DEMOCRATIZING ADMINISTRATIVE LAW

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ABSTRACT

When agencies make statements about the law, people listen. This insight yields a fundamental tension. According to one set of views, such agency statements, and their ability to influence public behavior, are critical not only for a well-functioning bureaucracy but also for our entire system of government. According to another set of views, this agency power, if left unchecked, could border on tyranny.

Administrative law responds to this tension through an extensive, purportedly comprehensive, framework that attempts to police agency statements. The framework places different types of agency statements into different legal categories. On the one hand, legislative rules make new binding law. On the other hand, less formal guidance (including interpretive rules and policy statements) offers an agency’s interpretive or policy positions about the law. Scholars and courts have long debated the categorization effort as well as what legal consequences flow from it.

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This Article identifies a striking gap in this categorization framework. As a critical part of their service to the general public, agencies often simply explain the law. Although such explanations are central to agency interactions with the public, the intricate administrative law framework that applies to agency statements fails to capture such explanations. Agency explanations of the law could be seen as a subset of existing categories of agency statements (such as “legislative rules,” “interpretive rules,” or “policy statements”), but agency explanations do not fit comfortably into any of these categories. All of these regimes assume that agencies are communicating what the law is or what agencies believe it to be. But when agencies provide such explanations to the public, they often present the law as simpler than it is or what agencies believe it to be.

We argue that administrative law’s failure to address communications between agencies and the general public reflects a broader “democracy deficit.” Administrative law fails to ensure that agency communications with the general public occur in ways that are consistent with essential features of democratic governance, such as transparency, public scrutiny, and debate. In contrast, when sophisticated parties and industry insiders engage with agencies regarding formal guidance, there are ample protections to engender agency transparency and provide affected parties with opportunities to contribute to the guidance.

After identifying the democracy deficit in administrative law, we propose a framework for infusing agency communications with the general public with the same administrative law and democratic values as those that apply in interactions between agencies and sophisticated parties. These reforms would encourage public participation in drafting and issuing agency explanations of the law, provide opportunities to challenge published agency explanations, and allow members of the public to rely on certain agency explanations and to bind the agencies to follow these statements in enforcing the law. We also identify the types of agency communications with the public that most urgently need reform.

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INTRODUCTION

When agencies make statements about the law, people listen. This central insight yields a fundamental tension. According to one set of views, such agency statements, and their ability to influence public behavior, are critical not only for a well-functioning bureaucracy but also for our entire system of government.¹ According to another set of views, this agency power, if left unchecked, could border on tyranny.²

Administrative law responds to this tension through an extensive, and supposedly comprehensive, framework that attempts to police

¹ See, e.g., Gillian E. Metzger, Forward: 1930s Redux: The Administrative State Under Siege, 131 HARV. L. REV. 1, 7 (2017) (arguing both that “the administrative state today is constitutionally obligatory, given the broad delegations of authority to the executive branch that represent the central reality of contemporary national government” and that “[t]hose delegations are necessary given the economic, social, scientific, and technological realities of our day”).

agency statements. The framework places different types of agency statements into different legal categories. On the one hand, legislative rules make new binding law. On the other hand, less formal guidance (including interpretive rules and policy statements) offers an agency's interpretive or policy positions on the law.

Scholars and courts have long debated the categorization effort as well as what legal consequences flow from it. Many judges, scholars, and other commentators have suggested that the distinction between legislative rules and other forms of guidance is analytically unsound. And courts have created a muddle out of many of the issues that arise from this framework, such as whether and under what circumstances informal guidance is subject to judicial review. These debates underscore the perceived centrality of the framework for policing agency statements to the public.

Strikingly, however, the extensive discussion and debate about the categories and the legal consequences that flow from them have missed an important, underlying assumption. Whether the agency is making new law, or interpreting the law, or offering the agency’s policy with respect to the law, the existing categories all assume that the agency means what it says. Put differently, all of the existing categories assume that the agency is offering a faithful statement of the law or the agency’s interpretive or policy positions with respect to it.

This unstated assumption is critical because, as it turns out, many times agencies do not actually mean what they say. In prior, extensive work, we have explored how, as a critical part of their service to the general public, agencies often explain the law. Moreover, as we have
illustrated, when agencies provide such explanations to the public, they often present the law as simpler than it is or what agencies believe it to be. Agencies do so because the actual law is often too complex for the general public to understand.

We could attempt to categorize these sorts of explanations under the existing categories of agency statements. When the explanations do not map exactly onto the underlying law, they could arguably be making new law in a way that could result in their being classified as legislative rules. Or, since they attempt to explain the law to the public, they might best be classified as interpretive rules. To round out the possibilities, since they may seem to offer an agency’s own response to complex law, they could be thought of as policy statements. But none of these categorizations is quite right. Even when agency explanations do not map exactly onto the underlying formal law, agencies are not attempting to make new law with them, making it hard to see them as legislative rules. And agency explanations are also not easily seen as interpretive rules or policy statements because, to the extent they deviate from the underlying law, they often do not represent agencies’ own interpretations or policies regarding the law.

Fundamentally, there is a disconnect between the assumptions underlying the administrative law framework for agency statements and the reality of agency explanations. An unstated assumption regarding the fundamental categories of legislative rules, interpretive rules, and policy statements is that, when agencies engage with the public, the agencies are describing what the law is or what the agencies believe it to be. In contrast, when agencies offer simplified explanations of law to the general public, the agencies are frequently not describing the law as they believe it to be. The result is that, somewhat strikingly, administrative law simply fails to address the
In this Article, we argue that administrative law’s failure to address communications between agencies and the general public reflects a broader “democracy deficit.” Administrative law fails to ensure that agency communications with the general public occur in ways that are consistent with essential features of democratic governance, such as transparency, public scrutiny, and debate. When sophisticated parties and industry insiders engage with agency officials regarding formal guidance, there are ample protections in place to ensure that agencies act transparently and provide affected parties with opportunities to contribute to the guidance. These protections include extensive rules around notice-and-comment regulations along with numerous opportunities for sophisticated parties to influence the outcome of these regulations outside of such procedures. In contrast, members of the general public rarely engage, and, when they do, their comments are often dismissed as the type of “value-laden” proposals for which there is no space in agency regulation. Moreover, when agencies do provide advice to the general public, this guidance often lacks the reliability and penalty protection that apply when agencies interact with sophisticated parties. The general public also is systematically disadvantaged in its ability to challenge agency communications of the law. Put together, these disparities reveal that the current administrative law regime has crowded out protective norms needed for agency communications with the general public.

After identifying the democracy deficit in administrative law, we suggest the need for a fundamental rethinking of how agencies should communicate with the general public. We propose a framework for infusing agency communications with the general public with the same administrative law and democratic values as those that apply in interactions between agencies and sophisticated parties. We outline democracy reforms that policymakers could apply to agency communications.

10. See infra Part III.A.
11. See infra Part III.A.
12. See infra Part III.A.
13. See infra Part III.A.
14. See infra Part III.A.
15. See infra Part III.B.
explanations of the law. Among other things, these reforms would encourage public participation in drafting and issuing agency explanations of the law, provide opportunities to challenge published agency explanations, and allow members of the public to rely on certain agency explanations and to bind the agencies to follow these statements in enforcing the law. We also identify the types of agency communications with the public that most urgently need reform.

This Article proceeds in three parts. Part I describes the tension between agency statements and the administrative law framework that responds to them. Part II draws on our prior work by illustrating the widespread use of agency explanations and builds on such work by explaining that the existing administrative law framework does not capture them. Part III roots this phenomenon in a broader democracy deficit of administrative law and offers a framework for agency explanations that can help ameliorate it.

I. ADMINISTRATIVE LAW’S TENSION AND RESOLUTION

A. Agency Statements and the Fundamental Tension

Administrative agencies make many statements about the law. Sometimes an agency formally promulgates regulations that alter rights and duties under the legal regime. At other times, a high-level official may forecast future regulation. Alternatively, a lower-level agency official may make a statement about what she believes the law to be or where she believes the law is going. In still other

16. See infra Part III.B.
17. See infra Part III.B.
18. See infra Part III.C.
20. See, e.g., Miguel Cardona, Sec’y of Educ., Secretary Cardona’s Vision for Education in America (Jan. 27, 2022) (forecasting, among other things, how the Department of Education would work with Congress to overhaul the Public Loan Forgiveness program and create a strong Gainful Employment Rule).
circumstances, central agency officials may make internal statements to convey the agency’s view of the law to its own officials.22

These sorts of statements occur in a variety of formats. Binding regulations are formally promulgated and ultimately codified in the Federal Register.23 Internal statements to agency officials may be harder to find—although the Freedom of Information Act may enable the public to gain access to them.24 Sometimes, statements by agency officials may occur at a public venue, such as in an official speech or industry conference.25 Still other times, these statements may occur in private contexts, such as interactions with affected parties.26

Whatever form they may take, a central insight of administrative law is that agency statements command attention.27 When agencies promulgate regulations that create new rights and duties, the public is bound by them, as long as the agency has acted in a procedurally and substantively legitimate fashion.28 Moreover, even when agencies offer much less formal statements about the law, members of the public are

22. See, e.g., Gillian E. Metzger & Kevin M. Stack, Internal Administrative Law, 115 Mich. L. Rev. 1239, 1239 (2017) (describing and examining generally “the internal directives, guidance, and organizational forms through which agencies structure the discretion of their employees and presidents control the workings of the executive branch”).


25. See, e.g., Alderoty, supra note 21 (describing an “infamous” speech by the SEC Director of Corporation Finance at the Yahoo Markets Summit).


likely to listen. This can be true even when the statements only purport to offer internal agency guidance.

This widespread attention to agency statements emanates from agency authority to administer legal regimes. Agencies are typically charged not only with communicating the law but also with administering benefits and enforcing the legal regime. As a result, when agencies make statements about the law—even in the form of allegedly nonbinding guidance—members of the public have strong reasons to hew to them. The result is that agency statements have significant power to affect public behavior.

This power creates a fundamental tension in administrative law. To operate efficiently, agencies must be able to make statements about the law with relative ease. Congress often delegates wide-ranging and significant decisions to administrative agencies. This delegation is arguably essential to the functioning of government in an increasingly complex world. And yet, agencies often operate on limited budgets and without adequate resources. If it is too burdensome for agencies to make statements about the law, the legal regime may falter with attendant, negative consequences for public welfare and potentially for constitutional governance. Even if agencies were always adequately


30. See, e.g., Letter Rulings, IRS Again Okays Synthetic Lease Arrangement—Not a Financing Transaction, 94 J. Tax’n 56, 56 (2001) (describing an example of an industry journal providing advice based on an internal agency document by explaining: “This field service advice illustrates the importance of properly structuring a synthetic lease”).


32. See, e.g., Parrillo, supra note 28, at 169 (describing this “great fear” in administrative law).

33. See, e.g., Whitman v. Am. Trucking Ass’n, 531 U.S. 457, 473–74 (2001) (upholding the Clean Air Act’s delegation to the EPA of the responsibility to set national ambient air quality standards at levels “requisite to protect public health”).

34. See, e.g., Metzger, supra note 1.

35. See, e.g., Maier v. EPA, 114 F.3d 1032, 1045 (10th Cir. 1997) (concluding that the EPA’s rejection of rulemaking was not arbitrary and capricious, in part because “[p]romulgating revised regulations necessitates a substantial commitment of limited agency resources”).

36. See Metzger, supra note 1, at 89–90 (suggesting that the nature of modern governance is such that extensive administrative capacity is constitutionally required).
resourced, they still often need the freedom to respond to pressing problems and open questions expeditiously.\textsuperscript{37}

However, allowing agencies to make statements too freely can also be problematic. For some, the concerns are deeply rooted in constitutional skepticism about the administrative state.\textsuperscript{38} In this line of critique, agency power to both make and enforce the law may raise the specter of tyranny and violate constitutional demarcations of power.\textsuperscript{39} Many others reject this deep-seated challenge as out of step with the realities and necessity of administrative bureaucracy for a well-functioning system of modern governance.\textsuperscript{40} They may even see these critiques as out of step with the history of our system of governance.\textsuperscript{41}


\textsuperscript{38} See generally, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Gary Lawson, The Rise and Rise of the Administrative State, 107 HARV. L. REV. 1231 (1994) (providing an example of particularly forceful, recent, and longstanding attacks). As many have noted, these attacks are no longer merely academic and have attracted adherence from important members of the judiciary. See, e.g., West Virginia v. EPA, 142 S. Ct. 2587, 2626 (2022) (Gorsuch, J., concurring) (“In our Republic, ‘[i]t is the peculiar province of the legislature to prescribe general rules for the government of society.’” (quoting Fletcher v. Peck, 6 Cranch 87, 136 (1810))); Dep’t of Transp. v. Ass’n of Am. R.R., 575 U.S. 43, 86 (2015) (Thomas, J., concurring) (“We should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power.”); City of Arlington v. FCC, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (“The Framers could hardly have envisioned today’s ‘vast and varied federal bureaucracy’ and the authority administrative agencies now hold over our economic, social, and political activities.” (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010))).

\textsuperscript{39} See, e.g., HAMBURGER, supra note 2, at 64 (“Americans therefore need to recognize that administrative power revives absolute power and profoundly threatens civil liberties.”); Calabresi & Lawson, supra note 2, at 825 (concluding that “certain features of the federal administrative state . . . are unconstitutional through numerous violations of the separation of powers, that they violate Magna Carta and the Duce Process of Law Clause of the Fifth Amendment, and that they are bad ideas as a matter of policy”); Lawson, supra note 2, at 623 (arguing that “liberty and the laws depend entirely on . . . separation of” the legislative and congressional powers).

\textsuperscript{40} See, e.g., Metzger, supra note 1, at 7 (“In fact, however, the administrative state is essential for actualizing constitutional separation of powers today, serving both to constrain executive power and to mitigate the dangers of presidential unilateralism while also enabling effective governance.”).

\textsuperscript{41} See, e.g., Julian Davis Mortenson & Nicholas Bagley, Delegation at the Founding, 121 COLUM. L. REV. 277, 277 (2021) (arguing that there was no nondelegation doctrine at the Founding, undermining the originalist objection to administrative delegations); Nicholas Bagley, The Procedure Fetish, 118 MICH. L. REV. 345, 375 (2019) (“To read into the spare text of the Constitution some kind of distaste for federal agencies—because they wield ‘too much’ power,
Regardless, even those who welcome the role of agency bureaucracy in modern U.S. governance believe that agency statements need to be inculcated with appropriate process and procedure. Indeed, it is in part this process and procedure that arguably legitimates agency legal pronouncements.

B. The Resolution: Framework for Agency Statements

The Administrative Procedure Act ("APA") can be and has been understood as a sort of compromise meant to mediate between these tensions of agency power. As Professor George Shepherd has described, the APA resulted from a "pitched political battle" over the power of government in the New Deal era. On the one hand, under the guise of "efficiency," liberals sought to achieve easy, agency-led implementation of New Deal programs that was unhampered by "cumbersome procedural requirements or intrusive judicial review." On the other hand, under the guise of "individual rights," conservatives sought to impose procedural and judicial restraints to undermine these New Deal expansions of agency power and programs.

The APA reflects this compromise in addressing agency statements. In particular, the APA set forth a framework for agency rulemaking, which is one of the principal forms of agency action contemplated by the APA. Under this framework, agency

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42. See, e.g., Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. REV. 461, 527–53 (2003) (discussing how “ordinary” administrative law principles and procedures confer legitimacy on the administrative state). But see, e.g., Bagley, supra note 41, at 349 (“Proceduralism has a role to play in preserving legitimacy and discouraging capture, but it advances those goals more obliquely than is commonly assumed and may exacerbate the very problems it aims to address.”).

43. See generally, e.g., JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 285 (2012) (explaining that administrative practice has helped fill in the hole in the text of the U.S. Constitution by asking, “What structures and processes for administrative action satisfy our demands for effective government and the legitimate exercise of governmental authority?”).


46. Id. at 1680.

47. Id.

48. The other is agency adjudication. See Christopher J. Walker, Modernizing the Administrative Procedure Act, 69 ADMIN. L. REV. 629, 633 (2017) ("The APA establishes detailed
rulemaking is generally subject to what appear to be the fairly minimal requirements that the agency provides: notice of the proposed rule, an opportunity for the public to comment, and a “concise general statement” of the “basis and purpose” of the rule that the agency adopts after public comment.\textsuperscript{49} However, these requirements do not apply to a number of categories of agency statements, or rules, including “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”\textsuperscript{50}

Over time, courts, as well as Congress and the executive branch to a lesser extent, greatly elaborated on the requirements for what came to be known as “legislative rules,” or the rules subject to notice-and-comment procedures.\textsuperscript{51} As Professor Thomas McGarity has perhaps most famously described, a variety of factors including “hard look” review by courts have transformed legislative rulemaking into a laborious and costly process.\textsuperscript{52} In contrast, what have become known as “interpretive rules” and “policy statements” remain much freer of procedural requirements. Some agencies have adopted policies and procedures that apply to guidance documents.\textsuperscript{53} And the Office of Management and Budget has adopted “good guidance practices” for “significant guidance documents.”\textsuperscript{54} Most notably, “significant guidance documents” include guidance documents that “[l]ead to an annual effect on the economy of $100 million or more” or that “[r]aise novel legal or policy issues.”\textsuperscript{55} The Supreme Court has also found that agencies must be cognizant of “serious reliance interests” that their policies may engender, including, for instance, when considering procedures for the two core means of agency action—rulemaking and adjudication—while recognizing that other statutes may provide for different forms of agency action.”\textsuperscript{49–55}
rescinding a major executive policy, such as Deferred Action for Childhood Arrivals (“DACA”).\textsuperscript{56} Outside of these exceptional categories, however, agencies generally remain able to speak relatively freely when issuing interpretive rules or policy statements.

Aside from procedural requirements, other distinctions exist between legislative rules and the categories of statements characterized as “guidance” (the latter of which comprises interpretive rules and policy statements). The greater procedural requirements applicable to legislative rules dovetail with the fact that these rules bind the agency and the public, whereas less formal guidance is more advisory.\textsuperscript{57} The binding quality of legislative rules, as well as the procedural requirements, also means that legislative rules are much more likely than guidance to be subject to intensive judicial review.\textsuperscript{58}

These distinctions between legislative rules and less formal guidance map onto the warring tension between promoting and controlling agency power. The APA framework does so by purporting to provide agencies space to communicate openly and easily with the public when the agencies are merely offering their own views.\textsuperscript{59} However, consistent with concerns about agency power, the framework imposes many more requirements and review on agencies when they create new, binding legal requirements.\textsuperscript{60}

II. AGENCY EXPLANATIONS OF THE LAW

If the framework set forth above aims to cover the statements that agencies make about the law, what about instances where agencies attempt to explain the law to the public? If agency explanations of the law are widely used, we would expect them to fit into this framework.

\textsuperscript{56} Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913 (2020).
\textsuperscript{57} See, e.g., Richard J. Pierce, Jr., Distinguishing Legislative Rules from Interpretative Rules, 52 ADMIN. L. REV. 547, 552 (2000) (explaining that “[a] legislative rule binds the public and courts in a manner indistinguishable from a statute [whereas] an interpretative rule is only a statement of the agency’s present interpretation of the statute” but also indicating some ways courts have blurred the distinction).
\textsuperscript{58} Nat’l Mining Ass’n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014) (“In terms of reviewability, legislative rules and sometimes even interpretive rules may be subject to pre-enforcement judicial review, but general statements of policy are not.”).
\textsuperscript{59} See, e.g., Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin., 452 F.3d 798, 808 (D.C. Cir. 2006) (“[T]he case law is clear that we lack authority to review claims under the APA ’where “an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party.’”’ (citing Indep. Equip. Dealers Ass’n v. EPA, 372 F.3d 420, 427 (D.C. Cir. 2004) (quoting AT & T Co. v. EEOC, 270 F.3d 973, 975 (D.C. Cir. 2001)))).
\textsuperscript{60} See supra notes 49–52 and accompanying text.
But as this Part describes in detail, the existing administrative law framework does not categorize or otherwise accommodate agency explanations, despite agencies’ widespread use of them. As we argue, the reason for this lack of attention is that the APA framework does not contemplate the service role that agencies frequently play in modern governance, where agencies are required to explain law that is too complex for most members of the general public to understand.

A. What Are Agency Explanations?

Agency explanations, as we refer to them, exist when an agency attempts to explain complex law to the public. At first glance, agency explanations may not seem significant—they may appear to be mere secondary summaries of what the actual law is. However, when agencies provide such explanations to the public, they often present the law as simpler than it is or what agencies believe it to be. Agencies do so because the actual law is often too complex for the general public to understand. In these cases, agencies knowingly use deviations to make it possible for the public to understand an approximation of what the underlying law is.

Government agencies and officials regularly issue agency explanations to the public in order to help them understand and satisfy complex legal obligations.61 When agencies characterize the formal law to the public through explanations, they present statements that feature an attribute that we have described as “simplexity”—the presentation of complex formal law as though it is simple and clear, despite the lack of actual simplification of the underlying formal law.62

A number of factors have contributed to the growth of agency explanations and the simplexity within them. A statutory obligation, the Plain Writing Act of 2010, requires all federal agencies to offer members of the public “plain language” explanations and instructions that are “clear, concise, [and] well-organized.”63 Apart from this statutory requirement, some agencies have adopted greater focus on providing accessible guidance to users. For example, since 1998, the Internal Revenue Service (“IRS”) has revised its mission statement to

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include a commitment to providing taxpayers with “top quality service” \(^64\) and the “right to be informed” \(^65\) regarding all forms and procedures. \(^66\) Agencies may reasonably conclude that one way they can help inform the public about the law is by offering simplified representations of it. The intuition would be that offering a much simpler explanation that is 95 percent right may be more effective than offering a very complex, completely correct explanation. Finally, increased use of automated customer service tools by private sector businesses \(^67\) has caused federal agencies increasingly to adopt automated explanations of law to satisfy user expectations. \(^68\) Adoption of such tools in easily usable formats, such as chatbots, can also help agencies meet budget constraints. \(^69\) Expectations regarding these formats tend to call for even more simplified explanations than might exist in other contexts. \(^70\)

As we describe below, agency explanations often appear through printed publications and pamphlets; \(^71\) frequently asked questions (“FAQs”) and other statements on their websites; \(^72\) and online interactive tools such as chatbots, which we have termed “automated legal guidance.” \(^73\) We offer specific examples of each of these types of explanations below.


68. Blank & Osofsky, Automated Agencies, supra note 6, at 2118–19.

69. Id. at 2146, 2164.

70. Id. at 2158.


Publications and Pamphlets. For decades, federal agencies have offered simplified summaries of the formal law to the public through printed publications and pamphlets. As one prominent example, the IRS publishes dozens of “IRS publications,” which it issues to help taxpayers meet their tax obligations. In the past, the IRS distributed these documents in printed form in public libraries, schools, post offices, and other venues; in more recent years, it has posted these documents in PDF format to its website. For instance, IRS Publication 17, Your Federal Income Tax, describes the general rules for filing an individual annual tax return, IRS Form 1040. This document describes the formal tax law by offering examples that apply the law and indicates where taxpayers should take extra caution, such as by retaining records. Other IRS publications address topics such as tax deductions for charitable contributions, the tax treatment of sales of personal residences, and net operating losses for small businesses, among many others. Many other agencies offer similar publications—the U.S. Citizenship and Immigration Services (“USCIS”), for example, regularly updates and publishes Welcome to the United States: A Guide for New Immigrants. As we have documented in prior work, while these publications offer clear and accessible explanations of the law to the public, they also frequently present complex, often-contested, formal law as simpler than it is in reality.

Frequently Asked Questions. Federal agencies often post FAQs and answers on their websites to respond to common questions about new and complex laws. For instance, the U.S. Department of

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74. See Publications Online, supra note 71; Blank & Osofsky, Simplicity, supra note 6, at 207–14.
75. See Publications Online, supra note 71. For discussion, see Blank & Osofsky, Simplicity, supra note 6, at 202–04.
77. Id.
80. See Blank & Osofsky, Simplicity, supra note 6, at 206–07; Blank & Osofsky, Automated Legal Guidance, supra note 6, at 202–17.
Agriculture answers commonly asked questions regarding regulatory requirements involving plant and produce imports, among other topics, through its “AskUSDA” website. The IRS often uses FAQs as a way to communicate with the public during the time between the enactment of a statute and the publication of proposed Treasury regulations. In 2020, the IRS issued nearly three hundred FAQs addressing special tax credits that Congress had just enacted in response to the COVID-19 pandemic and the related economic crisis. One criticism of the increasing use of FAQs is that agencies often provide users with answers that appear as descriptions of settled law, even though this may not be the case. Another concern raised by FAQs is that agencies may revise posted questions and answers without providing the public with any explanation of the changes. Commentators and even some government officials, such as the National Taxpayer Advocate, have criticized agencies’ increasing use of FAQs because, unlike formal regulations, which are subject to the APA, “FAQs can be changed, supplemented, and amended without notice and public comment.”

Automated Legal Guidance. When individuals have questions about federal benefits, services, and legal rules, they are increasingly seeking help from government chatbots, virtual assistants, and other automated tools. For example, “Aidan,” the virtual assistant created by the Department of Education, helps members of the public answer questions about federal student aid, such as whether a student loan is dischargeable in bankruptcy. As another example, “Emma,” a computer-generated virtual assistant created by USCIS, answers questions that users have about U.S. immigration, such as whether a green card holder can travel outside the United States to visit an ailing relative for a lengthy period of time without having an adverse effect

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84. See Blank & Osofsky, Inequity of Informal Guidance, supra note 6, at 1118.
85. See id.
86. Id.
on immigration status. Finally, the “Interactive Tax Assistant” (“ITA”), an online tool created by the IRS, can answer questions specific to taxpayers’ personal circumstances, such as whether student scholarship awards must be included in taxable income.

As we have documented in prior articles and a study conducted under the Administrative Conference of the United States (“ACUS”) of all U.S. federal agencies that have adopted automated legal guidance tools, automated legal guidance can deliver accurate answers to simple questions regarding issues like filing deadlines and types of forms. But it can also present answers that deviate from the underlying formal law. As we have found, the federal government’s current automated tools often portray unsettled formal law as unambiguous, add administrative gloss to the formal law, and omit discussion of statutory and regulatory exceptions and requirements. Sometimes the agency explanations delivered by these tools, if followed, benefit users; at other times, they conflict with users’ interests.

Consider the following example involving the IRS’s ITA. Imagine a chronically ill taxpayer who is not able to take care of her daily needs, such as bathing, cooking, basic house cleaning (including laundry and dishes), and administering daily medication. The taxpayer hires a home health aide, who assists with all these needs. To determine whether the expense of hiring the home health aide is a tax-deductible expense, the taxpayer turns to ITA through the IRS’s website and selects the category of questions titled “Can I Deduct My Medical and Dental Expenses?” After asking the taxpayer a series of introductory questions, ITA asks the taxpayer to choose from a list of

89. *ITA*, supra note 73.
91. *Blank & Osofsky, ACUS REPORT*, supra note 90, at 31–32.
93. *ITA*, supra note 73.
95. *See* *ITA*, supra note 73.
potential expenses. After selecting “Household Help Expenses,” ITA immediately responds, “The Household Help Expenses are not a deductible expense. Your Household Help Expenses are not a qualified medical expense.” 96

This answer, however, may be inconsistent with the governing law. It is true that under the Internal Revenue Code, as a general matter, “no deduction shall be allowed for personal, living, or family expenses.” 97 It is also true that historically, this meant that even a taxpayer medically incapable of providing for their own basic needs could not deduct the cost of hiring help to provide for such needs. 98 However, after 1996, the Internal Revenue Code added payments for “qualified long-term care services” to the list of deductible medical care. 99 Moreover, “qualified long-term care services” is defined as including, among other things, “maintenance or personal care services, which — (A) are required by a chronically ill individual, and (B) are provided pursuant to a plan of care prescribed by a licensed health care practitioner.” 100 The legislative history makes clear that “maintenance or personal care services” may include “meal preparation, household cleaning, and other similar services which the chronically ill individual is unable to perform.” 101 As a result, the chronically ill taxpayer who accessed ITA very well may be entitled to take the very deduction for “household help expenses” that ITA just told her she was not eligible to take. The IRS may be adopting this (misleading) simplification because of its duties to explain the law clearly to taxpayers under the Plain Writing Act or because IRS officials independently think that


97. I.R.C. § 262(a).

98. See, e.g., Rev. Rul. 76-106, 1976-1 C.B. 71 (explaining that a quadriplegic taxpayer who hired an assistant for help with medical and household needs had to apportion the time the assistant spent on the medical and household needs because payments for the latter were nondeductible).


100. I.R.C. § 7702B(c).

101. STAFF OF THE JOINT COMM. ON TAX’N, 104TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 104TH CONGRESS 338 (Comm. Print 1996); see Ron West, Diagnose Payments for Bigger Medical Expense Deductions, 62 PRAC. TAX STRATEGIES 289, 298 (1999) (exploring the history and application of these provisions).
making the explanation simple and mostly right is a better way to serve the public. This example nonetheless illustrates the point we have seen time and again: in their attempt to present the law in a straightforward manner, agency explanations often deviate materially from the underlying law.102

B. Why the Existing Framework Fails To Capture Agency Explanations

Notwithstanding the widespread use of agency explanations, the administrative law framework fails to capture these explanations. As an initial matter, despite the importance of distinguishing between the different categories of legislative rules, interpretive rules, and policy statements, it is notoriously difficult to do so. As scholars and courts have widely acknowledged, the distinctions between these categories are “baffling,” “tenuous,” “fuzzy,” “blurred,” and “enshrouded in considerable smog.”103

Indeed, for this reason, we have suggested in prior work that if one wanted to apply the existing administrative law framework to agency explanations, one may be able to argue that any of the categories apply.104 In considering how the administrative law framework applies to ITA’s guidance in the example involving household help expenses described above, one could try to argue that any of the existing categories applies. To start, while the definition of a “legislative rule” is highly contested, as Professor Kristin Hickman has described, lower courts have often explained that legislative rules “‘create law,’ ‘prescribe, modify, or abolish duties, rights, or exemptions,’ or ‘fill’ statutory ‘gaps.’”105 The Treasury regulations regarding the medical-expense deduction have not been amended since 1979.106 As a result, they do not reflect the addition to the Internal Revenue Code of the available deduction for qualified long-term care services. While, as expressed above, the statute requires such deductible long-term care services to include “maintenance or personal care services . . . required

102.  See generally Blank & Osofsky, Simplexity, supra note 6.
by a chronically ill individual,“107 it is possible that the IRS is intending to create law with ITA by excluding household help expenses from the deductible category of “maintenance or personal care services.”

However, the fact that the legislative history explicitly references “meal preparation, household cleaning, and other similar services” for chronically ill individuals as deductible expenses108 makes it unlikely that the IRS is trying to change the law to exclude such items from deductibility. Moreover, if the Treasury Department did want to create this legal rule regarding nondeductibility, notwithstanding tension with the legislative history on this point, it seems unlikely that the Treasury would do so in the online ITA rather than in a more authoritative source (such as, ideally, a Treasury regulation). Indeed, as the D.C. Circuit has recognized in American Mining Congress v. Mine Safety & Health Administration,109 a key marker of a legislative rule is “if Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule.”110 The agency can exhibit its intent to exercise this power in a number of ways, including, for instance, by explicitly invoking its general legislative authority in making the rule.111 It strains credulity to imagine that the Treasury, or the IRS through the Treasury, is invoking general legislative authority to make new law in an online tax assistant without the use of accompanying regulations. The IRS’s disclaimer that ITA’s statements “do not constitute written advice,” which yield penalty protection under the tax law, bolsters the case against the characterization of such statements as legislative rules.112

If it is problematic to view the household help expenses statement as a legislative rule, perhaps, instead, it is an interpretive rule. The Attorney General’s Manual on the Administrative Procedure Act provides that interpretive rules include “rules or statements issued by [an] agency’s construction of the

107. I.R.C. § 7702B(c).
110. Id. at 1109.
111. Id. at 1112.
statutes and rules which it administers.”113 This is distinct from “substantive rules,” which the Attorney General’s Manual describes as “implement[ing] the statute” and which “have the force and effect of law.”114 As many have recognized, and as poignantly explained by Professor Ronald Levin, “[b]eyond these truisms . . . the doctrine runs into trouble” principally because it is nearly impossible to distinguish between what makes law and what merely interprets it.115

Despite the definitional difficulty surrounding interpretive rules, one could at least argue that ITA’s guidance on household help expenses offers the IRS’s interpretation or construction of the existing statutes and regulations. And, putting aside the deviation in the IRS’s explanation, an interpretive rule seems to be the best fit for ITA’s statement. Here, as is generally the case with ITA, the IRS is taking a body of underlying, formal law and telling the taxpayer how the IRS thinks it applies or what the agency’s construction is in a given case.

The trouble comes with what to do with the deviation in the explanation. One argument might be that we should ignore the deviation and treat the IRS’s explanation as merely an interpretive rule. Or perhaps, somewhat similarly, we should treat the explanation as an incorrect interpretive rule. The problem with this approach is that the reason why interpretive rules do not have to be subject to any of the rulemaking procedures of legislative rules is because interpretive rules are not supposed to matter for lawmaking. They should not change rights or obligations and thus should have no significant impact on public behavior.116 But if the agency is not accurately representing what the law is, the interpretive rule may indeed matter. It is, in fact, changing legal rights and obligations to the extent that people pay attention to the statement. So there is an inherent and problematic contradiction in characterizing the statement as interpretive or saying that interpretive but incorrect statements are not subject to procedure.

Is it possible, then, to conclude that the deviation itself is the interpretive view of the IRS? Here, the argument might be that, in the absence of additional governing statutory or regulatory guidance, the

113.  U.S. DEP’T OF JUST., ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) [hereinafter ATTORNEY GENERAL’S MANUAL].
114.  Id.
116.  See supra notes 59–60 and accompanying text.
IRS is expressing its view that “maintenance or personal care services”\textsuperscript{117} does not include household help expenses, such as meal preparation, cleaning, or laundry. Yet viewing the household help expenses statement as interpretive is problematic too. As the Ninth Circuit has explained in \textit{Gunderson}, “If a rule is inconsistent with or amends an existing legislative rule, then it cannot be interpretive. Such a rule would impose new rights or obligations by changing an existing law and must follow the applicable procedures of the APA.”\textsuperscript{118} The case is even stronger that an interpretive rule cannot be inconsistent with the statute. Such a rule would not be a valid interpretation. Yet, as discussed above, the household help expenses statement seems inconsistent with the statute, at least as applied to “maintenance or personal care services” that “(A) are required by a chronically ill individual, and (B) are provided pursuant to a plan of care prescribed by a licensed health care practitioner.”\textsuperscript{119} In this regard, the statute does not seem to provide room for an interpretation that rejects deductibility, a conclusion made only stronger by the legislative history.\textsuperscript{120}

Finally, without belaboring the point, it is worthwhile to point out that the analysis regarding policy statements is similar. The Attorney General’s Manual describes policy statements as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”\textsuperscript{121} The key inquiry is whether a statement really leaves the matter open for future decision or whether it establishes a “binding norm.”\textsuperscript{122} While one could argue that the household help expenses guidance merely constitutes the IRS’s policy with respect to certain types of expenses (such as cleaning and laundry expenses), an agency also cannot legitimately have a policy inconsistent with the statute.\textsuperscript{123} As a result, for the same reasons that it is problematic to view the guidance as an interpretive rule, it is problematic to view the guidance as a policy statement.

\textsuperscript{117} See I.R.C. § 7702B(c).
\textsuperscript{118} Gunderson v. Hood, 268 F.3d 1149, 1154 (9th Cir. 2001).
\textsuperscript{119} See I.R.C. § 7702B(c)(1).
\textsuperscript{120} See infra notes 125–26.
\textsuperscript{121} ATTORNEY GENERAL’S MANUAL, supra note 113, at 30 n.3.
\textsuperscript{123} The issue is more complicated with agency nonenforcement, particularly when such nonenforcement is motivated by limited resources. See, e.g., Heckler v. Chaney, 470 U.S. 821, 831–32 (1985). In any event, such nonenforcement is not at issue in this case.
The difficulty fitting the IRS’s explanation regarding household help expenses into any of the existing categories of agency statements under the APA illustrates a striking point: the best conclusion regarding this agency explanation seems to be that none of the existing categories really applies. Most likely, when offering the guidance regarding household help expenses, the IRS simply was not considering the “chronically ill individual” who is being provided “maintenance or personal care services . . . pursuant to a plan of care prescribed by a licensed health care practitioner.”124 Instead, the IRS was likely contemplating the vast majority of taxpayers for whom household help expenses are not deductible medical expenses. In other words, as to the qualifying chronically ill taxpayer, the IRS is unlikely trying to create new law that denies the deduction. It is unlikely that the IRS’s interpretive position is that the statute and legislative history do not, in fact, allow the deduction in this case.125 And it is equally unlikely that the IRS’s policy would be to deny the deduction for such taxpayer if it examined the issue.126 Rather, the best explanation is that, in offering a simplified explanation of complex law, the IRS is knowingly offering an incomplete and, at times, inaccurate answer. The IRS has likely made a calculated judgment that explaining the law in a way that gets it wrong for some number of taxpayers is worth it to make the law comprehensible to many more taxpayers.

Critically, none of the existing categories of agency statements appear to capture this situation. Indeed, the strongest conclusion might be that agency explanations may not qualify as “rules” that are subject to the APA’s classification framework at all. The APA defines a “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . .”127 Generally, courts have not been particularly attentive to this definition, ignoring it and applying

124. See I.R.C. § 7702B(c).
126. See id.
common-sense understandings when necessary. However, when courts have been called upon to consider the definition of a “rule,” such as in the context of an agency’s informational guide to the public, courts have explained that the mere provision of information does not “change any law or official policy presently in effect.” Providing information therefore does not constitute an agency “rule.” This conclusion is bolstered to the extent that the guide does not appear in the Code of Federal Regulations or the Federal Register. In other words, careful examination reveals that the most likely treatment, at least under judicial consideration of the matter thus far, might be that the many thousands of pages of agency explanations of the law may have no place within the administrative law framework.

Many may be tempted to accept this outcome and applaud it as the correct result. One might applaud the outcome to the extent one thinks that agency explanations do not serve an important role. On the other end of the spectrum, one might support the outcome if one believes that agency explanations provide an important service to the public, which may be hampered by requiring additional administrative promulgation procedures.

However, a deeper understanding of agency explanations renders this outcome deeply problematic. As illustrated in Part II.A, agencies pervasively rely on explanations in their communication of the law to the general public, and an inherent part of such explanations is that they often deviate from a faithful representation of the complex legal regime. Indeed, as illustrated by the household help expenses example, in creating such deviations, agencies are likely often (though not always) choosing to represent the law in ways that are not always accurate for all parties to make the law comprehensible for most members of the public. In this regard, it is hard to see agency explanations as anything but agencies’ choice as to how to “implement” the law, which should bring agency explanations squarely

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128. See, e.g., Antonin Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 SUP. CT. REV. 345, 383 (explaining that “it is generally acknowledged that the only responsible judicial attitude toward this central APA definition is one of benign disregard”).


131. Id. at 1121.
in the APA definition of an agency “rule.” In this regard, the administrative law regime’s failure to capture agency explanations not only ignores the principal way that agencies communicate with the general public. It also ignores the ways that agencies are shaping the law and public perceptions of the law in these explanations.

The failure to grapple with the role of agency explanations is reflected in the administrative law literature as well. Agency explanations have generally received little attention in the administrative law literature. The best treatment is in a 2019 ACUS report by Professors Blake Emerson and Ronald Levin. This report is based on the authors’ examination of interpretive rules. The authors explain that, during interviews with agency officials, they learned that agencies sometimes publish “practice guides” that explain basic legal principles to the public. The agency officials with whom Emerson and Levin spoke characterized such explanations as “uncontroversial,” a characterization that Emerson and Levin accepted. Based on this description, Emerson and Levin concluded that “[such] pronouncements would presumably fall within the definition of interpretive rules, but they may be essentially educational in nature.”

We applaud Emerson and Levin for recognizing the role of agency explanations, and we agree with them that agency explanations in practice guides and the like, often found on agency websites, may best be characterized as “educational” in nature. However, the notion that such explanations merely offer “uncontroversial” statements of law misses the deviations at the heart of many explanations. As we have extensively illustrated here and elsewhere, in trying to offer simplified explanations of the law to the public, agencies often gloss over complexities and ambiguities in the underlying law, resulting in

133. Our own work has, in contrast, examined this topic extensively, though it has not yet focused on how these statements fit in the administrative law framework. See, e.g., Blank & Osofsky, Simplexity, supra note 6; Blank & Osofsky, Inequity of Informal Guidance, supra note 6; Blank & Osofsky, Automated Legal Guidance, supra note 6; Blank & Osofsky, Automated Agencies, supra note 6.
135. Id. at 36.
136. Id.
137. Id. (emphasis omitted).
presentations that deviate from the underlying law. The fact that one of the most attentive treatments of agency explanations does not recognize this feature only underscores the way that the APA and administrative law literature do not focus on the significant role that agencies play in explaining the law to the public.

III. THE DEMOCRACY DEFICIT IN ADMINISTRATIVE LAW

The fact that the existing administrative law framework fails to categorize and address agency explanations of the law, demonstrated in Part II, is not mere happenstance. Rather, it represents a more general failure of administrative law to ensure that agency communications with the general public occur in ways that are consistent with essential features of democratic governance, such as transparency, public scrutiny, and debate. When sophisticated parties and industry insiders engage with agency officials regarding formal guidance, the APA and other sources of administrative law attempt to ensure that agencies act transparently and provide affected parties with opportunities to contribute to the development of the guidance. Comparable procedures and protections are absent, however, when members of the general public receive explanations of the law from agency officials.

In this Part, we highlight how administrative law’s failure to address agency explanations of the law reflects a broader “democracy deficit” and point toward potential solutions. We explore the broader democracy deficit in Section A. In Section B, we then offer a framework for infusing agency communications with the general public with the same administrative law and democratic values as those that apply in interactions between agencies and sophisticated parties. Specifically, we outline reforms that would apply to agency explanations of the law and encourage public participation, public challenge, and public reliance. Finally, in Section C, we identify the types of agency communications with the public that most urgently need reform.


A. How Administrative Law Fails To Serve the General Public

Categorization of agency statements, which we explored in Part II, is a fundamental aspect of a broader legal regime applicable to agency statements. Once a statement is categorized according to the administrative law framework, a series of legal consequences follows. As we will show, many of these consequences exhibit the same phenomenon we identified in Part II: the failure of administrative law to take seriously agency communications with the general public.

1. Notice and Comment. As an initial matter, if an agency statement is categorized as a legislative rule, the statement must comply with notice-and-comment procedures. As suggested previously, the notice-and-comment process is supposed to inculcate agency creation of binding legal rules with transparency and legitimacy, thereby serving as a constraint on agency power. At its ideal, notice-and-comment is supposed to ensure a pluralistic blend of ideas and divergent interests, producing binding legal rules that yield the greatest collective good. For this reason, Professor Kenneth Culp Davis, a foundational scholar of administrative law, has referred to agency rulemaking as “one of the greatest inventions of modern government,” a sentiment that has been echoed, albeit in less exclamatory terms, by more recent administrative law scholarship.

However, an extensive literature shows that the formulation of legislative rules is dominated by industry insiders, with public interest groups having significantly less influence in the process and the general public having almost none. Worse yet, administrative law itself has the perverse impact of encouraging these disparate influences. Administrative law has done so through its elaboration of the APA’s seemingly minimal requirements for the creation of legislative rules

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140. See supra note 60 and accompanying text.
141. See, e.g., Robert B. Reich, Public Administration and Public Deliberation: An Interpretive Essay, 94 YALE L.J. 1617, 1618–24 (1985) (describing how the administrative process became an uneasy way to imagine that agency officials both intermediate between different interests and maximize net benefits for the collective).
143. See, e.g., Bressman, supra note 42, at 546 (arguing that allowing agencies to avoid notice-and-comment procedures jeopardizes agency legitimacy).
144. See infra note 153 and accompanying text.
145. See infra Part III.A.
(which, as explained previously, include notice of the proposed rule, an opportunity for the public to comment, and a “concise general statement” of the “basis and purpose” of the rule that the agency adopts after public comment).\textsuperscript{146}

First, agencies must provide adequate notice of the proposed rule. The APA requires that the agency provide:

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.\textsuperscript{147}

Despite the seemingly straightforward nature of this requirement, courts have raised the stakes significantly on what agencies must do in a notice of proposed rulemaking. Courts have held that, to be upheld, final regulations must be a “logical outgrowth”\textsuperscript{148} of the notice of proposed rulemaking, and agencies must provide detailed information, such as the data and evidence on which the agency is relying.\textsuperscript{149} This stringent requirement means that agencies that fail to provide detailed elaborations of the proposed rules and their basis in the notice of proposed rulemaking risk having their time- and resource-intensive rulemakings overturned as a result of lack of notice.\textsuperscript{150} The perverse outcome is that agencies have a strong incentive to engage in extensive rule development prior to issuing a notice of proposed rulemaking, leaving little room for contemplation and change in the public

\textsuperscript{146} Supra note 49 and accompanying text.

\textsuperscript{147} 5 U.S.C. § 553(b).


\textsuperscript{149} Portland Cement Ass’n v. Ruckelshaus, 486 F.2d 375, 392–93 (D.C. Cir. 1973) (“It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, critical degree, is known only to the agency.”).

\textsuperscript{150} See, e.g., Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1252 (D.C. Cir. 2005) (overturning the secretary of labor’s final regulations adopting a velocity cap in part because, in the notice of proposed rulemaking, the secretary suggested that “empirical research indicated a cap would increase safety problems”); Shell Oil Co. v. EPA, 950 F.2d 741, 757–63 (D.C. Cir. 1991) (overturning the EPA’s final regulation when the EPA’s approach to an environmental hazard shifted from the approach offered in the notice of proposed rulemaking).
rulemaking period. To offer these well-developed rules at the notice-of-proposed-rulemaking stage, agencies have a strong incentive to engage privately with the sophisticated parties and industry groups who are most likely to challenge the final rules. Indeed, almost by definition, insiders are the parties who would tend to have contacts with agencies, allowing them access to rule development prior to public comment. Studies have confirmed this outcome, finding significant pre-notice engagement with sophisticated parties.

A related problem is that, even if less informed members of the general public wanted to engage in the public comment period of the rulemaking, the level of detail and technicality in the notice of proposed rulemaking makes such engagement difficult. While rulemakings often raise contested values, by the time the notice of proposed rulemaking is issued, agencies generally have decided on a technical approach that obscures these choices. Indeed, agencies tend to offer a kitchen-sink elaboration of technical, detailed rules in the notice of proposed rulemaking, crowding out participation by members of the public lacking technical expertise.

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156. Wagner, supra note 152, at 1368 (“If affected parties have been left out of pre-proposed-rule discussions and are faced with the prospect of processing and critiquing a one-hundred-page, opaque explanation and discussion during a short notice-and-comment period, it is at least possible that they will choose to forgo this rather time-intensive exercise.”).
157. For a general discussion of the issue, see id.
Next, the APA requires the agency to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”158 The ways courts have interpreted this requirement contradict the seemingly low threshold suggested by the requirement to provide an “opportunity to participate.” Courts have rejected rulemakings because of an agency’s failure to adequately consider a comment in the notice-and-comment period.159 The lesson is that agencies that fail to respond to every comment do so at their peril, with the risk of regulations potentially being invalidated even years after they have been finalized.160

As scholars have identified, resulting notice-and-comment periods have ended up being extraordinarily expensive behemoths, far from the basic framework suggested by the APA.161 Worse yet, scholars have repeatedly identified that sophisticated parties and industry insiders end up dominating this process, crowding out participation by the general public.162 Indeed, Professor Wendy Wagner has expertly illustrated how well-informed, sophisticated parties and insiders

158. 5 U.S.C. § 553(c).
159. See, e.g., United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 253 (2d Cir. 1977) (providing an old cautionary tale in the form of a court rejecting FDA rulemaking as a result of failure to consider a comment in the rulemaking).
161. See generally McGarity, supra note 52, at 1148–49 (providing a foundational exploration of ossification); Pierce, supra note 37 (same). But see generally Yackee & Yackee, supra note 52 (challenging the ossification thesis); Connor Raso, Agency Avoidance of Rulemaking Procedures, 67 ADMIN. L. REV. 65, 65 (2015) (exploring agency avoidance of rulemaking).
manipulate the notice-and-comment procedures by flooding agencies with information, allowing for information capture.\textsuperscript{163}

Even on the back end, the rulemaking process does not seem to accommodate the general public. Once again, the text of the APA seems to provide a simple mechanism for agencies to engage with the public about promulgated regulations. The APA states that, when issuing a final regulation, the agency shall “incorporate in the rules adopted a concise general statement of their basis and purpose.”\textsuperscript{164} However, as Alec Webley has adeptly described, courts have essentially written the “concise” and “general” aspects out of the requirement for preambles for final rules.\textsuperscript{165} Instead, courts have struck down agency regulations, which were backed by extraordinarily voluminous rulemaking records, when preambles failed to mention very specific facts or reasoning that were contained elsewhere in the records.\textsuperscript{166} Predictably, agencies have responded by producing extraordinarily lengthy and complex explanations of their final regulations—far too complex for any nonexpert to understand.\textsuperscript{167} Agencies have also largely eschewed an Office of Information and Regulatory Affairs requirement that they provide comprehensible “executive summaries” of regulations.\textsuperscript{168} Indeed, a study of executive summaries found that they are “significantly less readable than the preambles they are supposedly explaining.”\textsuperscript{169} The result is that agencies leave the general public largely at sea to navigate incomprehensible regulations and preambles. Professor Lars Noah has pointed out that, in one extreme case, the text of a Food and Drug Administration (“FDA”) tobacco regulation was only three pages—
but the preamble was almost a thousand pages. Tax practitioners have also noted that preambles of tax regulations have grown increasingly lengthy and complex over time.

While many had hoped that the advent of e-rulemaking would have allowed more democratic public participation in the rulemaking process, the reality has been less encouraging. As Professor Cary Coglianese has described, e-rulemaking has been stymied by many of the same dynamics as traditional rulemaking. As with traditional rulemaking, agencies seem unwilling or unable to make much use of value considerations that the general public is apt to express.

The resulting process for generating legislative rules is a far cry from the participatory ideal envisioned by the APA and some of the framers of the administrative law regime. Instead, rulemaking is in some ways an example of a vision of democratic governance gone awry. The very requirements that are supposed to ensure widespread

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172. See, e.g., Mendelson, supra note 155, at 1344–45 (citing enthusiasm for e-rulemaking); Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 433 (2004). Another phenomenon examined by some scholars is “visual rulemaking,” which seeks to engage the public with easier-to-understand visual appeals. See generally Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183 (2016) (exploring the phenomenon in depth). Even within this space, there are reasons to be concerned about inequities. As the authors note, agencies may provide the general public an opportunity to participate in online forums (like Facebook) without taking adequate account of such responses as official “comments.” Id. at 1249–52.


174. Mendelson, supra note 155, at 1359–71 (finding that agencies tend to be unresponsive to comments that address values); see also Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414 (2005) (finding that the sophistication of comments is critical to the likelihood of influence on agencies); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 174 (1997) (arguing that merely increasing participation can paradoxically reduce deliberation in the administrative system).
participation and transparency have become weapons that make the process obscure and open only to the sophisticated and resourced few.

2. Informal Explanation. Even if the general public has little ability to engage in the creation of notice-and-comment regulations, such regulations are not the only way in which the public can interact with the regulatory and legislative scheme. Agencies offer the public a slew of informal guidance. Such guidance ranges in level of formality from relatively formal rulings that offer an agency’s official interpretation of how the law applies in a given situation all the way down to very informal tweets and other types of social media engagement. For instance, the IRS provides “revenue rulings,” which are “an official interpretation by the IRS of the Internal Revenue Code, related statutes, tax treaties and regulations.”\(^{175}\) They are the “conclusion of the IRS on how the law is applied to a specific set of facts.”\(^{176}\) Practitioners place great weight on such guidance.\(^{177}\) At the other end of the spectrum, like many other agencies, the IRS also maintains an active social media presence, tweeting out tax law tips as well as other information.\(^{178}\) Agency explanations, or the basic summaries of law explored in Part II, are a subset of these types of communications and tend to appear in less formal forms of communication (such as a tweet or chatbot).

For all the reasons that impenetrable, technical agency communications seem problematic, it also seems that we should cheer informal agency communications with the general public. Indeed, ACUS has embraced and advocated for agency use of social media.\(^{179}\)


176. *Id.*

177. *See, e.g.*, Pat Raskob, *Revenue Ruling & Tax: Understanding the Basics*, TAXPROFESSIONALS.COM (2024), https://www.taxprofessionals.com/articles/revenue-ruling-tax-understanding-the-basics [https://perma.cc/5WYW-5ZKT] (“Revenue Rulings are important because they provide guidance on how the IRS interprets and applies tax laws. This guidance can be critical for taxpayers and tax professionals trying to understand their tax obligations and ensure that they comply with the law.”); *IRS Provides Roadmap on How To Value a Private Business*, MAULDIN & JENKINS (Feb. 22, 2023), https://www.mjcpa.com/irs-provides-roadmap-on-how-to-value-a-private-business [https://perma.cc/2DER-EZGY] (describing Revenue Ruling 59-60 as a “landmark piece of IRS guidance that outlines the factors to consider when estimating the fair market value of a private business”).


Informal communications like these often use plain language the public can understand, vindicating the access that otherwise may be lost in the regulatory process.\textsuperscript{180} Informal communications thereby seem to promise more democratic, public engagement with the law.\textsuperscript{181}

However, as we have explored in prior work, informal guidance does not put the general public on equal footing with sophisticated parties and industry insiders.\textsuperscript{182} Instead, it creates a two-tier system of law whereby sophisticated parties and insiders have a more advantageous version of law.\textsuperscript{183} Formal guidance, such as the regulations, are binding law.\textsuperscript{184} In contrast, outside of the operation of limited exceptions,\textsuperscript{185} informal guidance does not bind the agency\textsuperscript{186} and also does not protect users against penalties should they act in reliance on the guidance.\textsuperscript{187} The result is that when informal guidance seems to offer favorable outcomes to the public, the agency can later reject the outcomes and even impose a penalty for following the guidance.\textsuperscript{188} When the informal guidance offers unfavorable outcomes relative to the underlying law, the general public may be practically bound by the guidance\textsuperscript{189} in that the decision to follow the guidance is unlikely to be subject to any sort of backend challenge.\textsuperscript{190} Informal guidance thus poses risks for the public that do not exist for

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\textit{181. Cf. Ruth Sullivan, The Promise of Plain Language Drafting, 47 MCGILL L.J. 97, 97 (2001) (explaining that “[t]he purpose of drafting legislative texts in plain language is to enhance democracy and the rule of law by making legislation accessible to the people whose lives it affects” but also identifying some problems with this approach).}
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\textit{182. See Blank & Ososky, Inequity of Informal Guidance, supra note 6, at 1110–40.}
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\textit{183. See id.}
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\textit{184. Joseph v. U.S. Civ. Serv. Comm’n, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977) (“Legislative rules have the full force of law and are binding on a court . . . .”).}
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\textit{185. See, e.g., Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913 (2020) (warning that agencies have to be cognizant of “serious reliance interests”).}
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\textit{186. Blank & Ososky, Inequity of Informal Guidance, supra note 6, at 1132.}
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\textit{187. Id. at 1132–34.}
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\textit{188. See id. at 1133–34.}
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\textit{189. Id. at 1136.}
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\textit{190. Blank & Ososky, Automated Agencies, supra note 6, at 2173. For foundational work regarding the “practically-binding” nature of informal guidance more generally, see Anthony, supra note 27, at 1374.}
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sophisticated parties who are able to access the underlying, complex regulations and case law. Moreover, access to this underlying, complex law can offer advantageous planning opportunities not available through informal guidance.191

Indeed, even within informal guidance, there are varying categories, with the more “formal” forms of informal guidance being preferable over the less formal versions. Take, for instance, the examples offered from the tax context of revenue rulings on the one hand and the IRS’s tweets on the other. While many might praise the IRS for tweeting to increase public awareness of the law, the tweets have extremely limited value as law.192 In contrast, revenue rulings, while certainly below Treasury regulations in terms of authoritativeness, have legal properties. According to Treasury regulations, taxpayers can rely upon revenue rulings193 and use them to avoid penalties.194 And the IRS carefully and publicly catalogs revenue rulings, indicating when a revenue ruling has been revoked, superseded, or obsoleted.195 Not so with tweets—which come and go without notice and which the IRS may contradict or reject in the future without fanfare or, indeed, without any notice whatsoever.

Some may object that this lack of permanence and the low expectation of reliability is the very nature of social media. By embracing these norms, agencies can engage with the public quickly and influentially. Indeed, some may go on to worry that any attempts to formalize these interactions would be a regression, hamstringing agency attempts to communicate.

To this line of objection, we agree that very informal agency communications, such as on social media, can have an important role

191. See Blank & Ososky, Inequity of Informal Guidance, supra note 6, at 1135–36.
192. Indeed, in interview research we conducted, agency officials suggested that they view some of these informal interactions as offering “information about the . . . [law],” rather than law itself. Blank & Ososky, Automated Agencies, supra note 6, at 2160.
193. Treas. Reg. § 601.601(d)(v)(e) (2021) (“Taxpayers generally may rely upon Revenue Rulings published in the Bulletin in determining the tax treatment of their own transactions and need not request specific rulings applying the principles of a published Revenue Ruling to the facts of their particular cases.”).
194. Id. § 1.6662-3(b)(3); id. § 1.6662-4(d)(3)(ii). Revenue Rulings are published in the Internal Revenue Bulletin.
195. See, e.g., Rev. Rul. 98-37, 1998-2 C.B. 133 (providing a list of revenue rulings made obsolete because “(1) the applicable statutory provisions or regulations [were] changed . . . (2) the ruling position is specifically covered by a statute . . . ; or (3) the facts set forth no longer exist or are not sufficiently described to permit clear application of the current statute and regulations”).
to play in agency engagement with the general public. But acknowledging this role should not cause us to lose sight of the fact that the form of law that the general public is getting—refracted through these unreliable mediums and created through opaque and much less careful process—offers the general public inferior access to law relative to that offered to sophisticated parties and insiders. The communication efforts, therefore, in some ways both accept and entrench the broader hierarchies in agency communications.

3. Challenge. A final difference in the administrative regime between sophisticated parties and the general public is the ability to challenge agency communications. The general public is systematically disadvantaged in its ability to challenge agency communications for two reasons. First, agency communications with the general public are less likely to be “final” agency guidance that are “ripe” for review. Second, barriers to challenging agency inaction prevent the general public from challenging harmful deregulation by agencies. Put together, these features once again display how the administrative regime on agency communications leaves little space for the general public.

Only agency actions that are “final” and “ripe” for review can be challenged in court. The APA makes clear that “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”196 This means that only “final” agency action is subject to judicial review. The “finality” inquiry relates to the often interrelated “ripeness” doctrine, which seeks to “prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies.”197

What counts as “final” agency action has been subject to judicial disagreement. One line of authority with a “flexible view of finality” has asked whether the agency position was “definitive” and whether it had a “direct and immediate . . . effect on the day-to-day business” of the parties bringing the suit.198 However, another line of authority

198. FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 239–40 (1980) (quoting Abbott, 387 U.S. at 150–52); see also Frozen Food Express v. United States, 351 U.S. 40, 44 (1956) (listing, in an Interstate Commerce Commission order, which commodities were within the agricultural
following the Supreme Court case *Bennett v. Spear* provides a more formal inquiry. Under this line of authority, two conditions must exist for agency action to be final: (1) “the action must mark the ‘consummation’ of the agency’s decisionmaking process,” and (2) “the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” While the Court since *Bennett* has at times suggested a blend with a more flexible inquiry, and lower courts have followed suit in some circumstances, the formal inquiry under *Bennett* remains prominent.

The “finality” and “ripeness” inquiries matter because they create the same sort of hierarchy regarding agency communications as exists for the reliability of agency statements. Legislative rules are final agency actions that can be challenged. This means that the sophisticated parties and industry insiders who, as illustrated previously, are much more likely to access legislative rules are also much more likely to be able to challenge such rules. Informal guidance,
in general, is more of a muddle. Courts have certainly concluded that in some cases informal guidance is final agency action subject to judicial challenge. This is akin to the ways that the public can rely on certain types of informal guidance even though it is not as reliable as legislative rules. However, more typically, courts have concluded that “finality” or “ripeness” serve as barriers to judicial review of informal guidance. Moreover, the more agency guidance seems to merely explain the law to the general public, rather than engaging in any form of more sophisticated (and likely complex) lawmaking, the less likely it will be deemed to be final agency action subject to judicial review.

For instance, in *Golden & Zimmerman, LLC v. Domenech*, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) published the Firearms Regulations Reference Guide 2005 to provide “information designed to help [licensees] comply with all of the laws and regulations governing the manufacture, importation, and distribution of firearms and ammunition.” The petitioners sought a judgment declaring that one of the “Frequently Asked Question[s]” in the guide was inconsistent with the Gun Control Act. The Fourth Circuit concluded that there was no “agency action” in this case, much less “final agency action,” because the role of the reference guide “is simply to inform licensees of what the law, previously enacted or adopted, is, and its publication did not itself alter the legal landscape.” This was true, according to the Fourth Circuit, even to the extent that the reference guide did something “other than simply restate the requirements of the Gun Control Act” because, even in that case, the reference guide would be drawing on a revenue ruling published long ago. In reaching this conclusion, the Fourth Circuit

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205. See, e.g., Lindsay, supra note 204, at 2457 (describing judicial “confusion in determining the finality of concededly nonlegislative rules”).
206. See, e.g., Or. Nat’l Desert Ass’n v. U.S. Forest Serv., 465 F.3d 977, 979 (9th Cir. 2006) (“[T]he United States Forest Service’s issuance of annual operating instructions (‘AOIs’) to permitees who graze livestock on national forest land constitutes final agency action for purposes of judicial review.”).
209. Id. at 429.
210. Id. at 428.
211. Id. at 433.
212. Id. at 432.
did not think it mattered that the Gun Control Act had changed since the time the purportedly governing revenue ruling had been published (which would suggest that the agency was having to conduct some analysis in concluding that the law still stayed the same despite the change to the Gun Control Act).213 Instead, the Fourth Circuit viewed the simple fact that this was a reference guide, meant to inform the public of what the law was, as dispositive.214 The Fourth Circuit concluded that this type of communication could not be final agency action subject to judicial challenge.215

Golden & Zimmerman raises two important issues. First, the case reveals the way that, in the context of finality, as in the context of categorizing agency statements, administrative law fails to consider how agency explanations can create subtle deviations from what the underlying law is, which deviations are not subject to challenge. Second, the case reveals the way that the general public is systematically disadvantaged in its ability to challenge the law. Explanations of the law like the reference guide offered by the ATF are how the general public is likely to access the law—in large part because the more authoritative regulations and other administrative law are inaccessible. And yet the finality doctrine holds that the general public cannot challenge the very form of the law that the agency accessibly provides for the general public.

Added to this difficulty is the fact that the general public is often an indirect beneficiary of agency regulation. As Professor Nina Mendelson has observed, “Of the countless statutes passed by Congress to serve the ‘public interest,’ many regulatory statutes, including those aimed at pharmaceutical safety, workplace safety, and protecting the environment” indirectly benefit the general public, including drug consumers, workers, and the broad public affected by environmental harm.216 As indirect beneficiaries of agency action, the general public is typically harmed by agency inaction.217 However,

213. See id. at 429.
214. Id. at 432.
215. Id. at 433.
217. Some exceptions to this orientation apply. For instance, the tax law applies broadly to the general public. Even in this context, however, the inability to challenge deregulation remains an issue. Limitations on taxpayer standing, for instance, limit the ability to challenge regulations and enforcement that are too favorable to others.
judicial authority severely limits the ability to challenge agency inaction.\textsuperscript{218} As the Supreme Court has explained, courts should concern themselves with agency exercises of “coercive power over an individual’s liberty or property rights,” situations that “provide[] a focus for judicial review.”\textsuperscript{219} The result is that when an agency issues guidance that is unduly favorable to regulated parties relative to the underlying formal law, the general public often lacks the ability to challenge such guidance and protect its interests.\textsuperscript{220} Further worsening this dynamic is the fact that the low costs to agencies for engaging in inaction may distort agencies’ choices, causing them to engage in even less regulatory action.\textsuperscript{221} Plus, as Mendelson has pointed out, as difficult as it may be for the general public to influence the formation of regulations in the notice-and-comment process, in some ways the creation of less formal regulatory guidance is even more obscure and subject to disproportionate insider influence.\textsuperscript{222} Altogether, these dynamics systematically make it difficult for the general public to challenge agency inaction.

4. **Stepping Back.** As illustrated above, the broad spectrum of administrative law rules regarding agency communications—from the notice-and-comment process to the rules for informal explanations to the ability to challenge—are all tilted toward sophisticated parties and industry insiders and away from the general public. The failure of the basic classification of agency statements to incorporate agency explanations both makes sense and is made worse in light of this broader regime regarding agency communications. The general public receives its information about the law from communications that administrative law makes no space for. This would be less problematic if agency explanations were akin to mere photocopies of the underlying formal law. No one would think that additional administrative process

\textsuperscript{219} Id. (emphasis omitted).
\textsuperscript{220} See Mendelson, Regulatory Beneficiaries, supra note 216, at 420–24.
\textsuperscript{221} Cf. Cass R. Sunstein, Reviewing Agency Inaction After Heckler v. Chaney, 52 U. CHI. L. REV. 653, 656 (1985) (pointing out that the “availability of review will often serve as an important constraint on regulators during the decisionmaking process long before review actually comes into play”).
\textsuperscript{222} See Mendelson, supra note 216, at 427.
should apply to the act of photocopying. But, as we have shown here as well as extensively in prior work, agency explanations are not mere photocopies of the rest of the regulatory regime. The very process of offering seemingly simple explanations of complex regulatory law involves changing the nature of the legal rules, potentially denying members of the public benefits to which they may be entitled, or putting them at risk for taking positions that may not be supported by the underlying legal regime. Administrative law’s failure to classify or even consider such explanations exemplifies its generally broad-based inattention to communications with the general public.

B. Decreasing the Democracy Deficit in Administrative Law

We have identified a large category of statements that agencies make to the public that have no place in the administrative law framework. We have also identified ways that this fits into a broader democracy deficit in administrative law. Here, we identify major, systemic means of infusing these statements with the advantages enjoyed by sophisticated parties across the administrative communication system—in terms of participatory formulation, reliability, and ability to challenge.

Rooting the categorization issues we identify in this Article in broader, systemic imbalances suggests a need to fundamentally reorient our thinking around agency communications. This is because, as troublesome as each piece of the puzzle is individually, put together, the result is an administrative law system that is possible to understand but very challenging to defend. It is possible to understand how


224. See Blank & Ososky, Simplexity, supra note 6, at 206–207; Blank & Ososky, Automated Legal Guidance, supra note 6, at 206.

225. Id.

226. An alternative might be to provide more resources for back-end challenges by the public of application of the law. For instance, widespread public adherence to agency statements that seem to be unfaithful representations of the underlying law, such as with the COVID-19 relief payments discussed at infra notes 251–260 and accompanying text, may be resolved through claims for refund and impact litigation. This harkens back to some of the considerations about when it is better to resolve legal issues on an ex ante versus ex post basis. It is important to point out, however, that not all issues with agency explanations are capable of back-end resolution. An immigrant who leaves the United States based on a belief that citizenship is not available, for instance, may not have an adequate remedy for opportunities foregone as a result of leaving.
scholars and agency officials alike may shrug off agency explanations to the general public despite the fact that significant deviations exist in such explanations and that millions of people rely on them each year. It is possible to understand how the notice-and-comment process has become dominated by interested industry groups and how explanations that precede and succeed such engagement are tailored to these groups. It is possible to understand how agencies are reticent to be bound by informal statements that they make in an attempt to help the public comply with the law and how courts are reluctant to expand bindingness and penalty protections to informal guidance. And it is possible to understand how regulated parties have greater ability to challenge agency communications than the general public. However, altogether, this regime is extremely difficult to justify.

Below we offer a framework for policymakers to decrease the democracy deficit that currently exists when agencies communicate with the general public. We want to be clear about what our framework is not. It is not an attempt to apply the same rules to informal agency engagement as those that apply in formal engagement. It is not an attempt to require notice-and-comment at every turn. It is not an attempt to take the hyper-legalized norms that have, in some ways, perverted the administrative process and expand them to all engagement. It is not an attempt to expand judicial review.

228. *See, e.g.*, Wagner, *supra* note 152, at 1400 (describing factors that lead insiders to dominate the notice-and-comment process).
229. *See Webley, supra* note 165 (describing reasons for the opacity of preambles).
230. *See generally* Emily Cauble, *Detrimental Reliance on IRS Guidance*, 2015 Wis. L. Rev. 421 (2015) (exploring the IRS’s assignment of different reliability levels to different types of guidance likely to be used by different types of taxpayers).
232. *See, e.g.*, Mendelson, *supra* note 216 (describing the relative disadvantages faced by regulatory beneficiaries in attempting to challenge agency positions).
234. *Cf., e.g.*, Brian Galle & Stephen Shay, *Admin Law and the Crisis of Tax Administration*, 101 N.C. L. Rev. 1645, 1654 (2023); Weisbach, *supra* note 233 (arguing that stringent application of general administrative law to the tax regulatory process is unjustified and has negative effects on tax administration); *see also* Susan C. Morse, *Old Regs: The Default Six-Year Time Bar for Administrative Procedure Claims*, 31 Geo. Mason L. Rev. 191, 192 (2023) (raising and
Instead, our proposed framework is an attempt to infuse agency interactions with the general public with the sorts of values that were at the heart of the APA prior to hyper-legalization. These values included, among other things, a commitment to transparency, inclusion, and fairness.\(^{235}\) As scholars have emphasized, administrative law can and should embrace these values through norms and practices, not just through hyper-legalized, judicially enforceable rules. For instance, Professors Gillian Metzger and Kevin Stack have explored how “internal directives, guidance, and organizational forms . . . [are] critical means for . . . ensuring accountability within agencies\(^{236}\)” and how this conception was important when the APA was created.\(^{237}\) Likewise, Professor Chris Walker has emphasized that many important agency functions operate outside of judicial review and that it is a mistake to focus myopically on a “court-centric theory of administrative law.”\(^{238}\) Instead, Walker advises that we must find safeguards in agency practices and procedures that lie beyond judicial review.\(^{239}\)

In this regard, agencies should provide more participatory formulations of agency guidance, regardless of how such guidance is characterized under the administrative law framework. For instance, when an agency is creating centralized explanations of the law that are being offered broadly to the general public, such explanations should be created through careful involvement of counsel. When a rule does require notice-and-comment procedures, the agency should structure the process so as to engage broadly with the public prior to getting responding to potential administrative challenges to long-established regulations). For scholarship that helped set the stage for these concerns, see, for example, Stephanie Hunter McMahon, *The Perfect Process Is the Enemy of the Good Tax: Tax’s Exceptional Regulatory Process*, 35 VA. TAX. REV. 553 (2015); Lawrence Zelenak, *Maybe Just a Little Special, After All?*, 63 DUKE L.J. 1897 (2014).

\(^{235}\) See, e.g., Kathryn E. Kovacs, *From Presidential Administration to Bureaucratic Dictatorship*, 135 HARV. L. REV. F. 104, 107 (2021) (describing the APA’s “core values” as “public participation, transparency, deliberation, and uniformity” and arguing that a return to these values “would help to forestall the United States’ democratic backsliding”).

\(^{236}\) Metzger & Stack, supra note 22, at 1239.

\(^{237}\) Id. at 1266–78.

\(^{238}\) Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1639 (2018); see also Weisbach, supra note 233, at 62 (“The tax regulatory process would be better with less supervision by courts and more, if needed, by the President and Congress.”).

\(^{239}\) Walker, supra note 238, at 1639–40.
bogged down in industry concerns.\textsuperscript{240} To do so, the agency should make apparent the underlying values at stake with the rule formulation and how particular decisions may affect the public interest.\textsuperscript{241} Even with informal interactions with the general public, such as through tweets, there should be an internal review process within the agency to decide when statements should be modified or amended, and legal counsel should be involved in such review. This is especially important as these forms of communication become more common. And agencies and courts alike should be more open to arguments regarding reasonable reliance on agency statements in informal communications. All of these approaches, and others like them, should recognize that administration of the law affects the public at large, not only sophisticated parties. Agencies should articulate and follow a clear set of norms and practices that suggest as much.

In embracing this framework, we are aware of and sympathetic to concerns that process can be used as a stealth way to kill agencies. For instance, Professor Nicholas Bagley has forcefully argued that “proceduralism drains agency resources, introduces delay, and thwarts agency action. To that extent, it puts a thumb on the scale in favor of the status quo; by itself, that’s enough to give administrative law a libertarian, anti-statist cast.”\textsuperscript{242} Likewise, tax scholars have recently considered how applying administrative proceduralism to tax administration can have pernicious effects on the IRS’s ability to

\begin{itemize}
  \item \textsuperscript{240} See, e.g., Robert B. Reich, \textit{Public Administration and Public Deliberation: An Interpretive Essay}, 94 \textit{Yale L.J.} 1617, 1632 (1985) (describing a case in which the EPA administrator facilitated real, public deliberation about a difficult regulatory problem, including by making plain the various values at stake). For a more recent suggestion that agencies are still capable of broad-based pre-notice-and-comment engagement, see, for example, U.S. Dep’t of Treas., \textit{Treasury Seeks Public Input on Additional Clean Energy Tax Provisions of the Inflation Reduction Act}, (Nov. 3, 2022), https://home.treasury.gov/news/press-releases/jy1077 [https://perma.cc/ZZT4-FSM9] (describing “Treasury’s ongoing efforts to engage a broad spectrum of taxpayers and stakeholders to inform its work implementing the Inflation Reduction Act,” including through a “series of roundtable discussions with key stakeholder groups representing thousands of companies, millions of workers, and trillions of dollars in investment assets, as well as climate and environmental justice advocates, labor unions, community-based organizations, and other key actors that are critical to the success of the Inflation Reduction Act”); Michael Sant’Ambrogio & Glen Staszewski, \textit{Democratizing Rule Development}, 98 \textit{Wash. U. L. Rev.} 793, 816–31 (2021) (finding that agencies do try to engage the public before formulation of a proposed rulemaking but that these efforts are voluntary and ad hoc).
  \item \textsuperscript{241} See Wagner, \textit{supra} note 152, at 1417–18 (proposing that the EPA should be required to make transparent the impact of a given rule on public health).
  \item \textsuperscript{242} Bagley, \textit{supra} note 41, at 363.
\end{itemize}
administer the tax law and raise revenue. In some ways, this concern—and the broader fight over administrative doctrines as a political tool for dismantling the administrative state—is a mere continuation of the focus in the New Deal era on proceduralism as a proxy for a deeper fight over the role of the administrative state. The worry, and it is not unfounded, is that pushing additional proceduralism is really a way to bury agencies by making them ineffectual. The worry is perhaps reasonably heightened in an era in which there is a very real and ongoing threat to the administrative state being carried out at the highest levels of government.

However, while we are sympathetic to such concerns, we believe that a response that demands uncritical acceptance of all aspects of the current administrative state is the wrong one. We believe that the administrative state plays an essential role in U.S. governance—one that should be protected. But we also believe that, as we have illustrated in this Article, the administrative law framework, as it has evolved over time, does not make sufficient space for administrative communications with the general public.

To strengthen the administrative state, policymakers should reorient administrative law to embrace agency engagement with the general public more robustly and to provide norms and practices around it. Indeed, such a reorientation may be critical in shoring up support for the administrative state. Below we illustrate core features of our proposed framework for addressing the democracy deficit, which would encourage public participation, public challenge, and public reliance regarding agency communications with members of the general public.

243. See, e.g., Galle & Shay, supra note 234; Weisbach, supra note 233.


245. See supra notes 45–47 and accompanying text; Shepherd, supra note 45, at 1682 (“Given conservatives’ opposition to the New Deal, the proposals for inefficient administrative reform that conservatives offered were a sound and reasoned means to achieve conservative goals.”).

246. Heinzerling, supra note 244.

247. See, e.g., Jody Freeman & Sharon Jacobs, Structural Deregulation, 135 HARV. L. REV. 585, 664 (2021) (exploring ways that defunding and other mechanisms can also undermine agencies).
1. Public Participation. An initial step that agency officials could adopt to address the democracy deficit would be to introduce procedures that would allow members of the general public to participate in the issuance of agency communications, such as explanations of the law. The goal of each of the recommendations described below is to provide members of the general public some ability to contribute to the development of agency explanations. This would yield greater parity with the participatory opportunities available to sophisticated parties and industry insiders.

Opportunity for Public Comment. Agency officials should offer members of the public opportunities to comment on certain agency explanations of the law. Agency officials could offer these opportunities where they expect members of the public to reasonably rely upon agency explanations when attempting to comply with legal obligations.

One possibility for providing members of the public with the opportunity to participate in developing agency explanations would be to require agencies to issue agency explanations with a “draft” label and offer the public an opportunity to submit comments on these drafts. For instance, under its “good guidance practices,” the FDA invites members of the public to submit comments on its “draft Level 1 guidances,” which are those that set forth initial interpretations of significant regulatory requirements, describe substantial changes to earlier FDA interpretations, or address complex or controversial issues.248 Another approach could be for agencies to solicit feedback from the public on published agency explanations and to address inaccurate or misleading statements with revised versions. The IRS, for instance, hosts a website where it invites members of the public to submit comments on published tax forms, instructions, and publications through an online form.249 Similarly, the FDA states on its website that members of the public can submit comments on any guidance documents and that FDA officials review all comments and revise the documents if necessary.250 Each of these models would

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250. See FDA, supra note 248.
increase the general public’s ability to contribute to developing, publishing, and revising agency explanations of the law.

One reaction to our proposal is that members of the general public may not be equipped to identify inaccuracies and deviations in agency explanations. Consequently, the public may be unlikely to offer meaningful feedback to agency officials. This response, however, overlooks the possibility that, by offering the opportunity for public comment on agency explanations of the law, agencies may encourage participation of representatives of public interest organizations, experts, and other intermediaries.

For instance, in 2020, at the onset of the COVID-19 pandemic, Congress enacted the CARES Act, which provided “economic impact” payments to joint-filing married taxpayers as long as their adjusted gross income did not exceed certain thresholds. At the time of enactment, many taxpayers, including individuals whose spouses had died that year, questioned whether they were eligible to receive the payments. In response, the IRS posted an FAQ on its website that included the following question: “Q10: Does someone who has died qualify for the Payment?” The IRS responded to this question with the following answer: “A10: No. A Payment made to someone who died before receipt of the Payment should be returned to the IRS by following the instructions in the Q&A about repayments.” Even though the IRS’s FAQ lacked the force of formal law, within six months of the IRS posting this FAQ on its website in May 2020, taxpayers returned nearly sixty thousand economic impact payments,

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254. See id. (emphasis omitted).
totaling more than $72 million, that the IRS had previously distributed to deceased taxpayers.255

Despite the IRS’s strong public statement on this issue, former government officials and other commentators questioned the IRS’s legal interpretation.256 For instance, former National Taxpayer Advocate Nina Olson analyzed the requirements of the newly enacted statute and the IRS FAQ.257 While Olson was no longer speaking in her official capacity as National Taxpayer Advocate, she published detailed criticism of the IRS’s claim that individuals were ineligible to receive payment if they were deceased in 2020, even though they had been eligible individuals in 2018 or 2019.258 She also commented that in 2008, when Congress enacted stimulus legislation during the financial crisis and used the same statutory language as in the CARES Act, the IRS adopted a contrary position in its FAQs regarding payments of stimulus checks to deceased taxpayers.259 Following Olson’s criticism, several tax practitioners agreed that the statutory language provided that as long as taxpayers were “eligible individuals” in 2018 or 2019, they should be entitled to the payments in 2020, even if they were deceased in 2020.260 If agencies routinely offered opportunities for public comment on agency explanations prior to their publication, representatives of public interest organizations, including experts in the relevant legal areas, could offer similar evaluation and criticism of agency explanations, resulting in potentially significant improvements to guidance for the general public.261


256.  See, e.g., Olson, supra note 253; David M. Fogel, Must Economic Impact Payments to Deceased Individuals Be Returned?, TAX NOTES FED. 1719, 1721 (2020); Patrick Thomas, Analyzing the IRS FAQs on Incarcerated and Non-Resident Taxpayers, PROCEDURALLY TAXING (May 12, 2020), https://procedurallytaxing.com/analyzing-the-irs-faqs-on-incarcerated-and-non-resident-taxpayers [https://perma.cc/YLF5-G5EU].

257.  Olson, supra note 253.

258.  Id.

259.  Id.

260.  See Fogel, supra note 256, at 1721; Thomas, supra note 256.

261.  Participation by these sorts of groups on behalf of the public in notice-and-comment rulemaking would be beneficial as well. Either way, for the reasons discussed in this Article, we should encourage public participation and expert participation on behalf of the public in formulating agency explanations.
External Advisory Councils. Agency officials should also solicit participation from external advisory councils and other groups in developing agency explanations of the law. Agency officials should not expect internal review alone to identify discrepancies between agency explanations and the formal law. For instance, during our prior study of automated legal guidance tools, such as chatbots and virtual assistants, we found that many agencies evaluate the efficacy of these tools by measuring the “I don’t know rate”—the frequency with which the tools cannot answer user inquiries. This information alone cannot identify situations where an automated legal guidance tool provides users with an answer that deviates, sometimes significantly, from the underlying formal statutes, regulations, and judicial decisions.

Many federal agencies receive advice from external advisory groups, such as the Department of Education’s National Board for Education Sciences, the IRS’s Internal Revenue Service Advisory Council, and multiple advisory committees of the FDA. Each of these groups consists of experts, third-party advisors, and members of the public. Some agencies, such as the IRS, appear to include these external institutions in discussion of certain forms of agency explanations, such as IRS publications and forms, while others do not. By providing external advisory councils with a role in issuing agency explanations, members of these councils and other external groups could voice concerns, questions, and criticism on behalf of individual users and their advisors.

A likely objection to an increased role of the public in drafting and reviewing agency explanations of the law is that it could prevent agencies from making statements quickly and efficiently. However, there are several responses to this criticism. First, as we described above, agency officials should increase opportunities for public participation where they expect members of the public to reasonably rely upon agency explanations to comply with legal obligations.
Examples of the types of explanations that could merit this treatment could, for instance, include those that appear in FAQs that appear on agency websites, automated legal guidance tools (which are designed to replace human customer service representatives), and printed publications. Second, agency officials would not need to offer the opportunity for the public to provide comments on different versions of the same agency explanation. For instance, if an agency offers a venue for members of the public to provide comments on an FAQ on its website, it should not be expected to offer this opportunity for public comment again when it uses social media to link to, or otherwise publicize, this FAQ. Third, in situations where immediate publication is necessary, like the enactment of new legislation, agency officials can always include a “draft” label and note that the statement may be subject to future revision. Finally, while greater public participation could result in processes that delay issuing final agency explanations of the law, it could also improve the accuracy and usability of this guidance. Some delay because of deliberation is warranted when the public is likely to rely.

2. Public Challenge. Another opportunity for narrowing the democracy deficit is to ensure that, after agencies issue agency explanations of the law, they may face challenges on behalf of the public and respond to these challenges. Without the potential for ex post challenge by an individual or entity acting on behalf of the general public, agencies will have little incentive to adjust explanations of the law that deviate from the underlying formal law.268 If such agency explanations do not face challenges, most people will simply follow them, whether they are beneficial or adverse to individuals’ interests. As we argue, one of the most effective ways to increase scrutiny of agency explanations is to delegate this task to ombudsman offices within agencies.

There are limited opportunities today for parties to raise formal challenges to agency explanations that are inconsistent with the formal law. When the formal law is ambiguous, agency explanations may resolve the ambiguity in ways that are detrimental to the interests of members of the public and may, as a practical matter, serve as binding law. Where an agency explanation deviates from the formal law in ways

268. Cf., e.g., Galle & Shay, supra note 234, at 37 (discussing the implications of ex post, rather than merely ex ante, examination of tax regulations).
that are adverse to individuals’ interests, in most cases, individuals cannot pursue formal challenges until an enforcement action by the agency occurs.\textsuperscript{269} And, in most cases, if agencies issue explanations that are unfavorable to members of the public, these individuals are generally unable to participate in class actions because their factual or legal circumstances are too divergent.\textsuperscript{270} Further, where agency explanations deviate from the formal law in ways that are favorable to individuals, individuals do not have an incentive to question the agency, and other members of the general public lack standing to pursue legal action to ensure that agencies follow the underlying formal law.\textsuperscript{271}

To address this deficiency, Congress could request federal agency ombuds offices to review agency explanations and issue regular reports noting inconsistencies with the formal law. Congress could ask agencies to respond to any challenges included in these reports. Ombuds offices within federal agencies are designed “to foster government as accessible and responsive to the needs and concerns of both external and internal stakeholders” and “serve as a ‘voice’ to and within government institutions.”\textsuperscript{272} As a 2016 study by ACUS has noted, ombuds offices that “assist people in ‘navigating through the agency, fellow employees, industry, and the public’” have proliferated in recent years.\textsuperscript{273} “Advocate [o]mbuds offices,” as ACUS has described them, are both external- and internal-facing entities that survey constituents and assess timeliness and cost of resolving constituent concerns.\textsuperscript{274} One of the primary impacts of such ombuds offices is to yield better

\textsuperscript{269}. See, e.g., Scholl v. Mnuchin, 494 F. Supp. 3d 661, 670–71, 692 (N.D. Cal. 2020) (regarding the first round of economic impact payments under the CARES Act in which IRS stated in an online FAQ that incarcerated individuals were ineligible to receive payment).

\textsuperscript{270}. See id. at 670, 679 (addressing characteristics of class members).

\textsuperscript{271}. See Lawrence Zelenak, Custom and the Rule of Law in the Administration of the Income Tax, 62 DUKE L.J. 829, 847 (2012) (“Very few such suits are brought, however, and none succeed, because the law of standing does not permit self-appointed guardians of the public interest to challenge the IRS’s unduly lenient treatment of other taxpayers.”).


\textsuperscript{273}. Id. at 26.

\textsuperscript{274}. See id. at 70.
communication and compliance with laws and regulations by agencies.\footnote{275}

Some of the federal agency ombuds offices can be characterized as using an “advocate” model.\footnote{276} One prominent example of an advocate ombuds office is the IRS’s National Taxpayer Advocate, an office that “looks at patterns in taxpayer issues to determine if an IRS process or procedure is causing a problem, and if so, to recommend steps to resolve the problem.”\footnote{277} Another example is the Small Business Administration National Ombudsman, which rates federal agencies on their dealings with small businesses.\footnote{278} In addition, the U.S. Securities and Exchange Commission’s Office of Investor Advocate “analyze[s] the potential impact on investors of proposed regulatory changes, identif[ies] problems that investors have with investment products and financial service providers, and recommend[s] changes to statutes and regulations for the benefit of investors.”\footnote{279} As the ACUS study noted, in most cases of advocate ombuds offices within federal agencies, Congress has delegated specific tasks to these offices that cause them to advocate for systemic change within agencies on behalf of the public.\footnote{280}

Several attributes of advocate ombuds offices illustrate why this model would be an effective means of ensuring review of agency explanations of the law. First, Congress can require these offices to review specific agency activities. Second, because advocate ombuds offices are external facing, they can solicit concerns and questions from members of the public regarding agency explanations. Third, because advocate ombuds offices are also internal-facing entities, they

\begin{footnotes}
\footnotetext[275]{Id.}
\footnotetext[280]{See Houk et al., ACUS Report Part 1, supra note 272, at 6, 11.}
\footnotetext[281]{See id. at 73.}
\end{footnotes}
can investigate the reasoning behind agency explanations of the law by questioning agency officials involved in drafting them.\textsuperscript{282} Fourth, Congress can also require these offices to issue regular reports to Congress documenting concerns regarding agency explanations and mandate that agencies respond in writing to concerns raised by these reports. Finally, unlike other forms of internal review and investigation, reports by advocate ombuds offices to Congress and responses by agencies occur in public view, which would enhance transparency regarding agency explanations. If Congress were to require federal agency ombuds offices to review agency explanations of the law as part of their regular duties, it could transform many of these offices into advocate ombuds offices.

One response to this proposal may be that there are other federal offices with investigative powers that can review agency explanations of the law. For instance, there are over seventy federal inspectors general within federal agencies that could review agency explanations to determine whether they describe the formal law accurately and objectively.\textsuperscript{283} While inspectors general provide valuable oversight of agency conduct, their primary focuses are waste, fraud, and abuse within agencies.\textsuperscript{284} For this reason, federal inspectors general do not focus on the substance of agency communication with the public as one of their core responsibilities. In addition, compared to advocate ombuds offices, inspectors general are internal facing and do not investigate user experience, customer service, and similar types of issues that affect routine interactions between members of the public and agencies. Another possible entity that could review agency explanations is the U.S. Government Accountability Office (“GAO”), a nonpartisan agency that provides Congress with “fact-based information to help the government save money and work more efficiently.”\textsuperscript{285} One limitation is that officials in this office lack expertise and familiarity regarding the formal law that applies to specific agencies. In the early 1990s, the GAO reviewed IRS publications, and

\textsuperscript{282} See id. at 49–50.
\textsuperscript{284} See id. at 1.
\textsuperscript{285} Gov’t Accountability Off., About, https://www.gao.gov/about [https://perma.cc/2S3H-4QJH].
such review did not identify the need for any substantive changes.\footnote{See \textsc{Gen. Acct. Off.}, GAO/GGD-93-72, \textit{Tax Administration} 1, 4 (1993).} However, the GAO methodology in this review was quite limited in that it reviewed only four IRS publications.\footnote{\textit{See id.} at 4.} In contrast, advocate ombuds offices, such as the National Taxpayer Advocate, have the unique ability to review agencies’ explanations of the formal law to determine whether they are accurate and simultaneously gauge their impact on the actions of members of the general public.

3. \textit{Public Reliance}. Last, agencies should allow members of the public to reasonably rely on certain agency explanations, and agencies should bind themselves to follow such explanations in enforcing the law.

In 2022, in response to our \textit{ACUS} study of automated legal guidance in U.S. federal agencies, \textit{ACUS} adopted many of our recommendations.\footnote{Automated Legal Guidance at Federal Agencies, 87 Fed. Reg. 39801–02 (July 5, 2022).} While \textit{ACUS} adopted twenty recommendations based on our report, it did not adopt our call to require federal agencies to be bound by certain statements that agencies make through automated legal guidance to users.\footnote{\textit{See id.}; \textit{Blank & Osofsky, ACUS Report, supra note 90}; \textit{Blank & Osofsky, Automated Legal Guidance, supra note 6}, at 236–37.} Specifically, we had proposed that where an automated legal guidance tool such as a chatbot provides “unilateral guidance” (that is, the tool is the only actor speaking), agencies should allow users to reasonably rely on such statements to bind the agency.\footnote{\textit{See Blank & Osofsky, Automated Legal Guidance, supra note 6}, at 236–37.} Unlike formal regulations, agency explanations do not allow individuals who relied upon them to estop agencies during subsequent enforcement actions.\footnote{\textit{See}, e.g., Miller \textit{v. Comm’r}, 114 T.C. 184, 194–95 (2000); United States \textit{v. Josephberg}, 562 F.3d 478, 498–500 (2d Cir. 2009); Carpenter \textit{v. United States}, 495 F.2d 175, 184 (5th Cir. 1974); Adler \textit{v. Comm’r}, 330 F.2d 91, 93 (9th Cir. 1964); Zimmerman \textit{v. Comm’r}, 71 T.C. 367, 371 (1978), \textit{aff’d}, 614 F.2d 1294 (2d Cir. 1979) (unpublished table decision); Johnson \textit{v. Comm’r}, 620 F.2d 153, 154–55 (7th Cir. 1980) (per curiam).} Unlike formal regulations, agency explanations do not allow individuals who relied upon them to estop agencies during subsequent enforcement actions.\footnote{\textit{Cf.}, e.g., \textit{Michigan v. Bay Mills Indian Cmty.}, 572 U.S. 782, 798 (2014) (explaining that “\textit{stare decisis} is a foundation stone of the rule of law” and “that ‘any departure’ from the doctrine ‘demands special justification’” (quoting \textit{Arizona v. Rumsey}, 467 U.S. 203, 212 (1984))).}

We understand agencies’ reticence to be bound to statements they make. As a general matter, bindingness reduces flexibility and raises the stakes on what is said. However, committed adherence to public statements of law is critical for rule-of-law values.\footnote{\textit{Embracing such}}
values for agency explanations is essential to reducing the democracy
deficit we have identified.

Agencies binding themselves to follow their explanations of the
law—offered through automated legal guidance tools as well as
through other formats—could address significant aspects of the
democracy deficit. First, if agencies bound themselves to follow agency
explanations, these explanations would be far more reliable than under
current law, which would be particularly valuable for less sophisticated
individuals and industry outsiders. Policymakers could encourage
individuals to consider agency explanations of the law fully and in the
appropriate contexts by only allowing reliance on this guidance where
the reliance is reasonable. This change could increase participation in
formulating and reviewing agency explanations of the law by members
of the general public, representatives of public interest organizations,
and agency ombuds offices. Such a response would be especially
possible if policymakers adopted our previous recommendations
regarding public participation in the process and challenge of agency
explanations of the law. By committing to be bound by their own
explanations of the law, agencies could enhance their perceived
legitimacy by the public.

Would it be possible for agencies to bind themselves to follow
their unilateral explanations of the law? It may not be possible for
statements that clearly conflict with the underlying law. Agencies being
bound to such positions could raise separation-of-powers concerns,
among others.293 However, agency explanations often present one view
or several reasonable possibilities. Agencies could be bound in these
circumstances. To do so, agencies could follow the model offered by
the IRS’s treatment of statements published in the Internal Revenue
Bulletin (‘‘IRB’’).294 The IRS has adopted the position that whenever
it publishes statements in the IRB, a weekly government publication,
IRS employees must apply the law in a manner consistent with these
statements, and taxpayers may rely on them when fulfilling their tax
compliance obligations.295 This example nonetheless illustrates a

293. See, e.g., Fred Ansell, Unauthorized Conduct of Government Agents, 53 U. CHI. L. REV. 1026, 1027 (1986) (explaining when equitable estoppel against the government may be appropriate); Cauble, supra note 230, at 433–37 (exploring the separation of powers and other concerns with equitable estoppel); Stephanie Hoffler, Hobgoblin of Little Minds No More, 2006 UTAH L. REV. 317, 333 (discussing the restrictive nature of an equitable estoppel claim brought against the government).

294. IRM 4.10.7.2.4 (Jan. 10, 2018).

295. See id.
 mechanism for converting agency explanations into internally binding rules. Other agencies that have similar publications to the IRB, and those agencies that introduce them, could use these publications to commit to follow unilateral agency explanations.

A potential objection to this proposal is that its breadth may introduce administrative challenges. Specifically, agency officials may not be able to keep track of all agency explanations to apply the law consistently and efficiently. One response to this criticism is that agencies could introduce features that would address such administrability concerns, such as online archives of statements and dates on agency explanations. In limited circumstances, some agencies, such as the IRS, have already begun implementing such features in the case of certain FAQs.296 Further, we note that our proposal would not apply to “bilateral” agency explanations, where agencies may provide differing statements in response to users’ inputs of information on their personal circumstances. In these cases, the quality of agency explanations of the law depends upon the accuracy of users’ inputs and, as a result, may vary widely.

Another likely objection to recommending that agencies bind themselves to unilateral agency explanations is that doing so could disincentivize agencies from offering this guidance to the public. Agencies’ view of the law may reasonably change over time, and binding agencies to their explanations could undermine their ability to reflect such changes. However, our proposal for binding agencies does not require agencies to adhere to the same explanations of the law forever. Rather, agencies would be bound only on a retroactive basis to parties who had relied on such statements. Agencies may prospectively change their explanations of the law to conform better with their views over time. This possibility of change balances the rule-of-law benefits of binding agencies with the flexibility that agencies need to administer the law most effectively.

Some may protest that, as a general matter, each of our proposals will increase burdens on agencies and potentially reduce guidance for the general public. If agencies were to respond to our proposals by ceasing to issue agency explanations, especially where there is complex or absent formal law, their reticence would harm individuals most in

need of plain-language explanations of the law. In response, we acknowledge that democratic values like transparency, participation, and reliability can increase the burdens of governance. However, we do not believe that we should only be willing to bear these costs for sophisticated parties and industry insiders. Moreover, we believe that adopting the reforms we suggest may be less costly than we might suppose if they improve agency communication norms over time. For instance, if agencies bound themselves to follow unilateral explanations of the law, agency officials may exercise greater caution when issuing such explanations rather than refraining from issuing them altogether. This effect could result in agency explanations that are more consistent with underlying formal law and that are less likely to cause agencies to adopt conflicting legal interpretations when applying and enforcing the law in the future. Greater democratic parity for administrative communications with the general public thus may increase the reach and power of agency explanations. The result may be an improved, more democratic system of agency communications.

C. Where To Begin?

Agency communications with the general public, including explanations of the law, appear in a variety of different resources, media, and platforms. These formats range from oral communication by agency officials to static, printed publications to FAQs appearing on agency websites to interactive, automated legal guidance tools. 297 As a result, instituting our proposals could require wide-reaching changes. This Section directs policymakers toward the types of agency communications that most urgently need reform.

Policymakers should devote their immediate attention to the types of agency explanations that are most likely to lead to use and reliance by parties who lack access to legal resources, including sophisticated third-party advisors. And again, to prevent abuse of some of the reform proposals we have offered, policymakers should focus on situations involving reasonable, rather than any, reliance on such explanations.

To address agency explanations that are the most likely to induce use and reliance from individuals lacking access to sophisticated counsel, policymakers should first address agency explanations found on automated legal guidance and other online tools on agency websites. Specifically, the types of agency explanations to which

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297. See supra notes 71–89 and accompanying text.
policymakers should first apply our proposed reforms include chatbots, virtual assistants, online FAQs, and other online tools offered by agencies to the general public.

There are several reasons that support starting with this type of agency explanation. First, as we have shown, where agencies have introduced online tools, such as chatbots and other forms of automated legal guidance, members of the public have accessed these tools due to the speed and efficiency with which these tools can provide information.298 In 2020, USCIS, for instance, has reported that its chatbot Emma has successfully responded to more than thirty-five million inquiries from more than eleven million users.299 USCIS also described Emma as a “very useful tool for many of [its] applicants and the general public” because of its ability to provide responses to users’ inquiries.300 In contrast, the agency’s printed publications regarding immigration rules often consist of dozens of pages of text that individuals must read and interpret to find relevant information.301

Second, when agencies use automated legal guidance tools to deliver advice to users, they often speak in unqualified, authoritative terms. For instance, the IRS’s ITA provides users with an “answer” and opines on whether certain expenses are deductible.302 Printed IRS publications, by contrast, often include longer discussion and more frequent use of examples that reach differing outcomes depending on the circumstances.303 The use of unequivocal descriptions of the underlying law that often occur through automated legal guidance are likely to result in reasonable reliance by users.

Finally, compared to static, printed, informal guidance documents, online tools often offer guidance that appears to be tailored and personalized to individual users. Online tools, such as chatbots and FAQs, often feature agency explanations with second-person

298. See BLANK & OSOFSKY, ACUS REPORT, supra note 90.
300. Id. at 03:01.
302. See ITA, supra note 73.
303. See, e.g., IRS Publication 526, supra note 78.
pronouns such as “you” or “yours.”

Recent technological developments reinforce the need for policymakers to prioritize the democracy deficit arising out of agencies’ use of automated legal guidance and other online tools. Since the November 2022 public launch of a beta version of Open AI’s ChatGPT (Chat Generative Pre-trained Transformer), a chatbot that can communicate with users in a conversational tone, commentators have predicted that the tool may have significant effects on the design of chatbots and internet search engines. Public demand for such tools may cause agencies to introduce chatbots and other virtual assistants with similar user-friendly interfaces to help the public understand and follow the law. In light of these developments, policymakers should not delay in revising administrative law norms to respond to increased reliance by individuals on these tools. Agency explanations, already pervasive in agency interactions with the public, are poised to significantly expand their reach with the advent of more sophisticated chatbot technology. Incorporating the reforms suggested by this Article into any agency expansion of such technology may be a critical way of responding to an otherwise growing democracy deficit in agency interactions with the public.

CONCLUSION

One of the most fundamental issues in administrative law is how to police agency legal statements so that agencies can function effectively but also legitimately. Administrative law responds with an intricate rulemaking framework, which subjects different agency statements to different regimes. This extensive framework purports to

304. See ITA, supra note 73.
305. See, e.g., Ryan E. Cruz, James M. Leonhardt & Todd Pezzuti, Second Person Pronouns Enhance Consumer Involvement and Brand Attitude, 39 J. INTERACTIVE MKTG. 104, 104 (2017); Navdeep S. Sahni, S. Christian Wheeler & Pradeep Chintagunta, Personalization in Email Marketing, 37 MKTG. SCI. 236, 237 (2018) (finding that including the name in the subject line “increased the probability of the recipient opening the email by 20%”).
cover all sorts of rules and guidance that agencies offer to the public. In contrast to prior scholarship on these regimes, this Article addresses situations where agencies issue statements that attempt to explain the law to the general public.

In examining this type of agency communication, this Article makes several significant contributions to the legal literature. First, this Article demonstrates that the current administrative law framework that applies to agency statements fails to capture agency interactions with the general public, including agency explanations of the law. Agency explanations of the law do not fit within any of the existing categories of agency statements. These categories fail to apply to agency explanations of the law because each of them rests upon the assumption that when agencies issue statements, they are communicating what the law is or what they believe it to be. However, as we have documented extensively, when agencies provide explanations of the law to the general public, they often present the law as simpler than it is or what they believe it to be.

Second, we have rooted this gap in administrative law within a broader “democracy deficit.” On one hand, we have shown how current administrative law fails to ensure that agency communications with the general public occur in ways that are consistent with transparency, public review, and debate—fundamental features of democratic governance. On the other hand, we have shown that the administrative law framework provides significant protections to sophisticated parties and industry insiders when they interact with agencies during the development and issuance of guidance.

Third, after exploring this democracy deficit, we have proposed a new framework for ensuring that agency communications with the general public are consistent with administrative law and democratic values. This framework, we have argued, would encourage public participation in drafting agency explanations of the law, provide opportunities for challenging published agency explanations, and allow members of the public to rely on certain agency explanations by binding the agencies to follow these statements in enforcing the law.

This Article thus provides policymakers with a guide for extending to the general public some of the same protections and opportunities that sophisticated parties and industry insiders enjoy. The analysis and recommendations of this Article are relevant to legislators, government officials involved in regulatory guidance, practitioners, and scholars specializing in administrative law and democratic institutions.