibas, Notice-and-Comment Sentencing, 97 Minn. L. Rev. 1, 20 (2012) ("Public participation . . . is a crucial way to ensure that agency decisions are legitimate, accountable, and just."); Jacob E. Gersen & Anne Joseph O'Connell, Deadlines in Administrative Law, 156 U. Pa. L. Rev. 923, 972 (2008) ("Both democratic and technocratic ideals in administrative law suggest that notice and comment is a desirable form of agency action."); Lumen N. Mulligan & Glen Staszewski, The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law, 59 UCLA L. Rev. 1188, 1244 (2012) ("It is widely recognized in administrative law that notice-and-comment rulemaking provides opportunities for public participation and obligations for decisionmakers to consider a range of different perspectives, which improve the legitimacy of the administrative process.").

[373] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905, 1909 (2020).

[374] Id. at 1929 n.13 (Thomas, J., concurring in part).

[375] See Reeve T. Bull, Making the Administrative State "Safe for Democracy", 65 Admin. L. Rev. 611, 623 (2013) (finding that "[t]he literature reflects an underlying assumption that enhancing citizen participation in administrative decisionmaking . . . is a positive development"); see also Marshall J. Breger, Government Accountability in the Twenty-First Century, 57 U. Pitt. L. Rev. 423, 426 (1996) ("One distinctly American approach to ensuring government accountability has been a bias towards openness in government."); Coglianese et al., supra note 256, at 933 (arguing that "all parties" should have "the opportunity to file meaningful and informed comments" during rulemaking).

[376] See Sant'Ambrogio & Staszewski, supra note 217, at 804. Some argue participation should only be increased if it is useful to the agency. Jim Rossi, Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking, 92 Nw. U. L. Rev. 173, 178 (1997); Rubin, supra note 143, at 784–85.

agency action hold the legitimacy demand on the agency, not the general citizenry. This legitimacy demand generates the potentially affected principle to ensure affected persons can deliberate with the agency in the rulemaking process before the agency governs them. The procedural, relational, and substantive components of relational fairness structure participation to satisfy their legitimacy demand.

However, notice-and-comment does not consider these different normative relationships between agencies and persons, nor does it mete those differences out to structure participation. Instead, notice-and-comment takes the opposite approach by flattening participation to a single form for potentially affected persons, interested persons, and the general citizenry alike.

This flattening of participation causes the structure of notice-and-comment rulemaking to violate relational fairness. Notice-and-comment calls for passive, written, and non-contemporaneous communication between agencies and any interested person in civil society. Structurally, the passivity of communication in notice-and-comment places the burden on affected parties to participate in rulemaking. Even worse, this burden is disconnected to the actual desire of affected parties to participate, due to the resources that parties need to participate in notice-and-comment. However, the general legitimacy burden is on the agency to satisfy. As previously discussed, this burden creates affirmative obligations on the agency generated from the combination of procedural and relational values in relational fairness to proactively deliberate with affected parties.

The passivity of notice-and-comment participation also creates inequalities of access between affected parties. Due to the resources required to monitor and draft comments, business interests dominate notice-and-comment.[377] Even in rulemakings salient to wide portions of the public, business interests represent up to ninety-three percent of

[377] Steven P. Croley, Regulation and Public Interests: The Possibility of Good Regulatory Government 132 (2008) (concluding "business or industry interests participate in agency decision-making processes significantly more than other, broad-based types of interests"); Cary Coglianese, Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process, 30 Law & Soc'y Rev. 735, 743 (1996); Kimberly D. Krawiec, Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform, 55 Ariz. L. Rev. 53, 82 (2013); Wagner et al., supra note 133, at 128–29; see Daniel P. Carpenter et al., Inequality in American Democracy: Methods and Evidence from Financial Regulation 3 (Aug. 1, 2022) (unpublished manuscript), https://judgelord.github.io/finreg/participatory-inequality.pdf [https://perma.cc/CR29-XHUW].

contact with agencies.[378] The result is that, "[i]ndividuals, small businesses, public interest groups, NGOs, and state, local, and tribal government entities tend to be disadvantaged vis-à-vis national corporations, trade and professional associations, and other large, well-resourced private-sector entities."[379] Access inequalities are intolerable to relational fairness because they harm the ability of affected parties to deliberate with agencies and other affected persons during rulemaking.

The current structure of notice-and-comment is such that only some affected persons can satisfy their legitimacy demands. For example, sophisticated and well-resourced affected persons retain the ability to try to satisfy their demands on agencies through alternative participatory measures, such as ex parte communications. However, other potentially affected persons without similar means or ability are excluded from such practices and must only use notice-and-comment procedures. Agencies are also themselves responsible for further inequalities in treatment between affected parties that can harm administrative legitimacy.[380] Sometimes agencies work with only a select group of affected parties to determine a rule prior to even issuing an NPRM.[381] This behavior violates both the equal-access and equal-status values in relational fairness.[382]

2. Congressional Attempts to Improve Informal Rulemaking

The APA's drafters assumed agencies would mostly use formal rulemaking,[383] but agencies shifted to informal rulemaking in the ensuing decades.[384] Courts responded by strengthening informal rulemaking

[378] Krawiec, supra note 377, at 59.

[379] Farina et al., Rulemaking vs. Democracy, supra note 198, at 136–37.

[380] Wagner, supra note 217, at 1378–80 (finding regulated industries hold more influence over informal rulemaking than public interest groups); Jason Webb Yackee & Susan Webb Yackee, A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy, 68 J. Pol. 128, 135 (2006) (same).

[381] Jennifer Nou & Edward H. Stiglitz, Strategic Rulemaking Disclosure, 89 S. Cal. L. Rev. 733, 743–44 (2016); Wagner et al., supra note 133, at 102–03.

[382] For additional recent criticism of notice-and-comment rulemaking on inequality grounds, see, e.g., Feinstein, supra note 217, at 12–13; Walters, supra note 226, at 38–39.

[383] See Gary J. Edles, An APA-Default Presumption for Administrative Hearings: Some Thoughts on Ossifying the Adjudication Process, 55 Admin. L. Rev. 787, 791 (2003).

[384] Nat'l Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 698 (2d Cir. 1975); William F. Pedersen, Jr., Formal Records and Informal Rulemaking, 85 Yale. L.J. 38, 38–39 (1975).

requirements,[385] which generated talk of administrative ossification.[386] One of the most promising proposals to improve informal rulemaking was negotiated rulemaking.[387] The idea behind it was that face-to-face negotiations between agencies and affected parties could streamline informal rulemaking.[388]

The Negotiated Rulemaking Act of 1990[389] vests discretion in the agency head to determine whether to use negotiated rulemaking based upon multiple factors.[390] It establishes the procedures to form the negotiation committee,[391] and requires the agency to publish notice that it will use negotiated rulemaking.[392] In the notice, the agency must list those who will be affected by the proposed rule,[393] and solicit comments on the establishment and composition of the committee.[394] Agencies increasingly used negotiated rulemaking in the 1990s,[395] but scholars found it did not actually increase rulemaking efficiency[396] and its use rapidly declined.[397]

[385] See Ronald J. Krotoszynski, Jr., "History Belongs to the Winners": The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action, 58 Admin. L. Rev. 995, 999–1000, 1002–04 (2006).

[386] See generally Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L.J. 1385 (1992) (arguing that the rulemaking process has become so burdensome and complicated as to no longer be clearly superior to case-by-case adjudication).

[387] See generally Philip Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L.J. 133, 133 (1982) (explaining the benefits of negotiated rulemaking as compared to traditional informal rulemaking); Henry H. Perritt, Jr., Negotiated Rulemaking and Administrative Law, 38 Admin. L. Rev. 471, 473 (1986) (noting that negotiated rulemaking is most successful when all parties involved believe that the negotiated rule is a preferable outcome to one promulgated through traditional means); Lawrence Susskind & Gerard McMahon, The Theory and Practice of Negotiated Rulemaking, 3 Yale J. on Regul. 133 (1985) (arguing that refinements to EPA's approach to negotiated rulemaking "hold great promise for remedying the crisis of regulatory legitimacy").

[388] See Harter, supra note 387, at 64; Perritt, supra note 387, at 471–72; Susskind & McMahon, supra note 387, at 136.

[389] 5 U.S.C. §§ 561–570 (1992).

[390] Id. § 563(a).

[391] Id. § 565(a)(1).

[392] Id. § 564(a).

[393] Id. § 564(a)(3).

[394] Id. § 564(a)(7).

[395] Cary Coglianese, Assessing Consensus: The Promise and Performance of Negotiated Rulemaking, 46 Duke L.J. 1255, 1255–56 (1997).

[396] Id. at 1284.

[397] Jeffrey S. Lubbers, Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking, 49 S. Tex. L. Rev. 987, 988 (2008).

Commentators overlook that early proponents of negotiated rulemaking were also concerned with the legitimacy of agency rulemaking.[398] Unfortunately, these proponents never put forth a coherent theory of administrative legitimacy to justify negotiated rulemaking.[399]

Relational fairness explains why negotiated rulemaking better legitimizes agency rulemaking than notice-and-comment. Unlike notice-and-comment, negotiated rulemaking establishes active, contemporaneous, and ongoing deliberation between agencies and affected parties.[400] The burden is rightly placed on agencies to engage with affected parties to attempt to reach consensus. Notice-and-comment operates under conditions of background social and economic inequality between *interested* parties and does nothing to mitigate these inequalities to ensure equal access or equal status between *affected* parties. In contrast, negotiated rulemaking requires agencies to enter procedural and relational structures with affected parties through the creation of negotiation committees, which better satisfies relational fairness.[401] The fact that final decision-making authority remains with the agency under relational fairness means that negotiated rulemaking does not require the affected parties to actually reach consensus to enhance the legitimacy of agency rulemaking—the relations generated during the negotiated rulemaking process are doing the normative work.[402]

[398] See Harter, supra note 387, at 7; Susskind & McMahon, supra note 387, at 133.

[399] Harter mentions many theories of administrative legitimacy. Harter, supra note 387, at 7 (identifying the rights of parties to present facts and arguments to ensure rational agency decision-making); id. at 28 (identifying the agency crediting the opinions of parties in its decision-making); id. at 31 (identifying parties viewing agency action as reasonable and reaching consensus).

[400] 5 U.S.C. § 565 (1992) (describing the process of negotiated rulemaking).

[401] Id. § 565(a)–(b). As previously discussed, the combination of procedural and relational values of relational fairness creates an affirmative duty for the agency to proactively reach out to groups traditionally marginalized in policymaking. This duty would extend into negotiated rulemaking, which should ameliorate previous concerns that negotiated rulemaking was unrepresentative of civil society. For this critique, see Susan Rose-Ackerman, Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation, 43 Duke L.J. 1206, 1211 (1994).

[402] Under its previous iteration, the agency in negotiated rulemaking typically agrees to publish whatever rule is the consensus of the negotiating committee. David Wendel, Negotiated Rulemaking: An Analysis of Administrative Issues and Concerns Associated with Congressional Attempts to Codify a Negotiated Rulemaking Statute, 4 Admin. L.J. 227, 230 (1990). This situation reduces agencies to below the status of negotiating committee participants, rather than as an equal participant in policymaking. William Funk, Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public

Commentators have also proposed mechanisms that leverage technological improvements to improve notice-and-comment.[403] In 2002, Congress passed the E-Government Act,[404] which directed agencies to put notice-and-comment online and resulted in the creation of Regulations.gov, a website where citizens can view proposed regulations and submit comments.[405] The Obama Administration furthered these efforts by using social media and other online technologies.[406]

Although these efforts are laudable for increasing agency transparency, they do little to improve agency legitimacy.[407] E-rulemaking targets the wrong group of citizens in rulemaking. Relational fairness states agencies are legitimated through properly structuring their relationship with affected parties. The general public may have other normative demands on agencies, but agencies are not legitimated through structuring their participation during informal rulemaking.

E-rulemaking does little to change notice-and-comment.[408] In both processes, the agency publishes a proposed rule and waits for parties to submit comments. This passive transparency benefits affected parties with financial resources who can monitor e-rulemaking sites and quickly draft comments to proposed regulations. This system generates

Interest, 46 Duke L.J. 1351, 1376 (1997). Relational fairness rejects the requirement that agencies must effectuate the will of private parties.

[403] See generally Stuart Minor Benjamin, Evaluating E-Rulemaking: Public Participation and Political Institutions, 55 Duke L.J. 893 (2006) (arguing that rulemaking would become more participatory and responsive to the needs of interested citizens if electronic communications were integrated into the rulemaking process); Cary Coglianese, E-Rulemaking: Information Technology and the Regulatory Process, 56 Admin. L. Rev. 353 (2004) (noting that advances in digital technology can make the rulemaking process more efficient and transparent); Cynthia R. Farina, Mary J. Newhart, Claire Cardie & Dan Cosley, Cornell eRulemaking Initiative, Rulemaking 2.0, 65 U. Mia. L. Rev. 395 (2011) (discussing the impact of the online Regulation Room project in boosting public participation in federal rulemaking).

[404] E-Government Act of 2002, Pub. L. No. 107-347 (2002) (codified as amended in scattered sections of 44 U.S.C. §§ 5, 10, 13, 31, 40).

[405] About the eRulemaking Initiative, http://www.regulations.gov/about [https://perma.cc/EK7D-8CKP] (last visited Mar. 23, 2023).

[406] See Memorandum from Peter R. Orszag, Dir., Off. of Mgmt. & Budget, to the Heads of Exec. Dep'ts & Agencies (Dec. 8, 2009), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf [https://perma.cc/L8FR-874G].

[407] See Lisa Blomgren Bingham, The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance, 2010 Wis. L. Rev. 297, 339–40 (arguing President Obama's Open Government Initiative "has not made as much actual progress toward the goals of making government more participatory and collaborative").

[408] Bagley, The Procedure Fetish, supra note 220, at 395 (arguing that e-rulemaking has not improved informal rulemaking).

deliberation through background social inequality between affected parties, threatening to further imbalance the relationship between agencies and less-resourced affected parties unless measures are adopted to counter resource inequalities.[409] Empirical work on e-rulemaking has not found improvement in deliberation between agencies and participants.[410] Alternative proposals, such as the Regulation Room and online policy dialogues, which require active and ongoing interaction between agencies and affected parties, better align with relational fairness and should be encouraged.[411]

3. Agency Attempts to Improve Informal Rulemaking

Some agencies have also taken steps to improve the participation of affected persons beyond the minimum procedures required by notice-and-comment.[412] These include formal participatory structures, such as collaborative forums, hearings, roundtables, and focus groups,[413] and informal structures, such as forms of ex parte communications and meetings.[414] The Department of Energy's ("DOE") focus on the participation of affected parties is especially noteworthy. DOE became an early proponent of deliberation with affected parties during their implementation of the Department of Energy Organization Act in the mid-1970s.[415] This commitment led the agency to adopt a "Process Rule"

[409] McGarity, supra note 228, at 1745–46; Mendelson, supra note 372, at 1345–46, 1359.

[410] David Schlosberg, Stephen Zavestoski & Stuart W. Shulman, Democracy and E-Rulemaking: Web-Based Technologies, Participation, and the Potential for Deliberation, 4 J. Info. Tech. & Pol. 37, 44 (2007).

[411] See Thomas C. Beierle, Digital Deliberation: Engaging the Public Through Online Policy Dialogues, *in* Democracy Online: The Prospects for Political Renewal Through the Internet 156–58 (Peter Shane ed., 2004); Farina et al., Rulemaking in 140 Characters, supra note 8, at 383.

[412] See Steven J. Balla, Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking, 1 I/S: J.L. & Pol'y for Info. Soc'y 59, 82 (2005) (describing participatory mechanisms that complement traditional notice-and-comment procedures); see also Bernstein & Rodríguez, supra note 33, at 1656–58 (describing agency outreach efforts to interested parties in addition to more formalized rulemaking processes); Parrillo, supra note 216, at 74 (describing the diverse means of stakeholder participation during agency formulation of guidance documents).

[413] Parrillo, supra note 216, at 76.

[414] Id. at 81; Sant'Ambrogio & Staszewski, supra note 217, at 819–20.

[415] 42 U.S.C. § 7191 (1997).

that discusses DOE procedures for promulgating rules regarding consumer appliances.[416]

DOE's regulation for energy standards of residential refrigerators and freezers is a good example of the open, fair, and ongoing deliberative process it has embraced.[417] DOE initiated rulemaking by releasing a framework document in September 2008 that described the analytical and procedural approaches it intended to use during rulemaking, proactively identified issues to resolve during rulemaking, and solicited public comments on the document.[418] DOE then held a public meeting in September 2008 on its framework document to discuss the issues with interested parties and provide information about DOE's rulemaking process.[419] In 2009, DOE conducted a preliminary analysis on refrigerator energy standards and then publicly released and sought comment on its analysis.[420] DOE then held another public meeting in December 2009 to discuss its analysis with affected parties.[421]

In 2010, thirty-five stakeholder groups negotiated DOE's rulemaking.[422] The group reached a consensus in July and sent a joint comment with their position.[423] Impressively, the joint comment represented the position of diverse affected parties, including organizational representatives of manufacturers, energy and environmental advocates, and consumer groups.[424] In response to the joint comment, DOE revised their analyses, published a NPRM in September, and held a public meeting in response to the NPRM in October 2010.[425] DOE then analyzed price trends resulting from its proposed regulations, and released its assessments in a notice of data availability in February 2011 to solicit comments.[426]

[416] Energy Conservation Program for Consumer Products: Procedures for Consideration of New or Revised Energy Conservation Standards for Consumer Products, 61 Fed. Reg. 36974 (July 15, 1996) (to be codified at 10 C.F.R. pt. 430).

[417] Energy Conservation Program: Energy Conservation Standards for Residential Refrigerators, Refrigerator-Freezers, and Freezers, 76 Fed. Reg. 57516 (Sept. 15, 2011) (to be codified at 10 C.F.R. pt. 430).

[418] Id. at 57524.

[419] Id.

[420] Id.

[421] Id.

[422] Id.

[423] Id.

[424] Id.

[425] Id. at 57525.

[426] Id.

The deliberation between DOE and affected parties is impressive. At each step when the agency conducted analysis that altered rulemaking, the agency released its analyses and conducted public meetings to discuss it with affected parties. The negotiation process allowed affected parties to reach consensus on the regulation before the agency published their NPRM, causing affected parties to buy into the regulation and streamlining the path to the final rule. DOE's rulemaking process appears similar to the relationship created by relational fairness.

Other agencies have also embraced open, ongoing, and fair deliberation with affected parties.[427] While agency adoption of these participatory measure is laudatory, they have largely been ad hoc and unstructured.[428] Relational fairness provides both theoretical justification for their systematic use, as well as a framework for analyzing which types of participatory measures should be adopted to improve the legitimacy of informal rulemaking.

V. POTENTIAL CRITICISMS

This Part evaluates three potential criticisms to applying relational fairness in the administrative state: inefficiency, capture, and implementation.

A. The Inefficiency Criticism

Many commentators believe administrative governance is highly inefficient.[429] The Inefficiency Critic argues relational fairness requires additional procedures to rulemaking. Considering the inefficiencies of rulemaking, the Critic contends additional procedures are unjustified due to the efficiency sacrifice.[430]

[427] Also consider the fuel economy standards finalized by the National Highway Traffic Safety Administration ("NHTSA") and EPA in October 2012. 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62624 (Oct. 15, 2012) (to be codified at 40 C.F.R. pts. 85, 86, 600). The NHTSA and EPA held discussions on potential fuel economy standards with numerous affected parties, sought input from affected parties in advance of their Notice of Intent to Issue a Proposed Rulemaking, and repeatedly involved affected parties and the public through public meetings after they published the NPRM. Id. at 62635. This allowed the agencies to proactively reach consensus with many affected parties even before they published the proposed rule. Id.

[428] Sant'Ambrogio & Staszewski, supra note 217, at 830–31.

[429] See, e.g., McGarity, supra note 386.

[430] Id. at 1397.

First, the Critic is mistaken that relational fairness necessarily requires *additional* procedures. Instead, it requires *different* procedures. The last Part's discussions of negotiated rulemaking and the DOE's process rule serve as constructive examples of how to instill relational fairness through restructuring informal rulemaking. However, what ultimately matters in designing a system of informal rulemaking is that the values of relational fairness are substantiated through agency structure and processes. This means it is theoretically possible for a variety of different policymaking structures to satisfy relational fairness. The particular structure for informal rulemaking that is ultimately chosen by the state can then involve determinations of their comparative efficiency.

Second, there are no ex ante reasons why these different procedures increase rulemaking inefficiency. Taking negotiated rulemaking as an example, empirical evidence found it does not increase the time required to get to a final rule compared to notice-and-comment.[431] Multiple studies also show procedural constraints have not increased rule promulgation time, and may actually have the counterintuitive effect of speeding up rulemaking.[432] Based on available evidence, there are no ex ante grounds to believe that implementing relational fairness would increase rulemaking inefficiency.[433] Given that relational fairness allows for different kinds of processes to implement the theory, this question can only be answered by analyzing the specific agency policymaking structures that are adopted to implement relational fairness. Third, there are affirmative reasons to believe relational fairness could increase administrative efficiency. For example, if informal rulemaking satisfying relational fairness led to less litigation after rule finalization, then the time and uncertainty of the rulemaking process could decrease.

[431] See Coglianese, supra note 395, at 1274–75.

[432] See Jason Webb Yackee & Susan Webb Yackee, Administrative Procedures and Bureaucratic Performance: Is Federal Rule-Making "Ossified"?, 20 J. Pub. Admin. Res. Theory 261, 262 (2010); Stephen M. Johnson, Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001–2005, 38 Env't L. 767, 784 (2008); Anne Joseph O'Connell, Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State, 94 Va. L. Rev. 889, 932 (2008).

[433] Cf. Anne Joseph O'Connell, Bureaucracy at the Boundary, 162 U. Pa. L. Rev. 841, 892 (2014) (noting efficiency and accountability are not conflicting values in administrative law).

B. The Regulatory Capture Criticism

Critics often claim that the administrative state is captured, arguing that agencies work for the benefit of well-resourced interest groups rather than citizens.[434] Agencies are seen as vulnerable to industry capture due to the economic stakes of regulations and the repeated interactions between industry and agencies.[435] The Capture Critic criticizes relational fairness because it facilitates capture by emphasizing deliberation between agencies and affected parties.[436]

This criticism is a descriptive claim about the probability of capture occurring given certain institutional structures. It is not a theoretical criticism of relational fairness unless relational fairness *necessarily* causes capture. If this is not the case, the question is which structures and processes limit ex ante capture risk.[437]

Relational fairness is actually likely to reduce the potential for capture, especially compared to our current notice-and-comment regime. This is because relational fairness requires agency staff to deliberate with not just industry actors, but *all* affected parties on an open and equal basis, such that no party gains an upper hand to access agency officials. The very structure of relational fairness is designed to both open informal rulemaking and equalize the ability of affected parties to access agency deliberation. This process of equalization, and the affirmative duties it places on agencies to satisfy it, reduces the background structural and financial resource advantages of commercial groups.

Once the agency has come to a decision, the agency must be able to offer reasons made in good faith for their decision. The reasonableness proviso dictates these reasons must be understood by all affected parties, including those who lost in the policymaking process. As previously discussed, arbitrariness review is not satisfied if an agency gives pretextual reasons to hide agency capture. Regulatory capture is also a per se violation of relational fairness because the agency would not be displaying equal access or respect to all affected parties, and the enhanced

[434] Ernesto dal Bó, Regulatory Capture: A Review, 22 Oxford Rev. Econ. Pol'y 203, 203 (2006).

[435] See Alfred Kahn, The Economics of Regulation: Principles and Institutions 11 (1988); David Martimort, The Life Cycle of Regulatory Agencies: Dynamic Capture and Transaction Costs, 66 Rev. Econ. Stud. 929, 930–31 (1999).

[436] Ian Ayres & John Braithwaite, Tripartism: Regulatory Capture and Empowerment, 16 Law & Soc. Inquiry 435, 437 (1991); Bagley, The Procedure Fetish, supra note 220, at 368.

[437] See generally Barkow, supra note 54.

arbitrariness review utilized by courts after a claimed violation of the procedural or relational values of relational fairness would give judges the power to sniff out such violations. Agency action is illegitimate if the agency favors one affected party over others for reasons unrelated to the practical or normative desirability of policy outcomes.

There are important parallels between relational fairness and Ian Ayres and John Braithwaite's tripartism model to reduce regulatory capture.[438] Under tripartism, agencies create a competitive and democratic environment by providing organizations access to all available information, allow for open negotiation procedures between agencies and these organizations, and allow for NGOs to sue or prosecute under a regulatory statute.[439] Relational fairness similarly attempts to unlock "the smoke-filled rooms where the real business of regulation is transacted"[440] by opening and equalizing regulatory access, information, and deliberation to eliminate inequalities between affected parties.

C. The Implementation Criticism

The number of parties affected by regulation greatly varies. Some regulations affect only a few groups. For example, the Animal and Plant Health Inspection Service in the Department of Agriculture implements The Swine Health Protection Act[441] by regulating the methods that garbage must be processed if it is used as feed by pig farm facilities.[442] For these regulations, it is likely easy for the agency to identify the affected parties and to interact with them in a manner that satisfies relational fairness. However, other regulations affect dozens of groups, and millions of citizens. Consider regulations implementing the ACA.[443] The Implementation Critic concedes agencies could implement relational fairness for the Swine Health Protection Act, but questions whether agencies could implement relational fairness for the ACA.

The strength of this argument varies based on its scope. It is impossible for agency policymaking to directly involve all affected individuals. This

[438] Ian Ayres & John Braithwaite, Responsive Regulation: Transcending the Deregulatory Debate 54–97 (1992).

[439] Ayres & Braithwaite, supra note 436, at 441.

[440] Ayres & Braithwaite, supra note 438, at 58.

[441] 7 U.S.C. §§ 3801–3813 (1980).

[442] See, e.g., Swine Health Protection, 9 C.F.R. § 166.2 (2009) (regulating various aspects of swine facilities to ensure swine health).

[443] Patient Protection and Affordable Care Act, 42 U.S.C. § 18001(d) et seq. (2010).

is the case for any act of agency policymaking. However, requiring individual participation in policymaking makes the argument that only direct democracy is a legitimate form of governance. This is implausible. Modern democratic governance requires both elections and civil society to serve as filtering mechanisms, such that the interests and priorities of individuals are sorted through processes of representation.[444] Relational fairness is generated from recognizing the distinct normative relationships between persons and agencies, and therefore the theory is satisfied when each normative relationship that is potentially affected by agency action has an equal ex ante opportunity to deliberate and influence agency policymaking. This equality need not occur at the level of individual person, but rather at the level of each normative relationship between potentially affected persons and agencies.

There are multiple ways to ensure that each normative relationship of potentially affected persons is included within agency policymaking. First, the state should encourage civic organizations that consider specific normative relationships and include them in policymaking. The United States has a long history of supporting civil society groups that become important administrative stakeholders.[445] Individual and collective affected parties can monitor, interact with, and get involved in these organizations throughout this process.[446] Second, agency offices could be created with the purpose of considering the interests of the citizenry. Ombudsman and Public Advocate offices have already taken root in many countries and are beginning to take hold in the United States.[447] For

[444] See Habermas, supra note 83, at 351–62 (discussing the inability for a spontaneous, informal civil society to contribute to political discourse in democratic governance).

[445] See, e.g., Cathie Jo Martin, Business and the New Economic Activism: The Growth of Corporate Lobbies in the Sixties, 27 Polity 49, 51 (1994) (describing presidential use of the "business mobilization strategy" to encourage the development of trade associations and other organizations to support their political agendas); Cathie Jo Martin, Business Influence and State Power: The Case of U.S. Corporate Tax Policy, 17 Pol. & Soc'y 189, 201, 203 (1989) (same).

[446] Habermas, supra note 83, at 350–51.

[447] See Barkow, supra note 54, at 62 (advocating for formal public advocates within agencies); Margo Schlanger, Offices of Goodness: Influence Without Authority in Federal Agencies, 36 Cardozo L. Rev. 53, 65 n.48 (2014) (cataloging the various outward facing ombudsmen in the federal administrative state). See generally ACUS Recommendation 2016-5, The Use of Ombuds in Federal Agencies (Dec. 14, 2016), https://www.acus.gov/sites/default/files/documents/Recommendation%202016-5.pdf [https://perma.cc/KR7J-5JVX] (discussing the benefits of ombuds in federal agencies and recommending the use of ombuds be expanded within the federal administrative state); Brett McDonnell & Daniel Schwarcz,

example, the Federal Energy Regulatory Commission ("FERC") recently created the Office of Public Participation ("OPP") to serve as a liaison between the public affected by FERC proceedings and to help ensure that diverse public perspectives are represented during policymaking.[448] Among their other early projects, OPP has shown particular interest in developing an intervenor funding program to help subsidize expenses related to public input during FERC policymaking.[449] These citizen-facing offices could be expanded and included within agency policymaking.

Individual participation can also be encouraged under relational fairness through several different mechanisms. First, traditional avenues of individual participation could still be available for citizens, such as submitting comments or participating in public hearings. Additionally, participatory mechanisms could be created when affected parties include a large portion of the citizenry or the public-at-large, such as representative citizens chosen by lot, focus groups, or citizen task forces.[450] If a regulation requires technical expertise, then citizens can be briefed before deliberation to ensure they are informed about the relevant technical dimensions of policy before engaging in agency policymaking.[451] Implementing relational fairness will require a certain degree of institutional experimentation by agencies to determine how they wish to structure their relationships with affected parties in civil society.

Regulatory Contrarians, 89 N.C. L. Rev. 1629, 1654–56 (2011) (describing the use of different forms of regulatory contrarians within agencies, including ombudsmen).

[448] Office of Public Participation, Fed. Energy Regul. Comm'n, https://ferc.gov/OPP [https://perma.cc/3RD5-93WS] (last visited Mar. 23, 2023).

[449] Ethan Howland, FERC's Office of Public Participation Eyes Options for Intervenor Funding, UtilityDive (Apr. 4, 2022), https://www.utilitydive.com/news/ferc-office-public-participation-intervenor-funding-compensation/621406/ [https://perma.cc/NQ47-SYTX].

[450] See, e.g., David J. Arkush, Direct Republicanism in the Administrative Process, 81 Geo. Wash. L. Rev. 1458, 1513 (2013) (proposing administrative juries to help agencies better reflect public preferences); Jerry Frug, Administrative Democracy, 40 U. Toronto L.J. 559, 580 (1990) (suggesting the inclusion of public boards of directors, citizen groups chosen by lot, and ad hoc task forces into agencies); Mendelson, supra note 236, at 181 (proposing agency use of "focused polling, focus groups, public deliberation efforts, so-called citizen juries, and other devices"); Michael Sant'Ambrogio & Glen Staszewski, Public Engagement with Agency Rulemaking, Admin. Conf. of the U.S. 48–50 (Nov. 19, 2018), https://www.acus.gov/sites/default/files/documents/Public%20Engagement%20in%20Rulemaking%20Final%20Report.pdf [https://perma.cc/YAN7-7356] (describing the use of focus groups by federal agencies).

[451] Farina et al., Rulemaking vs. Democracy, supra note 198, at 143–44 (listing studies showing measures to brief citizens before deliberation are effective at getting citizens to update their policy preferences).

CONCLUSION

Administrative agencies will continue to be viewed with skepticism in administrative law until agencies can be normatively legitimated as part of our democratic government. Although previously proposed theories are intuitively appealing, they all run into problems.

This Article legitimates the administrative state on its own terms by building a new democratic relationship between agencies and persons potentially affected by agency action. This generates the theory of relational fairness, which legitimates the administrative state by structuring the direct relationship between agencies and potentially affected persons according to certain procedural, relational, and substantive components.

Federal courts, Congress, and agencies have implicitly shown concern for relational fairness, but their efforts have been uneven. Relational fairness explains these steps, justifies them, and serves as an organizing framework for further doctrinal and policy innovation. Focusing on the relationship between agencies and affected parties generates a deferential arbitrariness review. Relational fairness also calls for Congress and the courts to be involved in structuring internal administrative law doctrines that concern the relationship between agencies and affected parties, such as ex parte communications and the use of guidance documents by agencies.

Most notably, the theory rejects notice-and-comment rulemaking on legitimacy grounds due to the burdens it places on affected parties and the political inequalities it generates during agency policymaking. Congressional and agency efforts to modify informal rulemaking to align administrative policymaking with relational fairness should be encouraged to improve the legitimacy of the administrative state.