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# INTERPENETRATION OF POWERS: CHANNELS AND OBSTACLES FOR POPULIST IMPULSES

Anya Bernstein<sup>†</sup>

*Abstract:* Discussions of populism often focus on the most visible points of executive power: individual leaders. Yet individual leaders only accomplish things through administrative apparatuses that enable and support their power. Rejecting a political theology that imagines sovereignty as inhering in a single decision-maker, this article turns to political pragmatics focused on the people who populate the government. I draw on interviews with administrators in the government of two successful but quite different democracies. The first is the United States, an old, flagship democratic state. The second is Taiwan, which transitioned from a four-decade military dictatorship to a vibrant democracy in the late twentieth century.

My interviews probe how administrators understand their work and how they describe the conditions for its legitimacy. Many Taiwanese administrators tend to present their regulatory practices as highly dialogic and legitimated through ongoing interactions with multiple outside influences, including the legislature and multiple public sectors. Many American administrators, in contrast, tend to hew to a more rigid notion of separated powers, in which too much interaction with those outside the executive threatens the legitimacy of agency action.

My Taiwanese interviewees' idealized state-involved government branches highly integrated with one another and their surrounding society. I suggest that this insistence on interpenetration as a hallmark of legitimacy presents conceptual obstacles to populist impulses, which seek to cordon-off executive action from outside influence and bypass legislative power and public influence. In contrast, the ideal of separated, antagonistic powers that underlies my American interviewees' descriptions of their work presents potentially hospitable channels for the flow of such populist desires.

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## I. INTRODUCTION: SEPARATION OF POWERS CONSCIOUSNESS

The idea of populism is famously slippery: there is no clear, coherent, or consistent standard to hold it to.<sup>1</sup> That is, no doubt, part of its power, just as it is part of the power of populist leaders themselves.<sup>2</sup> Many commentators

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<sup>1</sup> See generally David Fontana, *Unbundling Populism*, 65 UCLA L. REV. 1482, 1485 (2018) (“Populism . . . is a they, and not an it.”).

<sup>2</sup> See generally Jean Comaroff, *Populism and Late Liberalism: A Special Affinity?*, 637 AM. ACAD. POL. & SOC. SCI. 99, 100 (2011) (arguing that “populism is what linguists call a shifter . . . its deployment

agree that populism tends to draw on Manichean oppositions: a “pure people” set against a “corrupt elite;”<sup>3</sup> a “will of the people” uniquely identifiable by the populist leader and set against a class of oppressive masters.<sup>4</sup> But it also goes beyond just pitting two groups against each other; it suggests a solution to the body politic, in the body of one person.

Populism claims for its leader a unique ability to hear the demands of the popular will. This ability justifies bypassing those intermediaries who normally produce, interpret, and implement the law, such as legislators, judges, and government administrators.<sup>5</sup> Indeed, members of those institutions become easily assimilable to that corrupt elite class of masters against whom the populist leader protects the people. Government institutions are part of the problem that the populist leader promises to solve.<sup>6</sup>

Instead, the populist’s claim to legitimacy rests on another claim: direct communication. The populist, on this image, hears and speaks to the people themselves, not just their representatives.<sup>7</sup> And his communication with the people bypasses the ordinary institutions of government, in speeches, rallies, or, now, in tweets.<sup>8</sup> Perhaps concomitantly, while *communication* is presented as a dialogue between the people and their leader, *power* and *authority* are imagined as unidirectional: they flow only from the leader on high down to the people below. By discrediting the ability of the standard intervening institutions of democracy to legitimately express, enact, or respond to the people’s will, and by presenting the people as too oppressed and dispersed to

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being more about marking difference than denoting content, and its meaning being largely relative to the standpoint from which it is deployed.”).

<sup>3</sup> CAS MUDDE & CRISTÓBAL ROVIRA KALTWASSER, *POPULISM: A VERY SHORT INTRODUCTION* 6 (2017).

<sup>4</sup> See generally BENJAMIN MOFFITT, *THE GLOBAL RISE OF POPULISM: PERFORMANCE, POLITICAL STYLE, AND REPRESENTATION* 95 (2016).

<sup>5</sup> Emiliana De Blasio & Michele Sorice, *Populism Between Direct Democracy and the Technological Myth*, 4 PALGRAVE COMM. 1, 3 (2018) (“[P]opulist movements and parties tend to reject the logic of participatory democracy [and] the methods of deliberation.”).

<sup>6</sup> See, e.g., HANS-GEORG BETZ, *RADICAL RIGHT-WING POPULISM IN WESTERN EUROPE* 2 (1994) (linking the rise of populism in Europe with a “disenchantment with the major political and social institutions [and] the weakening . . . of electoral alignments”).

<sup>7</sup> See, e.g., Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017) (analyzing the role of unscripted presidential utterances for litigation).

<sup>8</sup> Douglas B. McKechnie, *From Secret White House Recordings to @realDonaldTrump: The Democratic Value of Presidential Tweets*, 40 CAMPBELL L. REV. 611, 638 (2018) (arguing that U.S. President Trump’s tweets have democracy-enhancing value because they reveal an unguarded, intimate version of the President’s personality).

enact their will themselves, the populist leader positions himself as the only legitimated actor left.

Perhaps that is why, at moments of heightened executive power consolidation, it is tempting to fall back on Carl Schmitt's oracular slogan: "Sovereign is he who decides on the exception."<sup>9</sup> Schmitt's idea, so influential at various moments over the last century, locates sovereignty in the power to sidestep the "general norm, as represented by . . . ordinary legal prescription,"<sup>10</sup> in favor of "the exception, which is not codified in the existing legal order."<sup>11</sup> This ability to make that decision, to declare the suspension of the normal order, is what constitutes sovereign power according to Schmitt.<sup>12</sup>

Schmitt provides a powerful description of a populist leader's aspirations: to successfully claim a unique and hyper-legitimate connection to the populace;<sup>13</sup> to not only head a unified executive but, ideally, to unify the entire government under the leader's power. The leader derives this superordinate legitimacy from his direct communication with the people. He instantiates it through the ability to decide on the parameters of his own power. Schmitt's version of sovereignty—an individual who controls the entire state apparatus from a position not constrained by law or other institutions—presents the very image that the populist leader strives to project.

Yet, like most oracles, Schmitt's pronouncement distorts as much as it reveals. Framing sovereignty as centered on a single, decisive actor distorts the realities of political action. A decision, after all, does not enact itself. Political results never ride on one single decider; they always depend on the mobilization of numerous individuals and institutions. This distortion obscures the multiple communicative encounters, ongoing relationships, and multidirectional channels of efficacy at the heart of *any* political act—even those acts that appear autonomous, authoritative, and sovereign. And it ignores the multiplicities—of personality, motivation, competence, and

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<sup>9</sup> CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., MIT Press 1985) (1922).

<sup>10</sup> *Id.* at 6.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 7 ("[The sovereign] decides whether there is an extreme emergency as well as what must be done to eliminate it. Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended.").

<sup>13</sup> See, e.g., Moffitt, *supra* note 4, at 96 (discussing how populist discourses construct a notion of the populace).

authority—that characterize any modern state.<sup>14</sup> The executive, after all, is a *they*, not an *it*; not an individual but an institution with a social life of its own and a place in its wider society.<sup>15</sup>

The idea that a single person can control—or even keep track of—the governmental apparatus of a populous nation is exactly the sort of fantasy that would-be autocrats would have people believe.<sup>16</sup> Governments, after all, are highly internally variegated.<sup>17</sup> There are long-term employees and recent newcomers; there are political appointees and career civil servants. There are people who have imbibed the mission, culture, or habits of their agency, and others who chafe at those things. There are those who dutifully follow new directives, those who try to subvert them, and those who figure whatever is now will pass and move slowly to make it pass faster.<sup>18</sup> Each of these people, moreover, exists in a wider social world with its cultural proclivities, and within an individual biographical trajectory with its influences and convictions.<sup>19</sup> And in many places, these people are also subject to the kind of power they wield. In democracies with the rule of law, at least, administrators are both the subjects and the objects of regulation.<sup>20</sup>

I do not mean to say that a single person *cannot* amass power within the state apparatus. But when he does, he does so *through* this multiplicity of personalities and institutions. Tracking populist (or other) consolidation, then, necessarily involves looking to the complex of institutions and individuals who together create governance—not just at the person who claims to control them. Behind any single person who appears to personify a unified government stands the disaggregated mess of human interactivity that we

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<sup>14</sup> See, e.g., Comaroff, *supra* note 2, at 103 (arguing that populism “is in itself never enough to fuel sustained, politically constructive mobilizations”).

<sup>15</sup> Cf. Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 239 (1992).

<sup>16</sup> See also TIMOTHY MITCHELL, *STATE/CULTURE: STATE-FORMATION AFTER THE CULTURAL TURN* 76–97 (George Steinmetz ed., 1999) (noting that governments often create the illusion of internal coherence and external separateness from their society, a process Mitchell calls the “state effect”).

<sup>17</sup> See MATTHEW S. HULL, *GOVERNMENT OF PAPER: THE MATERIALITY OF BUREAUCRACY IN URBAN PAKISTAN* 129–30 (2012) (noting that understanding government action involves “understand[ing] collectivization and individuation as simultaneous functions of the same bureaucratic process, taking neither the agency of the individual nor the organization as given”).

<sup>18</sup> See, e.g., Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROB. 57, 62–64 (1991) (describing range of personnel typically involved in rulemaking process within one U.S. agency).

<sup>19</sup> See generally Anya Bernstein, *Bureaucratic Speech: Language Choice and Democratic Identity in the Taipei Bureaucracy*, 40 POL. & LEGAL ANTHROPOLOGY REV. 28 (2017).

<sup>20</sup> See generally Anya Bernstein, *The Social Life of Regulation in Taipei City Hall: The Role of Legality in the Administrative Bureaucracy*, 33 LAW & SOC. INQUIRY 925 (2008).

encounter when we enter the domain of the state. Talking about populism as an existing governmental phenomenon, thus, often buys into the populist's claims. It mistakes the conductor for the orchestra.

As an attempt to accurately describe executive power, then, the Schmittian phrase fails; it gives voice to a desire more than an analysis. Yet it is also revealing in its own way. It instantiates the way that both those who participate in politics and those who write about it can become so focused on highly visible individuals that we neglect the social infrastructure that both undergirds and channels their actions.

A contrasting contemporaneous view takes the plurality of any political effect more into account. Hannah Arendt's notion of political *action* takes its multiplicity and unpredictability as central features. Action "is essentially always the beginning of something new."<sup>21</sup> It is conduct that has creative effects in the world precisely because it is taken up—and potentially transformed—by others.<sup>22</sup> It entails a lack of total control: "we start something. We weave our strand into a network of relations. What comes of it we never know . . . because one *cannot* know."<sup>23</sup> Recognizing the effects of action has a helpless quality to it: we must "come to terms with what irrevocably happened and be reconciled with what unavoidably exists."<sup>24</sup> This helplessness, however, is merely the natural result of rejecting an understanding of the state that is primarily theological, and hence theoretical. For Schmitt, the essential characteristics of sovereignty emerge from the scholar's own definition of it. Arendt in contrast suggests a pragmatic approach, where an understanding of government grows out of its observed conduct.<sup>25</sup>

Understanding the populist potential of executive power requires following Arendt's lead. The tight logical structures and insistent clarity of political theology do not describe existing politics. On the contrary, political

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<sup>21</sup> HANNAH ARENDT, *ESSAYS IN UNDERSTANDING: 1930–1954*, 320–21 (Jerome Kohn ed., 1994).

<sup>22</sup> HANNAH ARENDT, *THE HUMAN CONDITION* 25, 198 (1958) (naming this kind of efficacious yet contingent action and speech as the two categories of human activity "out of which rises the realm of human affairs").

<sup>23</sup> HANNAH ARENDT, *THE PORTABLE HANNAH ARENDT* 21 (Peter Baehr ed., 2000).

<sup>24</sup> ARENDT, *ESSAYS IN UNDERSTANDING*, *supra* note 21, at 322.

<sup>25</sup> This pragmatism matches up with that of the American Pragmatists, for whom reality inhered not in a theoretical articulation of truth but in actual effects in the world. *See* CHARLES S. PEIRCE, *PHILOSOPHICAL WRITINGS OF PEIRCE* 259 (Justus Buchler ed., 1955) ("Consider what effects that might conceivably have practical bearing you conceive the object of your conception to have. Then your conception of those effects is the *WHOLE* of your conception of the object").

theology is itself one of the dangers that populist leaders pose to democratic regimes. It is easy to take claims of consolidated executive power at their word, neglecting the variety of ways that people who work in government structure its conduct. But a leader's power extends only as far as government workers allow it to go.

So rather than focusing on highly visible leaders, I talk to those who make any political decision actionable: bureaucrats. Drawing on interviews with government personnel, I ask how those who populate governments conceive of their own role in the political process. What is the "separation of powers consciousness"<sup>26</sup> (as one of my interviewees put it) of those who populate administrative agencies? How can political structures and cultures come to different assumptions about the networks relating government nodes?<sup>27</sup> What renders power and decision-making authority legitimate for those who wield and enable it? I suggest that political structures can be home to a range of conceptions about how government power should operate.<sup>28</sup>

To get a sense of the breadth of conceptions available, I interview administrators in two successful, but quite different, democracies: The United States and Taiwan (Republic of China). My U.S. interviewees operate in a longstanding flagship democracy, their work is structured by administrative procedures inscribed into law over seven decades ago. The Taiwanese administrators I interview, in contrast, saw their country move quickly from decades of dictatorship to full-fledged democracy over the final years of the twentieth century. Many were already working government jobs when the country passed its first law imposing constraints on administrative procedures. With martial law a living memory and democracy widely considered a continual work in progress, we can posit that these administrators may bring different attitudes, presuppositions, and values into play than their American counterparts.<sup>29</sup> Rather than assume that all democracies, or all employees of democratic states, share the same conception of legitimate governance, I

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<sup>26</sup> Interview with Taiwanese public law court judge (Nov. 2017).

<sup>27</sup> See generally Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMP. L. 859, 861 (2011) (arguing that administrative law scholarship should inquire into the social networks, rather than just the legal constraints, within which administrators act).

<sup>28</sup> See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 639–40 (2000) (explaining that separation of powers structures have far-reaching implications not only for all branches of government but also, more broadly, for conceptions and implementations of democracy, self-government, and the protection of individual rights).

<sup>29</sup> See generally Bernstein, *supra* note 19.

analyze the how workers in these different democracies present and legitimize their work.

I suggest below that such different conceptions can provide different environments for populist aspirations. They can form smooth channels along which populist impulses can flow, or, alternatively, throw up obstacles to populist consolidation. My interviews reveal a striking contrast in how American and Taiwanese administrators imagine power situated within their respective governments. American administrators present an image of a government divided: separate nodes bear different kinds of power, and interactions are limited and discouraged. Even where the realities of government organization entail considerable interaction—as, for instance, in the extensive role of agency personnel in statute drafting—the *image* my interviewees present remains static and separate.

This view is consistent with a vision of power relations popularized in some recent arguments about the separation of powers in the United States. Arguments consonant with unitary executive theory present government branches not only as possessing different expertise and fulfilling different central functions. They also present each branch as jealously guarding its powers against the others' incursions. On this view, America's system discourages cooperation and coordination, instead assuming that each branch will amass as much power for itself as it can. This view of government organization resonates in my interviewees' image of the executive branch they work for. It also supports a vision of government in which the executive branch could properly seek to block out democratic channels of representation, influence, and authority. On this view, each arena of governmental power is ideally immune from intrusion by the others. This American view thus provides, at the level of assumptions about legitimate government organization, a hospitable environment for populist impulses.

My Taiwanese interviewees, in contrast, present an image of government shot through with dialogue, debate, and ongoing mutual influence. Administrators participate openly and explicitly in legislative processes. Legislators instruct agencies on the proper way to interpret and implement statutes. And much agency work is done by nongovernmental parties whose participation is explicitly invoked and sometimes even legally required, not just hidden in webs of back-channel communication.



This image presents government as indelibly interactive: there are ideally no nodes protected from the influence and incursion of others. Taiwan's experience with democracy is much more recent than that of the United States. Either despite democracy's recent onset or because of it, Taiwanese administrators' understanding of the proper structure of government validates an interpenetration of powers. In this image, a populist bypassing representative institutions would be nakedly illegitimate—an ideological aberration rather than an extension of existing commitments. The assumptions of administrators in this new democracy provide fewer clear channels for populist ideology.

## II. DISTRIBUTION OF POWERS: THE POLITICAL IDENTITY OF THOSE WHO GOVERN

In this Article, I explore the political identities of those who populate the government. These people have historically been neglected by both scholars and commentators, who tend to pay attention either to individual leaders, or to depersonalized structures of government.<sup>30</sup> Those structures, however, both have effects on, and are also reciprocally affected by, the people who inhabit them. That ongoing mutual influence—the way that personal stakes, backgrounds, and relationships influence the workings of even organizations as large and as complicated as government—is easy to lose sight of. In part, that is a natural result of the size and complexity of the institution itself; it is just hard to keep track. But in part, it also arises from the difficulty of studying bureaucracies and similar organizations.

Max Weber provided the still classic description of government bureaucracy, laid out in a chapter of *Economy and Society*, as well as in scattered references throughout his writing.<sup>31</sup> Weber's discussion focused on the standardized, impersonal nature of government work: "The purely impersonal character of the office, with its separation of the private sphere from that of the official activities, facilitates the official's integration into the given functional conditions of the disciplined mechanism" that is

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<sup>30</sup> But see Colin Hoag & Matthew Hull, *A Review of the Anthropological Literature on the Civil Service* (World Bank Group Dev. Research Grp. Impact Evaluation Team. Working Paper No. 8081, 2017), <http://documents.worldbank.org/curated/en/492901496250951775/A-review-of-the-anthropological-literature-on-the-civil-service> (providing an overview of recent scholarship taking a cultural approach government personnel).

<sup>31</sup> See 2 MAX WEBER, *ECONOMY AND SOCIETY* 956 (Guenther Roth & Claus Wittich eds., 1978).

government.<sup>32</sup> This view, which presents each participant in the system as “only a small cog in a ceaselessly moving mechanism [which] prescribes to him an essentially fixed route of march,”<sup>33</sup> remains highly influential in both scholarship and popular discourse.<sup>34</sup>

Yet, as William Novak has forcefully argued, at least the popular take-up of Weber’s approach leaves out a range of considerations that we otherwise find essential both for describing human activity and for evaluating specifically democratic politics. The “Weberian legacy in thinking about the state,” Novak argued, “remains tethered to an essentially aristocratic rendering of statecraft—a state concept focused on . . . elites at the center of power. . . . [A]s if the actual state were not the people.”<sup>35</sup> This, Novak says, leads to studying the state as though it were autonomous and an essentially unified elite institution, an “evacuation of democracy” from understandings of the state that gives rise to “a cramped understanding of statecraft” that cannot realistically recognize the variety and extent of modern state action.<sup>36</sup>

Asking how those who occupy the centers of the state conceive of their relations to one another and the democratic process that structures their power helps counteract this tendency. It allows us to see in detail how the “actual state” is precisely “the people.”<sup>37</sup> Talking to state employees directly provides one way to get past ideas that present the state as a kind of aristocratic machine—a center peopled by elite but predictable cogs.<sup>38</sup> These organizations have effects on the world in undulating ways, sometimes operating inaccessibly, other times rearing up into public visibility;<sup>39</sup> sometimes acting through identifiable individuals, other times amalgamating

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<sup>32</sup> *Id.* at 968.

<sup>33</sup> *Id.* at 989.

<sup>34</sup> William J. Novak, *Beyond Max Weber: The Need for a Democratic (Not Aristocratic) Theory of the Modern State*, 36 *TOCQUEVILLE REV.* 43, 54 (2015) (“Weber’s conception of the state . . . continues to dominate and proliferate”).

<sup>35</sup> *Id.* at 69 (quoting KARL MARX: EARLY WRITINGS 85–86 (Rodney Livingstone & Gregor Benton trans., 1975)).

<sup>36</sup> *Id.* at 79.

<sup>37</sup> *Id.* at 69 (quoting KARL MARX: EARLY WRITINGS 85–86 (Rodney Livingstone & Gregor Benton trans., 1975)).

<sup>38</sup> See Martin Albrow, *Sine Ire et Studio—or Do Organizations Have Feelings?*, 13 *ORG. STUD.* 313, 326 (1992) (arguing for the “recognition of affectivity as a key aspect of organizational performance”).

<sup>39</sup> See Anya Bernstein, *Agency in State Agencies*, in *DISTRIBUTED AGENCY* 41 (N.J. Enfield & Paul Kockelman eds., 2017).

into collective action;<sup>40</sup> sometimes mechanistically following set procedures, other times shaped by individual personalities and relationships.<sup>41</sup>

It is, thus, important to take the worldviews and commitments of government personnel seriously. After all, they critically determine how government functions.<sup>42</sup> Weber tells us that bloodline stops mattering in a bureaucratized state, where participation is determined by more objective measures like performance on civil service exams. But recognizing the introduction of objective measures in constructing paths into the state should not lead us to assume that those within the state are depersonalized. The lowered importance of status to government employment—in Maine’s classic sense of aristocratic family position<sup>43</sup>—does not imply that individual views and personalities stop mattering, too.

Novak suggests that we open up our ideas of state functioning to allow for of the kind of outside influence that seems appropriate to a democracy. In the same vein, we can ask whether our ideas of separation of powers have that kind of openness as well. In other words, when we look to the people who populate the state, we can ask how they conceive of their work in relation to both other parts of the state and to people outside it.<sup>44</sup>

I focus here primarily on Taiwan, a recently democratized polity that has undergone a highly self-conscious, articulated evolution in the relationships among its governmental centers of power.<sup>45</sup> I draw on interviews

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<sup>40</sup> See HULL, *supra* note 17, at 129–30 (“The challenge is to collectivization and individuation as simultaneous functions of the same bureaucratic process, taking neither the agency of the individual nor the organization as given”).

<sup>41</sup> See, e.g., McGarity, *supra* note 18, at 73 (noting that the Environmental Protection Agency’s internal “management training materials” discuss the importance of not placing “rookies” and “bastards” on work teams that develop regulations).

<sup>42</sup> See, e.g., Michael S. Schmidt & Maggie Haberman, *Trump Wanted to Order Justice Dept. to Prosecute Comey and Clinton*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/20/us/politics/president-trump-justice-department.html> (detailing the ongoing inability of U.S. President Donald Trump to push executive branch administrators to enact his wish for a criminal investigation of his opponent in the 2016 presidential election—an investigation he was unable to undertake himself, and which he could not effectively order directly).

<sup>43</sup> See SIR HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 168–70 (1861).

<sup>44</sup> See generally PETER M. BLAU, *THE DYNAMICS OF BUREAUCRACY: A STUDY OF INTERPERSONAL RELATIONS IN TWO GOVERNMENT AGENCIES* 251–52 (2d. ed. 1963) (noting that the particular contours of bureaucracy will depend on social norms and especially social values in a particular context).

<sup>45</sup> See generally SHELLEY RIGGER, *POLITICS IN TAIWAN: VOTING FOR DEMOCRACY* (1999) (providing a history of Taiwan’s democratization); Jeeyang Rhee Baum, *Breaking Authoritarian Bonds: The Political Origins of the Taiwan Administrative Procedure Act*, 5 J. E. ASIAN STUD. 365 (2005) (elucidating the inter-

with around thirty participants in Taiwan's administrative system, as well as numerous more informal conversations with others, that I conducted over the course of 2015-2017.<sup>46</sup> My interviewees and interlocutors included administrators at a range of levels of the bureaucratic hierarchy and from a range of central and city government departments; judges at all levels of the public law court system;<sup>47</sup> activists for judicial, administrative, and community change; and scholars of law and policy.

I also draw on interviews with around thirty U.S. federal administrators, which I conducted over the course of 2015-2018.<sup>48</sup> These interviews highlight the particularities and contingencies of any single country's experience with relating its governmental nodes, and undercut any notion that there is one correct or natural way for a democracy to structure that relationship.<sup>49</sup> I choose this comparator advisedly, on the assumption that social scientific inquiry is always, inevitably, at least implicitly comparative,<sup>50</sup> whether we compare our object of analysis to another, or to our own preexisting predictions about it.<sup>51</sup> Indeed, this comparative element of sociological study is implicit in Weber's notion of the ideal type, a hypothesized characterization of an object of analysis that is continually revised as researchers discover more about the object—a process of discovery that itself is aided by having the ideal type as a comparator that helps researchers recognize relevant aspects of the object of study. I use evidence from the United States because it so often

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and intra-branch considerations that went into the development of Taiwan's Administrative Procedure Act); Jiunn-Rong Yeh, *Democracy-Driven Transformation to Regulatory State: The Case of Taiwan*, 3 NAT'L TAIWAN U. L. REV. 31, 47 (2008) (describing the relationship between democratization and changes to regulatory structure); Cheng-Yi Huang, *Judicial Deference to Legislative Delegation and Administrative Discretion in New Democracies: Recent Evidence from Poland, Taiwan, and South Africa*, in COMPARATIVE ADMINISTRATIVE LAW 466 (Susan Rose-Ackerman & Peter Lindseth eds., 2010) (discussing evolving relations among government branches in Taiwan and other new democracies).

<sup>46</sup> This work builds on my extensive ethnographic work with city government administrators and urban political activists in Taipei over the course of 2002–2004, which brought me into regular contact with legislators and administrators at the city and national level.

<sup>47</sup> Taiwan has adopted the civil law model of parallel, coequal court systems: one for private and criminal law cases, the other for public law cases, in which the government acts as defendant. See Yun-chien Chang, *An Empirical Study of Administrative Appeal in Taiwan: A Cautionary Tale*, 23 TRANSNAT'L L. & CONTEMP. PROB'S 263, 271 (2014).

<sup>48</sup> These interviews are part of a larger collaboration with Professor Cristina Rodríguez.

<sup>49</sup> As Bruce Ackerman has written, although no one is immune from thinking their way is the right way, American political writing is especially susceptible to this kind of myopic assumption. See, e.g., Ackerman, *supra* note 28, at 636 (“Especially since 1989, American jurists have become big boosters of the American Way at constitutional conventions everywhere”).

<sup>50</sup> See Anya Bernstein, *The Songs of Other Birds*, in INSIDERS, OUTSIDERS, INJURIES, AND LAW: REVISITING THE OVEN BIRD'S SONG 227 (Mary Nell Trautner ed., 2018) (describing “sociolegal analysis [as] inherently comparative”).

<sup>51</sup> See WEBER, *supra* note 31, at xxxviii–xxxix (Weber's “ideal type too has a comparative purpose”).

serves, in scholarship, as an exemplar of democratic governance—an often-unnamed comparator against which others are judged.<sup>52</sup> Making this usually unspoken comparison explicit allows us to ask how separation of powers consciousness functions in different systems and illuminate ways in which it may ameliorate populist impulses, or pave the way for them.

### III. SEPARATION OF POWERS VS. INTERPENETRATION OF POWERS

Taiwan's Constitution specifies how the executive should submit legislative bills to the national legislature.<sup>53</sup> That is, it clearly contemplates an administrative role in legislation.<sup>54</sup> Agencies are routinely involved in producing legislation, both at the request of individual legislators and legislative committees, and as an internal process through which the administration expresses its preferences and expertise.<sup>55</sup> Departments contain components specifically tasked with drafting or finalizing legislation to propose to the legislature.<sup>56</sup> Administrators participate in legislative sessions at which numerous drafts of legislation addressing the same topic are voted on. These different drafts may, again, be produced by the same agency, in response to requests from different legislators and as an expression of the administration's own suggestions. Administrators told me that it was not unusual for them to produce draft legislation for a legislator while at the same time informing that legislator of the problems with his or her approach.

In my interviews across a number of agencies in Taiwan's central government, administrators consistently referred to their intimate and ongoing interactions with the legislature. But they never referenced the constitutional provision that gave legal expression to this power. Instead, administrators presented this power as a key part of the legitimacy of their own actions. Drafting and proposing legislation, one high-ranking administrator explained to me, "is called *accountability*. I [the agency] am responsible for these things. So when I think that the way we do these things needs to be modified, well, I ought to express our suggestions. So for an agency to draft statutory language

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<sup>52</sup> See commentary, *supra* note 49.

<sup>53</sup> MINGUO XIANFA art. 58 (1947) (Taiwan).

<sup>54</sup> See Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL'Y J. 531, 560 (2002) (noting that Taiwan's Constitution allows the President to appoint a Premier in charge of the executive branch, creating a "semi-presidential (dual-executive) system," with influences from both presidential and parliamentary systems).

<sup>55</sup> Interviews with Taiwanese government administrators (Dec. 2016, Nov. to Dec. 2017).

<sup>56</sup> Interview with Taiwanese government administrator (Nov. 2017).

is extremely legitimate and reasonable.”<sup>57</sup> Her colleague agreed: after all, “the agency, *it* is responsible for its policies,” so it is only right for the agency to participate in drafting the laws that those policies implement.<sup>58</sup>

Administrators, of course, do not just produce legislative language but also implement it once it is enacted. To assist with that, Taiwan’s legislature typically includes a statement of purpose (*lifa liyou*, reason for statutory enactment) for each statutory provision.<sup>59</sup> Although this statement of purpose is not technically the law, administrators spoke of it as if it were: this was the legislature’s instruction to agencies, guiding agency policy to conform to statutory purpose. Administrators spoke with discomfort and exasperation about the occasional provision that gets enacted without an attached purpose statement, and praised a recent development that required the legislature to publicly post video recordings of the inter-party negotiations at which the fine points of controversial statutory provisions get hammered out, since these provide agencies with some indication of how legislators understood the provisions they voted on even in the absence of a purpose statement.<sup>60</sup>

For my Taiwanese agency interviewees, agency statute drafting and legislative purpose statements form key parts of the ongoing dialogue between legislature and executive. In other words, the interpenetration of lawmaking powers between the legislature and the administration is not only an aspect of constitutional structure. It has become also a part of bureaucratic ethics, one way that administrators understand their own proper place in the government and relations with other government institutions.<sup>61</sup>

In contrast to the highly interactive image of ongoing conversation between agencies and legislature that my Taiwanese interlocutors presented, American agency interviewees painted a picture of stark separation. American

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<sup>57</sup> “Zheige jiaozuo accountability. . . Wo dui zhexie shiqing fu zeren, wo renwei zhexie shiqing zuode you xuyao jiantao de shihou wo jiu yinggai yao tichu women de jianyi. Suoyi zai xingzheng bumen tichu fa’an shi feichang zhengdang erqie helide. 這個叫做accountability. 我對這些事情負責任，我認為這些事情做得有需要檢討的時候我就應該要提出我們的建議。所以在行政部門提出法案是非常政黨而且合理的。” Interview with Taiwanese government administrators (Nov. 2017).

<sup>58</sup> “[T]a xingzheng bumen ta dui tade zhengce fuze 它，行政部門，它對它的正則要負責。” Interview with Taiwanese government administrators (Nov. 2017).

<sup>59</sup> Interviews with Taiwanese government administrators (Dec. 2016, Nov. to Dec. 2017).

<sup>60</sup> Interview with Taiwanese government administrators (Nov. 2017).

<sup>61</sup> Cf. BLAU, *supra* note 44, at 264–65 (noting that democracy, as a social form suited to deciding on goals but not implementing them, is “complementary” to bureaucracy, as a social form suited to implementing goals but not deciding on them). Blau, like many researchers of bureaucratic culture, worked with front-line administrators rather than those who made regulations; had he worked with the latter, he may have seen more decision-making and goal-setting within the bureaucratic agency.

administrators never presented interactive co-creation of statutory language as a kind of accountability, as most Taiwanese interviewees did. Although American administrators generally spoke of their work as implementing policy within the parameters of a statutory mandate, they did not generally present it as their role to help Congress figure out what it wanted or suggest what it should do.

Similarly, when asked whether statements by members of Congress affected their understanding of a statutory provision, administrators almost always said no. Indeed, most administrators indicated that they treat such statements with suspicion. A number of administrators, for instance, recounted situations in which they understood such statements as attempts to change the statute's meaning, avoid its natural implications, or get an upper hand in a legislative negotiation. As one administrator put it when asked about Congressional input into statutory meaning, "Was there any ongoing discussions or conversation with congressional committees or congressional staff? I can tell you absolutely not. Zero. Zero times."<sup>62</sup> Or as another put it, "We would get a lot of 'I wrote this and that's not what I meant' [from members of Congress], which is obviously not the words on the page, right?"<sup>63</sup> A legislator's understanding of the statute is just another possible interpretation, evaluated like any other.

By invalidating the legislative veto on agency action, American judicial doctrine has limited the ways in which Congress may override or invalidate an agency's interpretation or implementation of a statute.<sup>64</sup> Congress retains other tools short of legislative invalidation, such as making pointed appropriations decisions and requiring agency personnel to testify before Congress. Perhaps surprisingly, American interviewees asked about their relations with Congress rarely mentioned these tools, and no interviewee presented these methods as ways that Congress effectively influences agency decisions.

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<sup>62</sup> Interview with U.S. federal administrator (Mar. 2018).

<sup>63</sup> Interview with U.S. federal administrator (Feb. 2018). Another administrator said that they had seen situations where members of Congress "wrote to [the agency], they wrote letters and saying, 'Well, this is what we meant, this is how you should implement it,' but the agency can't do that." Interview with U.S. federal administrator (Apr. 2018).

<sup>64</sup> *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (holding that allowing Congress to invalidate or override agency action through anything short of the legislative process provided for in the U.S. Constitution violates constitutional separation of powers).

On the contrary, the most extensive discussion of the role of congressional oversight in my interviews came in an administrator's discussion of the institutional effects of the contemporary legislative process—what has been called “unorthodox lawmaking” for the way it departs from traditional images of how a bill becomes a law.<sup>65</sup> “I think maybe before my time in government,” this long-term administrator said, “the Congress would work through well-functioning processes of committees, and then there'd be a clear record, and then conference committees, and there'd be a clear record, and you would have report language really to explain what was intended. That doesn't happen anymore.”<sup>66</sup> The effect of the absence of clear legislative records, moreover, “is . . . a lot more discretion to the agencies to interpret.”<sup>67</sup> Legislative disorganization thus empowers the administrative state: “Congress writes laws that are these huge balancing acts. They craft these very intricate compromises, and different . . . members of Congress have different points of view of . . . what they understood was actually passed.” That kind of “indecision . . . creates a lot of discretion for the agency.”<sup>68</sup>

In these ways, American administrators consistently presented legislation as something Congress creates and then hands to agencies. On this description, agencies play little role in creating the statute, and Congress plays no role in determining how it is implemented once it is enacted. Yet research on the United States has indicated that there, too, administrators often play a pivotal role in creating legislation;<sup>69</sup> that has been the case for at least most of the last century.<sup>70</sup> While public opprobrium has fallen to the role of lobbyists in producing legislation, scholars have noted that agencies also take part in the process.<sup>71</sup> Agencies sometimes play the role of editors, giving “technical

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<sup>65</sup> See generally BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* (2016).

<sup>66</sup> Interview with U.S. federal administrator (May 2018).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Brigham Daniels, *Agency as Principal*, 48 GA. L. REV. 335, 404 (2014) (“Sometimes Congress asks agencies to draft language, and sometimes agencies do so without being asked”).

<sup>70</sup> See, e.g., Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L. J. 266, 337 (2013) (“[United States] agency . . . employees drafted bills, provided congressmen with analyses, testified at hearings, and even served as ghostwriters for committee reports and floor speeches” starting with the New Deal).

<sup>71</sup> Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside- An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 758 (2014) (“[O]ur respondents told us that first drafts [of legislation] are typically written by . . . the White House and agencies, or policy experts and outside groups, like lobbyists”).



drafting assistance” to legislators drafting statutory language.<sup>72</sup> Other times, agencies draft legislation at the request of Congressional staff, or propose statutory drafts of their own accord.<sup>73</sup> Indeed, administrators within the American administrative state report that agencies almost always have *some* role in legislative drafting, whether by reviewing it and offering technical edits—for instance, to ensure that agency terms of art are used consistently in statutes relating to that agency—or by themselves drafting parts of the statute.<sup>74</sup> Such input, moreover, involves all levels of the agency, with “[c]omments generally flow[ing] up first from an agency’s program offices to the legislative affairs and legislative counsel offices within each bureau and then on to the departmental level.”<sup>75</sup>

As a factual matter, then, American agencies are highly involved in the production of laws passed by the legislature. They may not have an independent authority to propose legislation the way their counterparts in Taiwan do,<sup>76</sup> but they clearly play an important role in producing the language that becomes the law. Yet my interviewees across a range of U.S. federal agencies did not advert to this role of their own accord and downplayed it when asked about it directly. When asked about the agency’s role in drafting statutes, interviewees sometimes referred only to the offices concerned with communications with Congress, like the office of legislative or Congressional affairs; many brushed off agency participation in legislation as largely nonexistent or merely technical editing. For instance, one administrator noted that their Congressional Affairs Office was quite active and in touch with Congress members regularly, but when asked why, responded, “They might provide insights on bills in circulation. They’re yelled at by . . . members of Congress over particular agency actions.”<sup>77</sup> The way that this administrator presents being “yelled at” by Congress as part of someone’s job, rather than as part of an interactive process of inter-branch influence, matches my

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<sup>72</sup> Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1378–79 (2017) (“Federal agencies . . . help draft statutes in the background by providing ‘technical drafting assistance’ on legislation that originates from congressional staffers. Such drafting assistance is often provided confidentially—without White House oversight, much less public notice and comment—and continues to be provided throughout the legislative process”).

<sup>73</sup> Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 470–73 (2017).

<sup>74</sup> *Id.* at 484.

<sup>75</sup> *Id.*

<sup>76</sup> See *supra* notes 54, 57, & 58 and accompanying text.

<sup>77</sup> Interview with U.S. federal administrator (Mar. 2018).

administrative interviewees' general lack of emphasis on Congress's ability or desire to affect agency action.<sup>78</sup>

American agency interviewees, in sum, presented Congress as lacking the ability or the right to speak to the agency beyond the words of the statute. And they presented agencies as lacking the ability or the right to create those words themselves. This view fits into American constitutional structure, but that constitutional structure does not mandate it—indeed to some extent this image is belied by the actual practices of American agencies. But it expresses a particular view of legitimacy and accountability for administrative agencies.

American interviewees presented themselves as remaining accountable precisely by keeping their distance from Congress. Their job was to pursue policy within the parameters presented by the statutory words, not to have an ongoing conversation with legislators about the meanings and purposes of the laws. Taiwanese interviewees, in contrast, stressed the centrality of dialogue and the collaborative nature of statutory drafting and implementation to administrative accountability.

The policies that each group implements stem from different origins. For most of the post-World War II twentieth century, Taiwan operated as a one-party dictatorship ruled by the KMT (*guomindang* or Chinese Nationalist Party).<sup>79</sup> The country's regulatory policies emerged from a relatively closed circle centered on the ruling party. Politicians and administrators in the one-party state were, of course, involved. So were business leaders, who often overlapped in terms of social circle and personnel with those KMT operatives. Indeed, big businesses were often party-owned to begin with.<sup>80</sup> American advisors,<sup>81</sup> who managed the flood of U.S. subsidies that propped up the regime for the first decades of its existence,<sup>82</sup> and other U.S. and international

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<sup>78</sup> See *supra* text accompanying note 64.

<sup>79</sup> See Bernstein, *supra* note 19, at 31–33; see generally STEVEN E. PHILLIPS, *BETWEEN ASSIMILATION AND INDEPENDENCE: THE TAIWANESE ENCOUNTER WITH NATIONALIST CHINA, 1945–1950* (2003).

<sup>80</sup> Hsin-Huang Michael Hsiao, *The State and Business Relations in Taiwan*, 1 *ASIA PAC. BUS. REV.* 76, 80–83 (1995) (describing the close and overlapping relationships of Taiwanese businesses and the KMT).

<sup>81</sup> See generally Leonard Gordon, *American Planning for Taiwan, 1942–1945*, 37 *PAC. HIST. REV.* 201 (1968).

<sup>82</sup> See generally THOMAS B. GOLD, *STATE AND SOCIETY IN THE TAIWAN MIRACLE* 53–55 (1986) (explaining that the U.S. gave around \$2 billion to the KMT between 1945 and 1949, but, “disgusted with [the KMT’s] incompetence and insatiable appetite for funds that simply vanished,” had cut off aid shortly before the Communist victory in China in 1949. Aid resumed when “North Korea’s Kim Il-sung entered the story as the [KMT’s] *deus ex machina* by invading South Korea,” leading to the Korean War, which made

institutions, greatly influenced Taiwan's economic policy as well.<sup>83</sup> Taiwan in the post-War era became a classic developmental state, with tight controls on economic activity geared toward shoring up domestic industry,<sup>84</sup> followed by the encouragement of production for export and domestic labor for foreign corporations.<sup>85</sup>

Thus, policy in the post-World War II, pre-democracy era was developed within a relatively limited social loop. It was incredibly successful, contributing to astonishing economic growth with widespread benefits for Taiwan's residents.<sup>86</sup> Today, Taiwan's Executive branch remains headed by a single Premier (*Xingzheng Yuanzhang*, or Executive Branch Head), who is appointed by the President but who has independent reporting duties to the legislature.<sup>87</sup> The Premier heads up a clearly unitary executive; administrators routinely told me that, in the words of one interviewee, "the Premier is my boss."<sup>88</sup>

Nonetheless, the Taiwanese administrators I interviewed did not describe their policy development process as streamlined, unified, or closed. Nor did they valorize this approach to administrative decision-making by, for instance, comparing its efficiency or results favorably to other approaches. Instead, administrators consistently emphasized the importance of receiving input from multiple perspectives when creating policy.<sup>89</sup> Some told me that their policy-making process usually began by canvassing approaches to related issues in other countries, particularly the United States and Japan.<sup>90</sup>

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Taiwan relevant again to U.S. interests both as a Pacific military base and as part of a strategy of containment of Communist forces).

<sup>83</sup> Hsiao, *supra* note 80, at 79 (describing pressure exerted by the World Bank and USAID on Taiwan to make the Taiwanese economy more hospitable to U.S. capital).

<sup>84</sup> See John Ohnesorge, *Chinese Administrative Law in the Northeast Asian Mirror*, 16 *TRANSNAT'L L. & CONTEMPORARY PROBLEMS* 103, 108–16 (2006) (explaining the typical characteristics of the Asian developmental state).

<sup>85</sup> See Hsiao, *supra* note 80, at 78–79 (discussing Taiwan's shift from protectionist to export-oriented policies in the 1960s).

<sup>86</sup> See, e.g., Murray A. Rubinstein, *Introduction: The "Taiwan Miracle"*, in *THE OTHER TAIWAN: 1945 TO THE PRESENT* (Murray A. Rubinstein ed., 1994) (lamenting propensity of Western writing on Taiwan to focus only on its impressive economic growth and political stability, rather than on other cultural and social factors); Samuel P.S. Ho, *Economics, Economic Bureaucracy and Taiwan's Economic Development*, 20 *PAC. AFF.* 226, 226–31 (1987) (discussing Taiwan's dramatic success in the late twentieth century, which the author attributes to land redistribution and other economic policies).

<sup>87</sup> See Wang, *supra* note 54.

<sup>88</sup> "Xingzheng Yuanzhang shi wode laoban 行政院長是我的老闆." Interview with Taiwanese government administrator (Nov. 2017).

<sup>89</sup> Interviews with Taiwanese government administrators (Dec. 2016, Nov. to Dec. 2017).

<sup>90</sup> Interview with Taiwanese government administrators (Nov. 2017).

Many emphasized the centrality of communication with private parties through media like meetings, hearings, and online platforms organized by the agency.<sup>91</sup>

Taiwan's Administrative Procedure Act (APA), implemented in 2000, mandates some modicum of public consultation for the production of regulations.<sup>92</sup> It requires agencies to announce proposed regulations and accept public input about them either through comments or public hearings,<sup>93</sup> and to hold hearings for adjudications affecting private interests.<sup>94</sup> Yet, when I asked administrators how they developed policy, none referred to these requirements or procedures, even when discussing public input into the policy-making process. Rather, Taiwanese administrators phrased their policy development process as an ongoing conversation with the public through a range of media that administrators themselves set up and developed for that very purpose. Many of the people I talked to were already in government service when the Taiwan APA was enacted. Yet when I asked how the law had affected their policy-making practices, the common response was something along the lines of *not much*.<sup>95</sup> Administrators emphasized that they already communicated with interested parties and the public, and already reviewed regulations for legality, before the passage of the APA.<sup>96</sup>

Taiwanese administrators thus presented their work as open and dialogic, involving many inputs through a range of media. This openness and multiplicity, moreover, were clearly valorized; these were presented not as last resorts that legal strictures required but the proper, ethical, and accountable approaches to making policy.

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<sup>91</sup> Multiple interviews with Taiwanese government administrators (Dec. 2016, Nov. to Dec. 2017).

<sup>92</sup> See generally JEEYANG RHEE BAUM, *RESPONSIVE DEMOCRACY: INCREASING STATE ACCOUNTABILITY IN EAST ASIA* (2011) (describing the development of administrative law, and specifically Administrative Procedure Acts, in several East Asian countries including Taiwan).

<sup>93</sup> Xingzheng chengxufa (行政程式法) [ADMINISTRATIVE PROCEDURE ACT] art. 154–155 Fawubu Fagui Ziliaoku (2010) (amended 2015), <https://db.lawbank.com.tw/Eng/FLAW/FLAWDAT0201.asp>.

<sup>94</sup> *Id.* at art. 102.

<sup>95</sup> Interviews with Taiwanese government administrators (Dec. 2016, Nov.–Dec. 2017). When asked how the APA had affected her work, one administrator explained that she was already aware of the legal basis for agency action before its passage; this person clearly saw the APA as merely codifying existing legal requirements and best practices. Interview with Taiwanese government administrator, December 2016.

<sup>96</sup> In the U.S. context, some have also argued that the Administrative Procedure Act largely enacted practices that were already prevalent in the administrative state rather than imposing completely new or unusual requirements. JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* 11 (2012) (arguing that the passage of the APA did little to change the practices of many agencies, which had already developed the internal processes that the APA codified).

In contrast to their Taiwanese counterparts, my American administrative interviewees all entered a government already governed by the American Administrative Procedure Act, which was enacted in 1946.<sup>97</sup> Their careers were structured by its requirements, including the well-known “notice and comment” rulemaking process of announcing agency regulatory plans; accepting commentary from the public;<sup>98</sup> and responding to those comments in finalized regulations.<sup>99</sup> Yet in interviews, many American administrators downplayed the role of public input in their work. Their descriptions of the regulatory process focused for the most part on the work on either side of public input: interviewees described the extensive processes involved in producing a Notice of Proposed Rulemaking, and the workflow of producing responses to public comment.

This is not to say that American administrators’ attitude toward public input was uniform across agencies. Many agreed that public comments can change the course of rulemaking, usually by alerting agencies to unforeseen practical effects of proposed rules.<sup>100</sup> Occasionally, American administrators said that public input affects agency policy, as when some agencies undertake “listening tours” to gather information about issues on the ground from regulated or affected parties.<sup>101</sup> Employees in one smaller agency explained that they often used public input as a way to spur regulatory innovation.<sup>102</sup> Generally, though, American administrators did not present as an impetus for rulemaking or as central to the regulatory decision-making public comments process the way their Taiwanese counterparts did. Instead, public opinion often took the form of a surprising cameo appearance: a source of occasionally useful information you might not have thought of. It was not, however, usually described as a mainstay or a necessity. Unlike their Taiwanese counterparts, my American interviewees did not present themselves as primarily engaged in an ongoing conversation with the public they served.

Instead, American administrators presented policy as emerging largely from the administrative state itself. The American state is not nearly as clear-

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<sup>97</sup> Administrative Procedure Act of 1946, Pub. L. No. 79–404, 60 Stat. 237 (codified as 5 U.S.C. § 500 *et seq.* (1946)).

<sup>98</sup> 5 U.S.C. § 553 (2017) (requiring agencies to publicize a notice of proposed rulemaking, accepting public comments, and provide a statement of the basis for their final regulatory decisions).

<sup>99</sup> *See* United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977) (holding that agency must explain its reasoning and factual basis for a final rule).

<sup>100</sup> Interviews with U.S. federal administrators (Feb. to Mar. 2018).

<sup>101</sup> Interview with U.S. federal administrator (May 2018).

<sup>102</sup> Interviews with U.S. federal administrators (Feb. 2018).

cut a case of unified executive as the Taiwanese. But in interviews, American administrators tended to describe decision-making and policy production as a fairly closed circuit. This circuit involved personnel in the component agency—the particular office within a larger department where policy was being formulated—as well as those within the larger department itself. It also involved component agencies in the Executive Office of the President, like the Office of Management and Budget (OMB) and the Domestic Policy Council.<sup>103</sup>

I make no claims here about the extent of actual interaction with private parties outside the agency that either the American or the Taiwanese administration engages in. My concern is with the way that administrators imagine and depict their participation in governance, and the way they understand governing bodies to be structured. Since these are the people who carry out—or obstruct—the wishes of legislatures and leaders, their understanding of the role they occupy seems highly relevant to grasping the potentialities of populism.

When Taiwanese administrators describe their work, they tend to focus on the wide range of partners with whom they engage in ongoing dialogue as they develop policies and finalize regulations. They present their work as open and engaged with the legislature and relevant sectors of the public. Administrators describe the publics they communicate with in numerous ways: as interest groups pushing their preferences and agendas; experts and scholars who participate in regulatory drafting; affected parties whose interests are put at issue; and citizens at large. The lines of authority and influence that Taiwanese administrators describe when discussing their work tend to be variegated and multidirectional. On this image, there are a lot of speakers in a conversation that goes on and on, and they influence one another in different ways over time. Thus, my Taiwanese interviewees presented their agencies as part of an interactive interpenetration of powers among differently situated participants.

American administrators, in contrast, present a smaller, more insulated loop. Administrative work is concentrated within the administration, and largely centered in the component agency itself. They often describe the impetus for decisions, and the decision-making process, as an interactive process among people in the component agency, other components in the

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<sup>103</sup> See Cass Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2012).

same department, and central executive offices. Outside influences, including legislatures and the public, are depicted as just that: outside. They may push the agency in one direction or another, but administrators do not describe them as integrated into an ongoing interaction through which decisions are made. Rather, each sector has its own role, with interactions among sectors minimized: not an interpenetrating distribution, but a rather static separation, of powers.<sup>104</sup>

#### IV. SEPARATION, INTERPENETRATION, AND EXECUTIVE CONSOLIDATION

These two different visions of government structure have implications for populism. Interviewees in the American administrative state seem to have imbibed a relatively recent understanding of separations of powers in which each branch is as sealed off as possible from the others—a vision in which each branch is internally unified around its one particular kind of work and jealously guards its boundaries against outside incursion.<sup>105</sup> This vision presents a particular image of how government branches do, and should, interact: in a relationship not of power-sharing so much as of power-hoarding.<sup>106</sup>

The separate-and-jealous image of federal government organization was popularized by conservative U.S. legal practitioners in the 1980s and has gained great prominence in American legal discourse.<sup>107</sup> Its proponents argue that the Constitution's text requires this approach.<sup>108</sup> Like any legal text, though, the Constitution can plausibly give rise to multiple interpretations,<sup>109</sup> including multiple understandings of the nature of executive power. That may

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<sup>104</sup> For a discussion of the choice between “collaboration” and “confrontation” between the legislative and judicial branches, see Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 108–12 (2009) (describing the passage of the poll tax provision of the Voting Rights Act as an unusual attempt by Congress to collaborate rather than compete with the Supreme Court, and the Court's rejection of that invitation).

<sup>105</sup> See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 5–11 (1994) (outlining the theory of the unitary executive).

<sup>106</sup> See, e.g., Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 217 (2005) (arguing that Congress “cannot regulate the President's constitutional powers”).

<sup>107</sup> *Id.*

<sup>108</sup> Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 557 (1994) (arguing that constitutional interpretation must focus on constitutional text, which suggests an internally unitary executive that is also externally not subject to constraint by other parties).

<sup>109</sup> See generally Anya Bernstein, *Before Interpretation*, 84 U. CHI. L. REV. 567 (2017) (arguing that any legal text is subject to multiple interpretations at two key points—when the interpreter selects a focus for interpretation, and when she situates that object of interpretation into a broader linguistic, factual, or ideological context).

help explain why the starkly separated view of government propounded in unitary executive theory is itself of such recent provenance.<sup>110</sup>

Interviewees in American agencies largely describe their government branch in a way that follows this recently prominent description. Agencies are presented as closed off from both Congress and the populace. In some cases, this closed-off quality focuses on governmental structure, as when interviewees describe how they reject attempts by individual legislators to control the meaning of an enacted statutory provision because a single member's opinion cannot be imputed to the enacting Congress as a whole. But the commitment to separation also has a larger, more amorphous character: it takes on a kind of ethical valence, with an implicit claim about what constitutes legitimate executive action.<sup>111</sup> Too much interaction between Congress and the administration, my interviewees' responses suggest, sullies administrative decision-making. It subjects agencies to congressional whims or the interests of individual members of Congress. This may not be deemed unconstitutional, but it appears democratically inappropriate. Similarly, while American interviewees showed respect for the input of the public through comments, they generally avoided presenting themselves as substantially influenced by such public opinion.

There is nothing necessarily harmful about this view of the executive branch as sealed off from outside influence. But it is notable how amenable it is to the kind of populist impulses described in Part I. The populist leader presents himself as the one able to understand the true needs of the people and to act on their behalf, bypassing the standard structures of democratic representation in the legislature. But he also resists constraint by the public, positioning himself instead as the only chosen one to speak on its behalf.

Though I suspect that few of my American interviewees would have much sympathy for populism, the assumption of deeply separate powers they expressed supports the populist's rejection of constraint by the public and its elected representatives. Irrespective of any personal commitments, the implicit understanding of how government ought to work that many interviewees expressed fits well into an anti-republican ideology of

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<sup>110</sup> Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CAL. L. REV. 1, 8 (2018) (describing the recent rise of unitary executive theory).

<sup>111</sup> See generally Anya Bernstein, *Democratizing Interpretation*, 60 WM. & MARY L. REV. (2018) (describing implicit claims to legitimacy in the context of judicial opinions).



governing.<sup>112</sup> It does not foment populism, but it does provide a convenient channel for populist impulses.

Taiwanese administrators, in contrast, work in a structurally unitary executive explicitly headed by a Premier. But they present their government quite differently. Rather than shoring up a unified block and seeking to maintain its imperviousness to outside influence, Taiwanese interviewees presented themselves as seeking outside influence out. When asked about their work, they tended to describe it not in terms of internal agency process but in terms of iterative dialogues with multiple parties. These outside parties included both the legislature—individual legislators, legislative groups, and the legislature as a body—and the public—including individual commentators on agency announcements, scholars and experts recruited to help agencies research issues and write regulations, interested parties convened to meetings with agency personnel, and interest groups that exerted pressure on and provided advice to agency decision makers.

Like their American counterparts, moreover, Taiwanese administrators did not describe this governance format as a necessary, unavoidable result of their constitutional structure. Rather, administrators presented this messier image, of an administrative apparatus subject to multiple sources of oversight, influence, and constraint, as the legitimate way to work in their democracy. Populist desires to bypass legislative and popular constraint does not fit comfortably with this image of appropriate governance as highly interactive and amenable to outside influence.

Would-be populists who want to mold government to their wishes cannot do it alone. They depend on government administrators to implement their plans and policies.<sup>113</sup> I have argued here that understanding populism therefore requires understanding the administrators who carry it out. The research presented here takes a small step toward increasing our knowledge of this mysterious social group. It does suggest, though, that an understanding of government as composed by starkly separated, maximally independent powers may provide channels along which populist impulses can flow to power. In contrast, viewing government as inherently messy and multifarious can throw up obstacles to the consolidation of power in any one node. Despite—or perhaps because of—Taiwan’s relatively short experience with

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<sup>112</sup> See Ackerman, *supra* note 28 (noting the potentially pathological results of American style separation of powers).

<sup>113</sup> See, e.g., WEBER, *supra* note 31, at 993 (“[A]gainst the bureaucracy the ruler remains powerless”).

democratic governance, Taiwanese administrators' understanding of their own government suggests fewer channels for populist impulses, and more obstacles to them, than the understandings of their American counterparts.

