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Communicative Administration: The Administrative State Beyond Legal Administration

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Abstract. On many dimensions, the administrative state is at the nadir of its power. The Supreme Court has tightened administrative law controls on agency power, and the Trump Administration has stormed the bureaucracy in an unprecedented blitz designed to kneecap agency capacity and independence. For better or worse, many agencies and their civil servants are being sidelined as meaningful actors in the administration of government. Yet this familiar account doesn't tell the entire story. At the same time that agencies are being stripped of the power to implement law—what this Article calls “legal administration”—they are steadily accumulating extensive and largely unchecked powers to advance controversial policy goals through strategic uses of information and communication—what this Article calls “communicative administration.”

These powers, though not new, are becoming more potent: Amplified by modern communication technologies and legally unencumbered, they are emerging as attractive policymaking tools for partisan overseers of the administrative state. Against this backdrop, communicative administration is poised to become a stronger focal point for both real-world administrative action and significant contestation over administrative power. Already, the last two presidential administrations have aggressively used communicative administration to pursue policy goals that might exceed the scope of agencies' power in the

* Professor of Law, Texas A&M University School of Law. This Article benefited from presentation and feedback at the New Administrative Law Scholarship Roundtable at the University of Michigan Law School, the ABA Administrative Law Spring Academic Workshop, the University of Oklahoma School of Law Faculty Colloquium, and the Texas A&M University School of Law Public Law Workshop. I am grateful to Nick Bagley, Nicholas Bednar, Emily Bremer, Elena Chachko, Nathan Cortez, Katherine Mims Crocker, Haiyun Damon-Feng, Dan Deacon, Anuj Desai, Laura Dolbow, Bridget Fahey, Susan Fortney, Jeremy Graboyes, Andrew Hammond, Nick Handler, Chris Havasy, Monica Haymond, Jeff Lubbers, Alex Mechanick, Nina Mendelson, Gillian Metzger, Joel Michaels, Melissa Mortazavi, Julian Davis Mortenson, Jennifer Nou, Alex Nunn, Chris Odet, Nick Parrillo, Todd Phillips, Con Reynolds, Rachel Rothschild, Bill Sage, Matthew Sanders, Gabe Scheffler, Jennifer Selin, Bijal Shah, Jed Shugerman, Wendy Wagner, Chris Walker, and David Zaring for helpful guidance and conversations. Thanks also to Kirsten Worden and Michael Cooper, Texas A&M J.D. Class of 2025, for excellent research assistance, and to the entire editorial staff at the *Stanford Law Review* for their helpful suggestions and careful attention to the manuscript.

more traditional domain of legal administration—for instance, using social media to fight pandemic misinformation or running nationally televised commercials to encourage self-deportation. Responding to these strategies, courts have begun to improvise in the administrative law vacuum that surrounds communicative administration, seeking to curtail through legal means what used to be constrained by informal norms.

These developments have the potential to change not only the degree of power wielded by the administrative state, but also the very nature of that power. This Article seeks to draw greater scholarly attention to these risks by systematically charting the domain of communicative administration and showing how it eludes traditional administrative law constraints, even as it stands to become more consequential and contested in a highly polarized information society. The Article then ventures preliminary answers as to how communicative administration might be both harnessed to achieve goals that are no longer attainable through legal administration and regulated so as to prevent populist authoritarian co-optation. At its best, communicative administration could be part of a resurgent administrative democracy in a time of informational and democratic crisis; at its worst, it could be an instrument of democratic backsliding. Prevailing trends favoring executive power over administrative agencies make the latter far more likely, but the present moment is an inflection point, and either future remains possible. Which future prevails will be determined, in part, by how administrative law responds to the rise of communicative administration.

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Introduction

Among the many memorable moments of the COVID-19 pandemic was the disinformation storm surrounding the antifungal drug ivermectin and its purported uses for treating COVID-19. Well before the pandemic, ivermectin was viewed as a cure-all in certain medical subculture communities, but when a small group of advocates began to tout the drug as a “miracle” for treating the disease afflicting the nation, the ivermectin hysteria took off.¹ Interest in ivermectin and other “non-evidence-based treatments,” such as hydroxychloroquine, was so widespread that more than 1 in 20 COVID-19 patients reported using such treatments.² Of course, the use of ivermectin for this purpose was not supported by any scientific evidence, and its use not only risked medical consequences for users, but also distracted some from adopting more evidence-based treatments that might have been more effective.³ Given these risks, it was unsurprising that the Food and Drug Administration (FDA) intervened. What was more surprising was *how* the FDA intervened.

Rather than using any of its legal levers, such as regulating the marketing of the drug by manufacturers or distributors, the FDA issued what it called a “Consumer Update”—a bulletin directed at the general public.⁴ The FDA’s website for consumer updates bears a tagline: “Science-based health and safety information you can trust.”⁵ In its ivermectin consumer update, titled “Why You Should Not Use Ivermectin to Treat or Prevent COVID-19,” the FDA acknowledged that ivermectin was approved for certain uses in animals and humans, but stressed that it had not “authorized or approved ivermectin for use in preventing or treating COVID-19 in humans or animals,” and that “[c]urrently available data do not show ivermectin is effective against COVID-

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1. Kaitlyn Tiffany, *How Ivermectin Became a Belief System*, ATLANTIC (Mar. 22, 2023) (quoting *Early Outpatient Treatment: An Essential Part of a COVID-19 Solution, Part II*, 116th Cong. (2020) (statement of Pierre Kory, Assoc. Professor of Med. at St. Luke’s Aurora Med. Ctr.)), <https://perma.cc/FB8M-HBSM>.
 2. See Roy H. Perlis et al., *Misinformation, Trust, and Use of Ivermectin and Hydroxychloroquine for COVID-19*, 4 JAMA HEALTH F. e233257, at 7 (2023), <https://perma.cc/T87M-FDZJ>.
 3. *Id.* at 2 (noting that “[b]eyond a lack of efficacy,” use of ivermectin was “associated with risk of toxic effects” and “introduced inefficiencies” that “may help explain the observed association between more misinformation-prone countries and greater COVID-19 death rates”); see also *Ivermectin and COVID-19*, U.S. FDA, <https://perma.cc/7Y4E-RDX3> (last updated Apr. 5, 2024) (noting that the FDA “has determined that currently available clinical trial data do not demonstrate that ivermectin is effective against COVID-19 in humans”).
 4. See *Apter v. Dep’t of Health & Human Servs.*, 80 F.4th 579, 583-84 (5th Cir. 2023). The FDA has issued more than 150 consumer updates on a variety of topics, including advice about how (and how not) to protect oneself from sun damage, chemical additives in food, colorectal cancer, and more. See generally *Consumer Updates*, U.S. FDA, <https://perma.cc/WWD4-WLPZ> (last updated Oct. 23, 2025).
 5. *Apter*, 80 F.4th at 583-84.

19.”⁶ The FDA further warned that “[t]aking large doses of ivermectin is dangerous” and urged consumers who received a prescription from a health care provider to “take it *exactly* as prescribed” and to “[n]ever use medications intended for animals on yourself or other people.”⁷ Around the same time as it issued its ivermectin consumer update, the FDA used its official social media accounts to blast out warnings to an even broader audience: “You are not a horse. You are not a cow. Seriously, y’all. Stop it.”⁸

While it is difficult to know for sure, given many confounding factors, the FDA’s messaging may well have helped to quell interest in using ivermectin to treat COVID-19. Both interest in ivermectin, as measured by internet searches for “buy ivermectin,” and prescriptions for ivermectin fell sharply after the FDA’s August 2021 social media posts and continued their decline through the FDA’s final post in April 2022.⁹ The social media posts, in particular, went “viral.”¹⁰ And the FDA did all of this without so much as mentioning any legal obligation or announcing any interpretation of any statute.¹¹ All it did was communicate its own warning, understanding, and advice, like a good neighbor would.

Of course, some neighbors are bad—even noxious or manipulative. It is not hard to imagine a world where the FDA, at the urging of the President or Secretary of Health and Human Services, tweeted out precisely the opposite advice: “You may not be a horse or a cow, but you deserve to protect yourself from COVID-19 in whatever way you want. Ask your doctor about ivermectin today.” Or what if, as has actually happened in the second Trump Administration, the Department of Homeland Security ran nationally televised advertisements in which then-Secretary Kristi Noem offered thanks to President Donald Trump for his brutal stance on immigration enforcement and advised, “President Trump has a clear message: if you are here illegally, we will find you and deport you. You will never return. But if you leave now, you may have an opportunity to return and enjoy our freedom and live the American

6. *Id.* at 584 (quoting *Why You Should Not Use Ivermectin to Treat or Prevent COVID-19*, U.S. FDA, <https://perma.cc/YC5Y-WLN3> (last updated Dec. 10, 2021)).

7. *Id.* (quoting *Why You Should Not Use Ivermectin to Treat or Prevent COVID-19*, *supra* note 6).

8. *Id.* at 583-85 (quoting U.S. FDA (@US_FDA), TWITTER (Aug. 21, 2021, 7:57 PM), <https://perma.cc/JJE8-2Y95>).

9. See Adam M. Ostrovsky & Chitra Parikh, *Impact of Misinformation on Ivermectin Internet Searches and Prescribing Trends During COVID-19*, 45 J. PUB. HEALTH 631, 633-34 (2023). Of course, the interest in ivermectin has not entirely abated. See Richard Fausset, *Why the Right Still Embraces Ivermectin*, N.Y. TIMES (Mar. 31, 2025), <https://perma.cc/L75T-D4QJ>.

10. Stephanie Vine, *Saying Farewell to the Famous Horse Tweet*, MED. MAKER (Apr. 26, 2024), <https://perma.cc/5TP8-GSMF>.

11. See *Apter*, 80 F.4th at 584-85. The consumer update and associated “FAQ,” as they originally appeared, are reprinted in the *Apter v. Department of Health & Human Services* opinion. See generally *id.*

Dream.”¹² If agencies are empowered to freely communicate helpful advice, they can easily use those same powers to mislead and deceive.

Allowing administrative agencies to freely communicate information, beliefs, advice, and the like to the public has obvious benefits, but also obvious costs. Whether you want to harness the power of communication to adapt administrative governance to the digital age and enhance administrative democracy, or you are a would-be authoritarian or partisan information warrior seeking to speak directly to the public outside of legal constraint, the opportunity afforded by agency communications like these cannot be ignored. It is the premise of this Article that we have not thought enough about whether administrative law can and should be used to constrain agencies’ communicative power, but that this fraught moment in the history of the administrative state—in which we are seeing communicative administration being used in increasingly significant and unconstrained ways—forces us to do so. Because of this undertheorization, when the Fifth Circuit intervened to hold that the FDA’s ivermectin posts plausibly exceeded the agency’s statutory authority,¹³ it was taking a blind step into the necessary but fraught project of integrating such communicative action into the administrative law fold. This Article aims to shed more light on the questions that this move raises.

Beneath the FDA’s ivermectin consumer update, the Department of Homeland Security’s self-deportation ads, and countless other similar agency activities¹⁴ lie profound questions for administrative law, the body of law that helps to legitimize the exercise of administrative power by cabining administrative discretion and incorporating democratic input into Executive Branch decisionmaking.¹⁵ Activities like these—which this Article collectively terms “communicative administration”—are difficult to place into the traditional categories of analysis under administrative law. Despite sharing with “rules,” “orders,” and “guidance” an orientation toward changing behavior, norms, and even culture, they are formally and functionally distinguishable. Unlike conventional legal tools of administration, communicative administration activities do not have any legal effect or relevance, and instead involve communicating explicitly non-legal, purely informational material to

12. *DHS Announces Nationwide and International Ad Campaign Warning Illegal Aliens to Self-Deport and Stay Out*, U.S. DEP’T HOMELAND SEC. (Feb. 17, 2025), <https://perma.cc/2Z3B-RGCN>.

13. *Apter*, 80 F.4th at 583.

14. See *infra* Part I.C (typologizing different types of activities conducted by agencies involving information communication and collecting examples).

15. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 531-32 (2015) (“Administrative law, at root, is the process by which otherwise unencumbered agency officials are legally and politically constrained in an effort to prevent abuse and to confer legitimacy on the power that is exercised.”); see also *infra* text accompanying notes 166-72 (defining the boundaries of the field of administrative law).

outside audiences—for example, facts, data, opinions, practical advice, and much more.¹⁶ Whereas the conventional tools of what might, for the sake of contrast, be called “legal administration” invoke the formal sovereign power of the state to regulate private conduct or provide guidance about potential legal implications, communicative administration is no more legally relevant than ordinary conversations between people. In fact, communicative administration is perhaps best understood as the administrative state’s capacity to converse with the public as a co-equal partner in democratic deliberation and contestation.¹⁷ Its power is merely the “power to persuade.”¹⁸

Administrative lawyers and scholars have long noticed the blurry boundaries between the domain of legal administration and the more nebulous domain of communicative administration, even if they have not used precisely these terms. In 1973, following scholarship from Ernest Gellhorn,¹⁹ the Administrative Conference of the United States recommended that agencies develop internal standards to constrain abuse of “adverse agency publicity”—that is, communications such as press releases that impose reputational or economic harms on regulated or implicated parties.²⁰ In 2015, Nathan Cortez concluded that agencies were using modern means of electronic communication

16. See *infra* Part I.A (defining communicative administration as public, discretionary, non-legally relevant communication offered by agencies to the public). Critically, what I am calling communicative administration here is categorically distinguishable from what is more widely known as *informational regulation*—a category which includes things like “nudges,” “mandated disclosure,” and a panoply of other explicitly legal mechanisms that use communication (or force communication) in order to accomplish regulatory ends. See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: THE FINAL EDITION* (2021) (advocating for greater use of nudges as a softer, and sometimes more effective regulatory tool); William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701 (1999) (discussing mandated disclosure as a form of regulation); Hannah Bloch-Wehba, *Information Law Pluralism*, 101 IND. L.J. (forthcoming 2026) (providing a sweeping overview of information law and its many forms).

17. Deliberation and contestation are central to democratic defenses of the administrative state, see Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 9-10, 13-14 (2022), but these accounts have typically focused on communication coming *from* civil society and directed *to* agencies. Less recognized, but central to this Article’s normative perspective that communicative administration can be a democratic good, is that agencies themselves are speakers and participants in dialogue with the public.

18. Cf. Carlo Prato & Ian R. Turner, *The Institutional Foundations of the Power to Persuade*, 70 AM. J. POL. SCI. 120, 120 (2024) (discussing the literature on the President’s “power to persuade” agencies to go along with presidential agendas, including Richard Neustadt’s seminal work, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP FROM FDR TO CARTER* (1960)).

19. Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380 (1973) (drawing attention to the phenomenon of adverse publicity—both its positive uses and potential harms).

20. See *Recommendation 73-1: Adverse Agency Publicity*, 38 Fed. Reg. 16839 (June 27, 1973).

to engage in “modern publicity” that “tends to be written, presented, and disseminated in ways that could magnify the issues associated with traditional publicity.”²¹ Subsequently, the Administrative Conference revisited their earlier recommendation and proposed that agencies voluntarily adopt written standards and policies to internally govern their use of social media, press releases, public databases, and the like.²² Ultimately, the recommendation was adopted only in general terms.²³ Perhaps this was because, as Cortez acknowledged in his report, many agencies had organically developed internal constraints based on “informal custom and tradition.”²⁴

But recent trends in communicative administration suggest that these norms, customs, and traditions may be in the process of completely breaking down. As a large body of research has documented, society has undergone rapid changes in its informational ecosystem, with misinformation and fractured epistemic foundations now being exploited by deeply polarized ideological actors to engage in information warfare and undermine democracy.²⁵ These problems have crossed into the realm of public administration with recent presidential administrations—especially the second Trump Administration—each pushing agency communications that seem designed to skirt constraints on formal legal power in order to pursue deeply contested aims.²⁶ These developments reveal the stakes of administrative law’s longstanding

21. NATHAN CORTEZ, AGENCY PUBLICITY IN THE INTERNET ERA 3 (2015); see also Michael Herz, Opinion, *We Are All Publicists Now*, REGUL. REV., <https://perma.cc/ZEM8-T9X3> (May 3, 2016) (noting that “[g]overnmental publicity has always stirred controversy,” and that agencies make extensive use of new communicative technologies to expand the possibilities of communicative administration).

22. See COMM. ON ADMIN. & MGMT., ADMIN. CONF. OF THE U.S., PROPOSED RECOMMENDATION: AGENCY PUBLICITY IN THE INTERNET ERA 7 (2015), <https://perma.cc/8569-FBWC>.

23. See Adoption of Recommendations, 81 Fed. Reg. 40259, 40259-60 (June 21, 2016).

24. CORTEZ, *supra* note 21, at 4. Whether written or unwritten, these sorts of internal constraints are a prime example of what Gillian Metzger and Kevin Stack call “internal administrative law.” Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1244 (2017).

25. See generally, e.g., YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS (2018) (describing a general epistemic crisis in media and politics, driven largely by institutional, cultural, and political forces wielding new technologies); LEE MCINTYRE, ON DISINFORMATION: HOW TO FIGHT FOR TRUTH AND PROTECT DEMOCRACY (2023) (describing disinformation strategies deployed by politicians and others and their amplification); RICHARD L. HASEN, CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT (2022) (linking a glut of unreliable speech to ideas of market failure and arguing it weakens democracy by undermining the public’s ability to determine the veracity of information).

26. See *infra* Parts II.C.2, III.B (recounting recent episodes of arguable agency abuses of communicative administration during the Biden Administration and the second Trump Administration).

marginalization and undertheorization of communicative administration.²⁷ What is at risk is not merely reputational harms to firms from adverse publicity, as prior work has suggested,²⁸ but also the politicized distortion and weaponization of a key facet of administrative power²⁹ and the forfeiture of much of the democratic potential of agency communication.³⁰

This Article intervenes at this critical moment in the administrative state's history, aiming to bring communicative administration to the center of discussions about the future of the administrative state and to problematize administrative law's relationship to this form of administrative power. In doing so, the Article makes three contributions. First, Part I registers communicative administration as a central practice of public administration. As we will see, agencies draw on an arsenal of communicative modalities, and these modalities can in some ways serve as functional substitutes for legal administration, greatly enhancing agencies' powers. Second, Part II shows that communicative administration is formally outside of administrative law's purview, creating a "gap" in administrative law's regulation of public administration writ large. Formally, communicative administration activities are simply not constrained by the Administrative Procedure Act (APA) and other administrative law principles despite the functional similarity of communicative administration tools to many forms of legal administration that *are* so constrained. Sensing this gap, courts have begun to scope out limits on communicative administration through novel and uncomfortable applications of existing administrative law principles designed for the tools of legal administration. Third, Part III situates communicative administration in the contemporary politics of administration. I argue that recent uses and abuses of communicative administration, especially but not exclusively in the second Trump Administration, make filling the administrative law gap imperative.³¹ But rather than relying on courts to serve

27. For instances of the marginalization of communicative administration in administrative law, see text accompanying notes 172-218 below.

28. See *supra* notes 19-21 and accompanying text.

29. See *infra* Part III.B.

30. See *infra* Part III.A. On the claim that government communications are an essential democratic input, see notes 66-76, 294-305 and accompanying text below. For recent scholarship about the "post-truth" moment—scholarship which sees government persuasion, expression, and education as a pathway toward epistemic foundations for a pluralistic democracy—see COREY BRETTSCHEIDER, *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?: HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY* 13-15 (2012); LINDA M.G. ZERILLI, *A DEMOCRATIC THEORY OF TRUTH* 149-51 (2025).

31. One cannot help but notice how the rise of presidential control of communicative administration dovetails with the rise of "presidential administration," see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (coining the term "presidential administration" to describe accumulating presidential power over the administrative state), and the dangerous embrace of the "unitary executive theory" both in judicial opinions and in the President's public rhetoric, see PETER M. SHANE, *From the* footnote continued on next page

as a stopgap constraint on agency judgments about communication—an enterprise doomed to fail and fraught with risks of judicial aggrandizement—we ought to instead embrace structural solutions that diversify sources of agency communication and preserve channels of independence in such communication. Reforms such as these would both reduce the significant risks of populist authoritarian weaponization of communicative administration and help realize the enormous potential for communicative administration to enhance regulation and, indeed, democracy.

I. The Domain of Communicative Administration

One prominent way of thinking about the concept of public administration takes its cue from Woodrow Wilson, who defined public administration as the “detailed and systematic execution of public law.”³² In Wilson’s thinking, public administration involves legal administration—the “particular application of general law”³³—and nothing else. But as theorists have recognized, the concept of public administration is much richer than formalistic legal administration and incorporates political norms and managerial imperatives.³⁴ In this Part, I show that Wilson’s narrow understanding of public administration as legal administration tends to define away a class of activities that we also ought to think of as a cohesive and distinct concern of public administration: the domain of communicative administration. I contend that as a descriptive matter, communicative administration is enormously important to the way the modern administrative state operates, and it is only poised to grow in importance.³⁵

“Unitary” to the “Entitled” Executive, in DEMOCRACY’S CHIEF EXECUTIVE: INTERPRETING THE CONSTITUTION AND DEFINING THE FUTURE OF THE PRESIDENCY 3, 6-13 (2022) (contextualizing the unitary executive theory amid the rise of presidential power). I suggest in Part III.B below that presidential control of communicative administration is also a serious threat to democracy.

32. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 212 (1887).

33. *Id.*

34. FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT* 22 (1900) (noting that public administration extends beyond merely executing “positive law” to seeing to the execution of the “will of the state”); DWIGHT WALDO, *THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION* 109 (1948) (arguing that public administration involves “permanence, capacity, and expertise in government service” and that it is a “subject-matter field or technique in which one can specialize, a science and art one can learn”).

35. See *infra* Part III.A-.B (elaborating on why communicative administration will be more important as time passes).

A. Communicative Administration Precisely Defined

Communicative administration is a gestalt concept that ties together many patterns of agency behavior.³⁶ As with all gestalts, it can be somewhat difficult to offer a satisfying conceptual definition, but attempting to do so can be helpful at the outset. I define communicative administration as outward-facing, discretionary administrative messaging or informative communication, separate from the elaboration or implementation of law.³⁷

There are several conditions built into this definition that need to be unpacked. First, communicative administration involves messaging or informative communication to an audience outside the agency itself. Much of what agencies do involves internal communication (for example, communications among agency staff and officials about whatever the agency is doing³⁸) and internal information provision, sharing, and management.³⁹ But these activities do not qualify as communicative administration as I define the concept, because these kinds of communications are not primarily intended to speak to external audiences. To constitute communicative administration, the primary intent of the communication must be to reach the general public, or some constituency of it.⁴⁰

Second, communicative administration involves communication of information that is not required to be disclosed by the agency. There is, of course, a whole body of trans-substantive law that demands agency transparency and

36. See *infra* Part I.C (providing a typology of communicative administration activities).

37. Again, prior scholarship has previously focused on much of what falls within this definition. See *supra* notes 19-23 and accompanying text; see also Nathan Cortez, *Information Mischief Under the Trump Administration*, 94 CHI.-KENT L. REV. 315, 316 (2019) (identifying an overarching concept of “information policy” that includes “the countless decisions that the President and federal agencies make in deciding how—and indeed whether—to generate, collect, publish, and present information”). However, as will become apparent, each of my conditions limits the domain of communicative administration so that it does not entail literally any information provision that happens to connect to agencies.

38. Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 430 (2015) (conceptualizing agencies as “information-processing organizations” and describing internal negotiations between political appointees and permanent agency staff).

39. See generally Bridget A. Fahey & Raul Castro Fernandez, *The Structural Law of Data*, 93 U. CHI. L. REV. 67 (2026) (discussing the legal frameworks that determine how agencies manage and disseminate the information they possess).

40. In this sense, communicative administration might be conceived of as the external side of the larger “fact-making function” of the administrative state that Haiyun Damon-Feng has named. See Haiyun Damon-Feng, *Agency Fact-Making*, 135 YALE L.J. (forthcoming 2026) (manuscript at 3-4) (identifying the “fact-making function” as a “fourth core function of agencies” beyond rulemaking, enforcement, and adjudication, and arguing that it encompasses actions where “[a]gencies conduct original research and produce information,” “aggregate, analyze, and process data,” and “disseminate information through various forms and channels for consumption by private and public parties alike” (footnote omitted)).

disclosure of certain information.⁴¹ There are likewise many statutes that require agency information disclosure in a more targeted way—often to fulfill some regulatory purpose, such as helping people avoid exposure to toxic chemicals.⁴² Insofar as communications stem from legal obligations to disclose, these activities are separate from communicative administration as I define it.⁴³ But there is, critically, much more that agencies communicate that is not required by any law to be disclosed to outside audiences. For example, no law requires the National Park Service to post humorous memes to its social media accounts.⁴⁴ This kind of communication is instead something that agencies undertake voluntarily because they believe that the communication will be beneficial in some sense.⁴⁵ Often, that purpose is to change the behavior of the

41. See generally MARGARET B. KWOKA, *SAVING THE FREEDOM OF INFORMATION ACT* (2021) (providing a thorough overview of transparency law and contemporary debates about it); David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097 (2017) (critiquing transparency law).

42. See, e.g., 42 U.S.C. § 11023(j) (mandating that the EPA “establish and maintain in a computer data base a national toxic chemical inventory based on data submitted to the Administrator under this section” and “make these data accessible by computer telecommunication and other means to any person on a cost reimbursable basis”). The aforementioned Toxics Release Inventory, established as a part of the Emergency Planning and Community Right-to-Know-Act, is a canonical example of these regulatory disclosure statutes. See Annie Brett, *Rethinking Environmental Disclosure*, 112 CALIF. L. REV. 1535, 1537-38 (2024). Such requirements are ubiquitous in environmental law. See *id.* at 1538.

43. When agencies are obligated by statute or executive order to communicate information but go above and beyond what is required, I consider this superfluous communication as part of the domain of communicative administration. These distinctions require careful attention to specific disclosure requirements, and sometimes they are effectively obliterated by broad language requiring public disclosure “as appropriate,” or some such. See, e.g., 21 U.S.C. § 350(g) (requiring the FDA to follow a recall with a “press release” as well as “alerts and public notices, as appropriate, in order to provide notification” to affected consumers and retailers).

44. See Jurgita Dominauskaitė & Saulė Tolstych, *National Park Service Hired the Perfect Social Media Person as Their Tweets Are Hilarious so Here Are 34 of the Best Ones*, BORED PANDA (Jan. 26, 2023), <https://perma.cc/SBU5-EHAF> (to view the page correctly, click “View the live page” in the top right corner or “Accept and Close” if the browser allows).

45. See *infra* Part I.B (elaborating on the beneficial uses that agencies might anticipate from using communicative administration). An interesting case arises in the context of “leaks,” which are by definition not required by law but which arguably serve important purposes, both for the individual leaker and for the government as a whole. See generally David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013) (describing and characterizing the practice of leaking in the U.S. government). It makes sense to think of leaks and other similar forms of civil servant whistleblowing and counterspeech as part of communicative administration. See *infra* Part III.C (encouraging forms of dissenting counterspeech as a means to constrain risks associated with tight presidential control of communicative administration).

target audience by leveraging the reputation of the agency as a repository of knowledge that is situationally relevant to the recipient.⁴⁶

Third, and most importantly, communicative administration is not intended to implement law and is instead intended to be purely communicative in nature. In some sense, everything agencies do is concerned with the elaboration or implementation of law, if what we mean by law is the general mandate to pursue some organizational objective set by the Constitution or by statute.⁴⁷ General examples of this practice include protection of the environment or public health or the implementation of a social welfare system. But if we take instead a plausible definition of law implementation that is more definite—for example, the elaboration of legally binding obligations through rules and orders, as well as the issuance of legally suggestive guidance⁴⁸—there is much communication that agencies do that is not even plausibly intended to be legally operative. Examples of such communications include the publication of educational material on an agency website,⁴⁹ or the publication of agency-gathered data on Data.gov or other repositories.⁵⁰ There are harder cases, such as the FDA’s ivermectin statements or Homeland Security’s self-deportation recommendation.⁵¹ Those cases communicated subject matter that *could have*

46. See, e.g., *Put Safety on the Menu: Consumer Product Safety Commission Offers Safe Cooking Tips for a Joyful Holiday Season*, U.S. CONSUMER PRODS. SAFETY COMM’N (Nov. 19, 2025), <https://perma.cc/R9MM-BKCT>; see also *infra* text accompanying notes 59-65 (discussing the notion of agency reputational capital and connecting that with organizational goals such as regulation).

47. See Yoon-Ho Alex Lee, *Beyond Agency Core Mission*, 68 ADMIN. L. REV. 551, 553-54 (2016) (describing the conventional wisdom that conflates agency mission with legal mandate). Something like this intuition is frequently articulated by judges. See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting) (“Agencies are creatures of Congress—‘an agency literally has no power to act . . . unless and until Congress confers power upon it.’” (quoting *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986))); *Am. Bus. Ass’n v. Slater*, 231 F.3d 1, 9 (D.C. Cir. 2000) (Sentelle, J., concurring) (“Agencies have no inherent powers. They instead are creatures of statute, and may act only because, and only to the extent that, Congress affirmatively has delegated them the power to act.”). As Alex Lee notes, however, almost everyone seems to have some theory about an agency’s “core mission” that is based on an “extrinsic concept” separate from the agency’s organic statutes. Lee, *supra*, at 554.

48. See *infra* text accompanying notes 173-83 (distinguishing communicative administration from rules, orders, and guidance as they are defined and understood under the APA and general administrative law principles). I would also include spending as a part of law. See Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1077, 1083 (2021) (arguing that appropriations are a source of law and that administrative lawyers should pay more attention to the importance of law implementation in this context).

49. See *infra* Part I.C.2 (discussing examples of agencies engaged in teaching and education, such as the Securities and Exchange Commission’s investor education website).

50. See *infra* Part I.C.3 (discussing examples of agencies collecting, curating, and sharing critical data—for example, BLS reports on the economy).

51. See *supra* text accompanying notes 1-12.

been the basis of some sort of legal action, but were arguably not *intended* to be legally operative as rules, orders, or guidance. The fact that intent, rather than subject matter, is what divides the domain of legal administration from the domain of communicative administration makes for some difficult line drawing exercises.⁵² But unless we are prepared to say that a vast array of agency communications that are not typically thought of as legally operative are rules simply because they state “general principles” that *could* be embodied in rules, we cannot avoid drawing these lines.⁵³ Put differently, all legal administration involves communication (namely, communication of information *about* what the law may or may not require), but not all agency communication could be construed as intending to affect the world legally. Communicative information entails only the subset of agency communication that cannot be construed as intending to engage in lawmaking or law elaboration.

Taking a step back, what emerges from these three conditions is the recognition that agencies have inherent powers as authors, deliberators, creators, speakers, and publishers of messages or information. In other words, agencies have their own discursive voice that is separate from their “legal voice.”⁵⁴ And although there are some laws that govern this space, they are more

52. Many of these difficulties arise when an agency carefully avoids using legally operative language but treats the informational communication as a legal obligation. See Nathan Cortez & Lindsay F. Wiley, *Hortatory Mandates*, 91 GEO. WASH. L. REV. 617, 620, 622 (2023) (identifying certain agency actions that are “hortatory in form but mandatory in function,” and identifying a rise of such communications in recent years, especially during the COVID-19 pandemic). This problem parallels that which plagues courts’ efforts to distinguish legislative rules from nonlegislative guidance—often guidance is couched in precatory language or even explicitly disavows any binding effect but is nevertheless understood by agencies and intended audiences alike as a legally binding statement that should be treated as a legislative rule. See Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 168-69 (2019). Here, the challenge is discerning intent to implement law (either through binding rules or guidance) or to do something categorically non-legal, but the basic challenge of figuring out what is going on in the “brain” of an agency is the same.

53. As we will see, the rejection of this foundational premise is behind the Fifth Circuit’s decision to block FDA’s ivermectin communications in *Apter v. Department of Health and Human Services*, 80 F.4th 579, 583 (5th Cir. 2023). The court saw the communications as rules because they announced the general principle that people should avoid ivermectin, with no inquiry into whether the agency intended to communicate a legal message. See *id.* Taken at face value, the Fifth Circuit’s novel move might be understood to significantly encroach on the domain of communicative administration by defining agency communications that arguably do not have the intent to implement law as legal administration. See *infra* text accompanying notes 226-48 (discussing *Apter* and arguing that it attempts to extend general administrative law principles into the domain of communicative administration).

54. While some have argued that “[a]gencies have no inherent regulatory powers,” Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1528, speech is not regulatory, *footnote continued on next page*

of the exception that proves the rule—which is that agencies are presumptively free to use their non-legal voice as they see fit.⁵⁵ This is reflected in its purest form in the “government speech” doctrine under the First Amendment, which protects the government from constitutional scrutiny when it engages in speech that endorses a particular message.⁵⁶ As the Supreme Court has explained, Free Speech Clause challenges to instances of government speech that endorse a particular viewpoint should generally fail, because “it is the democratic electoral process that first and foremost provides a check on government speech.”⁵⁷ But beyond doctrine, some clearer recognition of government’s right to speak and express viewpoints seems inevitable, and certainly the elimination of government speech seems unthinkable.⁵⁸ This space is where communicative administration lives.

B. The Value of Communicative Administration

Although it is not always fully appreciated, communicative administration is central to public administration. First, communicative administration is in some sense the social circuitry that allows administrative agencies to be the kind of effective and responsive organizations that are even theoretically capable of fulfilling the missions that they serve. As Daniel Carpenter’s work shows, agencies must develop substantial institutional capital in order to carry out programs, and the most successful agencies do so by investing in reputational power.⁵⁹ Part of this power emerges from “the capacity to shape patterns and

and there is no suggestion that I am aware of that agencies do not inherit the general governmental power to speak as non-legal communicators.

55. See, e.g., *infra* notes 184-218 and accompanying text (discussing exceptions).

56. See HELEN NORTON, *THE GOVERNMENT’S SPEECH AND THE CONSTITUTION* 28-29 (2019) (characterizing the government speech doctrine). Much of the existing scholarship on the government speech doctrine focuses on how that doctrine applies in explicitly educational settings, such as public schools. See, e.g., Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 *WAKE FOREST L. REV.* 211, 212 (2013); Caroline Mala Corbin, Essay, *The Government Speech Doctrine Ate My Class: First Amendment Capture and Curriculum Bans*, 76 *STAN. L. REV.* 1473, 1476-78 (2024). However, there has been increased recognition of the relevance of the doctrine for ordinary government activities, especially in light of the first (and second) Trump Administration’s weaponization of government communication. See Michael Kang & Jacob Eisler, *Rethinking the Government Speech Doctrine, Post-Trump*, 2022 *U. ILL. L. REV.* 1943, 1945; G. Alex Sinha, *The End of Government Speech*, 44 *CARDOZO L. REV.* 1899, 1903 (2023).

57. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015).

58. See Daniel J. Hemel & Lisa Larrimore Ouellette, *Public Perceptions of Government Speech*, 2017 *SUP. CT. REV.* 33, 34-35 (“If all government speech were subject to the viewpoint-neutrality requirement, public administration would be paralyzed: a city could not erect a sign saying ‘STOP’ without adding one that says ‘GO.’”).

59. See DANIEL CARPENTER, *REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA* 10-11 (2010). For a helpful overview of some
footnote continued on next page

terms of thought and learning” through diffuse communicative activities over a sustained period of time, as when the FDA helped to establish and define the basic terms of modern pharmaceutical processes.⁶⁰ Being an active, leading participant in ongoing discursive exercises helped to solidify the FDA’s reputation among networks essential to the collaborative improvement of pharmaceutical regulation.⁶¹ When agencies develop this kind of reputational power, it becomes harder to assess the lines between law and “soft power.”⁶² Often an agency with a strong reputation need not invoke its “directive power” in order to actually influence behavior. For instance, severe weather warnings from the National Weather Service do not have to justify themselves for people to trust them and seek shelter. The Service’s reputation lays the groundwork for that trust. When this kind of trust exists, simply communicating salient information that audiences are inclined to credit might be enough to shape behavior at the ground level. And indeed, directive powers themselves might be more efficacious because of the communicative, or “expressive,” value of the statement.⁶³ Such reputational clout can also unlock the expressive power of communication—imbuing purely non-legal communication with law-like qualities.⁶⁴ Specifically, by virtue of their reputation, such agencies’ communications may inherently be a “focal point” around which diverse networks coordinate their activities.⁶⁵

Second, communicative administration is a potential source of democratic legitimacy. Administrative agencies, like any entity of government in a democracy, ultimately depend on developing “sociological legitimacy”—that is,

empirical literature on why and how agencies invest in their reputations, see Lauren A. Fahy, Erik-Hans Klijn & Judith van Erp, *Regulatory Agency Reputation Acquisition: A Q Methodology Analysis of the Views of Agency Employees*, 19 *REGUL. & GOVERNANCE* 104, 107-08 (2025).

60. See CARPENTER, *supra* note 59, at 17.

61. See *id.*

62. On “soft power,” see JOSEPH S. NYE, JR., *THE FUTURE OF POWER* 20-22 (2011) (distinguishing soft and hard power), as well as more recent work arguing that soft power expands in “information revolutions,” Joseph S. Nye, Jr., *The Information Revolution and Power*, 113 *CURRENT HIST.* 19, 19 (2014). For an application of the soft power concept to regulation and administrative law, see Adam S. Zimmerman, *Ghostwriting Federalism*, 133 *YALE L.J.* 1802, 1882 (2024).

63. See RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 5-6 (2015) (theorizing the expressive power of law as the power to induce coordination and provide information that changes beliefs).

64. See *id.* at 6-8.

65. See *id.* at 5 (discussing the theory of focal points). See generally KAUSHIK BASU, *THE REPUBLIC OF BELIEFS: A NEW APPROACH TO LAW AND ECONOMICS* (2018) (same). This point is especially important for the category of communicative administration that I call “information entrepreneurship,” which works because the government’s development of critical data on which private actors rely is a focal point. See *infra* Part I.C.3.

“the beliefs of a relevant population that an authority or decision is acceptable,”⁶⁶ regardless of “fear of sanctions or mere hope for personal reward.”⁶⁷ Scholars have identified many ways that administrative agencies foster this condition, such as adhering to procedural norms that afford the public rights to participate in and contest agency decisions,⁶⁸ or by maintaining clear lines of accountability to democratically elected leaders.⁶⁹ Most of these existing efforts to tie administration to democracy assume a sort of “trustee” or “monitory” model of democracy in which agency action is formally assessed and evaluated by outside constituents.⁷⁰ However, democracy is ideally a shared social project where the government and public together develop, through deliberation and contestation, a collective sense of the directions that the demos should take.⁷¹ In this more robust democratic project, communicative administration is essential. Theorists of democracy have long understood that some degree of communicative administration may be necessary for democracy to work and to ward off pathologies that naturally emerge in democratic government.⁷² The “public mind” is not preformed, and it may not even tend naturally toward social ties that transcend sectoral, economic, or cultural divisions in a large, pluralistic society.⁷³ Arguably one of the central tasks of a democratic government writ

66. Brian D. Feinstein, *Legitimizing Agencies*, 91 U. CHI. L. REV. 919, 928, 930 (2024).

67. *Id.* at 928, 932-33 (quoting Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005)) (discussing the concept of sociological legitimacy at it applies to administrative agencies).

68. *See, e.g.*, Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. 749, 796 (2023); *see also* Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 LAW & SOC'Y REV. 809, 811 (1994) (collecting articles about the role of procedural influences on the public perceptions of government).

69. *See, e.g.*, Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 54 (2008).

70. *See, e.g.*, Nikhil Menezes & David E. Pozen, *Looking for the Public in Public Law*, 92 U. CHI. L. REV. 971, 986 (2025); Katharine Jackson, *Administration as Democratic Trustee Representation*, 29 LEGAL THEORY 314, 324 (2023).

71. *See* Menezes & Pozen, *supra* note 70, at 1012 (noting the need to “empower publics that can perform the regulatory roles ascribed to them and make credible claims on behalf of ordinary people”); Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. 1763, 1765 (2023) (articulating a vision of agonistic republicanism that views contestation as constitutive of democracy); BLAKE EMERSON, *THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 173 (2019) (urging a fulfillment of a progressive vision of public participation and deliberation in administrative decisionmaking).

72. *See infra* text accompanying notes 298-304 (discussing the views of Walter Lippmann and John Dewey on the subject of government efforts to educate the populace and steer public opinion in a democracy).

73. *See* Menezes & Pozen, *supra* note 70, at 992-93 (acknowledging social scientific evidence that reveals the “public” to still be more of a “phantom” than a coherent force in regulation, and discussing “designed activation” theories that suggest that “special contrivances are needed to generate publics that can play a regulatory role”).

large is to invest in the formation of a public mind,⁷⁴ and it can accomplish this through a wide variety of distinctively communicative activities, such as the delivery of public education or the fostering of a press that can relay information to the public.⁷⁵ Agencies, too, insofar as they engage in communicative administration, are an important part of this dynamic. Certain agencies, as Heidi Kitrosser notes, are explicitly understood to be “public knowledge producers” because of their educative or journalistic missions.⁷⁶ Whether because of information and data that are created by agencies and then shared with the public or because of the active participation of agencies as participants in discourses over ideas and issues of importance to the community, agencies’ voices can help to shape what emerges from the democratic process.

We can set aside for now whether these motivations for communicative administration are counterbalanced by other considerations that might justify intervention to curb agency communicative administration.⁷⁷ For now, the point is that communicative administration is plausibly part of the essential business of the administrative state. Even if legal administration ceased to exist, there might still be a compelling case to be made that communicative administration should continue on, as there are no readily available substitutes for the communicative functions of agencies,⁷⁸ at least not to the same depth as

74. See JOSEPH TUSSMAN, *GOVERNMENT AND THE MIND* 3 (1977) (noting that democratic government not only has responsibilities for the development of the minds of its denizens, but “also that [those] responsibilities . . . are among the most important that it has”); *id.* at 115 (“[T]he proper image for the relation of government to public opinion is not one in which government, the ‘servant of the people,’ stands passively waiting for orders from its master; but rather one which recognizes that government is to lead, to discern needs, to formulate, propose, persuade, to enter as an active partner into the deliberative life of the community, into the process by which we make up our minds.”).

75. *E.g.*, Matthew Patrick Shaw, *The Public Right to Education*, 89 U. CHI. L. REV. 1179, 1181-82 (2022) (observing the critical nature of public education); Erin C. Carroll, *Beyond Democracy: How a Free Press Supports the Rule of Law*, 47 CARDOZO L. REV. 1, 33-39 (2025) (observing the important symbiosis between government and the free press).

76. See Heidi Kitrosser, *Protecting Public Knowledge Producers*, 4 J. FREE SPEECH L. 473, 475-78 (2024). An example of one of these agencies is the U.S. Agency for Global Media. *Id.* at 474.

77. See *infra* Part III.B (discussing these types of considerations).

78. See TUSSMAN, *supra* note 74, at 10-11 (“A polity must, if it is to continue, recruit and incorporate new members; it must provide for a fruitful life of communication; it must direct attention to its problems and cultivate the knowledge and wisdom it needs. Or it will die. There is, therefore, an overwhelming public interest in the condition of the mind, that, without exaggeration, may be regarded as the most fundamental part of the public domain.”); MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 22 (1983) (“The preservation of democracy, then, requires a balance between communications from government and those addressed to it.”). The most obvious alternative institution—the press—is beset with serious problems, including a lack of real commitment to making democracy work. See Hannah Bloch-Wehba, *The Ideology of Press Freedom*, 14 U.C. IRVINE L. REV. 1, 16 (2024) (noting a
footnote continued on next page

agencies' present communications. And that is especially true once we begin to see how common communicative administration really is and how it works in practice.

C. Charting the Domain of Communicative Administration

As Helen Norton notes, “agencies are now among the most prolific and significant of government speakers, bringing the government’s speech into our everyday lives.”⁷⁹ This Subpart maps the domain of communicative administration, developing a rough typology. I show that communicative administration is not monolithic—agencies have a variety of modalities of information provision through which they can advance their work, each modality adapted to particular goals, technologies, and audiences. Each of these modalities raises different issues, but all are part of the domain of communicative administration and can be usefully understood as similar departures from the paradigm of legal administration. These modalities are: (1) public advisories; (2) education; (3) informational entrepreneurship; (4) persuasion; and (5) naming, praising, and shaming.

1. Public advisories

The FDA’s ivermectin communications, discussed above, are a prime example of what might be called “public advisories,” which provide non-legal, non-binding recommendations for private behavior. They are, however, hardly the only example of public advisories in the administrative state. The Consumer Financial Protection Bureau, for instance, issues what it calls “consumer advisories” through its newsroom. The Bureau recently advised consumers to “[s]teer clear of costly and complex loans for solar energy installation,” citing the “[h]igh-pressure sales pitches” that mislead about what consumers are “really sign[ing] up for.”⁸⁰ Another consumer protection agency, the Federal Trade Commission (FTC), issues “Consumer Alerts” on a wide variety of scams and tells people how to avoid them.⁸¹ The FTC even cautions consumers about FTC impersonators, noting that the “FTC will never threaten you, say you must

tendency to “romanticize the press’s accountability-forcing role and the bygone days of dogged investigative reporting”).

79. NORTON, *supra* note 56, at 12. Some have suggested that there should be even more agency speech. See generally Gabriel Scheffler & Daniel E. Walters, *The Submerged Administrative State*, 2024 WIS. L. REV. 789, 796 (arguing that agencies are muzzled in a variety of ways and should be liberated from existing restraints on their public relations activities so that they can “unsubmerge[.]” their work and improve the public’s ability to understand what agencies do).

80. *Consumer Advisory: Steer Clear of Costly and Complex Loans for Solar Energy Installation*, CFPB (Aug. 7, 2024), <https://perma.cc/H2W7-F3CP>.

81. See *Consumer Alerts*, FTC, <https://perma.cc/JM8J-DKCC> (archived Feb. 16, 2026).

transfer your money to ‘protect it,’ or tell you to withdraw cash or buy gold and give it to someone.”⁸² Finally, the Environmental Protection Agency (EPA) uses its website to release “advice” about such matters as what seafood to eat when one might be pregnant,⁸³ as well as how to reduce lead exposure from drinking water in affected areas.⁸⁴

Another prominent use of public advisories is to communicate information about more exigent risks using alerts and ratings. An example is the State Department’s “Travel Advisories,” which provide recommendations about the risk involved in traveling to particular countries.⁸⁵ The Department’s Bureau of Consular Affairs maintains a website that collects advisories for particular countries and displays one of four possible recommendations: “Level 1: Exercise Normal Precautions;” “Level 2: Exercise Increased Caution;” “Level 3: Reconsider Travel;” and “Level 4: Do Not Travel.”⁸⁶ Despite the imperative language, it is well understood that travelers may still travel to countries with a Level 4 advisory, although the Department has at times ominously recommended that citizens “write a will prior to traveling and leave DNA samples in case of worst-case scenarios.”⁸⁷ The advisories contain additional “risk indicators” that

82. *Scams*, FTC, <https://perma.cc/8QP2-S4G9> (archived Feb. 16, 2026).

83. *EPA-FDA Advice About Eating Fish and Shellfish: For Females Who Might Become Pregnant, Are Pregnant, Are Breastfeeding, and for Children*, U.S. EPA, <https://perma.cc/7RBQ-6ML3> (last updated Nov. 6, 2025).

84. *See Advice to Chicago Residents About Lead in Drinking Water*, U.S. EPA (May 7, 2025), <https://perma.cc/9T5K-45XK>; *Advice to Flint Residents*, U.S. EPA (Feb. 10, 2026), <https://perma.cc/CB7Z-NK44>.

85. *Travel Advisories*, U.S. DEP’T STATE, <https://perma.cc/9TC2-NEMU> (last updated Aug. 11, 2025).

86. *Crime*, U.S. DEP’T STATE, <https://perma.cc/HA5J-ZSML> (last updated Aug. 11, 2025). Technically, the Travel Advisory Program includes both “travel warnings,” which are explicitly intended to render advice and recommendations, and “consular information sheets,” which avoid anything that could be construed as advice. *Fact Sheet: Travel Advisory Program*, 3 U.S. DEP’T STATE DISPATCH 775, 775 (1992).

87. *See Rachel Wolf, US Consulate Warns of Gun Battles, IEDs, Kidnappings in Mexican Border Towns Near Texas*, FOXNEWS (Jan. 28, 2025, 10:33 AM EST), <https://perma.cc/7ZF7-7HH8> (quoting *Safety and Security Messaging*, U.S. DEP’T STATE: BUREAU CONSULAR AFFS., <https://perma.cc/7JYF-RT57> (last updated Mar. 6, 2024)). The quoted language about wills and DNA samples has, unfortunately, been deleted from the State Department’s website—an illustration of the informational whiplash that characterizes presidential transitions in an age of communicative administration, *see infra* Part III—although the advice is still widely shared verbatim on news and state government websites. *See, e.g., Wolf, supra; State Information Security Foreign Travel Policy*, MD. DEP’T INFO. TECH., <https://perma.cc/K7BZ-4WHD> (last updated Jan. 24, 2025) (“The Department of State advises that U.S. citizens not travel to the country or to leave as soon as it is safe to do so. We advise that you write a will prior to traveling and leave DNA samples in case of worst-case scenarios.”). A notable exception to the purely advisory nature of these alerts is the travel advisory to North Korea, which specifically notes that travel to the country is prohibited unless one is approved for “special validation.” *See North Korea*, U.S. DEP’T STATE (Apr. 29, 2025), <https://perma.cc/WZL9-PETD>.

identify the precise nature of the threats that justify heightened caution.⁸⁸ Another familiar example is the National Weather Service’s (NWS) “Alerts” system, which announces a variety of warnings and watches for tornadoes, floods, and the like.⁸⁹ In fact, the NWS has collaborated with several other public safety agencies—namely, the Federal Emergency Management Agency (FEMA), the Federal Communications Commission, and the Department of Homeland Security—to automatically send “Wireless Emergency Alerts” through private wireless networks to inform people of localized and national emergencies, including extreme weather warnings, local emergencies requiring evacuation, AMBER alerts, and presidential alerts.⁹⁰

Public advisories, especially when they contain bite-sized amounts of information, are also tailor-made for mass-media devices such as ad spots, which can be embedded in social media feeds, posted on highway billboards, or broadcast on national television. By their nature, such agency messages tend to focus less on exigent risks and more on general warnings and recommendations. For instance, a recent National Highway Traffic Safety Administration (NHTSA) advertisement campaign on billboards around the country shows terrifying images of sharks before highlighting that texting while driving is far more dangerous.⁹¹ In contrast to much government communication, some agency ads employ humor and sarcasm to more effectively communicate public advisories to audiences who have come to expect creativity in marketing. For example, FEMA partnered with a private organization to produce an ad depicting a family taking turns discussing how they would fail to prepare for emergencies, which the agency then discouraged by noting that “[w]inging it is not an emergency plan.”⁹² The ad then directs viewers to Ready.gov, FEMA’s more traditional informational website, which contains recommendations for the public.⁹³

Many more potential examples of public advisories appear once one realizes that rules, orders, and guidance often contain a communicative component that is distinguishable from what makes these actions classifiable as legal administration. For instance, some agencies have the legal power to order recalls

88. *Travel Advisories*, *supra* note 85.

89. *Active Alerts*, NAT’L WEATHER SERV., <https://perma.cc/YZ4T-QSDQ> (archived Feb. 16, 2026).

90. *Weather Warnings on the Go!*, NAT’L WEATHER SERV., <https://perma.cc/6SKS-WGHF> (archived Feb. 16, 2026).

91. AD COUNCIL, *The Dive—Really Scary: Distracted Driving Prevention* (YouTube, Oct. 24, 2023), <https://perma.cc/H2SQ-AA8W> (to view the video, click “View the live page”).

92. Video posted by FEMA (@FEMA), FACEBOOK, *Winging It Is Not an Emergency Plan* (Mar. 5, 2014), <https://perma.cc/4CNN-LXA4> (to view the video, click “View the live page”).

93. *Id.*; *Let’s Make a Plan*, U.S. DEP’T HOMELAND SEC., <https://perma.cc/7EKF-WAT3> (last updated Mar. 4, 2024).

of products that they deem unsafe.⁹⁴ What makes these actions orders under the APA is that they require businesses to take certain concrete steps to withdraw products from the market.⁹⁵ But in issuing recall orders, agencies may also provide information to the public that can simply help consumers avoid consumption.⁹⁶ The FDA, for instance, provides the public detailed information about tainted products, such as their Universal Product Code and Julian codes.⁹⁷ It is likely that much of the benefit of recalls is realized not because sellers remove products from shelves, but because consumers will check their refrigerators and throw away products that have been recalled. In these types of action, legal administration and communicative administration co-occur and are symbiotic, but are still identifiably different.

2. Education

While public advisories inherently involve an educative function in service of risk reduction, some agency actions are more generally educative—that is, they educate for learning’s sake. For instance, the Department of Agriculture (USDA) has long maintained a “Cooperative Extension Program,” managed by its National Institute of Food and Agriculture.⁹⁸ That program “provid[es] nonformal higher education and learning activities to farmers, ranchers, communities, youth, and families,” and is “operated through the nation’s land-grant university system in partnership with federal and state and local governments.”⁹⁹ Other agencies, such as the Bureau of Land Management and the National Park Service, provide programs like “Teachers on the Public Lands” and “Teacher Ranger Teacher,” both of which provide opportunities for elementary school educators to work with agency staff to learn about agency

94. See, e.g., 21 U.S.C. § 350l(b)(1) (granting the Secretary of Health and Human Services recall authority); 49 U.S.C. §§ 30118, 30120 (granting the Secretary of Transportation recall authority).

95. See 5 U.S.C. § 551(6); 49 U.S.C. § 30118(b) (authorizing the Secretary of Transportation to make “a final decision that a motor vehicle or replacement equipment contains a defect” and “order the manufacturer to . . . give notification . . . to the owners, purchasers, and dealers . . . and remedy the defect”); 21 U.S.C. § 350l(b)(1) (giving authority to the Secretary of Health and Human Services to “order” a responsible party to “immediately cease distribution of such article” and “notify” certain parties).

96. 49 U.S.C. §§ 30166(f), 30167 (requiring the Secretary of Transportation to make certain information public). The agency carries out its duty to inform the public through a searchable database. See *Check for Recalls*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <https://perma.cc/55VZ-M85F> (archived Feb. 17, 2026).

97. Bill Chappell, *Costco Egg Recall for Salmonella Receives FDA’s Most Severe Designation*, NPR (Dec. 27, 2024, 4:35 PM ET), <https://perma.cc/A45B-CHV3>.

98. See *Cooperative Extension Program*, U.S. DEP’T HEALTH & HUM. SERVS.: OFF. DISEASE PREVENTION & HEALTH PROMOTION (Sept. 10, 2024), <https://perma.cc/2T3Q-GR3C>.

99. *Id.*

practices and incorporate them in lessons for students.¹⁰⁰ Sometimes, agencies work to promote education on skills that cut across the interests of a wide variety of government programs. For example, the Census Bureau maintains a “Statistics in Schools Ambassador Program” that supports “statistical literacy” by partnering with educators to develop lesson plans based around census data.¹⁰¹

The usual model of agency education is to create programs that partner with more traditional educators to develop lesson plans and the like. But agencies also do much education themselves. National parks tend to offer guided tours led by NPS staff,¹⁰² and provide informational signs and placards that “welcome, direct, warn, inform, and more.”¹⁰³ The Securities and Exchange Commission’s Office of Investor Education and Advocacy maintains a website—Investor.gov—which is part of its mission to “[p]rovide[] a variety of services and resources to help investors invest wisely, build wealth, and avoid fraud.”¹⁰⁴ More recently, the Federal Energy Regulatory Commission has created an Office of Public Participation that provides “educational materials” about complex energy topics like how the electricity grids and markets work.¹⁰⁵ While these educational functions are usually subsidiary to agencies’ legal functions, they may be some of the most likely ways that the general public will actually interact with agencies.

3. Informational entrepreneurship

A good deal of communicative administration involves a constellation of products provided as what might be termed “informational entrepreneurship”: the provision of information, especially highly salient information, as a public good that may not be adequately supplied (or supplied efficiently) by private actors. Examples include the publication of key indices, datasets, and associated Application Program Interfaces that actors inside and outside government rely

100. *Teachers on the Public Lands*, U.S. DEP’T INTERIOR: BUREAU LAND MGMT., <https://perma.cc/HM2J-NDCE> (archived Feb. 18, 2026); *Teacher Ranger Teacher*, NAT’L PARK SERV., <https://perma.cc/S9MZ-PT54> (last updated Jan. 6, 2026).

101. U.S. Census Bureau, *Statistics in Schools Ambassador Program*, at 1 (n.d.), <https://perma.cc/9H8E-K8FN>.

102. *See, e.g., Guided Tours*, NAT’L PARK SERV.: NAT’L MALL & MEM’L PARKS, <https://perma.cc/TVF3-X6C5> (last updated Apr. 18, 2017).

103. *Signs*, NAT’L PARK SERV.: HARPERS FERRY CTR., <https://perma.cc/83C8-7XW3> (last updated July 23, 2024).

104. *Office of Investor Education and Advocacy*, U.S. SEC. & EXCH. COMM’N: OFF. INV. EDUC. & ADVOC., <https://perma.cc/TA5V-X39R> (archived Feb. 19, 2026).

105. *See* FED. ENERGY REG. COMM’N: OFF. PUB. PARTICIPATION, *GUIDE: AN INTRODUCTORY GUIDE TO ELECTRICITY MARKETS REGULATED BY THE FEDERAL ENERGY REGULATORY COMMISSION 1-2* (2025), <https://perma.cc/5TSV-DHCF>.

on heavily in coordinating and fueling their work.¹⁰⁶ Many agencies involved in these activities are part of a broader governmental consortium of informational entrepreneurs called the Federal Statistical System and an interagency council on statistical policy that spans almost every corner of the administrative state.¹⁰⁷

The poster child for informational entrepreneurship is the Federal Reserve Board's Federal Open Market Committee's (FOMC) publication of updates to its target range for federal funds—"the interest rate at which depository institutions . . . borrow from and lend to each other overnight."¹⁰⁸ The FOMC's target rates function less like rules, orders, or guidance, and more like salient reports on the state of the economy, because simply publishing the target rate causes predictable movement in a variety of lending markets.¹⁰⁹ This is true even though the Federal Reserve has its own "tools of monetary policy" that it can leverage to "ensure that market interest rates, especially the federal funds rate, move in the direction of the new target range."¹¹⁰ The FOMC's target rates can also cause serious damage when information happens to be wrong, as "hyper-responsive capital markets" may swiftly adjust prices to "reflect new information—whether the information is inaccurate, misleading, or simply misinterpreted."¹¹¹ Such is the importance of simple informational entrepreneurship. A single number like the target rate has enormous value precisely because it is a focal point for coordination of complex systems maintained by private actors.¹¹²

Much of the federal government's informational entrepreneurship originates in the Department of Commerce or the Department of Labor. For instance, the Department of Labor's Bureau of Labor Statistics is "the principal

106. See David Robinson, Harlan Yu, William P. Zeller & Edward W. Felten, *Government Data and the Invisible Hand*, 11 YALE J.L. & TECH. 160, 160-61 (2009); BETH SIMONE NOVECK, WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL 124-26 (2009); Kali Murray, *Infrastructure(s): Administering Information*, 71 BUFF. L. REV. 625, 662-63 (2023); Nathan Cortez, *Regulation by Database*, 89 U. COLO. L. REV. 1, 4-5 (2018).

107. Off. of Mgmt. & Budget, *About Us: The Federal Statistical System*, STATS.POLICY.GOV, <https://perma.cc/42R8-PGKC> (archived Feb. 19, 2026).

108. U.S. FED. RSRV. SYS., THE FED EXPLAINED: WHAT THE CENTRAL BANK DOES 25 (11th ed. 2021), <https://perma.cc/KCD7-6CV3>.

109. See Nathaniel Drake, *What Determines the Rate on a 30-Year Mortgage?*, FANNIE MAE (Dec. 11, 2024), <https://perma.cc/ML2V-H724>.

110. *How the Fed Implements Monetary Policy with Its Tools*, FED. RSRV. BANK ST. LOUIS, <https://perma.cc/6YAX-UYRH> (archived Feb. 19, 2026).

111. See Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 BYU L. REV. 1371, 1396 (capitalization altered).

112. See MCADAMS, *supra* note 63, at 5 (describing the concept of "focal points" and linking them to coordination).

fact-finding agency in the broad field of labor economics and statistics”¹¹³—providing benchmarking data on the state of the economy, as measured by things like unemployment,¹¹⁴ jobs,¹¹⁵ consumer prices,¹¹⁶ and productivity.¹¹⁷ Financial markets react sharply to these indices, both when they are first reported¹¹⁸ and when they are annually corrected,¹¹⁹ indicating the importance of getting the numbers right. Similarly, the NWS, which is part of the Department of Commerce’s National Oceanic and Atmospheric Administration, collects and shares data on the state of the atmosphere—data on which other agencies and private weather services, like AccuWeather, rely.¹²⁰ Again, this information has the potential to shape a good deal of private behavior.¹²¹ Because it is essentially the only game in town (no private system could exist at the scale supported by the government), it is a textbook example of informational entrepreneurship.

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113. Off. of Publ’ns & Special Stud., *BLS Information Guide*, U.S. BUREAU LAB. STATS., <https://perma.cc/KN8G-BWRH> (archived Feb. 20, 2026).
 114. Off. of Emp. & Unemployment Stats., *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU LAB. STATS., <https://perma.cc/375W-R4WV> (archived Feb. 20, 2026).
 115. Off. of Emp. & Unemployment Stats., *Job Openings and Labor Turnover Survey*, U.S. BUREAU LAB. STATS., <https://perma.cc/XGK5-8MB6> (archived Feb. 20, 2026).
 116. See Off. of Prices & Living Conditions, *Consumer Price Index*, U.S. BUREAU LAB. STATS., <https://perma.cc/EVQ3-SUEA> (archived Feb. 20, 2026). For a fantastic profile of this undertaking and the civil servants behind its success, see generally John Lanchester, *The Number*, in *WHO IS GOVERNMENT? THE UNTOLD STORY OF PUBLIC SERVICE 100* (Michael Lewis, ed., 2025).
 117. Off. of Productivity & Tech., *Productivity Research and Program Development*, U.S. BUREAU LAB. STATS., <https://perma.cc/86K8-6XWP> (archived Feb. 20, 2026).
 118. See BEN S. BERNANKE & KENNETH N. KUTTNER, FED. RSRV. BANK OF N.Y., STAFF REPS. No. 174, *WHAT EXPLAINS THE STOCK MARKET’S REACTION TO FEDERAL RESERVE POLICY?* 10, 14 (2003), <https://perma.cc/WH9T-QH8L>; John H. Boyd, Ravi Jagannathan & Jian Hu, *The Stock Market’s Reaction to Unemployment News: Why Bad News Is Usually Good for Stocks* 3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 8092, 2001), <https://perma.cc/2AMA-JTVP>.
 119. See, e.g., *BLS Revisions: They’re Business as Usual and an Important Part of the Process*, JARED BERNSTEIN (Aug. 4, 2025), <https://perma.cc/C3E3-GHY9> (explaining that a “negative revision” in a jobs report “reverberate[d] through economic, financial, and political markets”).
 120. *AccuWeather Does Not Support Project 2025 Plan to Fully Commercializing NWS Operations; NOAA Has Critical Role in American Weather Enterprise*, ACCUWEATHER (July 10, 2024, 4:33 AM EST), <https://perma.cc/HSX7-7EA3>; EVA LIPIEC, CONG. RSCH. SERV., R47636, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA): ORGANIZATION OVERVIEW AND ISSUES FOR CONGRESS 1 (2025).
 121. See Sebastian Acevedo, Mico Mrkaic, Natalija Novta, Evgenia Pugacheva & Petia Topalova, *The Effects of Weather Shocks on Economic Activity: What Are the Channels of Impact?*, J. MACROECONOMICS, Sept. 2020, at 1 (showing the impacts of weather events on economic output); Jeffrey G. Shrader, Laura Bakkensen & Derek Lemoine, *Fatal Errors: The Mortality Value of Accurate Weather Forecasts 2-5* (Nat’l Bureau of Econ. Rsch., Working Paper No. 31361, 2023).

4. Persuasion

Some agency communications combine elements of the foregoing modalities in ways that seem designed to convince or motivate beliefs, lifestyles, or commitments, specifically where shared norms may not already exist. We can call this distinct modality “persuasion.”

A paradigmatic example is the USDA’s famous “Food Guide Pyramid,” a program first launched in 1992, which sought to “visually illustrate the amounts of each food group that should be consumed from the wide base (cereals and grains) to the narrow top (fats, oils, and sweets).”¹²² Subsequently, the pyramid was replaced with the MyPlate campaign, which purports to provide a “personalized approach to healthy eating.”¹²³ Most recently, the USDA and the Department of Health and Human Services issued updated Dietary Guidelines, including a “new” inverted pyramid with an emphasis on what they call “real food”—namely, proteins, vegetables, and fruits—and less on “processed foods” and refined carbohydrates.¹²⁴

Another example, also involving broad public health campaigns, was the “Let’s Move” campaign.¹²⁵ Let’s Move, an initiative of First Lady Michelle Obama, was “dedicated to solving the challenge of childhood obesity within a generation, so that children born today will grow up healthier and able to pursue their dreams.”¹²⁶ The initiative attempted to persuade the public that childhood obesity is a serious public health crisis,¹²⁷ but it also urged stakeholders to take “5 simple steps to success,” several of which contained recommendations for how to organize in civil society to advance the initiative’s goals.¹²⁸

These public health examples involve persuasion about personal lifestyle choices, but agencies’ persuasive endeavors can venture into more fraught terrain, such as values and civics. Historically, these kinds of appeals were more common. During World War I, for instance, the Wilson Administration created the “Committee on Public Information” to gin up public support for the war

122. RUTH MACDONALD & CHERYLL REITMEIER, UNDERSTANDING FOOD SYSTEMS: AGRICULTURE, FOOD SCIENCE, AND NUTRITION IN THE UNITED STATES 246 (2017).

123. *Id.*; U.S. Dep’t of Agric., *What Is MyPlate?*, MYPLATE, <https://perma.cc/Z792-9Q67> (archived Feb. 20, 2026).

124. *Kennedy, Rollins Unveil Historic Reset of U.S. Nutrition Policy, Put Real Food Back at Center of Health*, U.S. DEP’T AGRIC. (Jan. 7, 2026), <https://perma.cc/9WDN-AHDV>; U.S. Dep’t of Agric., *Real Food Wins*, REALFOOD, <https://perma.cc/4L8E-5FUF> (archived Feb. 20, 2026).

125. *Learn the Facts*, LET’S MOVE!, <https://perma.cc/7FSV-P8UJ> (archived Feb. 21, 2026).

126. *Id.*

127. *See id.*

128. *5 Simple Steps to Success*, LET’S MOVE! (capitalization altered), <https://perma.cc/WTH2-JFK8> (archived Feb. 21, 2026).

effort.¹²⁹ By the New Deal, such public-spirited communication was ubiquitous and not cabined to military efforts.¹³⁰ A poster from the Forest Service depicted “Smokey Bear” standing in front of a raging forest fire and a family of non-ranger bears and explaining, “This shameful waste WEAKENS AMERICA! Remember—Only *you* can PREVENT FOREST FIRES!”¹³¹ While such communication has become less common, due in part to its association with the idea of propaganda,¹³² there are still plenty of agency communications that exist mainly to persuade people of the importance of certain causes.¹³³

Persuasion can also combat general misinformation, as well as the risks of misinformation for agency reputations. Following Hurricane Helene, rumors circulated that FEMA was unprepared to help victims.¹³⁴ Noting that “[f]alse or misleading information can harm survivors by causing confusion and preventing people from getting the help they need,” FEMA launched a “rumor response page.”¹³⁵ That page aimed to “provide accurate information, keep people aware of rumors and scams and explain the federal disaster assistance programs and processes.”¹³⁶ As recently as January 2025, the page continued on, providing Hurricane Helene victims assurance that FEMA was not diverting funds from North Carolina and other affected areas to respond to wildfires in Los Angeles.¹³⁷ Rather explicitly, the page sought to persuade the public that FEMA could be trusted.

As with several of the other modalities, sometimes these kinds of persuasive activities are connected to, but distinct from, rulemaking and enforcement. In one infamous instance involving the EPA’s “Waters of the United States”

129. STEPHEN VAUGHN, *HOLDING FAST THE INNER LINES: DEMOCRACY, NATIONALISM, AND THE COMMITTEE ON PUBLIC INFORMATION* 23-24 (1980); NORTON, *supra* note 56, at 12; WALTER LIPPMANN, *PUBLIC OPINION* 46-47 (1922) (describing the Committee as the “largest and most intensive effort to carry quickly a fairly uniform set of ideas to all the people of a nation”).

130. *See* Scheffler & Walters, *supra* note 79, at 809.

131. *See* FOREST SERV., U.S. DEP’T OF AGRIC., 52-CFFP-4A, *THIS SHAMEFUL WASTE WEAKENS AMERICA! REMEMBER—ONLY YOU CAN PREVENT FOREST FIRES!* (1951), <https://perma.cc/X69E-C7V7>.

132. Scheffler & Walters, *supra* note 79, at 815.

133. *See, e.g., supra* text accompanying notes 122-28. These activities exist at the state level as well, as evidenced by the Texas Department of Transportation’s “Don’t Mess With Texas” anti-pollution campaign. *See* Katie Nodjimbadem, *The Trashy Beginnings of “Don’t Mess with Texas,”* SMITHSONIAN MAG. (Mar. 10, 2017), <https://perma.cc/B5KL-N2R4>.

134. *See* Filip Timotija, *FEMA Warns of Helene Misinformation, Launches ‘Rumor Response’ Page*, HILL (Oct. 10, 2024, 11:38 AM EST), <https://perma.cc/QH6V-7MD8>.

135. *FEMA Launches Web Page to Respond to Rumors and Confirm the Facts Related to Hurricane Helene Response and Recovery*, FED. EMERGENCY MGMT. AGENCY (Oct. 4, 2024), <https://perma.cc/MBS9-WWZF>.

136. *Id.*

137. *Hurricane Rumor Response*, FED. EMERGENCY MGMT. AGENCY, <https://perma.cc/HD5W-BVJR> (last updated Oct. 14, 2024).

rulemaking, the agency responded to a social media lobbying campaign urging the agency to “#DitchTheRule” by starting its own social media campaign to “#DitchTheMyth.”¹³⁸ The EPA’s campaign sought to publicly rehabilitate the rule and to encourage supporters to share their perspectives in the comment period.¹³⁹ Unsurprisingly, these social media campaigns are some of the most contested sorts of persuasive communications. Indeed, in response to a request from a Republican lawmaker, the Government Accountability Office (GAO) found that EPA violated prohibitions on “covert propaganda” by not clearly indicating the source of the message.¹⁴⁰ Subsequently, some critics argued that persuasion campaigns in the context of rulemaking are inappropriate, and the proposed Regulatory Accountability Act even contained limitations on ‘agency advocacy’ during comment periods.¹⁴¹ Ultimately, these efforts to institute a flat ban on agency advocacy connected to rulemakings failed, leaving many forms of agency persuasion to be constrained only by more targeted anti-publicity and anti-propaganda riders passed by Congress.¹⁴²

5. Naming, shaming, and praising

A final modality involves agencies communicating evaluative information about individuals or groups. Agencies have a long history of “naming and shaming” firms or individuals that have been subject to enforcement, investigation, inspection, or scrutiny.¹⁴³ For instance, the Occupational Safety and Health Administration has sometimes taken to X to announce alleged violations of worker safety regulations by specific firms, and the FDA has published a “blacklist” of companies that allegedly failed to share samples of name-brand drugs with prospective generic producers, suggesting that these firms were thwarting competition.¹⁴⁴ Indeed, such “adverse publicity” is extremely common at the FDA, which has been found to issue about one press announcement daily, 65% of which identify a specific product, company, or individual, frequently casting them in a negative light.¹⁴⁵

138. See Stephen M. Johnson, *#BetterRules: The Appropriate Use of Social Media in Rulemaking*, 44 FLA. ST. U. L. REV. 1379, 1399-1400 (2017).

139. *Id.* at 1400-01.

140. *Id.* at 1420-21.

141. See Christopher J. Walker, Essay, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 631, 664-65 (2017) (citing Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017)).

142. See *infra* notes 204-18 and accompanying text.

143. See Cortez, *supra* note 111, at 1378 & n.13 (discussing the Gellhorn study, *supra* note 19, of “adverse publicity” and scholarship that predated even that study).

144. Sharon Yadin, Opinion, *Should Regulators Shame Companies into Compliance?*, REGUL. REV. (Sept. 18, 2019), <https://perma.cc/U8JN-KZ88>.

145. Cortez, *supra* note 111, at 1375.

Many real-world uses of regulatory shaming fall outside of communicative administration, either because they must be disclosed or because they are so connected to law enforcement and agency adjudication that they fit nearer to legal administration than to communicative administration.¹⁴⁶ But at least some regulatory shaming is arguably free-standing from legal administration—the fact that an agency views certain actors or activities as suspect carries informational value and may be invoked separately from ongoing legal administration. In 2025, the U.S. Department of Education publicly broadcasted its intent to investigate fifty-two universities for their alleged use of “racial preferences and stereotypes in education programs and activities.”¹⁴⁷ While some of the listed universities may actually be targeted for enforcement actions, the list is the punishment for most: By publicly associating these institutions with views of “diversity, equity, and inclusion” that may be unpopular with certain constituencies, the Administration presumably seeks to impose reputational damage.

As is typical of communicative administration, there are positives and negatives to these kinds of communications. Firms and individuals have incentives to avoid public shaming by reputable institutions like administrative agencies, which can often easily influence behavior by selectively engaging in shaming.¹⁴⁸ But agencies can easily exploit this leverage, often with coercive effects or catastrophic consequences for targets.¹⁴⁹ It is therefore unsurprising that agencies’ use of so-called “adverse publicity” has been criticized by administrative law scholars, although only in the form of recommendations for internal norm-building.¹⁵⁰

146. For instance, a significant portion of adverse publicity in press announcements at the FDA accompanies final orders and seems inextricably interwoven with actual legal administration. *See id.* at 1413 (reporting statistics showing that only a fraction of FDA press announcements containing adverse publicity were about preliminary or pending action, as opposed to final orders). *See supra* Part I.A (defining and differentiating legal and communicative administration).

147. Juliana Kim, *Over 50 Universities Are Under Investigation as Part of Trump’s Anti-DEI Crackdown*, NPR (updated Mar. 14, 2025, 4:27 PM ET) (quoting Press Release, U.S. Dep’t of Educ., Office for Civil Rights Initiates Title VI Investigations into Institutions of Higher Education (Mar. 14, 2025), <https://perma.cc/X5D9-5HNM>), <https://perma.cc/7T2C-NMUX>.

148. *See* Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws*, 110 AM. ECON. REV. 1866, 1868 (2020) (finding that issuing a press release leads to 73% fewer violations at peer facilities within a 5-kilometer radius, yielding compliance gains roughly 50% greater than those produced by a typical OSHA investigation); Sharon Yadin, *Shaming Big Pharma*, 36 YALE J. ON REGUL. BULL. 131, 136-37 (2019).

149. *See* Yadin, *supra* note 148, at 137; *see also* Cortez, *supra* note 111, at 1380-88 (collecting examples and critiques of such shaming tactics).

150. *See supra* notes 19-24 and accompanying text (describing Administrative Conference recommendations and scholarship focusing largely on the reputational risks to firms or
footnote continued on next page

Less recognized is that agencies sometimes name to praise. Such praising can be directed toward exemplary actors, as it was with EPA's voluntary environmental leadership program, Performance Track.¹⁵¹ Agencies could also theoretically praise themselves and their employees to boost public trust in government, although such "naming and faming" has mostly been done by private organizations.¹⁵² Assuming that an agency has a good reputation, its efforts to praise might be just as useful as its efforts to shame, drawing attention to leadership or other laudable traits and encouraging its audience to reward that behavior through a behavioral change of their own. Of course, it is easy to see how this mechanism could become a tool for favoritism toward particular firms, individuals, or groups.

As this brief review suggests, communicative administration activities are far from a side show. Ubiquitous as the examples collected above are, they only scrape the surface. The pervasiveness of communicative administration raises questions about how the law accounts for this mass of activity, to which the next Part turns.

II. Administrative Law's Communicative Blind Spot

Besides being an integral part of how agencies operate, communicative administration presents significant questions about the boundaries of administrative law as a field—questions that have received insufficient attention. These questions arise because many of the modalities of communicative administration look much like the tools of legal administration

individuals targeted by such communications). Courts show more interest in constraining government action when such communications fall under the narrow "stigma-plus" doctrine of procedural due process. *See generally* Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79, 81 (2009) (reviewing the procedural due process jurisprudence around reputation as a cognizable liberty interest and urging a more capacious understanding).

151. Cary Coglianesse & Jennifer Nash, *Performance Track's Postmortem: Lessons from the Rise and Fall of EPA's "Flagship" Voluntary Program*, 38 HARV. ENV'T L. REV. 1, 13 (2014). The authors critique Performance Track and other voluntary programs as a mode of regulation, illustrating that the program was a suboptimal means of encouraging exemplary behavior. *See id.* at 83-86. However, such programs might still be beneficial if they are coupled with a sophisticated measurement and evaluation strategy. *See* Cary Coglianesse & Jennifer Nash, *Opinion, Rethinking the Value of Voluntary Environmental Programs*, REGUL. REV. (Aug. 25, 2014), <https://perma.cc/AUP5-Q4F2>.

152. *See* Alisa Zomer, *Naming and Faming (Not Shaming) to Hold Public Officials Accountable*, MIT GOV/LAB (Jan. 2018), <https://perma.cc/Q5UV-MZ5S> (describing private efforts to start a reality TV show called "Integrity Idol" in six countries that would praise "good public officials"); Casey Cep, *Dispatch, The Oscars for the Deep State*, NEW YORKER (Sept. 17, 2024), <https://perma.cc/5V4E-J2FC> (describing the "Sammies"—the Service to America Medals—awarded to outstanding civil servants in the federal government).

and are very often used to exercise power.¹⁵³ The tools of legal administration are regulated by administrative law likely because they are mechanisms for changing behavior using the sovereign, coercive authority of the state. But as we have seen, communicative administration often implicates practically the same concerns, and it can be very difficult to see where communicative power ends and legal power begins.

Despite this, administrative law systematically exempts most of the practice of communicative administration from the constraints that otherwise structure agency work.¹⁵⁴ The word *exempt* may even miss the mark; administrative law is actually just blind to communicative administration. This blind spot is also a vacuum where agencies can do things that would be more difficult in the register of legal administration, and recent presidential administrations have exploited this opportunity.¹⁵⁵ It is unsurprising, then, that we are beginning to see efforts by courts to fill the gap by extending administrative law designed for legal administration into the domain of communicative administration.¹⁵⁶

A. Communication Is Power

As Daryl Levinson has written, power is both central to public law and woefully underdefined—indeed, the term is “used so promiscuously in constitutional and political discourse that it might seem hopeless to insist on a single definition.”¹⁵⁷ Administrative law is likewise underdefined. The field can be basically understood as a regulatory response to the existence of discretionary power in administrative agencies,¹⁵⁸ but the scope of the field ultimately depends on how expansively one defines power.

Some scholars narrowly define power as the ability to control outcomes—that is, “A has power over B to the extent that he can get B to do something that B would not otherwise do.”¹⁵⁹ This “first face” of power can be further subdivided into “hard” and “soft” varieties, the former involving formal state

153. See *supra* Part I.A (defining communicative administration and noting that distinctions from legal administration often hinge on the hard-to-discern intent to engage in legal administration); *infra* text accompanying notes 157–65 (discussing theories of power).

154. See *infra* text accompanying notes 166–71.

155. See *infra* Part III.A–B.

156. See *infra* Part II.C.

157. Daryl J. Levinson, *The Supreme Court 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 33, 38–39 (2016).

158. *But see* Emily S. Bremer, *Power Corrupts*, 41 YALE J. ON REGUL. 426, 429 (2024) (arguing that the field of administrative law should focus less on power and more on administration). See generally KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969) (centering discretionary power in an account of the purposes of administrative law).

159. Levinson, *supra* note 157, at 39 n. 39 (quoting Robert A. Dahl, *The Concept of Power*, 2 BEHAV. SCI. 201, 202–03 (1957)).

power to coerce, and the latter encompassing efforts to “influence” behavior short of mandating it.¹⁶⁰ Other scholars have identified additional faces of power that can shape behavior and outcomes in subtler ways. Peter Bachrach and Morton Baratz highlighted as a “second face” the power one can exercise to prevent policy alternatives from being considered at all.¹⁶¹ Steven Lukes added a third dimension to this by highlighting the power to manipulate other actors such that their seemingly voluntary behavior happens to comport with the manipulator’s interests.¹⁶²

The power literature can help us to see what might otherwise be obscured by a focus on formal legal power¹⁶³—namely, that communicative administration fundamentally implicates political power. Only the narrowest understanding of power—the “hard” power to legally coerce a change of behavior—is inapplicable to communicative administration.¹⁶⁴ By contrast, one can readily see how communicative administration might change behavior either by exercising “soft” power to directly influence outcomes or by influencing attitudes so pervasively that there is no need to try to influence individual decisions.

As we will see, the power implications of communicative administration raise the question of why administrative law exempts communicative administration at all, as well as whether anything needs to or can be done to bring communicative administration under administrative law control.¹⁶⁵

B. The Legal Gap

Despite communicative administration’s functional power, administrative law has almost nothing to say about it. The communicative blind spot in administrative law begins at a conceptual level: Administrative law has almost always focused on a different set of public administration activities—that is, the exercise of legal power to bind or compel. Take, for instance, Ernst Freund’s linking, in 1923, of administrative law with the power of agencies to “administer

160. See Zimmerman, *supra* note 62, at 1882 (“The traditional portrayal of federal administrative agencies depicts an expert bureaucrat laboring on regulations that, if not set aside by the courts, will immediately bind an entire industry. But agencies, like nation-states, exercise soft power too.”).

161. Levinson, *supra* note 157, at 39 n. 39 (citing Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 947 (1962)).

162. *Id.* (citing STEVEN LUKES, POWER: A RADICAL VIEW 23 (1974)).

163. See *infra* notes 166-71 and accompanying text.

164. See *infra* Part II.B (discussing how the modalities of non-communicative administration do not exercise the power to bind).

165. See *infra* Part III.

law.”¹⁶⁶ Just a few years later, in 1927, Felix Frankfurter echoed Freund when he said that “administrative law deals with the field of legal control exercised by law-administering agencies other than courts, and the field of control exercised by courts over such agencies.”¹⁶⁷ Freund’s and Frankfurter’s fixation on the administration of legally binding material and their conspicuous lack of concern with non-legal administration such as communicative administration is also typical of more contemporary restatements of the purpose of administrative law.¹⁶⁸ The clearest example of this choice comes in the *Administrative Law Treatise*. While it does acknowledge that “[a]gencies . . . ‘administer’ in the broadest sense of that word,” (meaning “[t]hey investigate, enforce, cajole, politicize, spend, hire, fire, contract, collect information, and disseminate information”¹⁶⁹) the treatise also follows the traditional conception of administrative law by excluding much of that administration, focusing instead on “the processes through which agencies make and administer law.”¹⁷⁰ Even contemporary critics of the administrative state, such as Philip Hamburger, who presumably want to expansively construe the domain of administrative law, do not understand administrative law as reaching beyond the “executive power to issue edicts that bind, or confine, subjects.”¹⁷¹

These conceptual boundaries for the field are predictably made concrete in the “constitution” of administrative law—the APA. Under the APA, agency

166. Ernst Freund, *Historical Survey*, in ERNST FREUND ET AL., *THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* 9, 16 (1923) (“If the American lawyer takes an increasing interest in Administrative Law it is because he associates it with the fact that he has more and more occasion to attend to the interests of his clients in government departments and before commissions which claim to administer law without pretending to be courts of justice.”).

167. Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 615 (1927).

168. See, e.g., Cary Coglianese, Gabriel Scheffler & Daniel E. Walters, *Unrules*, 73 STAN. L. REV. 885, 894, 938 & n.215 (2021) (collecting sources focusing on controlling the imposition of “legal obligations” as the purpose of administrative law); see also Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 350 (2019) (criticizing the field’s obsession with imposing constraints on the exercise of legal powers and disregard of good governance). There are of course exceptions, such as the Gellhorn & Byse casebook, which contains a more general statement that “[a]dministrative law comprises the body of general rules and principles governing administrative agencies—governing both how they do their own work and how the results of that work will be viewed, or reviewed, by the President, Congress, and the federal courts.” PETER L. STRAUSS, TODD D. RAKOFF, GILLIAN E. METZGER, DAVID J. BARRON & ANNE JOSEPH O’CONNELL, *GELHORN AND BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS* 21 (12th ed. 2018). “Work” is probably a broad enough concept that it would sweep in communicative administration.

169. 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 1.1 (5th ed. 2010).

170. *Id.*

171. See generally PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 2 (2014). Elsewhere, Hamburger clarifies that edicts can be binding either in a “legislative” or “judicial” sense, and it is this feature that renders it allegedly unconstitutional, because the executive power is purportedly hermetically sealed off from exercising anything but “coercion” to implement an otherwise binding edict. See *id.* at 3-4.

action is either a rule, order, license, sanction, or relief, and agencies follow different procedures depending on the form of action as well as the formality of the action.¹⁷² While there are undoubtedly many difficulties that arise in distinguishing these different types of “agency action” under the APA,¹⁷³ all are clearly concerned with binding (or unbinding) some party. For instance, a rule is defined as a “statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy,”¹⁷⁴ and an order is defined as a “final disposition, whether affirmative, negative, injunctive, or declaratory in form.”¹⁷⁵ Even some of the less familiar forms of agency action, such as a “sanction” or “relief” are defined in ways that preclude non-binding, purely communicative action.¹⁷⁶ All of this definitional work makes the APA distinctly focused on what this Article calls “legal administration.”

One potential wrinkle arises from the category of agency action known as “guidance.”¹⁷⁷ Some treatments of guidance regard it as a sort of residual category of agency action that captures everything that agencies do that is not formally binding—potentially including activities that could be understood as

172. 5 U.S.C. § 551(13) (defining “agency action” as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act”); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1390 (2004) (“Each form has a different procedure associated with it.”).

173. See, e.g., PIERCE, JR., *supra* note 169, § 6.1 (collecting cases sifting through whether particular actions are rules or orders and noting that “[n]o one has yet proposed a definition of ‘rule’ that is entirely satisfactory”); see also Ronald M. Levin, *The Case for (Finally) Fixing the APA’s Definition of “Rule,”* 56 ADMIN. L. REV. 1077, 1077-78 (2004) (arguing that the APA’s definition of *rule* is incoherent and has largely been treated as irrelevant by the courts).

174. 5 U.S.C. § 551(4). The word “policy” in this definition of rules might seem somewhat squishier, such that it could encompass communicative administration. But context indicates a narrower meaning—the word “policy” is used in the APA to reference “general statements of policy,” which have always been understood to be statements about how agencies intend to exercise enforcement discretion in their adjudicative powers. See *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (“A general statement of policy is . . . neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings and adjudications.”).

175. 5 U.S.C. § 551(6).

176. See 5 U.S.C. § 551(10)-(11). But see Cortez, *supra* note 111, at 1442 (noting that there is evidence that the drafters of the APA might have understood “sanction” to include at least agency publicity that had an adverse impact on a party, although the courts have generally not interpreted it that way).

177. For background on guidance, see generally Parrillo, note 52 above. For further background, see Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263 (2018), focusing on judicial review of guidance and the confusing doctrinal edifice courts have erected to distinguish guidance from legislative rules.

purely communicative administration.¹⁷⁸ However, this catchall understanding of guidance is difficult to square with the fact that guidance exists as an exception to the procedural requirement to undergo notice-and-comment rulemaking; there is no recognition of “guidance” as a category of agency action independent of rules.¹⁷⁹ Technically, guidance documents are legislative rules that are exempt as interpretive rules or as policy statements.¹⁸⁰ What makes them exempt is that they are not considered formally binding absent further notice-and-comment rulemaking.¹⁸¹ However, they are often practically binding in the sense that they are reasonably accurate forecasts of how the law itself will be implemented.¹⁸² But in order to be considered guidance, such non-binding statements would still have to be sufficiently concerned with the elaboration of law to be viewed as exempt legislative rules. For this reason, many forms of communicative administration, including most agency websites (except those that meet the definition of rules on their own terms), are not properly understood as guidance at all, but rather as a separate category of action not contemplated by the APA.¹⁸³ At the end of the day, communicative administration is definitionally not intended to be legally material, and if that is true, it cannot possibly be either rules or guidance.

Widening the aperture to encompass more than just the APA, we see that much of the same pattern holds (with some notable exceptions that tend to prove the rule that communicative administration is a blind spot). At first

178. See, e.g., Cary Coglianese, *Illuminating Regulatory Guidance*, 9 MICH. J. ENV'T & ADMIN. L. 243, 247-55 (2020) (noting that “agencies and their employees presumably produce thousands, if not millions, of non-binding statements on a regular basis”).

179. Joshua D. Blank & Leigh Osofsky, *Democratizing Administrative Law*, 73 DUKE L.J. 1615, 1619 (2024) (noting that many agency statements do not fit the definitions of a rule because they are not intended to communicate a legal obligation, but instead to “present the law as simpler than it is” in order to enhance public “understand[ing]”). Blank and Osofsky persuasively argue that when an agency says something that is not meant to be a definitive articulation of the law, that statement is not within the definition of “agency action” as a rule, an order, or even as guidance. *Id.* at 1653.

180. See Admin. Conf. of the U.S., Statement of Principles for Agency Guidance Documents 1-2 (2024), <https://perma.cc/JD38-JQKK>.

181. David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278 (2010); see Levin, *supra* note 177, at 266.

182. See Parrillo, *supra* note 52, at 186.

183. See, e.g., Cortez, *supra* note 111, at 1442-53 (providing a thorough analysis of cases and concluding that judicial review is rarely available to challenge agency publicity). Consistent with this argument, when courts have been confronted with claims that these types of agency communications present justiciable issues, they have almost uniformly concluded that such actions are not reviewable, often because they are not “final agency action” under the APA. See *id.* The most notable exception is *Apter v. Department of Health and Human Services*, in which the Fifth Circuit held that FDA’s ivermectin communications were plausibly a “rule” under the APA. 80 F.4th 579, 583, 590-91 (5th Cir. 2023). For more discussion and a critique of *Apter*, see text accompanying notes 226-52 below.

glance, one might think that the Freedom of Information Act (FOIA) might be a place where we would see greater recognition, and regulation, of communicative administration.¹⁸⁴ But those intuitions would be misplaced: FOIA has little to do with agencies' affirmative disclosure of information. Instead, FOIA has much more to do with the public's rights to demand production of information where agencies are otherwise inclined *not* to engage in communicative administration,¹⁸⁵ making FOIA definitionally not public facing.¹⁸⁶ Moreover, FOIA's exemptions for national security, internal deliberative materials, and enforcement records weigh toward agency secrecy.¹⁸⁷ FOIA does require publication of documents related to legal administration activities, such as rules, orders, and policy statements, but outside of that, it essentially turns a blind eye.¹⁸⁸ As it turns out, FOIA touches on communicative administration only in the narrowest possible way.

Another place where we might expect to see some recognition of communicative administration is in the Office of Information and Regulatory Affairs (OIRA). Again, the titular nod to information disappoints. OIRA's communicative administration role is limited to implementation of the Paperwork Reduction Act.¹⁸⁹ While the Act's purpose of setting "Federal information policies" might appear broad enough to allow OIRA to oversee communicative administration activities of the kind detailed in Part I,¹⁹⁰ its operative provisions are narrowly focused on responsible development and

184. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552).

185. See KWOKA, *supra* note 41, at 25; Pozen, *supra* note 41, at 1101. Of course, the government's motives here are complex. See Pozen, *supra* note 45, at 515 (noting that the federal government tolerates many informal leaks as a "rational, power-enhancing strategy").

186. See *supra* text accompanying note 37 (including, as part of the definition of communicative administration, outward-facing communication).

187. Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 211 (2013) (arguing that courts have interpreted the exemptions in such a way that amounts to deference to government secrecy).

188. Cortez, *supra* note 37, at 340 ("Otherwise, the APA leaves the vast majority of agency information practices unspecified. Press releases, social media posts, web site publication, and database practices exist largely outside the APA."); 5 U.S.C. § 552(a)(1)-(2) (requiring certain listed documents to be published in the *Federal Register* or published electronically).

189. See Stuart Shapiro, *Reinvigorating the Paperwork Reduction Act*, 43 REGUL., Fall 2020, at 36 (discussing OIRA's role in implementing the Act); Paperwork Reduction Act, Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified as amended in scattered sections of the U.S. Code).

190. Paperwork Reduction Act § 3501(4) (codified as amended at 44 U.S.C. § 3501); see 44 U.S.C. § 3504(b)(2) (providing that the Director of OIRA will "foster greater sharing, dissemination, and access to public information").

stewardship of “information system[s].”¹⁹¹ While this conceivably encompasses communicative administration, it only does so insofar as a goal of the Paperwork Reduction Act is to ensure that the data the government collects and often eventually distributes is of a high quality.¹⁹² Further, this data collection represents only a small slice of the communicative administration universe—specifically, what this Article referred to as “informational entrepreneurship,” and even then refers only to informational entrepreneurship involving data collection.

The closest we have come to a generally applicable communicative administration law is the Information Quality Act (IQA).¹⁹³ Technically an amendment to the Paperwork Reduction Act contained in the Treasury and General Government Appropriations Act for Fiscal Year 2001, the IQA seeks to ensure the “quality, objectivity, utility, and integrity” of agency “information.”¹⁹⁴ Specifically, it requires the Office of Management and Budget (OMB) to develop guidelines applicable to all federal agencies for information quality,¹⁹⁵ and likewise requires that agencies develop their own internal guidelines.¹⁹⁶ Infamously, the IQA also required agencies to include in their guidelines “administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency.”¹⁹⁷

Yet while the terms of the IQA itself are extremely broad, the reach of the law has been circumscribed such that it cannot be understood as regulating communicative administration. First, the OMB’s initial guidance on the IQA delimits the scope of these requirements. On the one hand, the OMB defines “information” as “any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms.”¹⁹⁸ But its definition excludes much that would be considered communicative administration: The IQA does not reach agency statements of “opinion,” nor does it reach “correspondence

191. See 44 U.S.C. § 3502(8). The statute has been interpreted to require agencies to obtain preclearance from OIRA before distributing information collection requests to ten or more people. See 5 C.F.R. § 1320.3(c).

192. See 44 U.S.C. § 3501.

193. Information Quality Act, Pub. L. No. 106-554 app. C, § 515, 114 Stat. 2763A-153 (2000) (codified at 44 U.S.C. § 3516 statutory note).

194. *Id.* § 515(a).

195. *Id.*

196. *Id.* § 515(b)(2)(A).

197. *Id.* § 515(b)(2)(B).

198. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452, 8460 (Feb. 22, 2002).

with individuals or persons” or “press releases.”¹⁹⁹ Second, while it is not obvious from the statutory text, the general context in which the law was passed strongly suggests that the law was intended mostly to check agency science (itself only a subset of agency communications), which critics argued was too often relying on flawed data.²⁰⁰ Indeed, much of the OMB’s subsequent IQA guidance has focused on peer review practices.²⁰¹ Third, the IQA’s implementation has been decidedly limited. Agencies typically maintain IQA guidance and afford opportunities for contestation of disputed information, but these procedures are not robust, and courts have uniformly refused to review complaints about the way that agencies handle appeals of specific uses of information.²⁰² Unsurprisingly, given this narrowing of the IQA, information quality remains quite spotty and perceived violations of the Act remain fairly irremediable.²⁰³

The most directly relevant laws for communicative administration are Congress’s sporadic efforts to curb agency “publicity,” “propaganda,” and “lobbying.”²⁰⁴ The earliest versions of these laws²⁰⁵ responded to aggressive efforts to use public relations campaigns to promote agency work, and mobilize and educate the public—in other words, core communicative administration.²⁰⁶ Since then, anti-publicity laws have appeared as appropriation riders barring certain agencies from hiring publicity experts, from engaging in unauthorized propaganda or publicity, or from lobbying on pending Congressional legislation.²⁰⁷ In practice, though, the Government Accountability Office has narrowly interpreted these anti-publicity and anti-propaganda riders, such that they effectively cover only publicity or propaganda that is “of a nature tending

199. *Id.*

200. See Wendy E. Wagner, *Importing Daubert to Administrative Agencies Through the Information Quality Act*, 12 J.L. & POL’Y 589, 594-97 (2004) (noting that most early IQA petitions were targeted at the EPA’s scientific findings undergirding significant regulations); Allison M. Whelan, *Executive Capture of Agency Decisionmaking*, 75 VAND. L. REV. 1787, 1857-59 (2022) (noting that the primary object of the IQA was promotion of “scientific integrity” and urging slightly different approaches to that distinct challenge).

201. See, e.g., Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. at 8454.

202. See Cortez, *supra* note 37, at 341-42.

203. See Janet Freilich & W. Nicholson Price II, *Uncorrected*, 106 B.U. L. REV. (forthcoming 2026) (manuscript at 6 n.21), <https://perma.cc/NKY7-6NBA>; Stuart Shapiro, *Embracing Ossification*, REGUL., Winter 2018-2019, at 9.

204. Scheffler & Walters, *supra* note 79, at 816-19.

205. See, e.g., Act of Oct. 22, 1913, ch. 32, § 1, 38 Stat. 212 (codified as amended at 5 U.S.C. § 3107 and 28 U.S.C § 549) (“Appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose.”).

206. Scheffler & Walters, *supra* note 79, at 816-17.

207. *Id.* at 816-17, 819.

to emphasize the importance of the agency or activity in question.”²⁰⁸ As long as agencies clearly disclose that they are the author of the communication, their communications will not be deemed covert propaganda.²⁰⁹ And as long as agencies steer away from “puffery,” they can generally avoid having the GAO conclude that their communications are prohibited propaganda.²¹⁰ Further, the GAO reads the prohibitions on grassroots lobbying as only blocking agencies from directly appealing to the public to lobby Congress on behalf of the agency with regard to pending legislation.²¹¹ Most efforts to generate support for agency programs, even on general matters of public concern, will not run afoul of this prohibition. The GAO has, in its own words, been careful to display “proper respect for an agency’s right to communicate with the public and Congress about its policies and activities.”²¹²

Related to anti-publicity, propaganda, and grassroots lobbying restrictions—but critically different—is the Hatch Act.²¹³ Passed in 1939, the Act bars federal employees, including political appointees, from, among other things, “engaging in partisan political activity on official duty time; on federal property; while wearing a uniform or insignia identifying them as federal officials or employees; or while using a government vehicle.”²¹⁴ For certain high-ranking officials, there is an exception that allows partisan political activities so long as no government money is used.²¹⁵ Unlike the anti-publicity, propaganda, and grassroots lobbying restrictions, the Hatch Act is regularly

208. *Id.* (quoting MORDECAI LEE, CONGRESS VS. THE BUREAUCRACY: MUZZLING AGENCY PUBLIC RELATIONS 179 (2011)).

209. See Letter from Susan A. Poling, Gen. Couns., U.S. Gov’t Accountability Off., to the Hon. James M. Inhofe, Chairman of the Comm. on Env’t & Pub. Works, U.S. Senate 11, 13 (Dec. 14, 2015), <https://perma.cc/KR2B-SR3Y> (finding that the EPA engaged in “covert propaganda” by failing to “identify EPA as the creator” of a message that was shared on social media); see also Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 940 n.227 (2010) (noting instances when the government’s undisclosed role in communications was disclosed through whistleblowing or sanctioned by the GAO as covert propaganda).

210. See LEE, *supra* note 208, at 180.

211. Letter from Thomas H. Armstrong, Gen. Couns., U.S. Gov’t Accountability Off., to Congressional Requesters 13, 18 (Sept. 25, 2018), <https://perma.cc/58PH-ZKE7> (discussing the GAO’s understanding of “self-aggrandizement” and “puffery”).

212. Letter from Susan A. Poling, *supra* note 209, at 17 (offering an opinion on whether the EPA violated the law in its communications regarding the Waters of the United States rulemaking).

213. Hatch Act, ch. 410, 53 Stat. 1147 (1939) (codified as amended at scattered sections of 5 U.S.C. and 18 U.S.C.).

214. CYNTHIA BROWN & JACK MASKELL, CONG. RSCH. SERV., R44469, HATCH ACT RESTRICTIONS ON FEDERAL EMPLOYEES’ POLITICAL ACTIVITIES IN THE DIGITAL AGE 3-4 (2016) (paraphrasing 5 U.S.C. § 7324(a)).

215. 5 U.S.C. § 7324(b)(1).

enforced.²¹⁶ At least in theory, then, the Hatch Act could be viewed as restricting the small subset of explicitly *partisan* communicative administration, though exactly when a communication is “political activity” is unclear.²¹⁷ Because most communicative administration can steer well clear of endorsing a political party, a specific candidate for office, or a specific partisan group, the Hatch Act is usually not a serious constraint on communicative administration.²¹⁸

Taking a step back, it is difficult to avoid the conclusion that administrative law deals with communicative administration only at the fringes. The core of the field—the APA—exclusively focuses on legal administration.²¹⁹ Other laws sometimes at least recognize a dimension of communicative administration, but they stop well short of offering a comprehensive approach like the one that characterizes legal administration.²²⁰ There is an elephant-sized hole where a communicative administrative law might have been—one that is growing all the more conspicuous in light of the generally expanding role of administrative law in constraining legal administration.²²¹

C. Ad Hoc Adaptation to a Communicative Administration Age

In recent years, the courts have begun to examine the administrative law blind spot around communicative administration. This is unsurprising, given what has been said so far about communicative administration: While it is formally distinguishable from legal administration and therefore generally unregulated, communicative administration often can be used to accomplish many of the same goals as legal administration.²²² These features make communicative administration an attractive tool compared to legal administration, especially because courts have taken a sharply critical posture

216. See Sean Michael Newhouse, *Some Hatch Act Restrictions Loosened Under the Trump Administration*, GOV'T. EXEC. (Apr. 28, 2025), <https://perma.cc/4LM7-3UN6> (discussing recent changes to Hatch Act enforcement policies but noting that it “remains on the books”).

217. Cf. 5 C.F.R. § 734.101 (defining “[p]olitical activity” as “activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group”).

218. The Hatch Act became relevant during the fall 2025 government shutdown, when Trump Administration officials posted partisan messages on agency websites and attempted to play partisan messages on TV monitors at TSA checkpoints. See Faris Tanyos, *Government Website Blames Shutdown on “Radical Left.” Ethics Group Calls It a “Blatant Violation,”* CBS NEWS (updated Oct. 9, 2025, 9:01 AM EDT), <https://perma.cc/H97Y-NRAM>; Shannon Najmabadi & Aaron Gregg, *Airports Say They Won’t Air Kristi Noem Shutdown Video at TSA Checkpoints*, WASH. POST (Oct. 13, 2025), <https://perma.cc/6LHB-T53G>.

219. See *supra* notes 172-76 and accompanying text.

220. See, e.g., *supra* notes 213-18 and accompanying text.

221. See *infra* Part III.B.

222. See *supra* Part II.A.-B.

toward the latter.²²³ But the more agencies rely on communicative administration as a substitute for legal administration, the more that courts will then seek to extend or stretch extant doctrines that were designed more for legal administration than for communicative administration. In fact, as this Subpart shows, these processes may already be underway, albeit in an ad hoc way that is easy to overlook.

1. Demands for legal authority to communicate

This Article introduced the core of communicative administration by telling the story of how the FDA used “consumer updates” (a form of public advisory) and social media posts to inform the public of the agency’s view that taking ivermectin to treat COVID-19 was not supported by the weight of science.²²⁴ The FDA ultimately retracted these statements after an adverse decision by the U.S. Court of Appeals for the Fifth Circuit in what could be a bellwether case for how courts will handle complaints about agency use of communicative administration strategies.²²⁵

In *Apter v. Department of Health and Human Services*, a group of three doctors who prescribed a human version of ivermectin to thousands of patients for off-label use in treating COVID-19 sued the FDA for their consumer updates and social media posts.²²⁶ The district court concluded that the FDA’s ivermectin communications were not “final agency action” under the APA, and therefore not entitled to the APA’s waiver of sovereign immunity.²²⁷ The court also rejected the doctors’ argument that the common law “exception” to sovereign immunity for agency actions that are ultra vires applied.²²⁸ According to the

223. It is no secret that agencies are facing serious roadblocks to using legal administration tools—roadblocks like the new major questions doctrine, the overturning of *Chevron* deference, curtailed enforcement powers, and skepticism of delegations of rulemaking powers. See generally Blake Emerson, *The Existential Challenge to the Administrative State*, 113 GEO. L.J. 1263 (2025) (recounting recent developments in administrative law jurisprudence and arguing that they evince an anti-administrative philosophy).

224. See *supra* text accompanying notes 1-9.

225. *Apter v. Dep’t of Health & Hum. Servs.*, 80 F.4th 579, 583 (5th Cir. 2023).

226. *Id.*

227. See *Apter v. U.S. Dep’t of Health & Hum. Servs.*, 644 F. Supp. 3d 361, 370 (S.D. Tex. 2022), *rev’d*, *Apter*, 80 F.4th 579. The district court noted that “no case law establishes the proposition that fleeting content on social media can mark the consummation of an agency’s decisionmaking process” under the *Bennett v. Spear* test for finality, but it ultimately declined to decide that issue because the second prong of the finality test was not met: “None of the statements determine rights, obligations, or legal consequences.” *Id.* The district court quite correctly noted that the statements were “unlike the guidance documents” that had been held to be final agency action in prior cases because there was “no indication the FDA has adopted a legal position, no indication of any future liability on non-complying parties, and no establishment of safe harbors.” *Id.* at 371.

228. *Id.* at 369.

district court, there was no statute barring the communication, and the FDA inherently has authority to make public statements that pursue the general purpose of the agency.²²⁹ Hence, the district court held that the communications were unreviewable—undoubtedly the correct conclusion under existing law.²³⁰

The Fifth Circuit reversed, holding that the FDA has no statutory authority explicitly allowing it to render advice to the public about which drugs to take, and that its ivermectin communications were therefore *ultra vires*.²³¹ The panel further held that the ivermectin communications were rules under the APA.²³² For the panel, it was enough that the communications “contain the generally-applicable principle that consumers ‘should not use Ivermectin to treat or prevent COVID-19,’”²³³ notwithstanding the FDA’s argument that the communications were purely “informational statements” that “do not ‘direct’ consumers, or anyone else, to do or refrain from doing anything.”²³⁴ This conclusion opened the door to a waiver of sovereign immunity.²³⁵ Finally, the panel held that the FDA’s “rules” were not final for purposes of judicial review under an APA cause of action, but that the *ultra vires* action nevertheless opened the door to a nonstatutory cause of action that could use the APA’s waiver of sovereign immunity.²³⁶ Finding review possible, the panel reversed the district court and remanded for further proceedings.²³⁷ The FDA settled the lawsuit by agreeing to remove the ivermectin communications.²³⁸

229. *See id.* at 368–69. More specifically, the court found that 21 U.S.C. § 396, which states that no provision of the Food, Drug, and Cosmetic Act “shall be construed to limit or interfere with the authority of a health care practitioner to prescribe or administer any legally marketed device to a patient for any condition or disease within a legitimate health care practitioner-patient relationship,” did not limit the FDA’s authority to make statements recommending use or non-use of drugs. *See id.* at 368 (quoting 21 U.S.C. § 396). Further, the court disagreed with the notion “that the FDA had no colorable basis of authority” for making recommendations about drugs because “[t]he FDA is charged by Congress with protecting public health and ensuring that regulated medical products are safe and effective, among other things.” *See id.* at 369.

230. *See supra* Part II.B (showing there is a “[l]egal [g]ap” in administrative law that exempts communicative administration from APA constraints).

231. *See Apter*, 80 F.4th at 587.

232. *Id.* at 590.

233. *Id.* (capitalization altered) (quoting U.S. FDA (@US_FDA), TWITTER (Aug. 21, 2021, 7:57 PM), <https://perma.cc/JJE8-2Y95> (to locate, click “View the live page”).

234. *Id.* at 591 (quoting Brief for Appellees at 25, *Apter*, 80 F.4th 579 (No. 22-40802), 2023 WL 2557100, ECF No. 37).

235. *Id.* at 589–90.

236. *Id.* at 591.

237. *Id.* at 583.

238. Jen Christensen, *FDA Settles Lawsuit over Ivermectin Content That Doctors Claimed Harmed Their Practice*, CNN (updated Mar. 27, 2024, 6:53 PM EDT), <https://perma.cc/QE3H-VPWY>.

The Fifth Circuit’s concerns about the FDA’s use of communicative administration are perhaps understandable given the functional similarity of the ivermectin communications to rules, but the court’s superimposition of administrative law principles onto communicative administration is a trainwreck that threatens to chill a wide swath of agency communications. In effect, the Fifth Circuit’s approach to communicative administration would beleaguer agencies with impractical procedural fetters and allow judges to micromanage agency communications by opening up an entirely subjective inquiry into what is truly “objective fact.” The panel’s opinion makes two critical missteps that lead it down this questionable path.

First, central to the panel’s reasoning is the conclusion that the ivermectin statements are “plausibly agency action” under the APA.²³⁹ Specifically, the panel held that the ivermectin statements (even the social media posts) were “rules” under the APA—a conclusion virtually preordained by the panel’s exceptionally broad understanding that “[t]he APA defines the term ‘rule’ broadly enough to include virtually every statement an agency may make.”²⁴⁰ This understanding implicitly rejects the category of communicative administration, adopting the position that everything must be agency action, either a rule or order or guidance.²⁴¹ If that were true, every weather alert from the NWS, every tweet from the National Park Service, and every release of employment statistics from the Bureau of Labor Statistics would require notice-and-comment rulemaking (or at least the invocation of an exemption from notice-and-comment rulemaking).²⁴² Moreover, the holding that the ivermectin communications are rules for the purpose of the APA cannot be squared with the court’s conclusion that they lack finality. In order to be a substantive rule, the FDA’s statements must be “designed to implement, interpret, or prescribe law or policy,”²⁴³ but the panel itself acknowledged that the statements created no binding law.²⁴⁴ Under the court’s analysis, non-legal statements, such as opinions or public advisories, that contain “general principle[s]” must be fitted into the APA’s framework as rules.²⁴⁵

239. *Apter*, 80 F.4th at 583. The district court assumed, *arguendo*, that the statements were agency action, but nevertheless concluded that they were not final agency actions. *Apter v. U.S. Dep’t of Health & Hum. Servs.*, 644 F. Supp. 3d 361, 370 (S.D. Tex. 2022), *rev’d*, *Apter*, 80 F.4th 579.

240. *Apter*, 80 F.4th at 590 (quoting *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983)).

241. *See supra* Part II.

242. As I have noted, these are activities that tend to fall within the domain of communicative administration. *See supra* Part I.C.

243. 5 U.S.C. § 551(4).

244. *See Apter*, 80 F.4th at 591.

245. *Id.* at 583.

Second, while the panel accepted the FDA’s argument that it has some inherent authority to issue “purely informational” statements, it latched onto the FDA’s concession that the ivermectin statements provide recommendations to consumers on the way to concluding that the “FDA never points to any authority that allows it to issue recommendations or give medical advice.”²⁴⁶ The panel, in other words, invented a distinction between “factual statements and information” on the one hand, and every other kind of communication (for example, advisory, evaluative, persuasive, sarcastic, etc.) on the other.²⁴⁷ This distinction is jurisprudentially important because it determines whether the agency needs “express statutory authority” to communicate.²⁴⁸ Whatever one thinks about the panel’s conclusion that the FDA’s statutes do not provide express authority for the agency’s rendering of practical advice to consumers, it seems entirely novel to suggest that courts must generally parse whether a statement is purely informational and require specific statutory authorization for anything that does not meet that standard. While at least some communicative administration activity, as this Article conceptualizes it, would not require express statutory authorization under this test, a sizeable portion would.

So far, *Apter*’s two adaptations to communicative administration have not been widely discussed or adopted by other courts. However, the decision could authorize a much more sweeping set of rights to challenge agency communicative administration activities. FDA law scholars have recognized the potential for such an expansion of rights to challenge FDA communications,²⁴⁹ but there is nothing particularly distinctive about FDA communicative administration activities, as this Article has shown.²⁵⁰ It is likely that *Apter* will spread throughout public law wherever communicative administration ventures out of the realm of the provision of indisputably objective facts²⁵¹—

246. *Id.* at 588 (quoting Brief for Appellees, *supra* note 234, at 2).

247. *See id.*

248. *Id.*

249. *See, e.g.*, Jonathan Berman & Colleen M. Heisey, *Apter v. Department of Health and Human Services*, FOOD & DRUG L. INST., <https://perma.cc/63NT-CN5Y> (archived Feb. 21, 2026) (noting that *Apter* “opens up a new (or at least seldom-used) pathway for challenging FDA’s public statements,” and that it “calls into question FDA’s ability to issue . . . warnings, many of which arguably do not merely ‘inform,’ but also make medical recommendations, denounce, and advise”); Eric Alexander, *Fifth Circuit FDA Decision Puzzles*, DRUG & DEVICE L. BLOG (Sept. 14, 2023), <https://perma.cc/HYSS-3FA3> (critiquing the decision and highlighting outstanding questions raised by the Fifth Circuit’s reasoning for other FDA efforts to advise and persuade).

250. *See supra* Part I.C.

251. *See* Abdulla Abuwasel & Mahmoud Abuwasel, “*You Are Not a Horse.*”—*How the US Court’s Ruling on COVID and Ivermectin Impacts Global Industries*, LEXOLOGY (Sept. 5, 2023), <https://perma.cc/VU3K-XLUL> (“By focusing on the distinction ‘between telling about and telling to,’ the Court has clarified an important aspect of regulatory communication
footnote continued on next page”).

which is to say, most of the time. Moreover, if much of communicative administration is deemed to be outside of the realm of objective fact, it seems that agencies would rarely meet the Fifth Circuit's exacting requirement of specific statutory authority for the nonfactual but informative communication, as Congress rarely provides such specific authorization.²⁵²

2. Anti-jawboning principles

While *Apter* is the most direct example of courts adapting administrative law to salient uses of communicative administration, several other strands of doctrinal innovation indicate judicial discomfort with an unregulated sphere of communicative administration, albeit from a First Amendment angle. These include recent claims regarding government "jawboning" of private conduct through non-legal communications,²⁵³ as well as recent complications regarding the government speech doctrine.²⁵⁴

We can start with *Murthy v. Missouri*, which involved claims from social media users and state government officials that federal government agencies unconstitutionally coerced social media platforms to suppress their speech during the 2020 election cycle.²⁵⁵ It was undisputed that White House officials, the Surgeon General, the Centers for Disease Control and Prevention, the Federal Bureau of Investigation (FBI), and the Cybersecurity and Infrastructure Security Agency (CISA) "regularly spoke with the platforms about COVID-19 and election-related misinformation."²⁵⁶ It was also undisputed that many of these communications urged the social media platforms to suppress disfavored content,²⁵⁷ and sometimes threatened to seek changes to antitrust laws to break up platforms if the government's suggestions were not taken.²⁵⁸ These

that is relevant across various sectors. In a digital age where information is easily accessible, the judgment underscores the need for both regulators and industries to be cautious in how they issue and interpret guidance." (quoting *Apter*, 80 F.4th at 595)).

252. See Cortez, *supra* note 111, at 1384 ("The vast majority of agencies do not have explicit statutory authority to issue adverse publicity, and thus do so either as a form of extrastatutory enforcement, or as a power they derive from the interstices of broadly worded enabling statutes.").

253. Enrique Armijo & Derek Bambauer, *Murthy v. Missouri, Government Jawboning, and Our Collective Disinformation Problem*, KNIGHT FIRST AMEND. INST. (Mar. 22, 2024), <https://perma.cc/8A63-A6L9>.

254. Mayze Teitler, *Doctrinal Disarray*, KNIGHT FIRST AMEND. INST. (Mar. 15, 2024), <https://perma.cc/L5MJ-GZNA>.

255. 144 S. Ct. 1972, 1981 (2024).

256. *Id.* at 1982.

257. *Id.* at 1983.

258. *Id.* But see *id.* (noting that FBI's and CISA's "communications typically stated that the agency w[ould] not take any action, favorable or unfavorable, toward social media companies based on decisions about how or whether to use [information about election misinformation provided by the agencies]" (internal quotation marks omitted)).

communications could be characterized as persuasive communications under this Article’s typology of modalities.²⁵⁹ Although the targets of the government’s persuasive communications were the social media companies, the litigation in *Murthy* was brought by individual social media users who blamed the government for social media companies’ alleged censorship.²⁶⁰ The plaintiffs sought, and received, a preliminary injunction “seeking to stop the defendants from taking any steps to demand, urge, encourage, pressure, or otherwise induce any platform” to engage in certain platform moderation activities that allegedly restricted political speech.²⁶¹ In other words, the theory of the case was that the government communications were regulations of private speech, using private platforms as a conduit.

The Fifth Circuit applied what it called the “close nexus test,” which instructs that the government can be deemed the real actor “when a private party is coerced or significantly encouraged by the government to such a degree that its ‘choice’—which if made by the government would be unconstitutional—‘must in law be deemed to be that of the State.’”²⁶² The court acknowledged that “[n]ot just any coaxing will do,” because “the government can speak for itself” and “advocate and defend its own policies.”²⁶³ Even so, the court held that the plaintiffs were substantially likely to prevail on their claims that the government either significantly encouraged or coerced the social media platforms into taking action that the federal government could not itself take.²⁶⁴ The Supreme Court narrowly reversed in *Murthy*, holding that the plaintiffs lacked standing, as their injuries were not fairly traceable to the government’s communicative activity.²⁶⁵ It was decisive for standing purposes that the platforms independently seemed to be cracking down on the plaintiffs’ misinformation.²⁶⁶ Despite that narrow holding, there is still substantial uncertainty about the limits on the power of government to urge private action through communications that fall outside the ambit of legal administration. The

259. See *supra* Part I.C.4.

260. *Murthy*, 144 S. Ct. at 1984 (“Though the platforms restricted the plaintiffs’ content, the plaintiffs maintain that the Federal Government was behind it.”).

261. *Id.* (internal quotation marks omitted).

262. *Missouri v. Biden*, 83 F.4th 350, 373-74 (5th Cir. 2023) (per curiam) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

263. *Id.* at 374 (quoting *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000)).

264. See *id.* at 392.

265. *Murthy*, 144 S. Ct. at 1981.

266. *Id.* at 1992 (noting that even the plaintiff who made the “best showing” of traceability ultimately could not overcome the fact that “Facebook was targeting her pages before almost all of its communications with the White House and the CDC, which weakens the inference that her subsequent restrictions are likely traceable to ‘government-coerced enforcement’ of Facebook’s policies” (quoting *Missouri v. Biden*, 83 F.4th at 370)).

Supreme Court's opinion in *Murthy* had almost nothing to say about the merits question of whether government actors unconstitutionally jawboned the social media companies.²⁶⁷ The Fifth Circuit's basic description of the law—that significant encouragement by government can turn intermediary social media platforms into state actors subject to First Amendment limitations—still stands in that circuit.²⁶⁸ At least with regard to relationships with social media companies, communicative administration may therefore be substantially limited by the uncertainty after *Murthy*.

In another case the same term, the Supreme Court even seemed to extend this First Amendment skepticism of government jawboning beyond social media platforms. In *National Rifle Association of America v. Vullo*, the Court was faced with claims that the New York Department of Financial Services (NYDFS) engaged in a pressure campaign against the National Rifle Association (NRA) “by threatening enforcement actions against those entities that refused to disassociate from the NRA and other gun-promotion advocacy groups.”²⁶⁹ As part of this campaign, Maria Vullo, the Superintendent of NYDFS, issued letters and a joint press release with Governor Andrew Cuomo.²⁷⁰ Governor Cuomo even tweeted: “The NRA is an extremist organization. I urge companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public.”²⁷¹ The Supreme Court reversed the Second Circuit's holding that Vullo's “alleged actions constituted permissible government speech and legitimate law enforcement, and not unconstitutional coercion.”²⁷² Although the Court nodded to the government's substantial latitude to “say what it wishes” and “select the views that it wants to express,”²⁷³ it countered by noting

267. See *id.* at 1985 (“We begin—and end—with standing. At this stage, neither the individual nor the state plaintiffs have established standing to seek an injunction against any defendant. We therefore lack jurisdiction to reach the merits of the dispute.”). Justice Samuel Alito, joined by Justice Clarence Thomas and Justice Neil Gorsuch, would have reached the merits, and would have held that the First Amendment bars the government's “subtle and sophisticated” messaging because it crosses a line between “permissible persuasion” and “unconstitutional coercion.” *Id.* at 2009-10 (Alito, J., dissenting).

268. See *Missouri*, 83 F.4th at 373-74, 381-82.

269. 144 S. Ct. 1316, 1322 (2024).

270. *Id.* at 1324.

271. *Id.* (quoting National Rifle Association of America's Second Amended Complaint & Jury Demand at 21, *NRA of Am. v. Cuomo*, 2020 WL 13179578 (N.D.N.Y. June 1, 2020) (No. 18-cv-00566), 2020 WL 4341928, ECF No. 203).

272. *Id.* at 1325.

273. *Id.* at 1326 (quoting *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 467-468 (2009)); see also *id.* (noting that the government's latitude to speak “makes sense; the government could barely function otherwise”); *id.* (“A government official can share her views freely and criticize particular beliefs and she can do so forcefully in the hopes of persuading others to follow her lead. In doing so, she can rely on the merits and force of her ideas, the strength of her convictions, and her ability to inspire others.”).

that the domain of legitimate government speech ends when government officials “use the power of the State to punish or suppress disfavored expression.”²⁷⁴ Citing its prior decision in *Bantam Books v. Sullivan*, the Court noted that “the First Amendment prohibits the government from relying on the ‘threat of invoking legal sanctions and other means of coercion . . . to achieve the suppression’ of disfavored speech,” even when the government actor itself lacks the “power to apply formal legal sanctions.”²⁷⁵ Thus, “[t]o state a claim that the government violated the First Amendment through coercion of a third party, a plaintiff must plausibly allege conduct that viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff’s speech.”²⁷⁶

In summary, the jawboning cases discussed stand for the possibility that the First Amendment will limit the domain of communicative administration. Some of this is perhaps best understood as an extension of the First Amendment *Lochnerism* that some scholars have taken note of—a use of a particular understanding of individual constitutional rights to pursue anti-regulatory, anti-administrative purposes.²⁷⁷ It is easy to imagine circumstances in which communicative administration that names, shames, endorses, or persuades might cause a private third-party actor to take an action that can be challenged as encroaching on the speech or religious rights of a challenger. Moreover, the fact-bound nature of the inquiry will make it difficult for government officials to determine *ex ante* whether communicative administration activities run a risk of violating the First Amendment.

III. Communicative Horizons of the Administrative State

In “normal times,” the recognition that communicative administration exists and is underregulated would present a serious, but manageable, and even familiar, challenge for the field of administrative law. There would probably be research, Administrative Conference reports, recommendations, proposed legislation, robust debate, and eventually legislative or executive reform action, whether of the internal or external administrative law mold.²⁷⁸ As the relatively

274. *Id.* at 1326 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995)).

275. *Id.* at 1327 (quoting 372 U.S. 58, 66-68 (1963)).

276. *Id.* at 1328.

277. See Genevieve Lakier, *The First Amendment’s Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1332, 1334 (2020); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 135.

278. As discussed earlier, one longstanding problem related to communicative administration—the problem of harms to regulated parties from “adverse publicity”—was subject to precisely this process. After an early call for standards from Gellhorn, note 19 above, at 1423-24, the Administrative Conference took up the challenge and
footnote continued on next page

modest attempts to incorporate communicative administrative law into existing legal frameworks discussed above suggest, some of this work is already being done.²⁷⁹ Such is the “warp and woof” of this area of the law.²⁸⁰

These, however, are not “normal times.” The administrative state is at a pivotal moment. It is under assault from an increasingly anti-administrativist judiciary.²⁸¹ It is being ramrodded by the second Trump Administration’s unprecedented bureaucratic blitzkrieg.²⁸² And Congress, for its part, is content to be a bystander.²⁸³ It is difficult to know what kind of administrative state will emerge from this moment, who will determine its shape, and whether it will look anything like what came before. Virtually any future seems possible.

In this final Part, I turn from the descriptive focus of the last two Parts to a more predictive and evaluative mode, asking: What is the future of communicative administration, and what should administrative law do to both preserve its promise and guard against the emerging perils associated with it? I do so with some trepidation, given the epochal uncertainty surrounding the administrative state. Still, social, technological, and political trends suggest that it is likely that communicative administration—and the knock-on question of what administrative law should do to constrain it—will become exponentially more important.²⁸⁴ It is even possible that communicative administration’s

urged agencies to develop standards. *See Recommendation 73-1: Adverse Agency Publicity*, 38 Fed. Reg. 16839 (June 27, 1973). For an overview of the problem of adverse publicity and a call to reinvigorate the standard-setting process in response to changes in society that are increasing risks of adverse publicity, see Cortez, note 111 above, at 1371-78.

279. *See supra* Part II.C.

280. *Cf. Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2294 (2024) (Kagan, J., dissenting) (noting that *Chevron* deference, until it was overturned, was “part of the warp and woof of modern government”).

281. Emerson, *supra* note 223, at 1274-75 (identifying an “existential challenge” from the judiciary, motivated by an “anti-statist” ideology, and noting that if it succeeds the “administrative state as we know it would cease to exist”).

282. *See* Jody Freeman & Sharon Jacobs, *President Trump’s Campaign of ‘Structural Deregulation,’* LAWFARE (Feb. 12, 2025, 10:40 AM), <https://perma.cc/E8VK-22LL>.

283. Cindy May, *As Trump Remakes America, Where Is Congress?*, CONVERSATION (Mar. 13, 2025, 9:36 AM EDT), <https://perma.cc/2NVW-MPGN>; Carl Hulse, *Trump Kicks Congress to the Curb, with Little Protest from Republicans*, N.Y. TIMES (updated Jan. 31, 2025), <https://perma.cc/JX8Y-6DTS>.

284. Indeed, the trend appears to be toward growing salience and politicization—it would have been difficult to predict, for instance, the enormous attention that *Loper Bright* would receive in mainstream media. *See* Cary Coglianese & Daniel E. Walters, *The Great Unsettling: Administrative Governance After Loper Bright*, 77 ADMIN. L. REV. 1, 4 (2025). (“We . . . cannot help but note, and marvel at, the extensive popular attention the Court’s decision has received—which is certainly unusual for administrative law decisions and which is also likely shaping public views about the Court’s future role in government.”). These trends push back against one potential response to the arguments in this Article—that nobody is listening to agencies’ communicative administration and so the risks are likely to be minimal.

importance will soon eclipse legal administration's importance, and that administrative law's communicative administration gap will continue to widen, leaving us all vulnerable to the unconstrained use of communicative administrative power.

Ultimately, I suggest that conventional administrative law provides no off-the-shelf solution to the growing problems of communicative administration. Instead of imposing new procedural hurdles on agencies or enlisting courts to review communicative administration, both of which would chill many valuable forms of agency communication, it would be better to embrace structural solutions that ensure that communicative administration is checked by counterspeech. What is needed, in a sense, is an amalgam of administrative law and First Amendment logics that encourage a pluralistic public sphere of agency communications.

A. The Communicative Administration Imperative

Part I identified communicative administration as a natural, but quite distinctive, form of public administration. Nevertheless, some readers might think that communicative administration is, and will always be, secondary to legal administration. Under that conception, it makes some sense for there to be an administrative law gap for communicative administrative power. However, in this Subpart, I suggest that to the contrary, communicative administration, while already inherently valuable to some degree, is poised to grow only more valuable over time as society itself embraces informational forms of organization, inciting greater need for agencies to engage in communicative administration.

First, our economic and political systems—the typical targets of regulation—are themselves becoming increasingly informational and communicative,²⁸⁵ making it more likely that agency action will operate in a communicative register. As a result of breakneck digital innovation in recent decades, most recently in artificial intelligence, there has been an enormous growth of power in the communicative sphere managed largely by tech monopolies.²⁸⁶ As the turn to an informational and networked society and

285. See generally MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* (1996) (describing the rise of information and communication in modern societies and economies); YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006) (arguing that the internet has enabled the emergence of a networked information society); SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019) (describing the emergence and increasing centrality of a new form of capital in the form of behavioral data acquired through pervasive surveillance).

286. See Lina M. Khan, *Sources of Tech Platform Power*, 2 GEO. L. TECH. REV. 325, 326, 328-30, (2018); TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 6-7
footnote continued on next page

economy has progressed, it has become more imperative that regulatory strategies match the medium they purport to regulate, and to counteract the abuse of economic power *qua* communicative power.²⁸⁷ Ultimately, the First Amendment puts little constraint on the government when it is the speaker,²⁸⁸ making it easier for agencies to use purely informational tools to counteract communicative harms like misinformation. In sum, while yesterday's regulatory harms often concerned tangible, non-communicative problems, like pollution, tomorrow's regulatory harms are more often rooted in the distortion of communicative power by those dealing with information as a commodity.

Second, the government can increase its efficacy by using communicative tools to compete in the marketplace for attention. Commentators have begun to note a fundamental shift toward an attention-oriented economy and society—that is, an economy and society in which the most valuable resource is people's attention and the bulk of human activity is directed at capturing some of the attentional surplus.²⁸⁹ For instance, it is now well understood that social media firms and influencers go to great lengths to harvest users' attention and market it to those seeking an audience, such as advertisers.²⁹⁰ In this model, the users' attentional capacity is the product.²⁹¹ While this economic logic of reselling attention is not directly applicable to the government sector, the imperative to compete for attention is still present, insofar as attention is a predicate for influence.²⁹² To be competitive in this market, government will have to make significant investments. People have come to expect that information worthy of their attention will come to them in ever-more-efficient forms that will not

(2011); Tejas N. Narechania & Ganesh Sitaraman, *An Antimonopoly Approach to Governing Artificial Intelligence*, 43 YALE L. & POL'Y REV. 95, 99-100 (2024).

287. MANUEL CASTELLS, COMMUNICATION POWER 3 (2009) (noting that “power is based on the control of communication and information,” and thus counterpower “depends on breaking through such control”).

288. NORTON, *supra* note 56, at 203 (noting that the “Supreme Court’s contemporary government speech doctrine rejects expectations of the government’s expressive neutrality”). *But see supra* Part II.C.2.

289. *See, e.g.*, JAMES G. WEBSTER, THE MARKETPLACE OF ATTENTION: HOW AUDIENCES TAKE SHAPE IN A DIGITAL AGE 1-2 (2014); CHRIS HAYES, THE SIRENS’ CALL: HOW ATTENTION BECAME THE WORLD’S MOST ENDANGERED RESOURCE 11-16 (2025); TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS 6-7 (2016).

290. WU, *supra* note 289, at 5-6; HAYES, *supra* note 289, at 122-31 (observing the novel commodification of attention).

291. *See id.* at 6.

292. It is certainly possible that government would simply vacate the field and rely entirely on the private sector (including the news media) to supply all informational demands that the people might have regarding government activity. But this carries the risk, particularly in our fragmented and polarized media ecosystem, of failing to reach the right audience.

be cognitively burdensome.²⁹³ In an economy and society driven largely by scarce attention and fierce competition for it, there is likely much value to government simply getting a message to the right people at the right time.

Third, and most aspirational, communicative administration could be used to counterbalance private communication and thereby serve as a partial solution to one of the most pressing problems of our time—the fraying of the epistemic conditions necessary for democracy to function. It has become increasingly clear that one of the biggest problems facing the United States is the breakdown in the shared knowledge that makes cooperation possible.²⁹⁴ Americans increasingly live in epistemic bubbles that tend to reify ideological divides and amp up political conflict.²⁹⁵ Rather than fostering shared understanding, modern information technologies and networks create fierce competition for attention, serving instead to fragment and divide.²⁹⁶ This is a crisis of democratic culture, and communicative administration will likely be key to how government will respond, if it does at all.²⁹⁷

Interestingly, these observations tie communicative administration back to the foundations of the modern administrative state in the early twentieth century, when heavyweight public intellectuals like Walter Lippmann and John Dewey debated how government should engage in forming “publics” but did not disagree much on *whether* it should be doing so.²⁹⁸ Informed by the experience of the Committee on Public Information’s massive informational (some would say propaganda) enterprise,²⁹⁹ Lippmann came to believe that the public was a “phantom.”³⁰⁰ As Tim Wu explains, Lippmann believed that the “consent’ of the governed” had to be manufactured, as it was during World War I, and for the better—in general it was “no longer possible . . . to believe in the original dogma of democracy; that the knowledge needed for the management

293. See Riane Lumer, *Conserving Your Superpower, Which Is Your Attention Span*, CNN HEALTH (updated Aug. 11, 2024, 7:07 PM EDT), <https://perma.cc/9BTD-SFQ2> (noting that social media users “can develop expectations for fast content shifts”); HAYES, *supra* note 289, at 253-54 (noting that attention-age markets are increasingly rapid and commitment-free).

294. See Jonathan Benson, *Democracy and the Epistemic Problems of Political Polarization*, 118 AM. POL. SCI. REV. 1719, 1719 (2024) (describing polarization as an epistemic problem leading to a lack of perspectival diversity necessary to “identify and address the full range of problems of public concern”).

295. See *id.* at 1720.

296. See BENKLER, FARIS & ROBERTS, *supra* note 25, at 45-46.

297. See, e.g., Lanchester, *supra* note 116, at 103-04 (discussing the Consumer Price Index, and data gathering and sharing more generally, as a symbol of “our ambition for a stable, coherent society,” and noting that “if we abandon the work of creating statistical truths, we risk abandoning democracy, too”).

298. Menezes & Pozen, *supra* note 70, at 988-90.

299. See sources cited *supra* note 129; *supra* text accompanying note 133.

300. WALTER LIPPMANN, *THE PHANTOM PUBLIC* 77 (1925); see also Menezes & Pozen, *supra* note 70, at 973.

of human affairs comes up spontaneously from the human heart.”³⁰¹ For Lippmann, this observation led to the conclusion that the best democracy can do is to use informational provision to construct public support for technocratic government.³⁰² Dewey was less skeptical of the public’s capacity for learning what needs to be learned to support democratic cooperation, but like Lippmann, Dewey envisioned substantial government-sponsored “educational” activity to support democratic citizenship.³⁰³ In other words, while Lippmann and Dewey are often presented as in a debate with one another, in fact the debate was narrowly focused on the best way to engage in what this Article has called communicative administration.

Just as then, there are now existential questions about whether the U.S. can find enough common ground to keep democracy going, although the challenge may be even greater than Lippmann and Dewey could have imagined.³⁰⁴ Communicative administration holds out the promise of a less passive approach to democracy—one where agencies use their considerable knowledge and expertise to engage in collective meaning-making that transcends divides that threaten the democratic project. Of course, this is a daunting task in a polarized and “post-truth” world,³⁰⁵ but communicatively savvy agencies with reputational clout and a democratic mindset have the potential to cut through this baggage—potentially more than any other institution in existence today.

In sum, the overarching trajectory is clearly toward an informational society, where reality is in some sense defined, and problems generated, within complex networks of communication. In those conditions, it seems very likely that administration itself will come to be only more communicative if it is to stay relevant. This is not to say that communicative administration will be, or even could be, a complete substitute for the hard power of legal administration. The point is simply that communicative administration will likely become more central to public administration in the future, both for better and for worse.

301. *WU*, *supra* note 289, at 47 (quoting LIPPMANN, *supra* note 129, at 248-49).

302. *See* LIPPMANN, *supra* note 129, at 248.

303. *See* JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 97-99 (The Free Press 1966) (1916); *see also* Menezes & Pozen, *supra* note 70, at 990.

304. ZAC GERSHBERG & SEAN ILLING, *THE PARADOX OF DEMOCRACY: FREE SPEECH, OPEN MEDIA, AND PERILOUS PERSUASION* 11 (2022) (“While Plato, Lippmann, and even Dewey recognized how difficult it is to control public discourse in a democracy, none of them could have imagined anything like the media environment before us today. We’re now confronting the greatest structural challenge to democracy we’ve ever seen: a truly open society. Without gatekeepers, there are no constraints on discourse. Digital technology has changed everything. Consequently, reality is up for grabs in a way it never has been before.”).

305. William Davies, *The Age of Post-Truth Politics*, N.Y. TIMES (Aug. 24, 2016), <https://perma.cc/LVF4-8G2Y>.

B. The Populist Authoritarian Threat

Communicative administration may be utterly unavoidable. It may even be an imperative for democracies responding to shifts in society, the economy, and technology, and a potential answer to our democratic malaise. But it still presents serious threats that demand our attention—most notably, the risk that its powers will be weaponized by populist authoritarians who seek to undermine democracy.³⁰⁶ Nowhere is this more apparent than in the second Trump presidency, which has made communicative administration a core part of its overtly authoritarian populist political strategy.³⁰⁷

The first Trump presidency previewed this move without fully embracing it as the official style of administration.³⁰⁸ There was, for instance, an attempt to manipulate forecasts for economic growth,³⁰⁹ as well as a full-on campaign to curb research on and prevent agencies from communicating about climate change.³¹⁰ There was, famously, “Sharpiegate,” when Trump tweeted in 2019 that Alabama was at risk of being hit by Hurricane Dorian, only to be contradicted by a Birmingham office of the NWS on Twitter, leading to Trump appearing at a FEMA briefing and “showing off a hurricane map—clumsily doctored with a black marker—that extended the path of the storm into Alabama.”³¹¹ Then came the COVID-19 pandemic, which saw Trump repeatedly

306. For general background on President Trump’s populist authoritarian approach to the presidency, see generally WILLIAM G. HOWELL & TERRY M. MOE, *PRESIDENTS, POPULISM, AND THE CRISIS OF DEMOCRACY* (2020) (highlighting, in part, Trump’s populist style and aggressive use of presidential power).

307. See, e.g., *infra* text accompanying notes 313-43. This is not to let the Biden Administration off the hook. As discussed in Part II.C above, the Biden Administration did sometimes use communicative administrative strategies in ways that could be described as undermining democracy. The trends here are, to some degree, cross-partisan, but there is also an unmistakable partisan asymmetry developing in American politics—that is, a differential willingness to engage in certain types of politics. See William G. Howell & Terry M. Moe, *The Strongman Presidency and the Two Logics of Presidential Power*, 53 *PRES. STUDS. Q.* 145, 159 (2023) (noting that the Republican party has been coopted by its populist base and is increasingly extremist); see also Joseph Fishkin & David E. Pozen, *Essay, Asymmetric Constitutional Hardball*, 118 *COLUM. L. REV.* 915, 938-43 (2018) (tracing these trends as they have played out in the domain of constitutional law and norms).

308. For an overview, see Cortez, *supra* note 37, at 335-36 (discussing many examples and highlighting various tactics that the first Trump Administration auditioned, such as “scrubbing terminology” and “weaponizing transparency” (capitalization altered)).

309. *Id.* at 330.

310. *Id.* at 332-35.

311. Nancy Cook, *The Short Arc of a Sharpie Captures the Long Arc of Trump*, *POLITICO* (Sept. 5, 2019, 6:36 PM EDT), <https://perma.cc/6C6T-DHFN>.

sparring with public health agencies, attempting to silence them to preserve his control of the political narrative surrounding the pandemic.³¹²

Still, these episodes look like child's play compared to the systematic effort to coopt agencies' communicative administrative powers during the early days of the second Trump presidency. Since assuming office, Trump has embarked on a concerted campaign to curtail and curate agencies' communicative administration. Much of this effort consists of purges of information that has long been provided by agencies, presumably because it contradicts Trump's preferred messaging or deprives him of control of the narrative.³¹³ Perhaps most dystopian in this regard is Trump's firing of the Bureau of Labor Statistics chief in response to the agency's release of underwhelming jobs data that Trump called "RIGGED."³¹⁴ Acting through the Department of Government Efficiency (DOGE), Trump has waged a broader "[w]ar on [m]easurement," seeking to undermine agencies' capacity to engage in informational entrepreneurship and research and peer production.³¹⁵ For instance, climate information websites across the administrative state were either removed or systematically stripped of references to climate.³¹⁶ And it is not just hot-button issues like climate: The National Weather Service has significantly reduced weather balloon launches, endangering the government's "vast repository of second-by-second data on everything from temperature to humidity to atmospheric pressure," which are all essential for weather forecasting.³¹⁷ In total, the Administration "has scrubbed nearly 3,400 federal datasets from the U.S. government's open data site, Data.gov," and hundreds, if not thousands, of websites have gone "dark."³¹⁸

312. Yasmeen Abutaleb, Ashley Parker, Josh Dawsey & Philip Rucker, *The Inside Story of How Trump's Denial, Mismanagement, and Magical Thinking Led to the Pandemic's Dark Winter*, WASH. POST (Dec. 19, 2020), <https://perma.cc/L37S-JUXW>.

313. See Hannah Bloch-Wehba, *Trump Is Ruling by Willful Blindness*, N.Y. TIMES (Aug. 29, 2025), <https://perma.cc/532R-HGX9> (collecting examples).

314. Steve Kopack, Monica Alba & Laura Strickler, *Trump Fires Labor Statistics Boss Hours After the Release of Weak Jobs Report*, NBC NEWS (updated Aug. 1, 2025, 3:13 PM PDT), (quoting Donald J. Trump (@realDonaldTrump), TRUTH SOC. (Aug. 1, 2025, 12:44 PM), <https://perma.cc/V8N2-YJMK>), <https://perma.cc/75BM-2C8X>.

315. See Alec MacGillis, *Trump's War on Measurement Means Losing Data on Drug Use, Maternal Mortality, Climate Change and More*, PROPUBLICA (Apr. 18, 2025, 6:00 AM), <https://perma.cc/MJZ3-FCD7>.

316. Oliver Milman, *Scientists Brace 'For the Worst' as Trump Purges Climate Mentions from Websites*, GUARDIAN (Feb. 4, 2025, 6:00 AM EST), <https://perma.cc/BF3B-WCS2>.

317. MacGillis, *supra* note 315.

318. Anna Kutz, *How Much Federal Data Has Trump Really Purged?*, HILL (Feb. 22, 2025, 7:44 AM EST), <https://perma.cc/ZA55-7M7U>; see also Ethan Singer, *Thousands of U.S. Government Web Pages Have Been Taken Down Since Friday*, N.Y. TIMES (updated Feb. 3, 2025), <https://perma.cc/C6EF-LFYT>.

Many of the remaining essential datasets “now sit orphaned, their caretakers banished and their future uncertain.”³¹⁹

The Administration has also sought to micromanage the rhetoric being used by agencies in their communication. For instance, one executive order aims to restore “biological truth to the federal government” by banning the use of the term *gender* in agency documents.³²⁰ Another order aims to curb “radical indoctrination” in K-12 schooling, including by re-establishing the so-called “1776 Commission” to promote “patriotic education.”³²¹ Perhaps most visibly, Trump ordered that certain geographic landmarks—Denali and the Gulf of Mexico—be restored to alternative “names that honor American greatness,”³²² a decision which was subsequently followed by Google Maps.³²³ Finally, in a “siege of science,” the Administration has worked to significantly curb the federal research apparatus and steer it away from DEI, climate, clean energy, and more.³²⁴ Among the words flagged for review in National Science Foundation grant-awarded projects: “women,” “diverse,” “institutional,” and “historically.”³²⁵ In fact, across the government, internal memos and guidance have encouraged agencies to systematically remove hundreds of terms flagged as “woke,” and this may not even be a complete list.³²⁶

319. MacGillis, *supra* note 315.

320. *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, Exec. Order No. 14,168, 90 Fed. Reg. 8615, 8616 (Jan. 30, 2025) (capitalization altered) (“Agencies shall remove all statements, policies, regulations, forms, communications, or other internal and external messages that promote or otherwise inculcate gender ideology, and shall cease issuing such statements, policies, regulations, forms, communications or other messages.”). This language was so broadly construed that it even caused the Census Bureau to temporarily remove public access to key statistical databases and research, “raising concerns among data users about threats to public trust in the agency and its independence from political interference.” Hansi Lo Wang, *The Public Lost Access to Census Bureau Data for Days After a Trump Order*, NPR (Feb. 12, 2025, 3:00 PM EST), <https://perma.cc/35S4-826D>.

321. *Ending Radical Indoctrination in K-12 Schooling*, Exec. Order No. 14,190, 90 Fed. Reg. 8853, 8855 (Feb. 3, 2025) (capitalization altered).

322. *Restoring Names That Honor American Greatness*, Exec. Order No. 14,172, 90 Fed. Reg. 8629, 8629-30 (Jan. 31, 2025) (capitalization altered).

323. Emily Mae Czachor, *Google Maps Users in U.S. Will See Gulf of Mexico Renamed Gulf of America and Denali Changed to Mount McKinley*, CBS NEWS (Jan. 28, 2025, 11:43 AM EST), <https://perma.cc/9ZDP-AXJK>.

324. Jeff Tollefson, Max Kozlov, Alexandra Witze & Dan Garisto, *Trump’s Siege of Science: How the First 30 Days Unfolded and What’s Next*, NATURE, Feb. 27, 2025, at 866 (capitalization altered), <https://perma.cc/Q24Z-6VES>.

325. Carolyn Y. Johnson, Scott Dance & Joel Achenbach, *Here Are the Words Putting Science in the Crosshairs of Trump’s Orders*, WASH. POST (Feb. 4, 2025) (capitalization altered), <https://perma.cc/F2ML-DLRQ>.

326. Karen Yourish, Annie Daniel, Saurabh Datar, Isaac White & Lazaro Gamio, *These Words Are Disappearing in the New Trump Administration*, N.Y. TIMES (Mar. 7, 2025), <https://perma.cc/PLV9-KXP9>.

Meanwhile, the Trump Administration has also moved to coopt channels of communicative administration to get its preferred message and advice out to the public. As mentioned in the Introduction, the Department of Homeland Security has paid for nationally televised ad spots that look like, feel like, and, indeed, are campaign ads coupled with a plainly authoritarian public advisory that people illegally in the United States will be found and deported and should therefore self-deport to preserve the possibility of returning.³²⁷ The Department has now put out an app—CBP Home—that has allowed about 7,000 people to register to self-deport.³²⁸

While these immigration messages are important, they are by no means the only such efforts. At many agencies, social media accounts have turned quite explicitly to trumpeting administration initiatives that are at odds with, or orthogonal to, agencies' missions. For instance, social media accounts at the Department of Labor have been used to promote white nationalist, anti-globalist themes,³²⁹ and the EPA's Facebook account touts the agency's place on the DOGE "Efficiency Leaderboard" and celebrates the "line-by-line review" of agency spending that allegedly brings the "total taxpayer dollars saved to more than \$171 million since" Administrator Lee Zeldin was sworn in.³³⁰ The EPA also used social media to send out a post of Zeldin "detailing how the previous Administration recklessly tossed \$20 billion of taxpayer money,"³³¹ an accusation that helped spur a controversial FBI investigation.³³² Perhaps most troublingly, the EPA issued a press release pushing back on some negative press coverage of these EPA efforts, stating that the "Washington Post has devolved into the radical left's own Pravda."³³³ Separately, the Administration has also attacked Voice of America, a government-sponsored news service aimed at international audiences.³³⁴ Trump's nominee for Director of Voice of America, Kari Lake, has promised that the service will not "become Trump TV" under her

327. See *supra* text accompanying note 12.

328. Nick Miroff, *The Self-Deportation Psyop*, ATLANTIC (June 25, 2025), <https://perma.cc/DM8B-E4TP>.

329. Evan Gorelick, *Homeland Security Hires Labor Dept. Aide Whose Posts Raised Alarms*, N.Y. TIMES (Feb. 11, 2026), <https://perma.cc/4DUS-Z5TN>.

330. U.S. Environmental Protection Agency (@U.S. Environmental Protection Agency), FACEBOOK (Feb. 25, 2025), <https://perma.cc/SK57-GHR4>.

331. Video posted by U.S. Environmental Protection Agency (@U.S. Environmental Protection Agency), FACEBOOK (Feb. 13, 2025), <https://perma.cc/7JS5-EYYM> (to locate, click "View the live page").

332. See Spencer S. Hsu, Maxine Joselow & Nicolás Rivero, *FBI Takes Up EPA Probe Amid Pushback from Judge, Prosecutors*, WASH. POST (Feb. 27, 2025), <https://perma.cc/JF5P-64DB>.

333. *EPA Press Office Fact Checks the Washington Post's Coverage of Waste & Abuse of Taxpayer Dollars*, U.S. EPA, <https://perma.cc/9VXY-5TUD> (last updated Mar. 6, 2025).

334. David Enrich & Minh Kim, *Voice of America Journalists Face Investigations for Trump Comments*, N.Y. TIMES (updated Mar. 2, 2025), <https://perma.cc/Z35A-TR28>.

watch, but it “sure as hell will not” have any of what she called “Trump Derangement Syndrome.”³³⁵ The Department of Commerce even considered changing the methodology behind its key GDP calculations to exclude government spending, likely in hopes of hiding the impact on GDP from DOGE’s spending cuts.³³⁶

As this noncomprehensive overview makes clear, communicative administration is at the center of Trump’s approach to the presidency, especially on the second go-round. The borderlines between communicative administration, propaganda, and censorship are real, if difficult to demarcate,³³⁷ but Trump’s aggressive approach has arguably obliterated the distinctions, and it is getting more difficult to dismiss his administration’s uses of communicative administration as mere symbolism.

This complete breakdown in norms around communicative administration has significant consequences. Not only do people rely on the information government provides, but they also depend on recognizing the information they receive from trusted sources, like the government, as representative of what they know to be true.³³⁸ In addition, Presidents and their appointees may pursue their agendas by exploiting agency *silence* on relevant matters. For instance, the CDC leadership reportedly “buried” an internal expert assessment of an emerging measles outbreak that “would have emphasized the importance of vaccinating,” and the CDC’s defense was that the report “[did] not say anything that the public doesn’t already know.”³³⁹ Ultimately, constructive information flows between the government and public depend crucially on both the quality of the information that is shared and on government fulfilling public expectations of information provision.³⁴⁰ It is not difficult to see the

335. *Id.* (quoting RIGHT SIDE BROADCASTING NETWORK, *Full Speech: Kari Lake Speaks at CPAC 2025 Day Two*, at 10:22 (YouTube, Feb. 21, 2025), <https://perma.cc/8ZVD-B537> (to locate, click “View the live page”).

336. See Josh Boak, *The Trump Administration May Exclude Government Spending from GDP, Obscuring the Impact of DOGE Cuts*, ASSOCIATED PRESS (updated Mar. 2, 2025, 6:54 PM PST), <https://perma.cc/FP5B-B7PS>.

337. See WU, *supra* note 289, at 47 (“Any communication, Lippmann came to see, is potentially propagandistic, in the sense of propagating a view. For it presents one set of facts, or one perspective, fostering or weakening some ‘stereotype’ held by the mind. It is fair to say, then, that any and all information that one consumes—pays attention to—will have some influence, even if just forcing a reaction.”).

338. See Cortez, *supra* note 37, at 318. Cortez specifically notes that “the public tends to trust federal sources of information,” and that “[f]acts and data published by agencies carry the imprimatur of the federal government,” making “government efforts to hide, manipulate, or engage in other information mischief . . . particularly pernicious.” *Id.*

339. Patricia Callahan, *The CDC Buried a Measles Forecast That Stressed the Need for Vaccinations*, PROPUBLICA (Mar. 28, 2025, 4:35 PM) (capitalization altered), <https://perma.cc/C4BB-T7S8>.

340. See Dylan Gyauch-Lewis, *Dispatches from Trump’s War on Information*, AMERICAN PROSPECT (Apr. 2, 2026), <https://perma.cc/KQ2G-NV8K>.

attraction, for someone like Trump, of the resulting disorientation. Tightly controlling what kind of information reaches the public, and ensuring that it is on brand for Trump, fosters the perception of total control and quashes conflicting claims of truth,³⁴¹ all of which tends to fulfill the basic goal of all authoritarian populists to appear to represent a single, organic demos.³⁴² And because of the administrative law gap they presently enjoy,³⁴³ it is comparatively easy for populist authoritarians to drive their agenda through communicative administration.

While Trump's approach to communicative administration is a jarring wakeup call, it would be a real mistake to view it as *sui generis*. In truth, the threat of populist authoritarian communicative administration is a permanent fixture of our government—a reality determined by our increasingly information-centric world, fierce political competition in our democracy, and normalization of populist authoritarian political strategy. Trump's communicative administration playbook will be copied, which makes it all the more imperative to turn, as I do in the next Subpart, to the question of how these threats might be operationally balanced with the promise of communicative administrative power in more enlightened hands.

C. The Challenge: Calibrating Controls on Communicative Administration

The previous two Subparts established that two conflicting uses of communicative administration—one benign, or even laudable and focused on forging an epistemic foundation for democracy, and the other malignant and focused on political aggrandizement and authoritarian control—are on a collision course. This Subpart aims to assess how, if at all, administrative law might respond in the instance of that collision (or even now, in anticipation of it). I argue that legal or procedural solutions to this dilemma are not promising, but that there is perhaps more reason to be optimistic about recommitment to long extant structural features of the administrative state—namely, its institutional pluralism, independence from presidential oversight, and

341. See Ezra Klein, Opinion, *Don't Believe Him*, N.Y. TIMES (Feb. 2, 2025), <https://perma.cc/F2UD-QJNR> (“Trump knows the power of marketing. If you make people believe something is true, you make it likelier that it becomes true. . . . He has always wanted to be king. His plan this time is to first play king on TV. If we believe he is already king, we will be likelier to let him govern as a king.”).

342. JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 3 (2016) (“In addition to being antielitist, populists are always *antipluralist*. Populists claim that they, and they alone, represent the people.”); see also Mark Fenster, *Populism and Transparency: The Political Core of an Administrative Norm*, 89 U. CIN. L. REV. 286, 288-91 (2021) (drawing attention to the ways that populists use selective transparency to bolster their popular appeal while forming an image of control).

343. See *supra* Part II.B. But see *supra* Part II.C (highlighting nascent attempts to extend constraints onto communicative administration).

commitment to informational contestation—and rejection of the ascendant unitary executive theory’s potential incursion into the domain of communicative administration.

1. Legal and procedural dead ends

One straightforward response to the issues presented by communicative administration is to subject agency communication to quality control. For instance, one could imagine judicially enforced content-based restrictions on the type of communicative administration that is permissible for government to provide, as in *Apter v. Department of Health and Human Services*,³⁴⁴ or perhaps procedural safeguards that tend to pursue the same result more prophylactically, by slowing the use of communicative administration down.³⁴⁵ The problem is that any such solutions would either be hopelessly indeterminate or taxing on government’s capacity to positively wield communicative administration, or perhaps even both at the same time.³⁴⁶

The case of the IQA is instructive.³⁴⁷ There is widespread agreement that IQA was unworkable, and that this unworkability stemmed largely from its ambiguities in defining what high-quality information is,³⁴⁸ as well as the

344. See *supra* Part II.C.1 (discussing *Apter*). For a defense of the judicial manageability of a “totality of the circumstances” approach to judicial review of allegedly propagandistic government speech, see Jamal Greene, *Government Counterspeech*, KNIGHT FIRST AMEND. INST. (Dec. 16, 2022), <https://perma.cc/V7BG-WZY6>.

345. See Aaron L. Nielson, *Optimal Ossification*, 86 GEO. WASH. L. REV. 1209, 1210-12 (2018) (pointing out that procedures that cause “ossification” may be desirable, because by slowing down agency action, agencies may be able to better develop long-term strategies and sell actions to the public).

346. In saying this, I recognize that there may be certain fields of regulations in certain sectors of the economy that are more susceptible to objective distinctions between “fact” and “opinion,” such that content-based restrictions that simply bar government from non-fact-based communicative administration might be sensible. See generally Cortez, *supra* note 37, at 319-21.

347. See *supra* text accompanying notes 193-203.

348. See, e.g., Michelle V. Lacko, Comment, *The Data Quality Act: Prologue to a Farce or a Tragedy?*, 53 EMORY L.J. 305, 316-18 (2004) (noting that IQA furthers the “misuse” of “sound science” rhetoric to attack regulations and is representative of “legislators’ overconfidence in the ability of science to resolve tough policy questions”); James T. O’Reilly, Commentary, *The Information Quality Act: Is There a There, There?*, 75 FOOD & DRUG L.J. 278, 279 (2020) (noting that when an agency statement or document is “attacked for lacking ‘quality’ or ‘utility,’ those subjective premises can be argued incessantly, but there is no means for any fixed objective measurement”); Stephen M. Johnson, *Junking the ‘Junk Science’ Law: Reforming the Information Quality Act*, 58 ADMIN. L. REV. 37, 61-71 (2006) (noting many negative impacts of the IQA in practice); Sidney A. Shapiro, *The Information Quality Act and Environmental Protection: The Perils of Reform by Appropriations Rider*, 28 WM. & MARY ENV’T L. & POL’Y REV. 339, 340 (2004) (noting that while “a process to vet information disseminated in government reports and on the internet is appropriate,” the “vague language used by Congress invites political and private actors to interpret the rider in ways that may ossify the information disclosure process”).

potential for mischief in the law's process for challenging agency statements for quality, which could be used to "ossify" agency work.³⁴⁹ As Janet Freilich and Nicholson Price recently noted, the IQA's central goal of "error correction" assumes that there "is an obtainable ground truth, and deviations from that ground truth can be fixed," but "[r]eality is, of course, more complicated," and "[e]fforts to increase data quality can mask attempts to undermine agency function by burdening . . . institutions."³⁵⁰ It is therefore no real surprise that courts took just about every available off ramp from judicial review, leaving the IQA without any real enforcement mechanism and relegating its role in administration.³⁵¹ On top of this, the IQA was mostly used to challenge information underlying more traditional legal administration—for instance, environmental science information supporting Clean Air Act rules.³⁵² Even reduced to that relatively small part of agency work, scaling truth determination proved challenging.³⁵³ Those problems would only be exaggerated were one to try to apply an IQA-like approach to communicative administration writ large, either in judicial review or in procedural requirements.

Much the same could be said of the possibility of working within First Amendment jurisprudence to build in judicially enforceable limits on coercion of third parties, as cases like *Murthy* and *Vullo* have begun to do.³⁵⁴ For one thing, at best such limits would control communicative administration that could be reasonably argued to be similar to "coercion" or a "threat,"³⁵⁵ which is not true of all communicative administration modalities.³⁵⁶ And even for this subset of communicative administration that could be characterized as coercive or threatening, it is implausible to suppose that courts would be well equipped to make responsible, apolitical decisions about how to balance the benefits of communicative administration with the risks. Disputes about communicative coercion tend to be highly politicized in ways that would put tremendous pressure on judges: For instance, the government communications challenged in *Murthy* and *Vullo* allegedly sought to achieve censorship of conservative

349. See Shapiro, *supra* note 203, at 9-10.

350. Freilich & Price, *supra* note 203, at 58.

351. See CORTEZ, *supra* note 21, at 29 n.216.

352. See Johnson, *supra* note 348, at 42-44 (collecting examples, such as endangered species listing decisions, rulemakings, and guidance that were challenged by businesses under the IQA); see also THOMAS O. MCGARITY ET AL., TRUTH AND SCIENCE BETRAYED: THE CASE AGAINST THE INFORMATION QUALITY ACT 14 (2005) (discussing a petition filed by an industry group examining data relied upon by the EPA in a Clean Air Act implementation).

353. See Shapiro, *supra* note 348, at 349-51.

354. See *supra* Part II.C.2.

355. See *supra* text accompanying notes 255-76.

356. See *supra* Part I.C (cataloging the modalities of communicative administration).

speech, but the shoe was on the other foot when Federal Communications Commission Chairman Brendan Carr threatened ABC with licensure revocation if it did not take Jimmy Kimmel off the air for making a joke about Charlie Kirk's death.³⁵⁷ It is naïve to think that judges could routinely enter into these politicized affairs without making the situation worse.

At the end of the day, the impulse to regulate the quality of communicative administration is understandable but unworkable. It invariably requires some decisionmaker (either courts, agencies, or both) to make difficult categorizations in a high volume of cases, encouraging excessive and delegitimizing fights over the nature of reality and truth themselves. Luckily, there may be other options that center on structural protections that ensure counterspeech within government.

2. Institutional pluralism and the marketplace for communicative administration

It may be that we do not need to do much to guard against populist authoritarian use of communicative administration other than to preserve certain features of the organization of the modern administrative state against erosion or deconstruction. This approach would insist on enlisting the sheer diversity of the administrative state as a structural check on *univalent* communicative administration. The basic idea here would be to multiply independent channels of communication within and across agencies, and thereby to encourage pluralistic counterspeech within the government.³⁵⁸ One of the enduring, if somewhat problematic, justifications for protecting free speech under the First Amendment is that it contributes to a “marketplace of ideas.”³⁵⁹ Such a marketplace not only ensures the proliferation of speech, but it also serves “liberal democratic ends” such as “truth-seeking, democratic deliberation, and checking the government.”³⁶⁰ In the context of communicative administration, one could imagine explicit efforts to cultivate a

357. See John Hendel, *It's the Threats That Are the Point: How Brendan Carr Exerts His FCC Power*, POLITICO (Sept. 27, 2025, 7:00 AM EDT), <https://perma.cc/PAM3-4HU9>; Aziz Huq, Opinion, *Jimmy Kimmel Should Have Strong Odds at the Supreme Court*, POLITICO MAG. (Sept. 18, 2025, 11:54 AM EDT), <https://perma.cc/5GX2-4KER> (recounting the controversy and arguing that Murthy and Vullo should *theoretically* provide a pathway for someone like Kimmel to sue for government coercion of private actors).

358. Cf. Walters, *supra* note 17, at 14 (arguing for the centrality of contestation to democratic legitimacy in the administrative state); Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1605-06 (2023) (finding accountability in the diffuse nature of the bureaucracy, where power is widely shared).

359. See Morgan N. Weiland, *First Amendment Metaphors: The Death of the 'Marketplace of Ideas' and the Rise of the Post-Truth 'Free Flow of Information'*, 33 YALE J.L. & HUMANS. 366, 368 (2022). To be clear, the marketplace metaphor has come in for some criticism. See *id.* at 370; Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 1-2.

360. Weiland, *supra* note 359, at 381.

“marketplace of communicative administration” that is similarly protective of liberal democratic ends and a motivator of diversified communicative administrative activity.

To some extent, this marketplace already exists—most communicative administration is managed independently by agencies despite President Trump’s recent and largely unprecedented efforts to coopt and centralize communicative administration. And in many cases there is pushback on presidential communication from within agencies, some of which is publicized enough through journalistic pathways or otherwise as to make plain that the government is of many minds.³⁶¹ But were we to embrace this logic as a generalized response to the threat of populist authoritarian use of communicative administration, many other structural safeguards could be erected to ensure that the marketplace of communicative administration remains free. These include promoting contestation and competition for communicative primacy by encouraging multiple agencies or subagencies to independently communicate information in a particular policy space, allowing for the possibility of disagreement and checking.³⁶² We might also consider institutionalizing opportunities for dissent in many facets of administrative process and even within single agencies, perhaps modeled on the State Department’s innovative “dissent channel.”³⁶³ Perhaps most directly, Congress might pass laws institutionalizing a right of executive branch employees and

361. See Virginia Heffernan, *Civil Servants Are Leading the American Resistance—With GameStop as a Guide*, GUARDIAN (Feb. 20, 2025, 6:00 AM EST), <https://perma.cc/SME3-Z7YH> (recounting recent examples of civil servants protesting by engaging in what “Alexander Solzhenitsyn, the great Soviet dissident, called ‘personal non-participation in lies’” (quoting ALEKSANDR SOLZHENITSYN, LIVE NOT BY LIES! (1974), in THE SOLZHENITSYN READER 558 (Edward E. Ericson, Jr. & Daniel J. Mahoney, eds., 2006))). For important scholarly analyses of the place for civil servant resistance to presidential administration, see generally, for example, Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349 (2019), which unpacks the notion of civil servant disobedience and inquires into normative foundations for legitimate disobedience.

362. For a discussion about how conflict between agencies can produce information, see Daniel A. Farber & Anne Joseph O’Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1421-22 (2017).

363. Warren Christopher, *Origins and Procedures: Secretary of State Christopher’s Message on the Dissent Channel*, U.S. DEP’T STATE (Aug. 8, 1995), <https://perma.cc/YK3N-L7XK>; see also *What Is the American State Department’s “Dissent Channel”?*, ECONOMIST (Nov. 9, 2023), <https://perma.cc/RPS4-DL7Z>. For an illustration of the purposes of the dissent channel, and the disastrous consequences of its nonuse, see generally ELIZABETH SHACKELFORD, *THE DISSENT CHANNEL: AMERICAN DIPLOMACY IN A DISHONEST AGE* (2020), which provides a first-hand account of dissent, and lack thereof, from the State Department’s diplomacy in South Sudan. Of course, dissent channels are “only as valuable as agencies’ commitments to both take the ‘dissents’ seriously and protect their users from the retaliation that whistleblower law protects against in other situations.” WILLIAM D. ARAIZA, *REBUILDING EXPERTISE: CREATING EFFECTIVE AND TRUSTWORTHY REGULATION IN AN AGE OF DOUBT* 133 (2022) (offering dissent channels as an approach to protecting integrity of information in government but also acknowledging their limitations).

officials to counterspeech and dissent that goes beyond the limited First Amendment rights that public-sector employees already have.³⁶⁴ We might also consider empowering outside checks on communicative administration by creating a public right to comment using the infrastructure of “comment boxes” already established in social media.³⁶⁵

To be clear, this approach is not a complete answer to a perceived information quality problem, and in fact it might make communicative administration less effective in some respects. For instance, Freilich and Price note that some informational errors arise from diffusing responsibility for information across institutions.³⁶⁶ Likewise, it is possible that some of the potential benefits of communicative administration—especially those that focus on democratic goods, like the forging of shared public meanings and understandings—would be diluted by a strategy to intentionally create opportunities for disagreement. To the extent that the benefits of communicative administration flow from the information being uncontested, what I am suggesting is certainly no answer. But what counterspeech forfeits is more than made up for by its built-in resistance to the more exigent threat of a populist authoritarian takeover of government airwaves.

If one is convinced that a protection of institutional pluralism and the development of a “marketplace” for communicative administration is a desirable response to the problems posed by communicative administration in our age, the legal challenge is clear: There must be some effort to defend informational pluralism against the ever-growing specter of the “unitary executive theory.”³⁶⁷

364. Under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), First Amendment protection for government employees’ critical speech only applies when they speak as private citizens; when speaking “pursuant to their official duties,” the government employer can tightly restrict critical speech. See Kermit Roosevelt III, *Not as Bad as You Think: Why Garcetti v. Ceballos Makes Sense*, 14 U. PA. J. CONST. L. 631, 632-34 (2012). Of course, *Garcetti* also affirmed some degree of protection for private speech on matters of public concern, and this private speech could be an important source of counterspeech and dissent in its own right. *Id.* at 634.

365. The power of comment boxes to highlight problematic uses of communicative administration is well demonstrated by the comments left on YouTube in response to a bizarre instance of Department of Interior propaganda celebrating the Trump Administration on Independence Day. See U.S. DEP’T OF INTERIOR, *Inside Interior* (YouTube, July 4, 2025), <https://perma.cc/TR44-YAKJ> (to view the video, click “View the live page”).

366. Freilich & Price, *supra* note 203, at 8 (“A particular block to both public and private information correction is the challenge of inter-institutional communication—where the error finder and the error fixer are not co-located.”).

367. See *supra* note 31 and accompanying text (discussing the unitary executive theory). For an attempt to defend the normative value of “government information” against the specter of unitary executive theory, see Barry Sullivan, *Expert Knowledge, Democratic Accountability, and the Unitary Executive*, 92 FORDHAM L. REV. 575, 579-80 (2023) (warning against presidential efforts to control information that carry the risk of “political or partisan filtering” and prevent both Congress and the public from “perform[ing] their respective legislative and oversight roles”).

It is not difficult to imagine how the unitary executive theory might be extended to cover presidential control of not just legal administration, but also communicative administration. On this account, part of the President's duty vested in him under the Constitution is to be the voice of the executive branch,³⁶⁸ not merely to "take [c]are that the [l]aws be faithfully executed."³⁶⁹ And to be *his* voice, the President must also be able to control all dissent and counterspeech within the executive branch—or so the argument might go.³⁷⁰ To be resilient against the ascendant unitary executive theory, there must be an argument for why communicative administration is special and deserving of some kind of carveout from the unitarian logic that has driven us to the precipice of constitutional crisis.³⁷¹

It turns out that there are some hooks for such a counter-unitary theory in the context of communicative administration. As the distinction between the Vesting Clause and the Take Care Clause above suggests, part of the textual justification for enhancing presidential power under the unitary executive theory is simply not applicable to communicative administration: The Take Care Clause, by its own terms, is limited to presidential power to engage in legal administration.³⁷² The part of Article II that is most directly on point with respect to communicative administration—the Opinions Clause³⁷³—may be

368. It is difficult to see any specific textual hook for this prerogative, but it may be implied in the longstanding duality in separation of powers law that Daphna Renan calls the "president's two bodies." See Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119, 1122-23 (2020). As Renan suggests, one of these bodies is the President as a person, and the legal recognition of this "body" entails the possibility of "charismatic leadership" that delivers "moral and political clout." *Id.* at 1123-24. This is why presidential "tweets" may have some legal status, see *id.* at 1127 & n.21 (citing Katherine Shaw, *Speech, Intent, and the President*, 104 CORN. L. REV. 1337, 1384-85 (2019)), but it also might suggest that if the President wants to micromanage all public communication within the institutional apparatus of the executive branch, that is within the job description.

369. U.S. CONST. art. II, § 3, cl. 1.

370. See Heidi Kitrosser, *In the Name of Accountability*, 98 S. CAL. L. REV. 1321, 1328-29 (2025) (noting the risk of "distortion" of information through presidential control and acknowledging that presidential authority to do this would "depend partly on how aggressively [unitary executive] theory is interpreted").

371. See Shalev Gad Roisman, *President Trump in the Era of Exclusive Powers*, HARV. L. REV. BLOG (Apr. 12, 2025), <https://perma.cc/3QPH-4T95> (explaining how the second Trump Administration's excesses are directly traceable to the Court's unitary executive theory—the Administration's "defining doctrinal innovation" has been to "take the Supreme Court at its word").

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

373. *Id.* art. II, § 2, cl. 1 (providing that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices").

understood as a limit on the unitary executive power.³⁷⁴ Finally, it may be worth asking whether communicative administration is exclusively an executive power in the first place. All branches of government engage in communication with the public, so there is nothing particularly “executive” about communicative administration except for its source.³⁷⁵

For all of these reasons, there appear to be avenues for resisting the incursion of unitarian logic into the sphere of communicative administration. Whether these avenues will convince courts to back away from the logical extensions of unitary executive theory and approve of protections of independent exercises of communicative administration below the level of the President is unclear, but there is a textual basis for distinction along with strong normative reasons for structural independence on communicative matters. One thing is for sure: If it is true that communicative administration will increasingly become a substitute for legal administration,³⁷⁶ then it is only a matter of time until we will have to confront the question of whether the unitary executive theory will extend into this domain, despite its chilling implications in an era of populist authoritarianism.

Conclusion

It is time for communicative administration to come more clearly into the administrative law field’s consciousness. Not only are there intellectual gains to be made by understanding it as a part of public administration writ large and linking it to our information age, but there is also essentially no choice: Communicative administration is becoming central to public administration, opening up vistas filled with exciting and terrifying possibilities. It deserves far more attention than the occasional treatments it has so far received, both in the academic literature on administrative law and in the law itself. This Article has

374. See Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. 877, 895 & nn.6, 8 (2020) (reviewing the literature on the Opinions Clause and noting scholarship arguing that it limits the unitary executive theory).

375. The most thorough examination of the original understanding of what was entailed by the “executive power” vested in the President by Article II provides little support for the notion that the executive power contained a prerogative to control executive branch speech, including dissent. See Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1173 (2019) (noting that the executive power was originally understood to be “nothing more than ‘a power of putting [the] laws in execution’” (quoting ROBERT FILMER, *THE ANARCHY OF A LIMITED OR MIXED MONARCHY* (1648), in *PATRIARCHA AND OTHER WRITINGS* 131, 136 (Johann P. Sommerville ed., Cambridge Univ. Press 1991))). Even if Mortenson is wrong that there is no royal residuum, there is no suggestion that I am aware of that the King had, as part of royal prerogative, a power to squelch and micromanage all speech within the government.

376. See *supra* Part III.A.

sought to begin a broader conversation about how administrative law can and should respond to the growth of communicative administration.

One key takeaway worth ending on is that communicative administration presents many distinctive challenges and opportunities. The inertial impulse, illustrated by the Fifth Circuit's decision in *Apter*, to simply pull existing administrative law tools—for example, judicial review and procedures, such as notice-and-comment—off the shelf is understandable but likely misguided. It risks squelching the enormous upside of communicative administration: namely, that it could be the foundation for administration beyond the force of law, and indeed for a renewed democracy built on shared epistemic commitments that can help navigate the nation through its current informational and ideological crises. Responsibly used, communicative administration is an unequivocal democratic good. But at the same time, as the present moment reveals, it is susceptible to co-optation by authoritarian actors who do not share the same normative aspirations for communicative administration. This reality means that even the most sanguine of us—including myself—ought to take seriously the challenge of constraining and channeling communicative administration. Administrative law has a role to play, but it may be that the administrative law of communicative administration will need to look very different than the administrative law of legal administration. I have suggested here that it will likely need to focus more on the structure of authority over who speaks within the administrative state, but ultimately my hope is that this Article will generate other approaches that share the aspiration to foster the best of communicative administration while constraining its abuse.