

## THE SUBMERGED ADMINISTRATIVE STATE

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The United States government is experiencing a reputation crisis: after decades of declining public trust, many Americans have lost confidence in the government's capacity to perform its basic functions. While various explanations have been offered for this worrying trend, these existing accounts overlook a key factor: people are unfamiliar with the institutions that actually do most of the governing—administrative agencies—and they devalue what they cannot easily observe. The “submerged” nature of the administrative state is, we argue, a central reason for declining trust in government.

This Article shows that the administrative state is systematically submerged in two ways. First, administrative agencies are constrained in their communications with the public: it is difficult for them to publicize their own accomplishments and successes due to a range of legal, political, and resource constraints. Second, agency actions are frequently opaque: it is difficult for the American public to perceive, comprehend, or trace policy outputs back to government action. Together, these factors have the effect of making Americans less aware of the work that the administrative state does, thereby undermining the public's trust in government.

The Article then argues that it is time to un-submerge the administrative state. Doing so has the potential to rebuild trust in government by bringing administrators and their expertise to light, revealing the extent of benefits provided by agencies, and bolstering public participation in agency processes. This approach comes with potential perils, including the dangers of

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propaganda, skewed agency priorities, and backlash, yet these dangers are outweighed by the necessity of bringing the administrative state to light.

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## INTRODUCTION

In his 2018 book, *The Fifth Risk*, Michael Lewis documents a curious phenomenon: despite remarkable improvements in the accuracy of the National Weather Service’s forecasts over the years, “people didn’t seem to realize that the government’s weather information was more and more reliable—or even that it was their government giving it to them.”<sup>1</sup> As a result of billions of dollars of public investments in satellites, weather radar, weather balloons, computing power, and

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1. MICHAEL LEWIS, *THE FIFTH RISK* 131–32 (2018).

forecast models, the National Weather Service now generates remarkably accurate weather forecasts, which it makes available to the public for free.<sup>2</sup> Private for-profit forecasting companies like AccuWeather also depend on the Weather Service's forecasts and data to produce their own private forecasts.<sup>3</sup> Nevertheless, Kathryn Sullivan, who served as the Administrator of the National Oceanic and Atmospheric Administration, incredulously recalled that a "United States congressman had asked her why the taxpayer needed to fund the National Weather Service when he could get his weather from AccuWeather. *Where on earth did he think AccuWeather—or the apps or the Weather Channel—got their weather?*"<sup>4</sup>

The explanation for the public's lack of awareness, Lewis suggests, is that much of the work that the National Weather Service does is not salient. This in turn is due to multiple factors: legal constraints that prohibit the Weather Service "from advertising the value of its services,"<sup>5</sup> an institutional culture where meteorologists at the Weather Service "never claim credit,"<sup>6</sup> and the efforts of AccuWeather to make the Weather Service's forecasts and data less accessible to the public (including, for instance, preventing the Weather Service from creating its own app), so that they do not pose a threat to AccuWeather's business model.<sup>7</sup> The end result is that, when Americans consult the weather forecast on their phone, television, or computer, they are unlikely to appreciate the extent to which they are benefitting from the work of a federal agency.<sup>8</sup>

This is not an isolated incident. Government provides essential goods and services that we all depend on, but it is hardly the first thing we think of when we benefit from its accomplishments. To cite only a few examples: government is behind many core technologies of our information economy (*e.g.*, microchips,<sup>9</sup> the Global Positioning System

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2. *See id.* at 169, 171.

3. *See id.* at 169–70.

4. *Id.* at 132.

5. *Id.* at 170.

6. *Id.* (quoting a former Obama Commerce Department official).

7. *Id.* at 170–76, 208–09.

8. *Id.* at 131–32.

9. Phil Goldstein, *How the Government Helped Spur the Microchip Industry*, FEDTECH (Sept. 11, 2018), <https://fedtechmagazine.com/article/2018/09/how-government-helped-spur-microchip-industry> [https://perma.cc/4CNH-ZZEG]. More recently, the government doubled down on its investment in microchips with the CHIPS Act. *See* Ana Swanson, *Congress Is Giving Billions to the Chip Industry. Strings Are Attached.*, N.Y. TIMES (Aug. 3, 2022), <https://www.nytimes.com/2022/08/03/business/economy/chip-industry-congress.html>.

(GPS),<sup>10</sup> the internet<sup>11</sup>),<sup>12</sup> has spearheaded efforts to develop life-saving medical and pharmaceutical advances (*e.g.*, penicillin, treatments for malaria, vaccines for influenza and COVID-19),<sup>13</sup> and has virtually eliminated a host of important public problems, from commercial plane crashes<sup>14</sup> to lead air pollution.<sup>15</sup> Nevertheless, a majority of Americans believe that government is incapable of solving problems and simply “does not work.”<sup>16</sup> As Jacob Hacker and Paul Pierson put it, Americans seem to suffer from a form of “amnesia” about the importance of government.<sup>17</sup>

This state of affairs should trouble anyone who cares about public trust in government. American government is experiencing a “reputation crisis.”<sup>18</sup> Trust in government has been declining for several decades, so much so that today only a small minority of Americans say they trust the

10. Phil Goldstein, *GPS Helps Agencies, and the World, Get Pinpoint Location Accuracy*, FEDTECH (Dec. 11, 2017), <https://fedtechmagazine.com/article/2017/12/gps-helps-agencies-and-world-get-pinpoint-location-accuracy> [https://perma.cc/DM7R-3XCU].

11. Robert E. Kahn, *The Role of Government in the Evolution of the Internet*, in REVOLUTION IN THE U.S. INFORMATION INFRASTRUCTURE 13, 13–16 (1995).

12. See Daniel P. Gross & Bhaven N. Sampat, *America, Jump-Started: World War II R&D and the Takeoff of the US Innovation System*, 113 AM. ECON. REV. 3323, 3324 (2023) (finding that the World War II-era federal Office of Scientific Research and Development funded “a range of technological advances” and “reshape[d] the US innovation system”).

13. See *id.* at 3324 n.2, 3328; Richard G. Frank, Leslie Dach & Nicole Lurie, *It Was the Government that Produced COVID-19 Vaccine Success*, HEALTH AFFS. (May 14, 2021), <https://www.healthaffairs.org/content/forefront/government-produced-covid-19-vaccine-success>; Helen Branswell, *Why Covid-19 Vaccines Are a Freaking Miracle*, STAT (Feb. 14, 2022), <https://www.statnews.com/2022/02/14/why-covid-19-vaccines-are-a-freaking-miracle/>.

14. See Leslie Josephs, *The Last Fatal US Airline Crash Was a Decade Ago. Here’s Why Our Skies Are Safer*, CNBC, <https://www.cnbc.com/2019/02/13/colgan-air-crash-10-years-ago-reshaped-us-aviation-safety.html> [https://perma.cc/9T7S-UK3X] (Mar. 8, 2019, 3:34 PM). There has not been a major commercial airline crash in the United States since 2009, and experts attribute this impressive record to regulation. See *id.*

15. Press Release, EPA, EPA Takes Final Step in Phaseout of Leaded Gasoline (Jan. 29, 1996), <https://www.epa.gov/archive/epa/aboutepa/epa-takes-final-step-phaseout-leaded-gasoline.html> [https://perma.cc/TA5L-QQWW].

16. Reid J. Epstein, *As Faith Flags in U.S. Government, Many Voters Want To Upend the System*, N.Y. TIMES, <https://www.nytimes.com/2022/07/13/us/politics/government-trust-voting-poll.html> (July 17, 2023).

17. See generally JACOB S. HACKER & PAUL PIERSON, AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER (2016).

18. See generally AMY E. LERMAN, GOOD ENOUGH FOR GOVERNMENT WORK: THE PUBLIC REPUTATION CRISIS IN AMERICA (AND WHAT WE CAN DO TO FIX IT) (2019).

federal government to do what is right.<sup>19</sup> Americans tend to underestimate the extent to which they benefit from government programs, either because they do not recognize that they are receiving these benefits or because they are not aware that the benefits are being provided by the government.<sup>20</sup>

The government's reputation crisis is not simply cosmetic; it undermines our ability to address pressing social challenges like economic inequality or climate change. A democratic government's ability to address such problems hinges in part on public trust.<sup>21</sup> For instance, trust in government can affect voluntary compliance with law and take-up of policy<sup>22</sup>: whether it is paying taxes,<sup>23</sup> getting vaccinated against COVID-19,<sup>24</sup> or signing up for health insurance.<sup>25</sup> Trust in

19. *Public Trust in Government: 1958-2023*, PEW RSCH. CTR., <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/> [<https://perma.cc/7E9S-Y87N>] (Sept. 19, 2023). Through the early 1960s, trust in government hovered around 75%. It then precipitously declined through the 1970s to a low of 27%, partially stabilized between the 20% to 40% percent range from the 1980s to the early 2000s, then returned to the 10% to 20% range for the last two decades. *Id.*

20. See generally SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* (2011).

21. For comprehensive reviews of the research literature on trust as it relates to government, see TRUST & GOVERNANCE (Valerie Braithwaite & Margaret Levi eds., 1998), Margaret Levi & Laura Stoker, *Political Trust and Trustworthiness*, 3 ANN. REV. POL. SCI. 475 (2000), and Jack Citrin & Laura Stoker, *Political Trust in a Cynical Age*, 21 ANN. REV. POL. SCI. 49 (2018). For an argument that reputational cachet is important for the effectiveness of administrative agencies in particular, see DANIEL CARPENTER, *REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA* (2010) (studying how the FDA's reputation impacts its operational power).

22. Chris Dann, *Does Public Trust in Government Matter for Effective Policy-Making?*, ECON. OBSERVATORY (July 26, 2022), <https://www.economicsobservatory.com/does-public-trust-in-government-matter-for-effective-policy-making> [<https://perma.cc/C93M-3RYW>]; Steven Van de Walle & Frédérique Six, *Trust and Distrust as Distinct Concepts: Why Studying Distrust in Institutions Is Important*, 16 J. COMPAR. POL'Y ANALYSIS: RSCH. & PRAC. 158, 160 (2014); Patti Tamara Lenard, *Trust Your Compatriots, but Count Your Change: The Roles of Trust, Mistrust and Distrust in Democracy*, 56 POL. STUD. 312, 313–15 (2008).

23. See Erzo F. P. Luttmer & Monica Singhal, *Tax Morale*, 28 J. ECON. PERSPS. 149 (2014); Christoph Kogler, Jerome Olsen, Erich Kirchler, Larissa M. Batrancea & Anca Nichita, *Perceptions of Trust and Power Are Associated with Tax Compliance: A Cross-Cultural Study*, 11 ECON. & POL. STUD. 365 (2023).

24. See Olivier Bargain & Ulugbek Aminjonov, *Trust and Compliance to Public Health Policies in Times of COVID-19*, J. PUB. ECON., Oct. 29, 2020, at 1; Daniel Devine, Jennifer Gaskell, Will Jennings & Gerry Stoker, *Trust and the Coronavirus Pandemic: What Are the Consequences of and for Trust? An Early Review of the Literature*, 19 POL. STUD. REV. 274 (2021); Elizabeth Suhay, Aparna Soni, Claudia Persico & Dave E. Marcotte, *Americans' Trust in Government and Health Behaviors During the COVID-19 Pandemic*, RUSSELL SAGE FOUND. J. SOC. SCIS., Dec. 2022, at 221.

25. See LERMAN, *supra* note 18, at 131–48.

government can also affect citizens' participation in democracy through voting and other mechanisms.<sup>26</sup> At a more fundamental level, some level of trust in government is arguably essential for a healthy, functioning democracy.<sup>27</sup>

Although there is no single driver of the government's reputation crisis, one key reason for Americans' low estimation of government is that Americans are not tuned into where most of the work of government is being done: the collection of agencies known as the "administrative state."<sup>28</sup> This Article argues that federal agencies' work is (to borrow a term coined by Suzanne Mettler) *submerged*, making it difficult for Americans to perceive it or to understand its day-to-day effects on their lives.<sup>29</sup> Today, many Americans appear to have a severely limited understanding of what administrative agencies like the National Weather

26. See COLIN HAY, *WHY WE HATE POLITICS* (2007); JAMILA MICHENER, *FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS* (2018); Yunsoo Lee & Hindy Lauer Schachter, *Exploring the Relationship Between Trust in Government and Citizen Participation*, 42 INT'L J. PUB. ADMIN. 405 (2019).

27. Lenard, *supra* note 22, at 313 (arguing that "trust is central to democracy" and "arguments that make distrust the central element of democracy fail"); WILLIAM D. ARAIZA, *REBUILDING EXPERTISE: CREATING EFFECTIVE AND TRUSTWORTHY REGULATION IN AN AGE OF DOUBT* 207 (2022) ("Distrust in government is corrosive to any democracy."); SUZANNE METTLER, *THE GOVERNMENT-CITIZEN DISCONNECT* 22 (2018) ("The government-citizen disconnect . . . frays the bonds that make representative government and democracy possible."); Arthur H. Miller, *Political Issues and Trust in Government: 1964-1970*, 68 AM. POL. SCI. REV. 951, 951 (1974) ("A democratic political system cannot survive for long without the support of a majority of its citizens.").

28. See Emily S. Bremer, *Power Corrupts*, 41 YALE J. REGUL. (forthcoming 2024) (manuscript at 2) ("Public trust in government thus depends on public trust in agencies . . .").

29. See generally METTLER, *supra* note 20. Although we are greatly indebted to Mettler, our focus differs from hers in a few respects. First, whereas much of Mettler's work focuses on legislation, our work focuses on the administrative state in particular. This separate focus is essential: as described above, most lawmaking today is done by agencies, not by Congress or Article III courts, and agencies also operate under a distinct set of constraints from Congress or the president. Second, Mettler primarily focuses on two specific ways in which contemporary government is submerged: namely, by channeling public benefits through the tax code or through subsidies to private organizations. In contrast, our focus is broader and encompasses a variety of other modes of concealment, including the constraints placed on government advertising and agencies' growing reliance on private standards. Finally, our project focuses in particular on the legal and institutional determinants of the submerged administrative state. Of note, Brian Feinstein and Jennifer Nou employ a similar term, "submerged independent agencies," but their focus differs from both Mettler's and our own. Namely, they focus on agencies headed by career staff removable only for cause who have been subdelegated authority by executive branch actors. Brian D. Feinstein & Jennifer Nou, *Submerged Independent Agencies*, 171 U. PA. L. REV. 945, 953 (2023).

Service do or how they do it.<sup>30</sup> Most Americans, for example, would likely be surprised to discover that the vast majority of binding federal laws are issued by administrative agencies, not by Congress,<sup>31</sup> or that federal agency adjudicators vastly outnumber Article III judges.<sup>32</sup> Even law students, many of whom majored in political science, often know little about administrative agencies or how they operate until they take a course in administrative law or legislation and regulation for the first

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30. See Craig W. Thomas, *Maintaining and Restoring Public Trust in Government Agencies and Their Employees*, 30 ADMIN. & SOC'Y 166, 168 (1998) (“[T]he general public knows relatively little about most agencies . . .”). The Annenberg Civics Knowledge Survey, which tracks public understanding of the Constitution and the structure of government, does not even ask about administrative agencies. See *Annenberg Civics Knowledge Survey*, ANNENBERG PUB. POL'Y CTR. UNIV. PA., <https://www.annenbergpublicpolicycenter.org/political-communication/civics-knowledge-survey/> [<https://perma.cc/8MZ8-MRHL>].

31. See Memorandum from Richard L. Revesz, Adm'r, Off. of Info. & Regul. Affs., to Heads of Exec. Dep'ts & Agencies 6 (July 19, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf> [<https://perma.cc/Z4Q9-APGN>] (“[T]he Federal regulatory process tends to receive much less attention in civics or government courses than the legislative process in Congress . . .”); CORNELIUS M. KERWIN & SCOTT R. FURLONG, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY*, at ix (5th ed. 2019) (“Rulemaking is the single most important function performed by agencies of government. Some readers may find this a surprising, if not outrageous, assertion.”); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 412 (2005) (“Because administrative lawyers are intimately familiar with those legal structures, they realize what many ordinary citizens do not: that nearly every facet of our modern life is defined by a sprawling, yet poorly understood, regulatory apparatus.”); Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 ANN. REV. POL. SCI. 37, 39 (2019) (“Federal agencies in 2015 issued 3,410 new notice and comment rules, which equates to approximately 30 rules for every piece of congressionally passed legislation that year.” (citation omitted)).

32. See Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1645 (2016) (“Despite numbers and caseloads substantially larger than Article III courts’, ALJs and AJs mostly go about unnoticed, toiling in the shadows of agency rulemaking.”); Faiza W. Sayed, *The Immigration Shadow Docket*, 117 NW. U. L. REV. 893, 906 (2023) (noting statistics on the “staggering number of appeals” heard by the Board of Immigration Appeals and the resulting substantial backlog); Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1098–100 (2018) (describing adjudications from the Social Security Administration, immigration judges, and the Board of Veterans Appeals, among others, as a “mountain of adjudication” and noting that “federal courts review only a tiny fraction of the cases agency adjudicators decide”). Notably, even administrative law specialists are a bit fuzzy on just how many adjudicators and adjudications there are in the administrative state. See Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 153–54 (2019) (noting estimates of non-ALJ adjudicators and acknowledging that the APA does not reach many of these adjudicators).

time.<sup>33</sup> We live in a “codified” society where many aspects of daily life are regulated by administrative agencies in ways that are not obvious to the public.<sup>34</sup>

Although some lack of understanding is to be expected, given the scale of government’s activities and the limited time and attention that Americans have to devote to the administrative state, the significant public deficit in the understanding of administrative governance is not inevitable. This Article argues that the administrative state is systematically submerged along two dimensions. First, administrative agencies are often unwilling or unable to communicate effectively with the public due to a confluence of laws barring certain public relations activities, resource limitations, and political incentives.<sup>35</sup> Second, agency actions themselves are designed or implemented in ways that frequently obscure the agency’s role: for example, agencies can implement policies through private contractors, making it difficult for the American public to attribute successes or failures; they can opt for behavioral nudges that in practice may conceal the government’s role in shaping our lives; or they can enshroud their actions in layers of legalese and technical complexity that prevent the public from understanding what is being done or who is responsible for it.<sup>36</sup>

Together, these factors have the effect of making Americans less aware of the work that the administrative state does, thereby concealing the extent to which Americans benefit from their government. As social scientists writing about “policy feedback effects” have demonstrated, the design and implementation of policies themselves help to shape the public’s political attitudes, including its attitudes toward government.<sup>37</sup> If the bulk of the work of the federal government is done by administrative agencies, and if the accomplishments of these agencies are not visible or recognizable as such, then it is no wonder that, as Andrea Louise

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33. See Aaron L. Nielson, *Deconstruction (Not Destruction)*, *DEDALUS*, Summer 2021, at 143, 144 (“Most important, you were most likely misinformed in grade school when you learned about how the federal government works.”); Craig N. Oren, *The Problems of Teaching Administrative Law: We Can’t Solve Them Alone*, 38 *BRANDEIS L.J.* 193, 193–94 (2000) (“Students don’t know very much about administrative agencies.” (emphasis omitted)). Indeed, the advent of “Leg-Reg” courses is an effort to make students much more aware of agencies and regulation early on in their legal education because of a recognition of how limited students’ understanding of these aspects of government is relative to their importance. See John F. Manning & Matthew Stephenson, *Legislation & Regulation and Reform of the First Year*, 65 *J. LEGAL EDUC.* 45, 60–68 (2015).

34. See BENJAMIN VAN ROOIJ & ADAM FINE, *THE BEHAVIORAL CODE: THE HIDDEN WAYS THE LAW MAKES US BETTER . . . OR WORSE* 3 (2021).

35. See *infra* Section II.A.

36. See *infra* Section II.B.

37. See *infra* Section I.C.



Campbell puts it, “many working-age Americans have difficulty seeing what government does for them; they conceive of themselves chiefly as taxpayers providing funds utilized by others rather than as members of society who both pay in and get back meaningful government benefits.”<sup>38</sup>

The upshot of this analysis is that, to begin building more trust in government, it is necessary to revisit certain constraints that currently incentivize agencies not to communicate effectively with the public and to design or implement their policies in opaque ways. This approach is not without its own perils, including the dangers of propaganda, skewed agency priorities, and backlash, yet these dangers are outweighed by the necessity of bringing the administrative state to light.

This Article proceeds as follows: Part I first examines two prominent alternative explanations for the government’s reputation crisis, which focus respectively on government’s failures and on ideological critiques of government bureaucracy. While these explanations are surely important parts of the story, we argue that they cannot by themselves fully account for the dearth of public trust in government today. We then offer a complementary theory, centering on the submerged nature of the administrative state. Part II turns to an analysis of *why* the administrative state is so submerged, making the case that administrative agencies are often incentivized to refrain from communicating effectively to the public, and that they are often hardwired to act in ways that are hard for the general public to notice or understand. Part III argues that unsubmerging the administrative state has the potential to create a positive feedback loop by increasing trust in government.

## I. THE TANGLED ROOTS OF THE PUBLIC REPUTATION CRISIS

To paraphrase the band Talking Heads, we may ask ourselves, how did we get here?<sup>39</sup> Many observers tell a simple story about the erosion of public trust in government, attributing it either to self-inflicted wounds or to damage wreaked by ideological actors on the political right or the political left, or to some combination of the two. This Part outlines these two prevailing perspectives—termed the “government failure perspective” and the “ideological assault perspective,” respectively.<sup>40</sup>

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38. Andrea Louise Campbell, *Policy Feedbacks and the Impact of Policy Designs on Public Opinion*, 36 J. HEALTH POL. POL’Y & L. 961, 967 (2011).

39. See TALKING HEADS, *Once in a Lifetime*, on REMAIN IN LIGHT (Sire Records 1980).

40. We focus on these two accounts because they are especially prominent and influential ones. However, there are other hypotheses for the public reputation crisis that we do not address in this Article. See, e.g., MARC J. HETHERINGTON & THOMAS J.

This Part then explores the limitations of these perspectives. Although both of these perspectives are important and undoubtedly have some explanatory power, they cannot fully account for the government's reputation crisis. This Part then turns to an alternative account, termed the "submergence perspective." The central claim of this Part is that a key reason why Americans likely do not have greater trust in government is that they cannot readily recognize, understand, or attribute the work that administrative agencies do.

### A. *The Government Failure Perspective*

The first perspective, which this Article terms the *government failure perspective*, attributes the erosion of public trust in government to government's own lackluster performance.<sup>41</sup> As applied to the administrative state, this perspective tends to portray administrative agencies as agents that use—or rather, misuse—their discretion to achieve policy ends.<sup>42</sup>

To those who are critical of the government's performance, it may seem ludicrous to speak of a "reputation crisis." Such critics might well protest that the very notion of a reputation crisis implies that the problem is merely one of public relations, and therefore that the public is simply misinformed about the performance of the government. In reality, these critics contend, the public is evaluating governmental performance just fine. As Peter Schuck writes, "across many different policy domains, the public perceives poor governmental performance—and generally speaking, the public is correct in this view."<sup>43</sup> To the extent, then, that Americans view government as providing little social value, as imposing excessive costs, as captured, or as undemocratic, this perspective suggests that is because government itself has earned this reputation. One

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RUDOLPH, WHY WASHINGTON WON'T WORK: POLARIZATION, POLITICAL TRUST, AND THE GOVERNING CRISIS (2015) (attributing declining trust to polarization). *But see* ARAIZA, *supra* note 27, at 3 (noting that the decline in public trust preceded the rise of polarization); LERMAN, *supra* note 18, at 50 ("What is most striking is that, in many years, Republicans and Democrats have expressed comparable levels of skepticism about government efficiency.").

41. *See, e.g.*, PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER (2014). *Cf.* Philip K. Howard, *Practical Fixes for a Broken Washington*, WALL ST. J. (Sept. 18, 2016, 5:43 PM), <http://www.wsj.com/articles/practical-fixes-for-a-broken-washington-1474235004> ("Like many Americans, I believe our government is broken.").

42. Donald P. Moynihan & Joe Soss, *Policy Feedback and the Politics of Administration*, 74 PUB. ADMIN. REV. 320, 321 (2014).

43. Peter H. Schuck, *Understanding Government Failure*, REGUL. REV. (Jan. 5, 2016), <https://www.theregreview.org/2016/01/05/schuck-understanding-government-failure/> [https://perma.cc/862M-J77T].

corollary of this view is that, if the goal is to improve public trust in government, then there is a simple solution: improve governmental performance.<sup>44</sup>

To be sure, there is some truth to this perspective. Government does fail, sometimes in spectacular fashion. Trust in government declined precipitously during the 1970s in particular,<sup>45</sup> a decline which coincided with several high-profile government failures, including the Vietnam War, Watergate, and the rise of stagflation.<sup>46</sup> In recent years, government missteps have contributed to—or exacerbated—several high-profile disasters, including the 2008 financial crisis,<sup>47</sup> the Deepwater Horizon oil spill,<sup>48</sup> and the COVID-19 pandemic,<sup>49</sup> to name only a few. Government also fails in ways which are more quotidian and low profile but which nevertheless have harmful consequences. For instance, agencies can take years to finalize important regulations<sup>50</sup> and months to resolve urgent claims for benefits.<sup>51</sup> Regulations sometimes impose questionable costs on private entities,<sup>52</sup> and many government programs

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44. See JENNIFER PAHLKA, RECODING AMERICA: WHY GOVERNMENT IS FAILING IN THE DIGITAL AGE AND HOW WE CAN DO BETTER 271 (2023) (“The only way to build trust with [people who are alienated from government] is to earn it.”); Gregg G. Van Ryzin, *Outcomes, Process, and Trust of Civil Servants*, 21 J. PUB. ADMIN. RSCH. & THEORY 745, 746 (2011) (“The performance movement in the United States and in Europe has tended to assume that government can restore public trust by delivering and demonstrating results—producing outcomes that matter to citizens.” (citations omitted)).

45. PEW RSCH. CTR., *supra* note 19.

46. ARAIZA, *supra* note 27, at 22–24.

47. See FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT (2011).

48. See NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING (2011).

49. See MAJORITY STAFF OF S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., 117TH CONG., HISTORICALLY UNPREPARED: EXAMINATION OF THE FEDERAL GOVERNMENT’S PANDEMIC PREPAREDNESS AND INITIAL COVID-19 RESPONSE (Comm. Print 2022).

50. Simon F. Haeder & Susan Webb Yackee, *Handmaidens of the Legislature? Understanding Regulatory Timing*, 42 J. PUB. POL’Y 298 (2022).

51. See, e.g., Kathleen Romig, *Policymakers Must Act To Address Social Security Service Crisis*, CTR. ON BUDGET & POL’Y PRIORITIES (May 26, 2022, 4:00 PM), <https://www.cbpp.org/blog/policymakers-must-act-to-address-social-security-service-crisis> [<https://perma.cc/WC5B-FZ43>].

52. An example from recent years might be a rule EPA promulgated regulating mercury emissions from power plants. The rule was vacated by the Supreme Court for EPA’s failure to consider the costs of the regulation, and legal scholars speculate that the Court’s complaints about the rule were likely driven by the low level of quantified benefits from the rule relative to the cost—indeed, the rule would have had a quantified cost-benefit ratio of 1,920 to 1. See Jonathan S. Masur & Eric A. Posner, *Unquantified*

are afflicted with problems of fraud, waste, and inefficiency.<sup>53</sup> Government's attempts to deliver services to the public are frequently derailed by technological breakdowns<sup>54</sup> or impose unjustified, costly, and even demeaning "administrative burdens."<sup>55</sup> And, of course, it is impossible to imagine trust in government remaining very high without the government's accomplishing the basic tasks assigned to it.<sup>56</sup>

In sum, according to the government failure perspective, the problem is not one of public relations; it is that government (including the administrative state) earned its poor reputation by failing so often and in such damaging ways.

### *B. The Ideological Assault Perspective*

A second perspective—which this Article terms the *ideological assault perspective*—focuses on the role that ideological actors on both ends of the political spectrum have played in undermining public trust in government.<sup>57</sup> This perspective emphasizes how ideological actors—primarily from the political right but also some from the political left—have worked to erode public trust in government through anti-government rhetoric and actions that have undercut government's effectiveness, thereby contributing to a further erosion of public

*Benefits and the Problem of Regulation Under Uncertainty*, 102 CORNELL L. REV. 87, 87–88 (2016) (discussing *Michigan v. EPA*, 576 U.S. 743 (2015)). That being said, the well-documented difficulties with quantifying the benefits of regulation make it difficult to assess any claim that particular regulations are clearly not cost-benefit justified. See generally Amy Sinden, *The Problem of Unquantified Benefits*, 49 ENV'T L. 73 (2019).

53. The U.S. Government Accountability Office maintains a "High-Risk List" for waste, fraud, abuse, and mismanagement, and its current list includes a number of policy programs, including, most notably, the Department of Defense's "Contract Management" program, "Medicare Program and Improper Payments," the "National Flood Insurance Program," the Department of Veterans Affairs's "Acquisition Management," and many others. See GAO, GAO-23-106203, HIGH-RISK SERIES (2023), <https://www.gao.gov/assets/gao-23-106203.pdf> [<https://perma.cc/2NY4-6XS7>].

54. See generally PAHLKA, *supra* note 44.

55. See generally PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS (2018); Julian Christensen, Lene Aarøe, Martin Baekgaard, Pamela Herd & Donald P. Moynihan, *Human Capital and Administrative Burden: The Role of Cognitive Resources in Citizen-State Interactions*, 80 PUB. ADMIN. REV. 127 (2019); Donald Moynihan, *The Politics of Administrative Burden*, in HANDBOOK ON THE POLITICS OF PUBLIC ADMINISTRATION 114 (Andreas Ladner & Fritz Sager eds., 2022).

56. See Margaret Levi, *Trustworthy Government: The Obligations of Government & the Responsibilities of the Governed*, DÆDALUS, Fall 2022, at 215, 215 ("Establishing credibility requires that government uphold its side of its implicit contract with citizens and subjects . . .").

57. See, e.g., HACKER & PIERSON, *supra* note 17.

confidence.<sup>58</sup> To some extent, then, this perspective overlaps with the government failure perspective. Yet, whereas the government failure perspective tends to portray administrative agencies as *agents*, the ideological assault perspective tends to portray agencies as *objects*, which have been acted upon by outside actors. This account also has a corollary: it suggests that simply focusing on improving governmental performance will be insufficient to address the government's reputation crisis.<sup>59</sup> Instead, the ideological assault perspective often seems fatalistic, portraying government as inevitably undercut by political attacks.

The ideological assault perspective has tended to focus primarily on the political right. This is for good reason: distrust of government has for decades been a staple of right-wing political ideology, and Republican politicians have long viewed it as in their own political interest to amplify this distrust.<sup>60</sup> Moreover, in recent years, there has been a resurgence in legal, rhetorical, and scholarly challenges to administrative governance in particular,<sup>61</sup> even sometimes calling to “deconstruct[]” the administrative state.<sup>62</sup> This “anti-administrativism” movement depicts the administrative state as incompatible with the Constitution and its separation of powers.<sup>63</sup> Republican politicians in turn have echoed these

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58. Donald Moynihan, *Delegitimization, Deconstruction and Control: Undermining the Administrative State*, ANNALS AM. ACAD., Jan. 2022, at 36, 38 (noting that “[p]arty leaders from both parties run against Washington, DC,” but that “elite rhetorical framing in the Republican Party has become not just more negative, but also more conspiratorial,” weaponizing the “paranoid style” to attack “public servants as part of a cabal of elites”).

59. See, e.g., William Funk, *Better Procedures and Regulations Are Not an Answer to the Loss of Trust in Government*, by William Funk, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 24, 2023), <https://www.yalejreg.com/nc/better-procedures-and-regulations-are-not-an-answer-to-the-loss-of-trust-in-government-by-william-funk/> [<https://perma.cc/UD76-KS4D>].

60. AMY FRIED & DOUGLAS B. HARRIS, AT WAR WITH GOVERNMENT: HOW CONSERVATIVES WEAPONIZED DISTRUST FROM GOLDWATER TO TRUMP (2021); Naomi Oreskes & Erik M. Conway, *From Anti-Government to Anti-Science: Why Conservatives Have Turned Against Science*, DÆDALUS, Fall 2022, at 98, 101.

61. Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8–42 (2017).

62. See Phillip Rucker & Robert Costa, *Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State'*, WASH. POST (Feb. 23, 2017, 9:28 PM), [https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643\\_story.html](https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html) [<https://perma.cc/6KUQ-B9ZC>]. See also David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753 (2022) (examining the political economy of administrative sabotage from within); Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021) (arguing that presidents, especially Republican presidents of recent decades, have attempted to undermine the institutional capacity of agencies).

63. Metzger, *supra* note 61, at 7.

charges, portraying the growth of the administrative state as a constitutional crisis<sup>64</sup> and accusing agency officials of comprising a shadowy “deep state” intent on thwarting democratic governance.<sup>65</sup>

An array of organizations on the political right with an explicitly deregulatory ideology, such as the Cato Institute, the Heritage Foundation, and the Competitive Enterprise Institute, has also funded and promoted research emphasizing the purported costs and inefficiency of government regulations.<sup>66</sup> In doing so, they have propagated a number of falsehoods about administrative government. For instance, Republican politicians routinely describe administrative regulations as “job killing,” even though they have little to no net impact on overall employment.<sup>67</sup> They also routinely claim that regulations cost \$2 trillion annually, even though that statistic has been thoroughly and repeatedly debunked.<sup>68</sup> Meanwhile, conservative-aligned industry groups misleadingly scapegoat agency regulations for their own economic woes.<sup>69</sup>

That said, in recent years, there has been renewed scholarly focus on the ways in which ideological actors on the political left—ranging from mainstream Democratic politicians to public interest advocates—have helped to undermine public trust in government generally, and in the administrative state in particular. For example, Elizabeth Popp Berman has detailed how some of the right’s skepticism of administrative government has been picked up by leading Democratic figures in what she calls the “economic style of reasoning,” which combines a general preference for markets (and a belief that government’s role is only to facilitate markets and correct for market failures) with an overriding emphasis on efficiency.<sup>70</sup> Democratic politicians such as Bill Clinton, Al

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64. *Id.* at 13.

65. Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1653–54 (2018) (“[W]hen things have gone badly for the Trump administration—as they often have—the President, his allies, and White House surrogates have been quick to blame the deep state.”); Erich Wagner, *Trump Vows To ‘Shatter the Deep State,’ Revive Schedule F and Move More Agencies out of DC*, GOV’T EXEC. (Mar. 21, 2023), <https://www.govexec.com/workforce/2023/03/trump-vows-shatter-deep-state-revive-schedule-f-and-move-more-agencies-out-dc/384266/> [<https://perma.cc/CR86-YYJ5>].

66. Richard W. Parker, *The Faux Scholarship Foundation of the Regulatory Rollback Movement*, 45 ECOLOGY L.Q. 845, 874 (2018).

67. Cary Coglianese & Christopher Carrigan, *The Jobs and Regulation Debate*, in DOES REGULATION KILL JOBS? 1, 2–6 (Cary Coglianese, Adam M. Finkel & Christopher Carrigan eds., 2013).

68. *See generally* Parker, *supra* note 66.

69. *See generally* Cary Coglianese & Daniel E. Walters, *Whither the Regulatory “War on Coal”? Scapegoats, Saviors, and Stock Market Reactions*, 47 ECOLOGY L.Q. 1 (2020).

70. ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY 3, 6 (2022).

Gore, Jimmy Carter, and Richard M. Daley embraced privatization and assailed bureaucratic waste and inefficiency.<sup>71</sup>

In addition, Paul Sabin has explored how the public interest litigation movement of the 1960s and 1970s arose in part from a deep skepticism of administrative institutions.<sup>72</sup> For instance, Rachel Carson's momentous call to action in *Silent Spring* was based in large part on a conviction that "government agencies themselves were a chief source of the problem," so much so that one advocate called the U.S. Department of Agriculture "the demon."<sup>73</sup> Sabin further argues that the public interest movement's critiques of government foreshadowed—and even influenced—the ideological critiques that would later be made by actors on the political right.<sup>74</sup> In particular, he suggests that Ralph Nader's depiction of the administrative state as captured by special interests foreshadowed some of the critiques that Ronald Reagan would later make during his first presidential campaign.<sup>75</sup> Today, it has become commonplace for politicians and commentators on both the political right and the political left to paint federal agencies as "captured" by special interest groups,<sup>76</sup> even though the empirical literature investigating these claims paints a much more nuanced picture.<sup>77</sup>

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71. See LERMAN, *supra* note 18, at 40–47.

72. See generally PAUL SABIN, *PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM* (2021).

73. *Id.* at 18–19.

74. See *id.* at 166.

75. *Id.* at 167. But see Gabriel L. Levine, *Beyond "Big Government": Toward New Legal Histories of the New Deal Order's End*, 121 MICH. L. REV. 1003, 1005 (2023) ("[U]nlike the conservatives who ultimately triumphed, public-interest liberals typically sought to expand the federal government, not—in Grover Norquist's charming phrase—to cut it to the size where they could drown it in a bathtub. Nader was not the unwitting ally of Ronald Reagan, his antibureaucracy rhetoric notwithstanding." (footnotes omitted)); Louis Menand, *Are Liberals To Blame for Our Crisis of Faith in Government?*, NEW YORKER (Aug. 9, 2021), <https://www.newyorker.com/magazine/2021/08/16/are-liberals-to-blame-for-our-crisis-of-faith-in-government> [<https://perma.cc/J8PX-6MPS>] ("[T]he public-interest advocates wanted more government, not less. They wanted Congress to pass laws telling businesses what they could and could not do. They wanted national standards for clean air and clean water. Those are not things that Ronald Reagan wanted.").

76. See Mike Lee, *Fighting Regulatory Capture in the 21st Century*, REGUL. REV. (June 16, 2016), <https://www.theregreview.org/2016/06/16/lee-fighting-regulatory-capture-in-the-21st-century/> [<https://perma.cc/3L2T-WV7H>]; Elizabeth Warren, *Corporate Capture of the Rulemaking Process*, REGUL. REV. (June 14, 2016), <https://www.theregreview.org/2016/06/14/warren-corporate-capture-of-the-rulemaking-process/> [<https://perma.cc/3KJL-775G>].

77. See, e.g., Daniel Carpenter, *Detecting and Measuring Capture, in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 57 (Daniel Carpenter & David A. Moss eds., 2014); STEVEN P. CROLEY, *REGULATION*

Again, to some extent, the ideological assault perspective and government failure perspectives overlap. Most obviously, some scholars argue that one important factor that has impeded government's effectiveness is that Republican politicians and anti-government advocates have deliberately undermined the government's ability to do its job.<sup>78</sup> In addition, other scholars have contended that public interest advocates on the political left have inadvertently undermined trust in government by supporting governmental reforms that have curtailed government's ability to address pressing social problems.<sup>79</sup> Although liberal critics of the administrative state desired different ends than their conservative counterparts, the two groups "made common cause" in supporting reforms in the 1970s that, among other things, imposed more stringent procedures which limited agencies' discretion and power; made judicial review of agency actions more searching and onerous; and subjected agencies to compliance with the National Environmental Policy Act (NEPA).<sup>80</sup> Recently, some observers have argued that, however well-intentioned these reforms may have been, they have been co-opted in ways that have undermined the government's ability to address pressing problems, like climate change and the shortage of affordable housing<sup>81</sup>—and, in doing so, have undermined public trust in government.<sup>82</sup>

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AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 304–06 (2008); Gabriel Scheffler, *Failure To Capture: Why Business Does Not Control the Rulemaking Process*, 79 MD. L. REV. 700, 709 (2020).

78. See, e.g., HACKER & PIERSON, *supra* note 17, at 310 ("With their two-decade-plus campaign against the [Internal Revenue Service], Republicans have mastered the self-fulfilling critique: Say the government isn't doing its job, make it harder for the government to do its job, repeat."). See also Noll, *supra* note 62, at 776 ("[W]hile left-wing politics occasionally generates demands to dismantle statutory programs, sabotage is an 'asymmetric' phenomenon that is most likely to occur under conservative presidents." (footnotes omitted)).

79. See, e.g., Levine, *supra* note 75, at 1013–14.

80. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 353–54 (2019).

81. See, e.g., *id.*; Levine, *supra* note 75, at 1013–14; J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?*, 44 VT. L. REV. 693, 718 (2020); Ezra Klein, *Government Is Flailing, in Part Because Liberals Hobbled It*, N.Y. TIMES (Mar. 13, 2022), <https://www.nytimes.com/2022/03/13/opinion/berkeley-enrollment-climate-crisis.html>; Ezra Klein, *The Problem with Everything-Bagel Liberalism*, N.Y. TIMES (Apr. 2, 2023), <https://www.nytimes.com/2023/04/02/opinion/democrats-liberalism.html>.

82. See Bagley, *supra* note 80, at 379–80; The Ezra Klein Show, *Transcript: Ezra Klein Interviews Nicholas Bagley*, N.Y. TIMES (Feb. 7, 2023), <https://www.nytimes.com/2023/02/07/podcasts/ezra-klein-show-transcript-nicholas-bagley.html>; Levine, *supra* note 75, at 1013–14.



In sum, according to the ideological assault perspective, ideological actors (primarily from the political right, but also including some on the political left) have depicted agencies as clumsy and inefficient at best, captured and even unconstitutional at worst. In some cases, they have also contributed to reforms which have made government less effective, thereby contributing to a further erosion of trust in governance.

### *C. Limitations and the Submergence Perspective*

While the government failure perspective and the ideological assault perspective surely have some explanatory power, neither of them can fully account for the government's reputation crisis. This Section considers a few key questions that the government failure perspective and the ideological assault perspective cannot fully answer.

#### 1. THE LIMITATIONS OF THE GOVERNMENT FAILURE PERSPECTIVE

To start, the degree to which the government fails is sometimes exaggerated by the government failure perspective. To be sure, agencies occasionally fail. Yet the mere fact that a high-profile disaster occurred does not ipso facto mean that government has failed: after all, regulations are meant to manage risk, not to eliminate it, and Americans surely would not tolerate a society in which regulations allowed for zero risks to be taken.<sup>83</sup> Moreover, private companies—from Enron to Lehman Brothers to Theranos to FTX—are not immune from failure either. Nevertheless, as Amy Lerman has demonstrated, both Republicans and Democrats view private services as higher quality than public services, even when the opposite is in fact true.<sup>84</sup> This leads to the first question that the government failure perspective cannot answer: why are Americans less forgiving when it comes to government failure than when it comes to private companies' failures?<sup>85</sup>

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83. See Christopher Carrigan & Cary Coglianese, *Oversight in Hindsight: Assessing the U.S. Regulatory System in the Wake of Calamity*, in REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 1, 9–10 (Cary Coglianese ed., 2012) (“People want both to drive cars and to be safe; they want oil to fuel their cars and an environment free of oil spills; and they want the energy and materials made possible from mining and other industrial operations without injuries and fatalities from workplace accidents.”); Cary Coglianese, *Is Government Really Broken?*, 1 U. PA. J. L. & PUB. AFFS. 66, 74–75 (2016) (“In a perfect world, it would be possible to have the proverbial problem-free cake while still eating it too.”).

84. See LERMAN, *supra* note 18, at 6.

85. See Hilary J. Allen, *Regulatory Innovation and Permission To Fail: The Case of Suptech*, 19 N.Y.U. J. L. & BUS. 237, 241 (2023) (“In the private sector, there

Likewise, although government sometimes fails, it also succeeds in delivering important benefits to large segments of the American public.<sup>86</sup> It helps to provide food, infrastructure, housing, health insurance coverage, financial assistance, and numerous other valuable social goods and services. It protects Americans from traffic and airline accidents, foodborne illnesses, toxic pollutants, dangerous consumer products, predatory financial instruments, economic instability, and threats to national security. These benefits are not marginal. For instance, by one estimate, the 1990 Clean Air Act Amendments (which the Environmental Protection Agency played a role in implementing) alone delivered \$2 trillion in benefits (compared with only \$65 billion in costs) by 2020.<sup>87</sup> Nor is this an atypical example. The Office of Management and Budget found that, “[i]n the first three years of the Obama Administration, the net benefits of economically significant regulation exceeded \$91 billion.”<sup>88</sup>

Yet whereas government’s failures often generate tremendous amounts of publicity and attention, their successes often go unnoticed.<sup>89</sup> For instance, while the Department of Energy Loan Programs Office’s

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is a much higher tolerance for failure . . . . When it comes to the public sector, though, it is challenging to ‘persuade the media and the public that it is acceptable, in certain contexts and under certain conditions, to spend public money on things that turn out to be failures.’” (quoting Christopher Pollitt, *Innovation in the Public Sector: An Introductory Overview*, in *INNOVATION IN THE PUBLIC SECTOR: LINKING CAPACITY AND LEADERSHIP* 35, 39 (Victor Bekkers, Jurian Edelenbos & Bram Steijn eds., 2011)).

86. SCHUCK, *supra* note 41, at 327–68.

87. *Benefits and Costs of the Clean Air Act Amendments of 1990*, EPA, <https://www.epa.gov/sites/default/files/2015-07/documents/factsheet.pdf> [<https://perma.cc/SB3V-VB88>].

88. Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1864 n.90 (2013) (citing OFF. OF MGMT. & BUDGET, DRAFT 2012 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 54 (2012), [https://obamawhitehouse.archives.gov/sites/default/files/omb/oir/draft\\_2012\\_cost\\_benefit\\_report.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/oir/draft_2012_cost_benefit_report.pdf) [<https://perma.cc/VH4G-9P5F>]).

89. JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC 217–18 (2017) (“Right now, all we hear about are the scandals and failures, but never the great successes or, even better, the simple, small, and routine things that we take for granted but that keep people safe and secure. As Donald Kettl reminds us, ‘Newspapers never headline . . . “Social Security Checks Arrive by the Millions”’—yet that gigantic, remarkable system runs like clockwork.” (quoting DONALD F. KETTL, THE NEXT GOVERNMENT OF THE UNITED STATES: WHY OUR INSTITUTIONS FAIL US AND HOW TO FIX THEM 33 (2009)). See also Janet M. Kelly & David Swindell, *A Multiple-Indicator Approach to Municipal Service Evaluation: Correlating Performance Measurement and Citizen Satisfaction Across Jurisdictions*, 62 PUB. ADMIN. REV. 610, 618 (2002) (finding “less correlation between citizen satisfaction and administrative performance measures than expected”).

infamous failed loan to Solyndra, a solar panel company, was met with withering scrutiny from the media and Congress,<sup>90</sup> Americans are far less likely to know that that same office provided a crucial bridge loan to Tesla that “got Tesla to where it is today.”<sup>91</sup> Likewise, although the 2013 failed launch of Healthcare.gov was the subject of numerous congressional hearings and front-page news stories, the subsequent smooth and successful implementation of the Medicare Access and CHIP Reauthorization Act received relatively little attention.<sup>92</sup>

Perhaps some asymmetry between the public’s ability to appreciate government failures and successes is inevitable. Humans have a well-established tendency to pay more attention to bad events than good ones.<sup>93</sup> Moreover, when it comes to regulatory policy or public health in particular, it is much harder to notice the disasters that regulators or public health authorities prevent than those they fail to prevent.<sup>94</sup>

Nevertheless, it is striking that Americans often do not even recognize when government programs have delivered tangible benefits to them. In one national survey, over half of Americans responded, in general terms, that they had never used a government social program.<sup>95</sup> Yet when confronted with a specific list of government programs (such as the Earned Income Tax Credit), over ninety percent of these same individuals acknowledged that they had used at least one of these

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90. See Jeff Brady, *After Solyndra Loss, U.S. Energy Loan Program Turning a Profit*, NPR (Nov. 13, 2014, 12:03 AM), <https://www.npr.org/2014/11/13/363572151/after-solyndra-loss-u-s-energy-loan-program-turning-a-profit> [<https://perma.cc/WFE6-5N7D>].

91. The Ezra Klein Show, *Transcript: Ezra Klein Interviews Robinson Meyer*, N.Y. TIMES (July 7, 2023), <https://www.nytimes.com/2023/07/07/podcasts/ezra-klein-podcast-transcript-robinson-meyer.html>.

92. See *Case Study 17: The Disastrous Launch of Healthcare.gov*, HENRICO DOLFING (Mar. 19, 2023), <https://www.henricodolfing.com/2022/12/case-study-launch-failure-healthcare-gov.html> [<https://perma.cc/679T-JRXL>] (detailing the timeline and aftermath of the Healthcare.gov launch); PAHLKA, *supra* note 44, at 218 (attributing this asymmetry to multiple factors, including that “things working well seldom make the news”).

93. OLIVER JAMES, DONALD P. MOYNIHAN, ASMUS LETH OLSEN & GREGG G. VAN RYZIN, *BEHAVIORAL PUBLIC PERFORMANCE: HOW PEOPLE MAKE SENSE OF GOVERNMENT METRICS 23–27* (2020) (discussing negativity bias and associated mechanisms, such as loss aversion and equivalence framing).

94. See ARAIZA, *supra* note 27, at 208 (“[E]ffective regulation often remains hidden.”); Robert S. Adler, *Reflections of an Unapologetic Safety Regulator*, 11 REGUL. REV. 31, 33 (2022) (“Paradoxically, the more successful that regulators are in protecting the public, the less anyone notices.”); Carrigan & Coglianese, *supra* note 83, at 13 (“We see the disasters that were not prevented; we seldom see evidence of the disasters that were successfully prevented, unless obvious precursors exist so that ‘near-miss’ data can be collected.”); *The Invisible Shield* (PBS television broadcast 2024).

95. METTLER, *supra* note 20, at 37.

programs.<sup>96</sup> This leads to the second question that the government failure perspective cannot answer: why are more Americans not moved by—or at least more aware of—the benefits that they receive from government?

## 2. THE LIMITATIONS OF THE IDEOLOGICAL ASSAULT PERSPECTIVE

The ideological assault perspective seems to assume that government's reputation is entirely determined by external factors that are out of the government's control. Yet the government is not an inert vessel, buffeted about by the waves of public opinion. Just as public attitudes influence the government, the government in turn can shape and inform public attitudes through its own actions and communications.<sup>97</sup>

When private companies face comparable attacks on their reputation, they typically launch an advertising or rebranding campaign to restore their public image.<sup>98</sup> Businesses tend to devote substantial resources to “corporate communication strategy”—a catch-all term for the coordinated way that firms interface with the public through advertising, public relations, branding, and the like.<sup>99</sup> Recognizing Warren Buffet's admonition that “losing reputation is a far greater sin for an organization than losing money,” corporations jealously guard their reputations.<sup>100</sup> Likewise, non-profit organizations devote substantial resources to communicating their achievements and alliances to their potential donors and allies.<sup>101</sup> These kinds of communication strategies

96. *Id.*

97. See Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2075 (2013).

98. See LERMAN, *supra* note 18, at 170–74.

99. See Benita Steyn, *From Strategy to Corporate Communication Strategy: A Conceptualisation*, 8 J. COMM'N MGMT. 168, 178 (2003) (calling for an integration of these disparate public relations functions with overall corporate strategy). See also Steve McKee, *What Should You Spend on Advertising?*, BLOOMBERG (Feb. 10, 2009, 6:36 AM), <https://www.bloomberg.com/news/articles/2009-02-10/what-should-you-spend-on-advertising?embedded-checkout=true&leadSource=verify> (collecting examples of corporate advertising budget ratios ranging from 0.4 percent to upwards of 15 percent).

100. James G. Hutton, Michael B. Goodman, Jill B. Alexander & Christina M. Genest, *Reputation Management: The New Face of Corporate Public Relations?*, 27 PUB. RELS. REV. 247, 249 (2001).

101. See generally SALLY J. PATTERSON & JANEL M. RADTKE, STRATEGIC COMMUNICATIONS FOR NONPROFIT ORGANIZATIONS: SEVEN STEPS TO CREATING A SUCCESSFUL PLAN (2d ed. 2009); Julia L. Carboni & Sarah P. Maxwell, *Effective Social Media Engagement for Nonprofits: What Matters?*, 1 J. PUB. & NONPROFIT AFFS. 18 (2015); Michail Vafeiadis, Virginia S. Harrison, Pratiti Diddi, Frank Dardis & Christen Buckley, *Strategic Nonprofit Communication: Effects of Cross-Sector Corporate Social Responsibility (CSR) Alliances on Nonprofits and the Mediating Role of Social-Objectives Achievement and Consumer Brand Identification*, 15 INT'L J. STRATEGIC COMM'N 275 (2021).

become particularly important for those organizations that find themselves in the midst of a reputation crisis.<sup>102</sup>

Agencies might, therefore, be expected to devote substantial resources to communicating their successes. For instance, one would assume that the EPA would have an interest in making sure that every single American is aware of the delivery of \$2 trillion in net benefits to policy beneficiaries under the Clean Air Act alone.<sup>103</sup> Yet, although government agencies do engage in public communications (the U.S. Department of Defense stands out in this regard),<sup>104</sup> by and large they do not do so today with nearly the same level of resources, strategy, or sophistication as the business and nonprofit world.

The administrative state was not always so ineffectual in its communications strategy. Social Security was able to withstand early pushback in part by creating an “Information Service” under the Social Security Board that aimed to “familiarize the public with the program, rebut efforts to discredit it, and—most importantly—reduce learning costs to facilitate the employer and beneficiary enrollment necessary for the program to function.”<sup>105</sup> New Deal programs such as the Public Works Administration, the Works Progress Administration, and the Civilian Conservation Corps once employed millions of Americans and built infrastructure all around the country that is still in use today, proudly branding such projects as the work of government agencies.<sup>106</sup> Enterprising administrators organized public relations campaigns to educate the public about agency missions and build political support for their programs.<sup>107</sup> Some of these campaigns are still seared into the memories of generations of Americans: Smokey Bear and Woodsy Owl, for instance.<sup>108</sup> Yet the notion that the administrative state could be so

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102. See LERMAN, *supra* note 18, at 181–93.

103. See *Benefits and Costs of the Clean Air Act Amendments of 1990*, *supra* note 87.

104. See *infra* Section II.A.2.

105. See HERD & MOYNIHAN, *supra* note 55, at 229.

106. See generally ROBERT D. LEIGHNINGER JR., LONG-RANGE PUBLIC INVESTMENT: THE FORGOTTEN LEGACY OF THE NEW DEAL (2007).

107. See DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928, at 15 (2001) (noting that some agencies were able to develop reputations and protect their autonomy in part by “demonstrat[ing] their capacities and sell[ing] their ideas to the media and a diverse set of organized interests”); MORDECAI LEE, CONGRESS VS. THE BUREAUCRACY: MUZZLING AGENCY PUBLIC RELATIONS 7–12 (2011) (discussing historical examples of agencies hiring publicity experts and engaging in concerted efforts to shape public opinion about agency programs).

108. *Meet the Amazing Mascots and Messengers of the U.S. Government*, UNIV. N. TEX.: SYCAMORE STACKS BLOG (Nov. 7, 2021),

visible and vocal in the present day is almost unthinkable. Why is this the case? Why has the administrative state itself not done more to restore its own public image or build awareness of what it is doing for the public? The ideological assault perspective has little to say in response to these kinds of questions.

Again, all this is not to say that the ideological assault perspective—or the government failure perspective—is wrong. Our point is simply that they only tell a part of the story of why the government ended up mired in a reputation crisis.

### 3. THE SUBMERGENCE PERSPECTIVE

To answer the aforementioned questions, one must recognize a different perspective that centers on the lack of salience of administrative work: that is, the *submergence perspective*. Put simply, this submergence perspective links the lack of trust in government to a lack of awareness and understanding of what government is doing.

At the outset, the claim that the administrative state is “submerged” (*i.e.*, less visible or recognizable as a government program) may strike some as implausible in an age of unprecedented government transparency. Indeed, laws like the Freedom of Information Act (FOIA) and the Government in the Sunshine Act, despite containing serious flaws,<sup>109</sup> make much of government’s work formally available to the public in some form. The same can be said about the many investments the federal government has made in “e-rulemaking,” which aim to use

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<https://blogs.library.unt.edu/sycamore-stacks/2021/11/07/meet-the-amazing-mascots-and-messengers-of-the-u-s-government/> [<https://perma.cc/2Q7B-FAXT>]. Visitors to the National Postal Museum can still see the taxidermized body of “Owney the Dog,” the celebrity mascot of the U.S. Postal Service. *Owney the Dog*, SMITHSONIAN NAT’L POSTAL MUSEUM, <https://postalmuseum.si.edu/exhibition/about-postal-operations-popular-culture-seals-symbols/owney-the-dog> [<https://perma.cc/JYZ3-8J9T>]. Woodsy Owl and Smokey Bear even had their own songs! *See id.* Of course, government songs can be delightful and memorable, but not every government song is a smash hit. *See, e.g.*, Randy Buxton, *FAAAnthem.wmv*, YOUTUBE (Dec. 6, 2011), <https://www.youtube.com/watch?v=Pw9pNrMRlto>.

109. *See, e.g.*, David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097 (2017) (arguing that FOIA’s reactive framework has built-in inegalitarian and anti-regulatory biases); Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361 (2016) (showing the ways that business interests have coopted FOIA); Kathy Bradley, Note, *Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC and You*, 49 FED. COMM’NS L.J. 473 (1997) (discussing the costs of the Government in the Sunshine Act and suggesting reforms).

digital technologies to make it easier for the public to participate in the rulemaking process.<sup>110</sup>

Nevertheless, the submergence perspective—and in particular, how it applies to administrative agencies—is essential to understanding the government’s reputation crisis. Despite agencies doing the vast bulk of government work, it is inordinately difficult for even the most informed Americans to appreciate the extent to which agency action affects their lives. Of course, Americans interact with agencies in certain individualized settings, such as when the Social Security Administration grants or denies an application for disability benefits.<sup>111</sup> However, as William Araiza writes, “[i]n contrast to such particularized interactions, when an agency acts more generally—for example, commencing a rulemaking process—the average citizen’s ability to engage meaningfully with the agency . . . is limited.”<sup>112</sup>

A focus on submergence helps to explain why the government’s reputation has suffered while ordinary people are losing their ability to appreciate and understand the work that it does. These two phenomena are likely related: we are less likely to trust what we do not understand. To take one well-known example: Rick Perry famously called for the abolition of the Department of Energy during a presidential debate (though he struggled to remember its name).<sup>113</sup> Then, during a later congressional hearing on his nomination to lead the Energy Department, he admitted that “he hadn’t actually known what the Department of Energy did.”<sup>114</sup> Conversely, we are more likely to trust what we are familiar with.<sup>115</sup> Recent polling suggests that the public actually maintains favorable attitudes toward a number of agencies that provide highly salient and popular services, with the National Park Service and U.S.

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110. On e-rulemaking, see CARY COGLIANESE, *E-RULEMAKING: INFORMATION TECHNOLOGY AND REGULATORY POLICY: NEW DIRECTIONS IN DIGITAL GOVERNMENT RESEARCH* (2004), <https://www.law.upenn.edu/live/files/5565-erulemakingreport2004> [<https://perma.cc/965P-ZVVK>].

111. ARAIZA, *supra* note 27, at 212.

112. *Id.* See also MICHAELS, *supra* note 89, at 220 (“[M]any Americans have never heard of the *Federal Register*, and most have never seen it, let alone read from it.”).

113. LEWIS, *supra* note 1, at 47.

114. *Id.*

115. See Mark Lubell, *Familiarity Breeds Trust: Collective Action in a Policy Domain*, 69 J. POL. 237, 245, 247 (2007) (“Although the statistical evidence is not definitive, the results suggest that social trust in people becomes more important as interaction becomes more frequent, allowing people to potentially divorce their trust expectations from any broad stereotypes about government agencies.”).

Postal Service topping the list in a recent survey.<sup>116</sup> As Paul Verkuil puts, it, “[i]n these cases familiarity breeds respect, not contempt.”<sup>117</sup> Likewise, Craig Thomas observes that “citizens generally perceive their concrete experiences with individual agencies in a favorable light.”<sup>118</sup>

The plausibility of the submergence explanation is greatly enhanced by what we know from the political science literature on “policy feedback effects.” Work in this vein has long recognized that, as E. E. Schattschneider put it, “[n]ew policies create a new politics.”<sup>119</sup> That is, laws and policies are not only products of their political environment, but they also have “feedback effects” that reconfigure the political environment. In other words, laws are not merely outputs of the political

116. J. Baxter Oliphant & Andy Cerda, *Americans Feel Favorably About Many Federal Agencies, Especially the Park Service, Postal Service and NASA*, PEW RSCH. CTR. (Mar. 30, 2023), <https://www.pewresearch.org/short-reads/2023/03/30/americans-feel-favorably-about-many-federal-agencies-especially-the-park-service-postal-service-and-nasa/> [<https://perma.cc/W9Z2-TTQ2>] (finding that “Americans view 14 of 16 federal agencies more favorably than unfavorably”). By comparison, around seven in ten Americans have unfavorable views of Congress, and around half of adults say they have unfavorable opinions of the Supreme Court. *In Divided Washington, Americans Have Highly Negative Views of Both Parties’ Leaders*, PEW RSCH. CTR. (Apr. 7, 2023), <https://www.pewresearch.org/politics/2023/04/07/views-of-congress-the-supreme-court-and-the-political-system/> [<https://perma.cc/ZS9P-WAV6>].

117. PAUL R. VERKUIL, *VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT* 26 (2d ed. 2017). On the other hand, as William Araiza points out, “the lowest scores were earned by two agencies with whom many Americans are also familiar—the [Internal Revenue Service] and the Department of Veterans Affairs.” ARAIZA, *supra* note 27, at 4. That being said, these two agencies have also been a special target of ideological assaults—so it seems plausible that Verkuil is generally correct that “familiarity breeds respect,” but that in these cases, that familiarity is counterbalanced by other factors. *See* HACKER & PIERSON, *supra* note 17, at 310–11 (discussing how “Republicans generated enormous support for a crusade” against the Internal Revenue Service).

118. Thomas, *supra* note 30, at 168 (citation omitted). *See also* THE FEDERALIST No. 27 (Alexander Hamilton) (“[T]he more the operations of the national authority are intermingled in the ordinary exercise of government, the more the citizens are accustomed to meet with it in the common occurrences of their political life, the more it is familiarized to their sight and to their feelings, the further it enters into those objects which touch the most sensible chords and put in motion the most active springs of the human heart, the greater will be the probability that it will conciliate the respect and attachment of the community. . . . A government continually at a distance and out of sight can hardly be expected to interest the sensations of the people. The inference is, that the authority of the Union, and the affections of the citizens towards it, will be strengthened, rather than weakened, by its extension to what are called matters of internal concern; and will have less occasion to recur to force, in proportion to the familiarity and comprehensiveness of its agency.”).

119. E. E. SCHATTSCHNEIDER, *POLITICS, PRESSURES AND THE TARIFF* 288 (Archon Books 1963) (1935).



system; they are also inputs that reshape the political system—and the government—in important ways.<sup>120</sup>

These feedback effects can have wide-ranging and profound consequences. They can help to bolster political support for laws or institutions and help to ensure that that they endure over time.<sup>121</sup> On the other hand, policy feedback effects can sometimes undermine political support for laws or institutions, and in so doing, lead to their erosion over time, even threatening their survival.<sup>122</sup> Policy feedback effects can also reverberate well beyond specific laws or institutions and have transformative impacts on society writ large. For instance, they can empower or lead to the formation of new interest group constituencies;<sup>123</sup> they can bolster or undermine public trust in government;<sup>124</sup> and they can even strengthen or weaken Americans' engagement in the democratic process.<sup>125</sup>

Importantly, policy feedback effects are not merely determined by whether a policy is a “success” or a “failure”; rather, they depend—at least in part—on how that policy is experienced by, and communicated

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120. See Moynihan & Soss, *supra* note 42, at 320–21.

121. See, e.g., ERIC M. PATASHNIK, REFORMS AT RISK: WHAT HAPPENS AFTER MAJOR POLICY CHANGES ARE ENACTED 29 (2008); Andrea Louise Campbell, *Policy Makes Mass Politics*, 15 ANN. REV. POL. SCI. 333, 334 (2012); Suzanne Mettler, *The Polityscape and the Challenges of Contemporary Politics to Policy Maintenance*, 14 PERSPS. ON POL. 369, 371 (2016).

122. Alan M. Jacobs & R. Kent Weaver, *When Policies Undo Themselves: Self-Undermining Feedback as a Source of Policy Change*, 28 GOVERNANCE 441 (2015). For instance, the legislative design of the 2010 Patient Protection and Affordable Care Act contained several provisions that helped to undermine political support for the law, especially during its early years, when the law was most vulnerable. See Gabriel Scheffler, *The Ghosts of the Affordable Care Act*, 101 WASH. U. L. REV. 791 (2024).

123. See ANDREA LOUISE CAMPBELL, HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE 112–13, 123–24, 138–39 (2003) (showing how Social Security created a new politics—the organization of elderly beneficiaries of Social Security through the Association for the Advancement of Retired Persons—that made it difficult, if not impossible, for later policy proposals to privatize or change Social Security to pass).

124. See SUZANNE METTLER, SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION 106–20 (2005) (showing how the G.I. Bill, by providing for education for returning veterans after World War II, cultivated a politically engaged generation with high degrees of trust in government).

125. See JOE SOSS, UNWANTED CLAIMS: THE POLITICS OF PARTICIPATION IN THE U.S. WELFARE SYSTEM 13–14, 187–89, 196, 200 (2000) (showing how “welfare” enrollees react negatively to aspects of program administration that demonstrate a lack of respect for them as persons, or that stigmatize them, and that these negative impacts may even manifest in diminished political agency); MICHENER, *supra* note 26, at 79–83 (finding that Medicaid beneficiaries are less likely to participate in the political system in states that reduce benefits).

to, the general public.<sup>126</sup> Moreover, to the extent that a policy is submerged, it will be less likely that beneficiaries of that policy will credit the government with having helped them.<sup>127</sup> According to this perspective, restoring the government's reputation is not simply a matter of improving its performance. No matter how well government performs, its reputation will not improve unless the benefits it provides are sufficiently salient that Americans are aware of them and sufficiently traceable that Americans recognize that these benefits are being provided by the government (as opposed to private companies).<sup>128</sup>

To be sure, the submergence perspective itself has limitations. For one thing, the flip side of the prior statements is also true: simply increasing awareness of governmental performance will fail to improve public trust if that performance is miserable.<sup>129</sup> In addition, even if a government program provides visible and traceable benefits, the feedback effects of such a program may be diminished by motivated reasoning or partisan identities.<sup>130</sup> In sum, the submergence perspective cannot, by itself, fully explain the government's reputation crisis, just as neither the government failure perspective nor the ideological assault perspective can offer a complete explanation. Instead, these three perspectives are complementary, not mutually exclusive.

The question, then, is why the administrative state has not done more to make its policies salient and traceable or to communicate its successes to the general public? The answer lies in a web of legal, resource, and political constraints on agencies that determine how the administrative state designs its policies and communicates with the public. These constraints are explored in Part II.

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126. See Moynihan & Soss, *supra* note 42, at 321.

127. See METTLER, *supra* note 27, at 21.

128. See HAY, *supra* note 26, at 60 (noting that, in order for government policies to influence public preferences, policies “must be *perceived* by potential participants as salient”).

129. LERMAN, *supra* note 18, at 197–98 (“[P]olitical leaders should not expect to rebuild government’s reputation solely by communicating a positive message. Where government is already working well, marketing campaigns might be sufficient to build public trust. But in those areas where government currently struggles to provide quality products and services and to do this efficiently, political leaders must make meaningful improvements and communicate those reforms to the citizenry.”); Donald Moynihan, Pamela Herd & Hope Harvey, *Administrative Burden: Learning, Psychological, and Compliance Costs in Citizen-State Interactions*, 25 J. PUB. ADMIN. RSCH. & THEORY 43, 47 (2014) (noting connections between policy feedbacks and the subjective experience of administrative burden); JOHN D. DONAHUE, *THE WARPING OF GOVERNMENT WORK* 159 (2008) (“Burnishing the image of public service is a partial strategy, of course, and cannot get very far without improvements in the government’s actual performance.”).

130. See LERMAN, *supra* note 18, at 73–88; METTLER, *supra* note 27, at 81–116.

## II. THE ROOTS OF THE SUBMERGED ADMINISTRATIVE STATE

This Part argues that a substantial amount of the administrative state's submergence is politically and legally constructed. It is a choice that is baked into the administrative state's DNA, with severe consequences for the government's reputational health.

More specifically, the administrative state is submerged in two main ways: through its communications strategy and through the very design and implementation of its policies.<sup>131</sup> First, agencies employ an impoverished communications toolkit that would be unacceptable in the business or nonprofit world. Second, much of what agencies do and how they do it is opaque, either because it is incomprehensible to the general public or because it is not visible or traceable to government agencies. Section II.A starts the discussion with a focus on agency communications, and Section II.B turns to the design of programs.

### *A. Agency Communications*

This Section aims to uncover why public agencies lag so far behind when it comes to the communication strategies so effectively deployed in other domains to build, maintain, and repair reputations. No doubt, part of the explanation is a longstanding tradition of agency caution in communications, lest their messages be deemed government "propaganda."<sup>132</sup> Some can likewise be explained by the difficulty of communicating often highly technical information to the lay public. But these explanations obscure a more complex, and more politically and legally constructed situation. Legal constraints, resource constraints, and political constraints each play important roles. Given this veritable minefield, agencies are significantly limited in their ability to publicize their own achievements.

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131. These two dimensions we discuss map onto what Suzanne Mettler finds to be deficiencies in government's more general public-facing strategy. METTLER, *supra* note 20, at 116–17 (arguing that "reformers must reveal to the public what is at stake in reform through political communication" and that "reformers must redesign policies to make governance more visible to citizens" (emphasis omitted)).

132. Maureen Taylor & Michael L. Kent, *Towards Legitimacy and Professionalism: A Call To Repeal the Gillett Amendment*, PUB. RELS. REV., Dec. 10, 2015, at 1, 1–2 (noting the existing of a "long standing tradition that governments at every level—federal, state, and local—should not engage too overtly or directly in communication with the people" (quoting Ray Eldon Hiebert, *A Model of the Government Communication Process*, in *INFORMING THE PEOPLE: A PUBLIC AFFAIRS HANDBOOK* 3, 3 (Lewis M. Helm, Ray Eldon Hiebert, Michael R. Naver & Kenneth Rabin eds., 1981)); LEE, *supra* note 107, at 20–22 (discussing historical examples of concerns about propaganda influencing discussions of agency publicity).

## 1. LEGAL CONSTRAINTS

Perhaps the most direct way that agency communications are limited is through legal limits on what agencies can say. There are many laws that expressly aim to control agencies' communications.<sup>133</sup> The most direct control is the federal ban on the use of appropriated funds to pay publicity experts. In the early twentieth century, enterprising administrators like the Forest Service's Gifford Pinchot hired publicity experts to coordinate agency public relations campaigns, promoting agency missions and educating the public.<sup>134</sup> Together with progressive anti-corruption interests, the opponents of agency communications mobilized in 1913 to pass what became the Gillett Amendment, which is still on the books today and which sets a default rule for all agencies that appropriated funds are not to be used for the hiring of "publicity experts" unless specifically approved.<sup>135</sup> This standing ban has been supplemented over the years by more specific appropriations riders that bar specific agencies from spending appropriated funds on various publicity activities.<sup>136</sup> Violation of these laws subjects violators to civil and even potentially criminal liability under the Anti-Deficiency Act, which provides that unauthorized spending is criminally punishable.<sup>137</sup>

Agencies must also labor under general prohibitions on publicity and propaganda. In 1951, Congress passed the Smith Amendment, which provided that "[n]o part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not heretofore authorized by the Congress."<sup>138</sup> Since then, this language has been standard boilerplate in appropriations bills.<sup>139</sup> Given the Smith Amendment's lack of clarity, it fell to the Government Accountability Office (GAO) to figure out what was prohibited, and its decisions emphasized that the Smith Amendment banned "publicity of a nature tending to emphasize

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133. For an overview, see LEE, *supra* note 107.

134. *See id.* at 6.

135. 5 U.S.C. § 3107 ("Appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose."). *See also* Taylor & Kent, *supra* note 132, at 1-2.

136. Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183, 1268 (2016).

137. 31 U.S.C. §§ 1341(a)(1)(A), 1350.

138. LEE, *supra* note 107, at 178 (quoting Labor-Federal Security Appropriation Act of 1952, Pub. L. No. 134, § 702, 65 Stat. 223).

139. LEE, *supra* note 107, at 179; Legal Info. Inst., *Publicity or Propaganda*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/publicity\\_or\\_propaganda](https://www.law.cornell.edu/wex/publicity_or_propaganda) [<https://perma.cc/XVE2-C8KJ>].

the importance of the agency or activity in question.”<sup>140</sup> That interpretation of the Smith Amendment language eventually crystallized in an “anti-aggrandizement” and anti-puffery formulation.<sup>141</sup> In 2004, the GAO concluded that a series of Department of Health and Human Services (HHS) video news releases that were about certain new drug benefits under Medicare and that were designed to be pulled off the shelf by television journalists violated the Smith Amendment bar on self-aggrandizement.<sup>142</sup> This aggressive application of the Smith Amendment led Congress to explicitly ban agencies from using appropriated funds to “produce any prepackaged news story intended for broadcast or distribution in the United States unless the story includes a clear notification within the text or audio of the prepackaged news story that the prepackaged news story was prepared or funded by that executive branch agency.”<sup>143</sup>

The conventional wisdom, however, is that these legal constraints are ineffective at constraining agencies. Elizabeth Porter and Kathryn Watts argue that anti-propaganda laws, and particularly the Gillett Amendment, have been “swallowed” by exceptions for “dissemination of factual or mission-related information” and suggest that they are rarely enforced by the GAO.<sup>144</sup> Likewise, Mordecai Lee maintains that in the various “showdown[s] between congressional power and bureaucratic autonomy over agency public relations, the bureaucracy has usually won.”<sup>145</sup> These accounts show that agencies have been able to work around some of the most onerous restrictions. For instance, agencies can almost entirely avoid application of the Gillett Amendment by labeling their communications hires anything but “publicity expert” (*e.g.*, “public affairs specialist”) or by assigning some proportion of communications duties to otherwise substantive policy workers.<sup>146</sup>

While these laws may be rarely enforced, a lack of enforcement does not necessarily mean that they have been ineffective at changing agencies’ behavior. After all, a complete lack of enforcement actions is equally consistent with perfect compliance as it is with non-

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140. LEE, *supra* note 107, at 179 (quoting NLRB, 31 Comp. Gen. 311, 313 (1952)).

141. *Id.* at 180.

142. *See id.* at 184.

143. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 301.

144. Porter & Watts, *supra* note 136, at 1268.

145. LEE, *supra* note 107, at 224. *See also id.* at 225 tbl.3 (summarizing results of a series of case studies on “Congressional Efforts to Control Executive Branch Public Relations in the Twentieth Century”).

146. *See id.* at 96.

compliance.<sup>147</sup> Although a credible threat of enforcement is often necessary for regulations to induce compliance, sometimes organizations and individuals will go well beyond what is necessary simply to avoid being penalized.<sup>148</sup> This is certainly true in other areas of the law: for instance, in a study of smoking restrictions, Robert Kagan and Jerome Skolnick found that such laws were almost never formally enforced, but that their existence appeared to change the culture and induce compliance.<sup>149</sup>

So even if government agencies do usually win showdowns with Congress when they occur, agencies may still act in such ways as to reduce the likelihood of such showdowns.<sup>150</sup> Likewise, even if the legal constraints on agency communications are not enforced very often, it seems quite plausible that they have a chilling effect on agency communications; they cause agencies to refrain from communicating more directly or effectively with the public than they would in the absence of the constraints. This chilling effect could easily become entrenched in the culture of administrative agencies, as bureaucracies are often shaped by routines, norms, and even behavioral psychology.<sup>151</sup>

Moreover, agencies have to worry about their communications being put under a microscope through the invocation of these authorities in congressional oversight hearings. For instance, when the EPA released its proposed “Waters of the United States” rule under the Clean Water Act during the Obama Administration, opponents in Congress requested

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147. See Cary Coglianese, Response, *Building Better Compliance*, 100 TEX. L. REV. ONLINE 192, 201 (2022), <https://texaslawreview.org/building-better-compliance/> [<https://perma.cc/7RQQ-P466>].

148. Cary Coglianese & Robert A. Kagan, *Introduction to REGULATION AND REGULATORY PROCESSES*, at xxi–xxiii (Cary Coglianese & Robert A. Kagan eds., 2007).

149. Robert A. Kagan & Jerome H. Skolnick, *Banning Smoking: Compliance Without Enforcement*, in *SMOKING POLICY: LAW, POLITICS, & CULTURE* 69, 79, 85–87 (Robert L. Rabin & Stephen D. Sugarman eds., 1993). Another example: it is well-known among health care lawyers that the Health Insurance Portability and Accountability Act (HIPAA) is widely misunderstood, and that health care providers frequently cite HIPAA as a reason not to disclose medical information, even in cases where the law clearly does not apply and is not likely to be enforced. See Donald M. Berwick & Martha E. Gaines, *How HIPAA Harms Care, and How To Stop It*, 320 JAMA 229 (2018); Jane Gross, *Keeping Patients' Details Private, Even from Kin*, N.Y. TIMES (July 3, 2007), <https://www.nytimes.com/2007/07/03/health/policy/03hipaa.html>. Thus, simply tallying up the number of HIPAA enforcement actions would dramatically understate the effect that the law has on medical care.

150. Even Mordecai Lee concludes his case studies by noting that “[s]ometimes agencies did have to keep a low profile for their external communications effort, but these defensive behaviors were quite different from ceasing such activities.” LEE, *supra* note 107, at 224 (emphasis added).

151. See Asbjørn Sonne Nørgaard, *Human Behavior Inside and Outside Bureaucracy: Lessons from Psychology*, 1 J. BEHAV. PUB. ADMIN., no. 1, 2018, at 1.

that the GAO conduct an investigation of the agency's communications campaigns.<sup>152</sup> EPA had used the Thunderclap platform to allow social media users to quickly and efficiently share EPA-generated content across multiple social media platforms.<sup>153</sup> GAO concluded that EPA did violate anti-lobbying statutes by failing to identify itself as the progenitor of the Thunderclap campaign, but it did not impose any sanctions.<sup>154</sup> Surely, though, the process is part of the punishment.<sup>155</sup> GAO routinely investigates and issues decisions on alleged violations of these limitations on propaganda,<sup>156</sup> enough to make agencies generally aware of the potential for congressional complaints and cast a broader pall over communications that might draw the attention of hostile congressmembers. Recent empirical research confirms that congressional oversight hearings can significantly depress the recurrence of behaviors that draw the ire of Congress.<sup>157</sup> This provides yet another reason why formal enforcement might not be all that common: congressional hearings can render further enforcement unnecessary.

In addition to laws that expressly aim to control agencies' communications, core administrative law doctrines have the *effect* (if not the purpose) of chilling agency communications. For instance, in formal adjudications and formal rulemakings, the Administrative Procedure Act (APA) puts tight restrictions on ex parte contacts on the theory that such formalized decisionmaking needs to be impartial.<sup>158</sup> When it comes to informal rulemaking, the APA is silent as to ex parte contacts. But rather than reading this silence for what it is, in *Home Box Office, Inc. v. FCC*,<sup>159</sup> the D.C. Circuit imposed a flat ban on such contacts with agency officials during the comment period in order to protect the "elaborate

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152. GAO, B-326944, Opinion Letter on Environmental Protection Agency—Application of Publicity or Propaganda and Anti-Lobbying Provisions 1 (Dec. 14, 2015), <https://www.gao.gov/assets/b-326944.pdf> [<https://perma.cc/KR2B-SR3Y>].

153. *Id.* at 3–5.

154. *See id.* at 26.

155. *Cf.* MALCOLM. M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

156. We searched "propaganda" in "Appropriation Decision" using the U.S. Government Accountability Office's search engine, and we found 110 search results, which almost certainly undercount the number of appropriations decisions that touch on the administration of these laws. U.S. GOV'T ACCOUNTABILITY OFF., [https://www.gao.gov/search?keyword=propaganda&f%5B0%5D=content\\_type\\_1%3AAppropriations%20Decision&f%5B1%5D=content\\_type\\_1](https://www.gao.gov/search?keyword=propaganda&f%5B0%5D=content_type_1%3AAppropriations%20Decision&f%5B1%5D=content_type_1) [<https://perma.cc/J6S9-H6P9>] (first filter for "Appropriations Decision"; then search in search bar for "propaganda").

157. Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1189, 1236 (2018).

158. *See* 5 U.S.C. § 557(d)(1).

159. 567 F.2d 9 (D.C. Cir. 1977).

public discussion” in the rulemaking docket from being “reduced to a sham.”<sup>160</sup> Although *HBO v. FCC*’s ban on ex parte contacts in informal rulemaking was quickly abandoned by the courts,<sup>161</sup> its spirit lives on in administrative law. Some statutes impose limits on ex parte communications in rulemaking or otherwise attempt to ensure that agencies remain passive and silent while rules are out for comment.<sup>162</sup> And where statutes do not impose such requirements, agencies often self-impose such restraints.<sup>163</sup> Recently, the proposed Portman-Heitkamp Regulatory Accountability Act would have also imposed restrictions on agency communications “directly advocat[ing], in support of or against the proposed rule, for the submission of information that will form part of the record for the proposed rule” or “appeal[ing] to the public . . . to undertake advocacy in support of or against the proposed rule.”<sup>164</sup>

The Supreme Court’s recent administrative law decisions have further stifled agencies’ communications with the public. First, the new major questions doctrine subjects “major” agency actions to more significant judicial scrutiny,<sup>165</sup> and the Court has specifically signaled that novel agency actions are more likely to be viewed as “major.”<sup>166</sup> This creates obvious incentives for agencies to frame their actions as neither major nor novel. Agencies are already taking such steps. For instance, in tweeting the announcement of the proposed replacement for the Clean Power Plan vacated in *West Virginia v. EPA*,<sup>167</sup> the EPA press office responded to questions about why the plan did not have a “fun little

160. *Id.* at 15, 51–59.

161. *See Sierra Club v. Costle*, 657 F.2d 298, 400–02 (D.C. Cir. 1981).

162. *See generally* ESA L. SFERRA-BONISTALLI, ADMIN. CONF. OF THE U.S., *EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING* (2014), <https://www.acus.gov/sites/default/files/documents/2014-4%20Report.pdf> [<https://perma.cc/T57A-LSHY>].

163. *See id.* at 53–68 (compiling agencies with self-imposed ex parte communications policies).

164. Regulatory Accountability Act of 2017, S. 951, 115th Cong. § 3(6)(A) (as reported by Sen. Johnson, Feb. 14, 2018). *See also* Daniel E. Walters, *Ditch the Flawed Legislative Proposal To Police Agency Communications*, REGUL. REV. (May 10, 2017), <https://www.theregreview.org/2017/05/10/walters-proposal-agency-communications/> [<https://perma.cc/25YS-PBW5>] (“The communications provisions in the Regulatory Accountability Act would foreclose even . . . careful, well-identified public engagement via social media.”).

165. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609–11 (2022); *Biden v. Nebraska*, 143 S. Ct. 2355, 2373–75 (2023). For background on the major questions doctrine, see Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022); Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465 (2024).

166. Deacon & Litman, *supra* note 165, at 1069–78.

167. 142 S. Ct. 2587 (2022).



name” like the Clean Power Plan by emphasizing that the rule took a “[t]raditional approach” and therefore had a “traditional name.”<sup>168</sup> This is despite the fact that these regulations were genuinely new (they would be the first regulations of carbon emissions from existing power plants) and are predicted to deliver around \$85 billion in climate and public benefits.<sup>169</sup>

A recent decision from the Fifth Circuit suggests another way that courts might chill agency communications. In *Apter v. Department of Health & Human Services*,<sup>170</sup> the court held that a group of doctors who prescribed ivermectin as a treatment for COVID-19 could challenge Food and Drug Administration’s (FDA) social media posts saying, among other things, “You are not a horse. You are not a cow. Seriously, y’all. Stop it.”<sup>171</sup> The court held that the social media posts were plausibly ultra vires agency action because FDA never “point[ed] to any authority that allows it to issue recommendations or give medical advice.”<sup>172</sup> While the court did concede that FDA had such explicit authority to “issue information,” the rendering of advice was a separate communicative activity that required its own statutory authorization.<sup>173</sup> It remains to be seen what will come of this nascent statutory limit on agency communications, but at the very least the FDA will need to take note of the emerging line between neutral information provision and medical advice or encouragement when they communicate with the public through social media or even more traditional guidance.

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168. EPA Press Office (@EPAPressOffice), TWITTER (May 11, 2023, 8:51 AM), <https://twitter.com/EPAPressOffice/status/1656658290816974851>. The EPA’s new power plant rule was inelegantly titled: “New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule.” 88 Fed. Reg. 33240 (May 23, 2023) (codified as “Standards of Performance for New Stationary Sources” at 40 C.F.R. pt. 60 (2023)).

169. EPA, FACT SHEET: GREENHOUSE GAS STANDARDS AND GUIDELINES FOR FOSSIL-FUEL-FIRED POWER PLANTS PROPOSED RULE 1-2 (2023), <https://www.epa.gov/system/files/documents/2023-05/FS-OVERVIEW-GHG-for%20Power%20Plants%20FINAL%20CLEAN.pdf> [<https://perma.cc/55HR-ZDLJ>].

170. 80 F.4th 579 (5th Cir. 2023).

171. *Id.* at 579–80, 584–85.

172. *Id.* at 588–89.

173. *Id.* at 589.

## 2. RESOURCE CONSTRAINTS

Communicating with the public requires resources. Yet most agencies do not allocate significant resources to communications activities, perhaps because their resources are stretched so thin already.<sup>174</sup>

Despite a much larger U.S. economy and population, the number of non-military full-time employees (FTEs) in the civil service has held steady at about two million for decades.<sup>175</sup> This is not to say that the size of government has held steady—in fact, the true size of government is nearing record highs due to a surge of hiring of contract and grant employees who work on behalf of the U.S. government in some capacity.<sup>176</sup> Nonetheless, the civil service is atrophying. Civil servants are increasingly aging out of the workforce or being driven out by politicization strategies from recent presidents.<sup>177</sup> Indeed, four years of the Trump Administration saw higher attrition levels in agencies politicized by President Trump.<sup>178</sup> Even after President Trump, the prospects for the civil service remain uncertain. For instance, some Republican members of Congress support reviving proposals for creating a “Schedule F” in the excepted service, which would allow for much greater political control of policy-focused civil servants.<sup>179</sup> First proposed in an executive order during the Trump Administration,<sup>180</sup> Schedule F attempts to make high-level, policy-oriented civil service jobs so unappealing and unstable that seasoned government professionals simply

174. See generally PAUL C. LIGHT, *A GOVERNMENT ILL EXECUTED: THE DECLINE OF THE FEDERAL SERVICE AND HOW TO REVERSE IT* (2008); JOHN J. DI IULIO JR., *BRING BACK THE BUREAUCRATS: WHY MORE FEDERAL WORKERS WILL LEAD TO BETTER (AND SMALLER!) GOVERNMENT* (2014); VERKUIL, *supra* note 117.

175. VERKUIL, *supra* note 117, at 48.

176. Paul C. Light, *The True Size of Government Is Nearing a Record High*, BROOKINGS (Oct. 7, 2020), <https://www.brookings.edu/blog/fixgov/2020/10/07/the-true-size-of-government-is-nearing-a-record-high/> [<https://perma.cc/X6XJ-2U8G>].

177. See DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 3–10 (2008); Emily Badger, Quoc Trung Bui & Alicia Parlapiano, *The Government Agencies that Became Smaller, and Unhappier, Under Trump*, N.Y. TIMES, <https://www.nytimes.com/2021/02/01/upshot/trump-effect-government-agencies.html> (Oct. 13, 2021).

178. Badger, Bui & Parlapiano, *supra* note 177.

179. Loren DeJonge Schulman, *Schedule F: An Unwelcome Resurgence*, LAWFARE (Aug. 12, 2022, 8:01 AM), <https://www.lawfaremedia.org/article/schedule-f-unwelcome-resurgence> [<https://perma.cc/K49Q-FJUV>].

180. Creating Schedule F in the Excepted Service, 85 Fed. Reg. 67631 (Oct. 26, 2020).

leave the service, making room for more political appointees or contractors.<sup>181</sup>

If the drain is wide open, the faucet is also not running: it is often difficult for agencies to hire entry-level FTEs at anywhere near the pace necessary to replenish human capital lost to attrition. Civil service rules, regulations, and procedures make it difficult to hire.<sup>182</sup> Indeed, it has become commonplace for civil servants to turn to contractors when they need to add services, as hiring contractors can be significantly easier than working through byzantine civil service laws that constrain hiring FTEs.<sup>183</sup> As a result, agencies do less and less of the core of government work, let alone the kind of public relations work that you might expect from an institution trying to rehabilitate its public image.

The Office of Personnel Management's Federal Workforce Database provides a glimpse into the limited number of FTEs who work in public communications or related fields. For instance, of the 2,191,011 FTEs in the federal government in September 2021, only 6,671 were classified as "public affairs" employees (0.3 percent), and only 1,621 as "visual information" employees (0.07 percent).<sup>184</sup> The employees in these occupational categories are deployed in just a small subset of the 537 total agencies in the dataset (105 agencies for public affairs, and thirty-two agencies for visual information); the modal agency employs zero FTEs in these occupations.<sup>185</sup> While these numbers do not account for the fact that some employees are not categorized as public affairs or visual information employees but still perform these services, they do provide reason to believe that the government devotes few resources to these kinds of activities, at least outside the military.

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181. See Paul R. Verkuil, *Policymaking Accountability and the Emerging Authoritarian State*, REGUL. REV. (Nov. 2, 2022), <https://www.theregreview.org/2022/11/02/verkuil-policymaking-accountability-and-the-emerging-authoritarian-state/> [https://perma.cc/N8MM-MUXW]; Donald P. Moynihan, *Public Management for Populists: Trump's Schedule F Executive Order and the Future of the Civil Service*, 82 PUB. ADMIN. REV. 174 (2021).

182. Kellie Lunney & Eric Katz, *Can't Hire, Can't Fire*, GOV'T EXEC. (Jan. 21, 2015), <https://www.govexec.com/magazine/features/2015/01/cant-hire-cant-fire/103338/> [https://perma.cc/75PN-MGZS].

183. VERKUIL, *supra* note 117, at 13–15.

184. All data is from the U.S. Office of Personnel Management. *Federal Workforce Data*, U.S. OFF. PERS. MGMT., <https://www.fedscope.opm.gov/> [https://perma.cc/JM6H-7WDV] (select "Quarter Months" under "Employment"; then select "2021" under "September"; then, in the top bar, select "Occupation - All," "White Collar," "10xx-INFORMATION AND ARTS," "1035-PUBLIC AFFAIRS"; and then reset and select "Occupation - All," "White Collar," "10xx-INFORMATION AND ARTS," "1084-VISUAL INFORMATION").

185. *Id.* (select "Quarter Months" under "Employment"; then select "2021" under "September"; and then, in the top bar, select "Agency - All," "All Agencies").

Agencies also contract with private firms that provide communications services, but such contracts represent a small proportion of their total spending. A 2016 GAO study attempted to catalog this spending using data from the Federal Procurement Data System.<sup>186</sup> Specifically, GAO looked at two “product service codes” (PSC) that best capture services related to communications strategy.<sup>187</sup> These estimates are imperfect because PSCs are alternately under- and over-inclusive.<sup>188</sup> Nevertheless, GAO found that federal government contracts in these PSCs amounted to about \$1 billion per year from 2006 to 2015, less than one-tenth of one percent of total annual government-wide obligations.<sup>189</sup>

The primary counterexample to these trends is the United States military.<sup>190</sup> Unlike other agencies, military agencies such as the Army, the Air Force, the Navy, and the Marine Corps (subject to oversight by the Secretary of Defense) receive massive annual appropriations to carry out “operations and maintenance,” which includes advertising to meet recruitment needs.<sup>191</sup> Strikingly, the GAO found that Department of Defense was responsible for over half of all federal obligations for public relations and advertising contracts between 2006 and 2015.<sup>192</sup> In other words, simply subtracting the Defense Department’s spending on public relations and advertising contracts means that total federal advertising contracts from all non-military agencies amounted to less than 0.05 percent of annual government-wide obligations over the period GAO surveyed.

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186. GAO, GAO-16-877R, Opinion Letter on Public Relations Spending: Reported Data on Related Federal Activities 1 (Sept. 30, 2016), <https://www.gao.gov/assets/gao-16-877r.pdf> [<https://perma.cc/3DXP-B8LL>].

187. *Id.* at 5 n.12.

188. *See id.* at 7. As GAO acknowledges, this approach may undercount agencies’ public relations spending, both because there are other PSCs that could capture some public relations activities, and because the PSC data do not include data from intelligence agencies, the U.S. Postal Service, or most of the legislative branch. On the other hand, it could overcount agencies’ public relations spending since it may include some spending on other types of services. *Id.* at 7 & n.15. In addition, the federal government does not maintain a uniform definition of what constitutes advertising, there is no government-wide reporting system for advertising expenses, and the Federal Procurement Data System does not include agency in-house advertising expenses. KEVIN R. KOSAR, CONG. RSCH. SERV., R41681, ADVERTISING BY THE FEDERAL GOVERNMENT: AN OVERVIEW 2–3 (2014), <https://sgp.fas.org/crs/misc/R41681.pdf> [<https://perma.cc/X584-ZMH4>].

189. GAO, *supra* note 186, at 5.

190. For further discussion, see *infra* Section III.A.3.

191. U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-396, DOD ADVERTISING: BETTER COORDINATION, PERFORMANCE MEASUREMENT, AND OVERSIGHT NEEDED TO HELP MEET RECRUITMENT GOALS 41 (2016), <https://www.gao.gov/assets/680/677231.pdf> [<https://perma.cc/PXH4-Z747>].

192. GAO, *supra* note 186, at 6.

Contrast this with the amount of investment in public relations activities in large corporations. Apple spent 3.4 percent of its profits in 2015 on advertising alone, which probably does not count other public relations work.<sup>193</sup> Other companies spend a much larger percentage of their revenue on marketing and sales: for instance, in 2023, SAP came in at thirty-five percent, and Salesforce came in at forty-three percent.<sup>194</sup> To be sure, these numbers are not entirely comparable, given that the U.S. government does not aim to recruit new customers or bring in a profit in the same way that corporations do, but it is a testament to the importance of marketing in changing minds and building and maintaining a reputation.<sup>195</sup>

### 3. POLITICAL CONSTRAINTS AND INCENTIVES

Political constraints also inhibit agencies' ability to communicate with the public. Presidential administrations and political appointees at the agencies have their own communications teams, and modern "presidential administration" entails keeping a tight leash on what agencies communicate to the public.<sup>196</sup> For instance, before officials from executive agencies can deliver a public speech or presentation, they often must clear their prepared remarks in advance with the White House communications team to ensure that their remarks conform to administration priorities.<sup>197</sup> Agency officials must also clear proposals, letters, and testimony that discuss legislation with the White House Office of Management and Budget.<sup>198</sup>

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193. See Jacqueline Basulto, *Why Apple Spends \$1.8 Billion on Advertising*, MEDIUM (July 13, 2018), <https://medium.com/seedx-digital-marketing-guru/why-apple-spends-1-8-billion-on-advertising-38d3940270bf> [<https://perma.cc/3MZQ-7764>].

194. Ben Hallman, *What Percent of Revenue Do Companies Spend on Marketing and Sales? [2024] [Breakdown by Industry]*, VITAL, <https://vitaldesign.com/percent-of-revenue-spent-on-marketing-sales/> [<https://perma.cc/ZKD3-BCY2>]; Lionel Sujay Vailshery, *SAP's Marketing and Sales Expenses from 2015 to 2023*, STATISTA (Mar. 1, 2024), <https://www.statista.com/statistics/862003/saps-marketing-and-sales-expenses/> [<https://perma.cc/5RF3-QDZC>].

195. See JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 39–48 (1989) (comparing the "profit-seeker" and "civil servant" models). See also NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* (2013) (tracing the history of American government's transition from profit-seeking toward salaries).

196. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250 (2001).

197. See MARTHA JOYNT KUMAR, *MANAGING THE PRESIDENT'S MESSAGE: THE WHITE HOUSE COMMUNICATIONS OPERATION* 114–15 (2007).

198. See ROBERT FAIRWEATHER, OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-21-18, *MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND*

An extreme example is the extraordinary effort that President Trump made to clamp down on climate change communications by agencies. These efforts ranged from issuing a pre-inauguration letter to the Department of Energy seeking the identities of employees working on climate issues,<sup>199</sup> to ignoring and contradicting agency scientific findings or statements,<sup>200</sup> to sanitizing news releases written by researchers before release.<sup>201</sup> This campaign not only derailed the agency's messaging, but it also caused many scientists to leave the government altogether.<sup>202</sup> Although this interference will strike many readers as nefarious primarily because of the anti-scientific bent it displayed, the political method—keeping tight tabs on messaging—is routine in the age of presidential administration in both scientific and non-scientific domains.<sup>203</sup> And when civil servants are told to remain quiet by political appointees, there often is not much recourse besides whistleblowing and leaking.<sup>204</sup>

Certain communications are also likely to be systematically privileged in this arrangement. A central part of the presidential administration strategy is credit claiming, wherein presidents present

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AGENCIES (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/03/M-21-18.pdf> [<https://perma.cc/864T-ZM4F>]; Eric Katz, *White House Reminds Agencies To Get Its Approval on Policy Proposals and Certain Communications*, GOV'T EXEC. (Mar. 5, 2021), <https://www.govexec.com/management/2021/03/white-house-reminds-agencies-get-its-approval-policy-proposals-and-certain-communications/172488/> [<https://perma.cc/MKY3-QM3J>].

199. Rowena Lindsay, *Trump Team's 'Intrusive' Memo Alarms Federal Climate Scientists*, CHRISTIAN SCI. MONITOR (Dec. 10, 2016), <https://www.csmonitor.com/USA/Politics/2016/1210/Trump-team-s-intrusive-memo-alarms-federal-climate-scientists> [<https://perma.cc/X4BH-NQ7H>].

200. See Chris Mooney & Juliet Eilperin, *In an Internal Memo, the White House Considered Whether To Simply 'Ignore' Federal Climate Research*, WASH. POST (May 23, 2018, 2:16 PM), <https://www.washingtonpost.com/news/energy-environment/wp/2018/05/23/in-an-internal-memo-the-white-house-considered-whether-to-simply-ignore-federal-climate-research/> [<https://perma.cc/Y2UF-DNUG>].

201. Scott Waldman, *Trump Officials Deleting Mentions of 'Climate Change' from U.S. Geological Survey Press Releases*, SCIENCE (July 8, 2019), <https://www.science.org/content/article/trump-officials-deleting-mentions-climate-change-us-geological-survey-press-releases>.

202. Brad Plumer & Coral Davenport, *Science Under Attack: How Trump Is Sidelining Researchers and Their Work*, N.Y. TIMES (Dec. 28, 2019), <https://www.nytimes.com/2019/12/28/climate/trump-administration-war-on-science.html>.

203. See Kagan, *supra* note 196, at 2250, 2302.

204. See Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349, 349–53 (2019) (discussing the ways that civil servants may attempt to resist presidents and political leaders); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 515–30 (2013) (discussing the varied and complex phenomenon of leaking by government employees and how leaking is a feature of the modern administrative state).

themselves as the impetus behind agency actions that will be popular with their base.<sup>205</sup> Conversely, presidents have an incentive to distance themselves from agency failures, leaving the agency hanging out to dry.<sup>206</sup> The result is that agency successes are more likely to be interpreted by the public as presidential successes, whereas agency failures are more likely to be viewed as their own failures. For example, when inflation was alarmingly high in January 2022, President Biden declared that the job of fighting inflation “rests with the Federal Reserve.”<sup>207</sup> However, when inflation fell in July 2023, President Biden took credit for the decline and celebrated it as “Bidenomics in action.”<sup>208</sup>

Similar dynamics exist in Congress. When Congress holds a hearing that focuses on the work of a federal agency (or when the GAO, Congress’s “watchdog” over the executive branch,<sup>209</sup> conducts an audit of an agency), it is typically because Congress thinks the agency has done something wrong.<sup>210</sup> Conversely, Congress and the GAO have little incentive to celebrate agencies’ achievements when they do a good job.<sup>211</sup> Likewise, public interest and industry groups often attempt to “bolster their own institutional position by scolding the agency, preferably in terms that will gain them press coverage.”<sup>212</sup> As Jerry Mashaw and David Harfst put it, “[r]egulatory administrators have few reliable political allies.”<sup>213</sup>

This dynamic in turn feeds disproportionately negative media coverage of agencies, which only compounds U.S. media outlets’

205. See Kagan, *supra* note 196, at 2250, 2302 (“Clinton’s appropriation of regulatory product, even when wholly post hoc, sent a loud and lingering message: these were *his* agencies; *he* was responsible for their actions; and *he* was due credit for their successes.”).

206. A classic example is when presidents seek to blame the independent Federal Reserve for raising interest rates, which tends to slow economic growth when most presidents have countervailing incentives. See PETER CONTI-BROWN & BRIAN D. FEINSTEIN, ECON. STUD. BROOKINGS, TWITTER AND THE FEDERAL RESERVE: HOW THE U.S. CENTRAL BANK IS (AND IS NOT) SURVIVING SOCIAL MEDIA 5–6 (2020), <https://www.brookings.edu/wp-content/uploads/2020/10/ES-10.29.20-Conti-Brown-Feinstein.pdf> [<https://perma.cc/7FY4-D2UZ>].

207. Neil Irwin, *Biden: Fighting Inflation Is the Fed’s Job*, AXIOS (Jan. 19, 2022), <https://www.axios.com/2022/01/19/biden-fighting-inflation-feds-job>.

208. Alan Rappoport, *Biden Touts Easing Inflation as ‘Bidenomics in Action,’* N.Y. TIMES (July 12, 2023), <https://www.nytimes.com/2023/07/12/business/biden-inflation-cpi.html>.

209. Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1545 (2020).

210. Cf. *supra* notes 138–43, 152–57 and accompanying text.

211. We thank Wendy Wagner for making this point.

212. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 248 (1990).

213. *Id.*

preexisting bias to emphasize bad news.<sup>214</sup> The result is that Americans are much more likely to hear bad news about agencies than good news.<sup>215</sup> The overwhelmingly negative scrutiny that agencies receive also likely compounds agency officials' tendency to be risk averse.<sup>216</sup> It may also make them more hesitant to boldly tout their own achievements for fear that doing so will backfire and create negative publicity.<sup>217</sup>

Finally, agencies themselves are under-incentivized to publicize their own achievements to the public. Unlike private companies, which must compete for customers' business, agencies have no comparable incentive to "sell" their achievements to the public.<sup>218</sup> And although more effective public communications might benefit agency personnel in certain ways (for instance, if it results in increased funding or improved recruitment), many of the benefits of such communications—assuming they result in improved trust in government—ultimately accrue to the American public as a whole.<sup>219</sup> Furthermore, such benefits are discretionary and long term, in contrast to the multitude of compulsory

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214. See David Leonhardt, *Bad News Bias*, N.Y. TIMES, <https://www.nytimes.com/2021/03/24/briefing/boulder-shooting-george-segal-astrazeneca.html> (Apr. 22, 2021); Bruce Sacerdote, Ranjan Sehgal & Molly Cook, *Why Is All COVID-19 News Bad News?* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28110, 2020).

215. We thank Cary Coglianese, Kathleen Claussen, Ron Levin, and Peter Strauss for their helpful comments that informed this discussion.

216. Cf. Allen, *supra* note 85, at 251 ("Regulatory agencies are often described as rule-obsessed and risk-averse . . . and these traits make some sense in the face of significant public scrutiny.").

217. See JAMES, MOYNIHAN, OLSEN & VAN RYZIN, *supra* note 93, at 24 ("For managers and policymakers, if bad performance is perceived as a loss, the publication of performance information constitutes a major risk. Metrics showing bad performance can derail a career, damage a reputation, undercut self-efficacy and hurt at the ballot box.").

218. Cf. John D. Donahue, *The Transformation of Government Work: Causes, Consequences, and Distortions*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 41, 45 (Jody Freeman & Martha Minow eds., 2009) ("Private providers tend to outscore government on productive efficiency not because there is something magic about the private sector, but because competition eliminates, or at least narrows, the opportunities to survive without being efficient."). Interestingly, when government does have to compete—as states often do with other states over things like tourism—we do see more effort to highlight advantages and more success. See, e.g., John Deskins & Matthew T. Seevers, *Are State Expenditures To Promote Tourism Effective?*, 50 J. TRAVEL RSCH. 154 (2011) (finding some evidence that state expenditures on tourism promotion pay off for states, particularly if they are trying to increase their tourism from a low baseline relative to other states).

219. Cf. LERMAN, *supra* note 18, at 241–43.



and immediate demands from Congress, the president, and the judiciary that agencies must juggle every day.<sup>220</sup>

In sum, presidents' communications teams tightly control agencies' public communications; presidents themselves may take credit for agencies' accomplishments or push blame onto them when they fail; Congress and the GAO jump on agencies' failures but fail to publicize their successes; and agencies themselves are under-incentivized to publicize their own achievements. The result is an agency culture of institutional modesty and cautiousness, where agency personnel understandably focus the vast majority of their limited resources on other priorities, rather than responding to criticisms or touting their accomplishments.<sup>221</sup>

### *B. Agency Actions*

The second general way in which agencies have become submerged is that their actions are frequently opaque. The opacity of agency actions manifests in two distinct forms. First, simply put, many agency rules are incomprehensible to much of the American public, such that it is difficult for people to understand regulatory law even if they are aware that it exists. Some of this incomprehensibility may be irreducible, given the technical subject matter of many agency actions, but a good deal of it results from political concerns and the incentives created by administrative law. Second, because of the ways in which they are designed and implemented, agency actions are often difficult for the public to notice, or to differentiate from private companies' actions. As a result of these two forms of opacity, many Americans do not understand what agencies do nor do they recognize the extent to which agencies affect their lives.

Two examples illustrate this. First, consider Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, known as the Volcker Rule.<sup>222</sup> This provision, roughly speaking, limits banks' ability to engage in proprietary trading (*i.e.*, banks using their clients' funds to engage in high-risk speculative bets) or to sponsor hedge funds

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220. See generally Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L.J. 1 (2019) (situating the administrative state in contemporary political dynamics, which pull agencies in many directions).

221. Cf. Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REGUL. 257, 297 (1987) (discussing how agencies become "risk averse" in response to potential "outside threat[s]").

222. *E.g.*, Press Release, SEC, Agencies Issue Final Rules Implementing the Volcker Rule (Dec. 10, 2013), <https://www.sec.gov/news/press-release/2013-258> [<https://perma.cc/RP85-W9GL>].

or private equity funds.<sup>223</sup> Although President Obama described the Volcker Rule as a “simple and common-sense reform,”<sup>224</sup> the rule is in fact notoriously complex: the preamble and regulatory text of its implementing regulations totaled over 900 pages, and they are chock-full of exceptions.<sup>225</sup> Leaving aside the actual merits of the Volcker Rule, its complexity poses a public relations problem: it makes the rule more difficult for the public to understand, undercutting its public support.<sup>226</sup>

Second, consider some of the ways that the Affordable Care Act (ACA) reformed the private health insurance market. The ACA instituted numerous reforms designed to make health insurance more accessible and generous: for instance, it required health insurance plans to provide minimum “essential health benefits,”<sup>227</sup> prohibited insurers from discriminating against people based on their health status or imposing annual or lifetime limits,<sup>228</sup> and imposed caps on out-of-pocket costs.<sup>229</sup> Yet because of the complexity of these reforms,<sup>230</sup> and the ways in which they were channeled through private health insurance companies, many people who benefitted from these reforms were likely unaware of the extent to which they did so—or that these benefits stemmed from the ACA.<sup>231</sup> The public is even less likely to be aware of the numerous

223. *Volcker Rule*, BD. GOVERNORS FED. RSRV. SYS., <https://www.federalreserve.gov/supervisionreg/volcker-rule.htm> [https://perma.cc/87A7-ARDK] (Jan. 30, 2020).

224. President Barack Obama, Remarks by the President on Financial Reform (Jan. 21, 2010), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-financial-reform> [https://perma.cc/CY7Q-8B7N].

225. See, e.g., Roberta Romano, *Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation*, 43 HOFSTRA L. REV. 25, 72 (2014) (describing the Volcker Rule as “Rube Goldberg-like”).

226. See Kimberly D. Krawiec, *Don’t “Screw Joe the Plummer”: The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 75–77 (2013) (finding that many individuals’ comments “provide little evidence that commenters even understand, or care, what proprietary trading or fund investment is, much less the ways in which the Volcker Rule might govern such activities”).

227. 42 U.S.C. §§ 18022(a)–(b).

228. 42 U.S.C. §§ 300gg-4, -11.

229. 42 U.S.C. §§ 18022(a)(2), (c).

230. See Paul Starr, *Built To Last?: Policy Entrenchment and Regret in Medicare, Medicaid, and the Affordable Care Act*, in *MEDICARE AND MEDICAID AT 50: AMERICA’S ENTITLEMENT PROGRAMS IN THE AGE OF AFFORDABLE CARE* 319, 328 (Alan B. Cohen, David C. Colby, Keith A. Wailoo & Julian E. Zelizer eds., 2015); Erin C. Fuse Brown, *Developing a Durable Right to Health Care*, 14 MINN. J. L. SCI. & TECH. 439, 469–70 (2013).

231. See Abbe R. Gluck & Thomas Scott-Railton, *Affordable Care Act Entrenchment*, 108 GEO. L.J. 495, 554 (2020); Eric M. Patashnik & Julian E. Zelizer, *The Struggle To Remake Politics: Liberal Reform and the Limits of Policy Feedback in the Contemporary American State*, 11 PERSPS. ON POL. 1071, 1079 (2013); Starr, *supra* note 230, at 328.

regulations and guidance documents that implement and operationalize the ACA. For instance, each year, HHS releases a rule entitled the “Notice of Benefit and Payment Parameters” governing the implementation and oversight of the ACA’s health insurance exchanges. The 2023 Notice of Benefit and Payment Parameters includes a variety of requirements, including that insurers offer standardized plans and adequate plan networks.<sup>232</sup> Yet few Americans are likely aware of the role HHS has played in implementing these protections, if they are even aware of the protections at all. The following Section investigates each of these forms of agency opacity and their causes.

### 1. INCOMPREHENSIBLE REGULATIONS

The first way in which agency actions are opaque is that many regulations—and accompanying explanations—are incomprehensible to the general public.<sup>233</sup> To address this problem, multiple government initiatives have encouraged agencies to use simple and straightforward language in their communications to the public. Executive orders from the Carter Administration, Clinton Administration, and Obama Administration direct agencies to make their regulations “as simple and clear as possible.”<sup>234</sup> Likewise, the Plain Writing Act of 2010 requires that agencies use “plain writing” in every “covered document” (a term which excludes regulatory text but includes regulatory preambles).<sup>235</sup> Agencies have also recently made some investments in “visual rulemaking”—the use of more graphical forms of communication in rulemaking documents—that seem designed to ease the public’s digestion of agency affairs.<sup>236</sup> Yet despite these directives and initiatives, some administrative law scholars have concluded that, if anything, agency rules and explanations may be getting more incomprehensible.<sup>237</sup>

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232. HHS Notice of Benefit and Payment Parameters for 2023, 87 Fed. Reg. 27208 (May 6, 2022) (to be codified at 45 C.F.R. pts. 144, 147, 153, 155–56, 158).

233. See WENDY WAGNER WITH WILL WALKER, *INCOMPREHENSIBLE! A STUDY OF HOW OUR LEGAL SYSTEM ENCOURAGES INCOMPREHENSIBILITY, WHY IT MATTERS, AND WHAT WE CAN DO ABOUT IT* 158–60 (2019).

234. See Cynthia R. Farina, Mary J. Newhart & Cheryl Blake, *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 GEO. WASH. L. REV. 1358, 1373–76 (2015) (emphasis omitted) (quoting Exec. Order No. 12044 § 1, 3 C.F.R. 152, 152 (1979)); Exec. Order No. 12866 § 6(a)(3)(E)(ii), 3 C.F.R. 638, 646 (1994); Exec. Order No. 13563 § 1(a), 3 C.F.R. 215, 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 816 (2012)).

235. See 5 U.S.C. § 301 note (Plain Writing in Government Documents).

236. See generally Porter & Watts, *supra* note 136.

237. See WAGNER WITH WALKER, *supra* note 233, at 162; Farina, Newhart & Blake, *supra* note 234, at 1404–05.

One oft-cited indicator of this incomprehensibility is the sheer amount of information involved in rulemaking processes. Today, agency regulations are routinely accompanied by lengthy and dense preambles that cover a myriad of technical, legal, and policy issues.<sup>238</sup> Another indicator of incomprehensibility is its readability. For instance, Cynthia Farina, Mary Newhart, and Cheryl Blake examined a major proposed airline regulation and found that “its text was written at a reading level considerably above the ability of eighty percent of adults in the U.S.”<sup>239</sup>

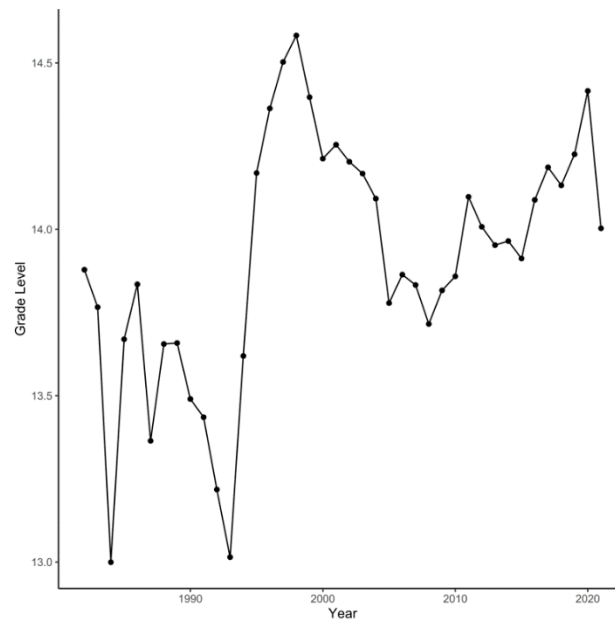
Building on these findings, we calculated the average Flesch-Kincaid grade level for all preambles accompanying final rules from 1982 to 2021. Figure 1 reports the results. We find that while there has been some variation, overall, preambles on average seem stuck at about the level of a sophomore in college, despite laws like the Plain Writing Act of 2010. Compare this to the eighth-grade reading level that some agencies encourage for communications with the general public.<sup>240</sup>

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238. WAGNER WITH WALKER, *supra* note 233, at 164–65 (discussing “Super-Sized Rules”); 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, 142, 145 (2011) (reporting that EPA’s Hazardous Air Pollutants rules, together with their preambles, “were, on average, thirty-nine pages in the *Federal Register*”).

239. Farina, Newhart & Blake, *supra* note 234, at 1365.

240. See Lisa Marchand, *What Is Readability and Why Should Content Editors Care About It?*, CTR. FOR PLAIN LANGUAGE (Mar. 22, 2017), <https://centerforplainlanguage.org/what-is-readability/> [<https://perma.cc/TU2J-MRLT>] (“The average American is considered to have a readability level equivalent to a 7th/8th grader (12 to 14 years old). This level is actively used as a benchmark for written guidelines in the medical industry.”). Some agencies aspire to an even simpler style. See *Readability for Developing and Pretesting Concepts, Messages, Materials, and Activities*, EPA, <https://www.epa.gov/choose-fish-and-shellfish-wisely/readability-developing-and-pretesting-concepts-messages-materials> [<https://perma.cc/M4WH-2H9S>] (“Readability should not exceed 7th to 8th grade (*average*), the lower end of the estimated average reading level of the U.S. population. In addition, because many people read below that level, a 4th to 6th grade level (*easy*) is a better goal for information that is critical for people to understand (such as medication instructions) . . .”).



*Figure 1. Average Flesch-Kincaid Grade Level of Preambles Accompanying Final Rules, 1982–2021.*

As Wendy Wagner and Will Walker have shown, the incomprehensibility of agency regulations can be attributed in large part to the incentives created by administrative law.<sup>241</sup> Not only does administrative law place almost no limits on the information that parties can submit in the administrative process, but it also incentivizes both agencies and affected interest groups to flood the rulemaking process with excessive information as a defensive mechanism.<sup>242</sup> Perhaps the most notable way in which the latter occurs is through the rise of “hard look” judicial review, which incentivizes agencies to develop lengthy and detailed preambles defending their rules against adverse comments in order to lower the risk of their being invalidated.<sup>243</sup> This in turn makes it more difficult for ordinary citizens or even public interest groups to participate effectively in the administrative process, since they typically have fewer resources to process all this information.<sup>244</sup>

241. WAGNER WITH WALKER, *supra* note 233, at 159–60.

242. See generally Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010).

243. *Id.* at 1357.

244. *Id.* at 1333.

## 2. SALIENCE AND TRACEABILITY

Administrative actions are also frequently difficult for the public to notice (that is, they are not salient) or to recognize as actions taken by administrative agencies (that is, they are not traceable). Consider the ACA again, which has been described as “the most ambitious and significant piece of domestic legislation to pass in half a century.”<sup>245</sup> Among other things, the ACA provided health insurance coverage to millions of previously uninsured Americans, and, for millions of other Americans who already had coverage, it made their coverage more generous by layering on new financial protections.<sup>246</sup> Yet many Americans did not initially realize that the benefits they received were provided by the law, in part because these benefits were intermediated by private insurance companies.<sup>247</sup> Indeed, for several years after the ACA was enacted, polling revealed a striking lack of public awareness of the law’s benefits.<sup>248</sup> This in turn likely undermined support for the ACA and provided an opening for those seeking to repeal it.<sup>249</sup>

This is not atypical: Suzanne Mettler shows that in recent decades, more and more policies in the United States—from those supporting home ownership and employer-based health insurance to research and development and subsidies for clean energy technologies—are implemented through the tax code or through subsidies to private organizations.<sup>250</sup> These kinds of submerged policies are less salient or traceable, so individuals who benefit from them are often unaware of those benefits, or at least they are unaware that it is the government that is responsible for their benefits. At the same time, more salient and

245. JONATHAN COHN, *THE TEN YEAR WAR: OBAMACARE AND THE UNFINISHED CRUSADE FOR UNIVERSAL COVERAGE* 334 (2021).

246. See generally *THE TRILLION DOLLAR REVOLUTION: HOW THE AFFORDABLE CARE ACT TRANSFORMED POLITICS, LAW, AND HEALTH CARE IN AMERICA 209–96* (Ezekiel J. Emanuel & Abbe R. Gluck eds., 2020) (assessing the ACA’s impacts on access to health care, health care spending, and medical practice).

247. See sources cited *supra* note 240.

248. See, e.g., Sarah Kliff, *Poll: Obamacare’s Biggest Beneficiaries Are Skeptical of Obamacare*, WASH. POST (Feb. 22, 2013, 2:05 PM), <https://www.washingtonpost.com/news/wonk/wp/2013/02/22/poll-obamacares-biggest-beneficiaries-are-skeptical-of-obamacare/> [<https://perma.cc/WSB6-JT37>]; *Kaiser Health Tracking Poll: January 2014*, KFF (Jan. 30, 2014), <https://www.kff.org/affordable-care-act/poll-finding/kaiser-health-tracking-poll-january-2014/> [<https://perma.cc/J75F-DTZQ>].

249. See Kyle Dropp & Brendan Nyhan, *One-Third Don’t Know Obamacare and Affordable Care Act Are the Same*, N.Y. TIMES (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/upshot/one-third-dont-know-obamacare-and-affordable-care-act-are-the-same.html>.

250. See generally METTLER, *supra* note 20, at 1–7.

traceable government programs (such as welfare or Pell Grants) have diminished.<sup>251</sup>

Agency actions have become less salient and traceable in at least three other ways. First, federal agencies have grown increasingly reliant on private standards in their regulations.<sup>252</sup> These standards are developed by industry or nongovernmental organizations and then often incorporated by reference into agency rules, meaning that what were heretofore private voluntary standards become legally binding public law.<sup>253</sup> This trend has been spurred on in part by the 1996 National Technology Transfer and Advancement Act, which directs agencies to “use technical standards that are developed or adopted by voluntary consensus standards bodies . . . to carry out policy objectives or activities determined by the agencies and departments,” unless “inconsistent with applicable law or otherwise impractical.”<sup>254</sup>

This growing reliance on private standards has the effect of reducing transparency. Agencies are generally required to publish legally binding regulations in the Federal Register<sup>255</sup> and then to codify them in the Code of Federal Regulations before they take effect.<sup>256</sup> However, under FOIA, agencies can be deemed to have met this requirement when they incorporate by reference material that has been published elsewhere,<sup>257</sup> meaning that these private standards can become binding public law without ever being published in the Federal Register or the Code of Federal Regulations.<sup>258</sup> Furthermore, private standards are often copyrighted, and so are frequently available only upon submitting a request to a private organization and paying a fee, which can be hundreds

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251. *Id.* at 15–16.

252. Cary Coglianese, *Private Standards and Public Governance*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 9, 2019), <https://www.yalejreg.com/nc/private-standards-and-public-governance-by-cary-coglianese/> [<https://perma.cc/7WRQ-Q987>].

253. Emily S. Bremer, *Technical Standards Meet Administrative Law: A Teaching Guide on Incorporation by Reference*, 71 ADMIN. L. REV. 315, 316 (2019). *See also* Cary Coglianese & Gabriel Scheffler, *Private Standards and the Benzene Case: A Teaching Guide*, 71 ADMIN. L. REV. 353, 354–55 (2019).

254. National Technology Transfer and Advancement Act of 1995 § 12(d), 15 U.S.C. § 272 note (Utilization of Consensus Technical Standards by Federal Agencies).

255. 5 U.S.C. § 552(a)(1)(D).

256. 44 U.S.C. § 1510.

257. 5 U.S.C. § 552(a)(1)(E); Emily S. Bremer, *On the Cost of Private Standards in Public Law*, 63 U. KAN. L. REV. 279, 284–85 (2015).

258. Emily S. Bremer, *Introducing Incorporation by Reference*, REGUL. REV. (Aug. 24, 2022), <https://www.theregreview.org/2022/08/24/bremer-introducing-incorporation-by-reference/> [<https://perma.cc/Q9K5-CZW8>].

of dollars or more.<sup>259</sup> The only alternative for someone wishing to read a private standard incorporated by reference is often to make an appointment to visit the reading room at the Office of the Federal Register in Washington, D.C.<sup>260</sup>

Second, the federal bureaucracy has grown increasingly reliant on private contractors.<sup>261</sup> Nobody knows for sure how many contractors are employed by the federal government, but Paul Light estimates that it is somewhere between 7.6 and 12 million workers.<sup>262</sup> Under a longstanding Office of Management and Budget Circular A-76, agencies are not supposed to contract out “inherently governmental” functions, but these limits have arguably not been observed in practice, as contractors today perform an array of important services.<sup>263</sup> This includes the rulemaking context, where contractors conduct regulatory impact analyses, analyze public comments, and even draft proposed rules.<sup>264</sup>

Like their increased reliance on private standards, agencies’ reliance on private contractors tends to reduce the visibility of government. For one thing, private contractors are not subject to the same procedural and

259. Bremer, *supra* note 253, at 286; Nina A. Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737, 743–44, 752 (2014). It remains to be seen what effect the D.C. Circuit’s decision in *American Society for Testing and Materials v. Public.Resource.Org, Inc.*, will have on availability of private standards. 82 F.4th 1262 (D.C. Cir. 2023). The court held that non-commercial publication of private standards by third parties is protected as fair use under the Copyright Act. *Id.* at 1265. In theory, this case may open the door to greater publication of private standards, but only if the non-commercial use qualifier is expansively interpreted and third parties step in to publish private standards.

260. Mendelson, *supra* note 259, at 740.

261. BRIDGET C.E. DOOLING & RACHEL AUGUSTINE POTTER, CONTRACTORS IN RULEMAKING 4 (2022), <https://www.acus.gov/sites/default/files/documents/Contractors%20in%20Rulemaking%20Final%20Report.pdf> [https://perma.cc/6587-FQ6D] (“Spending on [private contracting] services has been increasing, while the size of the federal civilian workforce has remained relatively level since roughly 1960 . . . .” (footnote omitted)).

262. VERKUIL, *supra* note 117, at 49; PAUL C. LIGHT, THE GOVERNMENT-INDUSTRIAL COMPLEX: THE TRUE SIZE OF THE FEDERAL GOVERNMENT, 1984–2018, at 31–32 (2019).

263. Jody Freeman & Martha Minow, *Reframing the Outsourcing Debates*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 1, 11–12 (Jody Freeman & Martha Minow eds., 2009). See also Rachel Augustine Potter, *Privatizing Personnel: Bureaucratic Outsourcing & the Administrative Presidency 1–2* (May 28, 2023) (unpublished manuscript), <https://www.dannyhayes.org/uploads/6/9/8/5/69858539/rap.privatizingpersonnel.2023spring.pdf> [https://perma.cc/8AZQ-8DS6].

264. DOOLING & POTTER, *supra* note 261, at 47–48; Rachel Augustine Potter, *How Much of Rulemaking Is Done by Contractors?*, BROOKINGS (Feb. 16, 2022), <https://www.brookings.edu/research/how-much-of-rulemaking-is-done-by-contractors/> [https://perma.cc/82AD-DMG6].



transparency requirements that administrative law imposes on government actors.<sup>265</sup> The APA and FOIA, among other legal structures, do not apply to private contractors.<sup>266</sup> The president's annual budget includes the number of FTE bureaucratic positions but does not include the number of contractors.<sup>267</sup> Private contracting also makes agencies' actions less traceable by obscuring the functions they perform. When it comes to rulemaking, it may be difficult for members of the public to tell which aspects of a rule were overseen by government employees and which were overseen by private contractors.<sup>268</sup>

Likewise, when government benefits are delivered by private organizations, it may obscure the role that government plays in providing these benefits.<sup>269</sup> Since the Medicare Modernization Act of 2003, enrollment in Medicare Advantage (also known as Medicare Part C) has steadily grown. Today, more than half of all Medicare enrollees receive their Medicare benefits from a private insurance company.<sup>270</sup> Meanwhile, over seventy percent of enrollees in Medicaid receive their benefits from a private comprehensive risk-based managed care organization.<sup>271</sup> These trends may make it more difficult for Medicare or Medicaid beneficiaries to ascertain the extent to which the government is responsible for their benefits.<sup>272</sup>

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265. Nina A. Mendelson, *Six Simple Steps To Increase Contractor Accountability*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 263, at 241, 244–53 (comparing legal constraints and procedures that apply to federal agency activities to those that apply to contractors).

266. *Id.* at 248–50.

267. Potter, *supra* note 263, at 10.

268. DOOLING & POTTER, *supra* note 261, at 8. Even high-level government officials may not be aware of the role played by contractors in the rulemaking process. *Id.* at 47 (“While respondents overseeing the day-to-day interactions with contractors expressed confidence in their own oversight, we observed that at senior leadership levels there was generally less visibility into how a rule was put together. Instead, we heard the sentiment from more senior leaders that knowing what tasks had been performed by a contractor was ‘below my level.’”).

269. METTLER, *supra* note 27, at 87; David M. Van Slyke & Christine H. Roch, *What Do They Know, and Whom Do They Hold Accountable? Citizens in the Government-Nonprofit Contracting Relationship*, 14 J. PUB. ADMIN. RSCH. & THEORY 191, 197, 202–04 (2004).

270. Nancy Ochieng, Jeannie Fuglesten Biniek, Meredith Freed, Anthony Damico & Tricia Neuman, *Medicare Advantage in 2023: Enrollment Update and Key Trends*, KFF (Aug. 9, 2023), <https://www.kff.org/medicare/issue-brief/medicare-advantage-in-2023-enrollment-update-and-key-trends/> [https://perma.cc/6YQP-R5TB].

271. Elizabeth Hinton & Jada Raphael, *10 Things To Know About Medicaid Managed Care*, KFF (Mar. 1, 2023), <https://www.kff.org/medicaid/issue-brief/10-things-to-know-about-medicoid-managed-care/> [https://perma.cc/V887-CWG9].

272. LERMAN, *supra* note 18, at 115.

Finally, federal agencies have become increasingly reliant on so-called “nudges”—interventions that “alter[] people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives.”<sup>273</sup> These kinds of interventions come in two main flavors: “architectural” nudges “include automatic enrollment, mandatory choice, and simplification so as to highlight, and draw attention to, certain options,” and “educative” nudges (*e.g.*, calorie counts) that provide information, warnings, or reminders.<sup>274</sup> Regulators’ growing reliance on nudges seems likely to make their actions less salient and less traceable to the government than more coercive forms of regulation, whose effectiveness depends on private actors’ understanding that the government has proscribed certain conduct. For certain kinds of kinds of architectural nudges (*e.g.*, allocating a certain percentage of workers’ income to a retirement plan to increase savings for retirement or placing fruits and vegetables in a cafeteria at eye-level to prompt healthier choices), it seems unlikely that many people will be aware that they are being nudged.<sup>275</sup> Indeed, some government interventions may actually be more effective when they are hidden. In one prominent example, the Obama Administration intentionally structured a provision of the 2009 Stimulus Act as a low-salience tax credit, rather than a high-salience rebate, based on behavioral economics research that suggested that doing so would be more effective in spurring consumption.<sup>276</sup> Even with educative nudges (*e.g.*, calorie counts), which only work if they are salient,<sup>277</sup> the public seems less likely to know that the government is the

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273. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* 8 (final ed. 2021). *See also* Kathleen DeLaney Thomas, *Taxing Nudges*, 107 VA. L. REV. 571, 578 (2021) (“Governments have increasingly adopted nudges as cost-effective ways to promote public policy.”).

274. Cass R. Sunstein, *Welfare Now*, 72 DUKE L.J. 1643, 1654 (2023).

275. *See* Nicolas Cornell, *The Aesthetic Toll of Nudging*, 14 GEO. J. L. & PUB. POL’Y 841, 843 (2016) (“The choice architect seems to be circumventing our rational choice and operating through subconscious processes.”); Daniel M. Hausman & Brynn Welch, *Debate: To Nudge or Not To Nudge*, 18 J. POL. PHIL. 123, 130 (2010) (“[T]here may be something more insidious about shaping choices than about open constraint.”); Dahlia Lithwick, *Taming Your Inner Homer Simpson: How To Opt out of Your Own Stupid Choices*, SLATE (May 12, 2008, 7:03 AM), <https://slate.com/culture/2008/05/cass-sunstein-and-richard-thaler-s-nudge.html> [<https://perma.cc/W2YW-GQRD>] (“Is it oh-so-slightly creepy . . . to envision a world in which shadowy choice architects are nudging you away from the cashews and toward organ donation?”). *But see* THALER & SUNSTEIN, *supra* note 273, at 323 (“Default rules should be, and usually are, entirely transparent.”).

276. *See* Suzanne Mettler with Matt Guardino, *From Nudge to Reveal*, in *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY*, *supra* note 20, at 48, 48–49.

277. THALER & SUNSTEIN, *supra* note 273, at 323 (“Labels, warnings, and reminders are not exactly hidden; if they are, they will not work.”).

source of the intervention (as opposed to, say, private companies) than with more coercive forms of government regulation (say, bans on menthol cigarettes).<sup>278</sup> In sum, while nudges are a powerful regulatory tool, overreliance on them risks rendering the functions that government performs less visible and traceable to ordinary Americans.<sup>279</sup>

\* \* \*

This Part shows that the administrative state has become submerged in two main ways. First, agencies are highly constrained from communicating effectively with the public due to a combination of legal restrictions, limited resources, and political dynamics. Second, federal regulations (and accompanying preambles) are often difficult for ordinary members of the public to comprehend, and regulations and public benefits are often designed and implemented in ways that make them harder to notice or trace back to the government. Of course, there are exceptions to these general trends: agencies sometimes undertake highly salient actions, and the military in particular expends significant resources on public relations. But together, the aforementioned factors help to obscure the importance of agency actions and the extent to which Americans' lives are affected by agencies.

Two obvious questions follow from this analysis: First, what (if anything) should be done to "unsubmerge" the administrative state? Second, given the depths of the government's reputation crisis, would unsubmerging the administrative state really help to improve trust in government? Part III responds to these questions.

### III. THE PROMISE AND PERILS OF UNSUBMERGING THE ADMINISTRATIVE STATE

Until this point, this Article has argued that the submerged nature of administrative governance helps to explain why public trust in government has declined. Part III argues that the inverse also is likely true: unsubmerging the administrative state could help to improve public trust in government. While there are different ways that this could be

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278. Of course, many mandates apply to private companies, rather than individual members of the public, and as described above, the public is unlikely to be aware of these mandates. *See supra* notes 257–60 and accompanying text. That being said, it seems likely to us that many members of the public will be unaware that educational nudges result from government action, even when they are designed to change the public's behavior.

279. We thank Cass Sunstein for pushback that helped to inform the development of this Section.

accomplished,<sup>280</sup> this Part focuses on three strategies that have the potential to improve the government's reputation. At the same time, this Part also acknowledges three potential concerns, including risks of unleashing propaganda, skewing agency priorities, and precipitating a backlash.

### *A. Creating a Positive Feedback Loop*

First, unsubmerging the administrative state could improve public trust in government. That is not to say that policymakers should simply impose more stringent transparency requirements on agencies. Instead, drawing on recent empirical scholarship in law and the social sciences, this Section makes the case that three targeted strategies have the potential to improve public trust: making administrative expertise more salient, making the benefits that agencies deliver more salient, and enabling more Americans to participate in administrative process. An agenda to “unsubmerge” the administrative state along these lines would need to address the two dimensions along which the administrative state is submerged: its communications and the design and implementation of its policies.

#### 1. MAKING ADMINISTRATIVE EXPERTISE MORE SALIENT

Polling suggests that federal civil servants are viewed much more positively than elected leaders and political appointees.<sup>281</sup> Cross-partisan majorities agree that non-elected federal government employees serve public interests, are competent, and work hard.<sup>282</sup> However, when pollsters ask for participants' views of the federal government as a whole, the script flips. Majorities disagree that the federal government is

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280. See MICHAELS, *supra* note 89, at 202–30 (surveying methods of instituting a “second *pax administrativa*,” including rebuilding the civil service, strengthening civil society, and, closest to our project, rebuilding administrative government’s “reputation”).

281. See Moynihan, *supra* note 58, at 39–40 (reporting data from Pew Research Center polls from the early 1980s that asked about government agencies specifically and concluding that “public opinion about individual federal agencies tends to be more positive than evaluations of government as a whole and does not show the same pattern of decline”); P’SHP FOR PUB. SERV. & FREEDMAN CONSULTING, LLC, PUBLIC OPINION ON TRUST IN GOVERNMENT AND RELATED ISSUES: KEY FINDINGS FROM IMPACT RESEARCH POLLING 5 (2022), <https://ourpublicservice.org/wp-content/uploads/2022/02/Partnership-and-Freedman-Trust-Polling.pdf> [<https://perma.cc/RBN7-QJL4>]. See also *supra* note 116 and accompanying text (noting that some agencies poll better than other parts of the federal government).

282. See P’SHP FOR PUB. SERV. & FREEDMAN CONSULTING, LLC, *supra* note 281, at 4.

effective, accountable, transparent, or listening to the public.<sup>283</sup> When respondents are asked their views about political appointees and members of Congress in particular, as opposed to federal government employees, majorities of Americans have unfavorable attitudes.<sup>284</sup> These findings about low trust in elected and appointed leaders are consistent with a literature in political science demonstrating that Americans tend to dislike politicians, whom they view as self-interested and corrupt.<sup>285</sup>

Taking a step back, it is not hard to square Americans' relative trust in government employees with their distrust of government and of members of Congress and political appointees in particular: Americans do not fully appreciate how much of government work is done by non-political civil servants. As Max Stier and Tom Freedman write, "the public either does not know about or overlooks significant work by our country's civil servants — the individuals who care for veterans and assist Americans in need, keep us safe, engage in cutting-edge scientific and medical research, and advance our national interest."<sup>286</sup>

The polling numbers are also broadly consistent with recent empirical work that suggests the public is more likely to trust agencies when prompted to believe agencies' work is based on substantive expertise, rather than politics. In a nationally representative survey of trust in public health agencies, Gillian SteelFisher and co-authors find that respondents with higher levels of trust in public health agencies report agencies' adherence to scientific research and expert staff as reasons for trusting them, while those with lower trust reported that agencies were politically influenced.<sup>287</sup> Likewise, Brian Feinstein conducts a survey experiment in which participants read about a hypothetical agency decision and classify the decision in terms of its legitimacy.<sup>288</sup> Feinstein finds that when the vignette emphasizes the agency's expertise and insulation from politics, participants in the

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283. *Id.* at 8.

284. *Id.* at 5.

285. See JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* 124 (2002); HAY, *supra* note 26, at 34–37.

286. Max Stier & Tom Freedman, Opinion, *Why Democracy's in Such Trouble: A Crisis in Public Trust of Government*, POLITICO (Mar. 1, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/03/01/democracy-public-crisis-trust-government-faith-00012565>.

287. Gillian K. SteelFisher, Mary G. Findling, Hannah L. Caporello, Keri M. Lubell, Kathleen G. Vidoloff Melville et al., *Trust in US Federal, State, and Local Public Health Agencies During COVID-19: Responses and Policy Implications*, 42 HEALTH AFFS. 328, 334–36 (2023).

288. Brian D. Feinstein, *Legitimizing Agencies*, U. CHI. L. REV. (forthcoming) (manuscript at 25) (on file with authors).

experiments are more likely to view the agency's decision as legitimate.<sup>289</sup> Similarly, Jon Rogowski conducts a survey experiment on a nationally representative sample of Americans and finds that a loss of expertise causes a significant decrease in public confidence.<sup>290</sup>

Taken together, the aforementioned findings suggest that the expertise of agencies carries great value for the public. This in turn suggests that if the public were better informed about the important work done by civil servant experts, and better understood the non-political nature of their roles, it would help to improve public trust in government.<sup>291</sup>

Of course, agencies are not purely technocratic institutions. By necessity, agencies make political decisions about “who gets what, when, and how.”<sup>292</sup> On its face, this might suggest that making agency decisions more salient would drag them into “the political gutter.”<sup>293</sup> However, it is possible that the public is capable of identifying the kind of “administrative competence” that combines expert knowledge with responsible, reasoned, and public-regarding resolution of policy conflicts<sup>294</sup> and distinguishing it from naked self-interested, partisan, or corrupt politics.<sup>295</sup> Making such competence more salient would likely provide a stronger basis for trust in administrative agencies than would expertise alone. To the extent that agency decisions are based on political considerations, the best way to regain trust in institutions is not to gloss over this fact, but instead to provide more “inclusive processes for framing policy questions, greater attentiveness to dissenting voices and minority views, and more humility in admitting where science falls short.”<sup>296</sup>

289. *Id.* (manuscript at 45–46).

290. Jon C. Rogowski, *The Administrative Presidency and Public Trust in Bureaucracy*, 1 J. POL. INSTS. & POL. ECON. (SPECIAL ISSUE - POL. ECON. EXEC. POLS.) 27, 33, 35, 38–46 (2020).

291. Levi, *supra* note 56, at 215 (noting that establishing governmental credibility and trustworthiness depends on “demonstrable administrative capacity”).

292. Cary Coglianese & Daniel E. Walters, *Antipolitics and the Administrative State*, COMMON KNOWLEDGE (forthcoming) (manuscript at 2) (on file with authors).

293. *Id.* (manuscript at 9).

294. ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW 15–16 (2020). *See also* ARAIZA, *supra* note 27, at 206–07.

295. Coglianese & Walters, *supra* note 292 (manuscript at 9) (distinguishing politics as discretion from politics as favoritism and suggesting that the latter has no place in administration).

296. Sheila Jasanoff, *The Discontents of Truth & Trust in 21st Century America*, DÆDALUS, Fall 2022, at 25, 25.

## 2. MAKING ADMINISTRATIVE BENEFITS MORE SALIENT

One of the central themes of Suzanne Mettler's book *The Submerged State* is that the submerged nature of many government programs in the United States leads many Americans to underestimate the extent to which they benefit from government.<sup>297</sup> This, in turn, implies that if government programs were more salient, then the public would be more supportive of these programs. Although Mettler does not focus on administrative agencies in particular, it seems reasonable to suppose that her conclusions are applicable to administrative agencies and the benefits they provide to the public. If Americans were, for instance, made more aware of the important benefits that agencies confer on large swaths of the American public (*e.g.*, ensuring clean air and water, protecting against predatory financial practices, providing health insurance coverage), it stands to reason that they would be more supportive of government.

Again, recent empirical work supports this hypothesis. Amy Lerman and Katherine McCabe find that Americans who enroll in Medicare are more likely to oppose cutting the Medicare program and more likely to express support for the ACA. Importantly, Lerman and McCabe find that these effects are especially strong among Republicans, who were less likely to support Medicare and the ACA at baseline, suggesting that in some cases policy feedback effects can overcome pre-existing ideological commitments.<sup>298</sup> In addition, they find that the effects of participating are greater when the benefits they receive are salient to the individuals.<sup>299</sup>

One promising way to make administrative benefits more salient is through counteracting what public administration scholars refer to as "administrative burdens."<sup>300</sup> These burdens often accompany efforts to access government benefits, such as disability benefits,<sup>301</sup> supplemental

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297. See METTLER, *supra* note 20, at 6. See also Campbell, *supra* note 38, at 967–68 ("To [Americans], government is a force simply taking money out of their pockets, not a force that visibly (and positively) affects their lives.").

298. Amy E. Lerman & Katherine T. McCabe, *Personal Experience and Public Opinion: A Theory and Test of Conditional Policy Feedback*, 79 J. POL. 624 (2017); LERMAN, *supra* note 18, at 149–65.

299. LERMAN, *supra* note 18, at 151–62.

300. HERD & MOYNIHAN, *supra* note 55, at 1–41.

301. See generally Karen M. Tani, *Disability Benefits as Poverty Law: Revisiting the "Disabled State,"* 170 U. PA. L. REV. 1687 (2022).

nutrition benefits,<sup>302</sup> health care benefits,<sup>303</sup> and even tax refunds.<sup>304</sup> Often, citizens' first and only direct interaction with government comes as the experience of a burden in the form of paperwork requirements, excessive learning curves, or even physical challenges.<sup>305</sup>

Of course, administrative burdens are themselves quite salient: in fact, they are some of the most inherently salient features of administrative government. Yet they render the benefits that agencies deliver less salient and accessible.<sup>306</sup> In terms of policy feedbacks, these initial experiences with burdens therefore can be expected to play an outsized role, potentially making it difficult for government's image to recover once someone begins to see government institutions as a burden.<sup>307</sup> Minimizing administrative burdens is a priority of the Biden Administration,<sup>308</sup> and there is an additional benefit in these efforts: eliminating burdens minimizes the risk of bad first impressions and frees up "cognitive capital" for the more positive contributions of agencies to

302. See generally Ashley Fox, Wenhui Feng & Megan Reynolds, *The Effect of Administrative Burden on State Safety-Net Participation: Evidence from Food Assistance, Cash Assistance, and Medicaid*, 83 PUB. ADMIN. REV. 367 (2022).

303. See generally Simon F. Haeder & Donald P. Moynihan, *Most Americans Support Minimizing Administrative Burdens for Medicaid Recipients as the Public Health Emergency Ends*, HEALTH AFFS. SCHOLAR, July 2023, at 1.

304. HERD & MOYNIHAN, *supra* note 55, at 9–11.

305. Cf. *id.* at 2, 7 ("The presence of administrative burdens makes the difference as to whether government is experienced as accessible or opaque, simple or bewildering, respectful or antagonistic.").

306. This is another example of how the government failure perspective, ideological assault perspective, and submergence perspective overlap. Administrative burdens may result from ideological assaults or governmental incompetence and at the same time serve to make the benefits government delivers less salient. See *supra* note 55 and accompanying text.

307. See *supra* notes 120–28 and accompanying text. Interestingly, there is some evidence that perceptions of burdens can enhance public support for policy programs among those who believe that programs are being abused, which suggests a need to be attentive to the policy feedback effects of eliminating administrative burdens. See Lael R. Keiser & Susan M. Miller, *Does Administrative Burden Influence Public Support for Government Programs? Evidence from a Survey Experiment*, 80 PUB. ADMIN. REV. 137 (2020).

308. See, e.g., OFF. OF INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, STRATEGIES FOR REDUCING ADMINISTRATIVE BURDEN IN PUBLIC BENEFIT AND SERVICE PROGRAMS, <https://www.whitehouse.gov/wp-content/uploads/2022/12/BurdenReductionStrategies.pdf> [https://perma.cc/3U89-2PFY]; OFF. OF INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, M-22-10, IMPROVING ACCESS TO PUBLIC BENEFITS PROGRAMS THROUGH THE PAPERWORK REDUCTION ACT (Apr. 13, 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-10.pdf> [https://perma.cc/VXR4-43X2]; Exec. Order No. 14058, 3 C.F.R. 704 (2022) ("Transforming Federal Customer Experience and Service Delivery To Rebuild Trust in Government").



sink in.<sup>309</sup> As agencies work on making their work more salient to the public, they need to also consider ways to clear out much of the administrative undergrowth that does not serve that purpose and may detract from it.

### 3. ENHANCING PUBLIC PARTICIPATION

An agenda to unsubmit the administrative state could also include increasing public participation in the rulemaking process. Concerted efforts to lower the access barriers to administrative processes, such as through e-rulemaking and other similar Web 2.0 tactics,<sup>310</sup> have not substantially increased public participation,<sup>311</sup> at least outside of a few notable highly salient rules.<sup>312</sup> By and large, rulemaking processes are still typically dominated by businesses and business interests.<sup>313</sup>

There are reasons to think that bolstering public participation by a more representative cross section of the public would in turn increase public trust in government. For one thing, as Jed Stiglitz shows in his book *The Reasoning State*, when agencies make decisions and accompany them with “credible reasoning,” as is required by various procedural administrative law statutes and doctrines, the result is that participants are more willing to trust the decisions.<sup>314</sup> Likewise, Brian Feinstein finds some suggestive evidence that, when participants in his experiments are made aware of opportunities for public involvement in administrative procedures, they may view agency decisions as more legitimate.<sup>315</sup> It

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309. Emily R.D. Murphy, *Collective Cognitive Capital*, 63 WM. & MARY L. REV. 1347 (2022). To be clear, the lack of salience of some nudges in practice, *see supra* notes 273–79 and accompanying text, may be viewed as an attempt to reduce administrative burdens along these lines. We would distinguish regulatory nudges that provide benefits from nudges that exist purely to reduce burdens. For instance, a popular topic in the behavioral administration literature is the automatic tax return. From our perspective, the automatic tax return is the reduction of an administrative burden rather than a nudge that creates benefits, and we would therefore support this intervention as a way of reducing those burdens.

310. *See* Cynthia R. Farina, Mary J. Newhart, Claire Cardie, Dan Cosley & Cornell eRulemaking Initiative (CeRI), *Rulemaking 2.0*, 65 U. MIA. L. REV. 395, 406 (2011); Stephen M. Johnson, *#BetterRules: The Appropriate Use of Social Media in Rulemaking*, 44 FLA. ST. U. L. REV. 1379, 1396–98 (2017).

311. Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943 (2006).

312. Steven J. Balla, Reeve Bull, Bridget C.E. Dooling, Emily Hammond, Michael Herz et al., *Responding to Mass, Computer-Generated, and Malattributed Comments*, 74 ADMIN. L. REV. 95, 97–98, 115–26 (2022) (discussing examples of mass comment incidents, including the FCC’s net neutrality rulemakings).

313. Scheffler, *supra* note 77, at 712.

314. EDWARD STIGLITZ, *THE REASONING STATE* 7–9 (2022).

315. Feinstein, *supra* note 288 (manuscript at 39–40, 42–43).

follows that improving participation rates among the public could amplify these effects.

Greater public participation in administrative procedures could also improve trust in government more indirectly by improving administrative decisionmaking.<sup>316</sup> For instance, outside experts in science, economics, math, and other disciplines may use participatory opportunities to share or vet technical data that would be difficult or costly for the government to produce or assess otherwise.<sup>317</sup> Local experts will have information that is not apparent to federal regulators.<sup>318</sup> Likewise, disadvantaged and overlooked communities can use participatory opportunities, such as environmental justice consultations, to bring attention to knowledge and perspectives that might otherwise be ignored.<sup>319</sup> All of this can allow agencies to improve their decisionmaking, which could in turn improve trust in administrative governance.<sup>320</sup>

The key is to present opportunities for engagement in a way that encourages the public to want to participate more. One of the main barriers to this kind of positive feedback is the lack of comprehensibility of many government communications.<sup>321</sup> There are a number of promising ideas for enhancing the public's awareness of government initiatives, such as using the tools of the attention economy and social media to better direct information to potentially interested people and encourage more dynamic dialogues between agencies and the public.<sup>322</sup>

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316. See MICHAEL HERZ, USING SOCIAL MEDIA IN RULEMAKING: POSSIBILITIES AND BARRIERS 6 (2013), <https://www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf> [<https://perma.cc/HC48-M7AS>].

317. BETH SIMONE NOVECK, WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL 142 (2009).

318. Cary Coglianese, *Weak Democracy, Strong Information: The Role of Information Technology in the Rulemaking Process*, in GOVERNANCE AND INFORMATION TECHNOLOGY: FROM ELECTRONIC GOVERNMENT TO INFORMATION GOVERNMENT 101, 117 (Viktor Mayer-Schönberger & David Lazer eds., 2007).

319. Wendy Wagner, *Regulating by the Stars*, in ACHIEVING REGULATORY EXCELLENCE 36, 40–44 (Cary Coglianese ed., 2017).

320. See Johnson, *supra* note 310, at 1385.

321. See Cynthia R. Farina, Paul Miller, Mary J. Newhart, Claire Cardie, Dan Cosley et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382, 389–90 (2011). See also MICHAELS, *supra* note 89, at 220–30 (discussing barriers to effective notice and lay comprehension of administrative initiatives and linking them to the project of “flatten[ing], deepen[ing], and broaden[ing] public participation”).

322. See ARAIZA, *supra* note 27, at 219–25; MICHAELS, *supra* note 89, at 220–30; WAGNER WITH WALKER, *supra* note 233, at 200–03; Michael Sant’Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 831–43 (2021).

Even when the public is exposed to government actions, the technocratic legalese required or encouraged by many procedural requirements runs a risk of turning people off to participation.<sup>323</sup> Simple reforms—such as the recent amendments to the APA to require agencies to include in their rulemaking notices an “Internet address of a summary of not more than 100 words in length of the proposed rule, in plain language”<sup>324</sup>—that correct this tendency have great promise to make it easier to engage with agencies and improve government’s reputation.<sup>325</sup> Broadening public participation in the rulemaking process is a massive undertaking but likely worth the effort in terms of reputational benefits.

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In sum, the empirical literature suggests that unsubmerging the administrative state in these ways—making administrative expertise more salient, making the benefits that agencies deliver more salient and accessible, and encouraging public participation in administrative processes—could improve public trust in government.

As Part II makes clear, the task of unsubmerging cannot be left solely to agencies. For example, Congress may need to scale back some of the legal and resource constraints that currently prevent agencies from communicating effectively with the public or that incentivize agencies to make their actions less salient and traceable. The president and Congress—or even groups like the American Bar Association—could do more to reward civil servants’ accomplishments and to inform the public about the non-political nature of the work they do.<sup>326</sup> If the Supreme Court is unwilling to abandon the major questions doctrine altogether, it could, at the very least, cease relying on agencies’ communications to the public as indicia of “majorness,” which has the effect of incentivizing them to downplay their own actions.

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323. See WAGNER WITH WALKER, *supra* note 233, at 188–90 (discussing how well-intentioned procedural reforms, like the National Environmental Policy Act’s requirement for environmental impact assessments for government action, can “further aggravate, rather than correct, the problem of incomprehensible rules”).

324. Providing Accountability Through Transparency Act of 2023, Pub. L. No. 118-9, 137 Stat. 55 (to be codified at 5 U.S.C. § 553(b)(4)).

325. See MICHAELS, *supra* note 89, at 224–26 (discussing the benefits of a plain English synopsis requirement).

326. We thank Christopher Walker for making this point. One example along these lines that already exists is the Samuel J. Heyman Service to America Medals (or, the “Sammies”), which are awarded to federal employees and are billed as the “‘Oscars’ of public service.” SAMUEL J. HEYMAN SERVICE TO AMERICA MEDALS, <https://servicetoamericamedals.org/> [<https://perma.cc/Z948-PJ6D>].

At the same time, agencies can do more to inform the public about their expertise, the benefits they provide, and how to participate in administrative processes. For instance, agencies can, to some extent, reconsider their reliance on practices that have the effect of concealing their actions from the general public, such as utilizing private contractors or incorporating private standards into rules. They can write regulatory preambles in ways that are easier for the public to understand, and they can be more proactive in soliciting participation from the public—and in particular, from groups that currently tend not to participate in regulatory processes.<sup>327</sup> Agencies can also embrace modes of communications that are more likely to reach ordinary Americans, such as social media, and use “visual rulemaking” to make information easier to digest.<sup>328</sup>

Although we cannot observe the counterfactual world where the administrative state is highly salient, there is at least one revealing counterexample: the military. Again, military agencies are unusual in that they receive significant annual appropriations to carry out advertising to meet their recruitment needs.<sup>329</sup> According to data from the Office of the Defense Comptroller, the military spent over \$801 million on advertising in fiscal year 2020.<sup>330</sup> As Jon Michaels puts it, “alarmingly, the Pentagon spends four times more on advertising than Congress appropriates in total to the National Highway Traffic Safety Administration, the federal government’s chief but perennially understaffed and underfunded auto safety unit.”<sup>331</sup>

The military agencies have used these resources to fund a “media mix” that includes advertisements distributed via television, radio, newspapers, internet websites, direct mail campaigns, and recruiting videos.<sup>332</sup> They conduct sophisticated public relations campaigns, replete with action-packed commercials and catchy slogans like “Be All You

327. Office of Information and Regulatory Affairs Administrator Richard Revesz recently issued a memorandum with several suggestions for agencies to do just this. See OFF. OF INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, BROADENING PUBLIC PARTICIPATION AND COMMUNITY ENGAGEMENT IN THE REGULATORY PROCESS 15–19 (July 19, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf> [<https://perma.cc/Y8ME-C5BH>].

328. See generally Porter & Watts, *supra* note 136.

329. See *supra* notes 190–92 and accompanying text.

330. OFF. OF THE UNDER SEC’Y OF DEF. (COMPTROLLER)/CHIEF FIN. OFFICER, U.S. DEP’T OF DEF., OPERATION AND MAINTENANCE OVERVIEW 133 (2021), [https://comptroller.defense.gov/Portals/45/Documents/defbudget/FY2022/FY2022\\_OM\\_Overview.pdf](https://comptroller.defense.gov/Portals/45/Documents/defbudget/FY2022/FY2022_OM_Overview.pdf) [<https://perma.cc/MP8W-NSZW>].

331. MICHAELS, *supra* note 89, at 216 (footnote omitted).

332. See OFF. OF THE UNDER SEC’Y OF DEF. (COMPTROLLER)/CHIEF FIN. OFFICER, *supra* note 330, at 133.

Can Be.”<sup>333</sup> They partner with Hollywood studios, incorporating their brand into Marvel movies and even collaborating on *Top Gun*.<sup>334</sup>

These efforts have paid off. In June 2023, Gallup found that 60% of Americans reported “having a great deal or fair amount of confidence” in the military, the second-highest level of confidence that Americans had in any major institution in the United States, behind only small businesses.<sup>335</sup> By comparison, only 27% of Americans reported the same degree of confidence in the Supreme Court, only 26% had such confidence in the Presidency, and only 8% had such confidence in Congress during this period.<sup>336</sup>

Although the public’s confidence in the military cannot be fully attributed to the military’s advertising campaigns, surely some can be.<sup>337</sup> The military’s persuasion campaign is “sophisticated and expensive,” involving “intensive market research.”<sup>338</sup> It has also produced its desired effects, not only sustaining an all-volunteer force, but also convincing “parents and other influencers” and generally “boost[ing] the broader public’s image of the military.”<sup>339</sup> As a result, there is a “popular militarism” that has been robust enough even to survive highly unpopular wars in Iraq and Afghanistan.<sup>340</sup>

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333. See Beth Bailey, *The Army in the Marketplace: Recruiting an All-Volunteer Force*, 94 J. AM. HIST. 47, 47 (2007).

334. MICHAELS, *supra* note 89, at 216.

335. Lydia Saad, *Historically Low Faith in U.S. Institutions Continues*, GALLUP (July 6, 2023), <https://news.gallup.com/poll/508169/historically-low-faith-institutions-continues.aspx> [<https://perma.cc/EZ4F-ZULY>].

336. *Id.*

337. See MICHAELS, *supra* note 89, at 215–18; Max Margulies & Jessica Blankshain, *Specific Sources of Trust in Generals: Individual-Level Trust in the U.S. Military*, DÆDALUS, Fall 2022, at 254, 255–57 (writing that one important “driver[] of public trust in the military” is persuasion, which is largely accomplished through “public depictions of the military, including ‘the careful use of advertising, movies, and the news media to portray the military’s improved performance and professionalism in the best possible light’” (quoting DAVID C. KING & ZACHARY KARABELL, *THE GENERATION OF TRUST: PUBLIC CONFIDENCE IN THE U.S. MILITARY SINCE VIETNAM 3* (2003))).

338. Margulies & Blankshain, *supra* note 337, at 257 (quoting Bailey, *supra* note 333, at 48).

339. *Id.*

340. *Id.* (quoting Ronald R. Krebs & Robert Ralston, *More Deferential but Also More Political: How Americans’ Views of the Military Have Changed over 20 Years*, WAR ON ROCKS (Nov. 17, 2021), <https://warontherocks.com/2021/11/more-deferential-but-also-more-political-how-americans-views-of-the-military-have-changed-over-20-years/> [<https://perma.cc/A8BK-DZD7>]). See also Henry E. Brady & Thomas B. Kent, *Fifty Years of Declining Confidence & Increasing Polarization in Trust in American Institutions*, DÆDALUS, Fall 2022, at 43, 47 (reporting data showing the only sector that has experienced a *gain* in confidence since the 1970s is the military).

Of course, some observers may view such advertising as highly objectionable propaganda.<sup>341</sup> Yet the point is not to endorse the various means by which the military promotes its own reputation, nor is it to suggest that other agencies should follow in going to these lengths (if that were even possible). It is rather, as Jon Michaels writes, to demonstrate that, “when the government wants—and needs—to promote its work, it knows how to do so.”<sup>342</sup> Thus, the experience of military agencies reveals both the promise and perils of unsubmerging the administrative state. It is these perils that Section III.B turns to next.

### *B. The Perils of Agency Salience*

Although an unsubmerged administrative state could contribute to a positive feedback loop by enhancing trust in government, there are some potential dangers in this approach. This Section responds to three concerns that might be raised about unsubmerging administrative government: propaganda, skewed agency priorities, and backlash.

#### 1. PROPAGANDA

The specter of “propaganda” can be found behind some of the constraints on agency communication described in Part II. For instance, the Gillett Amendment emerged during the Progressive Era as part of an attempt to protect the fledgling administrative state from politicization and from being used as a tool to enable propaganda.<sup>343</sup> Indeed, these concerns are sometimes articulated in a constitutional register: “government’s efforts to persuade the public on certain contested political matters pose threats of totalitarianism, of the government’s thought control.”<sup>344</sup> Of particular concern is the idea that “the government’s voice – with its advantages of resources and power – will inevitably drown out dissent, thus distorting public discourse.”<sup>345</sup>

It is not difficult to put a real-world face on these kinds of concerns. Policymakers have, on recent occasions, directed administrators to take highly salient actions that would serve their own political ends, even when doing so is arguably at odds with agencies’ own statutory mission. For instance, just weeks before the 2020 election, the Trump Administration hatched a plan to issue Trump-branded debit cards for

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341. *See infra* Section III.B.

342. MICHAELS, *supra* note 89, at 217.

343. LEE, *supra* note 107, at 84–89.

344. HELEN NORTON, THE GOVERNMENT’S SPEECH AND THE CONSTITUTION 184 (2019).

345. *Id.*

prescription drugs to Medicare beneficiaries in an effort to boost President Trump's flagging poll numbers among seniors—even though doing so was likely prohibited by statute.<sup>346</sup> These types of overtly partisan uses of the channels of government communication connect with disturbing trends identified by Kate Shaw as “partisanship creep”—*i.e.*, the rejection of longstanding norms of nonpartisanship in government work that maintained that “government resources should not be used to further partisan interests, or to damage partisan adversaries.”<sup>347</sup>

Although concerns about political misuse are valid, they do not justify the various constraints on agency communications identified in Part II.<sup>348</sup> For one thing, it is simply not desirable to ban anything that could *plausibly* constitute propaganda. A dictionary definition of “propaganda” is “the spreading of ideas, information, or rumor for the purpose of helping or injuring an institution, a cause, or a person.”<sup>349</sup> Read broadly, this definition would appear to cover virtually every form of political communication, from the annual Economic Report of the President, issued by the White House Council of Economic Advisers, all the way to the State of the Union Address. Moreover, as the policy feedback literature shows, government policies could themselves be considered propaganda, since they can be designed and implemented in ways that spread ideas for the purpose of bolstering political support for institutions and causes. For instance, government programs can be designed as to maximize political support for the program and ensure its survival over time—a practice that Paul Starr refers to as “strategic entrenchment.”<sup>350</sup> No wonder, then, that constitutional cases enforcing

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346. Jonathan Cohn & Matt Fuller, *Trump's Last-Minute Push for Legally Tenuous Prescription Drug Cards*, HUFFPOST (Oct. 9, 2020, 6:24 PM), [https://www.huffpost.com/entry/trump-prescription-drug-cards-seniors-2020-election\\_n\\_5f80a90bc5b6e6d033a1fe54](https://www.huffpost.com/entry/trump-prescription-drug-cards-seniors-2020-election_n_5f80a90bc5b6e6d033a1fe54) [<https://perma.cc/63ZW-6YHN>].

347. Katherine Shaw, *Partisanship Creep*, 118 NW. U. L. REV. (forthcoming 2024) (manuscript at 1), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4617706](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4617706) [<https://perma.cc/77FD-FYYF>].

348. *Cf.* MICHAELS, *supra* note 89, at 223–24 (discussing the propaganda critique and concluding that it is “overblown”).

349. *Propaganda*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/propaganda> [<https://perma.cc/W6A7-4Y87>].

350. PAUL STARR, ENTRENCHMENT: WEALTH, POWER, AND THE CONSTITUTION OF DEMOCRATIC SOCIETIES 5–6 (2019).

limits on government speech promoting certain causes are few and far between,<sup>351</sup> for now at least.<sup>352</sup>

Politicians also have an incentive to label agency communications as propaganda when it suits their own political interests, which suggests a need to discount rhetoric about propaganda when it is being used strategically. For instance, when HHS announced its “We Can Do This” COVID-19 public education campaign in the summer of 2020, several Democratic members of Congress sent a letter to the GAO and HHS demanding an explanation.<sup>353</sup> According to them, the contract’s goal of “‘defeat[ing] despair and inspir[ing] hope’ amid the coronavirus pandemic” raised “grave concerns that, rather than focus on planning and executing a national strategy to contain the coronavirus, the Trump Administration [was] using a quarter of a billion dollars in taxpayer money to fund what appear[ed] to be a political propaganda campaign just two months before a presidential election.”<sup>354</sup> Then, once the Biden Administration took over and continued the campaign, the shoe was on the other foot: this time, Republican senators began to call for an audit

351. See NORTON, *supra* note 344, at 203–04 (noting that courts have shied away from enforcing constitutional limits, instead pointing to political accountability as a remedy for any government overreach).

352. In *Missouri v. Biden*, the court held that the federal government’s efforts to convince social media companies to engage in certain content moderation decisions was not defensible as government speech because it likely had the effect of coercing the private companies to take actions the government favored. 83 F.4th 350, 392 (5th Cir. 2023). This case perhaps forecasts greater willingness on the part of courts to curb government speech on constitutional grounds.

353. GAO, GAO-22-104724, COVID-19: INFORMATION ON HHS’S PUBLIC EDUCATION CAMPAIGN (2022), <https://www.gao.gov/assets/gao-22-104724.pdf> [<https://perma.cc/V2KX-PCCR>]; Letter from Carolyn B. Maloney, Chairwoman, Comm. on Oversight & Reform, James E. Clyburn, Chairman, Select Subcomm. on the Coronavirus Crisis & Raja Krishnamoorthi, Chairman, Subcomm. on Econ. & Consumer Pol’y, to Alex M. Azar II, Sec’y, Dep’t of Health & Hum. Servs. (Sept. 10, 2020), <https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2020-09-10.CBM%20JEC%20RK%20to%20Azar-HHS%20re%20Defeat%20Despair%20Contract.pdf> [<https://perma.cc/Q6JT-KF3W>] [hereinafter Letter to HHS].

354. Letter to HHS, *supra* note 353 (quoting in part Daniel Lippman, *HHS Bids \$250 Million Contract Meant To ‘Defeat Despair and Inspire Hope’ on Coronavirus*, POLITICO (Aug. 31, 2020, 6:29 PM), <https://www.politico.com/news/2020/08/31/hhs-contract-coronavirus-despair-hope-406361>). See also Press Release, Comm. on Oversight & Accountability, Maloney, Clyburn, and Krishnamoorthi Call on Trump Administration To Suspend \$250 Million Coronavirus PR Contract (Sept. 11, 2020), <https://oversightdemocrats.house.gov/news/press-releases/maloney-clyburn-and-krishnamoorthi-call-on-trump-administration-to-suspend-250> [<https://perma.cc/6D5G-V4MV>]; John Maxwell Hamilton & Kevin R. Kosar, *Call It What It Is: Propaganda*, POLITICO (Oct. 8, 2020, 4:30 AM), <https://www.politico.com/news/magazine/2020/10/08/government-communication-propaganda-427290>.



of the campaign,<sup>355</sup> and Judicial Watch called for investigation of what it termed a “Biden Administration propaganda plan to push COVID vaccine.”<sup>356</sup>

Finally, the fact that Congress presently appropriates significant funding for military advertising and recruiting suggests that Americans are already comfortable with government communication that some might label propaganda.<sup>357</sup> This phenomenon should undercut some criticisms of domestic agency “propaganda,” as the latter would arguably iron out an asymmetry (and one that seems perhaps unjustifiable, given the special dangers of propaganda in the military context). Certainly, observers could decide that the risks of propaganda are too high across the board to tolerate it even in the military space, but another position would be to ease the restrictions on domestic agency communications so that they are more on par with military agency communications.

From this perspective, then, a pragmatic attitude towards government communications is the best policy. The goal should not be to ban anything that could plausibly be considered propaganda, but rather to balance legitimate concerns about propaganda with the harms of constraining agency communications. In contrast to the ominous specter of propaganda, the latter harms are easier to overlook, since recognizing them requires envisioning long-term benefits to government legitimacy from empowering agencies to communicate more effectively.

One final note: in at least one respect, unsubmerging the administrative state could undercut the threat of propaganda by making agencies more accountable to the public. Democratic accountability—one of the central, albeit contested,<sup>358</sup> values in administrative law—is threatened when the public does not understand the role that agencies

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355. *Romney, Colleagues Call for IG Audit of Biden’s \$10 Billion COVID-19 Vaccine Public Education Campaign*, MITT ROMNEY (July 25, 2022), <https://www.romney.senate.gov/romney-colleagues-call-for-ig-audit-of-bidens-10-billion-covid-19-vaccine-public-education-campaign/> [https://perma.cc/38VX-WTGL].

356. Press Release, Judicial Watch, *Judicial Watch Uncovers Biden Administration Propaganda Plan To Push COVID Vaccine* (Oct. 4, 2022), <https://www.judicialwatch.org/covid-19-vaccine-campaign/> [https://perma.cc/5C84-GX7K].

357. See MICHAELS, *supra* note 89, at 221 (“Here, as elsewhere, our seemingly instinctive fears of imperious domestic agencies sharply contrast with our willingness to indulge the far more licentious military propagandists.”).

358. See Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115, 115–18 (Michael W. Dowdle ed., 2006) (describing accountability as “protean” and describing six different features of accountability); Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600 (2023) (providing an overview and a critique of the use of “accountability” as a construct in administrative law).

play in formulating policy,<sup>359</sup> and that is the case whether what is being obscured are government successes or government failures. Making the public more aware of the functions that administrative agencies perform could therefore strengthen accountability, if agencies fail to live up to the public's expectations or act in ways that are inconsistent with the public interest.

In sum, while there is a risk that removing constraints on agency communications will lead to propaganda, the legalistic, and arguably asymmetric, default currently employed is not working. It likely chills some forms of domestic agency communications that would be desirable. A more nuanced and balanced attitude toward agency communications would go a long way toward liberating agencies to make more positive use of the policy feedbacks that flow from effective communications with the public.

## 2. SKEWED AGENCY PRIORITIES

A second concern about unsubmerging administrative governance is the risk of skewing agency priorities. Unsubmerging the administrative state could mean engaging in modern communications strategies, launching social media campaigns, posting billboards, hiring spokespersons, curating public information to avoid unnecessary technicalities, and using “visual rulemaking” to make information easier to digest. Yet the further agencies push in this direction, the greater the risk that stylistic considerations could take precedence over substantive ones. Moreover, with agency resources being limited, there is only so much work agencies can do on the stylistic front without taking resources away from substantive work.

Another kind of distraction is perhaps more concerning. Adopting a more strategic approach to policy feedback could distort agenda-setting, causing agencies to focus more on “big ticket” items that have more potential to lead to political payoff than to deliver real value to the public. As regulatory scholars and behavioral psychologists have shown, the risks that people perceive as large are often not nearly as risky as other more significant risks that attract less attention. For instance, people tend to overestimate the risk of dying in a commercial airline crash and to

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359. See Kagan, *supra* note 196, at 2332 (“[A] fundamental precondition of accountability in administration [is] the degree to which the public can understand the sources and levers of bureaucratic action.”); Michael Herz, *Administrative Braggadocio*, YALE J. ON REGUL.: NOTICE & COMMENT (Jan. 30, 2018), <https://www.yalejreg.com/nc/administrative-braggadocio-by-michael-herz/> [<https://perma.cc/VEC2-Z93P>] (“For a democracy to function even a little bit like it should, the public needs to know what the government is up to.”).

greatly underestimate the risk of dying from health conditions caused by air pollution.<sup>360</sup> Prompting agencies to focus on making their actions more salient could therefore lead agencies to prioritize policies that have less beneficial impacts but have high constructive political payoffs.<sup>361</sup>

While these are legitimate concerns, they do not negate the case for unsubmerging administrative governance. For one thing, even if some of the constraints on agency communications are scaled back and agencies make their actions more salient, traceable, and comprehensible, agencies' discretion will still be limited in important ways: for instance, they still must comply with their substantive statutes and with well-specified procedural requirements, and they are still subject to political control by Congress and the president. Moreover, while concerns about skewed agency priorities are valid, they must be balanced against the costs of agencies not reaching the public effectively at all. As argued throughout this Article, these costs are substantial: they undermine trust in government, which is essential for effective governance.

### 3. BACKLASH

A third objection is that unsubmerging the administrative state could backfire in unanticipated ways: namely, instead of bolstering public trust and support for the work that agencies do, it could actually undermine trust in government. For instance, perhaps unsubmerging the administrative state could precipitate an anti-government backlash from libertarian-leaning Americans who had not previously appreciated the size and importance of the administrative state.<sup>362</sup> Or maybe it could cause people to focus more on the sometimes problematic role of business

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360. Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 *STAN. L. REV.* 683, 702–03 (1999).

361 On the other hand, agencies are already incentivized to focus on big ticket items to some extent. One reason for this is that agencies depend on members of Congress and the president for budgetary support, and these latter elected officials themselves tend to be focused on big ticket items that affect their electoral prospects. *See, e.g.*, Nicholas R. Bednar & David E. Lewis, *Presidential Investment in the Administrative State*, 118 *AM. POL. SCI. REV.* 442 (2024) (explaining how presidents strategically invest in building capacity within agencies that they expect will deliver important policy changes). Indeed, it is even possible that an unsubmerged administrative state could help to counteract this problem (or at least make it more widely known) by improving public awareness of agencies' priorities. We thank Nick Bednar for making this point.

362. *Cf.* BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* 380 (2009) (arguing that the public “responded far more favorably” to nineteenth century state-building “when the General Government was inconspicuous, or at least hidden in plain sight,” implying that federal power was only able to grow to the scale it did because of submergence).

influence in the administrative process.<sup>363</sup> Or it could impose excessive and unwelcome informational costs on people who may prefer not to know what government is up to and who resent informational encroachment on their time.<sup>364</sup>

If we were simply calling for greater transparency writ large, then these concerns would have greater force.<sup>365</sup> However, that is not what we mean by “unsubmerging the administrative state.” Instead, we are calling for more targeted efforts to improve the visibility of agencies’ expertise and the benefits agencies deliver, as well as to improve public participation in administrative processes. The kind of information disclosure and communication required for these targeted efforts falls far short of reflexive information dumping,

Improving trust in government will not be easy. The conventional wisdom is that public attitudes toward government are hard to shift because some Americans are simply not paying attention while others are paying attention but have strong ideological commitments.<sup>366</sup> Further, we

363. The public, for instance, is often perturbed by the close relationship between business and government and the nefarious implications of a perceived “revolving door,” even though these concerns are arguably overstated. *See* David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507. *See also supra* notes 76–77 and accompanying text (noting that the “capture” critique of regulation is often overstated).

364. *See generally* HIBBING & THEISS-MORSE, *supra* note 285 (arguing that most Americans prefer “stealth” government that operates quietly, and effectively, in the background); Kiel Brennan-Marquez & Brendan S. Maher, *Micro-Costs*, GEO. L.J. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4747495](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4747495) [<https://perma.cc/434D-9KKU>] (diagnosing a glut of “tiny attentional impositions” that collectively make everything worse in a way that is obvious to everyone but persist nonetheless due to the ease with which “cognitive asks” are imposed on others).

365. We agree that indiscriminate government transparency is in tension with the aspiration to protect peoples’ valuable time and distance from the unpleasantness of government. We also agree with much of the critical literature on transparency laws: in aiming for “fishbowl” transparency, *see* Cary Coglianese & David Lehr, *Transparency and Algorithmic Governance*, 71 ADMIN. L. REV. 1 (2019), these laws have inundated the public with useless information that does not aim to educate the public and have underappreciated impacts on our politics. *See generally supra* note 109 and accompanying text; Lawrence Lessig, *Against Transparency: The Perils of Openness in Government*, NEW REPUBLIC (Oct. 8, 2009), <https://newrepublic.com/article/70097/againsttransparency> [<https://perma.cc/WR66-3WPU>]. *See also* WAGNER WITH WALKER, *supra* note 233, at 12 (“In some settings, complete information may not only fail to ensure effective communication, but when pursued too far, it can even get in the way of this goal.”).

366. LERMAN, *supra* note 18, at 152. *See also* Sarah F. Anzia, Jake Alton Jares & Neil Malhotra, *Does Receiving Government Assistance Shape Political Attitudes? Evidence from Agricultural Producers*, 116 AM. POL. SCI. REV. 1389 (2022) (finding that policy feedbacks from receiving government benefits from USDA were not sufficient to overcome ideological distrust of government for recipients, at least as to highly divisive policies).

fully acknowledge that there is much that we do not know about how to improve trust in government, and that efforts to unsubmerge the administrative state must be paired with efforts to ensure quality governmental performance.<sup>367</sup>

However, we are optimistic that unsubmerging the administrative state has the potential to improve trust, in light of both the empirical literature described above<sup>368</sup> and the history of successful government publicity campaigns (especially in the military).<sup>369</sup> In addition, one of the core lessons of the policy feedback literature is that positive policy feedbacks can empower the public and spur democratic engagement.<sup>370</sup> This was the case with both Social Security and the G.I. Bill,<sup>371</sup> and more recently with the Affordable Care Act.<sup>372</sup> It seems at least possible that such effects could exist with the administrative process as well, if administrative governance were less submerged.

Of course, there is always a risk that, if agency officials are empowered to communicate more with the public, then they may occasionally engage in ill-advised public relations tactics that will be ineffective or even result in negative publicity.<sup>373</sup> Yet there is also reason to believe that agencies will learn from their mistakes and improve over time.<sup>374</sup> Again, we believe the potential benefits of experimentation with efforts to unsubmerge the administrative state are worth the risks.

## CONCLUSION

American government is experiencing a reputation crisis. Although there are many reasons for this, this Article argues that one key and underappreciated reason is that although agencies do the bulk of the government's work, their efforts are systematically submerged: agencies

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367. See *supra* note 129 and accompanying text.

368. See *supra* Section III.A.

369. See *supra* notes 105–08 and accompanying text.

370. See *supra* Section I.C.3.

371. See *supra* notes 123–25 and accompanying text.

372. Lawrence R. Jacobs, Suzanne Mettler & Ling Zhu, *The Pathways of Policy Feedback: How Health Reform Influences Political Efficacy and Participation*, 50 POL'Y STUD. J. 483 (2021).

373. See, e.g., Tiffany Hsu, *Doing the Harlem Shake, Ajit Pai as You've Never Seen Him Before*, N.Y. TIMES (Dec. 15, 2017), <https://www.nytimes.com/2017/12/15/business/ajit-pai-video.html> (describing the public reaction to a video featuring Ajit Pai, the head of the Federal Communications Commission, "making his argument for repealing net neutrality rules by donning a Santa Claus suit, wielding a fidget spinner and a toy gun, wearing eclipse glasses, being silly").

374. On the subject of policy learning, see, for example, Charles E. Lindblom, *The Science of "Muddling Through"*, 19 PUB. ADMIN. REV. 79 (1959), and Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480 (2008).

are constrained in their communications with the public, and much of what agencies do (and how they do it) is either incomprehensible to non-specialists or is not visible or traceable to the government.

Unsubmerging the administrative state has the potential to help reverse this reputation crisis and improve trust in governance. Making administrative expertise more salient, increasing awareness of the benefits that agencies provide, and improving participation in administrative processes would all likely improve public trust in administrative government. Given the important roles that agencies play in the federal government, it is reasonable to suppose that improving Americans' attitudes toward agencies would also improve their trust in the federal government as a whole. For those who care about improving public trust in government, it is worth working to unsubmerge the administrative state.