

Assessing Visions of Democracy in Regulatory Policymaking

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ABSTRACT

Motivated in part by Congress's failure to legislate, presidents in recent years seem to have turned even more to the regulatory process to make major policy. It is perhaps no coincidence that the field of administrative law has similarly seen a resurgence of scholarship extolling the virtues of democratic accountability in the modern administrative state. Some scholars have even argued that bureaucracy is as much as if not more democratically legitimate than Congress, either in the aggregative or deliberative sense, or both.

In our contribution to this Ensuring Democratic Accountability in the Administrative State Symposium, we make a modest intervention to suggest that visions of democracy in administrative law need to better take into account that presidents pursue major policymaking through modes of regulatory action beyond notice-and-comment rulemaking. They include interim final rulemaking, subregulatory agency guidance, executive orders and other presidential directives, formal agency adjudication, and informal adjudication and orders. These other modes of regulatory policymaking are far less democratically accountable, in terms of leveraging agency and public expertise and engaging stakeholders and issues in a public and transparent manner. As such, we argue that presidents should embrace notice-and-comment rulemaking as the default regulatory mode when it comes to making major policies through administrative action. We conclude, moreover, that notice-and-comment rulemaking, even when done well, is no panacea for democratic accountability. Congress needs to play its proper role in modern governance when it comes to questions of deep economic, moral, and political significance.

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** Professor of Law, University of Michigan Law School. Thanks are due to Joe Hillman and Neena Menon for terrific research assistance. The authors received funding from the Pacific Legal Foundation to prepare and present a draft of this Essay at the *Georgetown Journal of Law and Public Policy's* Ensuring Democratic Accountability in the Administrative State Symposium. © 2023, Shoba Sivaprasad Wadhia & Christopher J. Walker.

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INTRODUCTION

In November 2014, Saturday Night Live (SNL) aired a clever take on the classic Schoolhouse Rock music video *I'm Just a Bill*.¹ Entitled *How a Bill Does Not Become a Law*, this SNL music video explores how presidents can bypass Congress to make major policy through executive orders and other presidential directives. As the actor playing President Barack Obama sings, executive orders can be used to “create a national park, or a new holiday . . . or grant legal status to five million undocumented immigrants.”² SNL was, of course, referring to the executive actions taken by the Secretary of the Department of Homeland Security (DHS) during the Obama Administration to extend DHS’s Deferred Action for

1. See Christopher Walker, *I'm Just a Presidential Directive*, JOTWELL (Sept. 27, 2019) (reviewing Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. 877 (2020)), <https://adlaw.jotwell.com/im-just-a-presidential-directive/> [<https://perma.cc/YYZ5-9FMC>].

2. *How a Bill Does Not Become a Law*, Saturday Night Live (Nov. 22, 2014), <https://www.nbc.com/saturday-night-live/video/how-a-bill-does-not-become-a-law/2830152> [<https://perma.cc/77Y5-RYH8>].

Childhood Arrivals (DACA) program to cover more noncitizens in the form of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). DACA and DAPA emerged as regulatory initiatives during the Obama Administration when it became clear that Congress likely would not enact more durable measures for “dreamers” in the then-bipartisan Dream Act.³

The Obama Administration’s deferred-action immigration relief initiative is not a novel example of major policymaking via executive action. In recent years, presidents seem to have increasingly turned to administrative law and the regulatory process to make major policy. In the immigration context alone, we have seen presidents try to institute and rescind the deferred action programs, impose a ban on immigrants traveling from Muslim-majority countries, declare a national emergency to fund more border wall construction, and suspend the asylum program on the United States-Mexico border—just to name a few.

Congressional gridlock has no doubt helped fuel the rise of major policymaking via administrative action.⁴ Presidents, elected at least in part based on their policy positions during the campaign, find a polarized Congress often unwilling to pursue that policy agenda or even negotiate compromise legislation. In response, presidents turn more aggressively to regulatory policymaking, charging agencies to uncover statutory provisions that might provide some textually plausible authority to pursue the administration’s bold policy agenda through regulatory action. As one of us has explored elsewhere, this sometimes leads to textually broad statutory delegations to federal agencies becoming a source of authority for agencies to take action at a later time. This later action could be wholly unanticipated by the enacting Congress and may not receive support in the current Congress.⁵ Indeed, it is probably fair to conclude that the Supreme Court’s new major questions doctrine is motivated at least in part by presidential administrations attempting to use old statutes to aggressively pursue new major policy initiatives via regulation.⁶ Or, as Dan Farber puts it, “a much more satisfactory basis for the major questions doctrine” is that it serves “not so much as a

3. For more on DACA, DAPA, and the Dream Act, see generally SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* (2015). SNL labels DAPA as an executive order, which it is not; it is more appropriately categorized as an executive action taken by the DHS Secretary.

4. See, e.g., Michael J. Teter, *Congressional Gridlock’s Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1144–45 (2013).

5. Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1974–82 (2020); cf. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 7 (2014) (“We argue that agencies are better suited than courts to do that updating work and that the case for deferring to agencies in that task is stronger than ever with Congress largely absent from the policymaking process.”).

6. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (requiring “clear congressional authorization” for agencies to regulate certain questions of major political or economic significance); see also, e.g., Jonathan H. Adler, *West Virginia v. EPA: Some Answers about Major Questions*, 2022 CATO SUP. CT. REV. 37; Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4165724> [<https://perma.cc/GMT3-SQZU>].

way of preventing Congress from giving away too much power as a way to prevent Presidents from snatching powers they were not given.”⁷

With the apparent fall of legislation and the rise of regulation in federal law-making, it is perhaps no surprise that we also see a resurgence of scholarly attention on theories of democracy in administrative law. As surveyed in Part I of this Essay, some of these theories seek to make regulatory policymaking more democratically accountable, in terms of public and interest group participation. Others focus on civic republicanism and deliberative democracy, grounded in reasoned decisionmaking that requires federal agencies to engage with, and respond to, the substantial arguments and counterarguments for a regulatory initiative. Yet other theories offer a more minimalist view of democratic accountability, in terms of transparency and accountability to elected leaders and, in turn, effective implementation of statutory directives and the elected representatives’ policy preferences.

To be sure, many of these theories are more normative than descriptive—seeing potential for democracy in administrative law and urging further evolution and exploration. But others seem to be making descriptive claims about how the modern administrative state functions on the ground. For instance, Jerry Mashaw argues that “administrative governance that conforms to a model of what I am calling ‘reasoned administration,’ may provide the most democratic form of governance available to us in a modern, complex, and deeply compromised political world.”⁸ Building on Professor Mashaw’s work, Peter Shane has perhaps taken this one step further, arguing that “the democratic pedigree of the modern federal administrative establishment is at least as strong as that of Congress itself.”⁹

In our contribution to this Ensuring Democratic Accountability in the Administrative State Symposium, we make a modest intervention to suggest that visions of democracy in administrative law need to better take into account the fact that presidents pursue major policymaking through modes of regulatory action beyond notice-and-comment rulemaking. Indeed, so many of the headline-grabbing regulatory actions of the last three presidential administrations did not involve notice-and-comment rulemaking or other accountability-enhancing mechanisms: DACA/DAPA, DACA rescission, the attempt to add a citizenship question to the census, the CDC eviction moratorium, the OSHA COVID vaccine-or-test requirement for large employers, and the student loan cancellation program—just to name a few.

After surveying the recent literature on democracy in administrative law, Part II of this Essay categorizes and illustrates these various modes of regulatory

7. Daniel Farber, *The Major Question Doctrine, Nondelegation, and Presidential Power*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 2, 2022), <https://www.yalejreg.com/nc/synposium-shane-democracy-chief-executive-07/> [https://perma.cc/8824-2BJU].

8. JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 11 (2018).

9. PETER M. SHANE, DEMOCRACY’S CHIEF EXECUTIVE: INTERPRETING THE CONSTITUTION AND DEFINING THE FUTURE OF THE PRESIDENCY 171 (2022).

policymaking beyond notice-and-comment rulemaking. They include: interim final rulemaking, subregulatory agency guidance, executive orders and other presidential directives, formal agency adjudication, and informal adjudication and orders. These other modes of regulatory policymaking are far less democratically accountable, in terms of leveraging agency and public expertise and engaging stakeholders in a public and transparent manner. As such, we argue that presidents should embrace notice-and-comment rulemaking as the default regulatory mode when it comes to making major policies through administrative action.

In the Conclusion, we sketch out a path forward for how the President, Congress, and courts may be able to implement this rulemaking vision and then offer a cautionary note. Even when well done, notice-and-comment rulemaking is often not an adequate substitute for legislation to address major value judgments in federal lawmaking. Congress needs to play its proper role in modern governance when it comes to questions of deep economic, moral, and political significance. In other words, we are ultimately most persuaded by a more minimalist account of democratic accountability in administrative law—one where federal agencies engage in a deliberative process to effectively implement the policy directives of elected representatives.

At the outset, we should underscore that this Essay advances no argument concerning any potential constitutional or legal constraints on regulatory policymaking. Nor should it be read as assessing the merits of the various substantive policies we employ as examples. Agencies often have broad authority to make major policy using a variety of regulatory modes, and sometimes Congress requires agencies to use a regulatory policymaking mode other than notice-and-comment rulemaking. Instead, our focus here is on which mode(s) of policymaking makes the most sense as a matter of procedural policy, especially in the context of democratic accountability and effective governance.

I. COMPETING THEORIES OF DEMOCRATIC ACCOUNTABILITY IN ADMINISTRATIVE LAW

Situating democracy within the federal administrative state is not a new scholarly endeavor. Administration has always been a feature of our constitutional system, and the New Deal arguably brought increased attention to the purported democratic deficits in the administrative state. Daniel Walters has helpfully reviewed the literature on the “flowering of democratic theorizing about the administrative state” after the New Deal.¹⁰ Mirroring Jud Mathews’s prior categorization, Professor Walters divides these theories into three broad and somewhat overlapping categories: pluralism, deliberation, and minimalism.¹¹

10. Daniel E. Walters, *The Administrative Agon: A Democratic Theory for A Conflictual Regulatory State*, 132 YALE L.J. 1, 21 (2022).

11. See *id.* at 21–34; accord Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 613 (2016). Professor Mathews adds a fourth category, “presidentialist,” which we do not separately explore here. See Mathews, *supra* note 11, at 629–34.

We will not reproduce their helpful literature reviews here.¹² But each theory—or perhaps better framed, each category of theories—merits a brief discussion, emphasizing how scholars in more recent years have attempted to reinvigorate those visions. We discuss each category in turn, before concluding with a brief survey of newer visions of democracy in administrative law that are even harder to fit within the three more conventional categories.

A. *Pluralism and Public Participation*

Pluralist accounts of democracy in administrative law focus on the participatory aspects of the administrative process. The caricature of this theory is one of aggregative direct democracy: federal agencies hear from and respond to the various concerns of the public when crafting regulatory policy—thus reaching substantive policies that are representative of the diverse communities regulated and affected by the policies. The more sophisticated version is interest-group centered. Richard Stewart coined this theory of administrative law as the “interest representation model.”¹³ As Professor Walters recounts, early advocates of this pluralism vision urged agencies and courts to adopt procedures and judicial review mechanisms that would encourage a level of “interest-group participation [that] would serve as a ‘surrogate for the political process,’ thereby imparting democratic legitimacy on the administrative state.”¹⁴

We largely agree with Professor Walters that this pluralism vision is highly romanticized.¹⁵ As a descriptive matter, even notice-and-comment rulemaking—arguably the most public participatory mode of regulatory policymaking at the federal level—is not a vibrant direct-democracy town hall where the regulator is seeking to understand and accommodate the various perspectives and interests of the public, as represented by interest groups. There are huge power imbalances among those who participate, and the agency (and the President) has strong, often immovable policy preferences going into the process. As a normative matter, it is difficult to see how the administrative process could be structured to address these power imbalances and create incentives for agency policymaking outcomes to fully reflect the competing interests of the regulated and the public more generally.¹⁶

12. This Essay also makes no attempt to survey the evolution of the “democracy question” in administrative law over time. For a snapshot of the debate from nearly a half-century ago, see, e.g., Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

13. Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 441–43 (2003).

14. Walters, *supra* note 10, at 23 (quoting Stewart, *supra* note 13, at 445); see also Mathews, *supra* note 11, at 613–22 (surveying versions and criticisms of the pluralism category).

15. See Walters, *supra* note 10, at 24 (observing that “the empirical basis for pluralism’s rosy view of political competition was always questionable both inside and outside the administrative state”).

16. See also K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2016). Compare BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* (2019), with Mark Seidenfeld, *The Limits of Deliberation About the Public’s Values*, 119 MICH. L. REV. 1111, 1112 (2021), and Blake Emerson, *The Values of the Administrative State: A Reply to Seidenfeld*, 119 MICH. L. REV. ONLINE 81 (2021).

This pluralism theory was the “earliest answer” to the post-New Deal democracy question in the administrative state, and much of the scholarly debate took place decades ago.¹⁷ But administrative law scholars in recent years have turned back to public and interest group visions of democracy in administrative law. To be sure, most of these scholars would situate their work more in the deliberative democracy camp, but their arguments and theories also underscore the democratic accountability virtues of public and interest group participation in the regulatory process. Based on surveying agency officials, for example, Anya Bernstein and Cristina Rodríguez conclude that “agencies have more diverse, frequent, and interactive relationships with the publics and situations they regulate than elections could provide,” thus supporting a strong theory of bureaucratic accountability.¹⁸ Many of these scholars have focused on ways to further “democratize” administrative law by encouraging deeper and more accessible public engagement in regulatory policymaking.¹⁹ Nina Mendelson, for example, has argued that federal agencies should “engage comments on the value-laden questions more seriously, including the comments of lay persons submitted in large numbers” in order “to realize rulemaking’s promise of a wider democratic dialogue.”²⁰ Others have focused on how judicial review can encourage agencies to consider the views of the regulated and the public more generally.²¹ Some scholars have returned to the pluralism theories in the context of the Supreme Court’s major questions doctrine.²²

17. Walters, *supra* note 10, at 21.

18. Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 3000, 3007 (2023).

19. See, e.g., Joshua D. Blank & Leigh Osofsky, *Democratizing Administrative Law*, 73 DUKE L.J. (forthcoming 2024) (proposing reforms to help agencies communicate better with the general public); Reeve T. Bull, *Making the Administrative State “Safe for Democracy”: A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611, 611–12 (2013) (arguing for “the use of advisory committees, including demographically representative panels of citizens to provide public input on matters of agency policy”); Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court’s Political Theory*, 73 HASTINGS L.J. 371, 398–99 (2022) (“[T]hese examples of public involvement in rulemakings nonetheless show the potential of the administrative process to advance political liberty. Administrative procedures create fora, beyond elections, in which persons affected by executive policymaking can influence and constrain it.”); Gabriel Levine, *Democratically Durable Regulation*, 3 AM. J. L. & EQUAL. (2023) (exploring how regulatory review can, among other things, can be structured to better solicit and consider public input); Michael Sant’Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793 (2021) (proposing democratizing rulemaking in agencies by setting up broad and consistent processes for public engagement and developing structural frameworks for facilitating participation by those whose inputs are typically missed in the earlier parts of the rule formation process).

20. Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1380 (2011).

21. See, e.g., Bernstein & Rodríguez, *supra* note 18, at *71 (observing that “the prospects of judicial review and the courts’ proceduralist engagement with agency decisionmaking likely have played important roles in helping to shape the accountability practices we bring to light”).

22. See, e.g., Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. (forthcoming 2023); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019 (2018).

B. *Deliberative Democracy and Civic Republicanism*

Although no doubt overlapping to some degree with pluralism, the second category focuses more on the deliberative accountability aspects of bureaucracy, rather than aggregative accountability that seems to motivate the pluralism theories. Professor Walters aptly captures this distinction: “Whereas most democratic theory concerns itself with the problem of aggregating preexisting preferences of citizens, whether through elections or, as we saw with the pluralists, a system of interest-group competition for government attention, republican theory concerns itself with designing public institutions that are likely to result in good government.”²³ Jud Mathews nicely summarizes this deliberative or civic republican category in that “democracy is at heart about pursuing a shared vision of the common good, which is forged through collective deliberation.”²⁴

Many, many administrative law scholars have embraced some version of the deliberative democracy vision of administrative law.²⁵ We do not attempt to fully survey that literature here. Instead, we focus on one recent, prominent account.

In his 2018 book *Reasoned Administration and Democratic Legitimacy*, Professor Mashaw defends the democratic legitimacy of the administrative state on the basis of reason-giving and deliberation. By distinguishing aggregative or electoral accountability and deliberative accountability, he argues that American democracy melds these two distinct visions for democratic legitimacy. The legislative process advances aggregative or electoral accountability, and so does presidential administration—at least to some degree. That is one reason why Professor Mashaw recognizes political reason-giving as, within limits, legitimate. When it comes to deliberative democracy, however, he argues that the legislative process is deficient. After all, Congress is not required by law to provide any reasons at all. Thus, if we care about both electoral and deliberative democratic accountability, “reasoned administration completes and enhances an attractive vision of democratic government.”²⁶

In the latter part of the book, Professor Mashaw explains how we can and should improve reason-giving to make the administrative state more accountable in an aggregative sense, in addition to the deliberative sense.²⁷ For instance, he

23. Walters, *supra* note 10, at 25–26.

24. Mathews, *supra* note 11, at 608.

25. See, e.g., Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463 (2012); Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397 (2013); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992); Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849 (2012); Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141 (2012); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253 (2009). See generally Mathews, *supra* note 11, at 622–29 (surveying versions and criticisms of the civic republicanism and deliberative democracy category).

26. MASHAW, *supra* note 8, at 14.

27. See *id.* at 180–98.

embraces authenticity in reason-giving and suggests ways to improve that.²⁸ Like us, he argues that agencies should engage more in rulemaking, as opposed to less-formal agency guidance, to effectuate major policymaking at the agency level. And finally, he argues that agencies should address head-on value-oriented issues—like justice—in regulatory actions.²⁹

As noted in the Introduction, Professor Shane similarly embraces this deliberative democracy vision for the administrative state in his latest book, concluding that “the democratic pedigree of the modern federal administrative establishment is at least as strong as that of Congress itself.”³⁰ Professors Mashaw and Shane seem to recognize that the administrative state is much better at advancing deliberative than electoral or aggregative accountability. As the final chapters in *Democracy’s Chief Executive* demonstrate, Professor Shane views Congress’s role to be critical to advancing aggregative accountability, and he recommends various reforms to revive Congress’s interactions with the administrative state. Not all administrative law scholars who embrace a deliberative democracy theory necessarily view Congress as having a similar role.³¹

C. Minimalism and Electoral Democracy

The final main category is “democratic minimalism,” as Professor Mathews calls it.³² For Professor Mathews, “[d]emocratic minimalism is not a single theory so much as an orientation towards thinking about democracy”—i.e., the idea that “conventional theories of democracy are unrealistic as benchmarks to evaluate government practices, because they expect more than is reasonable of citizens, leaders, and institutions.”³³ In at least some ways, Ed Rubin’s vision of accountability in the administrative state fits in this minimalist category:

[T]rue accountability, in the realm of law and politics, involves many of the features that are central to the administrative state and that people find so

28. *Cf.* *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (2019) (“The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise.”).

29. Elsewhere one of us responds with some skepticism to Professor Mashaw’s vision of democracy in administrative law. *See* Christopher J. Walker, *Book Review: Reasoned Administration and Democratic Legitimacy*, 51 *AM. REV. PUB. ADMIN.* 73, 74–75 (2020); *see also* Christopher J. Walker, *Democracy’s Chief Executive and the Separation of Powers*, *YALE J. ON REG.: NOTICE & COMMENT* (Nov. 3, 2022) (reviewing SHANE, *supra* note 9), <https://www.yalejreg.com/nc/symposium-shane-democracy-chief-executive-08/> [<https://perma.cc/SH67-L68G>].

30. *See* SHANE, *supra* note 9, at 171.

31. *See* Walters, *supra* note 10, at 25–31 (surveying the full range of deliberative democracy or civil republicanism theories of administrative law).

32. Mathews, *supra* note 11, at 609.

33. *Id.*; *see also id.* at 634–57 (developing democratic minimalism in greater detail and responding to criticisms); *cf.* Walters, *supra* note 10, at 33–34 (“Despite minimalism’s simplified appeal, it ultimately hollows out the core concept of democracy—the idea that the polity will meaningfully follow the will of the people. . . . It sees little role for ordinary citizens in actually determining the direction of policymaking by the state.”).

unattractive about it—hierarchy, monitoring, reporting, internal rules, investigations, and job evaluations. Far from being the warm and fuzzy notion that some of its proponents seem to envision, accountability flows along the complex, hierarchical pathways that structure modern government, and reveals the managerial mechanisms of a people who are, in Genet’s words, “no longer childlike but severe.”³⁴

To provide a recent example, consider Gillian Metzger’s call for effective government. Responding to Professor Shane’s deliberative democracy theory of the administrative state, she observes that the theory omits key features of democracy: “Perhaps most notably missing is emphasis on effective government. Ensuring that elections translate into implemented policy is also essential for preserving democracy.”³⁵ For Professor Metzger, effective bureaucracy is not just a normative theory of administrative law; it is a constitutional requirement, at least in some respects.³⁶ To be sure, Professor Metzger’s minimalist vision of administrative law may well embrace some of the values of pluralism and deliberative democracy—but arguably only to the extent that they help advance effective governance.

D. *Mixing Theories and Beyond*

As this brief survey of recent scholarship reveals, many visions of democracy in administrative law today mix the pluralism, deliberation, and even minimalist accounts. The categories overlap, yet it is still helpful to disaggregate and understand the driving motivations for each. Moreover, some administrative law scholars have advanced distinct theories not captured in the three broad categories. Professor Walters, for instance, has advanced a theory based on the principle of “democratic agonism,” which “emphasizes the inevitability of conflict and builds democratic legitimacy around it.”³⁷ Or as Wendy Wagner puts it, Professor Walters’s agon theory encourages federal agencies to “strive to nurture and maintain deliberation and even disagreement, without worrying so much about whether there is a clear path out of the conflict.”³⁸ More recently, Katharine

34. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2075 (2005) (quoting JEAN GENET, *THE THIEF’S JOURNAL* (Bernard Frechtman trans., Bantam Books 1965) (1949)).

35. Gillian Metzger, *Of Presidents, Democracy, and Congress*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 4, 2022), <https://www.yalejreg.com/nc/symposium-shane-democracy-chief-executive-09/> [<https://perma.cc/BG9T-524X>].

36. See Gillian Metzger, *What Does Effective Government Have to Do With the Constitution?*, in CONSTITUTIONALISM AND A RIGHT TO EFFECTIVE GOVERNMENT? 164 (Vicki C. Jackson & Yasmin Dawood eds., 2022) (“In short, effective government has many roots in the US Constitution, making it fair to identify a constitutional commitment to effective government and an obligation on the part of Congress and the president to secure its realization.”)

37. Walters, *supra* note 10, at 14.

38. Wendy Wagner, *Embracing Conflict and Instability: A New Theory for the Administrative State*, JOTWELL (Aug. 17, 2022) (reviewing Walters, *supra* note 10), <https://adlaw.jotwell.com/embracing-conflict-and-instability-a-new-theory-for-the-administrative-state/> [<https://perma.cc/LN7G-M6YE>].

Jackson has encouraged the field to embrace a public trust vision of democracy in the administrative state, asserting that “agencies and their officials are themselves political representatives of the public” that “act and decide on our behalf just like a Congressman or a President acts and decides on our behalf.”³⁹ And Christopher Havasy has proposed a “relational fairness” theory of administrative law, which is grounded in the principle that “all persons potentially affected by an agency action must have the opportunity to deliberate with the agency during administrative decisionmaking.”⁴⁰

In the coming years, scholars will no doubt continue to develop and advance distinct and perhaps more nuanced visions of democracy in administrative law. This is particularly true if, as expected, regulation continues to predominate legislation with respect to major policymaking at the federal level. The perceived democratic deficits of such a lawmaking regime will remain, if not become more pronounced. And scholars and policymakers will seek to further democratize—or at least seek to legitimize democratically—major policymaking via regulation.

II. MODES OF REGULATORY POLICYMAKING AND THEIR VARYING IMPACTS ON DEMOCRATIC ACCOUNTABILITY

When it comes to visions of democracy in administrative law, the literature tends to fixate on one mode of regulatory policymaking: notice-and-comment rulemaking. And yet, as we outline in this Part, presidents pursue major policymaking through modes of regulatory action beyond notice-and-comment rulemaking. Those alternative modes of regulatory activity are far less democratically accountable, in terms of leveraging agency and public expertise (pluralism), encouraging public deliberation and reason-giving (deliberative democracy), and engaging stakeholders in a public and transparent manner (minimalism). Accordingly, we argue that notice-and-comment rulemaking should be the default regulatory mode for major policymaking in the executive branch. Importantly, however, we do not argue it should be the exclusive mode. Circumstances may counsel departing from this default. We begin with an overview of notice-and-comment rulemaking, and then we turn to the other modes of regulatory activity that the executive branch uses to make major policy today: interim final rulemaking, subregulatory agency guidance, executive orders and other presidential directives, formal agency adjudication, and informal adjudication and orders.

39. Katharine Jackson, *The Public Trust: Administrative Legitimacy and Democratic Lawmaking*, 56 CONN. L. REV. (forthcoming 2023).

40. Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. (forthcoming 2023).

A. Notice-and-Comment Rulemaking

As Kenneth Culp Davis famously observed, informal or notice-and-comment rulemaking is “one of the greatest inventions of modern government.”⁴¹ This observation may ring particularly true for those who care about democracy in administrative law.⁴² Especially in its current form, notice-and-comment rulemaking provides a process for regulatory policymaking that, when used effectively, can advance the various visions of democracy in administrative law.

Under Section 553 of the Administrative Procedure Act (APA), federal agencies engaged in rulemaking must publish in the Federal Register a “general notice of proposed rule making” and then allow for public comment, affording “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”⁴³ The agency, “[a]fter consideration of the relevant matter presented,” must then issue a final rule that includes a preamble “concise general statement of . . . basis and purpose.”⁴⁴

The text of Section 553 may suggest a barebones process for public notice and comment. But as one of us has explored elsewhere, courts have grafted onto Section 553 a number of procedural requirements that further advance the various visions of democracy in administrative law.⁴⁵ Agencies must issue a detailed notice of the proposed rule and disclose the underlying rationales and supporting data for public scrutiny.⁴⁶ They must also compile a publicly available rulemaking record—something Jeffrey Lubbers has argued is “one of the most significant changes in informal rulemaking procedure since the APA was enacted.”⁴⁷ And it is not enough that the agency issue a “concise general statement of . . . basis and purpose.” Today, these preambles are often quite voluminous, in large part because courts require that “[a]n agency must consider and respond to significant comments received during the period for public comment.”⁴⁸ Finally, courts have interpreted the judicial review provisions of the APA to require agencies to engage in reasoned decisionmaking, enabling the judicial review of, among other

41. 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 6.15, at 283 (1st ed. Supp. 1970). Professor Davis subsequently clarified that “[i]t wasn’t until 1970 that I began saying that [notice-and-comment rulemaking] was one of the great inventions of modern government.” Kenneth Culp Davis, Walter Gellhorn & Paul Verkuil, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 520 (1986).

42. *But see* Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69, 76 (2022) (“The historical perspective reveals that rulemaking’s democratic deficit persists because the process was designed to support an expertise-based model of administration that embraced the influence of regulated interests on agency decisionmaking.”).

43. 5 U.S.C. § 553(b), (c).

44. *Id.* § 553(c).

45. *See* Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733, 739–46 (2021).

46. *See, e.g.*, *Portland Cement Ass’n v. Ruckelhaus*, 486 F.2d 375, 393 (D.C. Cir. 1973).

47. JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 287 (5th ed. 2012).

48. *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015) (citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

things, whether agencies “explain the evidence which is available” and “offer a rational connection between the facts found and the choice made.”⁴⁹

Even this rough sketch of the informal rulemaking process illustrates how the public notice and comment process, coupled with judicial review, helps advance the various visions of democracy in administrative law—whether that is public participation, deliberative process, or even more minimalist conceptions of effective government and electoral accountability. Elsewhere we have argued at much greater length about how notice-and-comment rulemaking, compared to agency adjudication, in the immigration policymaking context better advances good-government values such as accountability, deliberation, expertise, public participation, and transparency compared to agency adjudication.⁵⁰ We do not repeat that analysis here, which could apply with similar force in other regulatory contexts and in comparison to the other modes of regulatory policymaking discussed below.

For present purposes, the above thumbnail sketch of the notice-and-comment rulemaking process likely suffices to illustrate how it advances the various visions of democracy in administrative law. We will return to these arguments and themes when exploring below how agencies use other modes of regulatory policymaking.⁵¹

B. *Interim Final Rulemaking*

Not all rules go through the notice-and-comment process before they become final. Indeed, Section 553 of the APA expressly provides that some substantive or legislative rules are exempt when “the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁵² Agencies have increasingly turned to this “good cause” exception to evade the notice-and-comment process. In 2012, for example, the Government Accountability Office found that federal agencies from 2003 through 2010 skipped the notice-and-comment process for thirty-five percent of “major” rules and forty-four percent of nonmajor rules.⁵³ Thirty-five percent of that subset of major rules never went through a post-promulgation notice-and-comment process either.⁵⁴

49. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, 52 (1983).

50. Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1214–34 (2021).

51. For the purposes of this Essay, we also leave to the side the issue of agency “ossification,” which has received extensive treatment in the literature. See, e.g., Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414 (2012).

52. 5 U.S.C. § 553(b)(B).

53. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 3 n.6, 8, 36 (2012).

54. See *id.* at 24–25.

Not surprisingly, there is a substantial literature on interim final rulemaking, including an exploration of its causes and potential remedies.⁵⁵ It is also likely easy to see how interim final rulemaking can be less effective at advancing visions of democracy in administrative law. But a recent example from the immigration policymaking context helps illustrate the point. In 2018, the Department of Homeland Security (DHS) issued a significant change to asylum law through an interim final rule.⁵⁶ As background, asylum is a remedy in immigration law that, by statute, permits any person to apply regardless of their manner of entry or their immigration status. Specifically, the statute reads:

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.⁵⁷

On November 9, 2018, DHS issued an interim final rule and a proclamation which together barred individuals from seeking asylum if they are caught in between ports of entry, or, put another way, if they arrive at the border irregularly—at a location other than a port of entry.⁵⁸ This was a major change to immigration policy, and yet no notice was provided to the public in advance and the public had no opportunity to comment on the proposed rule before it went into effect.

Our position is not that interim final rulemaking should never be used to create major federal policy. For example, sometimes emergencies dictate swifter action, and the need for swifter action might have strong support from the elected representatives.⁵⁹ But if one is concerned about public participation, deliberation, or

55. See, e.g., Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703 (1999); Kelli M. Golinghorst, *Meet Me in the Middle: The Search for the Appropriate Standard of Review for the APA's Good Cause Exception*, 103 IOWA L. REV. 1277 (2018); Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 261 (2016); James Kim, *For A Good Cause: Reforming the Good Cause Exception to Notice and Comment Rulemaking Under the Administrative Procedure Act*, 18 GEO. MASON L. REV. 1045 (2011); Martha Minow, *Not in the Room Where It Happens: Adversariness, Politicization, and Little Sisters of the Poor*, 2020 SUP. CT. REV. 35; Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008); Mark D. Shepard, *The Need for an Additional Notice and Comment Period When Final Rules Differ Substantially from Interim Rules*, 1981 DUKE L.J. 377.

56. One of us explores this issue in more detail elsewhere. See Shoba Sivaprasad Wadhia, *Asylum and the Abuse of Administrative Law*, REG. REV. (Nov. 20, 2018), <https://www.theregreview.org/2018/11/20/wadhia-asylum-abuse-administrative-law/> [<https://perma.cc/3KY5-72KS>].

57. 8 U.S.C. § 1158(a)(1).

58. Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018).

59. Recently, Mark Seidenfeld has advocated an even broader use of this APA exception to notice-and-comment rulemaking, encouraging agencies to issue interim final rules unless such approach “is

perhaps even effective implementation of statutory directives, rulemaking that evades notice and comment should be the exception to the general rule when it comes to major policymaking. And visions of democracy in administrative law must broaden their horizon to take this sidestepping phenomenon into account.

C. Subregulatory Agency Guidance

The APA recognizes another set of rules as not subject to notice and comment: “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”⁶⁰ These types of rules, which we will refer to in shorthand as subregulatory agency guidance, have been subject to extensive scholarly scrutiny in recent years.⁶¹ As Ron Levin chronicles, “[q]uestions pertaining to the application of this exemption may constitute the single most frequently litigated and important issue of rulemaking procedure in the federal courts today.”⁶²

For decades, much of immigration law and policy has been generated through subregulatory agency guidance. For many administrations, guidance documents and memoranda have been plentiful. Consider, for instance, the example of unlawful presence. “Unlawful presence” is a legal term of art codified by statute that can be triggered when a person seeks admission to the United States following a period in the United States without authorization.⁶³ Unlawful presence is significant because it bars a person from admission for three years, ten years, or even permanently.⁶⁴ And yet, there are no regulations in the Code of Federal Regulations! Instead, the U.S. Citizenship and Immigration Services (USCIS), for decades, has relied on reams of paper, first a medley of memos, then a

unlikely to result in a net increase in social welfare.” Mark Seidenfeld, *Rethinking the Good Cause Exception to Notice and Comment Rulemaking in Light of Interim Final Rules*, 75 ADMIN L. REV. (forthcoming 2023). Responding to Professor Seidenfeld’s important contribution to this debate exceeds the scope of this Essay. In short, we think his arguments have force when it comes to lower-impact rules, but we are less convinced when it comes to major policies, which are the subject of this Essay.

60. 5 U.S.C. § 553(b)(A).

61. See, e.g., Sean Croston, *The Petition Is Mightier Than the Sword: Rediscovering an Old Weapon in the Battles over “Regulation Through Guidance,”* 63 ADMIN. L. REV. 381 (2011); Crystal M. Cummings, *A Call to Replace the APA’s Notice-and-Comment Exemption for Guidance Documents*, 86 BROOK. L. REV. 1197 (2021); Hale Melnick, *Guidance Documents and Rules: Increasing Executive Accountability in the Regulatory World*, 44 B.C. ENVTL. AFFS. L. REV. 357 (2017); Nicholas R. Parrillo, *Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study*, 71 ADMIN. L. REV. 57 (2019); Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782 (2010); William Funk, *When Is a “Rule” A Regulation? Marking A Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659 (2002). See generally Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165 (2019) (detailing current debates on agency guidance and presenting the findings of an extensive empirical study on agencies’ use of guidance).

62. Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 263 (2018).

63. Immigration and Nationality Act § 212(a)(9), 8 USC § 1182(a)(9).

64. *Id.*; see also Shoba Sivaprasad Wadhia, *Immigration Law’s Catch–22: The Case for Removing the Three and Ten-Year Bars*, BENDER’S IMMIGR. BULL. (2014).

consolidated memo of more than 50 pages,⁶⁵ and later a part of a volume in the USCIS Policy Manual.⁶⁶

In the immigration context, perhaps the most prominent agency guidance in recent years is what we started with in the Introduction: the Obama Administration's DACA and DAPA deferred action initiatives and the Trump Administration's attempts to rescind DACA—both of which reached the Supreme Court.⁶⁷ The deferred action initiatives were originally understood as, at least in part, an exercise of agency enforcement discretion—a mode of regulatory policymaking that arguably merits its own subsection in this Essay.⁶⁸ In the judicial challenge to DAPA, the Fifth Circuit held that the United States had failed to make a strong showing that a policy of that magnitude and effect could have been implemented without going through notice-and-comment rulemaking.⁶⁹

Although Professor Mashaw disagrees with the Fifth Circuit on the law, it is worth noting that he finds it “understandable” that “something as important and controversial as the Department of Homeland Security's Deferred Action for Parents of American Citizens (DAPA) enforcement policy should have been vetted in some forum broader than the internal deliberations of the Executive Branch.”⁷⁰ Such a “process was a far cry from a request for comments from outsiders that would have involved the state governments that challenged the DAPA policy as well as immigrant rights groups, individual members of Congress, and others who might have cared to participate.”⁷¹ As Professor Mashaw concludes,

65. U.S. Citizenship & Immigr. Servs., Interoffice Memorandum (May 6, 2009), https://www.uscis.gov/sites/default/files/document/memos/revision_redesign_AFM.PDF [<https://perma.cc/3MBF-X9NS>].

66. U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL, vol. 9, part G (as of Feb. 22, 2023), <https://www.uscis.gov/policy-manual/volume-9-part-g> [<https://perma.cc/5MM2-QPGH>].

67. *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015) (DAPA), *aff'd by an equally divided court sub nom.*, *United States v. Texas*, 1136 S. Ct 2271 (2016); *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020) (DACA rescission).

68. Research literature on agency enforcement discretion is vast and varied. *See, e.g.*, Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753 (2016); Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183 (2015); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014); Peter M. Shane, *Faithful Nonexecution*, 29 CORNELL J. L. & PUB. POL'Y 405 (2019); Matthew Steilen, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 BUFF. L. REV. 557 (2018); Daniel Stepanicich, *Presidential Inaction and the Constitutional Basis for Executive Nonenforcement Discretion*, 18 U. PA. J. CONST. L. 1507 (2016); Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31 (2017).

69. *Texas v. United States*, 787 F.3d at 762–67.

70. MASHAW, *supra* note 8, at 194.

71. *Id.*; *see also id.* (“To be fair, that policy was formulated with the participation not only of the Department of Homeland Security, but also the Executive Office of the President and the Office of Legal Counsel (OLC) in the Justice Department, and was supported by a closely reasoned legal analysis by the OLC.”). Compare Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 254–55 (2017) (“[O]ne can reasonably wonder what would be gained from forcing DHS to move its deferred action program through the conventional rulemaking process. The better approach might have been to find any error harmless, especially given the APA's instruction that ‘due account shall be taken of the rule of prejudicial error’ in conducting judicial review. That possibility, however, was so far beyond the pale that the Administration didn't even make the argument.” (footnotes omitted)), *with* Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE

“[t]hat such vetting can be useful and supportive of the legitimacy of agency policymaking is evidenced by the fact that some agencies already engage in this process when issuing important or controversial guidance documents.”⁷²

Subregulatory agency guidance plays a critical role in administrative governance, and we do not mean to suggest otherwise here. Agency regulations often raise questions of implementation and compliance, about which the regulated and the public more generally need clear and expeditious guidance in order to comply and structure their affairs. But when it comes to *major* policymaking via agency action, the sticky default should include notice and comment. And, again, theories of democracy in administrative law need to grapple more seriously with the role agency guidance plays in major policymaking today.⁷³

D. Executive Orders and Other Presidential Actions

Presidential proclamations and executive orders reflect another category of major policymaking via administrative action outside of the notice-and-comment rulemaking context. Although these presidential actions may reflect at least some minimalist or electoral aspects of democratic accountability, they often fail to advance pluralism or deliberative democracy visions in administrative law.

Let's return to the immigration context. Two executive orders issued in early 2017 were dubbed the “travel ban” or “Muslim ban.”⁷⁴ The first ban was issued as an executive order on January 27, 2017, seven days after former President Trump took office, and suspended for 90 days the entry of certain noncitizens from seven Muslim-majority countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.⁷⁵ A second executive order was issued on March 6, 2017, and included these same countries except Iraq.⁷⁶ The executive orders were eventually blocked by the courts or expired on their own terms.⁷⁷ The third version of the travel ban was issued as a presidential proclamation on September 24, 2017, and indefinitely blocked entry for certain noncitizens from eight countries: Iran, Libya, Chad, North Korea, Syria, Somalia, Venezuela, and Yemen.⁷⁸ These

106, 111 (2017) (“This Response concludes with a warning about introducing such dramatic change to administrative law without considering its effects on the rest of the modern administrative state.”).

72. MASHAW, *supra* note 8, at 194; *see also id.* at 194–95 (discussing examples).

73. For a useful recent example of exploring how subregulatory agency guidance interacts with theories of legitimacy in administrative law, see Havasy, *supra* note 40, Part IV.A.ii.

74. The authors use “travel ban” and “Muslim ban” interchangeably, acknowledging that the original versions targeted nationals from Muslim-majority populations.

75. Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,729 (Jan. 27, 2017).

76. Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,780 (Mar. 6, 2017).

77. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2403–04 (2018) (describing litigation and outcomes regarding the first two executive orders).

78. Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats. 82 Fed. Reg. 45,161 (Sept. 24, 2017).

countries were ostensibly chosen based on the perceived threat these countries posed.⁷⁹

The proclamation was subject to legal action. In October 2017, federal district courts in Hawaii and Maryland blocked the proclamation on statutory grounds, constitutional grounds, or both.⁸⁰ The government appealed those decisions and asked the Supreme Court to place a hold on them. The Court agreed and issued an order allowing the full version of the proclamation to go into effect pending a decision by the appellate courts and consideration of the government's petition for certiorari before the Supreme Court.⁸¹

The order was remarkable as a broad ban was reinstated in full without a ruling by the appellate courts and without specific guidance for the implementing agencies about how the ban would apply in practice. One of the authors interviewed an attorney who described the story of an Iranian couple, both doctors, about to give birth to a child. Their parents were unable to travel from Iran to the United States to see their grandchild or help their children because of the proclamation.⁸² She said: "To not even be able to hold their grandchildren, not support their kids, who are doctors, it's hard. It's really, really hard on the community."⁸³ Eventually, the Fourth and Ninth Circuits ruled in favor of the plaintiffs. The presidential proclamation then returned to the Supreme Court—this time on the court's regular docket for full consideration on the merits.⁸⁴ In June 2018, the Court reversed the lower court's preliminary injunction, holding that the challengers "have not demonstrated a likelihood of success on the merits of their constitutional claim."⁸⁵

The process of creating executive orders is not publicly deliberative like notice-and-comment rulemaking. There is no substantial public or interest group participation. As Tara Leigh Grove reports, "The process for crafting directives takes place almost entirely behind closed doors; the details are not publicly available for many years (if at all)."⁸⁶ One of the authors spoke to a former government official who spent more than fifteen years at the Immigration and Naturalization Service, and who rarely observed the use of executive orders as a tool for

79. *Id.*

80. *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md. 2017), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017), *vacated and remanded sub nom. Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017); *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1160 (D. Haw. 2017), *aff'd in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *rev'd and remanded*, 138 S. Ct. 2392 (2018).

81. *Trump v. Hawaii*, 138 S. Ct. 542 (2017); *see also* Shoba Sivaprasad Wadhia, *Ban 3.0 at the Supreme Court: What You Need to Know*, MEDIUM (Dec. 5, 2017), <https://shobawadhia.medium.com/supreme-court-issues-orders-on-ban-3-0-what-this-means-db7c8e83c04c> [<https://perma.cc/NNL8-SGCE>].

82. SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 24 (2019).

83. *Id.*

84. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), *vacated and remanded sub nom. Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017); *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017), *rev'd and remanded*, 138 S. Ct. 2392 (2018).

85. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

86. Grove, *supra* note 1, at 900.

policymaking. He described the choice to issue executive orders rather than publish regulations by asking: “How much higher do you go if you want to comment or complain about an executive order? It’s a dramatically different way of doing business, and not a better way . . . there’s no public input in the executive order process . . . judgment is being made by one or two people.”⁸⁷ To be sure, however, there is much more inter-governmental consultation than one might have expected. As Tara Leigh Grove and Andrew Rudalevige have both documented, the process of creating an executive order typically involves the key stakeholders in the White House and at the relevant agencies.⁸⁸ That said, this inter-agency consultation process apparently did not take place with at least the first version of this ban.⁸⁹

That lack of public deliberation when the President issues an executive order is compounded by the fact that, as Lisa Manheim and Kathryn Watts explain, “there is no coherent or well-theorized legal framework analogous to the APA to guide courts’ review of Presidential orders.”⁹⁰ They stress three ways in which executive actions and orders threaten the separation of powers: (1) agencies have built-in accountability procedures which do not apply to executive orders, (2) agencies are congressional creatures while the President is not, and (3) the APA does not apply to the President.⁹¹ Accordingly, they argue that executive orders can circumvent not only public input and deliberation, but also a statutory framework on which Congress relies to increase accountability in the administrative state.⁹²

87. WADHIA, *supra* note 81, at 8.

88. ANDREW RUDALEVIGE, *BY EXECUTIVE ORDER: BUREAUCRATIC MANAGEMENT AND THE LIMITS OF PRESIDENTIAL POWER 8–9* (2021) (finding that executive orders, “even those that originate from the White House, are subject to extensive review by and negotiation with the wider executive branch; that around six of every ten executive orders issued by the president are crafted preponderantly by departments and agencies instead of by centralized staff; and that a surprising number of proposed [executive orders], including some dear to the president, are never issued at all”); Grove, *supra* note 1, at 900–10 (detailing the interagency consultation process for drafting executive orders); *see also* Christopher J. Walker, *The Role of Federal Agencies in Presidential Administration*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 27, 2021) (reviewing RUDALEVIGE, *supra*), <https://www.yalejreg.com/nc/symposium-by-executive-order-04/> [<https://perma.cc/4AFT-T8HD>]; Walker, *supra* note 1 (reviewing Grove, *supra* note 1).

89. *See, e.g.*, Evan Perez, Pamela Brown & Kevin Liptak, *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017) (“It wasn’t until Friday—the day Trump signed the order banning travel from seven Muslim-majority countries for 90 days and suspending all refugee admission for 120 days—that career homeland security staff were allowed to see the final details of the order, a person familiar with the matter said.”), <https://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/index.html> [<https://perma.cc/69HH-44J8>].

90. Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1763 (2019).

91. *Id.* at 1797–98.

92. There is an emerging, important literature on the role of executive orders in administrative law, including how to interpret them. *See, e.g.*, Matthew Chou, *Agency Interpretations of Executive Orders*, 71 ADMIN. L. REV. 555 (2019); Nestor M. Davidson & Ethan J. Leib, *Regleprudence—at OIRA and Beyond*, 103 GEO. L.J. 259 (2015); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007); Harold Anthony Lloyd, *Speaker Meaning and the Interpretation and Construction of Executive Orders*, 8 WAKE FOREST J. L. & POL’Y 319 (2018); Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026 (2015).

In arguing for notice-and-comment rulemaking over presidential directives for major policymaking at the agency level, we do not intend to overstate the claim. Executive orders play an important role in the modern regulatory “era of presidential administration,” as Elena Kagan put it.⁹³ Especially for those of us who care about electoral or minimalist democracy, the President can and should play an important role in setting the policymaking agenda for the executive branch. In particular, we agree with then-Professor Kagan on the wisdom of “the frequent issuance of formal and published memoranda to executive branch agency heads instructing them to take specified action within the scope of the discretionary power delegated to them by Congress.”⁹⁴ Issuing an executive order to urge an agency to engage in notice-and-comment rulemaking to create a major policy may well enhance the democratic accountability of that policy. Our concerns lie more with presidential orders being used in lieu of notice-and-comment rulemaking to effectuate major policymaking within the executive branch.

E. Formal Adjudication

The Supreme Court held long ago in *SEC v. Chenery Corp.* that agencies, if permitted under their organic statutes, can choose to make policy through either adjudication or rulemaking.⁹⁵ Ever since, there has been a long history of agency heads—as well as intermediate review bodies—using precedential adjudication decisions to establish or further develop policy for the agency as a whole.⁹⁶ Scholars have long questioned the wisdom of *Chenery II*, especially when it comes to retroactive policymaking.⁹⁷ Yet others have defended it, emphasizing that “developing policy through case-by-case adjudications—akin to courts’ development of the common law—can offer significant benefits over informal rulemaking, both to agency policymakers and the public.”⁹⁸

93. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001).

94. *Id.* at 2290.

95. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (holding that “the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency”).

96. See generally JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 129–47 (6th ed. 2018); CHRISTOPHER J. WALKER, MELISSA WASSERMAN & MATTHEW WIENER, PRECEDENTIAL DECISION MAKING IN AGENCY ADJUDICATION (report to Admin. Conf. of U.S., Dec. 6, 2022); Richard K. Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 28 ADMIN. L. REV. 149 (1986).

97. See, e.g., Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L.J. 931, 940 (2021) (arguing that in some circumstances agency policies made via adjudication should not receive *Chevron* deference); Wadhia & Walker, *supra* note 50, at 1202–03 (arguing that major immigration policy is better made through rulemaking than adjudication); see also Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 389 (2007) (recommending that Congress eliminate *Chevron* deference in immigration adjudication).

98. Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495, 498–99 (2021); see also Walters, *supra* note 10, at 64–65 (“resist[ing] the normative democratic commitment to stability” and thus arguing for more regulatory policymaking via adjudication instead of just rulemaking). There is ample scholarship supportive and critical of agency

Elsewhere we have detailed how the Justice Department has used adjudication to make immigration policy—through precedential decisions of both the Board of Immigration Appeals and the Attorney General (under her referral authority).⁹⁹ During the Trump Administration, for instance, the Attorney General issued fourteen precedential decisions and the Board issued ninety-one such decisions.¹⁰⁰ There we argued that major immigration policy is better made via rulemaking than adjudication—in terms of leveraging agency and public expertise, engaging in a deliberative process, and increasing political accountability—and thus perhaps *Chevron* deference should not apply to immigration policies embraced via adjudication (as opposed to rulemaking).¹⁰¹

It is worth noting that on February 2, 2021—after our article was made publicly available—President Biden issued Executive Order 14,010, which among other things, directed the Attorney General and Secretary of Homeland Security to engage in rulemaking (as opposed to adjudication) to adopt a definition of “particular social group” for asylum law purposes.¹⁰² In response, Attorney General Garland vacated two sets of Trump era Attorney General precedential adjudication decisions narrowing the definition of particular social groups—one that addressed domestic violence and gang violence by non-governmental actors¹⁰³ and another that addressed family-group membership.¹⁰⁴ As of this writing, DHS and the Justice Department have yet to issue a notice of proposed rulemaking on this issue, but they have indicated that such a rule is forthcoming.¹⁰⁵

Our recommendation that agencies shift from adjudication to rulemaking for policymaking is not a blanket rule, but instead a default rule limited to major

policymaking by adjudication. *See, e.g.*, M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1396–97 (2004); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 922 (1965).

99. *See* Wadhia & Walker, *supra* note 50, at 1204–12; *see generally* Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841 (2016) (documenting the history of the Attorney General exercising powers over immigration policy).

100. *See* Wadhia & Walker, *supra* note 50, at 1229 n.179 (collecting numbers).

101. *Id.* at 1242–43; *cf. id.* at 1236 n.204 (“Although scholars and judges may well reasonably disagree about the pull of statutory *stare decisis* in this context, one of us (Walker) is not convinced that overturning this statutory precedent [of *Chevron* deference] would be consistent with the doctrine of *stare decisis*.”).

102. Executive Order 14,010, 86 Fed. Reg. 8267 § 4(c)(ii) (Feb. 5, 2021) (“Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border”).

103. *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021) (vacating *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021)).

104. *Matter of L-E-A-*, 28 I&N Dec. 304 (A.G. 2021) (vacating *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019)).

105. Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18,087, 18,184 (Mar. 29, 2022); *see also* RIN 1615-AC65, Unified Agenda (Spring 2022), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=1615-AC65> [<https://perma.cc/3SP2-5CAU>] (noting that notice of proposed rulemaking was anticipated to issue in August 2022).

policymaking. We agree that in certain circumstances there may be “a very definite place for the case-by-case evolution of statutory standards.”¹⁰⁶ The *Chenery* Court, for instance, identified three: (1) “problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule”; (2) “the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule”; or (3) “the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule.”¹⁰⁷

Indeed, in a recent study on precedential decisionmaking in agency adjudication, one of us observed that the appellate bodies in agency adjudication systems generally do use adjudication to make major policy. Many of the agency leaders interviewed reported that “the use of precedential decisions is not usually about implementing the presidential administration’s policy preferences in a *Chenery II* lawmaking fashion. Instead, it is a most modest form of policymaking: gap filling in the interstices of the statutes and regulations to address novel and recurring issues in administration.”¹⁰⁸

F. Informal Adjudication and Orders

Under the APA, “informal adjudication” covers the residual category of all agency actions that are not addressed in the APA.¹⁰⁹ Many of these individual orders and activities are unlikely to create policy. But some do make policy, even in consequential ways. Consider, for instance, agency enforcement discretion. As one of us has observed elsewhere, “deciding when and where to dedicate enforcement resources is a powerful regulatory tool. When agencies decide not to enforce the law, those who would have benefited from enforcement suffer.”¹¹⁰ On the other hand, “when agencies decide to crack down, the objects of the crack-down suffer, whereas similarly situated regulated parties do not, for reasons beyond the control of the regulated.”¹¹¹

When it comes to informal adjudication and theories of democracy in administrative law, Professor Mashaw’s counsel is worth repeating:

Informal action in the adjudicatory context may be no less important. Agencies receive multitudes of requests to engage in particular enforcement actions concerning alleged violations of the statutes and regulations within their jurisdictions. These decisions about individual enforcement actions are presumptively free from judicial review and are subject to no reason-giving

106. SEC v. *Chenery Corp.*, 332 U.S. 194, 203 (1947).

107. *Id.* at 202–03.

108. WALKER, WASSERMAN & WIENER, *supra* note 96, at 20.

109. See, e.g., Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1629–31 (2018) (discussing some examples).

110. *Id.* at 1629 (citing Sohoni, *supra* note 68).

111. *Id.*

requirements under the APA. But, again, nothing prevents agencies from doing more. As previously mentioned, the NLRB has an appeals process within the office of its General Counsel that is available to petitioning parties whose requests for an enforcement action have been denied. After hearing these appeals, the Office of the General Counsel either accedes to the request or provides reasons why it believes that the agency should decline enforcement.¹¹²

Like Professor Mashaw, we do not recommend that “the APA be amended to mandate procedures like the ones described above in all cases of consequential agency informal action.”¹¹³ But agencies have considerable discretion to innovate within “*Vermont Yankee’s* white space,” as Emily Bremer and Sharon Jacobs call it¹¹⁴—to develop internal administrative law to advance democratic values in these informal adjudications that have broader consequences.

CONCLUSION

When it comes to major policymaking via administrative action, we have argued here and elsewhere that the default regulatory mode should be notice-and-comment rulemaking. This is not a hard-and-fast rule, and agencies (and Congress) must exercise their judgment in particular cases (and contexts). But especially if we are concerned with democracy in administrative law—whether that is in terms of pluralism, deliberation, or some more minimalist vision—this rulemaking default should be quite weighty.

As we have detailed elsewhere in the immigration context, all three branches can play a role to entrench notice-and-comment rulemaking as the default for major regulatory policymaking.¹¹⁵ The Supreme Court can modulate its judicial deference doctrines to afford more deference to agency policies when adopted via rulemaking.¹¹⁶ Congress can intervene to encourage this default, either on a universal level by modernizing the APA or in agency-specific contexts through regular reauthorization. Finally, the President need not wait for courts or Congress to act. The President can direct the heads of federal agencies to use

112. MASHAW, *supra* note 8, at 195; *see also id.* (discussing similar process at the Federal Trade Commission).

113. *Id.*

114. Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in Vermont Yankee’s White Space*, 32 J. LAND USE & ENV’T L. 523 (2017).

115. We briefly sketch out the path forward here, but have done so much more extensively in Wadhia & Walker, *supra* note 50, at 1235–42.

116. *See, e.g.,* Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019) (“We take the opportunity to restate, and somewhat expand on, those principles [of *Auer* deference to agency regulatory interpretations] here to clear up some mixed messages we have sent.”). As flagged in note 101 *supra*, one of us (Walker) views the pull of statutory *stare decisis* quite strong when it comes to interpreting the APA. *See also* Christopher J. Walker & Scott MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 NOTRE DAME L. REV. 1963, 1966 (2023) (arguing that “when it comes to interpretive questions [with respect to the APA] courts have already answered, the pull of statutory *stare decisis* should be quite strong, and reform to those statutory precedents should be left largely to Congress”).

rulemaking when it comes to major policymaking. As discussed in Part I.E, that is precisely what President Biden has done with respect to certain major policy matters in the immigration context. Indeed, agencies can make these procedural policies stickier by engaging in notice-and-comment rulemaking to create them.

We conclude with a cautionary note. Whereas notice-and-comment rulemaking may be the most democratically accountable mode of major policymaking within the Executive Branch, it will often still be an imperfect substitute for legislation. When it comes to questions of deep economic, moral, and political significance, Congress needs to play its primary legislative role. In the ideal world, Congress would make the major policy judgments directly, and federal agencies would engage in a deliberative process to effectively implement those policy directives of elected representatives. That vision of democracy may not be fully achievable today. In the meantime, federal agencies should embrace modes of regulatory policymaking that best leverage agency expertise, engage in a deliberative process, and increase political accountability. Notice-and-comment rulemaking will often be that best path forward when it comes to major policymaking.