



## ARTICLE

## Presidential Control and Administrative Capacity

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**Abstract.** Presidential control is the power to direct administrative capacity toward the President's own policy objectives. Accordingly, presidential power vis-à-vis administrative policymaking has two necessary components: control and capacity. First, the President must have the ability to set the agency's policymaking agenda and direct the day-to-day activities of its leadership and career employees. Second, the agency needs a well-managed team of policymakers with expertise and experience in both the substantive policy area and the policymaking process. Yet scholars have long assumed—without much empirical testing—that the administrative state has sufficient capacity to implement the President's agenda. Not so.

This Article argues that insufficient capacity prevents Presidents from implementing their policy agendas. This Article's goal is to encourage scholars, policymakers, and judges to engage more with capacity as a constraint on presidential action. Drawing on a survey of federal executives engaged in rulemaking, over 115 million federal personnel records, and over 5,000 rulemakings from three presidencies, this Article contributes three core findings to our understanding of presidential power. First, new measures of policymaking capacity show wider variation across federal agencies than people often assume. Second, a new survey of federal executives shows that Presidents and their proxies exercise a great

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degree of control over agencies' rulemaking agendas. Third and finally, multivariate models demonstrate that, controlling for presidential control and presidential priorities, low-capacity agencies are less likely to complete their rulemakings than high-capacity agencies. Most importantly, Presidents struggle to implement their agendas in low-capacity agencies regardless of whether they have significant control over those agencies. Traditional markers of presidential control prove ineffective in low-capacity agencies, and, therefore, control and capacity are complements—not substitutes.

The results have important implications for public administration and existing theories of presidential power. The wide variation in capacity raises questions about whether agencies have the capacity needed to make policy pursuant to congressional delegation. Moreover, strong adherence to unitary executive theory may have the unintended effect of weakening the President's ability to pursue their preferred policies by eroding administrative capacity. Instead, presidential power requires an appropriate balance of presidential control and administrative capacity. But control and capacity are in tension with one another. As presidential control increases within an agency, the agency may struggle to hire expert and experienced employees. Building a strong and efficacious presidency requires shifting the balance toward effective management, away from efforts to reduce structural insulation within agencies. Entrusting the President with the managerial prerogative requires increased oversight from the courts, Congress, and the public.

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## Introduction

*Under normal conditions, the power position of a fully developed bureaucracy is always towering. The “political master” finds himself in the position of the “dilettante” who stands opposite the “expert.”*

–Max Weber<sup>1</sup>

*We live today in an era of presidential administration.*

–Elena Kagan<sup>2</sup>

Rulemaking has superseded legislation as the dominant form of federal policymaking.<sup>3</sup> As the head of the Executive Branch, Presidents have claimed statutory authority delegated to federal agencies to enact policies related to climate change, gun control, internet access, and an array of other salient issues.<sup>4</sup> These policies are neither ministerial nor inconsequential. For example, President Obama announced the Environmental Protection Agency’s (EPA) Clean Power Plan as the “single most important step that America has ever made in the fight against global climate change.”<sup>5</sup> The Biden Administration cancelled over \$175 billion in student loans for 4.8 million Americans using authority possessed by the Department of Education under the Higher Education Act.<sup>6</sup> Even Presidents who prefer smaller government

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1. MAX WEBER, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 232 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).
  2. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001).
  3. See RACHEL AUGUSTINE POTTER, BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY 2 (2019) (“By some estimates, more than 90 percent of American law is created by administrative rules issued by federal agencies. In 2014 alone, federal agencies issued more than 3,500 legally binding rules, far outstripping the 224 new laws created by Congress and the [P]resident . . .” (footnotes omitted)).
  4. See, e.g., Application of the Definition of Machinegun to “Bump Fire” Stocks and Other Similar Devices, 83 Fed. Reg. 7949, 7949 (Feb. 23, 2018) (banning bump stocks on rifles); Statement on Internet Neutrality, 2 PUB. PAPERS 1426, 1427-28 (Nov. 10, 2014) (requesting that the Federal Communication Commission adopt net-neutrality regulations); Power Sector Carbon Pollution Standards, 78 Fed. Reg. 39535, 39535-37 (July 1, 2013) (proposing to regulate power plants to reduce carbon emissions).
  5. Lucy Perkins & Bill Chappell, *President Obama Unveils New Power Plant Rules in “Clean Power Plan,”* NPR (updated Aug. 3, 2015, 2:10 PM ET), <https://perma.cc/6W9X-5UUG>.
  6. See *Fact Sheet: President Biden Cancels Student Debt for More than 150,000 Student Loan Borrowers Ahead of Schedule*, WHITE HOUSE (Feb. 21, 2024), <https://perma.cc/Q55Y-VD3J> (“Already, the President has cancelled more student debt than any President in history—delivering lifechanging relief to students and families—and has created the most affordable student loan repayment plan ever: the SAVE plan.”); *Biden-Harris Administration Approves Additional \$4.5 Billion in Student Debt Relief for 60,000 Public Service Workers, Bringing Total to Over 1 Million Public Servants*, U.S. DEPT EDUC. (Oct. 17, 2024), <https://perma.cc/S42B-B2B2> (providing statistics and stating that “the footnote continued on next page

use rulemaking to repeal existing regulations.<sup>7</sup> President Trump described his deregulatory efforts as a “historic campaign to rescue American workers from job-killing regulations.”<sup>8</sup> While Presidents often take credit for regulating and deregulating, they owe their successes to the expertise and experience of agencies’ career employees. Administrative capacity ensures the completion of the President’s agenda.<sup>9</sup>

This Article provides empirical evidence that administrative capacity plays a far greater role in administrative policymaking than scholars acknowledge. Studies of administrative policymaking often omit discussions of capacity. They assume—without much empirical testing—that agencies have sufficient capacity to make policy and to faithfully execute the laws enacted by Congress.<sup>10</sup> Instead, these studies tend to ask: Who controls the policymaking process *within* the Executive Branch?<sup>11</sup> The President or career civil servants?

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Administration continues its work to issue debt relief regulations under the Higher Education Act”).

7. See, e.g., Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520, 32522 (July 8, 2019) (repealing the Clean Power Plan during the Trump Administration).
8. Remarks on Deregulation, 2016 DAILY COMP. PRES. DOC. 1 (July 16, 2020).
9. See *infra* Part III.B.
10. For research seeking to fill this gap, see SEAN GAILMARD & JOHN W. PATTY, LEARNING WHILE GOVERNING: EXPERTISE AND ACCOUNTABILITY IN THE EXECUTIVE BRANCH 2 (2013) (“[A]nalysis of the politics of executive branch policymaking has largely taken its informational advantage as given.”); and Alexander Bolton, Rachel Augustine Potter & Sharece Thrower, *Organizational Capacity, Regulatory Review, and the Limits of Political Control*, 32 J.L. ECON. & ORG. 242, 242 (2015) (“The study of political control, however, largely focuses on conflicts between political actors while giving less attention to the organizational constraints that agencies face in carrying out their missions.” (citation omitted)).
11. A single footnote cannot do justice to this literature. Historical surveys document the consolidation of administrative power within the White House. See generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008) (surveying presidential practice to support the existence of a unitary executive); Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131 (2024) (arguing that presidential administration is the product of intense political conflict). Other studies examine the strategies of presidential administration. See generally Terry M. Moe, *The Politicized Presidency*, in BROOKINGS INST., THE NEW DIRECTION IN AMERICAN POLITICS 235, 246 (John E. Chubb & Paul E. Peterson eds., 1985) (identifying politicization and centralization as key tools of presidential control); DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE (2008) (studying politicization and control of agency leadership); Anthony Bertelli & Sven E. Feldmann, *Strategic Appointments*, 17 J. PUB. ADMIN. RSCH. & THEORY 19 (2007) (same); Todd Phillips, *Commission Chairs*, 40 YALE J. ON REGUL. 277 (2023) (same); Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016) (studying centralization in budgeting); Sharece Thrower, *Policy Disruption*  
*footnote continued on next page*

Broadly, I define “control” as the ability to direct an agency’s capacity toward the actor’s preferred policies. Scholars debate whether Presidents or civil servants are more successful at steering policy toward their preferences. Some argue that the politicization of agency leadership and the centralization of policymaking within the Executive Office of the President (EOP) ensures that Presidents control administrative policymaking.<sup>12</sup> Others argue that bureaucratic resistance and structural independence inhibit presidential control.<sup>13</sup> Some reject a hierarchical theory of control, favoring a description

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*Through Regulatory Delay in the Trump Administration*, 48 PRESIDENTIAL STUD. Q. 517 (2018) (documenting the prevalence of regulatory delay as a tool of presidential control). Finally, a sizeable literature examines whether these strategies result in meaningful control. See generally Neal Devins & David E. Lewis, *The Independent Agency Myth*, 108 CORNELL L. REV. 1305 (2023) (studying control of independent agencies); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459 (2008) (same); Simon F. Haeder & Susan Webb Yackee, *Presidentially Directed Policy Change: The Office of Information and Regulatory Affairs as Partisan or Moderator?*, 28 J. PUB. ADMIN. RSCH. & THEORY 475 (2018) (showing mixed evidence of the Office of Information and Regulatory Affairs’ responsiveness to the President’s agenda); William F. West, *The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA*, 35 PRESIDENTIAL STUD. Q. 76 (2005) (same); Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008) (demonstrating rulemaking cycles follow presidential elections); Christopher Piper, *Going for Goals: Presidential Appointments and Agency Goal Change*, 52 PRESIDENTIAL STUD. Q. 140 (2022) (showing appointments influence goal change); Rachel Augustine Potter, *Providing Political Guidance? Agency Politicization and “As If” Policymaking*, 1 J. POL. INSTS. & POL. ECON. 1 (2020) (finding that politicization increases the issuance of guidance).

12. Both “centralization” and “politicization” have established meanings in political science. “Centralization” describes efforts to concentrate policymaking activities within the White House and the Executive Office of the President. See, e.g., Moe, *supra* note 11, at 244. “Politicization” describes the installation of political appointees in agency leadership positions. See, e.g., *id.* at 245. For research demonstrating presidential control, see generally Bolton et al., note 10 above (concluding that OIRA prioritizes the president’s policy preferences); Kagan, note 2 above (arguing that Presidents exercise the greatest control over agencies); Kenneth Lowande, *Politicization and Responsiveness in Executive Agencies*, 81 J. POL. 33 (2019) (finding that politicization decreases agency responsiveness to Congress); O’Connell, note 11 above (demonstrating rulemaking cycles follow presidential elections); Piper, note 11 above (showing appointments influence goal change); and Potter, note 11 above (finding that politicization increases the issuance of guidance).
13. For research questioning presidential control, see generally Alex Acs, *Presidential Directives in a Resistant Bureaucracy*, 41 J. PUB. POL’Y 776, 779 (2021) (“A president has the right, or formal authority, to issue policy directives and remove some subordinates within the bureaucracy, but this does not guarantee that the president has the power, or real authority, to influence a policy outcome.”); Rachel Augustine Potter & Charles R. Shipan, *Agency Rulemaking in a Separation of Powers System*, 39 J. PUB. POL’Y 89, 102-03 (2019) (finding evidence of both presidential and congressional control of rulemaking); and William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J. PUB. ADMIN. RSCH. & POL. ECON. 1 (2020) (finding that politicization increases the issuance of guidance).

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of administrative policymaking as cooperative and interdependent.<sup>14</sup>

The absence of administrative capacity from this conversation is puzzling. In the policymaking context, I define “capacity” as the expertise, experience, and team production that allow agencies to choose between policy alternatives and navigate the procedural requirements of the Administrative Procedure Act (APA).<sup>15</sup> Although scholars agree that a lack of capacity hinders policymaking,<sup>16</sup> they assume that Presidents build sufficient capacity within agencies to implement their policy agendas.<sup>17</sup> Existing studies of capacity tend to focus on either salient examples of mismanagement or on mass

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THEORY 495, 510-12 (2013) (describing the limited influence of the President and Congress’s prominent role).

14. For research on the interdependence between the President and career staff, see Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1630 (2023) (“While our interviewees did sometimes discuss political-career conflicts, the overarching image that emerged did not reflect a pervasively hierarchical, dichotomous, and oppositional principal-agent relationship. Rather, our interviews presented an everyday state of role-diversified coordination among political and careers.”).
15. For a general discussion of capacity, see ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE: REIMAGING ADMINISTRATIVE LAW 35-65 (2020) (conceptualizing capacity); M. ERNITA JOAQUIN & THOMAS J. GREITENS, AMERICAN ADMINISTRATIVE CAPACITY: DECLINE, DECAY, AND RESILIENCE 41-71 (2021) (same); and Nicholas Ryan Bednar, *Bureaucratic Autonomy and the Policymaking Capacity of United States Agencies, 1998-2021*, 12 POL. SCI. RSCH. & METHODS 652, 653-55 (2024) (same). For a discussion of the need for capacity in the rulemaking context, see Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992) (describing rulemaking as “increasingly rigid and burdensome”); and Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60-61 (1995) (highlighting reasons agencies avoid rulemaking). But see Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-Making “Ossified”?*, 20 J. PUB. ADMIN. RSCH. & THEORY 261, 270-78 (2010) (finding mixed evidence about which procedures speed up and slow down rulemakings).
16. Some studies of policymaking have included capacity as a control in empirical models. For articles including capacity as a control in empirical models, see, for example, Potter & Shipan, note 13 above, at 102-03; and Yackee & Yackee, note 15 above, at 273.
17. For statements assuming that Presidents have sufficient incentives to build capacity, see Kagan, note 2 above, at 2339; and Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 237 (1990).

adjudication.<sup>18</sup> Capacity's effect on policymaking has received less attention.<sup>19</sup>

This Article argues that the fetishization of presidential control has caused commentators to overemphasize its importance relative to capacity. By focusing on control, scholars ignore another plausible explanation for why Presidents occasionally struggle to accomplish their policy agendas: limited administrative capacity. Some agencies are overworked, under-resourced, and poorly managed. Both control and capacity are necessary conditions for policymaking success.<sup>20</sup> The intuition of this argument is simple enough. Without control, the agency may refuse to abide by the President's command. Without capacity, no amount of control will produce the policy desired by the President. In other words, capacity and control are complements—not substitutes.

The goal of this Article is to encourage scholars, policymakers, and judges to engage more with capacity as a constraint on presidential action. Drawing on new data from a survey of federal executives engaged in rulemaking, over 115 million federal personnel records, and over 5,000 rulemakings, this Article presents empirical evidence that Presidents often have sufficient mechanisms

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18. See generally MARTHA DERTHICK, *AGENCY UNDER STRESS: THE SOCIAL SECURITY ADMINISTRATION IN AMERICAN GOVERNMENT* (1990) (studying capacity in the Social Security Administration); JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983) (same); David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1 (2020) (studying capacity in the Department of Veteran Affairs); Nicholas R. Bednar, *The Public Administration of Justice*, 44 CARDOZO L. REV. 2139 (2023) (studying capacity in the EOIR); David K. Hausman, Daniel E. Ho, Mark S. Krass & Anne McDonough, *Executive Control of Agency Adjudication: Capacity, Selection, and Precedential Rulemaking*, 39 J.L. ECON. & ORG. 682 (2023) (same).
19. For limited literature on the effect of capacity on policymaking, see generally Annie Benn, *Tying Hands: Strategic Incentives to Undermine Bureaucratic Capacity* (Jan. 7, 2019) (unpublished manuscript) (on file with author) (theorizing that elections and ideological preferences induce Presidents with preferences for small government to undermine administrative capacity); Bolton, Potter & Thrower, note 10 above (examining the influence of OIRA's capacity on rulemaking); Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873 (2007) (theorizing that policymaking discretion induces capacity building); John D. Huber & Nolan McCarty, *Bureaucratic Capacity, Delegation, and Political Reform*, 98 AM. POL. SCI. REV. 481 (2004) (theorizing that capacity hinders the efficacy of delegation); and Ian R. Turner, *Policy Durability, Agency Capacity, and Executive Unilateralism*, 50 PRESIDENTIAL STUD. Q. 40 (2020) (theorizing that policy durability informs how much effort agencies invest).
20. See *infra* text accompanying notes 417-18 (arguing that "Presidents cannot successfully implement their agendas through control alone, because control has no meaningful impact on whether a low-capacity agency finalizes a particular rule"); *infra* Part IV (summarizing the empirical results and suggesting that, on average, presidential control alone is insufficient to make policy).



to set agency agendas but are limited by the lack of capacity in some agencies. This Article offers three main findings. First, agencies exhibit wider variation in policymaking capacity than traditionally recognized.<sup>21</sup> Second, federal executives report that Presidents and their proxies have the greatest influence in setting rulemaking agendas.<sup>22</sup> Third and finally, capacity has a significant effect on rulemaking initiation and completion.<sup>23</sup> Traditional mechanisms of control are less effective in low-capacity agencies.<sup>24</sup> Collectively, the results demonstrate that capacity has an equal—if not greater—effect on rulemaking than control.

These findings have several implications for public administration and theories of presidential power. First, the wide variation in capacity raises concern that many agencies are incapable of exercising the authority delegated to them by Congress.<sup>25</sup> Scholars have long assumed that Congress delegates policymaking authority to agencies with sufficient expertise and experience to fill gaps in statutory programs.<sup>26</sup> The literature argues that delegation produces better policy outcomes because it takes advantage of the agency's expertise.<sup>27</sup> If an agency lacks the expertise or experience needed to engage in policymaking, it raises questions about the virtues of delegation.

Second, the results raise concerns about ongoing efforts to increase presidential control over agencies.<sup>28</sup> As Frederick Mosher described, Presidents have long construed the “*executive* power . . . to include *administrative* power; and administrative power, to include both the execution of established policies and initiative in developing new ones.”<sup>29</sup> This belief has led Presidents to pursue “responsive competence” (i.e., control) over “neutral competence” (i.e., capacity) in managing the administrative state.<sup>30</sup> For example, President Trump proposed to exempt agency policymakers from civil-service

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21. See *infra* Part II.C.

22. See *infra* Part III.A.

23. See *infra* Parts III.B–C.

24. See *infra* Part III.B.

25. See *infra* Part II.D.

26. See Terry M. Moe, *Delegation, Control, and the Study of Public Bureaucracy*, 10 FORUM issue 2, art. 4, 2012, at 1, 31 (“[T]he delegation literature has focused all its attention on the information problem and brushed capacity aside.”).

27. See, e.g., CORNELIUS M. KERWIN & SCOTT R. FURLONG, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 29 (5th ed. 2019).

28. See *infra* Part IV.B.

29. FREDERICK C. MOSHER, *DEMOCRACY AND THE PUBLIC SERVICE* 84 (2d ed. 1982).

30. See Moe, *supra* note 11, at 239 (“[The President] is not interested in efficiency or effectiveness or coordination per se, and he does not give preeminence to the ‘neutral competence’ these properties may seem to require. . . . [W]hat he seeks is ‘responsive competence,’ not neutral competence.”).

protections by creating a new “Schedule F,” making it easier for Presidents to replace career employees following a presidential transition.<sup>31</sup>

The pursuit of presidential control has developed a constitutional dimension. Proponents of a unitary executive argue that the Constitution endows Presidents with the right to direct administrative policymaking and grants them tools of control over federal agencies.<sup>32</sup> The Supreme Court has embraced this theory by invalidating statutory provisions that protect appointees from removal.<sup>33</sup> Some would extend these holdings to all executive-branch employees.<sup>34</sup>

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31. See Exec. Order No. 13,957, 85 Fed. Reg. 67631, 67632-33 (Oct. 26, 2020), *revoked by* Exec. Order No. 14,003, 86 Fed. Reg. 7231, 7231 (Jan. 27, 2021); see also Erich Wagner, *Trump Has Endorsed a Plan to Purge the Civil Service of ‘Rogue Bureaucrats,’* GOV’T EXEC. (July 27, 2022), <https://perma.cc/PA6R-3XNF>.

32. See CALABRESI & YOO, *supra* note 11, at 3 (“The Constitution’s creation of a unitary executive eliminates conflicts in law enforcement and regulatory policy by ensuring that all of the cabinet departments and agencies that make up the federal government will execute the law in a consistent manner and in accordance with the president’s wishes.”); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 581 (1994) (“[A]gencies and officers executing federal law must retain the President’s approval and be subject to presidential superintendence if they are to continue to exercise ‘the executive Power.’”); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1242 (1994) (“But if a statute vests discretionary authority directly in an agency official (as do most regulatory statutes) rather than in the President, the Article II Vesting Clause seems to require that such discretionary authority be subject to the President’s control.”); David B. Rivkin, Jr., *The Unitary Executive and Presidential Control of Executive Branch Rulemaking*, 7 ADMIN. L.J. AM. U. 309, 317-20 (1993) (describing rulemaking as law execution entrusted to the President); see also Rels. of the President to the Exec. Dep’ts, 7 Op. Att’y Gen. 453, 469-70 (1855) (“[N]o Head of Department can lawfully perform an official act against the will of the President; and that will is by the Constitution to govern the performance of all such acts.”).

33. See, e.g., *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) (“The President must be able to remove not just officers who disobey his commands but also those . . . who have ‘different views of policy.’” (quoting *Myers v. United States*, 272 U.S. 52, 131 (1926))); *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2193, 2204 (2020) (“With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans.”); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010) (invalidating removal restrictions for an inferior officer that “determines the policy and enforces the laws of the United States”); see also U.S. CONST. art II, § 2, cl. 2 (prescribing the appointment power for Presidents); Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 382 (2020) (“[F]ive Justices have embraced much or all of the logic and reasoning of the unitary executive theory with respect to removals.”).

34. See *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 391 (5th Cir. 2023) (en banc) (Ho, J., concurring) (“[W]e should consider whether laws that limit the President’s power to remove Executive Branch employees are consistent with the vesting of executive power exclusively in the President.”), *vacated as moot*, 144 S. Ct. 480 (2023) (per curiam); PHILIP K. HOWARD, NOT ACCOUNTABLE: RETHINKING THE CONSTITUTIONALITY OF

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Reforms aimed at increasing presidential control are double-edged swords. The results suggest that the agencies with the highest levels of capacity are often those that are best insulated from politics, such as independent commissions.<sup>35</sup> This finding is consistent with empirical research demonstrating that capacity erodes as career employees lose autonomy and policy discretion.<sup>36</sup> Accordingly, strong adherence to unitary executive theory may have the unintended effect of *weakening* presidential power by reducing the administrative state's capacity for policymaking.<sup>37</sup> Although a strong unitary executive may be constitutionally feasible, its implementation hinders Presidents from pursuing their policy agendas.<sup>38</sup> Building a high capacity and politically responsive workforce requires a delicate balance between presidential control and bureaucratic autonomy.

Third, the results demonstrate the need for more vigorous management of federal agencies. Building capacity does not always require increased spending, but it does require the promotion of active management.<sup>39</sup> I argue that Presidents have the greatest opportunity to improve administration but do not always behave as good-faith managers.<sup>40</sup> Ultimately, the courts, Congress, and the public must play a greater role in holding Presidents accountable.

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PUBLIC EMPLOYEE UNIONS 135-40 (2023); *see also* Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 98 F.4th 646, 650 (5th Cir. 2024) (Ho, J., dissenting from denial of rehearing en banc).

35. *See infra* Part II.C (illustrating the difference in capacity between executive agencies and independent commissions).

36. *See* DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928, at 26-36 (2001) (describing the relationship between reputation, autonomy, and capacity building); Gailmard & Patty, *supra* note 19, at 875 ("[Merit system protections] alone [are] not enough to induce bureaucracies to invest in policy expertise . . . . The grant of policy discretion from the legislature, rationally chosen in response to expertise investment, fills this role."); Mark D. Richardson, *Politicization and Expertise: Exit, Effort, and Investment*, 81 J. POL. 878, 889 (2019) ("Loss of policy influence reduces the value policy-motivated civil servants derive from public service, which increases their incentives to exit and decreases their incentives to invest in and apply policy expertise.").

37. *See infra* Part IV.B (discussing the threat that unitary executive theory poses to capacity).

38. *See infra* Part IV.B.

39. *See generally* JOHN J. DI IULIO, JR., BRING BACK THE BUREAUCRATS: WHY MORE FEDERAL WORKERS WILL LEAD TO BETTER (AND SMALLER!) GOVERNMENT (2014) (arguing the current reliance on contracting reduces capacity relative to simply hiring civil servants).

40. *See infra* Part IV.B.

## I. Policymaking in the Executive Branch

Administrative policymaking describes the development of policy by the Executive Branch using rulemaking, executive orders, executive memoranda, guidance documents, and other devices. The administrative policymaking process often includes activities such as collecting evidence related to the policy problem, identifying policy alternatives, drafting regulatory text, and responding to comments from the public.<sup>41</sup> Sometimes, the word “policymaking” is used in a narrower sense, meaning “the activity of deciding on new policies.”<sup>42</sup> To avoid confusion, I describe the selection among policy alternatives as “agenda setting.”<sup>43</sup> An actor may participate in the policymaking process in a technical sense without setting the agenda.<sup>44</sup>

This Article discusses the *internal* dynamics that shape administrative policymaking. Because I focus on internal dynamics, this Article describes the relationship between two sets of actors: (1) the President and their appointees and (2) the agency’s career employees. For the President to exercise true control over administrative policymaking, they must have both agenda-setting authority and the power to direct the agency’s capacity toward that agenda. As this Article explains, presidential control is a necessary but insufficient condition for presidential power. The other necessary condition is capacity.

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41. See EUGENE BARDACH & ERIC M. PATASHNIK, A PRACTICAL GUIDE FOR POLICY ANALYSIS: THE EIGHTFOLD PATH TO MORE EFFECTIVE PROBLEM SOLVING 16-17 (7th ed. 2023) (describing the process of collecting evidence for policy analysis); JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 2-4 (updated 2d ed. 2011) (describing policymaking as comprising four distinct processes, including identifying policy alternatives); POTTER, *supra* note 3, at 29-39 (describing the rulemaking process as including—among other things—conducting research, consulting with stakeholders, drafting regulatory text, soliciting comments, and responding to comments).

42. *Policy-making*, CAMBRIDGE ENG. DICTIONARY, <https://perma.cc/79C9-E8JW> (archived Feb. 8, 2025).

43. For research using this phrase in policymaking contexts, see, for example, GARY W. COX & MATHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES 39 (2005); and KINGDON, note 41 above, at 3.

44. See Patrick Overeem, *The Value of the Dichotomy: Politics, Administration, and the Political Neutrality of Administrators*, 27 ADMIN. THEORY & PRACTICE 311, 313 (2005) (distinguishing key principles of agenda setting from administration). Of course, this dichotomy is a mirage. Deciding which scientific evidence should credibly inform alternatives, which comments should receive the greatest weight, and the like, all shape what policy alternatives exist for the decider. BARDACH & PATASHNIK, *supra* note 41, at 16-18, 120-26.

### A. Divergent Preferences

The administrative state comprises a hierarchy of different actors selected by different means.<sup>45</sup> Article II of the Constitution vests the executive power in the President<sup>46</sup> and establishes them as the de facto head of the administrative state.<sup>47</sup> The Constitution allows the President to appoint officers to agencies established by Congress, ensuring that the President does not remain the sole occupant of the Executive Branch.<sup>48</sup> Presidents often appoint agency leaders based on their ability to advance the President's policy interests.<sup>49</sup>

What do Presidents hope to gain through administrative policymaking? Presidents win office through a national election.<sup>50</sup> They seek reelection for themselves and their co-partisans while simultaneously hoping to leave legacies as "great" Presidents.<sup>51</sup> Winning reelection requires Presidents to

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45. Cf. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); U.S. CONST. art. II, § 2, cl. 2 (providing the President authority to appoint officers of the United States with advice and consent of the Senate); 5 U.S.C. § 3301(1) (authorizing the President to regulate the civil service); *id.* § 2301(b)(1) (outlining that the "selection and advancement" of federal personnel "should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity").

46. See U.S. CONST. art. II, § 1, cl. 1.

47. See Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 696 (2007) ("All will agree that the Constitution creates a unitary chief executive officer, the President, at the head of the government Congress defines to do the work its statutes detail.").

48. See U.S. CONST. art. II, § 2, cl. 2 ("[The President] . . . by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .").

49. See Bertelli & Feldmann, *supra* note 11, at 22 (explaining the strategy of presidential appointments in a world of political bargaining); Moe, *supra* note 11, at 245 ("By appointing individuals on the basis of loyalty, ideology, or programmatic support, [the President] can take direct action to enhance responsiveness throughout the administration, from presidential agencies like the OMB to the most remote independent boards and commissions.").

50. See U.S. CONST. art. II, § 1, cl. 3.

51. See DOUGLAS L. KRINER & ANDREW REEVES, *THE PARTICULARISTIC PRESIDENT: EXECUTIVE BRANCH AND POLITICAL INEQUALITY* 2 (2015) ("[P]residents have a primal desire to secure reelection or to assure their party's continued hold on the presidency to both defend and reinforce their legacy."); Jack Valenti, *The President as Political Leader*, in *FOUR VIRGINIA PAPERS PRESENTED AT THE MILLER CENTER FORUMS*, 1980: PART II, at 1, 4 (1980) ("I don't think there is any doubt that the principal goal of the president, any president, is to win enough votes in November of an election year to have a second four-year term.").

respond to the policy demands of a national constituency.<sup>52</sup> Accordingly, Presidents construct their policy agendas around the preferences of their electoral coalition.<sup>53</sup>

Asymmetries between the modern Democratic and Republican parties cause Presidents to prioritize different policies.<sup>54</sup> Most relevant here, stereotypes paint Democrats as pro-regulation and Republicans as pro-deregulation.<sup>55</sup> This heuristic is not infallible. For example, the Obama Administration repealed longstanding regulations that required commercial drivers to submit pre- and post-trip vehicle inspection reports.<sup>56</sup> The Trump Administration banned bump-stock devices that allow semiautomatic rifles to operate like machineguns.<sup>57</sup> To some degree, all Presidents seek to enact new policies and repeal the policies of their predecessors.<sup>58</sup> Regardless of whether Presidents seek to regulate or deregulate, they encounter the same constraints:

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52. See JOHN A. DEARBORN, *POWER SHIFTS: CONGRESS AND PRESIDENTIAL REPRESENTATION* 1-2 (2021) (tracing the idea of the President as a “national” figure).
53. See PAUL C. LIGHT, *THE PRESIDENT’S AGENDA: DOMESTIC POLICY CHOICE FROM KENNEDY TO CLINTON* 64-65 (3d ed. 1999) (describing Presidents as believing that “certain issues are essential in building and maintaining the electoral coalition”); Lawrence R. Jacobs & Robert Y. Shapiro, *Issues, Candidate Image, and Priming: The Use of Private Polls in Kennedy’s 1960 Presidential Campaign*, 88 AM. POL. SCI. REV. 527, 531-532 (1994) (describing how the John F. Kennedy campaign sought to identify issues that were “highly salient,” “accessible to the average voter,” and would appeal to members of the Democratic party and centrists).
54. See MATTHEW GROSSMANN & DAVID A. HOPKINS, *ASYMMETRIC POLITICS: IDEOLOGICAL REPUBLICANS AND GROUP INTEREST DEMOCRATS* 14-16 (2016).
55. See ANDREW KOHUT, CAROL DOHERTY, MICHAEL DIMOCK & SCOTT KEETER, PEW RSCH. CTR., *AUTO BAILOUT NOW BACKED, STIMULUS DIVISIVE: MIXED VIEWS OF REGULATION, SUPPORT FOR KEYSTONE PIPELINE* 14 (2012), <https://perma.cc/UH6R-EX8N> (providing polling data that 76% of Republicans believe that government regulation of business “usually does more harm than good” and 57% of Democrats believe that regulation “is necessary to protect public” in February 2012); LISA K. PARSHALL & JIM TWOMBLY, *DIRECTING THE WHIRLWIND: THE TRUMP PRESIDENCY AND THE DECONSTRUCTION OF THE ADMINISTRATIVE STATE*, at xvii (2020) (“Deregulation and the downsizing of the bureaucracy has thus been a hallmark of modern conservative presidents.”).
56. See *Inspection, Repair, and Maintenance; Driver-Vehicle Inspection Report (DVIR)*, 79 Fed. Reg. 75437, 75437-38 (Dec. 18, 2014).
57. See *Application of the Definition of Machinegun to “Bump Fire” Stocks and Other Similar Devices*, 83 Fed. Reg. 7949, 7949 (Feb. 23, 2018) (banning bump stocks on rifles); *Bump-Stock-Type Devices*, 83 Fed. Reg. 66514, 66514 (Dec. 26, 2018) (finalizing this rule), *vacated*, *Garland v. Cargill*, 144 S. Ct. 1613, 1624 (2024).
58. See Sharece Thrower, *To Revoke or Not Revoke? The Political Determinants of Executive Order Longevity*, 61 AM. J. POL. SCI. 642, 654 (2017) (presenting evidence that Presidents are more likely to revoke executive orders issued by ideologically opposed administrations); Thrower, *supra* note 11, at 518-22 (surveying methods of policy disruption).

a personal lack of sufficient information to make policy choices,<sup>59</sup> and the need to obey procedures prescribed by the APA.<sup>60</sup> Presidents and their appointees rely on career employees for help in the policymaking process.<sup>61</sup>

Presidents have always been supported by a cadre of career employees.<sup>62</sup> Since the passage of the Pendleton Act of 1883,<sup>63</sup> many career employees have enjoyed protection from removal during times of political transition.<sup>64</sup> The law instructs agencies to hire these employees based on merit rather than their political leanings.<sup>65</sup> Today, the Executive Branch employs more than two million civilian personnel,<sup>66</sup> most of whom serve in multiple administrations.<sup>67</sup> Most of these employees execute the law through rote implementation, such as distributing Social Security checks,<sup>68</sup> policing U.S. waterways,<sup>69</sup> and providing medical care to veterans.<sup>70</sup> This Article focuses

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59. See LIGHT, *supra* note 53, at 18-20 (discussing the President's difficulty of acquiring and processing information relevant to policy design).

60. See 5 U.S.C. § 551(5) (defining rulemaking as the "process for formulating, amending, or repealing a rule"); 5 U.S.C. § 553 (describing procedures for rulemaking).

61. See Bernstein & Rodríguez, *supra* note 14, at 1630 (describing the cooperative nature between appointees and career employees).

62. See PATRICIA WALLACE INGRAHAM, THE FOUNDATION OF MERIT: PUBLIC SERVICE IN AMERICAN DEMOCRACY 17-18 (1995) (describing the origins of the civil service).

63. Pendleton Civil Service Reform Act § 2, ch. 27, 22 Stat. 403, 403-04 (1883) (codified as amended in scattered sections of 5 U.S.C.). See generally STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 47-84 (1982) (detailing civil-service reform in the United States).

64. See generally U.S. OFF. OF PERS. MGMT., BIOGRAPHY OF AN IDEAL: A HISTORY OF THE FEDERAL CIVIL SERVICE 206-311 (2003) (describing how civil service reform protected employees from removal across administrations in ways that the prior patronage system had not).

65. See, e.g., 5 U.S.C. § 2301(b)(1).

66. See BEN LEUBSDORF & CAROL WILSON, CONG. RSCH. SERV., R47716, CURRENT FEDERAL CIVILIAN EMPLOYMENT BY STATE AND CONGRESSIONAL DISTRICT 1 (2023), <https://perma.cc/C3L5-L57Z>.

67. According to the U.S. Office of Personnel Management, the average full-time employee has served 13.51 years. See *Profile of Federal Civilian Non-Seasonal Full-Time Employees*, U.S. OFF. OF PERS. MGMT. (Sept. 30, 2017), <https://perma.cc/9MRV-SMCJ>.

68. See *Mission and Structure*, SOC. SEC. ADMIN., <https://perma.cc/YG8D-LZ7F> (archived Feb. 8, 2025) (describing the Social Security Administration's mission of delivering financial support).

69. See *Missions*, U.S. COAST GUARD, <https://perma.cc/5AJR-RCGB> (archived Feb. 8, 2025) (describing the Coast Guard's mission of protecting the seas).

70. See *Veterans Health Administration*, U.S. DEP'T OF VETERANS AFFS. (Feb. 8, 2025), <https://perma.cc/5CY9-L77J> (describing the Veterans Health Administration's mission of delivering healthcare to veterans).

specifically on employees engaged in policymaking activities. I refer to these employees as “agency policymakers.”<sup>71</sup>

The literature on presidential control rests on an uncontroversial assumption that Presidents and career staff occasionally have different preferences over policy outcomes.<sup>72</sup> Divergent preferences naturally arise because Presidents and career employees assume their positions through different selection mechanisms,<sup>73</sup> and they have different motivations for enacting policy. Agency policymakers pursue careers in government, in part, to nudge public policy in their preferred ideological direction.<sup>74</sup> These employees often forego higher salaries in the private sector to serve the public.<sup>75</sup> Of course, what it means to “serve the public” depends, in part, on the employee’s ideological priors about what the public needs.<sup>76</sup> Individuals with

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71. See POTTER, *supra* note 3, at 64-68 (describing the importance of rulemaking to bureaucrats); see also ANDREW RUDALEVIGE, BY EXECUTIVE ORDER: BUREAUCRATIC MANAGEMENT AND THE LIMITS OF PRESIDENTIAL POWER 35-36 (2021) (describing White House reliance on civil servants for drafting executive orders); Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 248-50 (2019) (discussing which officials participate in drafting guidance); Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1392-94 (2017) (showing high levels of agency participation in legislative drafting).
72. See ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 162-70 (2020) (describing the divergence between the Obama Administration and Immigration and Customs Enforcement); STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE 103-05, 107-09 (2021) (describing the divergence during the Trump Administration); Joel D. Aberbach & Bert A. Rockman, *Clashing Beliefs Within the Executive Branch*, 70 AM. POL. SCI. REV. 456, 460-66 (1976) (describing the divergence during the Nixon Administration); Robert Maranto, *Still Clashing After All These Years: Ideological Conflict in the Reagan Executive*, 37 AM. J. POL. SCI. 681, 690 (1993) (describing the divergence during the Reagan Administration).
73. Compare U.S. CONST. art. II, § 1, cl. 3 (providing for the election of Presidents), with 5 U.S.C. § 2301(b)(1) (codifying merit-based recruitment for civil servants).
74. See ANTHONY DOWNS, INSIDE BUREAUCRACY 88-89 (1967) (classifying employees based on their intrinsic motivations); Gailmard & Patty, *supra* note 19, at 875 (“By allowing agents to bend policy to their liking, it offers ‘policy rents’ for expertise development and a career in public service that only zealots value.”).
75. See PAUL R. VERKUIL, VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT 150 (2017) (describing the 18% wage gap between the government and the private sector for employees with advanced degrees); Gailmard & Patty, *supra* note 19, at 873, 886 (explaining incentives to accept a lower salary for greater discretion); David E. Lewis, *Deconstructing the Administrative State*, 81 J. POL. 767, 775-77 (2019) (showing the growth in federal spending and the decline in civil service wages); James L. Perry & Lois Recascino Wise, *The Motivational Bases of Public Service*, 50 PUB. ADMIN. REV. 367, 368-69 (1990) (describing public-service motivations).
76. See DOWNS, *supra* note 74, at 84 (eschewing an “objective” definition of “public interest” by focusing instead of “what each official believes the bureau ought to do to best carry out its social function”).



different policy preferences apply to work in different agencies.<sup>77</sup> For example, left-leaning individuals concerned about environmental policy choose to work for the EPA while right-leaning individuals concerned about border protection choose to work for the Department of Homeland Security (DHS).<sup>78</sup>

The selection of employees into like-minded agencies facilitates the development of distinct missions, cultures, and policy preferences.<sup>79</sup> These attributes reinforce the primacy of one or two of the agency's policy objectives over other ancillary tasks.<sup>80</sup> For example, the Department of Justice (DOJ) has a strong enforcement culture and tends to neglect its clemency tasks because it views clemency as a critique of prosecution.<sup>81</sup> The Internal Revenue Service (IRS) seeks to maximize revenue and therefore administers welfare programs with a large degree of skepticism.<sup>82</sup> An esprit de corps unifies the workforce and creates a sense of common purpose.<sup>83</sup>

Divergent preferences within the Executive Branch create the possibility of conflict.<sup>84</sup> A member of Trump's EPA transition team complained that "[i]t's

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77. See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 66 (1989) (discussing self-selection of employees into "activist" agencies and "traditional" agencies).

78. Measures of agency ideology consistently place the EPA and DHS on one end of the spectrum. See Jowei Chen & Tim Johnson, *Federal Employee Unionization and Presidential Control of the Bureaucracy: Estimating and Explaining Ideological Change in Executive Agencies*, 27 J. THEORETICAL POL. 151, 162-63, app. A2 (2015) (measuring agency ideology using campaign donations by agency employees); Joshua D. Clinton & David E. Lewis, *Expert Opinion, Agency Characteristics, and Agency Preferences*, 16 POL. ANALYSIS 3, 5-6 (2008) (measuring agency ideology with expert surveys); Mark D. Richardson, Joshua D. Clinton & David E. Lewis, *Elite Perceptions of Agency Ideology and Workforce Skill*, 80 J. POL. 303, 304-05 (2017) (measuring agency ideology with surveys of federal executives); Mark D. Richardson, Joshua D. Clinton & David E. Lewis, *Elite Perceptions of Agency Ideology and Workforce Skill* app. 14 (2018), <https://perma.cc/GPU8-PX4V>.

79. See CARPENTER, *supra* note 36, at 23-25 (defining bureaucratic culture); WILSON, *supra* note 77, at 65-68, 90-104 (describing the formation of culture, mission, and political ideology).

80. See WILSON, *supra* note 77, at 55-70 (explaining how agencies decide which tasks to pursue).

81. See Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 312-13 (2013).

82. See Kristin E. Hickman, *Pursuing a Single Mission (or Something Closer to It) for the IRS*, 7 COLUM. J. TAX L. 169, 184-85 (2016).

83. See WILSON, *supra* note 77, at 68 ("Bureaucracies will in time acquire a distinctive personality or culture that will shape the attitudes of people who join these organizations . . ."); cf. JOHN J. DI IULIO, JR., *GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT* 151-52 (1987) (describing socialization in the Texas corrections system).

84. See JOHN BREHM & SCOTT GATES, *WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC* 9-13 (1999) ("[B]ureaucrats' preferences might lead  
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been obvious since the beginning of the Trump administration that the career staff is sabotaging the rulemakings.”<sup>85</sup> The Obama Administration had concerns that DHS officers would resist immigration reform.<sup>86</sup> Divergent preferences shape the policymaking environment within the Executive Branch.<sup>87</sup> When Presidents and agency policymakers have similar priorities, successful policymaking depends on the agency having an expert and experienced workforce capable of implementing the President’s vision.<sup>88</sup> When Presidents and agencies have divergent preferences, Presidents also need mechanisms of control to direct the agency’s capacity toward their agendas.<sup>89</sup>

## B. Presidential Control

Given the potential for conflict, Presidents have reformed the Executive Branch to control administrative policymaking.<sup>90</sup> One way that Presidents have sought to increase control is through the politicization of agency leadership. Beyond presidential appointments with Senate confirmation, Presidents have politicized other positions in agencies by exempting them from civil-service protections. For example, the Civil Service Reform Act of 1978 created the Senior Executive Service to provide Presidents greater control over policymaking.<sup>91</sup> Agency leadership plays a crucial role in setting the agenda and spurring policy change.<sup>92</sup> Interviews suggests that career employees generally “accept the authority of politically appointed officials to

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them to significantly alter their behavior from what their superiors in the bureaucratic hierarchy might prefer them to do.”).

85. SKOWRONEK ET AL., *supra* note 72, at 109.

86. See COX & RODRÍGUEZ, *supra* note 72, at 166.

87. See Brian D. Feinstein & Abby K. Wood, *Divided Agencies*, 95 S. CAL. L. REV. 731, 736 (2022) (“Our results show that divided agencies—that is, those with ideologically opposed agency heads and civil servants—adopt a slower rulemaking posture than agencies that are more unified.”).

88. See *infra* Part III.B (empirically demonstrating that capacity affects rulemaking completion).

89. See *infra* Part I.B (discussing these institutional mechanisms).

90. See Moe, *supra* note 11, at 246.

91. LEWIS, *supra* note 11, at 23; see also INGRAHAM, *supra* note 62, at 79-80 (describing how the Senior Executive Service changed the relationship between political appointees and senior career employees).

92. See Piper, *supra* note 11, at 158 (providing evidence that appointees enable long-term goal change); Potter, *supra* note 11, at 16 & tbl.2 (showing that politicization increases the production of guidance documents).

have the final say” in setting the agency’s agenda.<sup>93</sup> Moreover, these appointees stave off efforts by Congress to influence administrative policymaking.<sup>94</sup>

Presidents have also centralized policymaking within the White House through a series of reforms. One component of centralization concerns the control of the coffers. The Budget and Accounting Act of 1921 centralized agency budgeting within the EOP,<sup>95</sup> providing the Office of Management and Budget (OMB) with levers to pressure agencies into accepting the President’s agenda.<sup>96</sup> If an agency refuses to comply, OMB may withhold disbursement of funds as long as legally possible.<sup>97</sup>

Another important component is the centralization of agenda setting and regulatory review. Executive Order 12,866 requires an annual meeting of the Vice President, the President’s regulatory policy advisors, and the heads of agencies “to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year.”<sup>98</sup> The Biden Administration required senior appointees to approve rulemaking agendas and sign off on many final rules.<sup>99</sup> Institutionalized coordination between the White House and appointees provides the President with significant agenda-setting authority. OMB also sometimes restricts the number of rulemakings the agency can pursue at a time, limiting expansion beyond the President’s agenda.<sup>100</sup>

After the President and their appointees have set the agenda, the Office of Information and Regulatory Affairs (OIRA) reviews “significant” rules that may implicate presidential priorities.<sup>101</sup> OIRA prioritizes review of

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93. Marissa Martino Golden, *Exit, Voice, Loyalty, and Neglect: Bureaucratic Responses to Presidential Control During the Reagan Administration*, 2 J. PUB. ADMIN. RSCH. & THEORY 29, 53 (1992).

94. See Lowande, *supra* note 11, at 47.

95. See Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C.); see also John A. Dearborn, *The “Proper Organs” for Presidential Representation: A Fresh Look at the Budget and Accounting Act of 1921*, 31 J. POL’Y HIST. 1, 5 (2019) (describing the Budget and Accounting Act as taking authority from the House of Representatives).

96. See Pasachoff, *supra* note 10, at 2213-30 (identifying these levers of power).

97. *Id.* at 2228-29 (discussing apportionment of agency spending).

98. Exec. Order No. 12,866, 58 Fed. Reg. 51735, 51738 (Oct. 4, 1993).

99. See Exec. Order No. 13,979, 86 Fed. Reg. 6813, 6813 (Jan. 22, 2021).

100. See Bernstein & Rodríguez, *supra* note 14, at 1621.

101. See Exec. Order No. 14,094, 88 Fed. Reg. 21879, 21879 (Apr. 11, 2023); Exec. Order No. 12,291, 46 Fed. Reg. 13193, 13194 (Feb. 19, 1981) (requiring agencies to submit “major rules” to OIRA for review); Exec. Order No. 12,866, 58 Fed. Reg. 51735, 51740-41 (Oct. 4, 1993) (subjecting significant regulatory action to centralized review). See generally Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013) (describing OIRA’s role in the regulatory process).

rulemakings related to the President's priorities and substantively edits proposed rules to comport with these priorities.<sup>102</sup> While OIRA alone manages mundane rulemakings, other White House offices become involved with larger proposals.<sup>103</sup>

Although Presidents have sought to expand their control over administrative policymaking, scholars continue to debate whether these mechanisms are effective. Some scholars describe agencies as unmanageable due to the size, expertise, and insulation of the civil service.<sup>104</sup> Career employees have an informational advantage over Congress<sup>105</sup> and the President's appointees,<sup>106</sup> because they better understand how proposed policies translate into policy outcomes. Moreover, career employees have a greater understanding of the policymaking process.<sup>107</sup> As Rachel Potter explains, "bureaucrats have expert insight into the consequences of the procedural choices and, accordingly, can capitalize on them for political advantage."<sup>108</sup>

Structural independence also inhibits presidential control by insulating career employees and some appointees from political influence. The civil-service law ensures that Presidents cannot simply fire career employees for political differences.<sup>109</sup> Insulation is even greater in independent commissions.

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102. See Bolton et al., *supra* note 10, at 262-64; Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV'T L. REV. 325, 344-45 (2014) (referring to OIRA as "the cockpit of the regulatory state" (quoting CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* 3 (2013))).

103. See Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 68 (2006).

104. See Acs, *supra* note 13, at 777 ("[B]ureaucrats are: (i) better informed about how to develop and implement policy change; (ii) numerous to the point of vastly outnumbering the president's political staff; (iii) prolific policymakers that are generally able to execute more decisions than the president's staff can reasonably monitor and (iv) largely protected from removal by the president." (citations omitted)).

105. See Huber & McCarty, *supra* note 19, at 490-91; see also Sean Gailmard, *Expertise, Subversion, and Bureaucratic Discretion*, 18 J. L. ECON. & ORG. 536, 552 (2002).

106. See Bernstein & Rodríguez, *supra* note 14, at 1635 (quoting one appointee as saying, "[T]he politicals usually know less about the substance than the people who are within the agency who have been doing it for decades in some cases"); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, L. & CONTEMP. PROBS., Spring 1994, at 1, 18 ("Political appointees can never know what career bureaucrats know; they will always be at a disadvantage.").

107. POTTER, *supra* note 3, at 63.

108. See *id.*

109. See 5 C.F.R. § 315.806(b) (2022) ("An employee may appeal under this paragraph a termination not required by statute which he or she alleges was based on partisan political reasons or marital status."). This has not prevented Presidents from finding alternative methods to make civil servants uncomfortable. By relocating headquarters, creating hostile work environments, and restricting bureaucratic autonomy,

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These agencies comprise multiple appointees who serve for fixed terms of office and enjoy removal protections.<sup>110</sup> Even when Presidents have the opportunity to appoint a new commissioner, statutory limitations, such as party-balancing requirements, restrict the pool of potential nominees.<sup>111</sup> Removal protections and other forms of structural insulation limit the ability of Presidents to replace insubordinate agency policymakers with individuals who share the Presidents' preferences.

Highly salient instances of resistance during the first Trump Administration raised further questions about whether Presidents can control the day-to-day work of federal agencies.<sup>112</sup> Acting Attorney General Sally Yates instructed the DOJ not to defend the Trump Administration's travel ban.<sup>113</sup> Assistant to the President for Economic Policy Gary Cohn removed a letter that would have withdrawn the United States from the North American Free Trade Agreement (NAFTA) from President Trump's desk to "protect the country."<sup>114</sup> The Foreign Service used its dissent channel to voice concerns about the Administration's ban on entry for nationals of certain Muslim-majority countries.<sup>115</sup>

At least some perceived "resistance" occurs because agencies respond to pressures from other actors. Congress uses its powers of agency design, budgeting, and investigation to influence administrative policymaking.<sup>116</sup> It

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Presidents can erode the civil servant workforce without violating civil-service laws. See generally Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 153 HARV. L. REV. 585, 591-627 (2021) (describing tactics used by Presidents to deconstruct the administrative state); PARSHALL & TWOMBLY, *supra* note 55 (exploring deconstruction in the Trump Administration); SKOWRONEK ET AL., *supra* note 72 (same).

110. See JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 42-44 (2d ed. 2018) (defining independent agencies).

111. See *id.* at 92 tbl.7 (listing statutory limitations on appointments).

112. See Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349, 357, 381 (2019) (providing examples of resistance, explaining that resistance "has been openly challenging decisions made by [the Trump Administration's] political appointees," and concluding that resistance raises questions about hierarchy in the administrative state).

113. See Matt Apuzzo, Eric Lichtblau & Michael D. Shear, *Acting Attorney General Orders Justice Dept. Not to Defend Refugee Ban*, N.Y. TIMES (Jan. 30, 2017), <https://perma.cc/HV5Y-BVAW>.

114. See SKOWRONEK ET AL., *supra* note 72, at 70-71.

115. See Jeffrey Gettleman, *State Dept. Dissent Cable on Trump's Ban Draws 1,000 Signatures*, N.Y. TIMES (Jan. 31, 2017), <https://perma.cc/M9F2-HQJB>.

116. See R. DOUGLAS ARNOLD, CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE 4-18 (1979) (discussing Congress-agency negotiations over agency budgets); MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 41 (2d ed. 1989) (describing congressional threats to "bleed" an agency); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243, 255 (1987) (theorizing how Congress uses procedure to "stack

*footnote continued on next page*

may use the Congressional Review Act to reject rules that conflict with its preferences.<sup>117</sup> It also passes appropriation riders that prohibit agencies from using funds for certain rulemaking activities.<sup>118</sup> Members of Congress may participate in the rulemaking process by submitting comments that either challenge the agency's policy position or request adjustments to the rulemaking procedures.<sup>119</sup> Similarly, interest groups successfully lobby agencies to make changes to proposed regulations during the notice-and-comment period.<sup>120</sup>

Yet many scholars resist widespread accusations of bureaucratic resistance. These scholars believe that career employees typically make a good faith effort to implement the President's agenda,<sup>121</sup> and Presidents have tools to induce compliance if necessary. According to Francis Rourke, the fear of "bureaucratic usurpation of power" persists despite "the fact that genuine cases of bureaucratic challenges to presidential authority . . . have been a rare occurrence."<sup>122</sup> James Q. Wilson states, "What is surprising is not that bureaucrats sometimes can defy the President but that they support his programs as much as they do."<sup>123</sup> Even when career employees disagree with

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the deck" in favor of particular results); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 444 (1989) (same); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165-67 (1984) (theorizing Congress's use of oversight).

117. See Paul J. Larkin, Jr., *The Trump Administration and the Congressional Review Act*, 16 GEO. J. L. & PUB. POL'Y 505, 514-16 (2018) (describing the Congressional Review Act).

118. See CURTIS W. COPELAND, CONG. RSCH. SERV., RL34354, CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATIONS RESTRICTIONS 7-17 (updated Aug. 5, 2008) (offering examples of appropriations restrictions on rulemaking).

119. See Kenneth Lowande & Rachel Augustine Potter, *Congressional Oversight Revisited: Politics and Procedure in Agency Rulemaking*, 83 J. POL. 401, 404-07 (2021).

120. See Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RSCH. & THEORY 103, 118-19 (2006) (finding that agencies are responsive to interest group comments during rulemaking); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 135 (2006) (finding that business commenters receive less regulation over 90% of the time).

121. See Bernstein & Rodríguez, *supra* note 14, at 1634 (quoting a civil servant as saying, "Part of the job is preserving policy options and lot of thought would go into trying not to constrain the political decision makers' choices"); Golden, *supra* note 93, at 48 (describing a situation where a career employee told an appointee that their decision was "completely wrong," but ultimately implementing the appointee's decision once it was final).

122. Francis E. Rourke, *Bureaucracy in the American Constitutional Order*, 102 POL. SCI. Q. 217, 219 (1987).

123. WILSON, *supra* note 77, at 275.

the President's agenda, they avoid proposing policies that the President will oppose.<sup>124</sup> Even independent agencies appear largely susceptible to presidential control. Neal Devins and David Lewis argue that "the benefits of the independent agency design are largely illusory and, relatedly, independent agency policy is little different than Executive Branch policy."<sup>125</sup>

Presidential control has synchronized the administrative state's internal clock to presidential transitions. Anne Joseph O'Connell observes that rulemaking cycles revolve around presidential transitions.<sup>126</sup> Agencies take time to ramp up rulemaking at the start of a new administration and complete significantly more rules during the final year of a presidential administration.<sup>127</sup> Rachel Potter and Charles Shipan find some evidence that the President's agenda influences the volume of rules produced within agencies.<sup>128</sup> Presidents contribute to this cycle by ordering agencies to freeze rulemaking activities and abandon uncompleted rulemakings.<sup>129</sup>

Conflicting empirical evidence creates two different stories about who truly controls administrative policymaking. On the one hand, some commentators attribute slowed policymaking efforts to resistance from career employees within agencies. On the other hand, Presidents appear quite successful at implementing their policies through administrative policymaking. The conflict within the empirical record raises questions about whether an omitted variable explains some of the disagreement between these theories. This Article explores one omitted variable: administrative capacity.

### C. The Omitted Variable: Administrative Capacity

Existing studies of presidential control fail to explain how policymaking changes based on administrative capacity. Scholars have assumed that Presidents are uniquely attuned to the management concerns of federal agencies, and, therefore, agencies possess sufficient capacity to engage in policymaking. Terry Moe writes, "All Presidents are acutely aware of [the

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124. See POTTER, *supra* note 3, at 56-57 (providing a theoretical framework that takes into account the political environment, as agencies make strategic decisions that make influence particular outcomes).

125. Devins & Lewis, *The Independent Agency Myth*, *supra* note 11, at 1312.

126. See O'Connell, *supra* note 11, at 943-43; Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 493-513 (2011).

127. See O'Connell, *Agency Rulemaking and Political Transitions*, *supra* note 126, at 503.

128. See Potter & Shipan, *supra* note 13, at 107.

129. See, e.g., Thrower, *supra* note 11, at 520-22; Memorandum for the Heads of Executive Departments and Agencies, 86 Fed. Reg. 7424 (Jan. 28, 2021) ("Regulatory Freeze Pending Review"); Memorandum for the Heads of Executive Departments and Agencies, 82 Fed. Reg. 8346 (Jan. 24, 2017) ("Regulatory Freeze Pending Review"); Regulatory Review, 74 Fed. Reg. 4435 (Jan. 26, 2009) ("Regulatory Review").

consequences of maladministration], and they respond by trying to build and deploy an institutional capacity for effective governance.”<sup>130</sup> Similarly, then-Professor Elena Kagan states that “Presidents have a large stake in ensuring an administration that works, at least in the eyes of the public.”<sup>131</sup> She describes Presidents as seeking responsiveness while needing “the capacity to achieve set objectives, without undue cost, in an expeditious and coherent manner.”<sup>132</sup> Yet she dismisses the notion that strong presidential control interferes with expert policymaking because Presidents have incentives to follow the guidance of career employees.<sup>133</sup>

These statements rest on a flawed assumption about the incentives of Presidents and members of Congress. Both actors prioritize actions that increase the likelihood of reelection for themselves and members of their parties, which necessitates some attention to the preferences of voters.<sup>134</sup> Voters have surprising little knowledge about the operations of federal agencies, even when they receive extraordinary benefits from their programs.<sup>135</sup> According to Jacob S. Hacker and Paul Pierson, the public suffers from “American Amnesia” when it comes to remembering the importance of governance.<sup>136</sup>

Voters may punish elected officials when government failures affect their pocketbooks or health.<sup>137</sup> Or they may reward them for direct relief packages

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130. Moe, *supra* note 17, at 237.

131. Kagan, *supra* note 2, at 2339.

132. *Id.*

133. *See id.* at 2354.

134. *See* KRINER & REEVES, *supra* note 51, at 2; DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5 (2d ed. 2004) (describing members of Congress as “single-minded seekers of reelection”).

135. *See* SUZANNE METTLER, THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY 15-16 (2011); MICHAEL LEWIS, THE FIFTH RISK 131-32 (2018) (“[P]eople didn’t seem to realize that the government’s weather information was more and more reliable—or even that it was their government giving it to them.”); Gabriel Scheffler & Daniel E. Walters, *The Submerged Administrative State*, 2024 WIS. L. REV. 789, 834.

136. *See* JACOB S. HACKER & PAUL PIERSON, AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER 2 (2016) (coining this term).

137. *See* CHRISTOPHER H. ACHEN & LARRY M. BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT 116-76 (2016) (showing how shark attacks, droughts, and economic conditions affect voting behavior); Neil Malhotra & Alexander G. Kuo, *Attributing Blame: The Public’s Response to Hurricane Katrina*, 70 J. POL. 120, 127 (2008) (examining the blame for Hurricane Katrina).



after a disaster.<sup>138</sup> But voters do not reward elected officials for investing in initiatives that build capacity in preparation of future problems.<sup>139</sup> Americans remember President Roosevelt for ending the Great Depression, creating Social Security, and winning major victories in World War II—not the Brownlow Committee or the Reorganization Act.<sup>140</sup>

Given the public's lack of interest in administration, Presidents and members of Congress have weak electoral incentives to build capacity across the administrative state.<sup>141</sup> Consequently, many agencies experience systemic and persistent neglect across all presidential administrations.<sup>142</sup>

Recent studies reveal the prevalence of this neglect. Delegations of new authority have outpaced appropriations.<sup>143</sup> Salaries for civil servants have not kept pace with the private sector.<sup>144</sup> In surveys, half of federal executives report that the White House spends no effort or little effort to ensure their agency “has what it needs to carry out its mission.”<sup>145</sup> Presidents also regularly fail to nominate officials to key positions that manage agency personnel, finances, and procurement.<sup>146</sup> Active efforts to deconstruct capacity cast further doubts on the willingness of Presidents to behave as good-faith managers.<sup>147</sup> Of course, Presidents sometimes selectively build capacity in agencies related to their policy agendas and electoral goals.<sup>148</sup>

These political dynamics create variation in which agencies have sufficient capacity to engage in policymaking.<sup>149</sup> This variation has consequences for

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138. See Andrew Healy & Neil Malhotra, *Myopic Voters and Natural Disaster Policy*, 103 AM. POL. SCI. REV. 387, 399 (2009) (showing a positive relationship between relief spending and votes but no relationship between preparedness spending and votes).

139. See *id.*

140. Nicholas R. Bednar & David E. Lewis, *Presidential Investment in the Administrative State*, 118 AM. POL. SCI. REV. 442, 445 (2024); see Lewis, *supra* note 75, at 770.

141. See Bednar & Lewis, *supra* note 140, at 454 (concluding that “neglect . . . is the norm”).

142. See *id.* at 454 (“[M]ost agencies receive no attention from the White House and, therefore, lack the capacity to implement the tasks entrusted to the executive branch by Congress.”).

143. See Lewis, *supra* note 75, at 774 & fig.1 (illustrating a significant increase in discretionary spending relative to the size of the federal workforce).

144. See VERKUIL, *supra* note 75, at 150 (describing the wage gap for employees with advanced degrees).

145. Bednar & Lewis, *supra* note 140, at 451.

146. *Id.* at 450–51.

147. See generally PARSHALL & TWOMBLY, *supra* note 55, at 21–29 (describing the efforts of deconstruction during the Trump Administration); SKOWRONEK ET AL., *supra* note 72, at 99–126 (same); Freeman & Jacobs, *supra* note 109, at 591–623 (same).

148. See Bednar & Lewis, *supra* note 140, at 454.

149. See *infra* Part ILC (illustrating variation in policymaking capacity across the administrative state).

existing theories of presidential power. If all agencies have sufficient capacity to engage in policymaking, then the absence of capacity from the extant literature would have few consequences. But if capacity varies greatly within the administrative state, theories and statistical models that exclude capacity may mistakenly suggest a larger relationship between presidential control and policymaking than truly exists.

This Article takes seriously the prospect that the administrative state exhibits greater variance in capacity than often assumed. Part II illustrates this variation with new measures of policymaking capacity. Variation, however, does not necessarily mean that capacity has a meaningful impact on administrative policymaking. Plausibly, the floor of capacity for any agency in the United States is so high that it poses no hinderance to policymaking. Part III illustrates this is not the case. The lack of capacity reduces the effectiveness of presidential control and prevents Presidents from completing their agendas while in office.<sup>150</sup>

## II. Administrative Capacity and Policymaking

Broadly, administrative capacity describes an agency's *prospective* ability—not its willingness—to complete tasks delegated to it by the President and Congress.<sup>151</sup> Capacity embodies the expertise and experience of the workforce, the material resources available to the agency, and the processes that promote efficiency and teamwork within the agency.<sup>152</sup> One should avoid confusing capacity with policy outcomes. Capacity describes an agency's prospective ability to complete a task whereas policy outcomes are the consequence of agency implementation.<sup>153</sup> Failure to achieve a desired outcome may also result from political interference, bureaucratic resistance, or unexpected

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150. See *infra* Table 2.

151. For research adopting a similar definition, see ALEXANDER BOLTON & SHARECE THROWER, CHECKS IN THE BALANCE: LEGISLATIVE CAPACITY AND THE DYNAMICS OF EXECUTIVE POWER 6 (2022) (defining “resource capacity” as “the tangible materials and human capital legislatures can acquire, usually through financial means, to carry out their core tasks”); Bednar, note 15 above, at 653 (“Bureaucratic capacity describes an agency’s ability to complete the tasks delegated to it by Congress and the president.”); and Bednar & Lewis, note 140 above, at 443 (“By ‘capacity,’ we mean the resources, information, and processes an agency needs to prospectively complete its tasks.”). See also FISHER & SHAPIRO, *supra* note 15, at 49–60 (offering a rich account of “capacity” as expertise); Francis Fukuyama, *What Is Governance?*, 26 GOVERNANCE 347, 353–55 (2013) (examining measures of capacity).

152. See JOAQUIN & GREITENS, *supra* note 15, at 42 (“Capacity could be reduced to a matter of resource acquisition or funding but also be expanded to include multidimensional, financial, human, physical, and technological attributes.”); Bednar, *supra* note 15, at 653–55 (describing capacity in terms of human resources and team production).

153. See Bednar, *supra* note 15, at 654.

difficulties that confront the agency during implementation—not just a lack of capacity.

The importance of capacity is readily apparent to scholars who study public administration.<sup>154</sup> Unsustainable workloads and workforce attrition led to the bungled launch of HealthCare.gov.<sup>155</sup> Difficulty recruiting physicians in the Veterans Health Administration contributed to long waitlists and, eventually, at least forty deaths at an Arizona facility.<sup>156</sup> The backlog of removal cases in the Executive Office for Immigration Review (EOIR) stems, in part, from a failure to hire adequate staff within the agency.<sup>157</sup> Empirical studies, however, have rarely examined how these same problems impede policymaking—especially as it relates to the implementation of the President’s agenda.<sup>158</sup>

#### A. Conceptualizing Policymaking Capacity

Agencies perform different tasks, and each task requires a different type and level of resources. Therefore, any conceptualization of capacity must be tailored to the specific task. Compare the U.S. Postal Service (USPS) to the Centers for Disease Control (CDC). The USPS employs over 500,000 career employees to process and deliver 318 million pieces of mail per day.<sup>159</sup> By

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154. See, e.g., CAROL LEONNIG, *ZERO FAIL: THE RISE AND FALL OF THE SECRET SERVICE* 486 (2021) (describing the pitfalls of the deficiency of material resources and staff within the Secret Service); MICHAEL LEWIS, *THE FIFTH RISK* 75 (2018) (“‘Program management’ is the existential threat that you never really even imagine as a risk.”); VERKUIL, *supra* note 75, at 1-2 (“Bureaucracy alone is not the problem; the problem lies with the quality of management that determines its energy and its efficacy.”); Cody A. Drolc & Lael R. Keiser, *The Importance of Oversight and Agency Capacity in Enhancing Performance in Public Service Delivery*, 31 J. PUB. ADMIN. RSCH. & THEORY 773, 773 (2021) (“[W]e argue that the likelihood that a given agency will respond to evidence of poor performance varies by the interaction of two factors—capacity of the oversight system and capacity of the agency itself.”).

155. See OFF. OF INSPECTOR GEN., OEI-06-14-00350, *HEALTHCARE.GOV: CMS MANAGEMENT OF THE FEDERAL MARKETPLACE* 11-13 (2016), <https://perma.cc/VQS9-SAF7>.

156. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-130, *VA HEALTH CARE: RELIABILITY OF REPORTED OUTPATIENT MEDICAL APPOINTMENT WAIT TIMES AND SCHEDULING OVERSIGHT NEED IMPROVEMENT* 27 (2012), <https://perma.cc/NW37-VLB7> (studying staffing problems); Scott Bronstein & Drew Griffin, *A Fatal Wait: Veterans Languish and Die on a VA Hospital’s Secret List*, CNN (updated Apr. 23, 2014, 9:19 PM EDT), <https://perma.cc/B89K-EUJP> (reporting these deaths); see also Ames et al., *supra* 18, at 5-8 (studying capacity problems within the Department of Veterans Affairs).

157. See Bednar, *supra* note 18, at 2170-73 (discussing the lack of sufficient support staff in EOIR).

158. For research that seriously considers capacity as a constraint, see note 19 above.

159. See *One Day in the Postal Service*, U.S. POSTAL SERV., <https://perma.cc/2S47-GCFG> (archived Feb. 8, 2025) (reporting data on mail delivery as of April 2024); *Size and Scope*, footnote continued on next page

contrast, the CDC employs about 12,300 individuals to study infectious diseases and mitigate threats to public health.<sup>160</sup> Does the CDC have less capacity than the USPS? Not necessarily. Delivering mail requires a different workforce than combating infectious diseases. These agencies also need different material resources. The USPS's fleet includes over 245,000 vehicles to deliver to urban areas,<sup>161</sup> mules to deliver mail to the Havasupai Tribe at the bottom of the Grand Canyon,<sup>162</sup> and hovercraft to deliver mail in rural Alaska.<sup>163</sup> Although the USPS can perform its duties without the CDC's world-class research labs and equipment, it would never manage to deliver the mail with the Department of Health and Human Services' 4,222 vehicles.<sup>164</sup>

What does administrative policymaking require? As a first-order condition, agencies need enough people to manage their policymaking workload. Policymaking requires tasks like studying possible policy solutions, consulting with internal and external stakeholders, drafting regulatory text, and responding to public comments.<sup>165</sup> A single employee can only complete

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U.S. POSTAL SERV., <https://perma.cc/B53D-RXX6> (archived Feb. 8, 2025) (reporting data on USPS employment as of 2023).

160. See *FedScope Employment Cube: March 2024*, OFF. OF PERS. MGMT., <https://perma.cc/48J6-4RNU> (archived Feb. 8, 2025) (reporting employment of 12,322 full-time employees as of March 2024) [hereinafter *FedScope*].

161. *Size and Scope*, *supra* note 159 (reporting data on the number of postal vehicles used by the USPS).

162. See *Mule Train Delivery*, U.S. POSTAL SERV., <https://perma.cc/U3HD-HLZ7> (archived Feb. 8, 2025).

163. See DEP'T OF TRANSP. & ENV'T ENG'G SOLS., UNITED STATES POSTAL SERVICE: HOVERCRAFT TRANSPORT OF ALASKA BYPASS MAIL ECOLOGICAL MONITORING SUMMARY REPORT 1 (2000).

164. GEN. SERVS. ADMIN., FISCAL YEAR 2023 FEDERAL FLEET OPEN DATA SET tbl.1-1 (May 2024), <https://perma.cc/7XKY-EYYF> (reporting 632 vehicles owned by the Department of Health and Human Services and 3,590 owned by the General Services Administration). This is the number of vehicles for all agencies within the Department of Health and Human Services—not just the CDC. It is not possible to disaggregate this data further.

165. Other studies examine agency behavior at the various stages of policymaking. For examples of studies looking at regulatory drafting, see POTTER, note 3 above, at 85-88 (describing the strategic process of drafting proposed rules); and Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1016-66 (2015) (surveying rule drafters about the tools they use in drafting regulatory text). For examples of studies looking at consultation, see SUSAN L. MOFFITT, *MAKING POLICY PUBLIC: PARTICIPATORY BUREAUCRACY IN AMERICAN DEMOCRACY* 18-54 (2014) (theorizing about when agencies engage in public participation); and POTTER, note 3 above, at 172-76 (discussing ex parte meetings for the Food and Drug Administration's menu-labelling rule). For examples of studies looking at how agencies respond to comments, see Steven J. Balla, Alexander R. Beck, Elizabeth Meehan, & Aryamala Prasad, *Lost in the Flood?: Agency Responsiveness to Mass Comment Campaigns in Administrative Rulemaking*, 16 REGUL. & GOVERNANCE 293, 306 (2022) (studying how agencies respond to mass comment campaigns); Nina A. Mendelson, *Rulemaking*,  
*footnote continued on next page*

so many of these tasks. A larger workforce allows the agency to prioritize a greater number of tasks and, therefore, complete more policy.<sup>166</sup>

Agency policymakers also need substantive and procedural expertise to make policy. Substantive expertise describes the scientific or technical knowledge brought to the agency by employees' education and past careers.<sup>167</sup> Agency policymakers use this expertise to determine which policy options may achieve a particular outcome. For example, what species will the Fish and Wildlife Service protect under the Endangered Species Act?<sup>168</sup> Which consumer products will the Department of Energy regulate under the Energy Policy and Conservation Act?<sup>169</sup> While objective facts must inform these decisions, they do not determine which competing alternatives the agency should adopt. Employees use their professional judgment to advise agency leaders about the tradeoffs between various policy alternatives.<sup>170</sup>

Procedural expertise describes the knowledge of process, procedure, and politicking attained through experience working in public service. According to Jerry Mashaw, experience teaches employees a "sense of what works and what doesn't when ferreting out information, what evidence is reliable and what is not—things that are an implicit part of the culture of the system but are not to be found in manuals or regulations."<sup>171</sup> Experience also allows

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*Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1356-71 (2011) (discussing agency responses to comments about public values); Yackee, note 120 above, at 104 (studying interest group participation in rulemaking); and Yackee & Yackee, note 120 above, at 128-29 (showing the effect of business participation in rulemaking).

166. Cf. Bednar, *supra* note 18, at 2152 ("To prevent workloads from exceeding manageable levels, agencies must employ a sufficient number of expert adjudicators to conduct hearings and issue decisions."); Drolc & Keiser, *supra* note 154, at 780 ("Using staff as a component of agency capacity captures the raw human resource capacity of agencies . . .").

167. See FISHER & SHAPIRO, *supra* note 15, at 50-52 (defining "explicit" and "tacit" knowledge); SHEILA JASANOFF, *THE FIFTH BRANCH: SCIENCE ADVISERS AS POLICYMAKERS* 77 (1994).

168. See 16 U.S.C. § 1533(a)(1) ("The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species . . .").

169. See 42 U.S.C. § 6292(b)(1) ("The Secretary may classify a type of consumer product as a covered product if he determines that [certain criteria are met].").

170. See FISHER & SHAPIRO, *supra* note 15, at 53 ("The judgment of the administrator makes a decision 'more art than science' because 'it draws on intuition as much as on method.'" (quoting EUGENE BARDACH, *A PRACTICE GUIDE FOR POLICY ANALYSIS: THE EIGHTFOLD PATH TO MORE EFFECTIVE PROBLEM SOLVING*, at xiv (2000))); GARY J. MILLER & ANDREW B. WHITFORD, *ABOVE POLITICS: BUREAUCRATIC DISCRETION AND CREDIBLE COMMITMENT* 7-8 (2016) (describing the role of professional norms in bureaucratic behavior); Bernstein & Rodríguez, *supra* note 14, at 1631-37 (discussing how agencies decide which policy options are viable).

171. MASHAW, *supra* note 18, at 67.

employees to develop what Elizabeth Fisher and Sidney Shapiro termed “decision-making expertise,” which is “the skill of reconciling conflicting evidence and arguments, disciplinary perspectives, political demands, legal commands, and other considerations.”<sup>172</sup>

Central to procedural expertise is knowledge of the policymaking process. Rulemaking, in particular, is procedurally onerous.<sup>173</sup> Drafting a proposed rule involves dozens of experts who must analyze the rule’s effect on the economy, environment, small businesses, state governments, and other actors.<sup>174</sup> Once drafted, the APA requires agencies to publish a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* and to solicit comments on the proposed rule.<sup>175</sup> Presidents, Congress, and the courts have made rulemaking more burdensome by layering additional analyses on top of the APA’s requirements.<sup>176</sup> Agencies may receive thousands of comments from the public, requiring a team of employees to review the comments.<sup>177</sup> For example, the Food and Drug Administration (FDA) required a separate warehouse and dozens of temporary workers working two shifts to review the over 710,000 comments received for

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172. FISHER & SHAPIRO, *supra* note 15, at 57-58 (emphasis omitted).

173. For studies discussing the difficulty of rulemaking, see sources cited in note 15 above.

174. See FISHER & SHAPIRO, *supra* note 15, at 56 (“[T]he analysis necessary to reach a regulatory decision involves the integration of different forms of expertise—the application of legal commands to specific circumstances; the evaluation of information, data, and arguments from professional scientific, social-scientific, engineering, and other specialist disciplines; and much else besides.”); JASANOFF, *supra* note 167, at 21-24 (describing how the exclusion of toxicologists jeopardized nitrite regulations); see also Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, § 2, 94 Stat. 1164 (codified at 5 U.S.C. § 601 note) (requiring agencies to consider the impact of their rules on small entities); Exec. Order No. 12,866, 58 Fed. Reg. 51735, 51740-41 (Oct. 4, 1993) (requiring agencies to conduct cost-benefit analysis).

175. See 5 U.S.C. § 553(b)-(c) (describing the process of proposing a rule).

176. For examples of additional rulemaking requirements beyond those supplied in the Administrative Procedure Act, see *Am. Radio Relay League v. FCC*, 524 F.3d 227, 237-38 (D.C. Cir. 2008) (describing the obligation of agencies to disclose data relied upon during rulemaking); 5 U.S.C. § 1532(a) (mandating that agencies conduct a cost-benefit analysis if the rule results in an aggregate expenditure of \$100,000,000 or more by governments or the private sector); Issuance of Revised OMB Circular No. A-4, “Regulatory Analysis,” 88 Fed. Reg. 77615, 77615 (Nov. 13, 2023) (expanding the criteria for cost-benefit analysis (citing OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-4, at 61-63 (2023), <https://perma.cc/2TUH-ZWKX> (encouraging agencies to analyze distributional effects))); Exec. Order No. 13,979, 86 Fed. Reg. 6813, 6813 (Jan. 22, 2021) (limiting rulemaking initiation to senior appointees); and Exec. Order. No. 12,291, 46 Fed. Reg. 13193, 13194-95 (Feb. 17, 1981) (requiring agencies to submit “major rules” to OMB for review).

177. See *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (requiring agencies to respond to “comments which are of cogent materiality”); *Ohio v. EPA*, 144 S. Ct. 2040, 2054 (2024) (vacating an agency rule for failing to respond to comments).

its 1996 tobacco regulations.<sup>178</sup> Only after an agency has reviewed and responded to all significant comments,<sup>179</sup> performed cost-benefit analysis,<sup>180</sup> and satisfied OIRA that the rule comports with presidential priorities, may the agency publish the final rule.<sup>181</sup>

When agency policymakers possess high levels of procedural expertise, they can manipulate these procedures to increase the likelihood of achieving the agency's preferred policy.<sup>182</sup> Rachel Potter documents the various tactics agencies use to ferry rules through the process.<sup>183</sup> Agency policymakers may expand or limit public participation depending on whether they expect stakeholders to support or oppose the policy.<sup>184</sup> They may manipulate the content and language of the rule to make it more difficult for stakeholders to ascertain the consequences of the proposal.<sup>185</sup> Finally, the partisan alignment of the White House and Congress may influence when the agency chooses to issue its final rule.<sup>186</sup> These tactics help protect the agency's proposed rule from political opposition.<sup>187</sup>

Rarely does a single employee contribute all the expertise and experience needed for policymaking.<sup>188</sup> Instead, agency policymakers work in teams,

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178. See DAVID KESSLER, *A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY* 336-37 (2001).

179. See *Ohio v. EPA*, 144 S. Ct. at 2053-54; *Nova Scotia*, 568 F.2d at 252.

180. See Heinzerling, *supra* note 102, at 352; Sunstein, *supra* note 101, at 1865 ("If the benefits of the agency's chosen approach do not appear to justify the costs, OIRA (along with others in the Executive Office of the President) will, under Executive Order 13,563, raise questions about whether the agency should proceed with that approach.").

181. See Sunstein, *supra* note 101, at 1858-59 ("In the face of significant interagency concerns, the process of OIRA review typically continues until such a resolution is found. If, for example, a high-level presidential adviser does not believe that a proposed rule should go forward in its current form, or if a member of the President's Cabinet has severe reservations, OIRA cannot simply ignore his or her concerns. . . . Of course it is also true that for some rules, the concerns are sufficiently serious, and sufficiently appreciated by the rulemaking agency, that the rule will be unlikely to proceed." (footnote omitted)).

182. See POTTER, *supra* note 3, at 55 (explaining how agencies prefer to engage in "procedural politicking" to increase a rule's chance of survival when the political environment is inhospitable rather than compromise with opponents).

183. See *id.* at 68-81 (describing the strategies of writing, consultation, and timing).

184. See *id.* at 75-76.

185. See *id.* at 87-88.

186. See *id.* at 142 & fig.6.2.

187. See *id.* at 60 ("In this kind of environment—where a principal is hostile to the agency's actions—rules are at high risk of failing. Anticipating this threat, an agency can maneuver to help its rules succeed in the face of adversity.").

188. See THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* 10-11 (1991) (describing a system of comprehensive analysis in the regulatory process).

bringing their unique perspectives and knowledge to each task.<sup>189</sup> Teamwork allows the agency to understand the diverse problems facing the agency. Consider the National Atmospheric and Oceanic Administration's development of regulations to protect sardine fisheries. The research team studying how to structure these regulations included individuals with training in biology,<sup>190</sup> zoology,<sup>191</sup> environmental science,<sup>192</sup> and economics.<sup>193</sup> This list does not include the lawyers who ultimately would turn the proposals into law.<sup>194</sup> When lacking key perspectives, agencies may miss an important element of the policy problem.

To build its policymaking capacity, the agency must recruit and retain expert and experienced employees. Agencies must offer competitive wages to discourage employees from leaving for the private sector.<sup>195</sup> They must also compete against other federal, state, and local agencies interested in hiring dedicated civil servants with relevant expertise.<sup>196</sup> Sometimes, however, even the most premium benefits package cannot prevent employees from leaving their agencies. Some agency policymakers value the opportunity to shape

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189. See FISHER & SHAPIRO, *supra* note 15, at 55 (“Agencies, however, rely on multiple types of expertise, and it is these different but related types of expertise that produce the coordinated expertise that gives agencies their institutional capacity to implement their statutory missions.”); Martin J. Williams, *Beyond State Capacity: Bureaucratic Performance, Policy Implementation and Reform*, 17 J. INST. ECON. 339, 345 (2021) (“Many outputs take the form of joint team production within or across organisations, as when individuals from various units give inputs to different aspects of a permit decision or policy document.”).
190. See, e.g., Alan Sarich, QUINAULT INDIAN NATION, <https://perma.cc/8WYL-2PPA> (archived Feb. 8, 2025) (marine biologist).
191. See, e.g., Kym C. Jacobson, Ph.D.: Research Zoologist, NOAA FISHERIES, <https://perma.cc/3ELL-C8HG> (archived Feb. 8, 2025).
192. See, e.g., *California Nearshore Aerial Pelagic Species Survey*, CAL. DEP’T OF FISH & WILDLIFE, <https://perma.cc/8PUS-2EEL> (archived Feb. 8, 2025) (describing Kirk Lynn as an environmental scientist).
193. See, e.g., James Hilger, LINKEDIN, <https://perma.cc/LFV7-2F2V> (archived Feb. 8, 2025) (economist); see also PAC. FISHERY MGMT. COUNCIL & NAT’L MARINE FISHERIES SERV., PACIFIC SARDINE REBUILDING PLAN: INCLUDING REBUILDING PLAN SPECIFICATIONS, ENVIRONMENTAL ASSESSMENT, AND MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT ACT ANALYSIS 2-3 (2021) (listing authors, including Alan Sarich, Kym Jacobson, Kirk Lynn, and James Hilger mentioned in the preceding three notes).
194. See Walker, *supra* note 165, at 1016-17 (showing that 91% of interviewed agency rule drafters had attended law school).
195. See Gailmard & Patty, *supra* note 19, at 885 (theorizing that insufficient wages cause civil servants to exit government service).
196. See generally MANUEL P. TEODORO, BUREAUCRATIC AMBITION: CAREERS, MOTIVES, AND THE INNOVATIVE ADMINISTRATOR (2011) (tracing career trajectories for officials across different state and local levels).



policy and may leave government service if they lose that opportunity.<sup>197</sup> Exiting public service, however, is the exception and not the rule.<sup>198</sup> The average agency policymaker has served in government for 15.6 years—nearly the length of four presidential terms.<sup>199</sup>

### B. Measuring Policymaking Capacity

The discussion above suggests that the ideal measure of capacity has several key features. First, the measure must be tailored to a specific task.<sup>200</sup> Here, an appropriate measure of capacity would capture the agency's ability to engage in policymaking. Second, the measure must capture the various components of capacity. In the policymaking context, most of the agency's capacity comes from the ability of its workforce to identify policy solutions and navigate the policymaking process.<sup>201</sup> Third and finally, an ideal measure will examine capacity over time across multiple agencies to allow for time-series comparisons.<sup>202</sup>

A perfect measure of capacity is unobtainable because concepts like “expertise,” “experience,” and “team dynamics” lack agreed-upon definitions.<sup>203</sup> Nevertheless, a valid measure should minimize sources of bias and reduce measurement error.<sup>204</sup> Traditional measures of capacity rely on blunt proxies or expensive survey techniques. Some scholars measure capacity using the

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197. See *supra* notes 74-78 and accompanying text (describing the incentives of agency policymakers).

198. See Golden, *supra* note 93, at 43 (describing exit as “extreme behavior”).

199. See Bednar, *supra* note 15, at 656.

200. See *supra* notes 159-64 and accompanying text (discussing the importance of identifying the task).

201. See *supra* notes 165-94 and accompanying text (identifying workforce size, expertise, experience, and team production as key components of policymaking).

202. See Donald Moynihan, *Measuring and Encouraging Performance Information Use in Government*, in THE GOVERNMENT ANALYTICS HANDBOOK: LEVERAGING DATA TO STRENGTHEN PUBLIC ADMINISTRATION 121, 122 (Daniel Rogger & Christian Schuster eds., 2023) (“The effective measurement of government analytics use [sic] benefits from longer time horizons that enable learning from previous experiences, as well as reforms to strengthen government analytics.”).

203. See, e.g., FISHER & SHAPIRO, *supra* note 15, at 46-47 (describing the conceptualization of expertise as “thin” and “incomplete”); cf. John Gerring, *What Makes a Concept Good? A Critical Framework for Understanding Concept Formation in the Social Sciences*, 31 POLITY 357, 359-61 (1999) (describing the ambiguity inherent in concept formation).

204. See Robert Adcock & David Collier, *Measurement Validity: A Shared Standard for Qualitative and Quantitative Research*, 95 AM. POL. SCI. REV. 529, 530-32 (2001) (describing measurement validity and error).

number of full-time employees within an agency.<sup>205</sup> Although the size of an agency's workforce is an important contributor to capacity, the number of employees says nothing about whether these employees possess the requisite expertise or experience to engage in policymaking.<sup>206</sup> As an alternative, scholars have sought to measure capacity by surveying employees about whether the agencies they work with possess sufficient skills.<sup>207</sup> But surveys of federal agencies are run infrequently due to cost and cannot produce reliable, time-series measures of capacity. Moreover, sampling and response bias may contribute to inaccurate assessments of an agency's capacity.<sup>208</sup>

The wealth of federal-government data presents opportunities to build better (albeit, imperfect) measures of capacity.<sup>209</sup> Scholars operating in other contexts have used personnel records to construct more nuanced measures of agency capacity.<sup>210</sup> Data from the Office of Personnel Management (OPM) can be used to construct similar measures. OPM periodically releases a version of its Enterprise Human Resources Integration (EHRI) database, which includes detailed information about individual employees.<sup>211</sup> Each row in the dataset is

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205. See, e.g., Bolton et al., *supra* note 10, at 254 (measuring capacity using staff size of OIRA); Potter & Shipan, *supra* note 13, at 102-03 (measuring capacity using the natural log of the number of employees within the agency).

206. See *supra* notes 165-94 and accompanying text (discussing how workforce size influences policy throughput).

207. See Richardson et al., *supra* note 78, at 304, 307-08 (using the Survey on the Future of Government Service to measure agency skills).

208. Cf. Morten Hjortskov, Christian Bøtcher Jacobsen & Anne Mette Kjeldsen, *Choir of Believers? Experimental and Longitudinal Evidence on Survey Participation, Response Bias, and Public Service Motivation*, 26 INT'L PUB. MGMT. J. 281, 282 (2023) (reviewing concerns that government employees with higher levels of public-service motivation respond to surveys at higher rates); Seung Hyun Kim & Sangmook Kim, *National Culture and Social Desirability Bias in Measuring Public Service Motivation*, 48 ADMIN. & SOC'Y 444, 457-60 (2016) (reporting social-desirability bias in questions about public-service motivations).

209. See Fukuyama, *supra* note 151, at 363-64 ("It is clear that in evaluating the quality of governance in large, complex countries like China or the United States, the existing quantitative measures are woefully inadequate. . . . It might be useful to start with a large, relatively data-rich country like the United States, and see how far we could get.").

210. See, e.g., Katherine Bersch, Sérgio Praça & Matthew M. Taylor, *State Capacity, Bureaucratic Politicization, and Corruption in the Brazilian State*, 30 GOVERNANCE 105, 108 (2017) (measuring capacity in Brazilian agencies using "the proportion of civil servants in expert careers, career longevity, staff requisitioned from other agencies, and average salaries"); Drolc & Keiser, *supra* note 154, at 780 (measuring capacity of social-service agencies using workforce size and employee membership in professional organizations).

211. The public version of this dataset is "FedScope." To download the raw data files, see *FedScope*, note 160 above. For a broader overview of EHRI, see *Enterprise Human Resources Integration*, OFF. OF PERS. MGMT., <https://perma.cc/FE84-87GH> (archived Feb. 8, 2025).

an individual employee and each column is a characteristic of that employee, such as their employer, occupation, education, salary, and length of service.<sup>212</sup> Combining data from multiple years allows for the creation of time-series measures. This study uses over 115 million personnel records of white-collar employees from 1998 to 2021.<sup>213</sup>

Many of the employees in the EHRI dataset do not engage in policymaking. Excluding these employees, such as tax auditors or border patrol officers, helps reduce measurement error by tailoring the measure to policymaking tasks. Identifying employees engaged in policymaking is possible because the federal government uses a standardized set of occupational codes to categorize employees.<sup>214</sup> Reading detailed descriptions of each occupation in OPM's *Handbook of Occupational Groups and Families*, I code for whether the description mentions responsibilities related to policymaking, such as "developing regulations" or "planning policies." I also include occupations described as conducting scientific or technical research, because individuals in these occupations often contribute to policymaking in more technical agencies.<sup>215</sup> The exclusion of these scientific occupations from the model does not meaningfully change the results.<sup>216</sup> Examples of occupations

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212. For a list of variables included in OPM's dataset, see *FedScope Data Definitions*, OFF. OF PERS. MGMT., <https://perma.cc/4XRN-P5QR> (archived Feb. 8, 2025).

213. Nicholas R. Bednar, *Replication Data for: Bureaucratic Autonomy and the Policymaking Capacity of United States Agencies*, HARV. DATAVERSE (June 6, 2023), <https://perma.cc/CY85-PYJF>. The total number of personnel files in the dataset can be found by excluding any agency identifier with "-DEP" in the name and summing the "TOTAL\_RAWNUM" column in "ehri\_data.csv" file. The exclusion of the "-DEP" identifier ensures that personnel records used to create department-level aggregates are not counted twice in the total. Note, this is the total number of white-collar employees in the agency—not just the number of agency policymakers. The total number of white-collar employees is used to calculate the proportion of the workforce that consists of agency policymakers. Each observation in this dataset is an agency-quarter, which explains why the number of entries exceeds the number of unique federal employees over this period. Cf. CAROL WILSON, CONG. RSCH. SERV., R43590, *FEDERAL WORKFORCE STATISTICS SOURCES: OPM AND OMB 3-4* (Sept. 29, 2023) (explaining that data is collected for "each federal employee" and "published quarterly" in FedScope).

214. For the latest list of the occupational codes used by the Federal Government, see OFF. OF PERS. MGMT., *HANDBOOK OF OCCUPATIONAL GROUPS AND FAMILIES* (2018), <https://perma.cc/3ZNH-NZ5V>. See also OFF. OF PERS. MGMT., *INTRODUCTION TO THE POSITION CLASSIFICATION STANDARDS 2* (2009), <https://perma.cc/5ET8-6QT9> (explaining OPM's legal authority to classify occupations).

215. See MCGARITY, *supra* note 188, at 10 (describing program offices as "inhabited largely by professions: scientists, engineers, economists, lawyers, and the like"); JASANOFF, *supra* note 167, at 4-9 (reviewing the literature on the role science and scientists play in administrative policymaking).

216. Nicholas Ryan Bednar, *Bureaucratic Autonomy and the Policymaking Capacity of United States Agencies, 1998-2021*, 12 POL. SCI. RSCH. & METHODS 1 online app. 14-15 (2023),  
*footnote continued on next page*

identified as policymaking occupations include attorneys, budget analysts, and foreign affairs specialists.<sup>217</sup> Standardized occupational codes improve measurement validity because they ensure that individuals in the same occupation perform similar tasks, have similar qualifications, and receive similar pay regardless of which agency employs them.<sup>218</sup>

To create agency-year measures of policymaking capacity, I construct five indicators theorized to correlate with the key components of administrative capacity. First, the number of policymakers within an agency constrains the amount of policymaking that the agency can undertake.<sup>219</sup> Therefore, I include the total number of policymaking employees in the agency. Second, agencies need policymakers with relevant substantive expertise.<sup>220</sup> Because policymakers often acquire significant knowledge through education,<sup>221</sup> I measure the substantive expertise within an agency's policymaking workforce as the proportion of policymaking employees with a college degree. As policymakers work in government, they hone their substantive expertise and professional judgment while simultaneously developing knowledge of policymaking procedures.<sup>222</sup> Accordingly, I measure the experience within the agency's policymaking workforce as the mean length of service of policymaking employees.

Whether agencies can recruit and retain expert and experienced policymakers depends, in part, on the salaries they offer. Even individuals with high levels of public-service motivation may pursue careers in the private sector if an agency's salaries are too low.<sup>223</sup> Moreover, higher salaries are thought to discourage corrupt behaviors and encourage harder work.<sup>224</sup>

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<https://perma.cc/WP83-RUQT> (showing a correlation of 0.80 between the model including research occupations and the model excluding research occupations).

217. For a complete list of occupations coded as "policymakers," see *id.* at 15-20.

218. For information on how OPM develops occupational codes, see generally OFF. OF PERS. MGMT., INTRODUCTION TO THE POSITION CLASSIFICATION STANDARDS, note 214 above.

219. See *supra* notes 165-66 and accompanying text (explaining the importance of workforce size).

220. See *supra* notes 167-70 and accompanying text (explaining the importance of expertise).

221. Cf. MCGARITY, *supra* note 188, at 6 (stating that most employees in agency program offices have graduate degrees); WILSON, *supra* note 77, at 139 ("[The merit of civil service] candidates can be examined in ways that do not involve a test—by assessing their education, training, and experience, for example. Scientific, technical, and engineering personnel are 'examined' by evaluating their college education and work history.").

222. See *supra* notes 171-78 and accompanying text (explaining the importance of experience).

223. See BREHM & GATES, *supra* note 84, at 80-81; Gailmard & Patty, *supra* note 19, at 877.

224. See BREHM & GATES, *supra* note 84, at 101-02 (showing some effect between satisfaction with pay and hard work); NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE  
*footnote continued on next page*

Therefore, the measure includes the average salary of the agency's policymaking employees.<sup>225</sup> The salary data includes any locality adjustment, which ensures that individuals in the same occupation receive comparable wages regardless of their location.

The most difficult component of capacity to measure is the organization and team dynamics of the workforce. The personnel records do not provide information on how the agency organizes or manages its workforce. The literature, however, demonstrates that agencies organize their workforces around tasks more central to their missions.<sup>226</sup> I assume that agencies with a higher proportion of policymaking employees are more likely to have organized the workforce for efficacious and efficient policymaking. Accordingly, the measure includes the proportion of the agency's white-collar workforce comprised of policymaking employees.<sup>227</sup>

Next, the indicators must be aggregated into a single measure of capacity. Although these indicators plausibly correlate with capacity, capacity is a latent trait that cannot be directly observed or measured.<sup>228</sup> Political scientists use latent variable modeling to estimate unobservable concepts, such as agency ideology and capacity, using observed indicators that are theorized to correlate with the underlying concept.<sup>229</sup> One benefit of this method is that it relies on patterns in the data to determine how to weigh each indicator rather than the researcher's subjective belief about what matters most.<sup>230</sup>

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SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940, at 359-62 (2013) (describing how the United States replaced for-profit law enforcement with salaries to promote republican values); Caroline Van Rijckeghem & Beatrice Weder, *Bureaucratic Corruption and the Rate of Temptation: Do Wages in the Civil Service Affect Corruption, and by How Much?*, 65 J. DEV. ECON. 307, 324 (2001) (demonstrating a negative correlation between pay and corruption).

225. To ensure uniformity across years, I adjust all salaries for inflation.

226. See *supra* notes 80-83 and accompanying text.

227. This is calculated by dividing the total number of agency policymakers in the agency by the total number of white-collar workers in the agency.

228. Cf. Shawn Treier & Simon Jackman, *Democracy as a Latent Variable*, 52 AM. J. POL. SCI. 201, 201 (2008) (listing examples of latent variables).

229. See, e.g., Bersch et al., *supra* note 210, at 109 (administrative capacity); Clinton & Lewis, *supra* note 78, at 7 (agency ideology); Richardson et al., *supra* note 78, at 305-07 (agency ideology and skills). A common application of these models is in educational testing, where a student's "aptitude" is estimated by weighing the difficulty of each question. See Xiaojing Wang, James O. Berger & Donald S. Burdick, *Bayesian Analysis of Dynamic Item Response Models in Educational Testing*, 7 ANNALS APPLIED STAT. 126, 126 (2013); Clinton & Lewis, *supra* note 78, at 7. The model identifies which questions best separate good students from average students and affords those questions a higher weight when calculating the students' scores.

230. See Bersch et al., *supra* note 210, at 109.

The model yields 5,590 yearly scores for 261 agencies from 1998-2021.<sup>231</sup> A positive score represents an agency with higher levels of policymaking capacity and a negative score represents an agency with lower levels of policymaking capacity. The resulting measures range from -2.38 (low policymaking capacity) to 3.59 (high policymaking capacity), with a mean of zero and a standard deviation of 0.68.<sup>232</sup> For cabinet departments, I create scores for the entire department as well as disaggregated scores for specific bureaus.<sup>233</sup> The resulting scores are robust as to different configurations and alternative measures of the five indicators.<sup>234</sup> Importantly, these scores differ considerably from more restrictive measures of capacity, such as the size of the agency's workforce.<sup>235</sup>

Before presenting the scores, several things deserve discussion. First, the scores measure the baseline level of human capital within each agency. The measures exclude external methods of augmenting the agency's policymaking capacity. Agencies sometimes detail employees to other agencies or Congress, allowing these employees to temporarily work for these other institutions.<sup>236</sup> Detailing may decrease capacity in the home agency while simultaneously increasing capacity in the other institution. Alternatively, agencies may use contractors to provide clerical work, offer substantive policy knowledge or skills, or perform other tasks that are essential to the policymaking process.<sup>237</sup> Incorporating these sources of capacity would require better data than is

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231. A Bayesian factor model aggregates these five variables. A Bayesian model estimates a latent characteristic—such as administrative capacity—based on indicators theorized to correlate with the underlying concept. For a thorough treatment of Bayesian estimation techniques, see generally ANDREW GELMAN ET AL., *BAYESIAN DATA ANALYSIS* (3d ed. 2014) (explaining elementary principles of Bayesian estimation).

232. Bednar, *supra* note 15, at 657 (providing descriptive statistics of the scores).

233. The ability to disaggregate by bureau depends on the level of aggregation in OPM's data. I sought to create scores for all agencies listed in the ACUS sourcebook. See SELIN & LEWIS, *supra* note 110, at 125-32 (listing agencies). For additional methodological information used in this Article, see Nicholas Bednar, *Presidential Control and Administrative Capacity: Methods Appendix*, 77 STAN. L. REV. 823 app. 1 (2025), <https://perma.cc/H2H5-JLCV> [hereinafter "Appendix"].

234. Robustness checks included estimating the model with alternative measures of workforce size, education, length of service, and different subsets of occupations. The scores were compared against other measures theorized to correlate with administrative capacity, including survey-based measures. See Bednar, *supra* note 217, at 1-20.

235. See Bednar, *supra* note 15, at 655.

236. See Russell W. Mills & Jennifer L. Selin, *Don't Sweat the Details! Enhancing Congressional Committee Expertise Through the Use of Detailees*, 42 LEGIS. STUD. Q. 611, 612-13 (2017); *Details with Other Agencies*, TTS HANDBOOK, <https://perma.cc/CTL8-2FBU> (archived Feb. 8, 2025).

237. See Bridget C.E. Dooling & Rachel Augustine Potter, *Regulatory Body Shops*, 73 DUKE L.J. 1677, 1696-1703 (2024) (surveying the roles contractors play in rulemaking).

currently available.<sup>238</sup> Nevertheless, we should still be concerned about low levels of baseline capacity. Detailees simply shift capacity from one agency to another while contractors raise a host of ethical concerns.<sup>239</sup> Identifying which agencies have the lowest levels of baseline capacity helps Presidents and Congress focus their reforms.

Second, the scores should only be understood as measuring the ability of the agency's workforce to complete policymaking tasks. The scores are not designed to measure the ability to complete other tasks, such as enforcement, litigation, adjudication, or benefits distribution.<sup>240</sup> In some cases, measuring these tasks requires greater incorporation of the material resources available to the agency. For example, a measure of the USPS's capacity to deliver the mail should incorporate indicators related to its vehicle fleet and store locations.<sup>241</sup> Likewise, the scores are somewhat agnostic to the form of policymaking but are best suited for more legislative-like activities (e.g., rulemaking, guidance, legislative drafting). Although agencies are free to make policy through case-by-case adjudication,<sup>242</sup> researchers hoping to study policymaking through adjudication would be better served developing measures that consider the nuances of those procedures.<sup>243</sup> Fortunately, the method described here can be extended to other tasks by coding relevant occupations and constructing indicators that appear relevant to the task of interest.

Third, recall that capacity is the *prospective* ability of an agency to complete a task.<sup>244</sup> The scores measure the *potential* for policymaking irrespective of how much policymaking the agency actually conducts. Some agencies are reluctant to engage in policymaking for political reasons but have the capability to do so when desired. The Federal Trade Commission (FTC) provides an example. Although the D.C. Circuit held that the FTC had authority to make rules related to antitrust,<sup>245</sup> the FTC largely eschewed rulemaking and resorted to consent decrees.<sup>246</sup> At least some of its aversion to

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238. See Rachel Augustine Potter, *How Much of Rulemaking Is Done by Contractors?*, BROOKINGS INST. (Feb. 16, 2022), <https://perma.cc/AC3B-JFN3> (describing transparency problems in contracting).

239. See Dooling & Potter, *supra* note 237, at 1704-08.

240. See *supra* notes 159-64 and accompanying text (explaining the importance of separating agency tasks).

241. See *supra* notes 159-64 and accompanying text.

242. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947).

243. Cf. Bednar, *supra* note 18, at 2150-55 (conceptualizing adjudicatory capacity).

244. See *supra* notes 151-53 and accompanying text (defining capacity as an agency's prospective ability to complete a task).

245. See *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 678 (D.C. Cir. 1973).

246. See Daniel A. Crane, *Debunking Humphrey's Executor*, 83 GEO. WASH. L. REV. 1835, 1868-69 (2015); Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, footnote continued on next page

rulemaking stemmed from the political backlash that resulted from previous efforts at rulemaking.<sup>247</sup> During the Biden Administration, however, the FTC issued the first regulation implementing the ban on “unfair methods of competition in commerce.”<sup>248</sup> The FTC demonstrates that an agency may have sufficient capacity to complete policymaking activities even if we do not observe high levels of policymaking within the agency.

Fourth, the scores do not incorporate a measure of agency workload. Empiricists using the measure to explore the relationship between capacity and policymaking should evaluate any relationships in the context of the agency’s workload. On average, however, we might expect that a higher capacity agency is capable of handling a larger workload.

### C. Variation in Policymaking Capacity

Three descriptive findings emerge from the capacity scores. First, the U.S. administrative state exhibits far greater variation in policymaking capacity than scholars often assume.<sup>249</sup> Second, there appears to be a relationship between capacity and structural independence.<sup>250</sup> Third and finally, recent Presidents have routinely prioritized policymaking in some of the lowest capacity agencies.<sup>251</sup>

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75 ADMIN. L. REV. 277, 285 (2023) (“For more than a century, the FTC has never engaged in legislative rulemaking in a matter that unambiguously involves its antitrust authority.”).

247. Cf. Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1953-54 (2000) (describing the history of backlash to FTC rulemaking).

248. See Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38342, 38348 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 920); see also Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357, 359-63 (2020) (arguing against FTC’s use of adjudication to regulate unfair competition). For the FTC’s authority, see 15 U.S.C. § 45(a)(1).

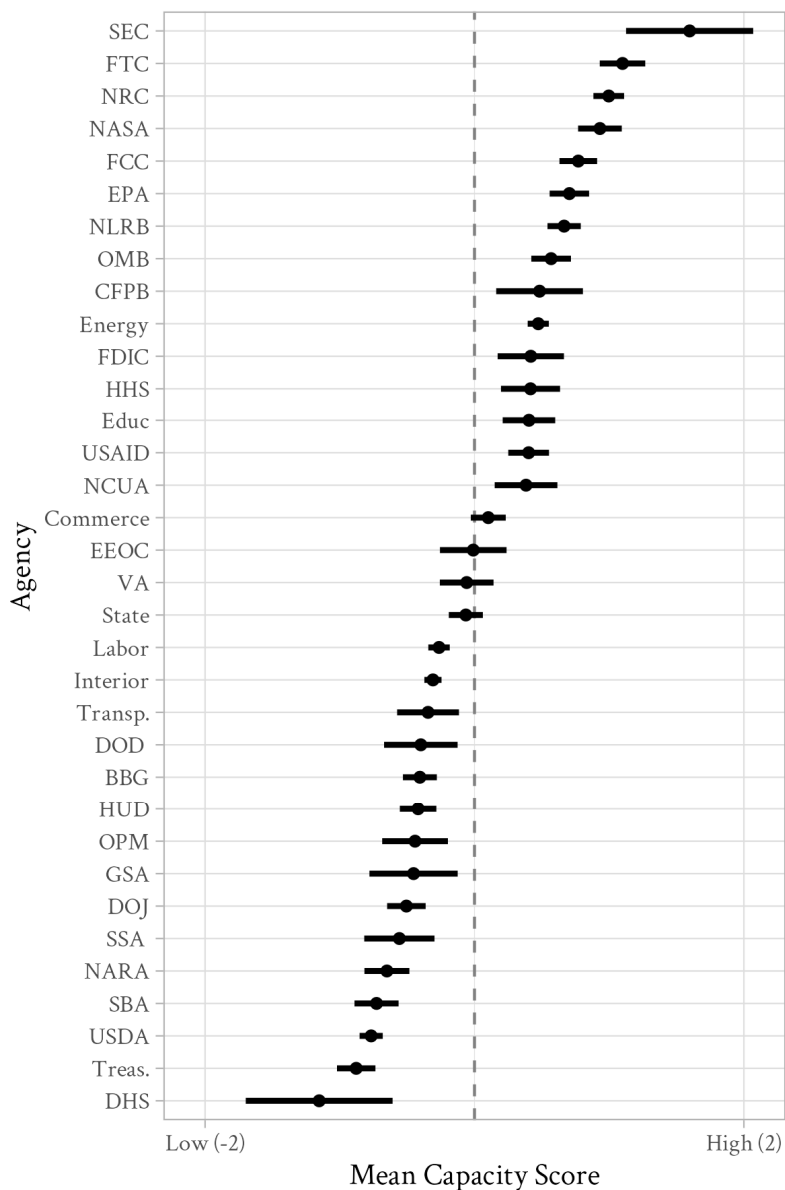
249. Compare *infra* Figures 2 & 3 (illustrating variation in capacity), with sources cited *supra* notes 10, 17 (citing scholarship that either makes this assumption or challenges it).

250. See *infra* Figure 4.

251. See *infra* notes 268-70 and accompanying text.



**Figure 1:**  
Policymaking Capacity Scores Among Cabinet Departments and Large Independent  
Agencies, 1998-2021<sup>252</sup>



252. Bednar, *supra* note 15, at 658 fig.1.

Figure 1 plots the range of scores for the cabinet departments and the largest independent agencies from 1998 to 2021. The dot represents the mean score of the agency during this time period, and the bar represents the standard deviation.<sup>253</sup> The plot reveals wide variation in the estimated policymaking capacity of these agencies. Agencies like the Securities and Exchange Commission (SEC), the FTC, and the Nuclear Regulatory Commission (NRC) have relatively high levels of capacity compared to the Department of Agriculture (USDA), the Department of the Treasury (Treas.), and the DHS. Moreover, the bars demonstrate that most agencies exhibit stable capacity, showing little fluctuation from year to year.

Figure 2 examines a subset of bureaus located in three cabinet departments: the Department of Health and Human Services (HHS), the DOJ, and the DHS.<sup>254</sup> Variation exists even within individual cabinet departments. For example, the EOIR and the Executive Office for U.S. Attorneys (EOUSA) have relatively high levels of policymaking capacity,<sup>255</sup> but other agencies within the Department of Justice do not. The agencies with lower levels of policymaking capacity, such as the Drug Enforcement Administration (DEA), the Federal Bureau of Investigation (FBI), and the U.S. Marshals Service (USMS), are predominately law enforcement agencies.<sup>256</sup> One possible explanation for this finding is that the President, Congress, and the agency may invest less effort into building policymaking capacity because policymaking is less central to the missions of these agencies.

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253. For a basic glossary definition of mean and standard deviation, see JEFFREY M. WOOLDRIDGE, *INTRODUCTORY ECONOMETRICS: A MODERN APPROACH* 760, 763, 768 (6th ed. 2016).

254. To see plots of all other agencies, see Appendix, *supra* note 233, at pt. I.D.

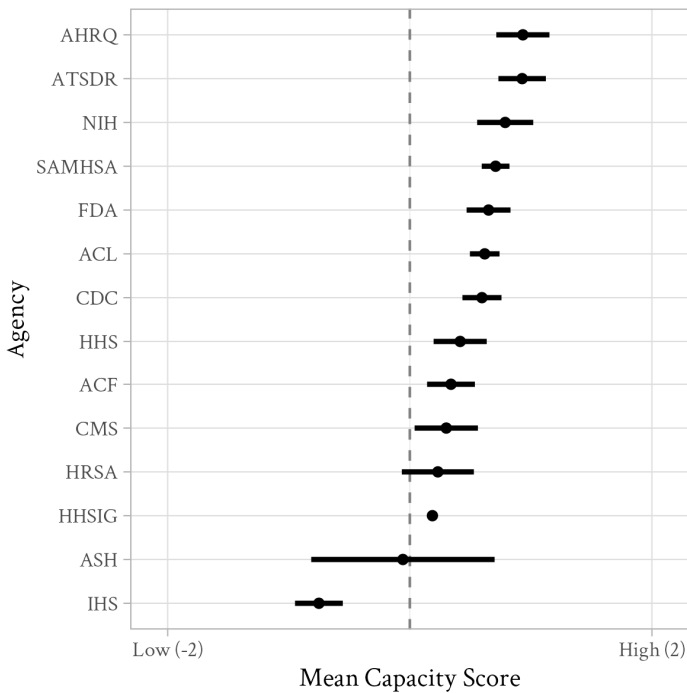
255. The EOIR manages the Immigration Courts, which adjudicate removal proceedings. See *About the Office*, U.S. DEP'T OF JUST.: EXEC. OFF. FOR IMMIGR. REV., <https://perma.cc/W6KP-22S8> (last updated Sept. 11, 2024). As of February 2025, EOIR has a backlog of 3,747,675 cases. See *Immigration*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, <https://perma.cc/SSR3-UN7U> (archived Feb. 8, 2025). The agency lacks sufficient personnel to adjudicate all these cases. See Bednar, *supra* note 18, at 2166-74. The capacity score of the EOIR serves as an important reminder of two considerations when using these scores. First, the measures only capture the ability of the agency to engage in policymaking—not other tasks such as adjudication. The EOIR's Office of Policy develops policy for the agency whereas the Office of the Chief Immigration Judge manages the bulk of EOIR's adjudicatory responsibilities. See *Executive Office for Immigration Review Organizational Chart*, U.S. DEP'T OF JUST.: EXEC. OFF. FOR IMMIGR. REV., <https://perma.cc/2C9K-LYDV> (archived Feb. 8, 2025). Second, the measures themselves do not examine workload. EOIR has a high baseline level of capacity relative to other agencies, but its policy workload may exceed its own capacity.

256. See *DEA Mission Statement*, DEA, <https://perma.cc/KM3C-LYMG> (archived Feb. 8, 2025); *What We Investigate*, FBI, <https://perma.cc/2C52-5HMZ> (archived Feb. 8, 2025); *What We Do*, U.S. MARSHALS SERV., <https://perma.cc/2T8X-LWV9> (archived Feb. 8, 2025).

In some cases, systemic problems may explain a lack of capacity within an entire department. For example, DHS lacked a central policy office until 2005.<sup>257</sup> Officials warned the Bush Administration that the lack of a policy office would constrain policymaking in the agency.<sup>258</sup> One official complained, “[c]reating a significant policy shop is like Bureaucracy 101.”<sup>259</sup> Instead, DHS routed all decisions through the White House, including mundane decisions like the uniforms for border guards and the choice of firearm used at training facilities.<sup>260</sup> The bureaus within DHS have some of the lowest policymaking capacity across the administrative state. Future research could explore how the support offices, such as policy shops, within a cabinet constrain or expand capacity to the individual bureaus.

**Figure 2.A**

Policymaking Capacity Scores Among Bureaus Within HHS, 1998-2021



257. See Katherine McIntire Peters, *DHS Policy Shop May Reshape Agency Priorities*, GOV'T EXEC. (July 20, 2005), <https://perma.cc/Q87Y-P7LN>.

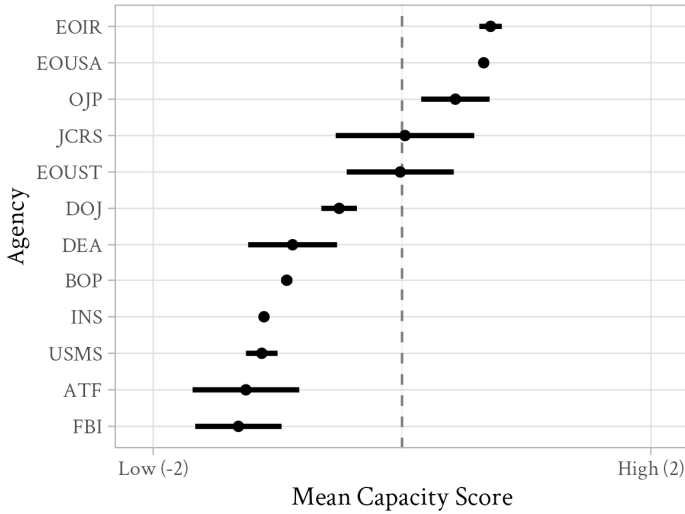
258. See Susan B. Glasser & Michael Grunwald, *Department's Mission Was Undermined from Start*, WASH. POST (Dec. 21, 2005), <https://perma.cc/6BWG-GQHQ>.

259. *Id.*

260. *Id.*

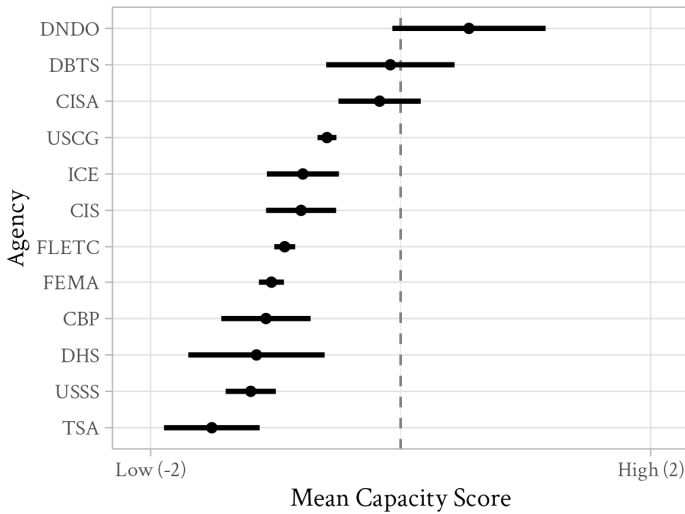
**Figure 2.B**

Polymaking Capacity Scores Among Bureaus Within DOJ, 1998-2021



**Figure 2.C**

Polymaking Capacity Scores Among Bureaus Within DHS, 1998-2021

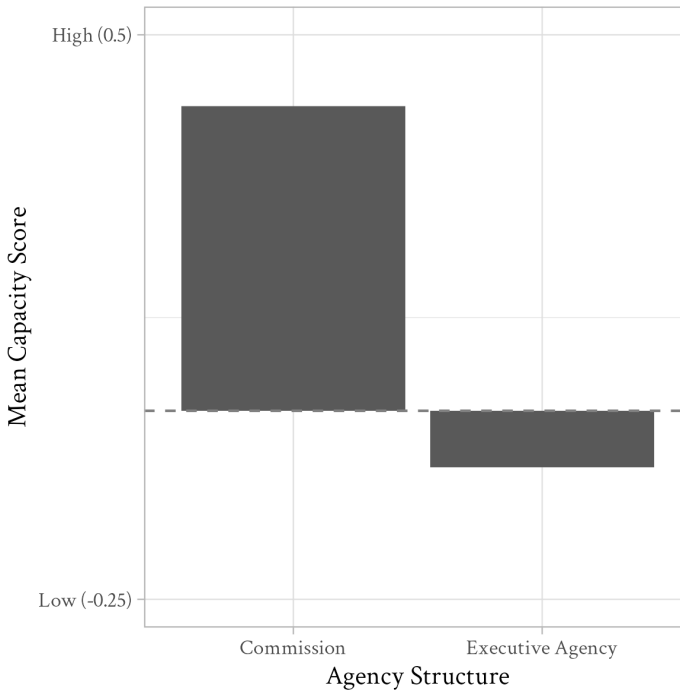


A different pattern emerges related to agency structure. Agencies with higher levels of structural independence, such as independent commissions, appear to have higher levels of policymaking capacity. Eight of the top ten

agencies are outside of the cabinet departments or the EOP.<sup>261</sup> Five of these agencies are independent commissions,<sup>262</sup> and one—the Consumer Finance Protection Bureau (CFPB)—has been described as the most insulated agency of all time.<sup>263</sup> By contrast, five of the bottom ten agencies are cabinet departments. Only four of the fifteen cabinet departments appear in the top half of the list.

**Figure 3**

Average Capacity Score by Agency Structure, 1998-2021



261. See SELIN & LEWIS, *supra* note 110, at 42 (classifying the SEC, the FTC, the NRC, the Federal Communications Commission (FCC), the National Labor Relations Board (NLRB), the Environmental Protection Agency (EPA), the National Aeronautics and Space Administration (NASA), and the Consumer Financial Protection Bureau (CFPB) as outside the EOP and the executive departments).

262. See *id.* (classifying the SEC, the FTC, the NRC, the FCC, and the NLRB as independent commissions).

263. See Jennifer L. Selin, *What Makes an Agency Independent?*, 59 AM. J. POL. SCI. 971, 979 (2015) (estimating the CFPB as the agency with the highest level of independence); see also *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020) (“In organizing the CFPB, Congress deviated from the structure of nearly every other independent administrative agency in our history.”); SELIN & LEWIS, *supra* note 110, at 42 tbl.3 (“The Consumer Financial Protection Bureau[] is not an independent commission.”).

Figure 3 compares the average capacity scores of executive agencies and independent commissions.<sup>264</sup> On average, independent commissions have a score of 0.41, indicating relatively high levels of capacity. By comparison, executive agencies have an average score of -0.07, indicating relatively low levels of capacity. The difference between the two groups is statistically significant.<sup>265</sup> Other research shows a statistically significant, positive correlation between structural independence and these scores.<sup>266</sup> These findings comport with other research predicting that insulation from political pressure encourages recruitment and retention of agency policymakers.<sup>267</sup>

Finally, recent Presidents have prioritized policymaking in some of the lowest capacity agencies. For example, Presidents Obama, Trump, and Biden all sought to use DHS's authority to reform immigration policy.<sup>268</sup> Despite warnings that the agency lacked "adequate resources," President Biden promised to use the Bureau of Alcohol, Tobacco, Firearms, and Explosives

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264. See Devins & Lewis, *The Independent Agency Myth*, *supra* note 11, at 1327 (listing agencies); see also Appendix, *supra* note 233, at pt. I.B (describing these agencies were identified).

265. A t-test returns a p-value of < 0.001, which is significant at the standard  $\alpha = 0.05$  threshold. For a basic understanding of the t-test, see KOSUKE IMAI, QUANTITATIVE SOCIAL SCIENCE: AN INTRODUCTION 339-41 (2017).

266. See Bednar, *supra* note 15, at 661-64 (using continuous measures of structural independence and more sophisticated models to address this question).

267. For a discussion of this literature, see notes 320-23 below. The relationship identified here conflicts with recent work by Neal Devins and David Lewis. Using a survey of federal executives, Devins and Lewis find that, on average, executive agencies and independent commissions are less "skilled." Devins & Lewis, *The Independent Agency Myth*, *supra* note 11, at 1329-30. Our methodological approaches may explain these differences. Devins and Lewis's survey-based measure relies on perceptions of agency skill rather than objective correlates of skill. In some cases, perceptions of skill—so long as not influenced by response bias—may better capture some of the nuances of administrative capacity. See *supra* notes 206-08 and accompanying text. Yet their measures do not disentangle skill-level based on the task. As they explain, "highly skilled lawyers may seek jobs at agencies that allow them to litigate in federal court; these lawyers may care more about that job feature than whether the agency is part of the executive branch." Devins & Lewis, *The Independent Agency Myth*, *supra* note 11, at 1331. The Devins and Lewis measure may capture the perception of average agency skill across all tasks but have less validity when used to examine a particular task, such as policymaking.

268. See, e.g., Address to the Nation on Immigration Reform, 2014 DAILY COMP. PRES. DOC. 2 (Nov. 20, 2014) (announcing deferred action for parents of U.S. citizens); Exec. Order. No. 13,767, 82 Fed. Reg. 8793, 8795-96 (Jan. 30, 2017) (ordering DHS to promulgate regulations tightening asylum requirements), *revoked by* Exec. Order No. 14,010, 86 Fed. Reg. 8267, 8270-71 (Feb. 5, 2021) (ordering DHS to promulgate regulations to ensure that asylum laws comport with "the 1951 Convention relating to the Status of Refugees"); *Fact Sheet: President Biden Announces New Actions to Keep Families Together*, WHITE HOUSE (June 18, 2024), <https://perma.cc/A3ZX-2Q9N> (expediting processing of immigration benefits for noncitizen spouses and children).

(ATF) to promulgate gun-control regulations.<sup>269</sup> The prioritization of policymaking in low-capacity agencies may increase the likelihood that a President will experience failure.<sup>270</sup>

The results show greater variation in policymaking capacity than often predicted. Again, this variance does not by itself mean that agencies fail to complete rulemakings due to a lack of capacity. Determining the relative importance of capacity requires an exploration of rulemaking and efforts of agencies to implement presidents' agendas.

#### D. Presidents and the Potential Consequences of Capacity

When should we expect capacity to impact Presidents' efforts to make policy? To develop testable hypotheses, I follow a rational-choice framework.<sup>271</sup> Under this framework, political actors—such as Presidents and agencies—seek to maximize the likelihood of achieving their most preferred outcome.<sup>272</sup> The framework requires holding fixed certain beliefs about the motivations of these political actors.<sup>273</sup> The behavioral assumptions made here are not without exception, but they generally enjoy support in the literature.

Both Presidents and agencies are policy-motivated. Presidents have a short time to accomplish their agendas and demonstrate to voters their ability to bring about policy change.<sup>274</sup> As elected officials who care about the immediate

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269. See Statement from President Joe Biden on the Supreme Court Decision *Garland v. Cargill*, WHITE HOUSE (June 14, 2024), <https://perma.cc/T8UL-RTEM> (describing the use of the Bureau as a tool for implementing the President's agenda on gun violence); Glenn Thrush, Danny Hakim & Mike McIntire, *How the A.T.F., Key to Biden's Gun Plan, Became an N.R.A. 'Whipping Boy'*, N.Y. TIMES (updated Sept. 29, 2021), <https://perma.cc/X6R4-F235> (describing restrictions on ATF's capacity and how those restrictions would affect President Biden's policy agenda).

270. See, e.g., *Garland v. Cargill*, 144 S. Ct. 1613, 1620 (2024) (vacating an ATF rule for exceeding the agency's statutory authority); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912 (2020) (holding that DHS's rescission of the Deferred Action for Childhood Arrivals program was arbitrary and capricious); *Firearms Regul. Accountability Coal., Inc. v. Garland*, 112 F.4th 507, 511 (8th Cir. 2024) (holding that plaintiffs were likely to succeed on their challenge to ATF's braced pistol rule because it was arbitrary and capricious).

271. See generally Daniel Diermeier & Keith Krehbiel, *Institutionalism as a Methodology*, 15 J. THEORETICAL POL. 123 (2003) (describing rational-choice theory as a method of studying government institutions).

272. See *id.* at 128 ("Rational choice theories postulate that decision-makers have well-defined preference orderings and that individual choices are consistent with this ordering.").

273. *Id.* at 127.

274. See Bednar & Lewis, *supra* note 140, at 445 ("Presidents only have 4 years—8 years if reelected—to achieve their objectives. Upon assuming office, presidents must rework the budget, push through nominees, and have a demonstrable record of accomplishment in the first 100 days.").

electoral consequences of their actions,<sup>275</sup> Presidents often care more about the initial completion of the policy rather than whether it will achieve certain outcomes in years to come.<sup>276</sup>

Rulemaking has three primary advantages over other forms of policymaking. First, Congress tends to delegate rulemaking authority in sweeping, ambiguous terms.<sup>277</sup> Broad delegations provide Presidents with discretion to craft a wide range of policies.<sup>278</sup> Second, like legislation, rules promulgated by agencies are binding law.<sup>279</sup> Third and finally, future administrations cannot easily revoke rules promulgated by previous administrations because agencies must follow the APA's strict procedures to enact—and repeal—rules.<sup>280</sup>

Presidents want to maximize the likelihood of completing a rulemaking before the next election because Presidents use these policy accomplishments to energize the electorate.<sup>281</sup> Moreover, if the agency fails to finalize a rulemaking—for whatever reason—before the end of the President's term, then a hostile incoming administration is likely to withdraw the proposed rule.<sup>282</sup>

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275. See *supra* notes 50-53 and accompanying text (describing Presidents' electoral motivations).

276. Cf. LIGHT, *supra* note 53, at 19 ("Traditionally, Presidents have not been concerned with long-range planning; the emphasis has been on the 'pass now/plan later' approach. . . . Presidents are rewarded for presenting a full domestic agenda as quickly as possible, not for producing 'good policy.'").

277. See Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1447-49 (2017) (offering examples of sweeping delegations). Despite changes to the ways in which the Supreme Court approaches interpretation of these grants of authority, the Court has still recognized that "the best reading of a statute" may be that "it delegates discretionary authority to an agency." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024).

278. See Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1936-37 (2020) (describing how agencies use broad grants of rulemaking authority to address new problems).

279. See *Nat'l Latino Media Coal. v. FCC*, 816 F.2d 785, 788 (D.C. Cir. 1987) ("A valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute. When Congress delegates rulemaking authority to an agency, and the agency adopts legislative rules, the agency stands in the place of Congress and makes law.").

280. See *supra* note 174-187 and accompanying text (surveying rulemaking procedures).

281. Cf. William L. Benoit, *Topic of Presidential Campaign Discourse and Election Outcome*, 67 W.J. COMM'N 97, 101 & tbl.1 (2003) (showing polling data that policy is the most important consideration for voters); Kim Quaile Hill, *The Policy Agendas of the President and the Mass Public: A Research Validation and Extension*, 4 AM. J. POL. SCI. 1328, 1330-31 (1998) (showing reciprocal attention between the President and the public in foreign affairs and economic issues).

282. See Thrower, *supra* note 11, at 523-24 (describing the conditions under which Presidents freeze ongoing rulemakings).



Presidents' use of rulemaking requires three things: (1) agenda-setting authority, (2) administrative capacity, and (3) control over the agency's day-to-day operations.

First, Presidents need the ability to set agencies' rulemaking agendas. Politicization of agency leadership and centralization of policymaking within the White House has strengthened the President's agenda-setting authority.<sup>283</sup> Nevertheless, the degree of control that Presidents exercise over their own appointees varies by agency structure.<sup>284</sup> It may take longer for Presidents to gain agenda control in independent commissions due to the appointees' fixed terms and the length of time it takes Presidents to achieve a partisan majority on these commissions.<sup>285</sup> Nevertheless, the relative strength of presidential control leads to the prediction that Presidents set rulemaking agendas in most agencies.

**Agenda-Setting Hypothesis:** Presidents and their appointees are more influential in setting rulemaking agendas than other actors. Presidential influence is higher in executive agencies than independent commissions.

Presidents rely on the expertise and experience of the agency's workforce to complete rulemakings.<sup>286</sup> Control allows Presidents to direct capacity toward their policymaking agendas. Presidents derive control from both the structure of the Executive Branch and the degree to which career employees share their policy preferences.<sup>287</sup> When the President's preferences do not align with the preferences of the career employees, Presidents may face resistance.<sup>288</sup> Structural independence further limits presidential control over the policymaking process.<sup>289</sup> For example, many independent commissions are not required to submit rulemakings to OIRA for regulatory review.<sup>290</sup>

At the same time, agencies must have capacity to complete the rulemaking—regardless of whether the President has sufficient control over the agency. This leads to a prediction that Presidents are most likely to

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283. See *supra* Part I.B. (describing mechanisms of presidential control).

284. See SELIN & LEWIS, *supra* note 110, at 89-102, 92 tbl.7, 97 tbl.9 (listing appointment and removal restrictions across agencies).

285. See Devins & Lewis, *Not-So Independent Agencies*, *supra* note 11, at 473 & fig.3 (showing that in some administrations it can take about two years for a President to appoint a partisan majority to an independent commission).

286. See *supra* notes 167-94 and accompanying text (conceptualizing policymaking capacity).

287. See *supra* Part I.A. (describing ideological conflicts and structures of presidential control).

288. See *supra* notes 84-89, 112-25 and accompanying text (summarizing the literature on bureaucratic dominance and resistance).

289. See *supra* notes 109-11 and accompanying text (describing structural insulation).

290. See SELIN & LEWIS, *supra* note 110, at 104 tbl.12 (listing agencies exempt from regulatory review).

experience rulemaking success in high-capacity agencies subject to high levels of presidential control.

**Completion Hypothesis:** As policymaking capacity and presidential control increase, the likelihood that the agency finalizes a rulemaking before the end of the President's term increases. However, the marginal effect of presidential control decreases as policymaking capacity decreases.

Given this prediction, where and when should Presidents prioritize the initiation of rulemakings? Presidents should anticipate that higher capacity agencies will be more successful at completing policies. If they suspect that the agency does not have sufficient capacity to complete the rulemaking process, Presidents may prefer to pursue unilateral action, legislation, or a less onerous form of administrative policymaking. A lack of presidential control may also encourage alternative modes of policymaking.

**Initiation Hypothesis:** As policymaking capacity and presidential control increase, the number of significant rulemakings begun by an agency increases. However, the marginal effect of presidential control decreases as policymaking capacity decreases.

Like all policy ventures, rulemaking is a gamble. Presidents cannot perfectly observe an agency's capacity and, therefore, they may over-estimate the agency's capabilities.<sup>291</sup> Other times, Presidents lack a viable alternative to rulemaking.<sup>292</sup> Faced with growing polarization and narrow majorities in Congress, Presidents may choose rulemaking in a low-capacity agency. All said, Presidents choose rulemaking over other forms of policymaking when they anticipate that the agency has a high likelihood of finalizing the proposed rule.

### III. Case Study: Rulemaking

This Part draws on data from three presidential administrations to test how policymaking capacity affects rulemaking. The results support all three hypotheses. First, federal executives report that Presidents and their proxies, such as appointees and OMB, exercise greater control over rulemaking agendas than other actors.<sup>293</sup> Second, both control and capacity increase the likelihood

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291. *Cf.* LIGHT, *supra* note 53, at 18-20 (describing the surprise Presidents and their staff experience at the difficulty of acquiring information).

292. *Cf.* Texas v. United States, 50 F.4th 498, 522-25 (5th Cir. 2022) (striking down the Obama Administration's Deferred Action for Childhood Arrivals program for failing to undergo notice-and-comment procedures); Texas v. United States, 809 F.3d 134, 176-78 (5th Cir. 2015) (enjoining the Obama Administration's Deferred Action for Parents of Americans and Lawful Permanent Residents program for failing to undergo rulemaking).

293. *See infra* Part III.A (testing the agenda-setting hypothesis).

that an agency finalizes a rule. Yet the effectiveness of control over rulemaking declines as capacity decreases.<sup>294</sup> Third and finally, these dynamics influence how Presidents pursue policymaking. High-capacity agencies subject to greater presidential control are more likely to initiate significant rulemakings.<sup>295</sup> Overall, the results suggest that control and capacity are complements to one another rather than substitutes.

#### A. Presidents Set Rulemaking Agendas

The *Agenda-Setting Hypothesis* predicts that Presidents exercise greater control over rulemaking agendas than other actors. To examine the degree of agenda-setting authority that Presidents exercise over rulemaking, I use new data from a survey of federal executives. The *Survey on the Future of Government Service* (SFGS) was opened in June 2020 and closed in December 2020.<sup>296</sup> The target population included all appointed and career federal executives in all non-advisory federal agencies, including all political appointees, career members of the Senior Executive Service, D.C.-based members of the Senior Foreign Service, and other high-level career officials in certain management positions.<sup>297</sup> The response rate was comparable to other public opinion surveys.<sup>298</sup>

To measure influence over rulemaking agendas, I use a question that asked respondents, “In your experience, how much influence do the following groups have over which issues get included on the agency’s *Unified Agenda*?”<sup>299</sup> The *Unified Agenda* is a periodically published document that explains the agency’s

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294. See *infra* Part III.B (testing the completion hypothesis).

295. See *infra* Part III.C (testing the initiation hypothesis).

296. See Bednar & Lewis, *supra* note 140, at 451 (listing the dates during which the SFGS survey was open). The survey was conducted by scholars from Georgetown University, Princeton University, and Vanderbilt University in collaboration with the Partnership for Public Service. *Survey on The Future of Government Service: About the Survey*, P'SHIP FOR PUB. SERV.: GOV'T SERV. SURV., <https://perma.cc/D4UL-RQQY> (archived Feb. 8, 2025). For other research using this survey, see Bednar & Lewis, note 140 above, at 451 (investigating presidential investment); Christopher Piper & David E. Lewis, *Do Vacancies Hurt Federal Agency Performance?*, 33 J. PUB. ADMIN. RSCH. & THEORY 313, 317-19 (2023) (examining the relationship between vacancies and agency performance); and Mark D. Richardson, Christopher Piper & David E. Lewis, *Measuring the Impact of Appointee Vacancies on U.S. Federal Agency Performance*, J. POL. (forthcoming 2025) (same).

297. See *infra* Appendix, *supra* note 233, at pt. II.A (describing sampling procedures).

298. The survey was sent to 16,232 federal executives. “The response rate of the survey was 9% (1,485 completed surveys)” with an “11% participation rate (1,779 complete or partial surveys).” Bednar & Lewis, *supra* note 140, at 451 n.15. Response rates for Gallup surveys average 7%. Stephanie Marken, *Still Listening: The State of Telephone Surveys*, GALLUP (Jan. 11, 2018), <https://perma.cc/EH5C-AAAY3>.

299. See Appendix, *supra* note 233, at pt. II.C.

planned or ongoing rulemaking activities.<sup>300</sup> All agencies engaged in rulemaking, including independent commissions, must report their planned and ongoing regulatory activities in the *Unified Agenda*.<sup>301</sup> All respondents who answered this question indicated that their job responsibilities included “[d]eveloping Notices of Proposed Rulemaking, summarizing related comments, writing final rules.”<sup>302</sup> Accordingly, responses came from federal executives with knowledge of the rulemaking process. A total of 492 respondents identified themselves as involved in the rulemaking process.

Respondents were asked about the influence of the following groups: (1) political appointees in their agency, (2) career civil servants in their agency, (3) members of Congress and their staffs, (4) the President/White House, (5) OMB/OIRA, (6) courts, (7) private citizens, (8) regulated parties, and (9) public interest advocacy groups.<sup>303</sup> For each group, they were asked whether the group had “no influence,” “little influence,” “some influence,” “a good bit of influence,” or “a great deal of influence.”<sup>304</sup>

Surveying federal executives has key advantages over other methods of identifying rulemaking influence. Federal executives, such as appointees and high-ranking career officials, negotiate with various actors during the policymaking process and may have a better sense of who directs the agency’s policy initiatives.<sup>305</sup> Another approach would be to ask career staff, such as contact officers,<sup>306</sup> about the influence of various groups.<sup>307</sup> William West and Connor Raso performed such a study, but warned that “rulemaking staff may not always be aware of communications between the White House and agency

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300. See *About the Unified Agenda*, OFF. OF INFO. & REGUL. AFFS., <https://perma.cc/NNF8-7L2B> (archived Feb. 8, 2025).

301. See Regulatory Flexibility Act § 3, 5 U.S.C. § 602(a) (requiring all agencies to publish a regulatory agenda in October and April of each year); Exec. Order No. 12,866, 58 Fed. Reg. 51735, 51738 (Oct. 4, 1993) (adopting the definition for “agency” from 5 U.S.C. § 3502(1) to include “independent regulatory agencies” for purposes of reporting requirements).

302. See Appendix, *supra* note 233, at pt. II.C.

303. See *id.*

304. See *id.* Respondents were also permitted to respond “not applicable.” Respondents who indicated that the question was “not applicable” are excluded from this discussion because they did not evaluate the influence of these groups.

305. Cf. Bertelli & Feldmann, *supra* note 11, at 31-33, 35-36 (describing this negotiating process); Bressman & Vandenbergh, *supra* note 103, at 63-64 (using a similar survey population to examine presidential control over policymaking).

306. See Kathleen M. Doherty, David E. Lewis, & Scott Limbocker, *Presidential Control and Turnover in Regulatory Personnel*, 51 ADMIN. & SOC’Y 1606, 1613 (2019) (describing “lead contacts” on major rulemakings, i.e., contact officers, as typically career staff).

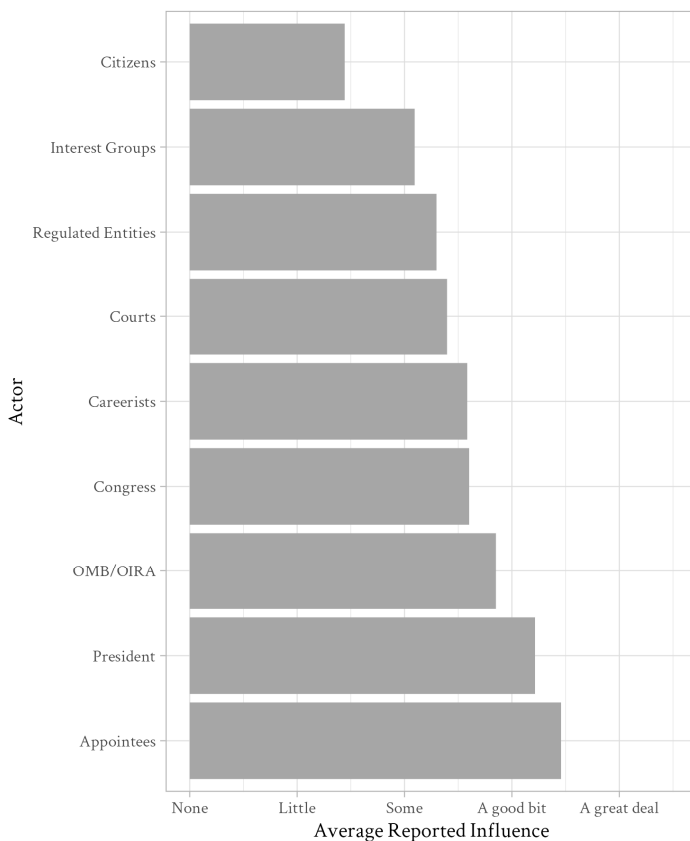
307. See, e.g., West & Raso, *supra* note 13, at 502-03 (surveying contact officers for various rulemakings).

executives.”<sup>308</sup> By surveying these executives about which groups influence rulemaking agendas, we may better capture influence from the negotiations and discussions that career staff do not observe.

Of course, it is reasonable to believe that influence may differ depending on the structure of the agency.<sup>309</sup> As in Part II, I report the average responses for two groups of agencies: executive agencies and independent commissions.<sup>310</sup>

**Figure 4.A**

Influence Over Rulemaking Agenda for Executive Agencies, SFGS 2020

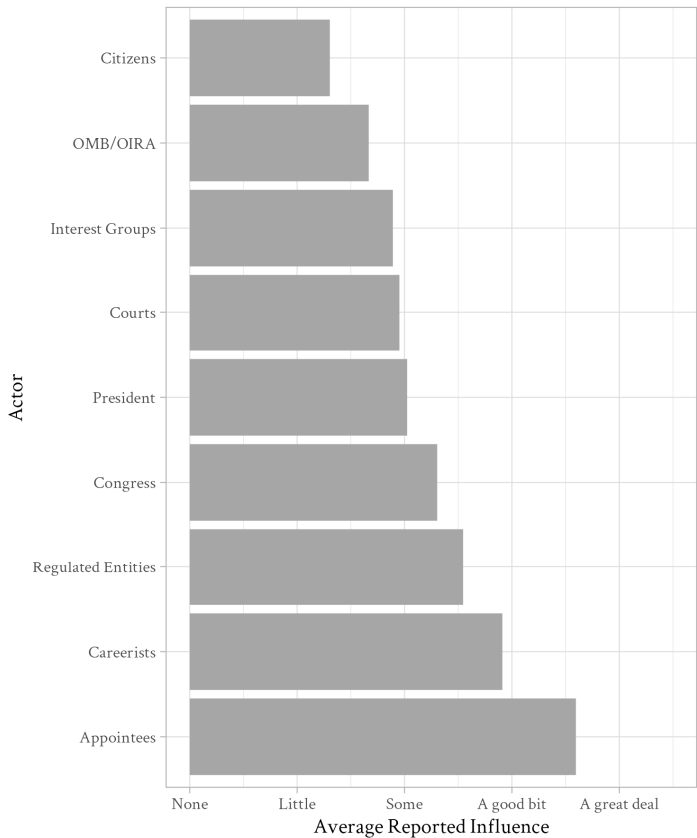


308. *Id.* at 510.

309. *See supra* notes 284-85, 289-90 and accompanying text (explaining why agenda setting may differ in independent commissions).

310. *See supra* note 264 and accompanying text (explaining the identification of independent commissions).

**Figure 4.B**  
Influence Over Rulemaking Agenda for Independent Commissions, SFGS 2020



*Note.* The question asked, “In your experience, how much influence do the following groups have over which issues get included on the agency’s Unified Agenda?” Respondents all stated that their job deals with “developing Notices of Proposed Rulemaking, summarizing related comments, writing final rules.” (N: 492). Source: 2020 Survey on the Future of Government Service.<sup>311</sup>

Figure 4 reports the average responses disaggregated by agency structure. The results for executive agencies are unsurprising. Both Democratic and Republican Presidents have invested considerable effort into increasing the number of political appointees in agencies for the express purpose of gaining

311. See *Survey on The Future of Government Service*, *supra* note 296.

better control over administrative policymaking.<sup>312</sup> OIRA prioritizes review of regulations promoted by the White House,<sup>313</sup> and ensures proposed rulemakings comport with the President's policy agenda.<sup>314</sup> Accordingly, the top three actors with the highest reported influence—appointees, the President, and OMB/OIRA—have formal mechanisms to ensure agencies comply with the President's policy agenda.

The results for independent commissions require careful dissection. As anticipated, OIRA exercises limited influence over independent commissions because it lacks authority to review rules proposed by these agencies.<sup>315</sup> The results also suggest that the President exercises relatively less influence than other actors—careerists, regulated entities, and Congress—over independent commissions.

What about appointees? Respondents in independent commissions report even *higher* levels of influence from appointees than respondents in executive agencies. Given limitations on the ability of the President to appoint and remove these appointees,<sup>316</sup> one might argue that Presidents exercise relatively little control over independent commissions. Yet an emerging literature challenges the idea that structural independence meaningfully impedes presidential control.<sup>317</sup> Although the length of time it takes Presidents to gain a partisan majority on an independent commission has increased, the average President still accomplishes this goal in less than two years at most.<sup>318</sup> Devins and Lewis argue that once Presidents appoint a partisan majority to a

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312. See generally LEWIS, *supra* note 11, at 203 ("Increasing the number of appointees allows presidents to influence agency planning, personnel, and processes, including rulemaking and budgeting.").

313. See Bolton et al., *supra* note 10, at 261 (finding evidence that OIRA prioritizes review of presidential priorities).

314. See Heinzerling, *supra* note 102, at 362-64 (explaining the lack of transparency in White House intervention in rulemaking finding "OIRA does not keep a publicly available log explaining when and by whom disputes between OIRA and the agencies were elevated"); Sunstein, *supra* note 101, at 1874 ("Insofar as the President and his closest advisers are clear on their priorities, OIRA will of course be made aware of their views and act accordingly. Those involved in the OIRA process are alert to the concerns and priorities of the President himself, and they take direction from him.").

315. See *supra* note 290 and accompanying text.

316. See SELIN & LEWIS, *supra* note 110, at 45-49 & tbls.4-5, 92 tbl.7 (listing agencies with for-cause removal protections and party-balancing requirements).

317. For recent research discussing whether independent agencies are truly independent, see Devin & Lewis, *Agency Myth*, note 11 above; Devin & Lewis, *Not-So Independent Agencies*, note 11 above; and Phillips, note 11 above.

318. See Devins & Lewis, *Not-So Independent Agencies*, *supra* note 11, at 472-73, 473 fig.3 (supporting this claim through the George W. Bush Administration).

commission, the commission's decision-making dramatically shifts to align with the preferences of the President.<sup>319</sup>

In many independent commissions, Presidents have discretion to select the chair—sometimes without Senate confirmation.<sup>320</sup> Todd Phillips demonstrates that most independent commissions endow their chairs with agenda-setting authority, shaping which policies the agency will consider.<sup>321</sup> The ability to select the chair gives Presidents considerable indirect control over commissions' policy agendas.<sup>322</sup> This dynamic of control helps to explain why Presidents Truman and Kennedy argued for strengthening the position of the chair and transferring selection of the chair to the President.<sup>323</sup>

Given this literature, one way to read the survey results is that Presidents use different mechanisms to control executive agencies and independent commissions. Presidents have a wide range of tools to influence executive agencies, and these tools all play an important role in setting agencies' rulemaking agendas.<sup>324</sup> By contrast, appointees are *the* mechanism that Presidents use to influence independent commissions.<sup>325</sup>

A separate question from the SFGS provides further evidence of presidential control over agenda setting. This question asked respondents, "Some agencies' policy agendas changed after the inauguration of President Trump. Other agencies' policy agendas stayed the same. In your experience, how much did the policy agenda of [your agency] change after the inauguration?"<sup>326</sup> Respondents selected from the following responses: "did not change," "changed minimally," "changed moderately," or "changed significantly."<sup>327</sup> Among executive agencies, 77.3% of respondents reported that the policy agenda changed "moderately" or "significantly." Among independent commissions, 60.4% of respondents reported the same.<sup>328</sup> The difference between these groups of agencies may reflect the fact that Presidents

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319. See *id.* at 493-94 (surveying studies showing the effect of presidential transitions).

320. See SELIN & LEWIS, *supra* note 110, at 100 tbl.11 (showing variation in chair selection).

321. See Phillips, *supra* note 11, at 300-01.

322. See *id.* at 312.

323. See Daniel E. Ho, *Measuring Agency Preferences: Experts, Voting, and the Power of Chairs*, 59 DEPAUL L. REV. 333, 359 (2010).

324. See *supra* Part I.B (describing the tools of politicization and centralization).

325. See *supra* notes 315-23 and accompanying text (summarizing studies that show how Presidents use appointees in independent commissions to influence policy).

326. Appendix, *supra* note 233, at pt. II.D.

327. *Id.* Respondents were also permitted to respond with "I did not experience the change in administration" or "don't know." Respondents who responded with one of these answers are excluded from this discussion because they were not able to provide information on how the presidential transition changed the agencies' policy agendas.

328. See Appendix, *supra* note 233, at pt. II.D.



have a somewhat harder time setting the policy agendas of independent agencies. Nevertheless, presidential transitions appear to meaningfully shift policy agendas in independent commissions in a way that is consistent with the conclusions of Devins, Lewis, and Phillips.<sup>329</sup>

A few words on the other actors who significantly influence agenda setting. First, Figure 4 shows that careerists exercise considerably less influence than presidential proxies in executive agencies and less influence than appointees in independent commissions. In interviews with political appointees, Anya Bernstein and Cristina Rodríguez found that political appointees relied on career staff for technical information and “real-time advice.”<sup>330</sup> In turn, careerists recognized that their “job was not to make policy” but to identify feasible policy alternatives for appointees.<sup>331</sup> Similarly, Marissa Golden found that career employees in the Reagan Administration tended to defer to the agenda-setting authority of appointees even when they disagree with the proposed policy.<sup>332</sup>

The survey results comport with this depiction of the world. Career employees exercise more influence relative to external actors because they use their expertise to identify policy alternatives.<sup>333</sup> Yet career employees appear to exercise less influence than appointees because they defer to appointees to set the agenda. It is plausible that some respondents reported high levels of career employee influence because they perceived resistance among the civil service. Yet resistance and sabotage likely occur—if at all—after appointees have set the rulemaking agenda and begun the notice-and-comment rulemaking process.<sup>334</sup> Therefore, it is entirely possible that Presidents and appointees succeed at *determining* “which issues get included on the agency’s *Unified Agenda*” but fail to finalize these rules because of resistance or a lack of capacity.<sup>335</sup>

Second, Congress’s influence in setting rulemaking agendas reflects several known dynamics. Congress regularly passes laws that mandate rulemaking.<sup>336</sup> In other cases, Congress may indirectly influence agenda-setting because agencies anticipate that Congress will respond to certain proposals by

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329. See *supra* notes 318–23 and accompanying text.

330. See Bernstein & Rodríguez, *supra* note 14, at 1634–35.

331. *Id.* at 1633–34.

332. See Golden, *supra* note 93, at 51–52.

333. See *supra* notes 312–19 and accompanying text; *supra* Figure 4.

334. Cf. POTTER, *supra* note 3, at 55 (identifying strategies careerists use to shape policy once rulemaking has begun).

335. See *supra* text accompanying note 299.

336. See West & Raso, *supra* note 13, at 512–13 (explaining congressional influence over rulemaking).

restricting appropriations or reversing the final rule using the Congressional Review Act.<sup>337</sup> Yet the results show that Congress tends to exercise less influence than other executive actors.

One limitation of the 2020 SFGS is that it only covers the Trump Administration. Given President Trump's efforts to control the civil service,<sup>338</sup> federal executives may have answered this question differently during other administrations. Although only the 2020 SFGS asked questions about rulemaking agendas, both the 2020 SFGS and the 2014 SFGS asked federal executives, "In general, how much influence do you think the following groups have over policy decisions in [your agency]."<sup>339</sup> This question was asked to a broader set of federal executives—not just those involved in rulemaking.<sup>340</sup> In both 2014 and 2020, executive agencies reported the highest levels of policy influence from appointees, the White House, and OMB.<sup>341</sup> Independent commissions again reported the highest levels of policy influence from appointees.<sup>342</sup> These results are consistent with the results above.

These findings contribute to the literature by illustrating that Presidents and their proxies exercise considerable control over rulemaking agendas in both executive agencies and independent commissions.<sup>343</sup> But the President's ability to set the agenda is not absolute. Presidential transitions result in moderately less change to the policy agendas in independent commissions compared to the agendas in executive agencies.<sup>344</sup> Moreover, other actors, such as career staff and Congress, still influence agencies' rulemaking agendas.<sup>345</sup> Yet Presidents still manage to bring about meaningful changes to rulemaking agendas following presidential transitions. The results suggest that Presidents' efforts to build responsive competence have largely paid off in the rulemaking context.<sup>346</sup>

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337. See *supra* notes 116-19 and accompanying text (discussing methods of congressional control).

338. See generally SKOWRONEK ET AL., *supra* note 72 (summarizing disputes between the Trump Administration and the civil service).

339. See Appendix, *supra* note 233, at pt. II.E.

340. The response available to respondents vary slightly between the 2020 and the 2014 survey. The 2020 *Survey on the Future of Government Service* did not ask about the influence of "stakeholders." The 2014 survey did. Nevertheless, the questions are sufficiently similar for comparisons sake. See Appendix, *supra* note 233, at pt. II.E.

341. See Appendix, *supra* note 233, at tbls. 6-7.

342. See Appendix, *supra* note 233, at pt. II.E.

343. See *supra* notes 312-19 and accompanying text (describing this literature).

344. See *supra* notes 326-29 and accompanying text.

345. See *supra* notes 330-36 and accompanying text.

346. See Moe, *supra* note 11, at 244-46 (describing the President's pursuit of "responsive competence").

Two final points on agenda setting. First, the ability of Presidents to set the policy agendas of agencies does not necessarily mean that Presidents care about all rulemakings. Agencies must still promulgate rules to administer a wide array of mundane and arcane regulatory programs.<sup>347</sup> Rather, these results suggest that the confluence of political forces creates rulemaking agendas that are—on average—inoffensive to the current administration and often advance the President’s most important policy initiatives. Second, determining the content of the agency’s rulemaking agenda and successfully implementing that agenda are two different stages of the policymaking process. Although the President may successfully instruct an agency to pursue a particular rule, a proposed rule may escape finalization due to either the President’s inability to control the rulemaking process or the agency’s lack of capacity.<sup>348</sup>

#### B. Capacity Affects Rulemaking Completion

Although Presidents appear to set rulemaking agendas, low policymaking capacity may hinder rulemaking completion. The *Completion Hypothesis* predicts that agencies with higher levels of presidential control and capacity are more likely to complete rulemakings before the end of the President’s term, but that the marginal effect of control decreases as capacity decreases.<sup>349</sup> In other words, this hypothesis challenges the notion that control *alone* is a sufficient condition for Presidents to accomplish their agendas.

I leverage presidential transitions to test how control and capacity affect the likelihood that an agency finalizes a rulemaking during the President’s first term in office. The data consists of rulemakings started during the first terms of the Bush, Obama, and Trump administrations, excluding any rulemaking carried over from the previous administration.

This study encounters two main inferential hurdles. First, the data must reasonably reflect proposed rulemakings that implement the President’s preferred policies. Our main concern is that low-capacity agencies may prioritize initiatives of the current administration over other rulemakings, such as those that are routine or those begun during a prior administration. If these non-priority rulemakings remain in the dataset, then we may still observe that capacity influences rulemaking overall even if it does not affect rulemakings related to the current President’s agenda. Observing the source of a particular policy idea, however, is impossible on a large scale. For example,

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347. See POTTER, *supra* note 3, at 4 (providing examples of mundane matters).

348. See *infra* Part III.B.

349. See *supra* Part II.D (theorizing about the impact of administrative capacity on rulemaking completion).

President Biden campaigned on gun control<sup>350</sup> and took credit for the Bureau of Alcohol, Tobacco, Firearms, and Explosives' regulations banning the sale of "ghost guns."<sup>351</sup> Yet the regulation itself makes no mention of the President's gun-control agenda.<sup>352</sup> The absence of this information makes it harder to identify the precise set of rulemakings that align with the President's agenda.

Several strategies help narrow the dataset to rules that are plausibly related to the President's policy priorities. First, I eliminate rules carried over from a previous administration. For example, rulemakings begun during the second term of the Obama Administration and continued in the Trump Administration do not appear in the dataset. This restriction helps to ensure that rulemakings are representative of the current administration's priorities and not the priorities of a previous administration.

Second, I exclude any rulemaking classified as "routine and frequent" or "informational/administrative/other" by the agency.<sup>353</sup> A rulemaking classified as "routine and frequent" is "a specific case of multiple recurring application of a regulatory program . . . that does not alter the body of the regulation."<sup>354</sup> A rulemaking classified as "informational/administrative/other" is "primarily informational or pertains to agency matters not central to accomplishing the agency's regulatory mandate."<sup>355</sup> Excluding these rulemakings assumes that routine and informational rules are less likely to be related to the President's agenda. All remaining rulemakings are classified as "economically significant," "other significant," or "substantive, nonsignificant"—in other words, the set of rules that result in substantive policy change.<sup>356</sup>

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350. See *Biden Campaign Press Release - Joe Biden Outlines Plan for Students, Educators, and Our Future*, AM. PRES. PROJECT (May 28, 2019), <https://perma.cc/DHZ5-96GG> ("In the months ahead, [Biden] will release additional proposals to address the gun violence epidemic in our country.").

351. See *Fact Sheet: The Biden Administration Cracks Down on Ghost Guns, Ensures that ATF Has the Leadership It Needs to Enforce Our Gun Laws*, WHITE HOUSE (Apr. 11, 2022), <https://perma.cc/WR38-FBUH>.

352. See Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24652, 24710, 24715 (Apr. 26, 2022) (mentioning the President twice but not in the context of his gun-control policies).

353. There are a relatively small number of "routine and frequent" rulemakings (N = 132) and "informational, administrative, or other" rulemakings (N = 140) in the dataset. See Appendix, *supra* note 233, at pt. II.B. Estimating the model with these rulemakings does not change the results. See *id.* at pt. IV.A.

354. Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions—Fall 2023, 89 Fed. Reg. 9292, 9295 (Feb. 9, 2024).

355. *Id.*

356. *Id.* In theory, one could subset the data further to just "economically significant" or "other significant" rulemakings. This selection method, however, introduces post-treatment bias into the model because capacity may influence whether the agency

*footnote continued on next page*

Third and finally, I perform the analysis on three subsets of rulemakings that may better represent the rulemakings related to the President's policy agenda:

- *All Rulemakings.* The first subset includes all rulemakings begun during the first term of the administration. This assumes that the President sets the rulemaking agenda in all agencies. Part III.A shows that Presidents bring meaningful change to the agendas of executive agencies and independent commissions.<sup>357</sup> This is the weakest assumption but offers the most data.
- *Rulemakings by Executive Agencies.* The second subset includes all rulemakings begun by executive agencies (i.e., not independent commissions) during the first term of the administration. Consistent with the results from Part III.A, this assumes that Presidents set the rulemaking agendas in executive agencies—even if they have trouble controlling the agendas of independent commissions.<sup>358</sup>
- *Rulemakings Prioritized by the President.* The third subset includes only rulemakings begun by agencies that the President has publicly prioritized. I determine whether the President has prioritized an agency using measures developed by David Lewis and me.<sup>359</sup> We examined each President's first address to Congress and campaign documents to determine whether the President had proposed a policy related to the agency's policy jurisdiction.<sup>360</sup> This subset assumes that rulemakings begun by priority agencies further the President's policy objectives and that Presidents make additional efforts to control the rulemaking agendas of these agencies.

None of these methods are perfect, but they are built around reasonable assumptions aimed at overcoming the inferential hurdle of identifying which rulemakings are consistent with the President's agenda.

Second, we want to identify the effect that capacity has on policymaking—not the other way around. The concern here is that the causal arrow may point in the opposite direction. Presidents build capacity in agencies that they prioritize for policymaking, meaning policymaking also influences the growth

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decides to pursue a significant and more controversial policy change versus a more incremental change. See Jonathan Homola, Miguel M. Pereira & Margit Tavits, *Fixed Effects and Post-Treatment Bias in Legacy Studies*, 118 AM. POL. SCI. REV. 537, 538-39 (2024) (explaining post-treatment bias).

357. See *supra* Part III.A.

358. See *id.*

359. See Nicholas R. Bednar & David E. Lewis, Replication Data for: Presidential Investment in the Administration State: Coding of Agency Priorities 1-9 (2022), <https://perma.cc/RFS6-9BAU>.

360. *Id.*

of capacity.<sup>361</sup> For purposes of inference, we want to avoid independent variables that change after the administration decides to pursue a rulemaking. Accordingly, all independent variables are (1) stable characteristics that do not change within an administration (such as structural characteristics of agency design or stable agency ideology), or (2) measured *before* the start of the current administration (such as policymaking capacity and rulemaking workloads). Measuring the independent variables before the start of the administration ensures that the current administration had no direct influence over the agency's capacity, structure, or preferences, avoiding certain sources of post-treatment bias.<sup>362</sup>

To collect data on rulemakings, I use the *Unified Agenda*.<sup>363</sup> The *Unified Agenda* is the standard source of data for scholars studying rulemaking.<sup>364</sup> Every rulemaking has a unique Regulation Identifier Number (RIN), allowing scholars to track the progress of rulemakings over time.<sup>365</sup> Machine-readable files make it possible to assemble a dataset of every reported rulemaking from January 2001 to January 2021.<sup>366</sup> A rulemaking enters the dataset if (1) it first appeared in the *Unified Agenda* during the first term of Bush, Obama, or Trump and (2) the agency published the first NPRM for the rulemaking in the same term. Although the *Unified Agenda* offers a comprehensive source of rulemaking data,<sup>367</sup> I identified a number of typographical errors and inconsistencies. Accordingly, I use the original publication in the *Federal Register* to verify the data in the *Unified Agenda* and make corrections to dates and the type of action (such as NPRM or final rule) reported by the agency.<sup>368</sup> The analysis includes 5,161 rulemakings from 152 agencies across three

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361. See Bednar & Lewis, *supra* note 140, at 454.

362. See, e.g., Homola et al., *supra* note 356, at 540-41 (illustrating a case where post-treatment was introduced by measuring a control variable after the treatment variable).

363. *RegInfo.gov*, OFF. OF INFO. & REGUL. AFFS., <https://perma.cc/SD92-LL7Y> (archived Feb. 8, 2025); see also *supra* notes 300-01 and accompanying text (explaining the *Unified Agenda*).

364. See, e.g., POTTER, *supra* note 3, at 203; O'Connell, *supra* note 11, at 895; Potter & Shipan, *supra* note 13, at 100.

365. See *How to Use the Unified Agenda*, OFF. OF INFO. & REGUL. AFFS., <https://perma.cc/L6FH-KMW7> (archived Feb. 8, 2025). (explaining the purpose of RINs).

366. For the complete set of machine-readable files, see *XML Reports*, OFF. OF INFO. & REGUL. AFFS., <https://perma.cc/9QQW-3KVG> (archived Feb. 8, 2025) (providing XML files for the *Unified Agenda* from Fall 1995 to present).

367. See O'Connell, *supra* note 11, at 895.

368. For a complete set of *Federal Register* files, see *Bulk Data Repository*, U.S. GOV'T PUBL'G OFF.: GOVINFO, <https://perma.cc/2Q8P-FX2C> (archived Feb. 8, 2025). For a description of the *Federal Register*, see *About the Federal Register*, NAT'L ARCHIVES, <https://perma.cc/S9CX-6PCU> (archived Feb. 8, 2025).

administrations.<sup>369</sup> The wide variety of agencies allows researchers to evaluate a myriad of combinations of agency capacity, structure, and preferences.

Reliance on the *Unified Agenda* has several disadvantages. First, agencies sometimes strategically manipulate their submissions to the *Unified Agenda* by choosing when to first disclose a rulemaking.<sup>370</sup> Relying on the rule's first appearance in the *Unified Agenda* may systematically underestimate the duration of rulemaking for some agencies. To overcome this problem, I use the date the NPRM first appeared in the *Federal Register*. Since publication in the *Federal Register* is a standardized requirement under the APA,<sup>371</sup> this provides an equal point of comparison for all rules. Second, the *Unified Agenda* does not include data on whether the rulemaking creates new regulatory requirements or repeals existing regulations. The question of how these results change based on the nature of the rule is an interesting question, but it does not speak to the heart of this study. As O'Connell explains, all regulatory and deregulatory proposals must follow the same rulemaking procedures and, therefore, the distinction between regulatory or deregulatory rules "is less problematic in evaluating the ossification of rulemaking."<sup>372</sup> Case studies and future empirical work may shed light on whether capacity has a smaller effect on rulemakings that repeal existing rules. Third and finally, rulemaking is not the only type of policymaking performed by agencies.<sup>373</sup> Control and capacity may have different effects when Presidents seek to make policy through executive orders, guidance, and legislation. Nevertheless, studying these dynamics in the rulemaking context advances our understanding of one of the most prevalent forms of lawmaking.

The dependent variable of interest is the duration of an ongoing rulemaking. I measure the duration of the rulemaking as the number of days between the publication of the first NPRM in the *Federal Register* to the

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369. The number reported here excludes any agency without a capacity score, measure of structural independence, or ideology score. The models exclude these rulemakings because the model cannot be estimated with missing data. See Appendix, *supra* note 233, at pt. III.A (providing additional information on the construction of the dataset).

370. See Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 757-58 (2016) (describing the strategic manipulation of when agencies report rules).

371. See 5 U.S.C. § 553(b) (requiring agencies to publish a proposed rulemaking in the *Federal Register*).

372. O'Connell, *supra* note 11, at 928-29 ("[T]he amount and length of rulemaking is important, whether the content is regulatory or deregulatory.").

373. For research examining other administrative policymaking endeavors, see generally Parrillo, note 71 above (guidance documents); Potter, note 11 above (same); RUDALEVIGE, note 71 above (executive orders); and Walker, note 71 above (legislation).

agency's final submission to OIRA.<sup>374</sup> I use days to final OIRA submission because, at that point, the agency has completed its work on the rulemaking. The data exhibits right censoring for rules that remain uncompleted after the President's first term. Right-censoring simply means that we do not observe what happens beyond the last day of the President's first term.<sup>375</sup> Censoring helps to control for situations where an agency abandons a rulemaking without providing public notice. By focusing on the last day of the President's first term, the dependent variable reflects the substantive concept of interest (i.e., the President's ability to deliver policy change) and avoids crucial measurement errors.

**Table 1**  
Rulemakings Begun During the First Term

Administration	Total Rulemakings (Priority Agency Rules)	Finalized (%)	Mean Duration (SD)
Bush II	1,690 (1,017)	1,054 (62.37%)	300.63 (252.68)
Obama	1,841 (1,417)	1,151 (62.52%)	313.87 (244.28)
Trump	1,630 (1,212)	1,115 (68.40%)	259.89 (216.16)
<b>Total</b>	5,161 (3,646)	3,320 (64.32%)	292.48 (241.70)

*Note.* Duration reported as the censored time from NPRM to Final Rule.

Table 1 summarizes the rulemaking data. Although Presidents differ in the number of rulemakings they pursued during their first terms, similar patterns emerge across administrations. Agencies finished approximately 64.3% of all rulemakings by the end of the first term.<sup>376</sup> The average rulemaking took about ten months from the issuance of the NPRM to the final rule. Of course, this measure underestimates rulemaking duration because it does not consider

374. If the final rule was exempt from OIRA review, then I use the day the final rule appeared in the *Federal Register*.

375. As a robustness check, I estimate the models on the uncensored time to finalization, allowing the duration to extend beyond the first term. All results hold. *See* Appendix, *supra* note 233, at pt. IV.B.

376. Rulemaking completion does not guarantee proper compliance with the Administrative Procedure Act. The Trump Administration had a high rate of completed rulemakings but a low success rate in federal court. *See Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POL'Y INTEGRITY, <https://perma.cc/LH2V-NFP4> (last updated Apr. 25, 2022).



the time and energy agencies spend drafting and vetting proposed rules before publishing the NPRM in the *Federal Register*.<sup>377</sup>

I predict that the most proximate reason that rulemaking succeeds is the capacity of the agency's policymaking teams. To measure policymaking capacity, I use the scores described in Part II.B.<sup>378</sup> Again, these scores estimate an agency's capacity within a given year based on the size, expertise, and experience of the agency's policymaking workforce.<sup>379</sup> If the *Completion Hypothesis* holds, then agencies with higher capacity should take less time to finalize their rulemakings.

Analyzing the relationship between capacity and rulemaking completion requires sophisticated statistical techniques. A simple bivariate relationship between rulemaking completion and capacity does not account for confounding variables that may explain both the completion of rulemaking and the acquisition of capacity.<sup>380</sup> For example, Part II.B. discusses how independent commissions exhibit higher levels of capacity.<sup>381</sup> At the same time, independent commissions may take less time to promulgate rulemakings because their rules do not undergo OIRA review.<sup>382</sup> For purposes of inference, the concern is that the agency's capacity proxies other concepts, such as the agency's structure, that better explain rulemaking outcomes.

A multivariate model controls for possible confounders and allows us to separate the effect of capacity from the effects of other variables.<sup>383</sup> For this study, I use a Cox proportional hazard model.<sup>384</sup> The Cox model belongs to a class of survival models that estimate the time to an event (i.e., rulemaking

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377. Cf. POTTER, *supra* note 3, at 29-33 (explaining the process of developing a proposed rule).

378. See *supra* Part II.C (showing variation in the capacity scores).

379. See *supra* notes 219-22 and accompanying text (explaining the construction of the capacity scores).

380. See, e.g., WOOLDRIDGE, *supra* note 253, at 78-81 (explaining how the omission of a key variable may bias estimates).

381. See *supra* notes 261-67 and accompanying text.

382. See SELIN & LEWIS, *supra* note 110, at 104. Exec. Order No. 12,866, 57 Fed. Reg. 51735, 51738 (Oct. 4, 1993) (defining "agency" to exclude "independent regulatory agencies" for purposes of OIRA review). During his second administration, President Trump amended Executive Order No. 12,866 to require rules promulgated by independent regulatory agencies to undergo OIRA review. See Exec. Order No. 14,215, 90 Fed. Reg. 10447, 10448 (Feb. 18, 2025).

383. See, e.g., IMAI, *supra* note 265, at 165 (explaining how multivariate models allow "researchers to assess the impact of each predictor").

384. Biostatistics uses "survival models" to measure the length of time that an individual survives after contracting a particular disease. For an introduction to this type of model, see JOHN P. KLEIN & MELVIN L. MOESCHBERGER, SURVIVAL ANALYSIS: TECHNIQUES FOR CENSORED AND TRUNCATED DATA 243-93 (2d ed. 2003).

completion) and has been used by other scholars studying rulemaking.<sup>385</sup> For purposes of studying rulemaking, the Cox model has an important advantage over other models because it estimates both whether higher capacity agencies complete their rules before the end of the President's first term and whether higher capacity agencies complete rulemakings faster. A key concern for Presidents is whether career employees resist their agendas by sabotaging rulemaking proceedings,<sup>386</sup> possibly by delaying the policymaking process.<sup>387</sup> By focusing on the time to rulemaking completion, the models allow us to examine which factors speed up or slow down rulemaking.

In addition to capacity, the model includes other explanatory variables of interest and confounders.<sup>388</sup> Specifically, the *Completion Hypothesis* predicts that the effect of capacity depends on presidential control.<sup>389</sup> Therefore, the model incorporates two agency characteristics related to presidential control:<sup>390</sup> structural independence and agency preferences.<sup>391</sup>

First, Presidents have fewer opportunities to exercise control over agencies whose leaders are more insulated from political pressure.<sup>392</sup>

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385. For other research using survival analysis in the rulemaking context, see POTTER, note 3 above, at 141; Bolton et al., note 10 above, at 258; O'Connell, *Agency Rulemaking and Political Transitions*, note 126 above, at 515; and Yackee & Yackee, note 15 above, at 270-71.

386. See SKOWRONEK ET AL., *supra* note 72, at 109 (describing these concerns in the Trump Administration).

387. Cf. POTTER, *supra* note 3, at 131-53 (describing timing as a tool strategically used).

388. See JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, *MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST'S COMPANION* 52-57 (2009) (explaining the importance of covariates to multivariable modeling).

389. See *supra* Part II.D (theorizing about how control and capacity interact to affect rulemaking completion).

390. See *supra* Parts I.A-B. (explaining how agency structure and ideological distance influence presidential control).

391. I focus on these characteristics because they are a function of agency design and, therefore, exogenous to the rulemaking activities of the current administration. Undoubtedly, there are other plausible measures of presidential control, such as the number of political appointees in the agency. Cf. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS*, *supra* note 11, at 128 tbl.5.6 (measuring the relationship between political ideology and politicization). Because I measure capacity at the start of the presidential administration, including a measure of politicization in the model would result in "post-treatment bias." See generally Paul R. Rosenbaum, *The Consequences of Adjustment for a Concomitant Variable That Has Been Affected by the Treatment*, 147 J. ROYAL STAT. SOC'Y SERIES A 656 (1984) (proving the problem of including controls that are measured after the treatment of interest).

392. See *supra* notes 285, 289-90 and accompanying text (describing the features that make independent commissions difficult to control).

Independence is a function of design choices made at the agency's inception.<sup>393</sup> To measure agency independence, Jennifer Selin codes various features of agency design based on the statute that created the agency.<sup>394</sup> Her measures incorporate structural features, such as whether appointees were protected by removal protections, whether Presidents must nominate appointees from different parties, and whether the statute specified that appointees serve the president.<sup>395</sup> To test the *Completion Hypothesis*, I interact this measure of structural independence with the measure of policymaking capacity. If the *Completion Hypothesis* holds, then the marginal effect of independence on rulemaking duration should decrease as the agency's capacity decreases.<sup>396</sup>

Second, Presidents have an easier time convincing agencies to work on policies related to their agendas when the agency shares the President's preferences.<sup>397</sup> To measure the ideological distance between the President and the agency, I rely on stable, time-invariant measures of agency ideology developed by Mark Richardson, Josh Clinton, and David Lewis.<sup>398</sup> Using the *Survey on the Future of Government Service*, Richardson, Clinton, and Lewis develop this measure by asking federal executives, "In your opinion, do the policy views of the following agencies tend to slant liberal, slant conservative, or neither consistently in both Democratic and Republican administrations?"<sup>399</sup> They present each respondent with a list of agencies the

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393. See McCubbins et al., *Structure and Process, Politics and Policy*, *supra* note 116, at 441-43 (arguing that Presidents and Congress uses administrative procedure to induce *ex ante* compliance with the preferences of the enacting coalition); Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 267, 324-25 (John E. Chubb & Paul E. Peterson eds., 1989) (describing the political bargaining that influences agency structure).

394. I measure agency independence using Jennifer Selin's 2015 measures of decision-maker independence. See Selin, *supra* note 263, at 976-79. Selin's measures model agency independence as a function of the statutory features that insulate agencies' leaders from political control. This measure ranges from 0.00 (low independence) to 3.08 (high independence) (Mean: 0.86, SD: 0.89). Substituting this measure for an indicator of whether the rulemaking agency is an independent commission does not change the results. See Appendix, *supra* note 233, at pt. IV.D. I use Selin's continuous measure in the main analysis because it provides variation to agency structure within the executive agencies.

395. See Selin, *supra* note 261, at 978.

396. See *supra* Part II.D (theorizing about how control and capacity interact to affect rulemaking completion).

397. See *supra* notes 84-89 and accompanying text (describing how preference divergence may shape the willingness of career employees to work with the President).

398. See generally Richardson et al., *supra* note 78 (describing the method of creating time-invariant measures by asking about consistent ideological leanings across different presidential administrations).

399. *Id.* at 304. The measure ranges from 0.06 (agency and president preferences are close) to 3.94 (agency and president preferences are distant) (Mean: 2.04, SD: 0.97).

respondent previously reported working with. I transform this measure into one of ideological distance by ensuring that conservative agencies are closest to Republican Presidents and that liberal agencies are closest to Democratic Presidents. To test the *Completion Hypothesis*, I interact this measure of ideological distance with the measure of policymaking capacity. If the *Completion Hypothesis* holds, then the marginal effect of ideological distance on rulemaking duration should decrease as the agency's capacity decreases.<sup>400</sup>

Agencies have varying levels of rulemaking authority and, over time, may have increased their capacity to satisfy their obligations. Left unaccounted, measures of capacity may simply proxy the expected level of rulemaking within the agency. I control for the agency's workload to account for this possibility.<sup>401</sup> I measure workload using the logged number of rulemakings reported in the *Unified Agenda* in the fall before the inauguration of the new President.<sup>402</sup> This measure shows that agencies do have some baseline level of rulemaking that persists regardless of changes in the White House.<sup>403</sup> However, a correlation test suggests that there is no meaningful relationship between an agency's capacity and its rulemaking workload.<sup>404</sup> This reduces concerns that the measure of capacity simply proxies the agency's workload.

Agencies may also rely to varying degrees on contract services for help with rulemaking.<sup>405</sup> Reliance on contractors is plausibly correlated with both capacity and the duration of rulemaking. Yet obtaining data on the use of

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400. See *supra* Part II.D (theorizing about how control and capacity interact to affect rulemaking completion).

401. Before the log transformation, the measure ranges from 0 to 374 rules (Mean: 89.40, SD: 94.11). See also WOOLDRIDGE, *supra* note 253, at 37-39 (explaining the use of log transformations in regression analysis).

402. This measure is consistent with workload measures used by other scholars. See Bolton et al., *supra* note 10, at 254-55. This measure may capture the maximum simultaneous workload because rulemaking finalizations often increase during the final year of a president's term. See O'Connell, *supra* note 11, at 948-50 (documenting "midnight" rulemaking). This makes for an appropriate measure for this study because it captures the number of rules the agency expects to complete in a time-sensitive period of the president's term.

403. A Pearson correlation test reveals a strong and significant relationship between agency workloads between the Bush and Obama Administrations ( $\rho = 0.96$ ;  $p < 0.001$ ) and the Obama and Trump Administrations ( $\rho = 0.96$ ;  $p < 0.001$ ). As anticipated, agencies have some baseline level of rulemaking that persists regardless of the current administration. For an explanation of correlations, see WOOLDRIDGE, note 253 above, at 658-60.

404. A Pearson correlation test returns a correlation coefficient of -0.02 and a p-value of 0.63.

405. See Dooling & Potter, *supra* note 237, 1686-88 (interviewing agency rulemaking officials to determine what roles contractors play in the rulemaking process).

contractors in the rulemaking process is notoriously difficult.<sup>406</sup> Instead, I use the logged number of contract managers employed full time by the agency.<sup>407</sup> This measure assumes that agencies that have more employees devoted to managing contracts are more likely to have the processes and procedures in place to use contractors in the rulemaking process. The data reveals an insignificant correlation between an agency's capacity and the number of contractor managers it hires.<sup>408</sup>

Additionally, I include fixed effects for presidential administrations to control for time-varying policies within administrations that affect rulemaking procedures.<sup>409</sup> For example, President Trump's Executive Order 13,771 introduced a "one-in, two-out" requirement that required agencies to repeal existing regulations when proposing new regulations.<sup>410</sup>

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406. Potter, *supra* note 238 (explaining the difficulties of tracking how many contracting awards go to rulemaking because "there is not a lot of transparency to what contractors do in rule making; agencies are not required to disclose what rulemaking work is done by contractors rather than federal employees").

407. Before the log transformation, this measure ranges from 1 contract manager to 5815 contract managers (Mean: 172.14, SD: 391.11).

408. A Pearson correlation test returns a correlation coefficient of -0.09 and a p-value of 0.11. Admittedly, this is a crude measures of contract services. The results hold if I remove the measure of contract managers from the model. See Appendix, *supra* note 233, at pt. IV.C.

409. I do not include any measures of divided government because (1) all three Presidents had a unified government during the first Congress of their first term and (2) the alignment of the second Congress may be a function of presidential policymaking success and, therefore, post-treatment. Fixed effects for presidential administration controls for some of the dynamics between Congress and the president. In addition, I do not include agency fixed effects. The agencies exhibit stability in their capacities across the three administrations. Therefore, there is insufficient variation to estimate within-agency effects of policymaking capacity. This is consistent with the discussion of Part II.B.

410. Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9339 (Jan. 30, 2017).

**Table 2**  
Cox Models of Duration of Completed Final Rules

	Hazard Rate of Finalization		
	All	Executive	Priorities
Capacity	0.57*** (0.09)	0.22** (0.12)	0.41*** (0.11)
Ideological Distance	-0.06** (0.02)	-0.06** (0.02)	-0.09*** (0.03)
Ideological Distance x Capacity	-0.07** (0.04)	0.01 (0.05)	-0.03 (0.05)
Independence	-0.17*** (0.04)	-0.29*** (0.05)	-0.19** (0.06)
Independence x Capacity	-0.19*** (0.04)	0.13 (0.09)	-0.12* (0.06)
Workload	0.05** (0.02)	0.13*** (0.02)	0.07*** (0.02)
Contractors	-0.04** (0.01)	-0.04** (0.02)	-0.04** (0.02)
Obama	-0.15** (0.05)	-0.10* (0.06)	0.04* (0.07)
Trump	0.16** (0.05)	0.16** (0.05)	0.34*** (0.06)
Capacity (Wald)	<0.001***	<0.001***	<0.001***
Ideological Distance (Wald)	<0.001***	0.032*	<0.001***
Independence (Wald)	<0.001***	<0.001***	<0.001***
Estimator	Cox	Cox	Cox
N	4,766	3,921	3,392

*Note.* Robust standard errors calculated using R's survival package.<sup>411</sup> Joint hypothesis tests performed using the Wald test. Reported statistic is the p-value from the Wald test. \* $p < 0.10$ ; \*\* $p < 0.05$ ; \*\*\* $p < 0.001$ .

Table 2 reports the estimates from the Cox model. Positive coefficients correspond to faster rulemakings, while negative coefficients reflect longer rulemakings. Consistent with the *Completion Hypothesis*, I find evidence that capacity increases the likelihood of rulemaking finalization. The results are similar regardless of which subset of rulemakings I use for the analysis. In all three models, capacity is a positive and significant predictor of rulemaking completion.<sup>412</sup> For simplicity, I report the results from the model that used all rulemakings. At any point in time, an agency with capacity one standard deviation above the mean (i.e., a high-capacity agency) is 57% more likely to complete an ongoing rulemaking. By contrast, an agency with capacity one standard deviation below the mean (i.e., a low-capacity agency) is about 26% less likely to complete a rulemaking. This is consistent with the expectation that agencies must have sufficient capacity to engage in rulemaking.

The *Completion Hypothesis* also predicts that the marginal effect of control declines as capacity decreases. The models provide some support for this hypothesis. First, the interaction term between capacity and independence is negative in two of the models, but statistically significant in one of the models. The positive effect in the second model may be caused by the lack of variation in the measure of agency independence. Agencies with the highest levels of independence (i.e., independent commission) are omitted from this model,<sup>413</sup> making it more difficult to estimate the interaction between capacity and independence. Second, the interaction term between capacity and ideological distance is negative in two models, but statistically significant in only one of the models. Although these coefficients are negative, the fact that they are statistically insignificant suggests that we cannot precisely estimate the effect size and meaningfully distinguish it from zero. Overall, the results suggest that Presidents have a harder time benefiting from structural control or ideological congruence when the agency has a lower level of administrative capacity.

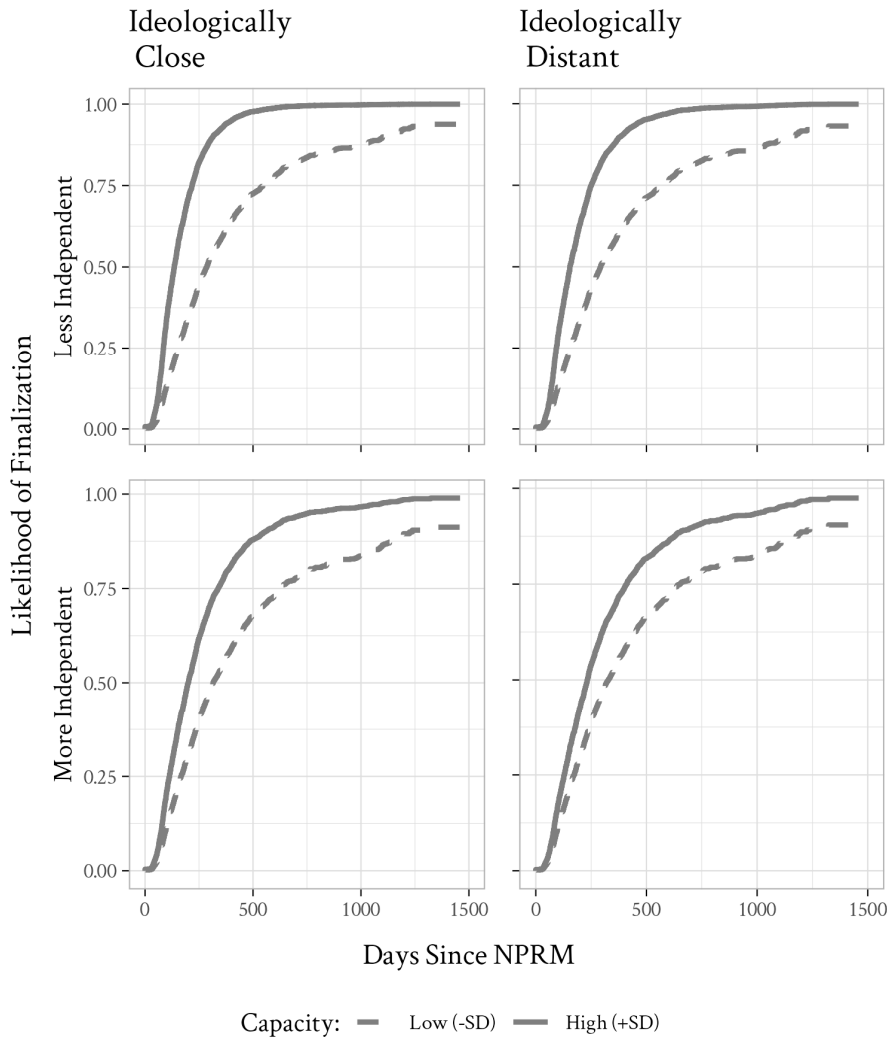
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411. Terry M. Therneau, Thomas Lumley, Elizabeth Atkinson & Cynthia Crowson, Package 'survival' 37 (2024), <https://perma.cc/F5SH-TTQA>. For an explanation of the use of robust standard errors, see Mohammad Ali Mansournia, Maryam Nazemipour, Ashley I. Naimi, Gary S. Collins & Michael J. Campbell, *Reflection on Modern Methods: Demystifying Robust Standard Errors for Epidemiologists*, 2021 INT'L J. EPIDEMIOLOGY 346, 347.

412. For a discussion of the difference between statistical significance and practical significance, see WOOLDRIDGE, *supra* note 253, at 120-22.

413. See Selin, *supra* note 263, at 979 (explaining that independent commissions have the highest scores in the measure).

Figure 5  
Cumulative Hazard Rates by Control and Capacity



*Note.* A “high capacity” agency is an agency with capacity one standard deviation above the mean. A “low capacity” agency is an agency with capacity one standard deviation below the mean. An “ideologically close” agency is an agency with ideological distance one standard deviation above the mean. An “ideologically distant” agency is an agency with ideological distance one standard deviation below the mean. A “less independent agency” is an agency with independence one standard deviation below the mean. A “more independent agency” is an agency with independence one standard deviation above the mean. Workload and contractors held at the mean.



To illustrate these effects, Figure 5 plots the predicted functions for the model that includes all rulemakings. The solid lines represent a high-capacity agency and the dashed lines represent a low-capacity agency. The upper-left quadrant predicts the likelihood of rulemaking finalization for an agency that is ideologically close to the President and less structurally insulated from presidential control. The President has the greatest control over such an agency and as predicted, has the highest likelihood of completing a rulemaking within this quadrant. But the President only benefits from this control if the agency has a high level of capacity. By comparison, the lower-right quadrant predicts the likelihood of rulemaking completion for an agency that is ideologically distant from the President and structurally insulated. Here, a high-capacity agency still provides some benefit for the President but less than when the President has significant control over the agency. By contrast, the low-capacity agency performs similarly regardless of the level of presidential control. Increasing presidential control or ideological congruence does not meaningfully increase the likelihood that a low-capacity agency finalizes a given rule. From the President's perspective, a low-capacity agency presents an even greater problem than a low-control agency.

One limitation of this analysis is that it only examines cases where Presidents do not achieve their objectives due to a lack of rulemaking completion. Yet capacity may result in other failures. For example, a court may vacate a rule for ignoring the APA's procedural requirements or relying on flawed technical analyses.<sup>414</sup> Likewise, a lack of expertise may result in a policy that fails to achieve the preferred outcome.<sup>415</sup> For example, the Environmental Protection Agency (EPA) was forced to modify regulations related to kiln emissions because it used an erroneous formula to conclude that individuals could safely consume 4.4 pounds of hazardous residue per day.<sup>416</sup> In the preamble of the amendment, EPA explained, "Clearly, this was not the Agency's intent."<sup>417</sup> Consequently, the results may *underestimate* the true role that capacity plays in administrative policymaking because the model only estimates the relationship between capacity and rulemaking completion.

The analysis of rulemaking completion suggests that capacity affects the efficacy of presidential control. Presidents have the greatest likelihood of succeeding in high-capacity and high-control agencies. As capacity wanes

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414. See Bethany A. Davis Noll, *"Tired of Winning": Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMIN. L. REV. 353, 358 (2021) (concluding that the Trump Administration's rules were frequently reversed due to procedural defects).

415. Cf. Moe, *supra* note 26, at 30-31 (explaining the relationship between policy production and capacity).

416. See *Burning of Hazardous Waste in Boilers and Industrial Furnaces*, 58 Fed. Reg. 59598, 59599 (Nov. 9, 1993) (codified at 40 C.F.R. §§ 266.112, 271.1).

417. *Id.*

within an agency, control matters less for achieving the President's policymaking agenda. To be clear, presidential control still influences rulemaking completion. But Presidents cannot successfully implement their agendas through control alone, because control has no meaningful impact on whether a low-capacity agency finalizes a particular rule. Whether these dynamics shape the President's decision to pursue rulemaking is the subject of the next section.

### C. Capacity Affects Rulemaking Initiation

If Presidents are strategic actors, then the capacities, structures, and preferences of federal agencies should inform when and how they pursue rulemaking. As Figure 4 illustrates, Presidents exercise great control over rulemaking agendas. The *Initiation Hypothesis* predicts that Presidents are more likely to prioritize rulemaking in high-capacity agencies over which they exercise the greatest amount of control.<sup>418</sup>

For this analysis, I aggregate the rulemaking data to the agency-term level. The dependent variable is the number of significant NPRMs published by the agency in the first terms of the Bush, Obama, and Trump presidencies. A rulemaking is coded as significant if the agency reported it as "economically significant" or "other significant" on the *Unified Agenda*. Economically significant rules are those that "will have an annual effect on the economy of least \$100 million or will adversely affect . . . the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."<sup>419</sup> Other significant rules are those that "are a priority of the agency head."<sup>420</sup> I focus on this subset of rules because they represent large policy initiatives that are more likely to be spearheaded by the White House. To enter the dataset, the agency must have existed at the time of the President's inauguration.<sup>421</sup> The independent variables remain the same as

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418. See *supra* Part II.D (theorizing about how control and capacity affect rulemaking initiation).

419. See Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions, 85 Fed. Reg. 52664, 52667 (Aug. 26, 2020). The threshold for economic significance was increased to \$200 million during the Biden Administration. See Exec. Order No. 14,094, 88 Fed. Reg. 21879, 21879 (Apr. 6, 2023), *revoked by* Exec. Order No. 14,148, 90 Fed. Reg. 8237, 8239 (Jan. 28, 2025). The subsequent increase does not impact this analysis.

420. See Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions, 85 Fed. Reg. at 52667.

421. Because the Department of Homeland Security was established in 2003, the estimates for President George W. Bush's Administration exclude rulemakings from that agency. Cf. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of the U.S. Code) (establishing the Department of Homeland Security).

the previous analysis. If the *Initiation Hypothesis* holds, then high-capacity and high-control agencies should initiate a greater number of significant rulemakings.<sup>422</sup>

**Table 3**  
Average Number of Significant Rulemakings Initiated by Agencies

Administration	Average Number of Significant Rules Per Agency (SD)	Average Number of Significant Rules Per Priority Agency (SD)
Bush II	20.30 (38.97)	22.93 (37.41)
Obama	17.37 (35.59)	19.10 (42.22)
Trump	9.82 (18.18)	11.31 (21.55)
<b>Overall</b>	15.64 (32.11)	17.66 (34.91)

As Table 3 demonstrates, the average level of rulemaking varied across administrations. During the Bush and Obama Administrations, the average agency initiated between nineteen and twenty-three significant rulemakings. The average agency initiated far fewer significant rulemakings during the Trump Administration. This may reflect the Trump Administration's aggressive approach to deregulation. Across all three administrations, priority agencies tend to propose as many—if not slightly more—significant rules as other agencies.

I estimate the effect of the independent variables on NPRM issuance using an ordinary least squares (OLS) regression.<sup>423</sup> The model includes the same agency-level measures as the durational analysis, including ideological distance, independence,<sup>424</sup> workload, contractors,<sup>425</sup> and presidential fixed effects. Like the Cox model from Part II.B, the linear regression also allows for

422. See *supra* Part II.D (theorizing about how control and capacity affect rulemaking initiation).

423. For an explanation of OLS regression, see WOOLDRIDGE, *supra* note 253, at 60-73.

424. As a robustness check, I substitute Selin's measure of independence for an indicator of whether the agency is an independent commission. The results hold. See Appendix, *supra* note 233, at pt. IV.D.

425. As a robustness check, I remove this measure of contractors from the model. The results hold. See Appendix, *supra* note 233, at pt. IV.D.

the inclusion of covariates and, therefore, controls for various confounders.<sup>426</sup> Positive coefficients represent the initiation of more rulemakings and negative coefficient represent the initiation of fewer rulemakings.

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426. See WOOLDRIDGE, *supra* note 253, at 60-73.

**Table 4**  
OLS Models of Significant NPRMs

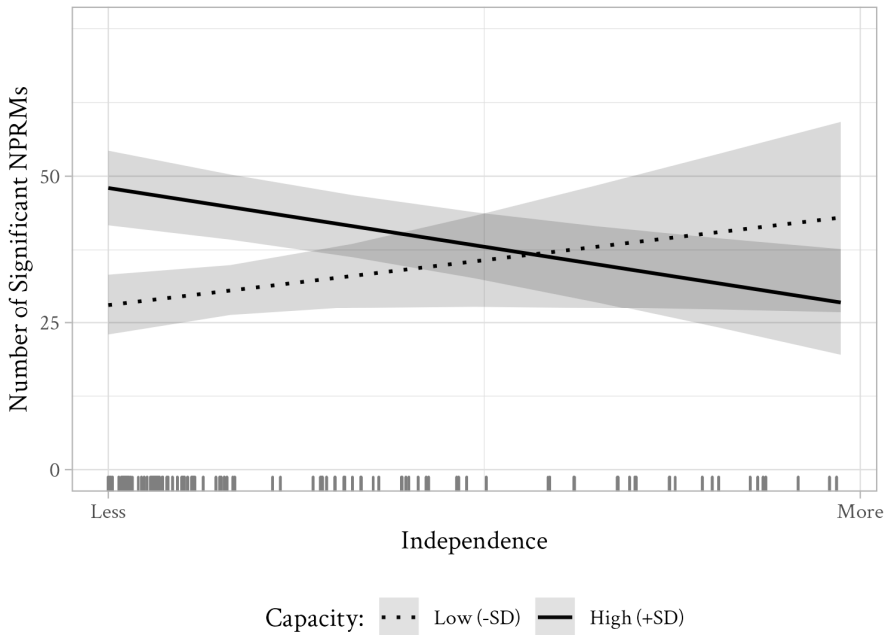
	Number of Significant NPRMs		
	All	Executive	Priorities
Capacity	14.50* (7.99)	17.37** (8.16)	23.05** (10.59)
Ideological Distance	0.93 (0.91)	0.26 (1.00)	-1.06 (1.66)
Capacity x Ideological Distance	0.48 (1.49)	-1.49 (2.07)	-4.49 (2.99)
Independence	-0.76 (3.04)	-0.47 (5.40)	-2.28 (6.79)
Capacity x Independence	-8.92** (4.11)	-2.93 (5.96)	-0.49 (7.97)
Workload	13.77*** (3.32)	15.59*** (3.90)	15.39*** (3.89)
Contractors	2.14* (1.14)	2.33* (1.22)	2.88* (1.27)
Obama	-5.55* (2.73)	-8.69** (3.20)	-9.86* (3.92)
Trump	-12.55*** (3.62)	-13.57*** (3.92)	-14.71** (4.74)
Constant	-18.73** (8.88)	-21.28** (9.95)	-18.92** (8.31)
Capacity (Wald)	0.003**	0.002**	0.022*
Ideological Distance (Wald)	0.902	0.734	0.485
Independence (Wald)	0.014*	0.81	0.911
Estimator	OLS	OLS	OLS
N	282	242	192
R-Squared	0.34	0.37	0.35

Note. HC1-type heteroskedastic-consistent standard errors clustered at the agency level. Joint hypothesis tests performed using the Wald test. Reported statistic is the p-value from the Wald test. \* $p < 0.10$ ; \*\* $p < 0.05$ ; \*\*\* $p < 0.001$ .

Table 4 reports the results. The *Initiation Hypothesis* predicts that Presidents more often pursue rulemaking in agencies with higher levels of control and capacity.<sup>427</sup> In all three models, capacity has a positive and statistically significant effect on the number of significant rulemakings begun by an agency. All else equal, an agency with capacity one standard deviation above the mean (i.e., a high-capacity agency) issues about nine more significant rules than an agency with the mean level of capacity. This is consistent with a finding that Presidents pursue significant rulemakings in agencies capable of finalizing them before the end of their first term.

**Figure 6.A**

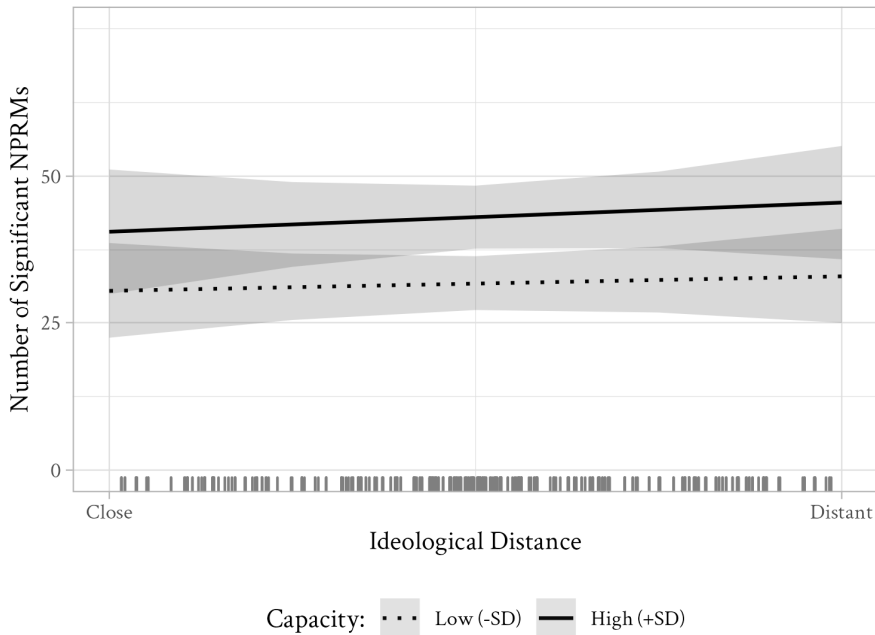
Predicted Number of Significant NPRMs: Effects of Independence



427. See *supra* Part II.D (theorizing about how control and capacity affect rulemaking initiation).

**Figure 6.B**

Predicted Number of Significant NPRMs: Effects of Ideological Distance



The model finds mixed support for Presidents' consideration of their ability to control agencies. Figure 7 plots the predicted number of significant NPRMs as a function of the agency's structural independence and its ideological distance from the President. In all three models, the marginal effect of capacity declines as structural independence increases. Above a certain level of independence, an agency's level of capacity factors less into the decision to pursue rulemaking. While the coefficient for the interaction term only achieves statistical significance in one model,<sup>428</sup> the result is consistent with the prediction that Presidents have fewer incentives to pursue rulemaking in agencies where they will struggle to control the outcome.

By contrast, the effect of ideological distance is imprecisely estimated and positive in the model including all rulemakings. Two phenomena may explain this finding. First, as shown in Table 2, ideological distance plays a much smaller role in rulemaking completion than other factors, including structural

<sup>428</sup> The independence variable suffers from the same problems as identified in Part II.B. See *supra* notes 410-12 and accompanying text.

independence. Presidents may compensate for ideological distance by further politicizing agency leadership or centralizing policymaking in the White House.<sup>429</sup> This is consistent with other work suggesting that Presidents politicize agencies to increase policymaking output.<sup>430</sup> Second, Presidents have few options when seeking to repeal the regulations of prior administrations. Presidents can either undergo the rulemaking process to reverse the regulations or seek legislation that would supersede the regulations. During divided government, rulemaking may be the only way for Presidents to keep deregulatory promises.

The findings suggest that Presidents face trade-offs between policy completion and durability. Presidents want durable policy change. For administrative policymaking, durability comes from rulemaking.<sup>431</sup> Yet agencies require sufficient capacity to advance the President's agenda. Without that capacity, Presidents may be forced to look for alternative forms of policymaking, such as issuing guidance or executive orders.<sup>432</sup>

#### IV. Implications

Both presidential control and policymaking capacity influence the degree to which Presidents accomplish their policy agendas through rulemaking.<sup>433</sup> By and large, the survey of federal executives reveals that Presidents set rulemaking agendas—especially within executive agencies.<sup>434</sup> Although Presidents exercise less direct influence over independent commissions, the survey and supporting literature suggests that the differences between executive agencies and independent commissions are less consequential than some have assumed.<sup>435</sup> Accordingly, capacity—not control—may present a greater obstacle for modern Presidents.<sup>436</sup>

The results reveal wide variation in the policymaking capacity of federal agencies.<sup>437</sup> Some agencies, such as the SEC and the FDA, have relatively high

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429. See *supra* Part I.B (explaining the role of politicization as a mechanism of presidential control).

430. Cf. Potter, *supra* note 11, at 15 (showing that politicization increases the production of guidance documents).

431. See *supra* notes 277–80 and accompanying text (describing the benefits of rulemaking).

432. See Potter, *supra* note 11, at 15; Turner, *supra* note 19, at 42 (exploring the trade-off between executive orders and legislation and the willingness of agencies to invest in greater capacity).

433. See *supra* Part III.

434. See *supra* Part III.A.

435. See *supra* Part III.A.

436. See *supra* Part III.B.

437. See *supra* Part II.C.



levels of administrative capacity.<sup>438</sup> Other agencies, such as Immigration and Customs Enforcement and the Indian Health Service, have relatively low levels.<sup>439</sup> This variation calls into question traditional wisdom suggesting that agencies by-and-large have the expertise and experience needed to engage in policymaking.<sup>440</sup>

Capacity has meaningful consequences for administrative policymaking. It affects the time that it takes agencies to complete the rulemaking process and influences which tools Presidents use to pursue their agendas.<sup>441</sup> Moreover, capacity has a greater overall effect on rulemaking completion than control.<sup>442</sup> In fact, a lack of capacity diminishes the overall effectiveness of control. This is intuitive. Presidential control is the power to direct the agency's capacity to the President's agenda. It does not provide the agency with the expertise, experience, and processes needed to undertake rulemaking.

This final Part discusses the implications of these findings. I focus on three questions. First, what do these findings tell us about the quality of administrative policymaking?<sup>443</sup> Second, what implications do these findings have for constitutional theories of presidential power?<sup>444</sup> Third, who should take on the role of managing the administrative state?<sup>445</sup>

#### A. Delegation and the Quality of Administrative Policymaking

Administrative policymaking rests on an assumption that federal agencies have greater expertise than Congress.<sup>446</sup> Congress faces its own capacity constraints and lacks the sorts of technical expertise possessed by federal agencies.<sup>447</sup> Likewise, Presidents believe they have a right to direct policy change,<sup>448</sup> but they and their appointees often lack knowledge of the legal

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438. *See supra* Figures 1-2.

439. *See supra* Figure 2.

440. *See supra* Part I.C.

441. *See supra* Part II.D.

442. *See supra* Figure 5.

443. *See infra* Part IV.A.

444. *See infra* Part IV.B.

445. *See infra* Part IV.C.

446. *See* KERWIN & FURLONG, *supra* note 27, at 29-30.

447. *See id.* at 29 ("Our laws require the constant application of knowledge and expertise to varied conditions and circumstances, so it makes sense to concentrate specialists in the administrative agencies that execute them rather than in the legislature."); BOLTON & THROWER, *supra* note 151, at 11-16 (arguing legislative capacity plays a significant role in the relationship between Congress and the Executive Branch).

448. *Cf.* MOSHER, *supra* note 29, at 84 (discussing the merger of administration and policymaking).

framework and technical minutiae of the policy environment.<sup>449</sup> Indeed, traditional theories of delegation assume that elected officials delegate to take advantage of the administrative state's capacity.<sup>450</sup>

What if, however, agencies have less capacity than either the President or Congress anticipates? I suspect that most agencies have greater capacity than the President or Congress, but only because the President and Congress have such little expertise in any specific policy area. Even with this advantage, an agency may nevertheless arrive at a suboptimal policy because it does not have the workforce needed to engage in effective policymaking. Accordingly, capacity has implications for both the substantive and procedural quality of administrative policymaking.

Substantively, we should be concerned that some agencies lack the expertise needed to consider all the issues presented by a particular policy problem. Indeed, Presidents and Congress often instruct agencies to consider scientific, economic, or social factors when drafting rules. For example, the Clean Air Act instructs the Environmental Protection Agency to take into account “energy, environmental, and economic impacts and other costs” when setting emission standards.<sup>451</sup> The Regulatory Flexibility Act requires agencies to analyze how their proposed rules will affect small businesses, non-profits, and municipal governments.<sup>452</sup> Most recently, the Biden Administration amended Circular A-4 to require agencies to consider the distributional effects on race, ethnicity, gender, sexual orientation, disability, income, and geographic location.<sup>453</sup>

If agencies lack the capacity to consider these problems, then they may mistakenly adopt a policy that has undue burdens on groups or unforeseen externalities.<sup>454</sup> Failure to perform a legally required analysis would likely

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449. See LIGHT, *supra* note 53, at 19 (“The President and the staff generally are ill-equipped to convert most raw data into useful information; nor are they prepared to invest the time and energy necessary to locate specific details.”); George A. Krause & Anne Joseph O’Connell, *Loyalty-Competence Trade-offs for Top U.S. Federal Bureaucratic Leaders in the Administrative Presidency Era*, 49 PRESIDENTIAL STUD. Q. 527, 546 (2019) (“[G]reater presidential efforts at political control of administrative agencies through appointment choices require a larger sacrifice of policy expertise relative to managerial skills.”).

450. See KERWIN & FURLONG, *supra* note 27, at 30 (describing agencies as being able to more quickly respond to emergencies through rulemaking); Gailmard, *supra* note 105, at 536 (“Delegation is often a concession to expertise . . .”).

451. Clean Air Act of 1990 § 169(3), 42 U.S.C. § 7479(3).

452. See 5 U.S.C. §§ 601(4)-(6), 603(a).

453. OFF. OF MGMT. & BUDGET, *supra* note 176, at 61-63.

454. Cf. Daniel A. Farber, *Inequality and Regulation: Designing Rules to Address Race, Poverty, and Environmental Justice*, 3 AM. J.L. & EQUALITY, Aug. 2023, at 2, 21 (describing how the failure to consider distributional effects leads to inequality).

render the agency's policy arbitrary and capricious.<sup>455</sup> The variation in capacity scores raises concerns that some agencies may lack the expertise and experience needed to conduct these kinds of assessments.<sup>456</sup> Future research on specific policies may illuminate how capacity influences the attainment of optimal policy outcomes.

Procedurally, we expect agencies to adhere to the requirements of the APA, such as responding to comments from the public.<sup>457</sup> Other scholars have raised concerns that these procedural burdens lead to the ossification of rulemaking.<sup>458</sup> Procedural burdens likely have a greater effect on lower capacity agencies, which may explain why these agencies take longer to complete their rulemakings.<sup>459</sup>

A recent example provides evidence of the ways in which capacity may affect the substantive and procedural quality of rulemaking. During the Trump Administration, agencies within the Department of the Interior suffered significant turnover.<sup>460</sup> One official stated that the Trump Administration engaged in “an intentional effort to hobble the agency” and “diminish the capacity of the department.”<sup>461</sup> The headquarters of the Bureau of Land Management (BLM)—an agency within the Department of the Interior—saw a 34% decrease in employees with at least twenty-five years of experience.<sup>462</sup> According to BLM employees, the loss of capacity led to delays in issuing policy and guidance.<sup>463</sup> Stakeholders also accused BLM of avoiding processes that would have allowed the public to weigh in on permitting decisions.<sup>464</sup> Scientists in the Fisheries and Wildlife Service expressed concerns that limited staffing created barriers to science-based decision-making.<sup>465</sup> The experience

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455. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (stating that a rule is “arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider” or “entirely failed to consider an important aspect of the problem.”).

456. See *supra* Part II.C.

457. See *State Farm*, 463 U.S. at 43 (describing that at least one goal of arbitrary-and-capricious review is to ascertain whether the agency has examined the relevant data and articulated a satisfactory explanation for its judgment); Mendelson, *supra* note 165, at 1347-52 (discussing democratic values in agency rulemaking).

458. See McGarity, *supra* note 15, at 1385; Pierce, *supra* note 15, at 60-61.

459. See *supra* Part III.B.

460. See Eric Katz, *It's Glacial': One Agency Is Still Struggling to Overcome the 'Assault' on Its Workforce*, GOV'T EXEC. (Mar. 7, 2023), <https://perma.cc/2L3A-NKK6>.

461. See *id.*

462. See Eric Katz, *Land Management Agency Still Facing Vacancies from Headquarters Move After Workers Fled*, GOV'T EXEC. (Nov. 18, 2021), <https://perma.cc/PA5Z-9XHD>.

463. See *id.*

464. See Katz, *supra* note 460.

465. See *id.*

of the Department of the Interior reveals the risk posed to the substantive and procedural quality of administrative policymaking.

Although this Article has dwelled on the role of administrative capacity in policymaking, we should remember that capacity constrains implementation as well. In a study of the Secret Service, Carol Leonnig described the agency as “stretched too thin, drowning in new missions, and fraught with security risks brought on by a fundamental mistrust between rank-and-file agents and leadership.”<sup>466</sup> Elsewhere, I have shown that limited staffing in the Immigration Courts leads to disparate case outcomes and shorter hearings.<sup>467</sup> Accordingly, these concerns about delegation do not simply extend to *policymaking*; they concern *policy implementation* as well.

As a theoretical matter, scholars of delegation should consider why Congress continues to expand agency authority without providing agencies the resources they need to exercise that authority. Since 1960, federal spending has increased by more than 500%, but the workforce has grown by only 17%.<sup>468</sup> As David Lewis explained, the administrative state is “[d]oing more with fewer and less[.]”<sup>469</sup> Why elected officials delegate greater authority to agencies without simultaneously building capacity presents a puzzle.

As a normative matter, the problem is not that elected officials rely on federal agencies to make policy. We should want the government to arrive at informed decisions based on the latest scientific, economic, and social-science expertise. At the same time, the nature of democratic governance requires these agencies to respond to public input. Administrative law helps to balance these trade-offs between expertise and democratic participation.<sup>470</sup> Yet administrative law also assumes that agencies have the capacity needed to evaluate competing policy alternatives and undergo notice-and-comment rulemaking.<sup>471</sup>

Improving the quality of administrative policymaking requires a two-fold approach. First, we must consider how to structure agencies to ensure they build and retain capacity. Second, we must identify ways to incentivize elected officials to build capacity across the administrative state.

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466. LEONNIG, *supra* note 154, at xv.

467. *See* Bednar, *supra* note 18, at 2177-90.

468. Lewis, *supra* note 75, at 774.

469. *Id.*

470. *Cf.* Mendelson, *supra* note 165, at 1347-52 (describing these trade-offs).

471. *See* FISHER & SHAPIRO, *supra* note 15, at 16 (describing administrative law as “grounded in administrative competence”).

B. The Trade-Off Between Capacity and Control

The results here and elsewhere show a positive relationship between capacity and structural independence.<sup>472</sup> Why do we observe this relationship? One explanation is that structural independence promotes bureaucratic autonomy.<sup>473</sup> Autonomy is not synonymous with the legal concept of “independence,” but describes a broader form of discretion.<sup>474</sup> By my definition, autonomy does not require a complete transfer of control from the President to agencies. Rather, career employees must personally feel like their opinion contributes to the operations of the agency.

Scholars have illustrated the importance of autonomy across time and contexts. Countries with stronger civil service laws possess higher levels of state capacity.<sup>475</sup> Historically, federal agencies with greater autonomy developed strong policymaking and implementation capabilities.<sup>476</sup> To explain this correlation, Sean Gailmard and John Patty theorize that discretion encourages individuals to choose careers in government and build expertise.<sup>477</sup>

As autonomy declines, however, career employees leave their agencies for other opportunities and expend less effort to build expertise.<sup>478</sup> Employees who perceive high levels of politicization are a third more likely to express an

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472. See *supra* Figure 3; Bednar, *supra* note 15, at 661-64.

473. Cf. Gailmard & Patty, *supra* note 19, at 882-85 (formally demonstrating that the expansion of bureaucratic discretion is one of the factors that leads to capacity building).

474. See Cary Coglianese, *The Semi-Autonomous Administrative State*, REGUL. REV. (Oct. 7, 2019), <https://perma.cc/7CTH-8Q46> (“‘Independence’ normally leads administrative lawyers to think about conditions for the removal of the head of an agency. The better concept to use when balancing insulation and accountability is agency ‘autonomy.’ . . . [A]ll agencies—even executive agencies—need some good amount of autonomy.”).

475. See generally BARBARA GEDDES, *POLITICIAN’S DILEMMA: BUILDING STATE CAPACITY IN LATIN AMERICA* (1994) (studying civil-service reform in Brazil, Chile, Colombia, Uruguay, and Venezuela); Peter Evans & James E. Rauch, *Bureaucracy and Growth: A Cross-National Analysis of the Effects of “Weberian” State Structures on Economic Growth*, 64 AM. SOCIO. REV. 748 (1999) (measuring the effect of meritocratic recruitment on GDP per capita). At times, individual agencies within a lower capacity state gather sufficient autonomy to build capacity. See generally ERIN METZ McDONNELL, *PATCHWORK LEVIATHAN: POCKETS OF BUREAUCRATIC EFFECTIVENESS IN DEVELOPING STATES* (2020) (studying the growth of capacity in Ghana’s Policy Analysis and Research Division).

476. See generally CARPENTER, *supra* note 36 (exploring how autonomy autonomy in the Postal Service allowed it advocated for an expansion of its capacity and law enforcement powers); William D. Adler, *State Capacity and Bureaucratic Autonomy in the Early United States: The Case of the Army Corps of Topographical Engineers*, 26 STUD. AM. POL. DEV. 107 (2012) (explaining how autonomy within the Army Corps of Engineers allowed the agency to push for its preferred policy goals).

477. See Gailmard & Patty, *supra* note 19, at 875.

478. See *id.* at 879-80.

intent to leave their agencies.<sup>479</sup> These same employees engage in fewer activities to develop expertise, such as attending trainings or consulting with outside policy experts.<sup>480</sup> Other evidence suggests that politicization decreases employee morale and results in poor performance.<sup>481</sup> As Mark Richardson explains, “[l]oss of policy influence reduces the value policy-motivated civil servants derive from public service.”<sup>482</sup>

Agency structures help to protect autonomy. Gailmard and Patty argue that governments can preserve autonomy, in part, by “instituting relatively common civil service practices,” such as tenure.<sup>483</sup> Although the United States has relatively high capacity compared to other states,<sup>484</sup> some agencies exhibit higher capacity than others.<sup>485</sup> One likely explanation is that many of the highest capacity agencies have additional structures, such as for-cause removal protections, that temper—but do not wholly eliminate—political influence.<sup>486</sup>

Collectively, these studies—paired with the finding that independent commissions exhibit higher levels of capacity<sup>487</sup>—offer evidence of a *negative* correlation between presidential control and capacity. Reforms aimed at increasing presidential control may erode capacity by eliminating structures that preserve autonomy. If true, then *increasing* presidential control may further *weaken* the President’s ability to implement their agenda in agencies that suffer from capacity constraints.

Current movements in constitutional law seek to strengthen presidential control. Proponents of a unitary executive argue that Article II vests the executive power in the President alone and, therefore, Presidents must have authority to control all powers of the Executive Branch.<sup>488</sup> Although proponents of a unitary executive agree that Presidents must control administrative policymaking, they disagree about what mechanisms of control

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479. See Richardson, *supra* note 36, at 886.

480. See *id.* at 887.

481. See generally LEWIS, *supra* note 11, at 172-201 (providing statistical evidence of this relationship).

482. See Richardson, *supra* note 36, at 889.

483. See Gailmard & Patty, *supra* note 19, at 886.

484. See Jonathan K. Hanson & Rachel Sigman, *Leviathan’s Latent Dimensions: Measuring State Capacity for Comparative Political Research*, 83 J. POL. 1495, 1504 (ranking the United States as one of the top 20 countries with the highest levels of state capacity).

485. See *supra* Figure 1.

486. See *supra* notes 285, 289-90 and accompanying text (describing the features that insulate independent commissions from control).

487. See *supra* Figure 3.

488. See Calabresi & Prakash, *supra* note 32, at 581-82; Lawson, *supra* note 32, at 1242; Rivkin, *supra* note 32, at 317-20.

the Constitution mandates.<sup>489</sup> Some proponents believe that Presidents may personally exercise the policymaking authority otherwise delegated to agencies.<sup>490</sup> Others state that the Constitution permits the President to “veto” the actions of a subordinate.<sup>491</sup> Most (but not all)<sup>492</sup> proponents argue that Article II endows Presidents with the power to remove officers.<sup>493</sup> This final argument has influenced the Supreme Court to strike down statutory features, such as for-cause removal protections, that insulate agencies from political pressure.<sup>494</sup>

Proponents of a unitary executive acknowledge—as a practical matter—that Presidents must rely on subordinates because they lack the requisite time and expertise to execute the laws themselves.<sup>495</sup> But they assume that presidential control has the effect of energizing government.<sup>496</sup> More often than not, proponents of a unitary executive espouse the familiar assumption that Presidents are sufficiently incentivized to build capacity and lack incentives to undermine capacity.<sup>497</sup> But neither proponents nor critics of the

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489. Compare Gary Lawson, *Command and Control: Operationalizing the Unitary Executive*, 92 FORDHAM L. REV. 441, 447 (2023) (“An unfettered removal power is not only inconsistent with the Constitution’s text and structure, but also fails to provide the constitutionally necessary measure of control.”), with Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 FORDHAM L. REV. 2541, 2554 (2011) (“Without the ability to direct and control backed up by the removal power, executive authority dissipates and this undermines the responsibility of the President for the actions of the executive branch.”).

490. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1166 (1992); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 704.

491. See Calabresi & Rhodes, *supra* note 490, at 1166.

492. See Lawson, *supra* note 489, at 447.

493. See CALABRESI & YOO, *supra* note 11, at 419-20; Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1026 (2006); Rao, *supra* note 489, at 2542-43.

494. See, e.g., *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021); *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2204 (2020); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 492 (2010).

495. See *Free Enter. Fund.*, 561 U.S. at 483 (“In light of [t]he impossibility that one man should be able to perform all the great business of the State, the Constitution provides for executive officers to ‘assist the supreme Magistrate in discharging the duties of his trust.’” (alteration in original) (quoting 30 THE WRITINGS OF GEORGE WASHINGTON 334 (John Fitzpatrick ed., 1939))).

496. See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 37-42 (1995) (describing reasons that a unitary executive theoretically energizes the Executive Branch).

497. Compare *supra* notes 130-33 and accompanying text (providing quotes related to this assumption), with CALABRESI & YOO, *supra* note 11, at 7 (“We fully support such merit-based hiring criteria and note that presidents have little incentive to fire carryover civil servants if presidents are unable to fill those jobs with dedicated loyalists from their own presidential campaigns.”).

unitary executive theory have thoroughly examined the risks presidential control poses to capacity.<sup>498</sup>

Unfortunately, implementation of unitary executive theory threatens policymaking capacity by eroding the autonomy that attracts individuals to public service. Schedule F provides one recent example. Schedule F exempted individuals in a “confidential, policy-determining, policy-making, or policy-advocating” occupation from the competitive service.<sup>499</sup> The Trump Administration justified Schedule F with constitutional rhetoric, arguing that “[f]aithful execution of the law requires that the President have appropriate management oversight regarding this select cadre of professionals.”<sup>500</sup> Proponents and opponents estimated that as many as 100,000 employees would be reclassified under Schedule F.<sup>501</sup> The Government Accountability Office warned that “Schedule F could result in increased employee turnover between administrations, leading to a lack of continuity and a potential degradation in the overall subject matter expertise held within the civil service.”<sup>502</sup>

In the courts, the implementation of unitary executive theory has focused on restrictions on the removal of appointees.<sup>503</sup> The degree to which the insulation of appointees protects the autonomy of career employees remains an open question. Nevertheless, some have sought to find a constitutional hook

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498. See Donald Moynihan, *Delegitimization, Deconstruction, and Control: Undermining the Administrative State*, 69 ANNALS AM. ACAD. POL. & SOC. SCI. 36, 46 (2022) (arguing neither proponents nor critics have thought through the performance consequences); Donald P. Moynihan, *Public Management for Populists: Trump’s Schedule F Executive Order and the Future of the Civil Service*, 82 PUB. ADMIN. REV. 174, 177 (2022) (suggesting that unitary-executive theory’s performance claims are unfounded).

499. See Exec. Order No. 13,957, 85 Fed. Reg. 67631, 67632 (Oct. 21, 2020).

500. *Id.* at 67631; see also U.S. CONST. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed . . .”).

501. U.S. GOV’T ACCOUNTABILITY OFF., GAO-22-105504, AGENCY RESPONSES AND PERSPECTIVES ON FORMER EXECUTIVE ORDER TO CREATE A NEW SCHEDULE F CATEGORY OF FEDERAL POSITIONS 30 (2022) (“Many stakeholders said that agencies could have identified positions affecting hundreds of thousands of federal employees across government because Schedule F criteria could be broadly interpreted.”); see also Eric Katz, *If Trump Is Reelected, His Aides Are Planning to Purge the Civil Service*, GOV’T EXEC. (July 22, 2022), <https://perma.cc/T6DZ-FZEU> (describing the Trump campaign’s identification of 50,000 current employees to dismiss under Schedule F); Donald F. Kettl, *Comments on Proposed Rule “Upholding Civil Service Protections and Merit System Principles,”* at 3 (Nov. 16, 2023), <https://perma.cc/3QCU-4628> (“Just how many federal employees would Schedule F have covered? Its proponents have presented varying estimates. In the early days, the numbers were ‘in the thousands.’ Since then, however, the proponents have varyingly suggested that the number would be at least 50,000 and perhaps as many as 100,000. With a federal civilian workforce of about 2.2 million employees, this is a very large number.” (footnote omitted)).

502. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 494, at 23.

503. See sources cited *supra* note 494; see also U.S. CONST. art II, § 2, cl. 2.



for eliminating civil-service protections for career employees. Judge James Ho of the Fifth Circuit has called on courts to reconsider the constitutionality of civil-service laws:

Federal civil service laws make it virtually impossible for a President to implement his vision without the active consent and cooperation of an army of unaccountable federal employees. . . . As anyone who has ever held a senior position in the Executive Branch can attest, federal employees often regard themselves, not as subordinates duty-bound to carry out the President's vision whether they personally agree with it or not, but as a free-standing interest group entitled to make demands on their superiors. . . . In an appropriate case, we should consider whether laws that limit the President's power to remove Executive Branch employees are consistent with the vesting of executive power exclusively in the President.<sup>504</sup>

These proposals would abandon the “relatively common civil service practices” that encourage individuals to pursue government service and invest in their expertise.<sup>505</sup> Proponents of these reforms, however, fail to recognize that the President cannot pursue their vision without the capacity provided by these employees. Presidential control means nothing if the President lacks the workforce needed to make policy. Even Presidents who favor deregulation need some source of procedural expertise to avoid having their policies reversed by federal courts under the APA.<sup>506</sup> As an assistant to President Lyndon Johnson once stated, “If you shouldn't fire a pistol with a blindfold, you shouldn't propose a major program without some basic knowledge of what will happen.”<sup>507</sup>

In theory, a robust labor pool may mitigate these concerns. If an administration could quickly fill vacancies with individuals who support the President's agenda, then the President would have fewer difficulties balancing control and capacity. But that is unrealistic and dangerous for several reasons. Presume for the moment that Presidents make a good faith effort to ensure agencies have the capacity they need to execute their visions. First, Presidents already fail to fully staff the approximately 1,300 presidential appointments with Senate confirmation (PAS) in federal agencies.<sup>508</sup> Larger human capital campaigns would require even greater effort. The Trump campaign indicated

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504. *See* *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 390-91 (5th Cir. 2023) (Ho, J., concurring).

505. *See* Gailmard & Patty, *supra* note 19, at 886.

506. *See* Noll, *supra* note 406, at 357-59.

507. LIGHT, *supra* note 53, at 20.

508. After two years, President Trump had only nominated individuals for 74% of those positions. This rate is not uniquely low. President Obama had nominated 85% of individuals to PAS positions after two years and President Biden had nominated 60% of individuals to PAS positions after a year-and-a-half. *See* Bednar & Lewis, *supra* note 140, at 448 & tbl.1.

that it would attempt to replace 50,000 career employees through reforms like Schedule F.<sup>509</sup> Staffing an additional 50,000 career employees would increase the federal government's rate of hiring by 64% within a single presidential term.<sup>510</sup>

Moreover, constant turnover deprives the workforce of the experience and institutional knowledge possessed by high-capacity agencies. Steep learning curves ensure new employees need time to develop the procedural expertise and professional judgment that enable policymaking.<sup>511</sup> When asked about turnover, career employees often express grave concerns about the loss of institutional knowledge in addition to the reduction in the size of the workforce.<sup>512</sup>

All of this suggests that a unitary executive threatens to undermine capacity by encouraging turnover and eliminating structures that protect bureaucratic autonomy.<sup>513</sup> Nor is it clear that further increasing presidential control would improve the President's ability to set rulemaking agendas or direct the day-to-day activities of the agency. The results generally suggest that control does not pose a major obstacle for Presidents because Presidents have invested significant energy into reforming the Executive Branch to improve responsive competence.<sup>514</sup> Large-scale reforms to agency design or the civil service may increase turnover, creating problems for agency recruitment and retention, with only marginal improvements in presidential control.

What is the proper balance between presidential control and capacity? It is hard to say. If Presidents increase their control over the administrative state, then agencies may struggle to recruit and retain expert and experienced agency policymakers. Suddenly, Presidents find themselves incapable of promulgating policy through rulemaking. On the other hand, if Presidents voluntarily

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509. Katz, *supra* note 501.

510. From FY 2015 to FY 2019, the Executive Branch hired 78,310 new employees across all white-collar positions in the Washington, D.C. area (Competitive Service: 25,516, Excepted Service: 51,335, Senior Executive Service: 1,459). See *Accessions Trend (FY 2015-FY 2019)*, OFF. OF PERS. MGMT., <https://perma.cc/FWV6-8G2T> (archived Feb. 8, 2025) (to replicate, set "Washington D.C." as the relevant location and the "Occupation" as "White Collar"). Data for new hires appears in the bar chart labelled "New Hires."

511. See Kuk-Kyoung Moon, *Voluntary Turnover Rates and Organizational Performance in the US Federal Government: The Moderating Role of High-Commitment Human Resource Practices*, 19 PUB. MGMT. REV. 1480, 1481-82 (2017).

512. See, e.g., Katz, *supra* note 462 ("[BLM] employees said that enough institutional knowledge walked out the door that the agency is struggling to weigh in on regulations and legislation.").

513. See *supra* notes 472-82 and accompanying text (explaining the relationship between autonomy and capacity).

514. See *supra* Parts III.A-B (examining the President's ability to set agendas and the influence of presidential control on rulemaking completion).

insulate agencies from presidential control to encourage recruitment, they may find themselves incapable of directing the agency's policymaking activities. Agencies and careerists *do* have their own policy preferences, and they do behave strategically to advance those interests through the rulemaking process.<sup>515</sup> Without institutions like OMB and OIRA, Presidents would surely encounter greater resistance to implementing their rulemaking agendas.

The equilibrium level of control and capacity varies from agency to agency. A preference for control may be more desirable in agencies that implement politically fraught policies under a theory that presidential involvement increases democratic accountability. A preference for capacity may be necessary in agencies that develop policies for highly technical and important sectors, such as financial, energy, or insurance markets. Discovering the precise balance requires management decisions tailored to specific domains rather than widespread reforms that impose a specific structure upon the entire administrative state.

### C. Who Should Manage the Administrative State?

Who should manage the administrative state? I explore four options: the President, the courts, Congress, and the public. I identify ways that all four actors can promote capacity building.

#### 1. Presidents

Presidents are the constitutional managers of the Executive Branch. Due to their position in the executive hierarchy, the President has the greatest opportunity to discover *why* a specific agency has failed to implement the President's agenda. When a President struggles to control an agency, they may further politicize the agency's leadership or centralize policymaking within the White House.<sup>516</sup> When the agency lacks capacity, the President may improve recruitment and retention.

In some cases, recruiting and retaining a workforce of expert and experienced policymakers may require Presidents to adopt structural reforms aimed at increasing bureaucratic autonomy. Indeed, one plausible justification for independent commissions is that they better preserve expertise relative to agencies subject to complete presidential control.<sup>517</sup> In the past, Congress has

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515. See POTTER, *supra* note 3, at 5.

516. See *supra* Part I.B.

517. See S. REP. NO. 63-597, at 8-9 (1914) ("It is generally conceded that the peculiar character and importance of [the antitrust] question make it indispensable that some of the administrative functions should be lodged in a body specially competent to deal with them, by reason of information, experience, and careful study of the business and economic conditions of the industry affected."). But see Devins & Lewis, *The Independent* footnote continued on next page

authorized Presidents to reorganize the Executive Branch to promote good governance.<sup>518</sup> In 2003, the Volcker Commission recommended granting the President “expedited authority to recommend structural reorganization of federal agencies and departments” to ensure that “the operations of the federal government keep pace with the demands placed upon it.”<sup>519</sup> Restoring the President’s authority to manage, reorganize, and restructure the administrative state may allow Presidents to design the administrative state in a way that improves agency performance.

Some may argue that Presidents would never use this reorganization power to insulate agencies. But history shows that Presidents sometimes tie their own hands to promote good administration. More than half of the agencies established since 1946 have been created through executive action, including the EPA, OPM, the Occupational Safety and Health Administration, and many others.<sup>520</sup> Reorganization grants the President a first-mover advantage, resulting in a different structure than Congress may have chosen through the legislative process.<sup>521</sup> Presidents occasionally choose to insulate these agencies from presidential control by locating them outside the cabinet departments, imposing a commission structure, or requiring appointees to have certain qualifications.<sup>522</sup> The willingness of Presidents to sometimes insulate agencies demonstrates some engagement with agency design as a means of promoting good management.

Presidents also propose the budget and have a first-mover advantage in the budgeting process.<sup>523</sup> In passing the Budget and Accounting Act, Representative James Good explained that “the President must lay out a work program for the Government, and the appropriations that would necessarily follow would only be to supply the money to do the work in accordance with

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*Agency Myth*, *supra* note 11, at 1328-31 (arguing that independent commissions do not exhibit higher levels of expertise than other agencies).

518. See RONALD C. MOE, CONG. RSCH. SERV., RL30876, THE PRESIDENT’S REORGANIZATION AUTHORITY: REVIEW AND ANALYSIS 1 (2001). These acts have historically contained a legislative veto, which the Supreme Court deemed unconstitutional. *INS v. Chadha*, 462 U.S. 919, 959 (1983). Any modern reorganization act would need to omit the legislative veto.

519. NAT’L COMM’N ON THE PUB. SERV., URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 17 (2003), <https://perma.cc/AC4F-YZL4>.

520. DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997, at 80 (2003).

521. See *id.* at 94-95 (exploring the case of the National Biological Survey).

522. See *id.* at 90-91.

523. See Dearborn, *supra* note 95, at 21-22.

that work program.”<sup>524</sup> But the budgeting process has become another tool of presidential control rather than one of capacity building.<sup>525</sup> Presidents should use budgeting as an opportunity to investigate which agencies need more capacity and to request that Congress provide needed resources.

I recommend presidential management with some trepidation. Improving the quality of administrative policymaking requires Presidents to take an active role in managing the administrative state. But Presidents rarely have sufficient incentives to build capacity.<sup>526</sup>

Asymmetric priorities among Presidents exacerbate the situation. During the 2020 election, 95% of liberal voters said that climate change was an important election issue.<sup>527</sup> President Biden coupled large regulatory reforms in the EPA with a significant push for increased staffing.<sup>528</sup> By contrast, President Trump disfavored EPA policy and allowed the agency’s workforce to shrink to the lowest level since the 1980s.<sup>529</sup> Ideological differences may cause agencies to whipsaw between periods of growth and periods of deconstruction. Left to their own devices, Presidents are unlikely to build or maintain capacity in an agency if they disapprove of its mission.

The EPA reveals another asymmetry. Although all Presidents enact new policies, some Presidents place a greater emphasis on deregulation. Approximately half of Americans support a reduction in government regulation and programs, making an emphasis on deregulation a viable campaign strategy for some Presidents.<sup>530</sup> Repealing existing regulations may require less capacity than developing new regulations. When seeking to develop new policies, agencies must collect evidence and identify new methods

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524. 67 CONG. REC. H1854 (daily ed. May 27, 1921) (statement of Rep. James Good) (“All these changes have gravitated toward the original provisions of the House bill.”).

525. See Pasachoff, *supra* note 11, at 2213-30 (describing the budgeting process as a mechanism of control).

526. See Bednar & Lewis, *supra* note 140, at 454 (“[M]ost agencies receive no attention from the White House and, therefore, lack the capacity to implement the tasks entrusted to the executive branch by Congress.”).

527. See Alec Tyson, *How Important Is Climate Change to Voters in the 2020 Election?*, PEW RSCH. CTR. (Oct. 6, 2020), <https://perma.cc/6MYT-PMBM>.

528. See Jean Chemnick, *Biden Admin to Finalize Most Climate Rules in Early 2024*, POLITICOPRO (Jan. 3, 2024, 6:08 AM EST), <https://perma.cc/UYZ2-5WTU>; Eric Katz, *Want to Work for the EPA? The Agency Is Preparing for a Substantial Hiring Push in 2024*, GOV’T EXEC. (Feb. 8, 2024), <https://perma.cc/4VMZ-959T>.

529. See Brady Dennis, *EPA Under Trump Shrinks to Near Reagan-Era Staffing Levels*, WASH. POST (Sept. 6, 2017, 10:43 AM EDT), <https://perma.cc/UD7W-XLC4>; Nadja Popovich, Livia Albeck-Ripka, and Kendra Pierre-Louis, *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here’s the Full List*, N.Y. TIMES (updated Jan. 20, 2021), <https://perma.cc/GY4P-7FH5>.

530. See Lydia Saad, *Public Firm in View Government Doing Too Much, Too Powerful*, GALLUP (Oct. 24, 2023), <https://perma.cc/2862-DAJT>.

of achieving the desired policy outcome.<sup>531</sup> By contrast, repealing old policies simply requires reversion to the status quo and a reasoned explanation about the benefits of the old policy.<sup>532</sup> Future research may explore whether deregulation truly requires less capacity.

At the same time, we should be cautious about overstating the role that these asymmetries play in everyday governance. Even Presidents who prefer deregulation benefit from experienced civil servants who understand the rulemaking process. Failure to rely on career civil servants during rulemaking often leads to litigation and vacatur of the agency's action.<sup>533</sup> Moreover, Presidents have few incentives to deconstruct agencies that administer popular programs. Benefits programs like Social Security and Medicare enjoy widespread support from the public.<sup>534</sup> To improve Medicare, the Trump Administration reduced Medicare Advantage premiums and reformed insulin pricing.<sup>535</sup> Other programs, however, are so obscure that Presidents have no reason to either build or deconstruct the agency's capacity. The greatest problem confronting the average agency is not deconstruction; it is decades of persistent neglect.<sup>536</sup>

How do we incentivize greater investment by Presidents and discourage behaviors that diminish capacity? Presidential control does not prompt Presidents to invest. The agencies with the lowest levels of capacity are in the fifteen cabinet departments.<sup>537</sup> Despite already high levels of control, we do not observe Presidents prioritizing management in these agencies. If control does not cure maladministration, then we must seek new strategies to improve governance. One strategy is to empower other actors—the courts, Congress,

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531. For a review of the literature on different tasks in the policymaking process, see note 41 and accompanying text above.

532. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44 (1983) (recognizing that agencies must have discretion to change policies but requiring the agency to offer a reasoned decision for its change in policy).

533. The Trump Administration was notorious for sidelining career policymakers. Consequently, the Administration lost 78% of Administrative Procedure Act claims brought against its policies. See *Roundup: Trump-Era Agency Policy in the Courts*, *supra* note 376.

534. Surveys show great opposition to proposals to cut Social Security and Medicare. 66% of respondents say that the government should not cut benefits to prevent major economic problems. At most, the majority of respondents favor “minor changes” to these programs. See *Medicare*, GALLUP, <https://perma.cc/2CDN-Z4EU> (archived Feb. 8, 2025).

535. *Trump Administration Announces Historically Low Medicare Advantage Premiums and New Payment Model to Make Insulin Affordable Again for Seniors*, CTR. FOR MEDICARE & MEDICAID SERVS. (Sept. 23, 2020), <https://perma.cc/CAE7-MRAH>.

536. Bednar & Lewis, *supra* note 140, at 451.

537. See *supra* Part II.C.

and the public—to meaningfully oversee the managerial activities of the President.

## 2. Courts

Judicial review may have both positive and negative impacts on administrative capacity. I have already reviewed the threat posed by constitutional challenges to agency design.<sup>538</sup> Another threat comes from the development of doctrine. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, the Supreme Court held that, “in light of internal organization considerations,” courts should not impose additional procedures on agency rulemaking beyond what the APA requires.<sup>539</sup> Despite *Vermont Yankee*, the courts have read heightened evidentiary requirements into the APA, such as hard look review,<sup>540</sup> the obligation to disclose data relied upon in rulemaking,<sup>541</sup> and the requirement that agencies respond to significant comments.<sup>542</sup> Some of these doctrines may follow from a good-faith reading of the APA; others may not.<sup>543</sup>

More stringent doctrines, such as hard look review, require agencies to conduct more reaching analyses during rulemaking, requiring greater capacity.<sup>544</sup> Richard Pierce accuses the Supreme Court of basing its doctrine “on the implicit assumption that the politically accountable branches of government will simply take whatever actions are necessary to assure adequate agency staffing and funding to perform the missions they are assigned in a manner consistent with the doctrines announced and applied by the Court”—an assumption that mirrors those advanced by scholars of presidential administration.<sup>545</sup>

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538. See *supra* notes 503-04 and accompanying text (discussing the Supreme Court’s removal jurisprudence and efforts to review civil-service laws).

539. See 435 U.S. 519, 541-48 (1978).

540. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44 (1983).

541. See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236-38 (D.C. Cir. 2008).

542. See *Ohio v. EPA*, 144 S. Ct. 2040, 2053-54 (2024).

543. Compare *Am. Radio Relay League*, 524 F.3d at 243-44 (Tatel, J., concurring) (defending the data disclosure requirement as consistent with APA § 706), with *id.* at 246 (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part) (describing this requirement as standing on “a shaky legal foundation” that cannot be squared with the APA). For a detailed discussion of whether *Vermont Yankee* should be viewed as a interpretive rule of the APA, see Adam Crews, *Visions of Vermont Yankee*, 77 STAN. L. REV. (forthcoming May 2025).

544. See Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 70-84 (1997).

545. *Id.* at 64. Compare *id.*, with *supra* notes 130-33 and accompanying text (reviewing this assumption in the presidential administration literature).

Judicial review plays an important role in checking the procedural and substantive quality of agency regulations.<sup>546</sup> At the same time, it is unclear whether stringent procedural requirements produce better policy. Nicholas Bagley argues that proceduralism tends to “drain agencies of their legitimacy, impair their responsiveness to the public, and expose them to capture” rather than improve their legitimacy.<sup>547</sup> Moreover, judges are generalists who may struggle to discern whether improper procedures truly resulted in substantive errors.<sup>548</sup> Justice Barrett’s dissent in *Ohio v. EPA* accuses the majority of favoring a “cherry-picked assortment of EPA statements” to strike down a regulation as procedurally defective based on purely speculative comments.<sup>549</sup> Of course, as Judge Posner states, “understaffing is not a defense to a violation of principles of administrative law.”<sup>550</sup> Yet the Supreme Court should review whether current administrative law doctrines frustrate the ability of agencies to implement the policies enacted by Congress.

Courts could also play a positive role by protecting agencies from intentional maladministration by the President. This argument assumes that Presidents have an obligation to faithfully manage the administrative state. Gillian Metzger argues that the delegation of broad authority to the Executive Branch creates a “responsibility to supervise so as to ensure that the transferred authority is used in a constitutional and accountable fashion.”<sup>551</sup> Metzger’s description creates a duty to supervise. Jodi Freeman and Sharon Jacobs argue that efforts to deconstruct agencies undermine the separation of powers by preventing agencies from executing the laws enacted by Congress.<sup>552</sup> Freeman and Jacobs’s description creates a prohibition on malicious deconstruction.

Proponents of a unitary executive have traditionally assumed Presidents do not engage in intentional maladministration.<sup>553</sup> Annie Benn, however, theorizes that Presidents intentionally undermine capacity to “tie the hands” of

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546. Cf. 5 U.S.C. § 706(2)(a) (instructing courts to set aside agency actions that are arbitrary, capricious, or otherwise unlawful).

547. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 400 (2019).

548. Cf. Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 CALIF. L. REV. 1529, 1562-63 (2018) (arguing that greater statutory specificity is necessary when Congress relies on litigation because agencies have greater expertise than courts).

549. See *Ohio v. EPA*, 144 S. Ct. 2040, 2063-68 (2024) (Barrett, J., dissenting).

550. See *Salameda v. INS*, 70 F.3d 447, 452 (7th Cir. 1995).

551. See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1842 (2015).

552. See Freeman & Jacobs, *supra* note 109, at 589-90.

553. See CALABRESI & YOO, *supra* note 111, at 7 (“We fully support such merit-based hiring criteria and note that presidents have little incentive to fire carryover civil servants if presidents are unable to fill those jobs with dedicated loyalists from their own presidential campaigns.”).



their successors.<sup>554</sup> Space may exist for courts to police intentional maladministration. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court invoked the Take Care Clause in severing for-cause removal restrictions from members of the Public Company Accounting Oversight Board.<sup>555</sup> In justifying the majority's decision, Chief Justice Roberts explained, "[t]he President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own."<sup>556</sup>

The Supreme Court's decision suggests that Presidents cannot manage the administrative state in ways that limit the power of future Presidents. It is unclear why a unitary executive would prohibit tying a successor's hand with respect to control but would permit intentionally undermining capacity. Undermining capacity diminishes the power of future Presidents by limiting their ability to engage in administrative policymaking.<sup>557</sup>

The Supreme Court has expressed hesitation to intervene in cases that involve an agency's allocation of resources.<sup>558</sup> How does one distinguish between budget cuts resulting from policy disagreements versus those that seek to intentionally hobble an agency's ability to execute the law? At the same time, courts have placed prisons into receivership when poor management interferes with the constitutional rights of inmates.<sup>559</sup> Future research may identify the conditions under which receivership of agencies is an appropriate remedy.

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554. See Benn, *supra* note 19, at 11 (using a formal model to demonstrate ideological asymmetries in deconstruction).

555. 561 U.S. 477, 484 (2010).

556. *Id.* at 497.

557. See *supra* Part III.B.

558. See e.g., *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("[A]n agency's allocation of funds from a lump-sum appropriation requires 'a complicated balancing of a number of factors which are peculiarly within its expertise . . .'" (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985))); *Heckler*, 470 U.S. at 831-32 ("Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. . . . The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.").

559. See Hernandez D. Stroud, *Receiverships for Jails and Prisons, Explained*, BRENNAN CTR. FOR JUST., <https://perma.cc/L9CQ-485M> (last updated Aug. 15, 2023).

### 3. Congress

We should not understate the role of Congress. Congress possesses the power of the purse and appropriates funds for agencies.<sup>560</sup> Congress should scrutinize any proposed budget cuts to determine whether those cuts are likely to interfere with agency operations. In the wake of government failure, Congress should conduct oversight hearings and pursue long-term solutions to deficiencies in capacity.

Yet like Presidents, members of Congress also lack sufficient incentives to build capacity.<sup>561</sup> Congress often builds capacity on a *quid pro quo* basis, expecting agencies to deliver benefits to their districts in exchange for funding.<sup>562</sup> Members of Congress also recognize the benefits of funding relief in the wake of a disaster because this spending increases their vote shares.<sup>563</sup> Yet they have fewer incentives to prepare the agency for productive management in the future.<sup>564</sup> Incentivizing Congress to appropriate funds and conduct oversight is a main hurdle to building capacity.

### 4. The public

Presidents and members of Congress lack electoral incentives to build administrative capacity. Therefore, the incentive must come from the voting public. A primary reason that Presidents and Congress neglect most agencies is that the public lacks awareness about these agencies and their programs.<sup>565</sup> The public struggles to connect the everyday benefits of government programs to specific agencies.<sup>566</sup> When voters do become aware of maladministration, however, they punish elected officials.<sup>567</sup> Raising public awareness about agencies, their programs, and maladministration may incentivize Presidents and members of Congress to build capacity to avoid these electoral consequences.

## Conclusion

All Presidents want to make policy using the authority delegated to federal agencies. Rulemaking allows Presidents to create durable policies while

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560. See U.S. CONST. art I, § 9, cl. 7.

561. See Lewis, *supra* note 75, at 768-70.

562. See ARNOLD, *supra* note 116, at 38-39 (explaining appropriations strategies).

563. See Healy & Malhotra, *supra* note 138, at 399-400.

564. See *id.* at 399.

565. See Bednar & Lewis, *supra* note 140, at 445.

566. See METTLER, *supra* note 135, at 15-16; Scheffler & Walters, *supra* note 135, at 834.

567. See Malhotra & Kuo, *supra* note 137, at 127.

circumventing congressional logjams. To succeed, Presidents must exercise sufficient control over the agency, and the agency to have sufficient capacity. Balancing control and capacity proves more difficult than scholars often appreciate.

Presidential power as it relates to the administrative state can only be defined when control and capacity are considered in concert. Undoubtedly, presidential control is important. The results in this Article suggest that Presidents largely succeed at setting rulemaking agendas and directing the day-to-day activities of agencies. Yet the dearth of capacity in many agencies poses a significant hurdle to presidential administration. Without sufficient capacity, agencies prove incapable of developing and promulgating the policies promised by Presidents.

Improving administrative capacity likely requires more than bigger budgets. Presidents must create an environment amenable to recruiting and retaining the best people for government work. In some instances, that means loosening the reins and granting civil servants some degree of autonomy over the policymaking process. Theories of presidential power that advocate for strengthening the presidency by improving presidential control may prove ineffective. Wrestling with this question requires both empiricists and constitutional law scholars to engage more with administrative capacity and less with presidential control.

### Postscript

Shortly before this Article's publication, President Trump was inaugurated for a second term in office. The early days of his presidency have highlighted the tension between presidential control and administrative capacity. The Trump Administration has cited unitary executive theory in its reinstatement of Schedule F and its efforts to remove over 700,000 federal employees through reductions in force, voluntary resignations, and the use of administrative leave.<sup>568</sup> These personnel actions have already had a negative impact on the

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568. For recent articles explaining the Trump Administration's personnel actions, see Nick Bednar, *President Trump and the Civil Service: Day 1*, LAWFARE (Jan. 23, 2025, 1:32 PM PST), <https://perma.cc/Q58R-QHLG> (discussing executive orders released on President Trump's first day in office); Nick Bednar, *A Primer on Reductions in Force*, LAWFARE (Feb. 20, 2025, 9:58 AM PST), <https://perma.cc/T8R5-UNAJ> (describing plans for large-scale reductions in force); Nick Bednar, *Breaking Down OPM's 'Fork in the Road' Email to Federal Workers*, LAWFARE (Jan. 30, 2025, 2:25 PM PST), <https://perma.cc/4D93-9HMS> (previewing legal problems associated with promises to pay federal employees their salaries if they choose to resign); and Nick Bednar, *The Use and Abuse of Administrative Leave*, LAWFARE (Feb. 13, 2025, 9:38 AM PST), <https://perma.cc/J3UL-V8PX> (explaining how the Trump administration's use of administrative leave may violate the Administrative Leave Act).

implementation of federal programs.<sup>569</sup> In some cases, the Trump Administration has sought to reverse its removal of career employees with limited success.<sup>570</sup> Simultaneously, it has also announced a massive deregulatory program that requires agencies to repeal ten existing rules for every new rule promulgated.<sup>571</sup>

Many of the personnel actions taken by the Trump administration reflect a fear that the President lacks sufficient control over career employees. For example, in reinstating Schedule F, President Trump included new language that Schedule F employees are “required to faithfully implement administration policies to the best of their ability, consistent with their constitutional oath and the vesting of executive authority solely in the President.”<sup>572</sup> This fear is misplaced. Presidential control rarely impedes the implementation of the President’s policy agenda. In light of his swift effort to shrink the federal workforce, administrative capacity will present a greater constraint on President Trump’s agenda during his second term. An attorney within the Department of Justice has told a federal judge that the firings have made it difficult to properly staff cases seeking to defend the President’s policies.<sup>573</sup> Diminishing administrative capacity will limit the administration’s ability to deregulate and defend its actions in court.

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569. See, e.g., Maxine Joselow & Andrea Sachs, *Long Lines and Canceled Rentals: Firings Bring Chaos to National Parks*, WASH. POST (updated Feb. 19, 2025), <https://perma.cc/P5LR-PK52> (describing long lines and cancelled reservations at National Parks due to staffing cuts); Ashley Lopez & Jenna McLaughlin, *The Social Security Administration Says it Plans to Cut Some 7,000 Jobs*, NPR (updated Feb. 28, 2025, 4:35 PM ET), <https://perma.cc/D4BZ-VF8K> (stating that “[l]ocal field offices will close, hold times will increase, and people will be sicker, hungry, or die” because of recent cuts at the Social Security Administration).

570. See Peter Alexander & Alexandra Marquez, *Trump Administration Wants to Un-Fire Nuclear Safety Workers But Can’t Figure Out How to Reach Them*, NBC NEWS (updated Feb. 15, 2025, 3:33 PM PST), <https://perma.cc/8K2H-8QUK> (describing difficulty reaching nuclear safety workers fired at the National Nuclear Security Administration).

571. See Exec. Order No. 14,192, 90 Fed. Reg. 9065, 9065 (Feb. 6, 2025) (imposing a regulatory cap on new regulations).

572. Exec. Order No. 14,171, 90 Fed. Reg. 8625, 8626 (Jan. 31, 2025).

573. See Malhotra & Kuo, *supra* note 137, at 127. In a case involving the dismantling of the U.S. Agency for International Development (USAID), a federal judge asked a Department of Justice attorney, Joshua Gardner, why they were unable to produce certain documents relevant to the plaintiffs’ claims:

GARDNER. I think it’s important that everyone understands the context here. Since January 20, we have received approximately 80 lawsuits and our staff at the Justice Department’s Federal Programs Branch has been cut in half. . . .

JUDGE CHUANG. You’re saying that the Justice Department isn’t taking this case seriously? That they’re not staffing it sufficiently?

GARDNER. It’s the opposite. I haven’t had a day off since January 20. We’re working day and night.

*footnote continued on next page*

In some ways, the events of the first month of the Trump administration provide support for the final arguments of this Article.<sup>574</sup> President Trump has demonstrated that the President has the greatest ability to make meaningful changes—good or bad—to agency management. At the same time, his actions demonstrate the need for significant guardrails to prevent executive actions from threatening the long-term health of the administrative state. Many courts have refused to intervene in cases involving the termination of federal employees, citing the need for employees to exhaust their administrative remedies before the Merit Systems Protection Board.<sup>575</sup> Members of Congress have done little to hold the President accountable,<sup>576</sup> despite concerns about the economic impact of the President’s actions in their districts.<sup>577</sup> Consequently, morale among federal workers has declined, and the agencies have begun to lose their credibility as employers.<sup>578</sup> The loss of agency autonomy, morale, and reputation will make it more difficult for future Presidents to rebuild the administrative capacity they need to implement their own policy agendas.

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JUDGE CHUANG. I understand that. They’re cutting people across the government. If you’re saying you don’t have enough people, maybe that’s part of the problem . . . I mean, if USAID can’t respond to lawsuits, maybe they need more people.

For a detailed transcript, see Anna Bower (@annawbower.bsky.social), BLUE SKY (Mar. 1, 2025, 6:20 AM PST), <https://perma.cc/5CFN-P8M9>.

574. See *supra* Part IV.C. (discussing who should have the power to control the Executive Branch).
575. See *Am. Fed’n of Gov’t Emps. v. Ezell*, No. 12-10276, 2025 WL 470459, at \*2 (D. Mass. Feb. 12, 2025) (“Congress intended for the FSL-MRS and the Civil Service Reform Act of 1978 . . . to provide the exclusive procedures for disputes involving employees and their federal employers and disputes between unions representing federal employees and the federal government.”); *Nat’l Treasury Emps. Union v. Trump*, 25-CV-420, 2025 WL 561080, at \*8 (D.D.C. Feb. 20, 2025) (requiring a union to present its claims to the Federal Labor Relations Authority).
576. See Carl Hulse, *Trump Kicks Congress to the Curb, With Little Protest from Republicans*, N.Y. TIMES (updated Jan. 31, 2025), <https://perma.cc/8PXR-PJJV> (“The absence of pushback from congressional Republicans is a stark acknowledgment that Mr. Trump is large and in charge, controlling their political futures while executing an agenda that they believe Republican voters demanded. It is a distinct break from the past, when lawmakers of both parties would vigorously defend Congress’s power—particularly the spending power granted in Article 1 of the Constitution—no matter who was in the White House.”).
577. See Frank Thorp V, Julie Tsirkin, Kate Santaliz & Nnamdi Egwuonwu, *Senate Republicans Voice DOGE Concerns in Meeting with White House Chief of Staff*, NBC NEWS (Feb. 26, 2025, 4:19 PM PST), <https://perma.cc/T723-M2U2> (quoting Republican members of Congress as expressing concern for how fast the Trump administration has cut federal employment).
578. See Jason Miller, *Firing of Probationary Employees Called ‘Self-Defeating,’* FED. NEWS NETWORK (Feb. 19, 2025, 3:21 PM), <https://perma.cc/8YQY-W9JM> (surveying 7,397 federal employees and concluding that “[m]ore than half of the respondents said morale in their agency or office has hit rock bottom”).