ARTICLES

Judicial Accountability

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Judicial decisions are moving ever more authority over regulatory statutes away from agencies and to courts instead. One justification offered for this power transfer: agencies lack the accountability of courts. This Article takes up that claim, assessing the institutions' relative capacities for accountability in their authoritative interpretations of regulatory statutes—agency regulations and court rulings. I take accountability to involve actors undertaking reasoned decisionmaking grounded in publicly recognized values and facts and justifying their decisions to others who can evaluate, influence, or override those judgments. Accountability thus involves a give and take: it gives an account of government reasoning to a range of publics in a way that takes their positions into account.

Distributing power among institutions inevitably involves comparison, but I argue that comparing courts and agencies is especially warranted. Both are grounded in the Constitution, which introduces federal courts as new characters while presupposing agencies like old friends. Both effectuate statutes: we may use different terms for their work, but in a pragmatic sense, both courts and agencies determine how statutes will function on the ground. And both combine political appointment with tenure protection in their staffing. These similarities distinguish courts and agencies from congresses and presidents.

One might argue that countermajoritarian courts don't need to be accountable in the first place. But lacking an electoral connection doesn't let them off the hook: any governing institution owes accountability to the governed. Like agencies, courts are accountable to the products of democratic decisions embodied in statutes. One might also argue that factors like reason-giving opinions, binding precedent, appellate review, and a commitment to the integrity of law suffice to make courts accountable. I show why each of these is salutary but limited: they might give courts good aspirations, but they do not create much capacity for accountability.

So, how do the institutions stack up? I review their capacities along a range of axes: the timing of their encounters with statutes; the focus and

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scope of their inquiries; the range of information and input they accommodate; the opportunities and obligations they have to explain their conduct to the public; and the epistemic implications of their staffing structures. In each arena, agencies have greater capacities for accountability than courts—a fact particularly important to acknowledge now, when agency capacity is being rapidly undermined from inside the executive branch itself. Perhaps most crucially, agencies have ways to recognize and respond to the consequences of their regulations; courts, in contrast, lack ways to see, much less adjust, the externalities of their decisions, even though regulatory litigation has similarly broad effects on the public.

A head-on comparison makes judicial denigration of agency accountability sound less like analysis and more like projection. The question becomes how to make courts more accountable. Ideally, judges would match their exercise of power to their capacity for accountability. But the Supreme Court has been taking the opposite tack. I suggest that Congress create a Judicial Accountability Office, modeled on the Government Accountability Office, to track judicial decisions' policy implications, evaluate their effects, and bring all of this to judges' attention. Scholars can help, too, by avoiding a juricentric perspective on regulatory statutes and recognizing courts as just one of several statute-effectuating institutions. In short, agencies have greater accountability capacities than do courts. We should all act accordingly.

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INTRODUCTION

Federal judges have a lot to say about how agencies work with statutes. That's as it should be, of course: the Administrative Procedure Act (APA) instructs reviewing courts to invalidate agency actions not supported by law.[1] This positions courts as boundary maintainers. In the structure the APA sets up, congresses and presidents enact regulatory statutes for agencies to implement: so goes the primary conversation. Courts—neither a statute's producers nor its addressees—sit, in a sense, to the side.[2] But the APA, along with federal common law, secures a role for courts—a role at the conversation's margins.[3] Courts guard the perimeter to prevent agencies from overstepping statutory bounds, subject to the normal conditions on judicial power: a live case or controversy brought by a litigant with a specific interest in a particular interpretation.[4]

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1. 5 U.S.C. § 706 ("[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law . . . .").

2. *See* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 728 (2014) (concluding that congressional staff who draft statutes work in "a primary interpretive conversation with *agencies*, not with courts").

3. *See generally* Braden Currey, Note, *Rationalizing the Administrative Record for Equitable Constitutional Claims*, 133 YALE L.J. 2017 (2024) (analyzing the federal common law of causes of action against agencies as part of proposing a unified approach for determining what kind of administrative record evidence courts should consider).

4. *See* James E. Pfander, *Standing, Litigable Interests, and Article III's Case-or-Controversy Requirement*, 65 UCLA L. REV. 170, 179–80 (2018) (laying out current standing requirements while

Yet judges now frequently express doubt, anxiety, and irritation far outstripping this particularized boundary maintenance. Justice Samuel Alito has decried the "dominance of lawmaking by executive Fiat rather than legislation."[5] Justice Neil Gorsuch has described agencies as issuing "edicts" to enforce their "unbounded policy choices"[6] and worried about "government by bureaucracy supplanting government by the people."[7] Chief Justice John Roberts has emphasized the "danger posed by the growing power of the administrative state."[8] Lower court judges have piled on. Then-D.C. Circuit Judge Brett Kavanaugh stated that agencies whose leadership Congress protects from at-will firing "pose a significant threat to individual liberty and to the . . . separation of powers and checks and balances."[9] Judge Justin Walker has described a regulation as typical of "power grabs by impatient agencies."[10] Judge Neomi Rao has sounded the alarm that "a single bureaucrat can at times exercise an authority that exceeds that of a member of Congress."[11] Judge Kent Jordan has disparaged the moldy-sounding "spores of the ever-expanding administrative state."[12]

Whether appearing in written opinions or speeches, articles, and similar mullings, these sentiments matter.[13] With its published dissents and concurrences, no page limits, unlimited dicta, and no fact checking,[14] our litigation system, like our political and media systems, gives judges a platform to express their views on all manner of things.[15] Such pronouncements come from public figures—one might say, tax-funded public intellectuals—who have the power to put their ideas into practice.

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arguing that "history casts serious doubt on the originalist case for certain elements of the Court's standing analysis").

5. Josh Blackman, *Video and Transcript of Justice Alito's Keynote Address to the Federalist Society*, VOLOKH CONSPIRACY (Nov. 12, 2020, 11:18 PM), https://reason.com/volokh/2020/11/12/video-and-transcript-of-justice-alitos-keynote-address-to-the-federalist-society [https://perma.cc/G2CC-V7UD] (providing a transcript of Justice Alito's speech).

6. Gundy v. United States, 588 U.S. 128, 152, 170 (2019) (Gorsuch, J., dissenting).

7. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. (*NFIB*), 595 U.S. 109, 125 (2022) (Gorsuch, J., concurring) (quoting Antonin Scalia, *A Note on the Benzene Case*, REGULATION, Jul.–Aug. 1980, at 25, 27). Justice Gorsuch quotes Justice Scalia—a proponent of agency power to interpret statutes in some periods, a skeptic in others. *Compare* Scalia, *supra*, at 27, *with* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 ("I tend to think . . . that in the long run *Chevron* will endure and be given its full scope—not so much because it represents a rule that is easier to follow and thus easier to predict (though that is true enough), but because it more accurately reflects the reality of government, and thus more adequately serves its needs.").

8. City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

9. PHH Corp. v. CFPB, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

10. Guedes v. Bureau of Alcohol, 66 F.4th 1018, 1023 (D.C. Cir. 2023) (Walker, J., dissenting).

11. Neomi Rao, *The Hedgehog & the Fox in Administrative Law*, DAEDALUS, Summer 2021, at 220, 228.

12. Egan v. Del. River Port Auth., 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring).

13. *See generally* MARIANNE CONSTABLE, OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS (2014) (exploring the efficaciousness of judicial writing beyond its legal authority).

14. *See* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1263 (2012) ("[T]here are currently no rules regulating [courts'] in-house fact finding . . . .").

15. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258, 260–64 (1972) (providing a paean to baseball not relevant to evaluating antitrust law).

These pronouncements raise concerns central to republican democracy: that institutions of governance take pluralistic interests and real-world facts into account rather than acting unilaterally or arbitrarily; that they proceed through open, reasoned deliberation rather than secret or unpredictable impulse; and that they remain subject to constraints that limit the breadth and duration of their effects. So far, so good. But these statements don't just *identify* such democratic concerns; they make a normative claim about them. Overall, this judicial rhetoric impugns agencies for being fundamentally *unaccountable*.[16] This is a serious charge; accountability is central to democratic governance. Yet those making it rarely explore, much less substantiate, their claims, relying instead on allusion and implication, asking neither how agencies function nor even what democratic accountability entails.[17] These complaints thus proffer an empirical *claim* that agencies are unaccountable but also present that very unaccountability as a *presumption*; in short, they treat their thesis as a premise. That helps shield their claim from contestation—or even from recognition as a claim.

This rhetoric complements the more frontal attack on agencies that the Supreme Court, among others, has been waging in recent years.[18] Innovations like the major questions doctrine and the threat of nondelegation-based statutory invalidation make agency action depend more on courts and less on statutes.[19] Recent Supreme Court administrative law jurisprudence—rejecting deference to

16. I discuss the rhetorical structure of these assertions further in Part V.

17. *See, e.g.*, *In re* MCP No. 165, Occupational Safety & Health Admin., Interim Final Rule: COVID-19 Vaccination & Testing, 20 F.4th 264, 291 (6th Cir. 2021) (Bush, J., dissenting from the denial of initial hearing en banc) (stating, with respect to OSHA's vaccine-or-mask regulation, "[i]f Congress purported to delegate such a sensitive 'money or lives' determination to an unaccountable agency, we would have to think hard about the propriety of that delegation").

18. *See, e.g.*, Blake Emerson, *The Existential Challenge to the Administrative State*, 113 GEO. L.J. (forthcoming 2025) (manuscript at 3) (on file with author); Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 471 (2023) ("[I]t is increasingly evident that the Court is pursuing an anti-administrativist agenda with thinly reasoned rules of statutory interpretation.").

19. "[T]he . . . major questions doctrine . . . directs courts not to discern the plain meaning of a statute using the normal tools of statutory interpretation, but instead to require explicit and specific congressional authorization for . . . agency policies . . . the Court deems 'major,'" even in the context of "broadly worded, otherwise unambiguous statutes." Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1012 (2023). *See generally* Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019 (2018); Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777 (2017); Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. 1763 (2023); Allison Orr Larsen, *Becoming a Doctrine*, 76 FLA. L. REV. 1 (2024). *See also* Beau J. Baumann, *The Major Questions Doctrine Reading List*, YALE J. REGUL.: NOTICE & COMMENT (Mar. 18, 2022), https://www.yalejreg.com/nc/the-major-questions-doctrine-reading-list-by-beau-j-baumann [https://perma.cc/W8FF-VSAY] (tracking academic work on the major questions doctrine).

The nondelegation doctrine posits that Congress works under a "prohibition on delegations of legislative power," which the courts should enforce by limiting the extent to which Congress can authorize agencies to act. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 280 (2021) (arguing that "the Constitution at the Founding contained no discernable, legalized prohibition" of this kind); *see also* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1301 (2021).

agency interpretations of ambiguous statutory terms,[20] limiting agencies' statutory enforcement ability,[21] extending opportunities for challenges to agency regulations,[22] and increasing agencies' justification burdens[23]—chips away at agency authority. Taken together, these moves transfer powers that statutes bestow on agencies over to courts.[24] The rhetoric I highlight here helps legitimize these doctrinal developments. Impugning agency accountability provides an ideological justification for increasing court power to make decisions about regulatory statutes.

So, when courts use claims about agencies' inferior accountability to justify siphoning off agency authority, we should not just take their word for it. We should ask how the two institutions stack up: which can pursue this work more accountably? This Article takes up that inquiry. I look specifically to the authoritative interpretation of federal regulatory statutes through administrative regulations and judicial holdings.[25] Such "comparative institutional analysis" can clarify how our government institutions work, not by implicit reference to an impossibly perfect ideal but by explicit comparison to plausible, if always "imperfect," alternatives.[26]

At first glance, courts and agencies might seem so different that this project would pit apples against oranges. Part I explains why comparing them makes sense. The Constitution recognizes both institutions: it provides for courts and presupposes agencies. Although we sometimes contrast the work of courts and

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20. Loper Bright Ents. v. Raimondo, 603 U.S. 369, 412–13 (2024) (rejecting the *Chevron* doctrine of accepting reasonable agency interpretations of ambiguous statutory terms); *see also* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

21. *See* SEC v. Jarkesy, 603 U.S. 109, 140 (2024) (holding that the Securities and Exchange Commission must go through a jury trial to impose securities fraud fines).

22. *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 825 (2024) (holding that 28 U.S.C. § 2401(a)'s six-year statute of limitations on agency action starts running not at the point of agency action but at the point at which a private entity is injured by that action).

23. *See* Ohio v. EPA, 603 U.S. 279, 293–94, 300 (2024) (granting a stay application based on purported inadequacy of agency responsiveness to potential concerns).

24. *See* Bernstein & Staszewski, *supra* note 19, at 1806 ("In anti-deference, nondelegation, and the major questions doctrines, courts take on a central policymaking role. . . . Transferring power from Congress and agencies to courts, these doctrines give pride of place to the least contestatory branch.").

25. I leave to other work the evaluation of judicial accountability in other areas—non-regulatory, non-federal, etc.—as well as the accountability of other agency work, such as adjudication in its highly varied forms.

26. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 3, 22 (1994) ("The crucial question concerns the *relative merits* of . . . institutions, when compared to each other."); *see also* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003) ("[D]ebates over legal interpretation cannot be sensibly resolved without attention to [institutional] capacities. The central question is not 'how, in principle, should a text be interpreted?' The question instead is 'how should certain institutions, with their distinctive abilities and limitations, interpret certain texts?'"). This approach is in line with "the tenets of the legal process school: Decisions should be assigned to different institutions of governance based on competence, and institutions have a corresponding obligation to hew to their peculiar norms and strengths." Thomas P. Schmidt, *Orders Without Law*, 122 MICH. L. REV. 1003, 1007 (2024) (first citing 3 G. EDWARD WHITE, LAW IN AMERICAN HISTORY, 1930–2000, at 353–55 (2019); and then citing Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959)).

agencies, in a pragmatic sense, both *effectuate* regulatory statutes: both help determine how statutes will work in practice, on the ground. And both are staffed through a mix of political appointment and tenure protections exceeding a single electoral cycle or governing coalition. There is a lot here to compare.

Even if courts and agencies are comparable, the inquiry might seem pointless: countermajoritarian federal courts are unaccountable by design. Without elected offices, the reasoning goes, what can we expect? But as Part II argues, accountability goes beyond elections: a democratic institution needs to justify its coercive force with reference to the people it governs. That involves considering both underlying realities and the interests of affected populations, justifying decisions in ways people can respond to, and limiting the exercise of power so as not to overstep the prerogatives of other institutions or later publics.[27] In that sense, the comparison I propose is not just sensible; it is unavoidable. Distributing power over regulatory statutes among different institutions implicitly involves weighing their relative capacities for accountability.[28] Making that comparison explicit does not create it but provides ways to recognize—and argue about—the issues at stake. Part II also emphasizes that courts do not stand outside the political system as disinterested arbiters of power distribution; they are down in the muck along with the other branches. As government institutions, courts bear accountability to the people they help govern. Because of their specifically legal focus, courts enact that obligation through their accountability to the statutes they effectuate—statutes that themselves do not emanate transcendentally from preexisting principles but instantiate concrete decisions enacted by democratically elected representatives.

One might argue that courts' special features—reason-giving opinions, precedent, appeals, and commitment to the integrity of the law—guarantee judicial accountability to the democratic process instantiated in enacted statutes. But, as Part III explains, the structure of judicial power limits courts' capacity for accountability and directs it mainly to other courts. Reactive to, and somewhat constrained by, litigants' decisions, interests, and arguments, courts lack the ability to take into account—or even learn about—the effects of their decisions. But their decisions still determine what a regulatory statute really means on the ground. These broad, enduring consequences—which affect the public at large but which courts may not even recognize—constitute an externality of public law

27. *See* HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 213 (2002) (arguing that decisionmaking legitimacy is enhanced "if (1) the process of debate allows for a fair hearing of all; (2) the process is contrived in such a way that majorities . . . need to take account of the views of the others; and (3) the formulation of alternatives and the process of debate is conducted in a way that encourages reasonable compromise among all").

28. *See* Joshua D. Blank & Leigh Osofsky, *Democratizing Administrative Law*, 73 DUKE L.J. 1615, 1620 (2024) (identifying "transparency, public scrutiny, and debate" as "essential features of democratic governance").

litigation itself. To stay accountable to the statutes they effectuate, courts should keep their exercise of power proportional to this limited capacity.[29]

Accountability is a complex concept that can be manifested through a variety of factors. It involves engagement with complex factual circumstances and diverse interests and views. It requires open dialogue, with an institution presenting its reasoning for evaluation by the governed public. And it requires constraints that allow for input from other institutional actors and the public, over social space and historical time. Befitting this complexity, Part IV compares court and agency capacities for accountability across a number of axes. I look at the timing of the institutions' encounter with a statute; the focus and scope of their inquiry; their interactions with information and input; the ways they justify and explain their conclusions; and the epistemic implications of their staffing. It turns out that agencies have a far greater capacity for accountability—that thick, substantive version of accountability—than do courts. That means the question to ask is less how to rein in agencies and more how to make courts accountable.

This Article primarily aims to illuminate courts' and agencies' relative accountability capacities. Part V does, however, offer some suggestions for pegging courts' power to that capacity. For judges, the keywords are minimalism and humility: recognizing the structural limitations on their own accountability should lead judges to acknowledge agencies' superior capacities and try to minimize litigation externalities. Congress should create a Judicial Accountability Office to evaluate how court decisions influence statute effectuation and should consider jurisdictional restrictions and expository legislation.[30] And scholars can help by avoiding a reflexively juricentric approach to regulatory statutes, instead adopting a comparative institutional orientation.

I. COURTS AND AGENCIES: COEQUAL COMPARATORS

Does it make sense to compare the courts with agencies? These two institutions seem distinct in important ways—perhaps too distinct to warrant direct comparison. This Part argues that such a comparison makes sense, at least when it comes to the authoritative interpretation of regulatory statutes produced in agency regulations and appellate opinions. I focus on three main similarities: constitutional position, work, and staffing. Both courts and agencies are central in the Constitution: courts are singled out with their own Article, while agencies are simply presupposed throughout. Courts and agencies also serve a similar function with respect to regulatory statutes: both determine how statutes will be effectuated on the ground. And both institutions' staffing practices have political-

29. *See* William W. Buzbee, *Jazz Improvisation and the Law: Constrained Choice, Sequence, and Strategic Movement Within Rules*, 2023 U. ILL. L. REV. 151, 214 (arguing that "legal actors should always assess the legal consequences of their own constrained choices for congruence with the legal materials shaping those choices, with priority given to legislative policy judgments and power allocations reflected in the law," and labeling such assessment as one of "*consequential congruence*").

30. *See* Alexander Zhang, *Legislative Statutory Interpretation*, 99 N.Y.U. L. REV. 950, 1012–23 (2024) (surveying statutes that interpret statutes).

appointment and tenure-protection elements. These elements apply to separate kinds of positions in agencies, while courts merge them in the position of the judge.[31] But combining these elements attenuates the effects of elections in ways that distinguish both courts and agencies from Congress and the President.[32]

A. CONSTITUTIONAL RECOGNITION

The Constitution recognizes both courts and agencies, giving them at least equal footing in the foundational structure of the U.S. government. One might argue that having a whole separate constitutional Article explicitly devoted to federal courts marks them as more fundamental than agencies or even gives them greater legitimacy. Article III establishes a Supreme Court and allows Congress to create other courts.[33] It specifies employment timelines (judges may continue in office "during good Behaviour") and conditions (judges should be periodically compensated with no diminution of salary).[34] And it sets the parameters of court authority over "Cases" and "Controversies,"[35] leaving further jurisdictional specifics to Congress.[36] The Constitution thus provides for the creation of courts and bounds their purview.

Agencies get no such separate treatment, yet they are hardly absent from the text. Congress's enumerated powers include legislating as "necessary and proper" to effectuate the constitutional "Powers vested" not just in Congress itself, nor just in the "Government of the United States" generally, but also "in any Department or Officer."[37] Congress may let "the Heads of Departments" appoint

31. These differences do have important epistemic implications. *See infra* Part III.

32. I do not want to overstate the distinction with the elected branches: the Executive Office of the President is a bureaucracy with political appointees and civil servants, and Congress, too, has "a workforce of nonpartisan, expert, and long-serving institutional actors and entities without which Congress as we know it could not function." Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1544 (2020).

33. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

34. *Id.* ("The Judges . . . shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

35. *Id.* § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

36. *Id.* § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

37. *Id.* art. I, § 8 ("The Congress shall have Power To . . . make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

"inferior Officers."[38] And the President may "require the Opinion . . . of the principal Officer in each of the executive Departments" about "the Duties of their respective Offices."[39] Aside from appointment,[40] the Constitution does not constrain how agencies may be created or staffed. No tenure or compensation strictures here; all we know is that "other Officers of the United States" can be "established by Law."[41]

In other words, while the Constitution provides for the creation of federal courts, it treats federal agencies as already extant, already a part of government even as government is being formed. Rather than being specifically defined and delineated, administrative departments are presupposed as part of the context in which constitutional provisions would operate.[42] In contrast, the Constitution does not assume that federal courts already exist. Instead, the Constitution itself creates the Supreme Court; other federal courts can be created because the Constitution allows Congress to create them. Courts, therefore, are a *consequence* of constitutional provisions rather than the preexisting context for them. The Constitution thus presents agencies as fundamental to government—so integral and obvious that the document simply refers to them as old friends, rather than introducing them as new characters.

And of course, federal courts of the sort delineated in the Constitution *were* new characters: the Articles of Confederation contemplated supra-state courts only to hear cases involving crimes on the high seas and, on an ad hoc basis, interstate disputes.[43] So it makes sense for the Constitution to provide explicitly for the creation of permanent federal courts with a new, broader purview. Not so

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38. *Id.* art. II, § 2, cl. 2 ("Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

39. *Id.* at cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . ."). The Twenty-Fifth Amendment, ratified in 1967, also provides for relieving the President of power upon a "declaration" by the Vice President and "a majority of . . . the principal officers of the executive departments" that the "President is unable to discharge" his responsibilities. *Id.* amend. XXV, § 4.

40. *Id.* art II, § 2, cl. 2 (providing that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law").

41. *Id.*

42. *See* Jack Sidnell, *Presupposition and Entailment*, *in* THE INTERNATIONAL ENCYCLOPEDIA OF LINGUISTIC ANTHROPOLOGY 1, 3 (2020) (noting that a "description . . . presupposes the existence of (and [a] recipient's knowledge about the existence of) the referent").

43. *See* ARTICLES OF CONFEDERATION of 1781, art. IX, paras. 1–2 ("The United States, in Congress assembled, shall have the sole and exclusive right and power of . . . appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures . . . . The United States, in Congress assembled, shall also be the last resort on appeal, in all disputes and differences . . . between two or more States . . . [for the prosecution of which the disputing states'] lawful agents . . . shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question . . . .").

novel were agencies and their employees.[44] Here, the Constitution does not circumscribe or specify the jurisdiction of departments. Agencies are presumptively up for anything—at least anything Congress is up for having them do.[45]

Early practice supports this understanding of agencies as implicit in, and central to, the constitutional scheme. Early Congresses relied extensively on administrative agencies to implement their statutes.[46] And rather than limiting agencies to some narrow sphere of authority, early Congresses tasked them with significant discretionary decisionmaking.[47] Text and practice combine to make agencies at least as fundamental to the government scheme as courts and at least as legitimate, if not more so.[48] It may be that we are used to seeing courts as superior because constitutional text focuses on them more explicitly. But the unquestioned condition of possibility for action may actually be more important—the water we fish swim in.[49]

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44. *See id.* at para. 5 ("The United States, in Congress assembled, shall have authority to . . . appoint such . . . committees and civil officers as may be necessary for managing the general affairs of the United States under their direction . . . .").

45. The jurisdiction of agencies would presumably be based on the jurisdiction of Congress itself, since agencies are concerned with executing the laws that Congress enacts.

46. *See, e.g.*, Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1260 (2006) ("From the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and provided for judicial review of administrative action.").

47. *See, e.g.*, Parrillo, *supra* note 19, at 1313 ("Vesting power in administrators to make sweeping discretionary decisions with high political stakes was not alien to the federal lawmakers who first put the Constitution into practice."); Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 132 (2022) ("[T]he First Federal Congress and President George Washington enacted scores of independent regulatory structures in the Founding era."); Nicholas R. Parrillo, *Nondelegation, Original Meaning, and Early Federal Taxation: A Dialogue with My Critics*, 71 DRAKE L. REV. 367, 370–75 (2024) (describing early congressional delegations including one "to set the overall pay scale for disabled soldiers . . . with no criteria for where to set it; . . . to impose any regulations whatever on persons trading with Native Americans, with no criteria for what the regulations should be; . . . to lay off half the U.S. army if 'consistent with the public safety'; . . . to lay an embargo for up to five months on all ships . . . 'if the public safety shall so require'; and . . . to decide criteria for seamen's eligibility for government medical care, with no guidance as to what the criteria should be," as well as giving dispersed boards power to "assign[] a taxable value to every piece of real estate in their district" for purposes of collecting a national tax, with the boards themselves deciding how "to define value and the methods to decide it"); Mortenson & Bagley, *supra* note 19, at 334–47 (showing that the First Congress delegated "standardless discretion" to the appointed governor of the Northwest Territories to "craft the entire body of laws for the territories"; gave federal officials the power to grant patents for inventions they deemed worthy of protection, with no guidance for making that evaluation; left standards for licensure to trade with Native peoples up to the executive; and authorized agency personnel to make tax and customs determinations "with little or no direction").

48. *See, e.g.*, Christine Kexel Chabot, *The President's Approval Power*, 92 FORDHAM L. REV. 373, 376 (2023) ("[T]he founding generation[] . . . delegated significant executive discretion to officials who were not removable at will or appointed to executive offices.").

49. *See* David Foster Wallace, "This Is Water" Commencement Address to the Kenyon College Class of 2005 (May 21, 2005) (transcript available at http://bulletin-archive.kenyon.edu/x4280.html [https://perma.cc/TA7G-7YUR]) ("There are these two young fish swimming along, and they happen to meet an older fish swimming the other way, who nods at them and says, 'Morning, boys, how's the water?' And the two young fish swim on for a bit, and then eventually one of them looks over at the other and goes, 'What the hell is water?'").

B. WORK AND REAL-WORLD EFFECTS

In the context of regulatory statutes, judges and scholars usually describe courts and agencies as doing work that may seem so distinct as to impede productive comparison, for instance, saying that agencies implement statutes, while courts interpret them.[50] Or they talk about courts as determining the "law" and agencies as making "policy."[51] But if we shift focus from how people tend to *describe* these institutions over to each institution's actual *functions* or *effects*, this distinction largely fades away.[52] That focus shift draws on the tradition of American pragmatism, which takes an institution's essence to be not its idealized role in a formally perfect universe but its practical effects on the actual world.[53] From this pragmatist perspective, it becomes clear that, when it comes to regulatory statutes, courts and agencies do similar things: each determines how a statute will be effectuated on the ground.

Both courts and agencies decide how a statutory provision will be effectuated. Agencies get there through policymaking; courts, by adjudicating. They take different steps and weigh different considerations, but ultimately both institutions make decisions with practical implications for how a statute will work. The similarity arises in part from the nature of the law itself: a linguistic expression that, when done properly, has effects on the world. Statutes are speech acts—expressions that help produce the situation they describe.[54] A statute's practical work is,

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50. *See* Anya Bernstein, *Saying What the Law Is*, 48 LAW & SOC. INQUIRY 14, 15 (2023).

51. We even use accusations of "policymaking" as an insult to courts. *See, e.g.*, David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 731–32 (2021) (identifying policy arguments as part of a range of arguments presumptively inappropriate for legal—and particularly constitutional—reasoning, thereby "shut[ting] out of constitutional law virtually all the arguments that drive most citizens' views on most matters of public concern").

52. *See* Bressman & Gluck, *supra* note 2, at 770–71 ("Theorists often distinguish between textual interpretation and substantive 'lawmaking' . . . . As understood by our respondents [statute drafters working for Congress], these lines are illusory. . . . The fear of 'lawmaking,' we think, has stifled productive thinking about what 'work' it is that courts are actually doing when they interpret statutes, just as the artificial divide on the agency side has stifled more inquiries into agency statutory interpretation.").

53. *See* Charles Sanders Peirce, *How to Make Our Ideas Clear*, in 1 THE ESSENTIAL PEIRCE: SELECTED PHILOSOPHICAL WRITINGS 124, 132 (Nathan Houser & Christian Kloesel eds. 1992) ("Consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object."); *see also* Susan Haack, *The Pragmatist Tradition: Lessons for Legal Theorists*, 95 WASH. U. L. REV. 1049, 1050 (2018) ("Unlike analytic philosophy, pragmatism invites us to focus, not exclusively on our language or our concepts, but on the world; and so, in the legal sphere, not exclusively on the *concept* of law but on the *phenomenon* of law—law as embodied in real legal systems.").

54. *See* JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 16–19 (Cambridge Univ. Press 1970) (1969); J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 4–7 (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975) (calling such utterances *performative*); Michelle Z. Rosaldo, *The Things We Do with Words: Ilongot Speech Acts and Speech Act Theory in Philosophy*, 11 LANGUAGE SOC'Y 203, 210–11 (1982) (noting "J. L. Austin . . . argue[d] that we would do well to think of language first as an activity" and "discovered illocutionary force in speech by concentrating on conventional acts that have the power to change the world"); *see also* Michael Silverstein, *Shifters, Linguistic Categories, and Cultural Description*, *in* MEANING IN ANTHROPOLOGY 11, 33–34 (Keith H. Basso & Henry A. Selby eds., 1976) (distinguishing between utterances in which an "aspect of the speech situation [is]

in a sense, built into its expression: the kind of linguistic expression a valid statute *is* is one that has practical effects. Even if a court describes itself as simply interpreting a statute's language, as long as litigants obey court orders, the effect of that interpretation is to influence how the statute will function on the ground.[55] Because a regulatory statute is an utterance that affects a state of affairs, there is no purely semantic perch for a court adjudicating its meaning.[56] Both agencies and courts, then, are in the business of deciding how a given statutory provision will affect the society it governs.[57]

This statute-effectuating role differentiates agencies and courts from other government organs. Congress produces and votes on statutes[58] but has little means of effectuating them or even determining how they will be effectuated in particular instances. Getting governing coalitions to agree to specific terms is hard,[59] and the world around the statute changes, leaving ephemeral coalitions unable to keep

presupposed by the sign token," such that one cannot understand a word without some shared knowledge about its situation of use, and a creative usage, which "make[s] explicit and overt the parameters of structure of the ongoing events" and brings some aspect "into sharp cognitive relief").

55. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 123 (2010) ("Statutory ambiguity is essentially a delegation of policymaking authority to the governmental actor charged with interpreting a statute. When Congress has delegated resolution of statutory ambiguity to the courts, it is no violation of the obligation of faithful agency for a court to exercise the discretion that Congress has given it.").

56. *See* Bernstein, *supra* note 50, at 16 ("Language ideologies help people make sense of their world by presenting normative visions of social ordering as though they were natural . . . . [T]he language ideology that splits interpretation from implementation supports a normative vision in which law has inherent meaning assayable through value-neutral interpretive approaches, while its implementation depends on . . . value-laden practices. . . . [T]he structure of legal language belies the empirical veracity of this vision, while the practice of agency action undermines its claim to normative desirability in a democratic society.").

57. *See* Michael C. Pollack, *Courts Beyond Judging*, 46 BYU L. REV. 719, 726–27 (2021) (discussing how state courts perform "quasi-administrative," "quasi-legislative," and prototypically executive functions).

58. Administrative agencies also routinely help produce statutes. *See* Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 459 (2017) (exploring "the important role that agencies play in every aspect of the legislative process"); Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1378 (2017) ("Federal agencies help draft statutes."). This is pretty typical of democratic governments. *See, e.g.*, Edward C. Page, *Their Word Is Law: Parliamentary Counsel and Creative Policy Analysis*, 2009 PUB. L. 790, 791–92 (discussing the UK, Canada, India, Australia, and New Zealand); Charler-Henri Montin, *The Better Regulation (BR) Approach to Legislative Drafting in France: An Introduction*, 1 INT'L J. LEGIS. DRAFTING & L. REFORM 82, 88 (2012) (discussing France); EDWARD DONELAN, REGULATORY GOVERNANCE: POLICY MAKING, LEGISLATIVE DRAFTING AND LAW REFORM 147 (2022) (discussing Spain); Constantin Stefanou, *Comparative Legislative Drafting: Comparing Across Legal Systems*, 18 EUR. J.L. REFORM 123, 130–32 (2016) (discussing Sweden and other civil-law jurisdictions); Yong-duck Jung, Yoon-ho Lee & Deok-soo Kim, *Institutional Change and Continuity in Korea's Central Agencies, 1948–2011*, 26 KOREAN J. POL'Y STUD. 21, 34–35 (2011) (discussing Korea); Anya Bernstein, *Porous Bureaucracy: Legitimating the Administrative State in Taiwan*, 45 LAW & SOC. INQUIRY 28, 36–37 (2020) (discussing Taiwan).

59. *See, e.g.*, 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 205 (2019) ("[I]n a subset of legislative processes it is sometimes easier to pass laws when nobody understands what's in them.").

up with the dynamic world their statutes govern.[60] Congressional oversight and appropriations committees can influence agencies,[61] and Congress can enact a statutory "override" of a judicial decision,[62] but these are rather resource-intensive activities, used sparingly,[63] and often not as effective as legislators might hope.[64] The President, meanwhile, "shall take Care that the Laws be faithfully executed" but does little of that execution himself.[65] A President can exert significant influence over agency decisionmaking, but research indicates that, even in the era of "presidential administration," this too has generally been resource intensive.[66] And though he staffs courts, the President cannot command them. In short, Congress and the President produce statutes over whose effectuation they have mediated influence. It is largely agencies and courts that, in the end, determine how those statutes work in practice.

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60. *See* Anya Bernstein & Cristina Rodríguez, *Working with Statutes*, 103 TEX. L. REV. (forthcoming 2025) (on file with author).

61. Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1187, 1192 (2018) (finding that congressional oversight hearings can "mov[e agency action] towards congressional preferences on issues ranging from the level of regulatory enforcement to the creation of programs that stretch agencies' statutory authority"); *see* DOUGLAS L. KRINER & ERIC SCHICKLER, INVESTIGATING THE PRESIDENT: CONGRESSIONAL CHECKS ON PRESIDENTIAL POWER 8 (2016) ("Even without spurring legislation, however, investigations can lead to direct policy changes by prompting the president to change course on his own initiative.").

62. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 332 n.1 (1991).

63. *See* Kenneth Lowande & Rachel Augustine Potter, *Congressional Oversight Revisited: Politics and Procedure in Agency Rulemaking*, 83 J. POL. 401, 402–03 (2020). Oversight hearings may often be conducted to "serve an electoral purpose in the form of position taking" visible to key constituencies and donors like industry representatives. *See id.* at 402, 406 (finding that "the marginal probability of engaging in oversight . . . generally increas[es]" with a "legislator's [ideological] distance from the policy proposal" because conducting oversight allows legislators to demonstrate opposition to a policy proposal for specific audiences).

64. Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 513 (2009) ("[C]ourts often continue to follow statutory interpretation precedents whose holdings have been repudiated by Congress."); *see also* Deborah A. Widiss, *How Courts Do—and Don't—Respond to Statutory Overrides*, 104 JUDICATURE 50, 51 (2020) ("[W]hen the Supreme Court overrules a prior decision, lower courts quickly decrease their reliance on the old precedent and begin to apply the new rule. By contrast, when Congress enacts an override, citation patterns to the prior precedent change very little. Even a decade later, many overridden precedents . . . are still routinely cited as controlling precedent.").

65. U.S. CONST. art. II, § 3; *see* Peter L. Strauss, *A Softer Formalism*, 124 HARV. L. REV. F. 55, 59 (2011) ("With respect to the military, the President is 'Commander in Chief'; but regarding domestic government, the *only* words about his relationship to it other than the appointments clause, is that he may demand of responsible officials their opinions about *their* duties.").

66. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Nicholas R. Bednar & David E. Lewis, *Presidential Investment in the Administrative State*, 118 AM. POL. SCI. REV. 442, 443 (2023) ("[N]eglect—rather than proactive building or deconstructing of capacity—is the norm for most agencies. When presidents do build capacity, they tend to focus on agencies that (1) implement policies central to the president's agenda, (2) share the president's ideological leanings, or (3) face a high risk of experiencing a publicly salient failure."); Anya Bernstein & Cristina Rodríguez, *The Diffuse Executive*, 92 FORDHAM L. REV. 363, 366 (2023) ("The President's . . . effects on policymaking . . . emerged in our interviews . . . as diffuse."). It may be less resource intensive to simply obstruct agencies from implementing the statutes they are charged with managing; such obstruction undermines agency capacity without making up for the attendant loss in government accountability.

C. MODES OF STAFFING

Federal agencies and federal courts have some striking similarities in their staffing practices, which also differentiate them from Congress and the President. Federal judges are appointed by the President, subject to a favorable vote by the Senate.[67] Same goes for agencies' politically appointed leadership.[68] The appointment process makes federal judges similar to agencies' political leadership and distinguishes both from elected officials like members of Congress and the President. Federal judges, like agency leaders, are political appointees.[69]

Judges are rarely called political appointees, though. This reticence about an obvious similarity between court and agency personnel may be based partly on a habit of treating the federal courts as though they were not quite part of the government.[70] It may also rest on the differences in what happens after appointment. A political appointee to the federal bench enjoys life tenure,[71] while a political appointee to an agency is often subject to at-will removal by the President, if not a time-limited period of service.[72] Many agency appointees are thus, in some sense, continually beholden to the sitting President in a way a federal judge, who need

67. *See* U.S. CONST. art. II, § 2, cl. 2. *See generally* Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1667–76 (2015) (discussing trends in Senate confirmations).

68. *See* U.S. CONST. art. II, § 2; O'Connell, *supra* note 67, at 1646 & n.1. Since the Senate has eliminated the filibuster for these nominees, there is now less need than ever for a President to seek consensus candidates or to compromise with a Senate minority. *See* Tim Lau, *The Filibuster Explained*, BRENNAN CTR. FOR JUST. (Apr. 26, 2021), https://www.brennancenter.org/our-work/research-reports/filibuster-explained [https://perma.cc/9WTJ-2GT9] (explaining that the Senate eliminated the filibuster for lower court judges and executive appointees in 2013 and for Supreme Court Justices in 2017); Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 105, 109 (2017).

69. *See, e.g.*, Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 218 (2019) ("From the earliest days of the Republic, the political parties have used the judicial appointments process to stock the courts with ideological allies. And from the earliest days of the Republic, political parties have understood that judicial review can be a useful tool for defending and advancing a party's commitments of ideology and interest.").

70. I discuss this kind of "judicial exceptionalism" further in Part II.B.

71. "Article III judges can be removed from office only through impeachment by the House of Representatives and conviction by the Senate." *About Federal Judges*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/about-federal-judges [https://perma.cc/FM2X-BBR8] (last visited Mar. 6, 2025).

72. The precise scope of the President's removal power is "one of the oldest and most venerable debates in constitutional and administrative law," not least because "the text of Article II does not expressly grant the President a removal power . . . over subordinate officers" at all. Chabot, *supra* note 47, at 131–32 (internal quotation marks omitted) (quoting STEVEN G. CALABRESI & CHISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3 (2008)). For my purposes here, it suffices to note that, in general, presidents have been allowed to remove many agency leaders at will, while some agency leaders occupy (often time-limited) positions somewhat insulated from removal. *See* Brian D. Feinstein & Jennifer Nou, *Submerged Independent Agencies*, 171 U. PA. L. REV. 945, 947–48 (2023). *See generally* Aaron L. Nielson & Christopher J. Walker, *The Early Years of Congress's Anti-Removal Power*, 63 AM. J. LEGAL HIST. 219 (2023) (canvassing ways for Congress to effectively discourage presidential removal of appointees).

not fear removal, is not.[73] Yet such post-appointment independence hardly takes judicial appointments out of the realm of politics: the people who get to be so independent are still appointed in a political process. Judicial appointment thus allows an inevitably temporary political coalition to embed personnel with particular political views in government for a period that outlasts the coalition itself.[74] Federal judges are particularly powerful, long-lasting political appointees.

Agencies, too, have some relatively long-term personnel. While the tenure of political appointees depends on the President or statutory limits, career civil servants have considerable job protections.[75] These fall way short of life tenure, of course. Yet, it is notable that the administrative state and the judiciary both have a significant set of employees whose positions presumptively outlast any given election.[76] In the administrative state, these employees are chosen through less political means, their employment not tied to any particular political coalition,[77] while in the judiciary, politically appointed judges have the greatest tenure protections. So, the two institutions' staffing practices do differ in relevant ways.[78] Still, both institutions rely heavily on politically appointed leaders, provide tenure

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73. *See* Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 586–88 (2020) (finding "that the identity of the appointing administration is not a statistically significant predictor of" decisions made by immigration judges—agency employees with relatively low tenure protections—but that "the identity of the administration in control at the time of decision . . . *is* a statistically significant predictor").

74. *See* Balkin, *supra* note 69, at 218.

75. *See, e.g.*, U.S. MERIT SYS. PROT. BD., https://www.mspb.gov/index.htm [https://perma.cc/47DB-FDZW] (last visited Mar. 6, 2025) ("One of the [Merit Systems Protection Board]'s primary statutory functions is to protect Federal merit systems against partisan political . . . personnel practices by adjudicating employee appeals . . . ."). "Federal agency employees are represented by the Merit Systems Protection Board ('MSPB') with respect to any efforts to suspend or terminate employment. The MSPB is known to aggressively protect agency employees, even those whose conduct is particularly egregious. " Shobe, *supra* note 58, at 499 n.206.

76. Such executive branch independence has recently come under attack—often using the terminology of agency unaccountability itself. *See, e.g.*, Seila L. LLC v. CFPB, 591 U.S. 197, 251 (2020); Restoring Accountability to Policy-Influencing Positions with the Federal Workforce, Exec. Order (Jan. 20, 2025) (reinstating a previous executive order that redesignated many career civil servants as political appointees subject to presidential removal at will) (citing Creating Schedule F in the Excepted Service, Exec. Order No. 13,957, 85 Fed. Reg. 67631 (Oct. 21, 2020)). These tenure protections may seem undesirable from the perspective of a President who seeks more control over decisions about how, and whether, to effectuate the law. For the purposes of my argument that comparing courts and agencies makes sense in part because of similarities in their staffing, these attacks simply underline the institutions' current similarities.

77. "The average agency policymaker has served in government for 15.8 years . . . ." Nicholas R. Bednar, *Presidential Control and Administrative Capacity*, 77 STAN. L. REV. (forthcoming 2025) (manuscript at 35–36) (on file with author). Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1633 (2023) ("One common theme in [agency] interviewees' discussions was that career civil servants researched and developed possible options for action, while political appointees decided which to pursue."). The contrast between politically appointed administrative officials and civil servants is sufficiently strong that it counts as an accusation of illegitimacy or bad faith to argue that a presidential administration has attempted to embed politically appointed personnel in long-term tenure-protected spots. *See* Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. Rev. 557, 564 (2003) ("Something about this activity strikes us as unseemly.").

78. I return to these differences in Part III.

protections that outlast electoral cycles for some, and have no elected members. Their similarities and their mutual distinction from Congress and the President render them ripe for comparison.

II. SHOULD COURTS BE ACCOUNTABLE?

Even if comparing how courts and agencies work with regulatory statutes makes sense, maybe we should not expect, or demand, accountability from federal courts to begin with. After all, as Lisa Heinzerling has noted, Article III courts are "the one part of our government specially designed to be democratically *un*accountable."[79] Federal judges, of course, are not subject to election, nor do courts reflect electoral results through the replacement of their politically appointed personnel. Federal courts can thus be said to be designed to be unaccountable in terms of *elections*. But, as this Part argues, that is not the only kind of accountability that matters in a democracy. Any institution of governance—especially one that can exercise coercive power—should be accountable. We cannot presume democratic accountability from the mere fact of an election, nor can we presume its absence from the absence of one. That is because democratic accountability is a substantive value, not just a formalistic one. As this Part explores, accountability involves a range of features: engaging with the interests and the realities of the governed population, grounding decisions in publicly available justifications, and limiting the exercise of power to avoid arbitrariness or domination. Courts, as much as agencies, as well as Congresses and Presidents, are subject to these requirements by virtue of being institutions of democratic governance—whether the Constitution requires it or not. Of course, each institution has its own parameters and procedures, so each will pursue accountability in its own particular way. We should understand the particularities of these institutions against the background of their obligation to act accountably.

A. DEMOCRATIC ACCOUNTABILITY GOES BEYOND ELECTIONS

To begin with, we should recognize that federal courts are, in fact, highly responsive to elections—the elections of a President and a Senate majority that appoint federal judges. Once appointed, however, judges are immune to electoral pressures. Does this let them off the accountability hook? It is true that descriptions sometimes equate accountability with elections.[80] But a closer look

79. Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. ENV'T L.J. 379, 379 (2021).

80. *See, e.g.*, Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 71 (2017) (describing schools of thought in legal scholarship that hold that the "administrative state enables the exercise of unaccountable and aggrandized executive power" because "[u]nelected bureaucrats wield a combination of de facto legislative, judicial, and executive powers outside of meaningful political or judicial constraint"); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 6, 18–19 (2014) (arguing that administrative power is "extralegal" because the Constitution authorizes only elected members of the legislature, not unelected administrators, to make rules with binding force). Significant recent scholarship challenges the historical pedigree of this view of legitimacy in the U.S. *See generally* Parrillo, *supra* note 19; Mortenson & Bagley, *supra* note 19; Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021). The elections-accountability connection has also been a keystone of a well-organized and well-funded antiregulatory movement that dates back at least to the Reagan era.

unsettles the equation. If democracy is legitimated through something like the consent of the governed, then governing institutions should take into account the interests of those they govern, give an accounting of their own decisions, and account for change over time.[81] Elections "pose periodic yes-or-no, all-or-nothing choices,"[82] and voters often lack information about, and interest in, both candidates' views and the plethora of specific choices policymakers must make.[83] So, elections cannot reliably reveal voter preferences or interests with respect to particular policy issues.[84] The American electoral system in particular is famously non-majoritarian in significant respects: from its Electoral College, to its assignment of Senators by political unit rather than population, to its gerrymandering opportunities.[85] That in itself suggests that elections cannot be the sole basis for

See generally STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008). *See also* Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 STUD. AM. POL. DEV. 61, 61–66 (2009) (describing the political aims of the Reagan Department of Justice). This movement has emphasized the accountability exacted by elections in contradistinction to bureaucracy's supposed removal from popular control. *See* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1254 (2009) ("[I]n what might be considered optimistically circular reasoning, modern public law typically presumes that elected officials *are* politically accountable . . . because they are selected and potentially removed from office by the voters.").

81. I draw here on a republicanist understanding of democratic legitimacy. *See* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 51–79 (1997) (explaining that domination involves an actor able to interfere with another arbitrarily—that is, "without reference to the interests, or the opinions, of those affected"—and arguing that real liberty instantiates *non*domination—that is, the absence of such arbitrary power); Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 640 (2016) ("[E]veryone affected by the operation of a particular domain of civil society should be presumed to have a say in its governance.").

82. Bernstein & Rodríguez, *supra* note 77, at 1615–16. Scholars have drawn attention to the limits of elections to represent or enact even majority preferences. *See, e.g.*, David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 123 (2000) ("Even if voters do choose politicians who share their personal values, politicians' policy choices are not always driven by those personal values. Rather, the relative immediacy and complexity of the electoral connection for politicians offers a great deal of opportunity for values that differ from those of the median voter to influence the policy choices of elected politicians."); *id.* at 124 (noting that politicians may cater to "particular constituencies," play off the high or low salience of particular issues to particular groups, and generally let "self-interest [and] the desire for re-election . . . contaminate the policy choice"). *See generally* Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073 (2005) (quoting IAN SHAPIRO, DEMOCRATIC JUSTICE 37 (1999)).

83. *See, e.g.*, Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 378–81 (2010) (discussing studies showing that voters often lack accurate understandings of presidential candidate policy positions, and that even well-informed voters often vote for candidates who share only some of their policy preferences). Partly for these reasons, "[p]olitical scientists have largely abandoned the simplistic account of presidential elections as national policy referenda that can be legitimately interpreted as issue mandates." *Id.* at 381 n.105.

84. *See* Bernstein & Staszewski, *supra* note 19, at 1781–82 (discussing the limitations of elections in revealing preferences).

85. *See, e.g.*, Sanford Levinson, *Our Undemocratic Constitution: Where the U.S. Constitution Goes Wrong (and How We the People Can Correct It)*, BULL. AM. ACAD. ARTS & SCIS., Winter 2007, at 31, 33 ("Because of the way the Electoral College operates, we have regularly, since World War II, sent to the White House presidents who did not have a majority of the popular vote."); ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA (2015). The structural

accountability; otherwise, second-term presidents and members of Congress in gerrymandered safe seats, at least, would be untouched by democracy's normative requirements.[86] The Constitution's sparse electoral provisions provide only a floor on which to build the kind of accountability that democracy demands.

It is easy to imagine why this unrealistic understanding of elections endures, however. Equating elections with accountability provides an easy, if imprecise, shorthand for democratically attractive traits—values and practices supporting a minority-protective majoritarianism that would push government actors to balance the incompatible interests of diverse publics in the face of the frequent absence of a preexisting majority view on any given policy question.[87] But elections do little to enable the accountability of even the most virtuous official. Substantive accountability—one that really makes a difference—must be more multifaceted. For instance, accountability pushes government actors to articulate reasons for their positions, rendering arbitrary or biased decisions more visible and contestable and helping to head off abuses of power. It allows interested publics to test the quality of government decisions and to influence them over time, giving the subjects of representative democracy an ongoing role in their own governance. It helps make public institutions sites for the contestations, negotiations, and provisional outcomes that keep a pluralistic polity going.[88] And it asks government actors to justify, persuade, and remain subject to evaluation in an ongoing way. Because such justification must hope to convince multiple audiences—other government institutions, involved parties, and affected publics—it should take multiple views and interests into account. In sum, I take accountability to involve actors undertaking reasoned decisionmaking grounded in publicly recognized values and facts; justifying their decisions to others who can evaluate, influence, or override those judgments; and having their power constrained both by contemporaneous institutions and by changes over time.[89]

An accountable actor may also be subject to discipline for wayward actions—whether through electoral defeat, professional demotion, criminal prosecution, or

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minoritarianism of the American electoral system is of course exacerbated by well-documented practices such as voter suppression, the disenfranchisement of social subgroups, and so on.

86. One might posit that a second-term President might feel accountable to his political party. That is certainly an opportunity for accountability, but hardly a mechanism for enforcing or even enabling it.

87. Most people will have no views at all on the kinds of questions that government institutions spend years working on, such as which technology should measure coal dust in mines at what frequency. *See, e.g.*, Bernstein & Rodríguez, *supra* note 77, at 1626 (discussing specific policy options interviewees explored).

88. *See* SUSAN ROSE-ACKERMAN, DEMOCRACY AND EXECUTIVE POWER: POLICYMAKING ACCOUNTABILITY IN THE US, THE UK, GERMANY, AND FRANCE 2 (2021) ("Disparate policy views are normal in a democracy. Unanimous consent is not a realistic goal for most policy choices.").

89. These values are central to a contemporary understanding of democracy that Glen Staszewski and I have called "agonistic republicanism," which sits at the Venn overlap of republican theory, deliberative democracy, and agonism. *See* Bernstein & Staszewski, *supra* note 19, at 1767–74 (focusing on the overlaps of civic republican, deliberative democratic, and agonistic theory to formulate a notion of agonistic republicanism); *see also* Bernstein & Rodríguez, *supra* note 77, at 1637 (developing a theory of government accountability as encompassing reasoned deliberation, pluralistic inclusivity, and a responsiveness to affected publics and regulated realities).

something else.[90] But being required and enabled to take into account and justify one's positions to relevant audiences is even more important. Ex post facto sanctions are a nice threat to have, but they can't compare to—and they don't amount to—having your views and interests influence the making of policies that affect you.[91]

Similarly, accountability ideally involves some outside entity exerting some sort of oversight[92]: one could argue that being *held* accountable, rather than deciding to be accountable, is key. Part V proposes some ways to enhance this aspect of court accountability. But even in the absence of an external monitor, an institution can exercise power in proportion to its capacity for accountability. If its capacity to interactively consider a wide range of facts and viewpoints is limited, so should its exercise of power be. Admittedly a second-best option, this still beats conduct that exceeds the institution's capacities. But it requires the institution to acknowledge its own capabilities and, crucially, its limitations. Democratic accountability thus involves a give and take: it *gives* an account of government reasoning to a range of publics in a way that *takes* their positions into account.

B. GOVERNING INSTITUTIONS SHARE GOVERNANCE VALUES

Even if democratic accountability takes more than elections, we can still ask whether *courts*, in particular, should be held to account. Legal writing might suggest not: it sometimes treats courts as special, distinct from the political branches not just in their insulation from electoral cycles but in some more metaphysical way. As Josh Chafetz points out, both scholars and judges sometimes speak of the courts as though they are distinct from, or even superior to, the government.[93] And courts are sometimes presented as though they are immune from the weaknesses of all-too-human institutions, such as social pressures, personal predilections, or variability.[94]

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90. *See* Jerry L. Mashaw, *Structuring a "Dense Complexity": Accountability and the Project of Administrative Law*, ISSUES LEGAL SCHOLARSHIP, 2005, at 1, 15, 19–20; *see also* Rubin, *supra* note 82, at 2073.

91. "For decades, legal academics have struggled with the 'countermajoritarian difficulty': the problem of justifying the exercise of judicial review by unelected and ostensibly unaccountable judges in what we otherwise deem to be a political democracy." Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002). *See generally* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995). But the prevalence of countermajoritarianism in the American electoral system, along with elections' weak connection to democratic accountability, may make this something of a red herring. *See generally* Luís Roberto Barroso, *Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies*, 67 AM. J. COMPAR. L. 109 (2019) (arguing that constitutional courts' roles go beyond countermajoritarianism in important ways).

92. *See* EDWARD H. STIGLITZ, THE REASONING STATE 8 (2022) (discussing the accountability-promoting effects of judicial review of agency action).

93. *See* Josh Chafetz, *Governing and Deciding Who Governs*, 2015 U. CHI. LEGAL F. 73, 75 (discussing the common "premise that the Court stands outside of, and indeed above, the structures and processes of governance").

94. *See generally, e.g.*, Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (treating judicial preferences as immutable and exogenous to judicial decisionmaking practices,

Such *judicial exceptionalism* cordons courts off into their own separate conceptual area,[95] a privileged position removed from the morass of human affairs. But where could that separate area lie? There is little room for it in our earthly existence. Society offers no such privileged position, no external fulcrum from which to move the world.[96] Like other parts of the government, courts are funded by Congress.[97] They decide on the proper application of law, sometimes in ways that even affect their own place in government.[98] They exercise coercive authority over both private litigants and the government itself. No non-governmental institution has such a role. When stated plainly, it seems too obvious to bother stating at all: courts are paradigmatic institutions of government.[99] So, it makes sense to evaluate courts with reference to the same values as other governing

but also as the proper basis for courts' statements of law); Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743 (2013) (arguing that legal scholarship's analysis often assumes that legal actors act on private incentives, but that its prescriptions ask those same actors to act on public-regarding motives, primarily using examples analyzing non-judicial actors while addressing prescriptions to judges); Jerome Frank, *Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17 (1931).

95. *Cf.* Bernstein, *supra* note 58, at 33–34 (noting that in Taiwan, political discourse lumps together the executive and the judiciary, leaving the legislature as a wild card).

96. *See* Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) ("[C]onstitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.").

97. *See* ADMIN. OFF. U.S. CTS., THE JUDICIARY FISCAL YEAR 2025 CONGRESSIONAL BUDGET SUMMARY (2024), https://www.uscourts.gov/sites/default/files/fy_2025_congressional_budget_summary.pdf [https://perma.cc/CL92-VJCW] (detailing the federal judiciary's request for funding from Congress for 2025).

98. *See, e.g.*, Z. Payvand Ahdout, *Separation-of-Powers Avoidance*, 132 YALE L.J. 2360, 2365 (2023) (describing the "systemic distortion that arises when the judicial branch – a participant in the separation of powers – adjudicates disputes between and among the coordinate branches"); Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2028 (2022) ("Rather than treat the separation of powers as a legal principle of interbranch entitlements secured by judicial enforcement, we contend that the separation of powers is a contingent political practice reflecting the policy needs, governance ideas, and political struggles of the moment."); *"Congress in a Post-*Chevron *World": Hearing Before the H. Comm. on H. Admin.*, 118th Cong. 5 (2024) (statement of Prof. Josh Chafetz) (arguing that recent Supreme Court administrative law doctrines "have in common … judicial self-aggrandizement: they all reinforce the idea that the *judiciary*—not Congress, not the agencies, not any other political actor—has the final say as to how government should be structured and what policies it may enact"); Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE 24, 27 (2023) (arguing that the Roberts Court has engaged in "judicial aggrandizement," in which courts position themselves as "the final arbiter of political disputes") (internal quotation marks omitted).

99. *See* Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 636 (2023) ("The judiciary is an institution. This should strike everyone as obvious. And yet, . . . judges . . . routinely deploy a number of techniques to conceal their institutional situatedness. They present themselves as standing outside of space, time, and politics. They obscure the fact that courts are staffed by human beings . . . . And they hold themselves out as a pure, reason-based alternative to the messy business of the 'political branches' in a manner that serves precisely to empower their own institution vis-à-vis the other branches in the game of constitutional politics."); Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329, 1329 (2010) ("The Court's institutional self-presentation suggests that it is immortal and therefore not temporally bound, and that claim of continuity typically extends to its decisions.").

institutions.[100] If democratic accountability is important for government institutions, then it is by definition important for courts.

Treating courts as the government actors they are does not entail denying their specific characteristics. Like any institution, courts have their own particular conditions for, and modes of, action. They are catalyzed by litigation and enact their governing role through decisions inscribed in opinions. They also, like any institution, have standards of propriety relevant to their roles, such as neutrality and independence.[101] But these commitments neither render them unique nor place them outside the governing system. Neutrality, for instance, is something we demand of other governing institutions in varying ways.[102] And judicial neutrality itself is hardly absolute.[103] Having no bias toward litigants does not relieve judges of their own preconceptions, political preferences, or adjudicatory tastes.[104] Plus, a court reviewing other government institutions' scope of authority is a participant in the division of power it adjudicates. It's hard to be a neutral referee when you're also playing the game.

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100. *See, e.g.*, Stephen B. Burbank, *What Do We Mean by "Judicial Independence"?*, 64 OHIO ST. L. J. 323, 331 (2003) ("[V]iewing the judiciary as one part of a complex governmental apparatus holds more promise of yielding a realistic conception of what it is we seek from courts . . . than an account . . . that disembodies . . . courts and their independence.").

101. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" (alteration in original) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955))).

102. Prohibitions on bribery, for instance, impose a kind of neutrality even on legislators: they limit the reasons for which a legislator may act. *See, e.g.*, 18 U.S.C. § 201(b) (prohibiting bribery); Tracey Tully, *What We Know About the Menendez Bribery Case*, N.Y. TIMES (Jan. 4, 2024), https://www.nytimes.com/article/bob-menendez-corruption-bribes.html (reporting on the indictment of a senator for bribery). Agency adjudicators, too, are bound to neutrality in the sense of unbiased, open-minded adjudication of specific disputes. *See* 5 U.S.C. §§ 554, 556–557 (setting out requirements for agency adjudication).

103. *See* Ryan Hübert, *Biased Judgments Without Biased Judges: How Legal Institutions Cause Errors*, 83 J. POL. 753, 753, 764 (2021) (arguing that, although an entire "set of institutions has developed . . . to guard against misapplication of law by judges," "litigant-driven appeals can (1) incentivize and enable a trial judge to make biased decisions and (2) allow a trial judge to reduce her effort in managing a case," producing biased outcomes even by judges who are, at the individual level, unbiased); Frederick Schauer, *Neutrality and Judicial Review*, 22 LAW & PHIL. 217, 235 (2003) (concluding that there is no way to make most legal interpretation simply "a process of law enforcement and not a process of value-laden interpretation and . . . law-making").

104. Judges may predecide to use some interpretive approach; have preconceived notions about what contested laws mean; or have political views relevant to litigation. This is not even to mention the practical difficulty of enforcing neutrality requirements on the federal courts outside the most egregious situations. *See, e.g.*, Jodi Kantor, *At Justice Alito's House, a 'Stop the Steal' Symbol on Display*, N.Y. TIMES (May 16, 2024), https://www.nytimes.com/2024/05/16/us/justice-alito-upside-down-flag.html ("Justice Clarence Thomas has declined to recuse himself [in cases related to the January 6, 2021, attempt to overturn the election] despite the direct involvement of his wife . . . in efforts to overturn the election."); Noah Pransky, Brooke Williams & Andrew Botolino, *Even When Big Cases Intersect with Their Families' Interests, Many Judges Choose Not to Recuse*, PROPUBLICA (July 16, 2024, 5:00 AM), https://www.propublica.org/article/judges-ethics-codes-recusal-conflict-of-interest-families [https://perma.cc/HM74-2CM7]. *See generally* Veronica Root Martinez, *Supreme Impropriety? Assessing the Justices' Conduct*, 87 LAW & CONTEMP. PROBS. 147 (2024) (proposing an "independent ethics commission" to evaluate Supreme Court Justices' conduct).

The same goes for independence.[105] It, too, is not unique to the judiciary but valued in other branches as well.[106] It is clearly important to ensure that judges are not controlled by political puppet masters.[107] But judges' independence from political control, like their neutrality as between parties to litigation, does not turn them into ideological blank slates or grant them superhuman objectivity.[108]

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105. *See* J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 721–22 (1994) (defining independent courts as "courts where politicians do not manipulate the careers of sitting judges"). *But see* Burbank, *supra* note 100, at 324 ("Judicial independence exists primarily as a rhetorical notion rather than as a subject of sustained, organized study."); McNollgast, *Conditions for Judicial Independence*, 15 J. CONTEMP. LEGAL ISSUES 105, 105–06 (2006) ("For some, judicial independence requires little more than life tenure for judges, while for others, judicial independence requires budgetary control or an appointment process that involves more than legislators doing the choosing. Still other scholars tout the virtues of judicial independence without defining clearly what they mean by 'independence', and others . . . suggest that judges are at least partially independent because they exercise discretion with every decision."). Even those who criticize scholars for failing to usefully define the notion of judicial independence can end up doing just that. *See* McNollgast, *supra*, at 108 (noting that scholars often fail to define judicial independence and explaining that the authors "defin[e] judicial independence as an outcome that emerges from strategic interactions among the judiciary, the legislature, and the executive," which does not differentiate judicial independence from the many other political realities that result from strategic interactions).

106. Public discourse is full of complaints about elected officials improperly serving the interests of their campaign donors rather than their constituents, which suggests that many people value legislative independence from pressures outside the electoral system. *See, e.g.*, *Reform Money in Politics*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/reform-money-politics [https://perma.cc/4BFR-6LHE] (last visited Mar. 3, 2025); Karim Doumar & Cynthia Gordy Giwa, *How to "Follow the Money" in a Political Campaign*, PROPUBLICA (Nov. 1, 2022, 9:00 AM), https://www.propublica.org/article/how-to-understand-political-contributions-campaign-finance [https://perma.cc/DFR5-YRJE]; Tom Udall, *The Super-Wealthy Have Outsize Influence in Politics. Here's How We Can Change That*, TIME (Aug. 14, 2019, 11:12 AM), https://time.com/5651417/constitutional-amendment-campaign-finance [https://perma.cc/86VD-44F4]. And the executive branch is currently structured to encourage some level of independence for some employees involved in both adjudication and rulemaking, though these are coming under attack from both litigants and executive branch actors themselves. *See* U.S. MERIT SYS. PROT. BD., *supra* note 75. There are good reasons to think that some independence from political control encourages deliberation and representativeness within the administrative state. *See, e.g.*, Bernstein & Rodríguez, *supra* note 60; Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 852 (2012) ("[A] deliberative theory of administrative legitimacy provides a more effective means to a more attractive end from the standpoint of democracy."); Brian D. Feinstein, *Legitimizing Agencies*, 91 U. CHI. L. REV. 919, 919 (2024) (arguing, based on experiments, that people generally view insulation from political influence as legitimizing policymaking).

107. Life tenure with a salary guarantee may not be enough for everyone. *See, e.g.*, Justin Elliott, Joshua Kaplan, Alex Mierjeski & Brett Murphy, *A "Delicate Matter": Clarence Thomas' Private Complaints About Money Sparked Fears He Would Resign*, PROPUBLICA (Dec. 18, 2023, 6:00 AM), https://www.propublica.org/article/clarence-thomas-money-complaints-sparked-resignation-fears-scotus [https://perma.cc/W3QW-NLXV] (reporting that Justice Thomas said Supreme Court Justices would resign if their salaries were not increased, and accepted "a stream of gifts . . . that appears to be unparalleled in the modern history of the Supreme Court"); Zach Montague, *Clarence Thomas Threatened to Resign over Salary Concerns in 2000*, N.Y. TIMES (Dec. 20, 2023), https://www.nytimes.com/2023/12/20/us/politics/clarence-thomas-supreme-court-salary.html.

108. *See, e.g.*, Pamela S. Karlan, *Judicial Independences*, 95 GEO. L.J. 1041, 1043 (2007) (arguing that "a positive conception of judicial independence," as not just the freedom from political pressure but also the freedom to pursue particular ends, "ultimately cannot escape substantive judgments"); John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 354 (1999) ("We want judges to be institutionally protected so that they can make the right

Neutrality and independence are just some ways of helping courts play their proper role and stay accountable.

If courts should be accountable, what should they be accountable *to*? They have no electoral constituency, and, limited to cases and controversies between litigants, they do not interact regularly with broad publics. Judicial review does, though, give federal courts a special relationship to the law, and we can posit that it is to that law—the regulatory statutes they interpret—that courts owe accountability. Those statutes themselves are a political product. They are not—as perhaps imagined in common law courts of yore—a transcendental system available for discovery, out of our control. Such an image of law as an autonomous, internally coherent system situated above messy social relations and political practices grates against a commitment to democracy, which is really all about translating those messes into governing principles through institutional mediation. Regulatory statutes in particular arise not from ancient principles but from the rather convoluted practices of a bureaucratically organized Congress (and President and agencies).[109] Law is a product of, and subject to change through, imperfect human institutions.[110] Not transcendental but the opposite: immanental.[111] We can thus say that courts are accountable to the statutes they work

decisions without worrying about personal consequences from such decisions. But providing personal protection for judges is no guarantee that they will respond to law and the constitution in desirable ways."); CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 8–10 (2006) (finding that "[i]n ideologically contested cases . . . a judge's ideological tendency can be predicted by the party of the appointing president," a tendency mitigated when fellow panelists were appointed by the other party, and heightened when fellow panelists were appointed by the same party); Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11, 19 (2013) (citing studies concluding that federal judges seek to maximize both policy preferences and "personal factors" such as job satisfaction, external satisfactions, leisure, income, and promotion); ELLIOT BULMER, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE (INT'L IDEA), JUDICIAL TENURE, REMOVAL, IMMUNITY AND ACCOUNTABILITY: INTERNATIONAL IDEA CONSTITUTION-BUILDING PRIMER 5, at 13 (2d ed. 2017) ("Life tenure or long terms of office will tend to promote judicial independence, albeit at the cost . . . of weakening judicial accountability.").

109. *See* Cross & Gluck, *supra* note 32. *See generally* Shobe, *supra* note 58.

110. This description resonates with the philosophical tradition of American pragmatism, which insists that the truth of a thing is its effects in the world—not an abstract or transcendent essence but a sociological, practical one. *See, e.g.*, Peirce, *supra* note 53, at 132; Haack, *supra* note 53, at 1050. In legal thought, this pragmatist view has been most closely associated with legal realism. *See, e.g.*, O.W. HOLMES, JR., THE COMMON LAW 1 (1881) ("The life of the law has not been logic: it has been experience."); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976) ("[I]f, for a moment, we take Holmes' advice and look closely at what federal courts . . . are doing 'in fact,' what we see will not easily fit our preconception of civil adjudication."). Quite aside from its philosophical trappings, this view provides a fairly straightforward description of law in a mass democracy, in which a pluralistic populace with varying views, interests, and attention spans produces and changes laws through mediating institutions subject to their own institutional vagaries, strengths, and pathologies.

111. Iveta Leitane, *Transcendence and Immanence*, *in* ENCYCLOPEDIA OF SCIENCES AND RELIGIONS 2275, 2275 (Anne L.C. Runehov & Llius Oviedo eds., 2013) ("Transcendence is a philosophical and theological concept of an ultimate origin or instance that is separated by an ontological gap from what it … brings into being …. The opposite of transcendence is the concept of immanence: where the foundational origin is not something separate from the 'world' but is contained and present within it." (internal citations omitted)).

with—the worldly, provisional products of institutional mediation among contested values and interests in ongoing political processes.[112] Being accountable to law keeps courts firmly planted in the realm of political institutions.

III. COURT ACCOUNTABILITY FEATURES

Courts have some distinctive characteristics that might contribute to accountability, most notably reason-giving; precedent and appellate review; and a commitment to fit, justification, and the integrity of law. But this accountability flows primarily to other courts. Courts review the sufficiency of an opinion's reasons, courts provide relevant precedent, and courts set the standards for the integrity of law. This limitation is structural: it depends less on what judges wish to do than on what they can do within the confines of their role. In this sense, the judiciary's limited ability to be democratically accountable is not the courts' fault; it's simply how the role is constructed. As Parts IV and V discuss further, that puts the onus on judges and other government actors to incorporate courts' limited accountability capacities into their decisions.

A. REASON-GIVING

In a key feature of the American legal system, judges are supposed to write opinions that explain their decisions, support them in law and facts, fairly respond to the parties' arguments, and offer reasons that could reasonably be accepted even by those who disagree, making their views available for public debate.[113] For all its importance, though, reason-giving only enables accountability to a small extent. For one thing, most appeals court decisions do not give fulsome reasons: far more are unpublished opinions that "contain an abbreviated summary of the facts and legal reasoning."[114] At the Supreme Court, the "shadow docket"—which includes "decisions on certiorari petitions, emergency applications, summary

112. This view is largely congruent with a vision of "the judiciary . . . as the legislature's fiduciary" in the interpretation of statutes, though I prefer to speak of duties to the *statute* rather than the legislature. Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 748 (2013). Statutes are usually produced and enacted with the participation of not just the legislature but also the President and relevant agencies. And since statutory meaning inevitably evolves as the world the statute regulates changes, I focus on the enduring authority of the statute rather than the ephemeral governing coalition that produces it. The public fiduciary model achieves something similar with its provision for situations in which "judges have a reasonable suspicion that legislators . . . are failing to live up to fiduciary standards," at which point judges should "reengage in direct fiduciary protection of the public." *Id.* at 749.

113. *See, e.g.*, Michael C. Dorf, *Courts, Reasons, and Rules*, *in* RULES AND REASONING: ESSAYS IN HONOUR OF FRED SCHAUER 129 (Linda Meyer ed., 1999); Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 486 (2015) ("More than other branches of government, judges are expected to be model reason-givers.").

114. Rachel Brown, Jade Ford, Sahrula Kubie, Katrin Marquez, Bennett Ostdiek & Abbe R. Gluck, *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 CORNELL L. REV. 1, 4 (2021) ("Over the last five years, eighty-seven percent of federal appeals were resolved in unpublished opinions. . . . Some are no longer than a sentence stating the outcome."); *see also* United States v. Texas, 144 S. Ct. 797 (2024) (upholding, providing no reasons, a circuit court order to stay a district court holding).

reversals, so-called GVRs (short for 'grant, vacate, and remand'), and more"—overshadows the merits one.[115] Because of the Supreme Court's discretionary docket, "[e]verything the Court does on the merits docket happens only because of a prior shadow docket decision" to grant cert.[116] The reason-giving order rests on a foundation of nonreasons.[117]

Judicial reason-giving is also limited by the reasons available to generalist judges operating under the constraints of justiciability doctrines. Courts primarily hear the arguments of litigants—adversaries in a lose-or-win situation about a particular issue that has allegedly given rise to sufficient harm to constitute a justiciable case or controversy. Even empirical information about how the world works usually enters the record through litigants, for instance, through the use of expert witnesses whom litigants select and pay.[118] Regulatory statute effectuation deals with issues that exceed the common law curriculum, implicating matters of technical, scientific, and sociological complexity, but litigants have no obligation to present those complexities to judges, and many lack the ability to do so anyway.[119] Even the judge who wishes to be well informed thus largely depends on the litigants before her. That limits the kind and the scope of reasons a judicial opinion can provide. Reason-giving is a central, valuable part of American judicial practice. But in terms of enabling courts to provide the kind of democratic accountability that a governing institution should offer, it is fairly limited.[120]

B. PRECEDENT AND APPELLATE REVIEW

Another key feature of the American court system is its heavy use of precedent, which creates a long-term conversation across cases as courts at different levels

115. Thomas P. Schmidt, *Orders Without Law*, 122 MICH. L. REV. 1003, 1005 (2024).

116. *Id.* at 1006; *see also id.* at 1004 ("These days, the Court grants only about 1.5 percent of cert petitions filed, disposing of the rest through unexplained orders."); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1, 1 (2015). *See generally* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023).

117. *See* Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 7 (2011) (considering ways to "increas[e] accountability, transparency, and [public] participation" in certiorari).

118. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835 (1985) ("At the American trial bar, those of us who serve as expert witnesses are known as 'saxophones.' . . . The idea is that the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes. . . . The more measured and impartial an expert is, the less likely he is to be used by either side.").

119. The litigant best positioned to provide such information is usually the agency promulgating the regulation, but the administrative record cannot reproduce the entire process of intra-agency development, inter-agency review, and public consultation that results in a rule. The information and input that goes into making a regulation must be made comprehensible to the judge. *See* Bernstein & Rodríguez, *supra* note 60 (quoting an agency lawyer as saying, "[o]n technical issues, the ultimate judge, if there's a challenge, will be a federal judge. So I would want to make sure, not only had we explained in a way that non-technical person like me or a federal judge could understand, [but also] that all significant comments be . . . answered in a manner that really deals with their efforts." (alterations in original)).

120. *See supra* Section II.A.

and in different times consider, interpret, reframe, and question the precedents they bring to bear.[121] Precedent provides a nexus for the percolation of issues through a hierarchical judicial network rendered somewhat diffuse by time—successive courts can not only overturn but also reinterpret precedent—and by administrative division—different circuits can have different precedents. Precedent thus functions systemically and diachronically to support deliberation, collaboration, and contestation within the judiciary.[122] Appellate review helps, too. Parties unhappy with a litigation result can get a second opinion, occasionally even a third, from a few other eyes who take another look at the legal issues. This dialogue between hierarchical levels can lend some uniformity to our rather dispersed adjudicatory system, create a conversation among courts that explores legal issues more deeply than one court alone can, and provide a more thorough justification of a litigation outcome.

At the same time, all this appealing and percolating has its limits. It's great that other judges get a say, but the say is still limited to judges. It is judges who review lower court judgments on appeal. Judges of different time periods might mobilize precedent in different ways in an intergenerational conversation, but in the end, the conversation is still among judges. Perhaps that is overstated: lawyers, after all, set the terms of litigation and tee up topics and arguments for judges. So, perhaps we can say that the conversation is not limited to judges but stays largely among legal professionals, plus *pro se* litigants. That leaves out a host of relevant voices: economists or toxicologists or sociologists who might assess a regulation's subject matter; laborers or manufacturers or environmental activists who might weigh in on its likely effects; or even people with field-specific knowledge who could just correct obvious errors.[123] Neither courts now nor courts then have the capacity to do reliable independent research into real-world social and technological circumstances. Nor can they convene a broad range of views and interests in the deliberation process. Courts, even with the assistance of lawyers, bring uniform expertise and a rather narrow range of experience to bear on statutes that regulate complex environments and affect a diverse populace in diverse ways.

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121. *See, e.g.*, Glen Staszewski, *A Deliberative Democratic Theory of Precedent*, 94 U. COLO. L. REV. 1, 4 (2023) ("It turns out . . . that regardless of what horizontal stare decisis was meant to do, what it does do is encourage deliberation."); Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 WM. & MARY L. REV. 221, 227 (2013) ("[Judicial] statutory interpretation in the modern regulatory state is best understood as a mechanism of contestatory democracy.").

122. *See, e.g.*, Kiel Brennan-Marquez, *Aggregate Stare Decisis*, 97 IND. L.J. 571, 576 (2022) (proposing a rule allowing the Court to overrule precedent only "if the tally of votes across . . . the court that fashioned the precedent . . . and the one scrutinizing it . . . totals a majority" such that "dismantling a 5–4 precedent would require six votes," "dismantling a 6–3 precedent would require seven; and so on"); Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1469–70 (2011) (proposing a rule allowing the Court to make binding precedent only when it has issued two noncontradictory opinions on the same issue in different Terms).

123. *See, e.g.*, Ohio v. EPA, No. 23A349, slip op. at 5, 7 (June 27, 2024) (repeatedly substituting the term nitrogen oxide, the ozone-producing pollutant at issue, with the term nitrous oxide, which is laughing gas). The error was widely reported before the opinion was revised. *See, e.g.*, Adam Liptak, *In a Volatile Term, a Fractured Supreme Court Remade America*, N.Y. TIMES (July 2, 2024), https://www.nytimes.com/2024/07/02/us/politics/supreme-court-term-decisions.html.

Besides, adherence to precedent is in many cases optional: appellate courts can overturn their precedent explicitly, and all courts can often wind their way around stare decisis by focusing on distinguishable rather than analogous characteristics or, sometimes, by simply ignoring plausible precedent altogether.[124] And in appeals, it is largely courts themselves that determine *how* courts will be reviewed. As long as five justices are up for it, the Supreme Court can change the standards appeals courts use to review district court decisions; no further consultation necessary.[125] Courts control how courts are controlled. In short, precedent and appellate review do encourage courts to be accountable, but that accountability flows mostly to other courts.[126]

C. FIT, JUSTIFICATION, INTEGRITY

A final factor that informs judicial accountability is a little harder to pinpoint: it is less clearly situated in court authority and more ideational. A judge may have a sense of obligation—call it role morality, or call it an "internal point of view"—to make the best, most informed, most fair decision possible on the merits, given the relevant law in a particular case.[127] And beyond particular cases, a judge may feel an obligation to make decisions cohere with the broader context of legal rules—to avoid tearing the "seamless web."[128] She may strive to make a decision "fit" comfortably in the ecology of laws.[129] And, in a normative stance, she may seek to act on the best "justification" for the law as a whole.[130] Whether guided by individual ethics or by professional norms, judges may be committed to preserving the "integrity" of the law over time and over cases.[131]

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124. *See, e.g.*, Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2162, 2169 (1998) (finding that whether appeals court panels followed precedent depended on judges' appointing parties, in a data set of opinions involving the *Chevron* framework).

125. *See, e.g.*, Alexander v. S.C. State Conf. of the NAACP, 602 U.S. 1, 68–69 (2024) (Kagan, J., dissenting) ("[T]he majority, though ostensibly using the clear-error standard, effectively inverts it whenever a trial court rules against a redistricting State. In the majority's version, all the deference that should go to the court's factual findings for the [winning] plaintiffs instead goes to the losing defendant . . . ."). *Alexander*'s supercharged clear-error review can be read to "empower all appeals courts, in all cases, to show less deference to factual findings by their trial court colleagues." Steve Vladeck, *82. The Supreme Court's Four Officers*, ONE FIRST (May 27, 2024), https://stevevladeck.substack.com/p/82-the-supreme-courts-four-officers [https://perma.cc/LVB6-7LQR].

126. Agencies such as the Administrative Conference of the U.S. Courts and the Federal Judiciary Center do report on the activities of the federal courts, but these agencies are themselves housed within, and controlled by, the judiciary. *See* FED. JUD. CTR., https://www.fjc.gov [https://perma.cc/DG2R-LG9G] ("The Federal Judicial Center is the research and education agency of the judicial branch of the U.S. government."); ADMIN. OFF. U.S. CTS., https://www.uscourts.gov/topics/administrative-office-us-courts [https://perma.cc/FM2X-BBR8] (providing information about the federal courts).

127. *See, e.g.*, Charles L. Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203, 1231 (2015) (describing Ronald Dworkin's concept of the "internal point of view" as "the argumentative, practical posture of a judge who puts legal practice in the best light in order to determine people's rights and duties").

128. F.W. Maitland, A Prologue to a History of English Law, 14 LAW Q. REV. 13, 13 (1898).

129. *See* RONALD DWORKIN, LAW'S EMPIRE 239 (1986).

130. *See id.*

131. *See id.* at 52–53, 98–99, 252–53 (describing the goal of legal interpretation as producing a coherent legal order).

Few professional requirements or institutional structures beyond reason-giving, appeals, and precedent enforce this orientation, so we might say it is "internal" not just to the law as a system of argumentation and authority, but also to individual judges, who decide whether to pursue these values. But that lack of external constraint does not necessarily diminish the value of these commitments. Of course, we can never know what lurks in a judge's heart,[132] but still it seems plausible that some, perhaps many, maybe even most, judges do feel the normative force of law's integrity and try to ensure fit and justification for their decisions. That can motivate a judge to look beyond her surface-level preferences and consider a broader spectrum of relevant issues. This seems salutary: these concepts can encourage accountability to the statutes judges interpret, themselves products of the democratic process.[133]

At the same time, motivation and encouragement do not quite amount to capability. So it is worth asking to what extent this internal point of view actually enables judges to act on commitments to fit, justification, and integrity. Regulatory statutes often deal with complex areas of society and economy and are often quite complex internally as well. To evaluate how a particular effectuation of a statutory provision will fit with surrounding laws requires knowing a lot about not just the part of the statute a litigant sues about, but also the statute as a whole and other statutes touching on related areas. These things can come into litigation, but they do not need to: litigation usually focuses on small excerpts of a regulatory statute, not on its whole structure nor on its place in the larger statutory complex. So, judges' ability to figure out fit can be limited.

Same with justification: statutes come into being at varying times and in varying circumstances. It is not clear that litigation about a particular statutory provision tells a judge what she needs to know about how that provision relates to the larger statutory ecology; neither does a generalist legal education necessarily provide that perspective. Perhaps in common law adjudication, a judge would already have a sense of the principles roughly underlying tort, contract, and so on. But it is not clear that the same goes for the principles underlying environmental regulation, consumer protection, small business support, immigration enforcement, and so on—even if we posit that there are congruent principles uniting all these things at some more actionable level of abstraction than "serving the public interest."

As for the integrity of the law, let us assume that regulatory statutes are part of its seamless web. It is nevertheless not obvious that judges, rather than other actors, are best positioned to determine how a particular statutory provision

132. "For what man knoweth the things of a man, save the spirit of man which is in him?" 1 *Corinthians* 2:11 (King James).

133. *But see* Andrei Marmor, Draft Lecture for NYU Conference on "Dworkin's Later Work": Integrity in *Law's Empire* (Sept. 2019) (transcript available at https://www.law.nyu.edu/sites/default/files/Integrity%20in%20Law%27s%20Empire_%20MARMOR.pdf [https://perma.cc/35WS-WQLT]) (questioning Dworkin's claim that a commitment to law's integrity helps ground or legitimize political community, and noting that prizing integrity is inherently conservative in ways that undermine its claim to normative primacy).

should be woven in. Any move to effectuate a provision in a regulatory statute interacts with many other moves effectuating other provisions, in both that and other statutes passed by different Congresses and Presidents.[134] Courts, limited largely to what litigants tell them, lack access to most of the available information about these interactions. In sum, while this more ideational, internal set of commitments forms an important, potentially laudatory aspect of judicial work, it does not increase courts' capacity for accountability.

One can reasonably think courts have a general accountability to the law itself. Yet, the law itself is a human product realized through pragmatic instantiation: a social precipitate.[135] So although judges may reasonably think of themselves as accountable to the law writ large, observers might equally reasonably ask for more grounding in the pragmatic realities of how laws govern. Precedent and appeals, fit and justification, and so on certainly provide some channels for accountability. But they leave out—because they have no way to take in—many other considerations that are no less important. An interpretation of a regulatory statute has effects on nonparties under the statute's purview; on the regulatory regime effectuating the statute as a whole; on related regimes effectuating related statutes; and on the real world the statute regulates, with all its technical and sociological complexity. These are all central components of a law's practical import—its actual meaning—in the world. But they are elusive for courts, which are not set up to gather or deliberate over this kind of information.[136] This is, in other words, not primarily a moral failing that can be overcome by better intentions or individual actions; it is a structural constraint on how courts operate.

IV. THE RELATIVE ACCOUNTABILITY OF COURTS AND AGENCIES

This Part undertakes the comparison I have been pitching. It compares courts and agencies on a number of axes relevant to accountability: the timing of the institutions' encounter with statutes; the focus of their inquiry and its scope; their interactions with information and input; their articulation of reasons for their conclusions; and the epistemic implications of their staffing. I focus here on the

134. *See* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 173–76 (2000) ("Th[e] cross-referencing of similarly phrased or directed provisions in different statutes is often justified with the . . . fiction that there is one Congress that knows how to achieve a certain goal or capture a certain meaning . . . . This interpretive practice gives judges a Herculean interpretive task of making sense of the law as a whole, and may free them to engage in just the kind of unpredictable and unprincipled ends-oriented interpretation so vehemently criticized by advocates of textualist methods of interpretation.").

135. *See supra* notes 109–12 and surrounding text.

136. As Matthew Steilen has argued, traditional common law judging does have responsive and deliberative aspects. Matthew Steilen, *The Democratic Common Law*, 10 J. JURIS. 437, 437 (2011) ("[M]odern common-law adjudication requires the court to engage the arguments of the parties in determining how the law ought to apply to their case. . . . Legislation under the deliberative theory of democracy is similar to common-law adjudication, in that in both cases, legitimacy depends on a process of exchanging reasons about the appropriate collective course of action."). Still, judicial decisions about regulatory statutes affect the public at large, not just the parties to the litigation, so the interests represented in court deliberation are dramatically narrower than those affected by its outcome.

capacity for accountability rather than on individual choices in any particular instance.[137] Capacity is a kind of scaffolding: it provides supports and channels that facilitate accountability. In any given situation, an institution may not take advantage of the full extent of its capacity.[138] But it is that capacity that tells us how much an institution can accomplish.

In the realm of regulatory statute effectuation, this Part concludes, courts have fewer scaffolds than agencies for broad accountability. Their interaction with a litigated statute is unpredictable and brief. The scope of their inquiry is severely constrained. They cannot take much input from interested publics and have access only to bits and pieces of relevant information. They do not have to provide much justification or explanation for their decisions and need not take input from those affected. And their homogeneous expertise and experience limit their ability to understand and incorporate the broad sweep of relevant issues. All this stands in marked contrast to agencies. It's not that individual judges wish to act unaccountably. It's just that the judicial system provides less support than the agency system does for reasoned, fact-based deliberation that takes a pluralistic range of facts and interests into account and recognizes the provisionality of governance decisions.

A. THE TIMING OF THEIR ENCOUNTERS WITH THE STATUTE

Agency obligations to the statute start from the very beginning: regulatory statutes enacted by Congress and the President address agencies as their primary implementers,[139] giving agencies the responsibility, as well as the authority, to effectuate statutory provisions. That involves decisions about how statutes should work—what they should mean—on the ground. Agencies are also often involved in drafting the statutes they implement, writing statutory language, and consulting with congressional staff about how a potential statutory provision would fit into the agency's regulatory regime.[140] That helps Congress delegate effectively: understanding the agency's capabilities, interpretive traditions, and existing regulatory framework helps ensure the agency can and will carry out the responsibilities a statute gives it. Congresses and Presidents thus make agencies statutes'

137. *See* Bernstein & Rodríguez, *supra* note 77, at 1604 (discussing accountability "scaffolds"). This Part's analysis reflects the normal agency rulemaking context as it had developed in the more than half-century preceding the second Trump Administration. That presidential administration is currently attempting to reshape agency action in ways that would significantly undermine the accountability capacities I discuss here.

138. *See* Anya Bernstein, *Differentiating Deference*, 33 YALE J. ON REG. 1, 29–30 (2016) (distinguishing "*potential competence* or *structural possibility*—the maximum competence that [an institution] could, in principle, achieve" from the "*actual competence*, or *practical capability*, mobilized in any given" situation, to identify "the extent to which an [institution] uses the range of its potential abilities").

139. This address emerges in the text of regulatory statutes, which pervasively instruct agency leaders to implement the statute through standards, rules, and so on. Empirical research indicates that this textual address reflects an underlying reality: that statutory drafters take agencies, rather than courts, as their primary addressees and interlocutors. *See, e.g.*, Bressman & Gluck, *supra* note 2, at 728; Shobe, *supra* note 58, at 459, 524.

140. *See* Shobe, *supra* note 58, at 515; Walker, *supra* note 58, at 1379–80.

"custodians."[141] Agencies have ongoing, long-term responsibility for effectuating and maintaining the whole statutory regime over its entire lifecycle.

Courts confront statutes on a very different timeline. While agencies act under statutory instructions, courts interpret statutes at the behest of litigants.[142] Whether, when, and how private parties decide to litigate about a statute depends on their own considerations: they may decide to challenge an agency interpretation in court right from the get-go,[143] or instead wait until the agency is enforcing the provision.[144] Courts can thus pop into the statutory effectuation process at various points.[145] When a court will encounter a given statutory provision is, in sum, unpredictable.[146] That encounter's duration is also, relatively speaking, quite short: a court does not accompany the statute from gestation on, the way an agency does. Rather, a court meets a statute when introduced by litigants making demands, and then, case over, it moves on. Court encounters with statutes are thus both stochastic and staccato.

Agencies and courts also project their decisions into the future differently. Regulations tend to be self-consciously provisional, with well-known mechanisms for alteration to account for new circumstances or reflect newly relevant interests or priorities.[147] Changes in politically appointed staff are understood to augur changes in policy orientation. Generally, agencies make provisional decisions to address current issues. Judges can be prone to more grandiose self-

141. *See* Jerry L. Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 U. TORONTO L.J. 497, 508 (2005) ("Statutes persist while presidents and congresses change. In this context, the agency becomes the guardian or custodian of the legislative scheme as enacted."); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 7 (2014) ("[B]ecause the agency is the legally designated custodian of the statute (so designated by the enacting Congress), the agency has the superior claim to interpret the statute's application to new problems during periods of congressional quiescence."); Bernstein & Rodríguez, *supra* note 77, at 1645, 1666.

142. Agencies do act at the behest of private parties when they respond to a petition for rulemaking. 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."). But an agency receiving a petition for rulemaking has already gained familiarity with the statute through pre-enactment consultation and likely through post-enactment effectuation. Plus, the most a petition for rulemaking can do is set off the normal rulemaking process.

143. *See* Abbott Lab'ys v. Gardner, 387 U.S. 136, 156 (1967) (holding that a regulated party may sue to challenge a regulation before an agency has sought to enforce it against the party).

144. The Supreme Court recently ruled that the APA's default six-year statute of limitations starts running not when an agency takes a final action, but when a party is affected by it, meaning that new market entrants can continue to challenge old regulations not subject to other statutes of limitation long past the APA's six-year limit. Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 804 (2024) (interpreting 28 U.S.C. § 2401(a)).

145. *See* Bernstein & Rodríguez, *supra* note 77, at 1636 (noting that "agency attorneys" in an interview study "routinely reported considering litigation risk . . . as part of policy development").

146. This unpredictability makes an agency's ability to effectuate a congressional command less predictable as well, since agency action is always at risk of challenge.

147. *See, e.g.*, Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (upholding a regulatory change to a statutory definition that determined the scope of a statutory constraint); Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983) (holding that rescinding a regulation requires the same procedures as promulgating one); Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183, 189 (2017) (finding that most agency regulations modify existing regulations).

assessment. They can claim to "say what the law is,"[148] not in a provisional but in a lasting, perhaps even inherent, way. "Courts," the majority wrote in *Loper Bright*, "understand that . . . statutes . . . do—in fact, must—have a single, best meaning."[149] Indeed, entire strands of legal theory claim this kind of "transcendental certainty" about the true meaning of statutory text.[150] Yet agencies—the institutions that statutes empower to implement statutes—do not share this understanding.[151] They recognize that what a statute means on the ground can change as the circumstances develop.

This difference is particularly striking given the institutions' differing timelines for statutory encounters. Agencies, which are present at and participate in the creation of most statutes, not to mention responsible for statutory implementation ever after, eschew pronouncements of eternal meaning. Courts, encountering statutory provisions fleetingly at the behest of a litigant, sometimes purport to recognize their timeless truths. Of course, sometimes outsiders can see things that familiars miss. Still, this disjunct of temporalities—between each institution's encounter with, and its claims about, the statute—might give us pause. Is the drop-in visitor really better at evaluating a statute's complexities than one who lives with the statute day in and day out?

B. THEIR FOCUS AND SCOPE OF INQUIRY

Litigation usually focuses on particular statutory provisions, often even particular words. When the Communication Act allows the Federal Communications Commission (FCC) to "modify any requirement made by or under the authority of this section," does that include relieving non-dominant telephone companies from the obligation to pre-file their proposed rates, which the section imposes?[152] In *MCI v. AT&T*, Justice Antonin Scalia's majority opinion focused on the word

148. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

149. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 400 (2024).

150. Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 314 (2021); *see, e.g.*, *Loper Bright*, 603 U.S. at 400 ("Courts . . . understand that . . . statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. . . . [E]ven if some judges might . . . consider the statute ambiguous, there is a best reading all the same—'the reading the court would have reached' if no agency were involved.'" (quoting *Chevron*, 467 U.S. at 843)).

151. Research indicates that members of Congress, too, work with statutory purposes and put little stake in specific statutory words having a single meaning. *See, e.g.*, Jesse M. Cross, *The Staffer's Error Doctrine*, 56 HARV. J. ON LEGIS. 83, 100–10 (2019) (showing that members of Congress usually know only the broad purposes that a bill is supposed to serve, rather than specific wordings); Cross & Gluck, *supra* note 32, at 1571–73 (showing that the congressional Office of Law Revision Counsel substantially affects statutory text after it is enacted, exercising "significant editorial discretion" to "alter or even add statutory text" and "to omit those provisions from the Code entirely that it deems not 'general and permanent,' such as most parts of appropriations bills," and finding that, due to the work of this office, "*more than half of the enacted text of the U.S. Code* is now in statutory notes—that is, not visible as inline text in print sources and not readily accessible at all on secondary electronic sources" (footnote omitted)).

152. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 224 (1994); *see* 47 U.S.C. § 203(b).

"modify," and largely reasoned from a discussion of dictionary definitions.[153] Courts' encounters with statutes are often pointillistic in this way, with analytical power trained on a tiny snippet of the text. A court's understanding of the statutory regime that snippet partakes of can thus remain quite limited, even as the resulting interpretation affects the entire statute's functioning. There is no standard way to bring to a court's attention—and certainly no way to make it take into account—the wide-ranging implications the interpretation of some little snippet might have for statutory effectuation writ large.[154]

Courts also have leeway to decide what to focus on: which snippet of text, which statutory context, and which extra-statutory considerations.[155] In *MCI v. AT&T*, the majority preferred to canvass dictionaries, focusing on the meaning that "modify" had in contexts outside the statute.[156] Although courts can cast their nets more broadly if they like, they need take account only of the positions of the litigants before them. Through their framing and arguments, litigants largely determine which snippet of a statute the court will focus on. The court need not consider how its ruling might affect nonparties or other regulations. And anyway, given their limited expertise and information, courts lack the capacity to take account of these considerations in a thorough, predictable, or coherent way. Their job is to evaluate litigant disputes.[157]

This contrasts dramatically with what agencies do. Agencies bear custodial responsibility not just for snippets of text but for the whole statutory mosaic they add up to.[158] When an agency wants to regulate under a statute, people with related briefs get a say: policy ideas go through multiple iterations and layers of

153. The majority opinion decided that most dictionaries define *modify* to mean small, rather than major, changes; it spent three pages deriding *Webster's Third* for listing both meanings. 512 U.S. at 226–29. Of course, it is not unusual for one word to mean different degrees of something—a markedness relation—or even quite divergent things. *Cleave* to your friends and let no one *cleave* you apart; *cut* a tree down before you *cut* it up; and so on. Justice Scalia's complaint thus seems better addressed to the English language than to the dictionary. Justice John Paul Stevens's dissent looked to other parts of the statute, arguing that the FCC's approach effectuated its anti-trust goals by imposing more burdens on the formerly monopolistic, still dominant market participant than on its upstart challengers. 512 U.S. at 242–43 (Stevens, J., dissenting). The majority retorted that "we doubt it makes sense . . . to require filing by the dominant carrier, the firm most likely to be a price leader," *id.* at 233, but did not explain its counterintuitive claim that a dominant market player would decrease its prices when consumers lack easily available alternatives.

154. *See generally* R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983).

155. Anya Bernstein, *Before Interpretation*, 84 U. CHI. L. REV. 567, 569 (2017) ("[J]udicial opinions select text to interpret and . . . situate that text within contexts they create.").

156. *See* 512 U.S. at 226–29; *cf.* Anya Bernstein, *Legal Corpus Linguistics and the Half-Empirical Attitude*, 106 CORNELL L. REV. 1397, 1443 (2021) ("[L]egal language differs from nonlegal language in some fairly obvious ways.").

157. *Cf.* Bernstein & Rodríguez, *supra* note 60, at 40 n.251 (quoting a federal administrator explaining that "there's no principle of statutory construction that we're trying to uphold," going on to say "[i]t's the opposite"—"[w]e're trying to use the statutory principles, the statutory construction to uphold the purpose of [the statute]").

158. *See* Abbe R. Gluck, Anne Joseph O'Connell, & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1800–03 (2015). *See generally* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (2017).

review to evaluate their effects on both private parties and regulatory schemes.[159] That includes consulting with colleagues in the agency component who have different expertise or purview; other components charged with implementing other parts of the statute or related statutory schemes; and other agencies working with other statutes who may be affected.[160] This intra- and inter-agency review allows for input from across the federal government.[161] And then, of course, the policy idea gets input from the public, which can alert the agency of implications it had not noticed.[162] This all makes it more likely that a given rule's impact on the effectuation of the rest of the statute and other statutes is understood and considered.[163]

Agencies must thus account for the full breadth of the statute, fitting their understanding of any individual snippet into a broader statutory regime and fitting that regime into a yet broader regulatory framework. And they must give their accounting to various audiences throughout the development of a policy initiative, not just when handing down a finalized opinion. That provides numerous opportunities for challenge and change.[164] Courts sometimes invoke the Whole Act and Whole Code canons of statutory interpretation,[165] but they need not actually confront any particular parts of the statutory context: they get to choose their focus. Regulatory procedures, in contrast, systematically bring a rule's statutory context and possible reverberations to an agency's attention and encourage, sometimes even force, a reckoning.

C. THE INPUT AND INFORMATION THEY CONSIDER

A similar contrast characterizes the kinds of input and information the two institutions get. When working with statutes, agencies tend to allow for public participation in their deliberations.[166] Agencies making regulations must usually

159. *See* Bernstein & Rodríguez, *supra* note 77, at 1640–41 (describing the iterative process of developing a policy).

160. *See id*.

161. *See generally* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995) (discussing the development of the interagency review process for rulemaking). *See also* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1841 (2013) ("OIRA frequently operates as a conveyer and a convener.").

162. *See infra* Part IV.C.

163. *See* Katharine Jackson, *Administration as Democratic Trustee Representation*, 29 LEGAL THEORY 314, 341 (2023) ("Unlike courts, agencies self-consciously engage in general, all-things-considered policymaking that impacts a broad group of individuals rather than opine, as courts do, on the rights of particular parties.").

164. *See* Bernstein & Rodríguez, *supra* note 77, at 1639, 1646.

165. *See* STEPHEN M. JOHNSON, STATUTORY LAW: A COURSE SOURCE 273, 284 ("The foundational structural canon, *the whole act rule*, provides that statutory language should not be read in isolation, but must be interpreted in the context of all the provisions in the statute and the design of the statute as a whole. . . . The *whole code canon* is an extension of the *whole act rule* and directs courts to interpret text in light of the other statutes in the same code.").

166. *See* Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69, 81–86 (2022) (reviewing a wide range of requirements imposed on agencies through "administrative common law," as part of an argument that the Administrative Procedure Act built on, but exceeded, contemporaneous agency practices to make rulemaking broadly inclusive of the general public).

provide notice of their plans and not only invite and take in, but also respond to, public comments, providing rationales for heeding or rejecting commenters' suggestions or concerns.[167] In each agency, people with expertise relevant to the agency's mandate add their research-based insights to the information gleaned from affected publics.[168] On top of that, agencies have to take into account a rule's potential effects on small businesses,[169] the environment,[170] state and local governments and budgets,[171] and a host of other considerations.[172]

Agencies also take in lots of information that is not mandated. They are subject to frequent lobbying by both private parties and members of Congress, meaning they end up hearing from some interested constituencies whether they want to or not.[173] They get scrutiny from congressional oversight committees and negotiate with congressional appropriators, who have their own opinions about what the agency should do.[174] And, often of their own initiative, agencies engage in a host of public interactions to solicit input on particular rules, broader policy orientations, and the regulated world more generally.[175] Agency action can also often be challenged in court,[176] applying yet another set of views, institutional positions, and procedures to an agency's statutory decisions. In general, a given regulatory proposal gets a lot of different eyes on it, bringing different experience, expertise, institutional affiliation, and sociological location to bear.

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167. 5 U.S.C. § 553 (mandating the procedures for informal rulemaking); *see, e.g.*, Bernstein & Rodríguez, *supra* note 60 (manuscript at 30 n.184) (quoting an interviewee as explaining "[w]e had spreadsheets basically where we categorized the comments by issue, [with] keywords about which stakeholders it was, which provisions of the rule they addressed, which issue they were responding to [and at] twice-weekly meetings with the core team that was drafting the rule, [staff would share] a synopsis of the comments received on [a particular] issue, and they proposed recommendation[s] for my review," and further explaining, "[w]e [would] have these two hour long meetings where we would discuss it and come to tentative resolution[s], speaking [to the Office of Civil Rights and the Office of General Counsel] about the position we wanted to take").

168. *See, e.g.*, Bernstein & Rodríguez, *supra* note 77, at 1640.

169. *See* Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601–12.

170. *See* National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332.

171. Exec. Order No. 13,132, 3 C.F.R. § 206 (2000); Unfunded Mandates Reform Act of 1995 § 2, 2 U.S.C. § 1501.

172. *See* Mark Seidenfeld, A Table of Requirements for Federal Administrative Rulemaking, 27 FLA. STATE U. L. REV. 533, 536–37 (2000).

173. *See* Bernstein & Rodríguez, *supra* note 60 (manuscript at 32–38) (describing lobbying by members of Congress).

174. *See, e.g.*, Lowande & Potter, *supra* note 63, 402–03 (explaining that Congressional committees can obtain "policy concessions" from agencies through procedural maneuvers).

175. *See* Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 816–17 (2021) (canvassing agency outreach for agenda-setting); Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93, 99 (2016) ("[M]any agency rules get started because of informal interactions between regulators and regulated entities."); *see also* William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC'Y 576, 583 (2009) (noting that "the identification and framing of issues" is one of the "most important decisions" in policymaking).

176. *See* 5 U.S.C. § 702 (granting a right to sue to "[a] person suffering legal wrong because of . . . or adversely affected or aggrieved by agency action").

Now of course, such input is skewed and limited in fairly predictable ways. People and entities that are more resourced, connected, and organized provide more input and get more of an audience with agencies, just as with other government institutions.[177] And agencies frequently skirt around the needs of the most vulnerable[178] or even heap more privileges on the already privileged.[179] So the input they receive is not universal or equally distributed, and the way they use that input is not always even-handed.

Nevertheless, agencies are both required to, and often go out of their way to, take account of multiple views and interests, far exceeding the views and interests of parties to litigation. They collect a lot of information and input about the likely effects of various options—effects on regulated parties, on regulatory regimes, and on society as a whole. And because agencies continue managing the statutory regime and taking input after deciding on a policy, they become intimately familiar with the consequences of their actions, often returning to revise those decisions.[180]

Here again, courts hear a different story. They need take input from no one besides the litigants before them, and maybe a couple of clerks and colleagues; the scope of what courts consider is largely set by parties to the lawsuit. The plaintiff, who has decided for its own reasons to pursue its own interests in court, frames the issues. The defendant can raise broader concerns, but, given the structure of civil litigation, must primarily respond to the plaintiff's allegations. Courts may, but need not, accept input from amici filers; even if they accept amicus briefs, they have no duty to respond to or even acknowledge the arguments

177. *See, e.g.*, Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1329–34 (2010); 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, 130–31 (2011) (arguing that results of study of third-party participation in EPA notice and comment rulemaking procedures were "[c]onsistent with dominant participation by industry"); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 234 (2012) (concluding that the U.S. government "correspond[s] more closely to a plutocracy than to a democracy" because of the outsized influence of the wealthy on Congress); BENJAMIN I. PAGE & MARTIN GILENS, DEMOCRACY IN AMERICA?: WHAT HAS GONE WRONG AND WHAT WE CAN DO ABOUT IT 135–37 (2020) (finding that interest group preferences have "substantial impact" on policy outcomes and that "business-oriented groups" have "nearly *twice as much influence*" as non-business "mass-membership groups"); Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 103–04 (1974). *See generally, e.g.*, MATTHEW DESMOND, POVERTY, BY AMERICA (2023) (showing how the tax code and other statutes advantage those with more resources and disadvantage those with fewer); Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797 (1990).

178. *See generally* Jodi L. Short, *In Search of the Public Interest*, 40 YALE J. ON REGUL. 759 (2023).

179. *See* Bijal Shah, *Administrative Subordination*, 91 U. CHI. L. REV. 1603, 1613–14; Daniel A. Farber, *Inequality and Regulation: Designing Rules to Address Race, Poverty, and Environmental Justice*, AMER. J.L. & EQUAL., Aug. 2023, at 3. *See generally* Jim Rossi & Kevin M. Stack, *Representative Rulemaking*, 109 IOWA L. REV. 1 (2023) (proposing mechanisms to increase the representation of affected interested in agency rulemaking, which is typically dominated by regulated industries rather than beneficiaries).

180. *See* Wagner et al., *supra* note 147, at 189 (showing that new rules often adjust existing rules and that "agencies engage in a great deal of informal review and modification of existing rules, often beginning before their effective dates").

amici make.[181] Courts do not, and cannot, perform the kind of outreach agencies do to bring other affected parties into the conversation—no round-tables or listening sessions here. And although courts make factual assertions all the time, they lack the resources to do reliable research into the regulated world and the likely outcomes of their decisions.[182] Judges have access to a highly sheltered set of perspectives, and that can make a difference—sometimes a difference of hundreds of perspectives.

When challenged, meanwhile, courts' interpretations of statutes get reviewed primarily by other courts. The lucky few to make it to the Supreme Court get review only on the issues that the Justices want to address, rather than the cases litigants decide to bring, limiting the scope of Supreme Court review to just a speck of that statutory snippet.[183] Courts, so limited in the information and input they can take in, get little more from judicial review. Individual judges and particular panels may try to gather information about the regulated world beyond that presented in the briefs, but, as discussed above, those efforts are necessarily quite circumscribed and often not very reliable.[184] Courts simply lack capacity for information-gathering and contestation at scale. Sometimes, it seems like they don't even want to try: even when Congress itself intervenes to override court decisions—the rare situation where another institution reviews judges' work—courts often simply ignore that legislative input.[185]

D. THE PUBLIC REASONING THEY PROVIDE

Courts and agencies also differ in how and when they communicate with the publics they govern. Both institutions have an imperative to provide public reasons justifying their decisions. Agencies do that incrementally, in a way that allows for considerable back-and-forth with interested people. A notice of proposed rulemaking (NPRM) reveals both an agency's plan for a regulation and its reasons, giving readers an opportunity to assess and respond to an agency's position.[186] Agencies may also issue a request for information to flesh out a regulatory idea, or float a "trial balloon" by including ideas for future rulemaking in an NPRM.[187] A final rule, in turn, must come with a justification responding to the substance of the comments the agency received.[188] Beyond that, agencies engage in a host of other interactions with regulated publics, some ongoing, some

181. *See* FED. R. APP. P. 29 (explaining federal appellate courts' duties toward amicus curiae).

182. *See* Larsen, *supra* note 19, at 1298–99.

183. *See* Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 852 (2022) (showing dramatic decrease in the Supreme Court's docket and discussing the Court's practice of reviewing only the issues it chooses rather than entire appealed cases).

184. *See* Larsen, *supra* note 19, at 1298–99.

185. *See* Brian J. Broughman & Deborah A. Widiss, *After the Override: An Empirical Analysis of Shadow Precedent*, 46 J. LEGAL STUD. 51, 53, 87 (2017).

186. *See* 5 U.S.C. § 553(b).

187. Bernstein & Rodríguez, *supra* note 60 (manuscript at 29).

188. *See supra* note 172 and accompanying text (detailing some considerations agencies are legally mandated to take into account).

ad hoc.[189] If a rule is challenged in litigation, agencies not only provide the court with evidence of their decisionmaking process but, like any litigant, explain it for a judge's consideration. And if the rule is invalidated, an agency that wants to develop a different rule gets to go through the whole process another time.

Some of these procedures are required by statute, like providing notice of a proposed rulemaking.[190] Some have been effectively imposed by courts, such as the lengthy justifications and responses to public comments that agencies routinely provide when issuing a final rule, as well as the voluminous records they compile for judicial review.[191] And some, like discussions with affected groups in the run-up to rule development, are practices developed at the agency's own prerogative.[192] A variety of factors thus push agencies to provide "credible reasoning" for their decisions and subject that reasoning to evaluation and response by multiple publics.[193]

Courts are supposed to provide reasons for their decisions too,[194] but they face smaller requirements. There is no statute or doctrine laying out just what an opinion must include or what it must respond to, and there are not many avenues for enforcing any such requirement anyway.[195] Aside from appeal, there is no clear path to making the court acknowledge facts it got wrong or address an argument it ignored. Appeal itself takes a litigant willing to appeal an error sufficiently harmful to warrant review.[196] But a litigant may lack motivation or funds to appeal, and a court's error can be important and yet not cause the litigant reviewable harm. Appeals in regulatory statute cases address the injuries litigants choose to raise, not the effects of statutory interpretations on broader publics. To take a recent example, deciding who should pay for federal monitors on fishing vessels affects not just the plaintiffs in *Loper Bright* but all fishing businesses, fish

189. *See* Sant'Ambrogio & Staszewski, *supra* note 175, at 819; Coglianese & Walters, *supra* note 175, at 99; Bernstein & Rodríguez, *supra* note 60 (manuscript at 28) (quoting a federal administrator as describing numerous consultations in which agency personnel "tried to listen to a lot of stakeholders," as not "formal in the sense it was mandated by anything. We just thought it made sense to do").

190. 5 U.S.C. § 553.

191. *See* Matthew C. Stephenson, *A Costly Signaling Theory of Hard Look Judicial Review*, 58 ADMIN. L. REV. 753, 754 (2006) (describing the judicial doctrine of "'hard look' review," which "require[s] that the government provide a satisfactory explanation for its proposed action, often in the form of a written record or statement"). *See generally* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019) (reviewing a range of procedural requirements imposed on agencies by both statutes and courts to argue that they undermine sound policymaking and statute effectuation).

192. *See* Sant'Ambrogio & Staszewski, *supra* note 175, at 819.

193. EDWARD H. STIGLITZ, THE REASONING STATE 8 (2022).

194. *See supra* Part III.

195. Judges retain significant discretion about what to include in an opinion and how much of their own reasoning to disclose. *See* Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 137 (2005) ("[T]here is no pre-existing, fixed concept of adjudication, or of its functions, against which to assess alternative forms.").

196. *See, e.g.*, *id.* at 135 ("[T]rial judges must deeply involve themselves in cases in the pretrial stage, as a result of which they are able to exercise considerable authority in ways that are beyond the reach of appellate scrutiny. At the same time, appellate courts have systematically narrowed the scope of their review over a wide range of issues, leaving considerably greater discretion to trial courts and further diminishing the controls afforded by the appeal mechanism.").

consumers, fish stocks, and, indeed, the ocean's ecology itself.[197] The statute at issue focuses not on paying for monitors, but on limiting the depletion of fish populations. Yet, such broader public interests have no litigant to represent them in the litigation.

The difficulties of ensuring credible reasoning in published judicial opinions are compounded in the lead-up to publication. Courts are not required to—and are usually not supposed to—reveal their plans to the public, much less to respond to public comments.[198] If anything, assumptions skew the other way. Recall when a draft of the Supreme Court's opinion eliminating the constitutional protection for abortion was leaked.[199] Much public commentary, and Chief Justice Roberts's response, revolved around the threat that such leaks posed to the Court's functioning or even its legitimacy.[200] In other contexts, the idea that governing institutions might share their plans with those they govern does not sound terribly farfetched. Yet farfetched—even outrageous—is how many reactions to the leak framed it.

The logic of judicial exceptionalism shields courts from such public interactions as though they were removed from democratic governance.[201] To some

197. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

198. Some have proposed that courts should do just that. Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 967 (2009) (proposing that courts "make draft opinions available to the public for comment before issuing them in final form"); *see also* Edward T. Swaine, *Infrequently Asked Questions*, 17 J. APP. PRAC. & PROCESS 271, 274 (2016) (proposing that courts should "judiciously inform[] parties in advance about particular issues the court might raise at oral argument"). Such proposals have gone largely unheeded. Even the few state courts that do publicize their plans make their thinking available for *litigants*, not for the broader public that may be affected by a public-law litigation outcome. *See generally* Alexander J. Konik, *Tentative Rulings in California Trial Courts: A Natural Experiment*, 47 COLUM. J.L. & SOC. PROBS. 325 (2014) (canvassing history and use of tentative rulings and proposing that courts use and evaluate them for judicial efficiency); Joshua Stein, *Tentative Oral Opinions: Improving Oral Argument Without Spending a Dime*, 14 J. APP. PRAC. & PROCESS 159 (2013) (evaluating tentative rulings given orally in some California courts and proposing their increased use).

199. Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473; *see also* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 301 (2022).

200. *See, e.g.*, Chad Marzen & Michael Conklin, *Information Leaking and the United States Supreme Court*, 37 BYU J. Pub. L. 101, 103 (2023) ("The unprecedented leak of a draft Supreme Court opinion has dealt a major hit to the traditions, confidence, and reputation of the Supreme Court."); Scott Douglas Gerber, *Supreme Court Leak Shows Our Government Institutions Are Broken*, NAT'L L.J. (May 4, 2022), https://www.law.com/nationallawjournal/2022/05/04/supreme-court-leak-shows-our-government-institutions-are-broken (arguing that the leak demonstrated that "the nation's highest court has become a dysfunctional hornet's nest of partisan politics"); Lynne Marie Kohm, *Why the* Dobbs *Draft Release Makes It Tougher to Teach Legal Ethics*, 13 ST. MARY'S J. LEGAL MALPRAC. & ETHICS 319, 323 (2023); Kevin Breuninger, *Supreme Court Says Leaked Abortion Draft Is Authentic; Roberts Orders Investigation into Leak,* CNBC (May 3, 2022, 2:40 PM), https://www.cnbc.com/2022/05/03/supreme-court-says-leaked-abortion-draft-is-authentic-roberts-orders-investigation-into-leak.html [https://perma.cc/2DD4-ZVHY] (quoting Chief Justice Roberts as saying that the leak "was a singular and egregious breach of . . . trust that is an affront to the Court and the community of public servants who work here").

201. *See* Chafetz, *supra* note 93, at 75.

extent, this exceptionalism demonstrates the uncomfortable pairing of public law with private litigation.[202] Claims with wide-ranging implications can, and often must, be litigated as though they were merely private disputes with effects limited to the litigants.[203] That structure creates broad externalities from litigation, affecting both the general public and the elected officials who enact statutes. Litigation between specific parties that ends with a court invalidating a rule, for instance, affects everyone. And it potentially leaves a statutory mandate—enacted by a legislature and entrusted to an agency—lacking effectuation.

E. THEIR STAFFING AND EPISTEMIC MODALITIES

In agencies, the pairing of relatively short-term political appointees with tenure-protected career civil servants creates a productive tension between the political impulses of the moment and long-term institutional stability: agency decisionmaking proceeds through the interplay of these epistemic modalities.[204] Civil servants often stay at their agencies for years, spanning multiple presidential administrations, bringing a long-range view, an institutional memory, a wealth of relevant contacts, and a deep expertise to the process.[205] They also tend to have a grounded sense of what will work and how to effectuate policy plans.[206] Political appointees, serving shorter stints more closely connected to specific presidential administrations, tend to contribute more policy initiatives and stay more attuned to the political valence of various options.[207] While these different modalities sometimes conflict, they are also complementary and interdependent.[208] Policymaking usually incorporates these different epistemic orientations regardless of who plays which role, allowing for the interplay of multiple, diverse opinions and specializations—divisions of epistemic labor—in any given decisionmaking

202. *See generally* Chayes, *supra* note 110 (exploring the tension between the traditional features of litigation and the emerging trend of litigation about public law, and proposing that class action could bridge the two).

203. *See generally* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001); David L. Noll & Luke Norris, *Federal Rules of Private Enforcement*, 108 CORNELL L. REV. 1639 (2023).

204. Bernstein & Rodríguez, *supra* note 77, at 1633 ("[P]oliticals and careers approached their work with somewhat distinct but compatible *modalities* of approaching government action. To many of our interviewees, these modalities were interdependent: both were necessary to make decisions, address problems, and produce policies."); *see also* Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 2 (distinguishing the "formalis[t]" approach that "treat[s] . . . governmental institution[s] . . . as more or less a . . . black box to which the . . . law . . . allocates specific legal powers and functions" from a functionalist approach, which "penetrate[s] the institutional black box and adapt[s] legal doctrine to take account of how these institutions actually function").

205. Bernstein & Rodríguez, *supra* note 77, at 1633–37.

206. *Id.*

207. *Id.* at 1633–34.

208. *Id.* at 1633–37. For discussions of conflict between political appointees and civil servants, see Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1760, 1771–77 (2013); Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT. L. REV. 349 (2019); and Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627, 630 (2019).

process.[209] Agencies' differentiated staffing helps make "contestation . . . a norm within the administrative state."[210]

Agencies also have other divisions of labor. Subject-matter experts keyed to the relevant arena—toxicology, perhaps, or education, or demographics—focus on the specific arenas of social life regulated by the statutes they implement. They must work with and explain their reasoning to policy experts, economists, lawyers, legislative liaisons, and others. Any given policymaking process thus brings together contributors with a variety of expertise—in the technical or scientific aspects of a decision, its environmental or sociological implications, its likely economic effects on different publics, its relation to other policies and initiatives, its legal framework, and so on.[211] While all agencies have staff with some kinds of expertise—everyone has lawyers checking policy against statute to ensure that a given decision is legal and defensible in court—each agency also employs people with specific areas of specialization relevant to the particular statutes the agency implements.[212] Each kind of employee brings something different to the policymaking process: varying backgrounds, knowledge bases, focuses, and professional orientations, interacting through ongoing "mutual accounting."[213] Internal differentiation gives agencies the capacity to consider multiple factual scenarios, perspectives, and time scales.

The courts' tenure-protected employees, in contrast, are those very judges appointed through a political process. Of course, judges work with others, such as their law clerks, to produce their opinions. But law clerks hardly contribute the kind of complementary epistemic modalities we see in agencies. For one thing,

209. Bernstein & Rodríguez, *supra* note 77, at 1631 ("Most of the work that interviewees described involved neither centralized command nor oppositional derailing. Rather, the theme that emerged was interdependence."). The current Trump Administration is attempting to dramatically change the balance between political appointees and career civil servants, in ways that will undermine the accountability capacities I discuss here. *See supra* note 76.

210. Bernstein & Rodríguez, *supra* note 77, at 1632 ("Disagreements were generally presented as part of the way the work got done: integral aspects of administrative decisions built on multiparty input and negotiation rather than on command and control."); *id.* at 1646 ("As one interviewee put it, '[T]here was no . . . single point of failure . . . . It was very hard for any one person to say, "I am making a decision, and this policy process is over."'").

211. *Id.* at 1643–44 ("Determining how to measure dust in coal mines, for instance, might involve scientific choices among measurement techniques; health-policy decisions about danger thresholds; technical decisions about mechanical-device characteristics; industry-practice-based decisions regarding device placement and usage; behavioral considerations based on typical mining practices; economic considerations about safety measure feasibility, and more. Deciding how to reimburse a new invention like bifocal contact lenses might involve considering the extent to which they improve quality of life; the likelihood of medical harm; the expense of a new technology; their fit with Medicare's mission; and how a new reimbursement may affect the rest of the program, among other things. Addressing each aspect of this policy formulation requires a decision of its own, but each decision must be made in the context of other decisions.").

212. *See* Bernstein & Rodríguez, *supra* note 60 (manuscript at Part I.B) (arguing that a sense of mission helps lend coherence to agency practice over time and that workability is a central administrative concern).

213. Bernstein & Rodríguez, *supra* note 77, at 1610; *see also id.* at 1632 ("Agency decision-making structures encourage participants to defend, challenge, and mutually evaluate different positions and interests in an open-ended process with provisional results . . . .").

they do not have meaningfully different expertise than judges; as early-career lawyers, they mostly just have less of it. Clerks have no job protection;[214] their jobs expire in a year, in two at most.[215] The occasional career clerk, who stays longer, is someone "who is able to pleasantly disagree" with the judge.[216] But a career clerk, too, serves at the judge's pleasure.[217] Staff attorneys, who often write memos or even draft opinions on less controversial or more routine cases, may have more tenure protections and do influence some decisionmaking but by definition have little role in more contested, high-profile, or complex cases.[218] Nonpolitically appointed court employees do not generally have the kind of constant, ubiquitous role in judicial decisionmaking that career civil servants have in agency decisionmaking. More importantly, while agency structure gives career civil servants significant influence over the policymaking process, the hierarchical structure of the judiciary renders clerks clearly subordinate.[219] Court decisionmakers are judges, with the expertise and the background that judges have: primarily, and often exclusively, the law.[220] But, as discussed in Part I, judges interpreting regulatory statutes determine how a statute will work on the ground, leading to all sorts of practical effects on the governed population and related regulatory regimes.

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214. *See, e.g.*, Judiciary Accountability Act of 2021, S. 2553, 117th Cong. (constituting a bill, not ultimately enacted, to apply employment discrimination laws to the federal judiciary for the first time).

215. This is not to say that clerks can't be influential. *See generally* TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK (2006).

216. Donald W. Molloy, *Designated Hitters, Pinch Hitters, and Bat Boys: Judges Dealing with Judgment and Inexperience, Career Clerks or Term Clerks*, 82 LAW & CONTEMP. PROBS. 133, 151 (2019).

217. *See id.* at 150–51 (contrasting career clerks with term clerks).

218. *See generally* Donald P. Ubell, *Evolution and Role of Appellate Court Central Staff Attorneys*, 2 COOLEY L. REV. 157 (1984) (providing a history). Delegating particular cases to staff attorneys can have important systemic effects, even disadvantaging entire classes of litigants. *See* Katherine A. Macfarlane, *Shadow Judges: Staff Attorney Adjudication of Prisoner Claims*, 95 OR. L. REV. 97, 118–31 (2016) (arguing that delegating whole classes of claims, such as pro se prisoner litigation, to nonjudicial staff poses both fairness and separation of powers problems).

219. An easy shorthand indication of this hierarchy is that federal judges are not subject to standard employment law provisions. *See* Ally Coll & Dylan Hosmer-Quint, *The Federal Judiciary Has a Harassment Problem—but There's a Fix*, BLOOMBERG L. (Nov. 19, 2021, 4:00 AM), https://news.bloomberglaw.com/us-law-week/the-federal-judiciary-has-a-harassment-problem-but-theres-a-fix ("Federal judicial employees are not protected under Title VII against sexual harassment in the workplace."); Susan Fortney, *The Role of Accountability in Preserving Judicial Independence: Examining the Ethical Infrastructure of the Federal Judicial Workplace*, 87 LAW & CONTEMP. PROBS. 119, 128–29 (2024) (concluding that the federal judiciary's internal ethics rules about sexual harassment lack enforcement mechanisms and remedies).

220. *See, e.g.*, JOANNA SHEPHERD, DEMAND JUST., JOBS, JUDGES, AND JUSTICE: THE RELATIONSHIP BETWEEN PROFESSIONAL DIVERSITY AND JUDICIAL DECISIONS 2–3 (2021), https://demandjustice.org/wp-content/uploads/2021/02/Jobs-Judges-and-Justices_Joanna-Shepherd-report_2021.pdf [https://perma.cc/7EZJ-PU9S] (compiling data showing that the majority of federal judicial nominees under Presidents Obama and Trump had either "a corporate [law]" or a "prosecutorial background," and running statistical analysis to conclude that judges with corporate or prosecutorial backgrounds are "less likely to decide employment cases in favor of claimants" than judges with other backgrounds); AM. BAR ASS'N, 2023 PROFILE OF THE LEGAL PROFESSION 56 (2023), https://www.americanbar.org/content/dam/aba/administrative/news/2023/potlp-2023.pdf (showing that federal judges are "overwhelmingly male (68%) and white (76%)").

A judge can strive to balance different interests, considering both short-term political preferences and long-term institutional needs. But such a judge must decide for herself what the institutional needs are and what the political preferences should be; she is limited by her own knowledge, priorities, and imagination. An appeals court judge may encounter disagreement among the members of a panel, potentially pushing her to consider new perspectives. But she does not face the salutary need to negotiate with multiple others bringing different concerns and different specializations to bear. Even a Supreme Court justice conferences with just a few similarly positioned colleagues: all politically appointed legal professionals with life tenure. The personnel structure of courts deprives them of the differentiation of epistemic labor that can be an important source of accountability in agencies. And judges themselves lack the expertise and specialization to consider the relevant options and realistically evaluate the full effects of their regulatory rulings.[221]

This homogeneity, and relative lack of opportunities for challenge along the way, gives judges a lot of leeway. There are few ways to make courts consider and respond to anyone's arguments or ground their conclusions in publicly available facts and law. The judicial structure allows courts to, for instance, ignore relevant information[222] or even make up standards for nonlegal determinations.[223] Courts can insist on purportedly ancient principles, undermining democratic responsiveness by sticking to idiosyncratic understandings of dead-hand rules.[224] Or they can opt for wild careening in public policy, throwing old precedent overboard.[225] Either way, they mostly account only to each other.

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221. One might argue that judges bring something special to the endeavor: a deep engagement with the law. But agencies, too, have many legal professionals on staff, both as political appointees and as civil servants. Those legal professionals, unlike judges, do not get to make the decisions by themselves.

222. *See, e.g.*, Cass R. Sunstein, Does Evidence Matter? Originalism and the Separation of Powers 3 (Sept. 23, 2000) (unpublished manuscript) (on file with author) ("The clear historical understandings [about the separation of powers emerging from historical research] appear to have had no impact—*none at all*—on originalist judges who have been committed to the nondelegation doctrine and unrestricted removal power. Their commitments seem impervious to the current evidence."); *see also* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 546 (2022) (Sotomayor, J., dissenting) (noting relevant case-related factual history that "[t]he Court ignores").

223. *See* All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507, 550 (N.D. Tex. 2023) (concluding that the conditions imposed on using a drug that has been approved have to match the conditions imposed for testing its safety for approval, but providing no medical reason to support that conclusion).

224. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 22 (2022) (describing constitutional review method of "scrutinizing whether [law] comported with history and tradition"); Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 906 (2023) ("[T]he tradition-entrenching methods the Court employed to decide *Bruen* . . . intensify the gender biases of a constitutional order that for the majority of its existence denied women a voice in lawmaking and restricted women's roles.").

225. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 301–02 (2022) (overturning a half century of settled law to eliminate a previously recognized constitutional right to individual reproductive decisionmaking); Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 127 HARV. L. REV. 728, 760 (2024) (arguing that the *Dobbs* opinion exhibited "myopia" about, *inter alia*, the "processes and institutions that . . . constitut[e] . . . democracy").

This Part has explained that, across a range of parameters, agencies' capacity for democratic accountability far outstrips that of courts. Judges meet the statutes they effectuate only briefly, at litigants' behest. Their inquiry is limited to the statutory provisions—or even phrases—that litigants put before them, even though those phrases form just small parts of large, interacting legislative mandates. Their access to outside views is highly constrained, and their ability to gather and process information is, relatively speaking, minimal. Courts get to decide how much and how thoroughly to explain their decisions to the public and do so only at the very end, when the decision has already been made. And judges work mostly with other legal professionals, limiting their access to differing expertise and experience. All this limits the ability of courts to fully understand the realities that statutes implicate or consider the varied interests they affect. It means that courts' justifications for their decisions often provide too little quite late. And it gives courts opportunities to weigh in so heavily on statutory effectuation that other institutions, and later publics, have a hard time balancing them out.

Agencies, in contrast, have ballast: the statutory regime and the agency mission pull toward continuity, while information gathering and presidential administrations suggest directions for change. Agencies are intimately familiar with their statutes, managing their effectuation across time and their effects across different statutory regimes. They both invite and seek out the views of others and information about the world. Their policies are amenable to input and challenge as they go along, as well as once they have made their decisions, and their processes routinely involve many participants with differing epistemic modalities, expertise, and experience. In short, courts lack many of the accountability channels that permeate agencies. The relevant question is thus not how to rein in agencies, but how to make *courts* more democratically accountable.

V. ENCOURAGING AND ENABLING JUDICIAL ACCOUNTABILITY

This Part briefly considers some ways to nudge courts toward more democratic accountability. The structure of litigation prevents a court from taking account of the full range of interests, facts, and laws that a judicial decision about the meaning of a regulatory statute implicates.[226] How can we square these limitations with the basic normative requirement that institutions of governance act accountably toward those they govern?[227] This conundrum lacks an obvious solution, but there are ways to move in a better direction. Congress could keep courts within tighter bounds by creating a legislative agency dedicated to court oversight—a Judicial Accountability Office. Courts could strive to keep their pronouncements proportional to their capacities by focusing their decisions on specific litigant controversies, minimizing litigation externalities, and yielding to institutions with superior accountability capacities. And scholars could insist on looking

226. *See supra* Parts III and IV.
227. *See supra* Part II.

beyond courts' self-descriptions to their capabilities, further exploring the disequilibrium in institutional capacity that I have pointed out here.

A. CONGRESS

The judiciary has long claimed for itself the authority to "say what the law is,"[228] but Congress can still nudge it toward more accountability. If statutes state clearly that they authorize agencies to interpret and enforce their provisions,[229] it might be more difficult for courts to say with a straight face that Congress did not mean to delegate authority over an issue—even one as "major" as "whether returning bycatch qualifies as a 'discharge' of a 'pollutant' under the [Clean Water] Act."[230] Writing delegation more clearly into statutes would be a salutary move, but its utility may be limited: it would help only for the tiny percentage of statutes enacted starting now but would not affect the vast majority of statutes, which were enacted before the Court veered onto its current path.

Congress might also pass an overarching, stand-alone statute addressing the scope of delegation available in regulatory statutes, which could clarify that Congress *does too* regularly task agencies with regulating issues of major economic and political importance, or even explicitly give interpretive primacy to agencies.[231] That could help distribute authority among government institutions somewhat proportionately to their accountability capacities. At least insofar as the major questions doctrine, for instance, purports to express a presumption about congressional preferences, one might think it amenable to statutory clarification about how Congress actually legislates. Yet, courts have been notoriously selective in taking Congress's input on how to interpret Congress's statutes.[232]

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228. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). *But see* Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125, 130–31 (2021) (explaining that "[t]he Marbury Court was making a straightforward claim about conflict-of-laws principles to be applied to cases already before a court," not the "grandiose claim of judicial supremacy" usually attributed to it, noting *Marbury* explained that "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule" and that "[i]f two laws conflict with each other, the courts must decide on the operation of each" (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)).

229. *See "Congress in a Post-*Chevron *World," supra* note 98, at 6 (law professor making similar proposal before Congress).

230. N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 297 (4th Cir. 2023) (holding that "whether returning bycatch qualifies as a 'discharge' of a 'pollutant' under the [Clean Water] Act is a major question").

231. *See "Congress in a Post-*Chevron *World," supra* note 98, at 6–7 (noting that Congress may pass a general statute instructing courts to defer to reasonable agency interpretations of ambiguous statutory provisions, but that the Court's "[c]laims of congressional empowerment may suddenly disappear if Congress decides to assert itself").

232. *See, e.g.*, Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 FORD. L. REV. 607, 625–27 (2014) (discussing the judiciary's traditional reluctance to accept some interpretive directions in statutes, even while accepting others); Broughman & Widiss, *supra* note 185, at 87 (finding that courts often ignore or skirt congressional overrides of judicial decisions).

Indeed, Congress has already enacted a statute indicating that agencies should address major questions. As Chad Squitieri has argued, the Congressional Review Act, enacted in 1996, "established a presumption that all 'major rules' must be given legal effect unless Congress affirmatively enacts a new law stating" otherwise.[233] But this statutory presumption contradicting the premise of the major questions doctrine has not stopped the Court.[234] If the major questions doctrine expresses a presumption about statutory drafting,[235] aimed at effectuating Congressional decisions, such resistance seems odd. But if the major questions doctrine is instead a means to constrain, rather than obey, Congress, this resistance looks more logical.

Perhaps sensing the limitations of such a one-and-done solution with the current judiciary, Christopher Walker has proposed a more whack-a-mole approach: "a Congressional Review Act (CRA) for the major questions doctrine," under which a "fast-track legislative process would bypass . . . congressional slowdown mechanisms whenever a federal court invalidates an agency rule on major questions doctrine grounds," to allow Congress an opportunity to respond.[236] This option would somewhat empower a congressional coalition of the current moment, "helping to restore Congress's legislative role in the modern administrative state."[237] At the same time, this approach has severe limits: a fast-track legislative process is still a legislative process, so it would only really work at a time of united government and only for issues that a governing coalition decides to act on; it would do little for the Congresses of the past, which enacted most of our laws but cannot step in to clarify.[238] And that's just for major questions. The nondelegation doctrine stands in the wings ready to strike, constraining Congress's power to legislate in the first place.

A Congressional push for more judicial accountability, then, may involve more than a statute telling judges to cut it out. Congress could alter the reach of court power itself, enacting what Ryan Doerfler and Samuel Moyn have called "disempowering reforms" that "take power away from the Court and redirect it to

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233. Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 491 (2021); *see* 5 U.S.C §§ 801–808.

234. Squitieri, *supra* note 233, at 491 ("In short, where the major questions doctrine presumes that Congress wishes to answer major questions itself, the CRA exhibits a congressional presumption that agencies will answer major questions through major rules.").

235. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 723 (2022) ("We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." (quoting U.S. Telecomm. Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc))).

236. Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J.L. & PUB. POL'Y 773, 776 (2022) ("The successful passage of a CRA-like joint resolution would amend the agency's governing statute to authorize expressly the regulatory power that the agency had claimed in the judicially invalidated rule.").

237. *Id.* Of course, one could argue that Congress has consistently played its legislative role by enacting broadly worded statutes delegating to agencies authority over major questions.

238. *See* Buzbee, *supra* note 134, at 179 ("Congress enacts laws in different periods, to be implemented by different agencies and administrations, against a different backdrop of case law, statutes, and agency regulation.").

the political branches instead."[239] That might include limiting court jurisdiction,[240] imposing supermajority requirements,[241] or constraining the Supreme Court's ability to set its own agenda.[242] Part of the problem my comparison has underlined, after all, is that the judiciary's political power outstrips its capacity for accountability.[243]

Congress could also beef up its oversight of the judiciary, using agency oversight as a model. For instance, the Government Accountability Office (GAO) tracks agency action, investigates potential administrative problems, and issues reports and recommendations regarding agencies to Congress.[244] This oversight can bring problems to Congress's attention and cast reputation-affecting light on internal agency practices. Jesse Cross and Abbe Gluck report that "GAO staff, in interviews, repeatedly volunteered that the office's primary role continues to be safeguarding 'Congress's constitutional prerogatives.'"[245] Congress could take a similar approach to courts, pushing them toward accountability with a *Judicial* Accountability Office (JAO) to report on federal court decisions affecting regulatory statute effectuation.[246] A JAO could safeguard Congress's constitutional

239. Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1704 (2021). Doerfler and Moyn contrast disempowering reforms with "personnel reforms," which target the political make-up and proclivities of the judiciary through "aggressive proposals like court-packing" and less aggressive ones like "partisan balance requirements or panel systems" to ameliorate the effects of the historically uneven distribution of judicial appointments. *Id.* "[P]ersonnel reforms take for granted that the Supreme Court wields tremendous policymaking authority," and seek to change its membership—rather than to adjust the scope of its power. *Id.* at 1721; *see also* Balkin, *supra* note 69, at 229–36 ("As [a political] regime proceeds, the dominant party is able to appoint a larger share of judges and Justices . . . [and] judicial review becomes increasingly useful to politicians in the dominant party . . . .").

240. *See* Doerfler & Moyn, *supra* note 239, at 1726. *See generally* Laura Dolbow, *Barring Judicial Review*, 77 VAND. L. REV. 307 (2024) (proposing that alternative oversight mechanisms can reasonably substitute for judicial review of agency action).

241. *See, e.g.*, Doerfler & Moyn, *supra* note 239, at 1727; Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 894 (2003); Anya Bernstein, *Democratizing Interpretation*, 60 WM. & MARY L. REV. 435, 505 (2018).

242. *See, e.g.*, Johnson, *supra* note 183, at 802 ("[T]he Court would be on firmer [legal] ground if it returned to a more traditional role of deciding entire cases. This shift would likely curb the Justices' role in setting national policy and hopefully de-escalate fights over the Court."); *see supra* notes 53–63 (collecting sources); Watts, *supra* note 117, at 2.

243. The court reform proposals in circulation largely comport with this Article in assuming that courts, like other institutions of governance, should further republican democratic values; but they often take Congress or the President as models in ways that elide agencies' central role in effectuating statutes. *See* Doerfler & Moyn, *supra* note 239, at 1720–28 (discussing proposals). As I have argued, there are good reasons to group courts and agencies together: they are law-effectuators that feel electoral effects in only attenuated ways, unlike congresses and presidents, which are law-enactors subject to direct electoral influence. That grouping helps illuminate different proposals' likely effects. For instance, constraining courts' interpretive jurisdiction over regulatory statutes may have more of an agency-empowering effect than constraining courts' ability to invalidate a statute altogether.

244. *See* Cross & Gluck, *supra* note 32, at 1588–94.

245. *Id.* at 1594.

246. Currently, judicial oversight offices are generally housed within the judiciary itself—another instantiation of courts policing themselves. *See, e.g.*, *Administrative Oversight and Accountability*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/judicial-administration/administrative-oversight-and-accountability [https://perma.cc/BEF2-KJK4] (last visited Mar. 7, 2025).

prerogatives with respect to the judiciary, which can impede the effectuation of Congressional legislation by invalidating agency statutory implementation.

The JAO, perhaps housed in the GAO itself, could similarly issue reports to make doctrinal trends more accessible to members of Congress, clarifying the context in which congressional legislation and agency implementation function.[247] The JAO could conduct retrospective reviews, evaluating the actual effects of regulatory rulings on agencies' statutory implementation. Courts have few incentives and less capacity to assess how litigation will affect the broader regulatory system or real-world environment—not least because judicial rulings have downstream, time-lapsed effects that courts have no way to track. A JAO could do that work. It could evaluate the accuracy of an opinion's prediction about its own effects. It could investigate how a statutory provision is implemented after a relevant regulation is invalidated and highlight if a court ruling has left Congress's command without effectuation.[248] In general, a JAO could assess how a court ruling reverberates through the regulatory framework over varying durations—something a court itself is not in a position to figure out.

Recognizing that court rulings often have important policy consequences even if courts lack policymaking capacities, the JAO could assess patterns in courts' policy effects, treating courts like the policy-effectuators they are. It could publish its reports and findings for the public, Congress, and federal judicial chambers.[249] The JAO could hold meetings to present major findings, highlight the effects of court rulings on statutory effectuation in various topic areas, and elucidate how such effects are best identified, assessed, and anticipated. These meetings could be open to the judiciary or to the public at large. Recordings could be distributed to judicial chambers, and the JAO could publish judicial attendee lists to pressure judges to take their own systemic effects seriously.[250] JAO reports might provide material for congressional queries to courts, encouraging courts to develop standard ways to incorporate JAO findings into their decisionmaking.

This body of work could eventually coalesce into best practices suggestions for courts evaluating regulatory statutes. These might, for instance, canvas indicia of a pluralistic, deliberative agency policymaking for courts to look for. For instance, policies that had the hallmarks of an inclusive process that solicited

247. *See* Ryan J. Owens, Justin Wedeking & Patrick C. Wohlfarth, *How the Supreme Court Alters Opinion Language to Evade Congressional Review*, 1 J.L. & CTS. 35, 36 (2013) ("[W]hen theoretically constrained by Congress, justices will obfuscate the language of the majority opinion as a means to minimize the likelihood that Congress will pursue retaliatory measures.").

248. *See* Bernstein & Rodríguez, *supra* note 60 (manuscript at 39) ("A bad litigation result could hang over an agency for a long time, affecting the way participants made policy decisions down the line—post-traumatic effects that could linger even when participants were skeptical of the court's results.").

249. *See, e.g.*, Karson Thompson, *Luddites No Longer: Adopting the Technology Tutorial at the Supreme Court*, 91 TEX. L. REV. 199, 200 (2012) (arguing that the Court should institute the "technology tutorial" on the model "used in patent litigation to educate generalist judges about complex technologies"). *Cf.* Cross & Gluck, *supra* note 32, at 2593 (discussing GAO reports).

250. *Cf.* Civil Justice Reform Act of 1990, 28 U.S.C. § 476 (requiring the United States Courts Administrative Office to prepare a semiannual report showing, by district and magistrate judge, all motions and bench trials pending more than six months).

input from affected parties and considered a full range of interests might deserve greater judicial deference. Best practices guidance could also describe legislative practices at different historical moments to illuminate likely congressional expectations about statutory interpretation.[251] This information could inform judges who seek, or claim, to be the legislature's faithful agents. If the JAO does enough for long enough, one can imagine litigants referring to its findings to support their contentions about the likely effects of a particular court ruling. Eventually, Congress might incorporate JAO findings into legislation, perhaps by making JAO findings relevant to statutory interpretation or using them to help fashion court jurisdiction or funding. A JAO would make realistic assessments of litigation's broader effects a public focus of attention.[252] It could show gaps and failings in judicial claims about statutes and perhaps even articulate congressional instructions about interpreting congressional enactments. Making judges consistently, unavoidably aware of their own role in policy effectuation would go some way toward encouraging their accountability. That would support Congress's position in the separation of powers, enhancing its ability to check the judiciary.[253] A JAO could help courts make better decisions about statutes and help Congress make better decisions about courts. And it could institutionalize the implication this Article has been pressing: that courts do not, and should not, have a monopoly on determining how statutes should work.

B. JUDGES

Come back to the anti-agency rhetoric that started this Article.[254] That rhetoric implies that agencies disrupt government institutions' balance of power, taking over the prerogatives of other branches: a kind of *interbranch imbalance*.[255] Judge Rao's complaint that a "single bureaucrat" has more "authority" than a "member of Congress," for instance, presents agencies as usurping the power of the legislature.[256] Judge Jordan, similarly, has decried agency deference doctrines

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251. *See, e.g.*, Cross, *supra* note 151, at 89–110 (explaining that Congress went through periods of delegating statute-drafting to congressional committees, and then to agencies, before arriving at the current model of statute-drafting by staffers); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 814 (2014) ("[T]he process by which a statute was drafted should . . . affect how the statute is interpreted.").

252. Currently, such investigation is mostly undertaken by scholars. *See, e.g.*, Elissa Gentry & W. Kip Viscusi, *The Misapplication of the Major Questions Doctrine to Emerging Risks*, 61 HOUS. L. REV. 469, 472–73 (2023) (using empirical data to criticize the Supreme Court for using "its own inexpert conjectures" instead of "considerable agency fact-finding"). Even when incisive and revealing, such scholarship lacks the official imprimatur of a legislative agency. And it depends on the individual interests and research capacities of private scholars, where a Judicial Accountability Office would establish a permanent research body with a relevant brief.

253. *See generally* Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 TEX. L. REV. 89, 95 (2022) ("[T]he *capacity* of the branches to mutually check one another—whether or not it is exercised in a given case—[forms] the entire theoretical and formal basis of the Constitution's separation of powers.").

254. *See supra* notes 5–12 and accompanying text.

255. *See, e.g.*, Gundy v. United States, 588 U.S. 128, 177–78 (2019) (Gorsuch, J., dissenting); Seila L. LLC v. CFPB, 591 U.S. 197 (2020).

256. Rao, *supra* note 11, at 228.

for requiring "judges to ignore their own best judgment on how to construe a statute."[257] This framing obfuscates separation of powers realities. A single member of Congress, after all, has no legal authority,[258] and Judge Rao does not suggest that any bureaucrat has more authority than Congress as a body.[259] Her description thus elides the institutions' actual powers. It also, oddly, ignores the fact that agencies exist because Congresses and Presidents—enacting statutes in that old-time constitutional way—have created them,[260] in a tradition of delegation dating back to the founding and arguably presumed by the Constitution itself.[261] Regulatory statutes give agencies, not courts, the responsibility to effectuate their mandates.[262] So there may be good reasons to prefer agency conclusions over some judge's "own best judgment."[263] Congress sure seems to.

Claims of *unilateral* decisionmaking also animate such accusations. Words like "fiat" and "edict" suggest top-down, autocratic decisions imposed on people with no opportunity to influence the result.[264] Chief Justice Roberts's worry about the "danger posed by the growing power of the administrative state"[265] is tied up with his "concern that it may slip from the Executive's control, and thus from that of the people."[266] The implication is that administrative decisions do not, and need not, take into account the interests they affect or allow the people they govern to participate in the decisionmaking process. This rhetoric presents agencies as *unconstrained*, acting on "unbounded policy choices" to make whatever rules they want.[267] On this view, courts should stand up to agencies to protect

257. Egan v. Del. River Port Auth., 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring).

258. Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 955–58 (1983) (holding that congressional authority exists only when the whole body acts in those legislative ways specified in Article I of the Constitution).

259. *See, e.g.*, Congressional Review Act of 1996, 5 U.S.C. §§ 801–808.

260. *See Seila L.*, 591 U.S. at 298 (Kagan, J., dissenting) ("The Constitution . . . . instructs Congress, not this Court, to decide on agency design."); *see also* Michael Coenen, *The Shaky Structural Foundations of the New Nondelegation Doctrine*, 27 PA. J. CONST. L. (forthcoming 2025) (on file with author).

261. *See supra* Part II.A. *See, e.g.*, Parrillo, *supra* note 19, at 1301; Mortenson & Bagley, *supra* note 19, at 280; Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to Critics*, 122 COLUM. L. REV. 2323, 2332 (2022) ("[T]he Founders didn't share even an inchoate affirmative belief that congressional delegations of legislative authority were limited by identifiable principles, categories, or impulses."); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1522 (2021) (arguing that "there is no direct support for the proposition that there was no nondelegation doctrine at the Founding"—an argument consistent with the claim that the founding generation simply did not think in these terms).

262. *See, e.g.*, Bressman & Gluck, *supra* note 2, at 774 (reporting a representative legislative drafter comment that "[t]he last thing we want is for courts to decide what your law means").

263. Egan v. Del. River Port Auth., 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring).

264. For instance, the Merriam-Webster dictionary defines fiat as "an authoritative or arbitrary order," and edict as "order, command." *Fiat*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/fiat [https://perma.cc/KJ5F-FKR4]; *Edict*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/edict [https://perma.cc/9E2C-NC3T].

265. City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

266. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010).

267. Gundy v. United States, 588 U.S. 128, 152 (2019) (Gorsuch, J., dissenting).

"individual liberty" and "preclude the exercise of arbitrary power."[268] If courts don't, who can?

Such assertions simply ignore the numerous constraints agencies work under,[269] instead imagining the administrative state as a kind of very large absolutist monarch. And they pretend that society's primary conflict rages between private parties and an overbearing government intent on restraining their—undifferentiated, equally shared—liberty. That vision, in turn, ignores that private interests often conflict, allowing agency action to protect individual liberty by constraining private parties' exercise of arbitrary power over other private parties.[270] This rhetoric does not, then, reflect the actual functioning of administrative agencies; it just throws doubt on their legitimacy.

The historical—and ideological—trajectory of such expressions is fairly clear. Casting doubt on the legitimacy of agencies goes part and parcel with the conservative legal movement, as it grew from the Reagan Revolution.[271] President Reagan promised to loosen government constraints on industries' externalities—a project often (imprecisely) labeled *deregulation*[272]—and derided the idea that government could serve a public interest.[273] The Reagan White House worked

268. *Egan*, 851 F.3d at 280 (Jordan, J., concurring) (citations omitted).

269. *See supra* Part IV.

270. *See* Bernstein & Staszewski, *supra* note 19, at 1769 ("Government can . . . enhance freedom by limiting private domination."); K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 81–83, 116–38 (2017) (proposing that "[a]nti-domination [a]s [r]egulatory [s]trategy" can ameliorate the modern corporation's potential "to arbitrarily dominate workers"); Kate Jackson, *All the Sovereign's Agents: The Constitutional Credentials of Administration*, 30 WM. & MARY BILL RTS. J. 777, 785 (2022) ("Many objections to agency power presume antiquated conceptions of sovereignty and rights. They juxtapose the will of a powerful organ-body sovereign against a governed mass of subjects who hold an array of pre-political liberties that require judicial protection. . . . Fortunately, this rubric is wrong."); *id.* at 786–87 (describing the common assumption of an undifferentiated populace as a "sovereign-subject hat trick: the ruled become the ruler, the democratic 'people,' understood as a body, a 'unitary macro-subject,' come to occupy what was once occupied by the body of the king," and noting that, for instance for the Nazi philosopher Carl "Schmitt, it was impossible to imagine a leader speaking with the voice of the people unless the people themselves first sang in perfect harmony").

271. *See generally* TELES, *supra* note 80.

272. As Glen Staszewski and I have argued elsewhere, what is commonly called deregulation "may be more productively conceived as seeking particular distributions, rather than a simple diminution, of government restraints." Bernstein & Staszewski, *supra* note 19, at 1814. Such redistribution becomes more evident when we remember that "the conservative legal movement has not called for the lessening of government regulation on individual liberty" across the board; for "controlled substances, immigration, [and] reproductive rights," for instance, it has called for more regulation instead, while in other contexts it "sought to decrease some constraints on private parties while increasing others." *Id.*

273. *See, e.g.*, President Ronald Reagan, The President's News Conference (Aug. 12, 1986) ("[T]he nine most terrifying words in the English language are: I'm from the Government, and I'm here to help.") (transcript available at https://www.reaganlibrary.gov/archives/speech/presidents-news-conference-23 [https://perma.cc/3Z7D-MJGX]); President Ronald Reagan, First Inaugural Address of Ronald Reagan, *reprinted in* THE AVALON PROJECT, https://avalon.law.yale.edu/20th_century/reagan1.asp [https://perma.cc/4PAN-YVW6]("[G]overnment is not the solution to our problem; government is the problem."); Paul Baumgardner, *Originalism and the Academy in Exile*, 37 LAW & HIST. REV. 787, 797–800, 802–06 (2019); Teles, *supra* note 80, 61–66; Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981–2000*, 89 DENV. U. L. REV. 197, 201–13 (2011); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 548 (2006). As Neil Fligstein notes, this

with civil society groups like the Federalist Society to lend that project legal justification, fend off normative objections, and build pipelines of like-minded legal practitioners to carry on the work.[274] These endeavors have deeply influenced legal discourse and, in particular, the federal judiciary.[275] In this sense, some judges casting aspersions on the administrative state comes as no surprise: expressing such views is part of how these folks got to be judges in the first place.[276]

Once we compare the institutions' relative capacities, though, judicial complaints about agency accountability begin to sound less like analysis and more like projection. One way to support judicial accountability, then, would be for judges to know themselves—at least a little better. Judges could recognize that they have little opportunity or capacity to see the full breadth of the regulatory issues that any litigated statutory speck implicates. They could acknowledge their limited means for subjecting their conclusions to challenge from either subject-matter experts or the people whom court rulings affect, and they could recognize the dangers of courts' ability to resist or simply ignore such people's interests and views. They could abjure the pretense that courts somehow stand above government. Instead, they could recognize that courts are just one government institution among several, each with their own roles and characteristics. That recognition might help judges stay cognizant of agencies' greater opportunities for accountable work with statutes. Judges could acknowledge the constraints agencies work under, the publics and institutions they negotiate among, and the opportunities for contestation and change they face. Recognizing their own lower accountability capacity, judges should aim for what Jud Mathews has called a "minimally democratic" approach: a "low intensity, reasonableness review" that plays to their abilities.[277]

Unfortunately, the Supreme Court has been pushing hard in the opposite direction, shifting decisional power about regulatory statutes away from agencies and toward judges. The new, expanded "major questions" doctrine allows courts to ignore a statutory grant of authority. A court can demand to see specific statutory

image also dominates much writing in economics. *See, e.g.*, NEIL FLIGSTEIN, THE ARCHITECTURE OF MARKETS: AN ECONOMIC SOCIOLOGY OF TWENTY-FIRST CENTURY CAPITALIST SOCIETIES 6 (2001) ("The frequently invoked opposition between governments and market actors, in which governments are viewed as intrusive and inefficient, and firms as efficient wealth producers, is simply wrong. Firms rely on governments and citizens for making markets.").

274. *See* Bernstein & Staszewski, *supra* note 19, at 1809–16 (collecting citations and reviewing how the conservative legal movement presented its opposition to government constraints on corporate externalities as an opposition to bureaucracy or a concern with liberty).

275. *See* Daniel E. Walters, *Four Futures of* Chevron *Deference*, 31 GEO. MASON L. REV. 635, 639–40 (2024) (explaining the central role of administrative law and the judiciary in the Reaganite deregulatory program).

276. *See* Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (April 17, 2017) (available at http://becketnewsite.s3.amazonaws.com/New-Yorker-The-Conservative-Pipeline-to-the-Supreme-Court.pdf [https://perma.cc/H6XB-BSWC]) (describing the "extraordinary influence" of the Federalist Society on recent judicial appointments).

277. Mathews, *supra* note 81, at 643; *see also id.* at 611 ("More judicial scrutiny is triggered by circumstances that suggest a high risk of domination . . . .").

authorization for some agency action the court calls major, even when the Congress that enacted the statute, almost always now many years gone, could not have clairvoyantly predicted either the specific situation the agency faces or this newfangled clear statement requirement the court now chooses to impose.[278] This makes courts powerful new arbiters in the conversation between Congress and agencies.

Moving in from the other side, members of the Court have resuscitated the nondelegation doctrine to suggest a broad, amorphous damper on congressional power.[279] Nondelegation works with major questions like a "pincer": where major questions limits what agencies can do with the authorities Congress grants them, nondelegation limits the authorities Congress can grant in the first place.[280] And the Court has invalidated the decades-old *Chevron* doctrine instructing courts to accept agencies' reasonable interpretations of open-ended statutory provisions.[281] Instead, the Court instructs judges to go ahead and declare what a statutory snippet means in the narrow confines of litigant-structured cases; let the agency deal with the fallout for the rest of the statutory regime. As Glen Staszewski and I have written, the Court's current regulatory jurisprudence moves policy decisionmaking from more to less contestatory nodes of government.[282] Again and again, the Court inserts judges into the heart of the conversation between Congress and agencies. Though sometimes presented as protecting congressional authority, these doctrines actually limit how much Congress's directives can be effectuated—effectuation for which Congress depends on agencies.

This all makes sense if you want to decrease the extent to which the federal government regulates the nation, as Justice Gorsuch, for instance, has called for.[283]

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278. *See supra* note 19 (collecting sources).

279. *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 86 (2015) (Thomas, J., concurring) (arguing that Congress's delegation of "*any* degree of policy judgment" to nonlegislators is impermissible "when it comes to establishing generally applicable rules governing private conduct"); Gundy v. United States, 588 U.S. 128, 157–59, 161 (2019) (Gorsuch, J., dissenting) (claiming that Congress must resolve the important questions of policy for itself when it seeks to regulate private conduct, and that Congress may only delegate authority to agencies "to fill up the details" of a statutory scheme, find facts, or perform certain "non-legislative responsibilities" (quoting Pan. Refin. Co. v. Ryan, 293 U.S. 388, 426 (1935))).

280. Bernstein & Staszewski, *supra* note 19, at 1805. As Justice Gorsuch has explained, if a statute purports to endow an agency with authority that a court finds overly major, "that law would likely constitute an unconstitutional delegation of legislative authority" under the newly emerging nondelegation doctrine. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. (*NFIB*), 595 U.S. 109, 126 (2022) (Gorsuch, J., concurring). That is, "[h]eads regulation loses, tails anti-regulation wins. Or, as Justice Gorsuch puts it, '[w]hichever the doctrine, the point is the same.'" Bernstein & Staszewski, *supra* note 19, at 1805 (quoting *NFIB*, 595 U.S. at 125 (Gorsuch, J., concurring)).

281. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 396, 412–13 (2024).

282. Bernstein & Staszewski, *supra* note 19, at 1777.

283. *See generally* NEIL GORSUCH & JANIE NITZE, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW (2024) (arguing that there is too much federal law).

Why, though, should judges get to determine the extent of federal governance?[284] It is, after all, Congress, not the judiciary, that is tasked with enacting legislation "necessary and proper" to implement government powers.[285] Nevertheless, that is the role the Supreme Court has been staking. And the hierarchical nature of the judicial system means that lower courts will—indeed, in some sense should—follow suit. Making courts accountable seems to be somebody else's job.

C. SCHOLARSHIP

Scholars, though less directly implicated, can also encourage a shift in accountability practices. Legal scholarship sometimes operates in a juricentric rut: we take courts as our main object of attention and take the judicial position as our main analytic perspective. That is, to a significant extent, we tend to focus on court rulings and consider agency action from the perspective of judicial review. It doesn't have to be that way. Getting clearer on the relative distribution of democratic accountability should push scholarship to move its gaze around a little more. More can follow the lead of intrepid scholars who have recognized the courts as regulators and proposed "lessons from administrative law" and agency practice,[286] such as instituting a notice-and-comment-style process for judicial opinions or judicial rulemaking; requiring more process for high-stakes cases; and other innovative applications of administrative principles to judicial regulation.[287] In general, such work suggests that agencies can serve as good models for court reform. This Article, in turn, has pointed to some key axes for such comparison and innovation.

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284. As a private citizen author, for instance, Mr. Gorsuch can express whatever opinion he likes about the quantity of laws regulating American society. But as *Justice* Gorsuch, he lacks authority to act on his stated views, which conflict with the practices of generations of elected representatives. Yet, it is not hard to imagine the conviction that duly enacted law is inherently illegitimate because of its quantity nonetheless informing a judge's approach to effectuating that law. *See, e.g.*, Chafetz, *supra* note 228, at 127–28 (arguing that the Roberts Court expresses a "judicial disdain for Congress and its representative role," instead pursuing "an architectonic project of judicial empowerment at the legislature's expense"); Bowie & Renan, *supra* note 98, at 2028 ("[T]he separation of powers is a contingent political practice reflecting the policy needs, governance ideas, and political struggles of the moment. This fundamentally unsettled constitutional framework is not a problem for constitutional law to solve. It is a central normative feature of American constitutional government.").

285. U.S. CONST. art. I, § 8, cl. 18.

286. Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1190 (2012).

287. *See id.* at 1190, 1193 (analogizing the Supreme Court's administration of civil procedure rules to agency administration of statutes, and arguing that the Court should primarily utilize the notice-and-comment process of the Civil Rules Advisory Committee rather than ad hoc adjudication); Abramowicz & Colby, *supra* note 198, at 967; *see also* Glen Staszewski, *Interpretation in the States*, 2022 WIS. L. REV. 1275, 1277 (2022) (arguing that, in the context of litigation over the meaning of enacted state ballot initiatives, the "original public meaning on the precise question at issue is often ambiguous," making "litigation . . . a continuation of the lawmaking process"); David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 407 (2019) ("[Multi-district litigation] is not simply a supersized version of the litigation that takes place every day in federal court, but a form of public administration that blends tools of ordinary litigation with tools of institutional design more commonly found in programs such as Social Security."). *See generally* Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71 (2020); Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1 (2011); Vermeule, *supra* note 122.

More broadly, scholars can resist the tendency to take judges'—and litigation's—word for what is important. Just like courts, legal scholarship sometimes seems to stand at the mercy of private litigant decisions. But the things that parties have chosen to litigate are not necessarily the most important issues in a regulatory regime. And because courts tend to know about, and write about, the law rather than the things the law regulates, scholars following courts can be beguiled by courts' application of legal principles to legal issues. We end up focused on what judges think about agencies and miss what agencies think about the world they govern. But democracies reveal themselves as much through the ongoing effectuation of democratic decisions as through stochastic, staccato litigation.[288] Scholarship on democratic accountability would do well to decenter courts, and litigation, from its understanding of what the law is.

CONCLUSION

When deciding what regulatory statutes mean and, therefore, how they should be effectuated, courts—as institutions of governance—owe accountability to the statutory regimes that representative democracy produces. In this context, judicial work overlaps with that of agencies. This Article compares these institutions' capacities for democratic accountability in effectuating regulatory statutes. This comparison is especially important now, when judicial claims about agencies' lack of accountability serve to justify doctrines transferring authorities that statutes give agencies over to courts instead.

Neither institution is accountable in an electoral sense. But elections neither enforce nor enable most of what makes accountability normatively appealing in a democracy: a reasoned account of government decisions that takes complex realities and pluralistic views into account and counts on change over time.[289] Evaluating these institutions' capacities for democratic accountability thus requires going beyond their unelected status and analyzing their decisionmaking structures. Courts' main accountability-supporting features—reason-giving, precedent and appellate review, and an internal point of view—turn out to be more limited than those of agencies across a range of axes: temporality, scope, information, communication, and epistemic modality. To combat that imbalance, Congress should give courts more oversight, judges should constrain themselves, and scholars should recognize the centrality of agencies to democratic governance. In short, agencies have greater accountability capacities than do courts. We should all act accordingly.

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288. *See, e.g.*, Janina Boughey, *Administrative Law: The Next Frontier for Comparative Law*, 62 INT'L & COMP. L.Q. 55, 62 (2013); Tom Ginsburg, *Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law*, *in* COMPARATIVE ADMINISTRATIVE LAW 117, 117 (Susan Rose-Ackerman & Peter Lindseth eds., 2010).

289. *See* Andrei Marmor, *Authority, Legitimacy & Accountability*, in ENGAGING RAZ: THEMES IN NORMATIVE PHILOSOPHY (Andrei Marmor et al. eds., forthcoming 2024) (manuscript at 15) (on file with author) ("Electoral procedures are designed to accomplish accountability; they are means to an end, and the end is the appropriate kind of accountability of an authority that is morally called for.").