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## All the Sovereign's Agents: The Constitutional Credentials of Administration

Kate Jackson

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# ALL THE SOVEREIGN’S AGENTS: THE CONSTITUTIONAL CREDENTIALS OF ADMINISTRATION

Kate Jackson\*

[P]rerogative being nothing, but a Power in the hands of the Prince to provide for the publick good, in such Cases, which depending upon unforeseen and uncertain Occurrences, certain and unalterable Laws could not safely direct, whatsoever shall be done manifestly for the good of the People, and the establishing the Government upon its true Foundations, is, and always well be just Prerogative.

—Locke, *Two Treatises of Government*, Ch. XIII ¶ 158<sup>1</sup>

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## INTRODUCTION

We face no less than four urgent crises: an ongoing pandemic;<sup>2</sup> racial injustice and its consequent civil unrest;<sup>3</sup> an economic depression approaching the pain

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<sup>1</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 3 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (ch. XIII, ¶ 158).

<sup>2</sup> *E.g.*, Exec. Order No. 14,002, 86 Fed. Reg. 7229 (Jan. 22, 2021); Exec. Order No. 13,995, 86 Fed. Reg. 7193 (Jan. 21, 2021).

<sup>3</sup> *E.g.*, Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

inflicted in 1929;<sup>4</sup> and the accumulating, existential threat of climate change.<sup>5</sup> Citizens must rely on their state to tackle these burning perils.<sup>6</sup> Yet critics both left and right would tear down its institutional capacity to do so.<sup>7</sup> Some denounce the exercise of administrative power as illiberal, unconstitutional, and obnoxious to the rule of law.<sup>8</sup> Others impugn it as undemocratic, paternalistic, and corrupt.<sup>9</sup> Yet without some kind of agent to carry out collective solutions, these perils may very well proceed unabated.

Pushing an anti-administrativist<sup>10</sup> agenda, libertarians continue their “long war”<sup>11</sup> against government agencies by insisting that they are an unconstitutional fourth branch of government. For them, administration is a kind of “absolutism” that violates the separation of powers and defies the principle of limited government.<sup>12</sup> They

<sup>4</sup> See generally David C. Wheelock, *Comparing the COVID-19 Recession with the Great Depression*, 39 ECON. SYNOPSIS (Aug. 12, 2020).

<sup>5</sup> E.g., Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

<sup>6</sup> See generally JEDIDIAH PURDY, THIS LAND IS OUR LAND: THE STRUGGLE FOR A NEW COMMONWEALTH (2019); Jedidiah Britton-Purdy, *The World We’ve Built*, DISSENT MAG. (July 3, 2018), [https://www.dissentmagazine.org/online\\_articles/world-we-built-sovereign-nature-infrastructure-leviathan](https://www.dissentmagazine.org/online_articles/world-we-built-sovereign-nature-infrastructure-leviathan) [<https://perma.cc/HD5H-YMGH>] (describing the “Leviathan” required to deal with climate change); Adam Tooze, *Shockwave*, 42 LONDON REV. BOOKS (Apr. 16, 2020), <https://www.lrb.co.uk/the-paper/v42/n08/adam-tooze/shockwave> [<https://perma.cc/L7EY-7GBX>] (describing the leadership and state capacity required to tackle the pandemic and its disastrous economic implications).

<sup>7</sup> Compare Wolfgang Streeck, *The Return of the Repressed*, 104 NEW LEFT REV. 5, 12–13 (2017) (agencies’ exclusionary elitism regarding experts contributes to populist blowback); Andrew Arato, *How We Got Here: Transition Failures, Their Causes and the Populist Interest in the Constitution*, 45 PHIL. & SOC. CRITICISM 1106, 1108 (2019) (executive power contributes to a democratic deficit that drives populism); Albena Azmanova, *The Crisis of Europe: Democratic Deficit and Eroding Sovereignty—Not Guilty*, 24 L. & CRITIQUE 23, 33–35 (2013) (technocratic government is insufficiently responsive to the undesirable consequences of its actions); JURGEN HABERMAS, TOWARD A RATIONAL SOCIETY: STUDENT PROTEST, SCIENCE AND POLITICS 81–82 (Jeremy J. Shapiro trans., Beacon Press ed. 1970) [hereinafter TOWARD A RATIONAL SOCIETY] (instrumental rationality, when performed by government bureaucracy, becomes a form of domination); and THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY AND THE CRISIS OF PUBLIC AUTHORITY 233 (1969) (arguing that the welfare state is an example of how private interest groups colonize public law-making), with Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3–4 (2017) [hereinafter *1930s Redux*] (describing proposed anti-administrative regulation and judicial suspicion of agency power—particularly that of Justice Gorsuch); see generally PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

<sup>8</sup> See HAMBURGER, *supra* note 7, at 7.

<sup>9</sup> See Streeck, *supra* note 7, at 15.

<sup>10</sup> This Article adopts the morphological derivation of “administrative” as seen in Metzger, *1930s Redux*, *supra* note 7, at 7.

<sup>11</sup> Charles H. Koch, Jr., *James Landis: The Administrative Process*, 48 ADMIN. L. REV. 419, 420 (1996).

<sup>12</sup> HAMBURGER, *supra* note 7, at 6; see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233 (1994) [hereinafter *The Rise and Rise*]; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335–37 (2002) [hereinafter

contend that agencies' discretionary rulemaking offends the liberal commitment to the rule of law.<sup>13</sup> Accordingly, they would punt agencies' responsibility for social, economic, and environmental problems to courts and legislatures.<sup>14</sup> Regulation would thus be placed at the mercy of an undemocratic judiciary who increasingly "weaponizes" the First Amendment in favor of big business<sup>15</sup>—or of a Congress whose already inefficient decision-making is crippled by hyperpolarization<sup>16</sup> and distorted by the kind of material inequalities that the welfare state is meant to ameliorate.<sup>17</sup>

Conservatives with a more authoritarian inflection seek to recall administration from its constitutional exile by subsuming it under presidential power.<sup>18</sup> Such critics would lend administration some democratic credentials by bootstrapping them to the president's electoral accountability. Yet ridding agencies of their independence by placing them under the discretion of the president grants the president personal control

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*Delegation and Original Meaning*]; RICHARD EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 12–13 (2006); JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 4 (2017); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1298–99 (2003). See generally Jeremy K. Kessler, *The Political Economy of "Constitutional Political Economy,"* 94 TEX. L. REV. 1527 (2016). For a recent opinion implementing this view, see *Florida v. Becerra*, No. 8:21-cv-839-SDM-AAS, 2021 WL 2514138, at \*31–37 (M.D. Fla. June 18, 2021).

<sup>13</sup> HAMBURGER, *supra* note 7, at 35–36, 50, 67–68, 72; ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 4 (2010). For theoretical discussions, see FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY 27–28 (Vol. II, 1976); PIERRE ROSANVALLON, GOOD GOVERNMENT 25–26 (2018).

<sup>14</sup> See, e.g., H.R. 5, 115th Cong. §§ 103, 202 (2017–2018) (increasing the constraints imposed on agency rulemaking and enhancing *de novo* judicial review of agency actions); LOWI, *supra* note 7, at 301.

<sup>15</sup> See Jedidiah Purdy, *Beyond the Bosses Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2162 (2018) (citing *Janus v. Am. Fed'n of State, 138 S. Ct. 2448, 2501* (2018) (Kagan, J., dissenting)).

<sup>16</sup> See, e.g., MATTHEW HOLDEN, JR., CONTINUITY AND DISRUPTIONS: ESSAYS IN PUBLIC ADMINISTRATION 225–26 (1996); BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 16 (2019).

<sup>17</sup> Peter L. Strauss, *Eroding 'Checks' on Presidential Authority: Norms, the Civil Service, and the Courts*, 94 CHI.-KENT L. REV. 581, 585 (2020); Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L.J. 1, 45 (2019).

<sup>18</sup> POSNER & VERMEULE, *supra* note 13, at 12–15; CARL SCHMITT, LEGALITY AND LEGITIMACY 13 (J.P. Seitzer trans., Duke Univ. Press 2004) (1932) [hereinafter LEGALITY AND LEGITIMACY] (“[T]he newly created financial bureaucracy . . . found the possibility of a new basis in the plebiscitary legitimacy of the German President elected by the entire German people.”); K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1673 (2018). Recent cases showing this inclination include, e.g., *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 685 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (buffering PCAOB commissioners from presidential oversight is unconstitutional); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020); and *Collins v. Yellen*, 141 S. Ct. 1761, 1784–85 (2021).

over agency policymaking and adjudication without the checks provided by Congress, the courts, or an independent civil service.<sup>19</sup> It arguably solves a separation-of-powers problem by introducing a new one.<sup>20</sup> More ominously, empowering the president with the patina of democratic legitimacy emits a strong whiff of Schmittian politics.<sup>21</sup> The prospect of a largely unbound executive officer claiming a popular mandate to hire and fire civil servants on a whim should alarm any that followed the Trump Administration's treatment of refugees, civil protestors, polluters, and political cronies.

Agency power likewise fares poorly in the hands of the left.<sup>22</sup> They blame administrative technocracy for a variety of social and political ailments: the reification of social differences and the juridification of human nature;<sup>23</sup> corruption, privatization and regulatory capture;<sup>24</sup> the depoliticization of economic issues and the subsidization of globalized financial capitalism<sup>25</sup> and, ultimately, the constellation of conspiratorial populist politics currently threatening liberal democratic states.<sup>26</sup> Their preferred solutions include democratizing agency decision-making<sup>27</sup> and constraining Congress' capacity to delegate its law-making function.<sup>28</sup> While their interventions are welcome,

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<sup>19</sup> See, e.g., ADAM B. COX & CRISTINA M. RODRIGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 7–8 (2020); *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018).

<sup>20</sup> DWIGHT WALDO, *THE ADMINISTRATIVE STATE* 145 (Routledge 2017) (1948); cf. ADRIAN VERMEULE, *LAW'S ABNEGATION* (2016) (arguing that no such problem exists because Congress knowingly delegated such policymaking to the executive).

<sup>21</sup> POSNER & VERMEULE, *supra* note 13, at 53–54, 90–91; Samuel Moyn, *The Guardians*, *THE NATION* (Aug. 24, 2020), <https://www.thenation.com/article/culture/eric-posner-demagogues-playbook/> [<https://perma.cc/N4LU-D69V>]; James Chappel, *Nudging Towards Theocracy: Adrian Vermeule's War on Liberalism*, *DISSENT MAG.* (2020), <https://www.dissentmagazine.org/article/nudging-towards-theocracy> [<https://perma.cc/4HCL-JZAM>]. We can observe this dynamic in Justice Gorsuch's dissent in *Gundy v. United States*, when he states that “to allow the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing . . . would . . . invite the tyranny of the majority.” 139 S. Ct. 2116, 2145 (2019). For a discussion of the shaky democratic credentials of unitary executive power in the context of the new Biden Administration, see Ashraf Ahmed and Karen Tani, *Presidential Primacy Amidst Democratic Decline*, 135 *HARV. L. REV. F.* 39 (2021).

<sup>22</sup> See Nicholas Bagley, *The Procedure Fetish*, 118 *MICH. L. REV.* 345, 348–50 (2019) (arguing that left-wing worries about agency legitimacy opened space for right-wing deregulatory reform).

<sup>23</sup> HABERMAS, *TOWARD A RATIONAL SOCIETY*, *supra* note 7, at 121–22; Michel Foucault, *Governmentality*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 87–104 (Graham Burchell et al. eds., 1991). For a discussion and summary of these critiques, see EMERSON, *supra* note 16, at 7–8, 65.

<sup>24</sup> See generally LOWI, *supra* note 7, at 12856; JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC* (2017).

<sup>25</sup> Streeck, *supra* note 7, at 12–13; Azmanova, *supra* note 7, at 28.

<sup>26</sup> See ROSANVALLON, *supra* note 13, at 162; see generally Arato, *supra* note 7.

<sup>27</sup> Rahman, *supra* note 18, at 1676; EMERSON, *supra* note 16, at 17–18.

<sup>28</sup> See, e.g., Robert Goodin, *Welfare, Rights and Discretion*, 6 *OXFORD J. LEG. STUDIES* 232, 250–53 (1986); Thomas Christiano, *Democracy and Bureaucracy*, 71 *PHIL. & PHENOMENOLOGICAL RSCH.* 211, 212 (2005); ROSANVALLON, *supra* note 13, at 160.

they may deprive government of the nimble expertise necessary to address environmental and economic crises.<sup>29</sup> Moreover, as illustrated by the president's extraordinary powers to shape national immigration policy despite its "notoriously complex and detailed statutory structure," increasing the amount of formal legislation may only expand agencies' enforcement discretion.<sup>30</sup> Agency democratization, furthermore, risks reproducing, perhaps under the cover of ostensible public consensus, the same social, economic and political inequalities that distort Congressional law-making.<sup>31</sup>

This Article contends that this multipronged anti-administrativist attack stands upon shaky conceptual foundations. Each builds atop a theory of constitutionalism that embraces a too-literal conception of popular sovereignty.<sup>32</sup> It is a conception that posits that there is, in fact, a "people" with a sovereign "will." It is a "will" that can be clearly identified through elections; straightforwardly transcribed through law-making; mechanically applied by administrators and constrained by judges.<sup>33</sup> But in a country of hundreds of millions, the diverse multiplicity of citizens could never find a common will.<sup>34</sup> It is even more impossible that it could ever be accurately expressed through the law-making of elected representatives.<sup>35</sup> As a result, critics of administration often grant statutory law-making more democratic credentials than it deserves.<sup>36</sup>

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<sup>29</sup> See James Landis, *Administrative Policies and the Courts*, 47 YALE L.J. 519, 530 (1938).

<sup>30</sup> COX & RODRIGUEZ, *supra* note 19, at 7–8.

<sup>31</sup> See LOWI, *supra* note 7, at 297314; EMERSON, *supra* note 16, at 76 (agency democratization reproduced racial bigotry); Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1669, 1764 (1975) [hereinafter *The Reformation of Administrative Law*] (collective action problems and the involvement of unaccountable public interest organizations skew attempts at agency democratization); Theda Skocpol & Kenneth Finegold, *State Capacity and Economic Intervention in the Early New Deal*, 97 POL. SCI. Q. 255, 265 (1982) (arguing that the NRA, despite its goals of incorporating labor and consumer interests, became captured by business).

<sup>32</sup> See Jurgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1, 9–10 (1994); discussed *infra* at Section I.A.

<sup>33</sup> Discussed *infra* at Sections I.A, I.B.

<sup>34</sup> See, e.g., CLAUDE LEFORT, DEMOCRACY AND POLITICAL THEORY 13–14 (David Macy trans., 1988); HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 65 (2002).

<sup>35</sup> See Michael Saward, *Shape-Shifting Representation*, 108 AM. POL. SCI. REV. 723, 723 (2014) [hereinafter *Shape-Shifting Representation*] (describing how politicians stand for different things to different people); see also *infra* Section II.A.

<sup>36</sup> This is called the "legislative primacy" argument. For an example, see POSNER & VERMEULE, *supra* note 13, at 8; and JEREMY WALDRON, *The Core of the Case Against Judicial Review*, in POLITICAL POLITICAL THEORY 196 (2016) [hereinafter *The Core of the Case Against Judicial Review*]. For a discussion of the historical intellectual roots of legislative primacy and its relation to individual rights, see ANICETO MASFERRER & ANNA TAITSLIN, *The Ill-Fated Union: Constitutional Entrenchment of Rights and the Will Theory from Rousseau to Waldron*, in THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (RECHSSTAAT), 105–06, 112 (James E. Hickey & James R. Silkenat eds., 2014) (explaining, *inter alia*, that Dicey believed in parliamentary supremacy and that the common law, enforced by judges,



The non-delegation doctrine purports to prevent the delegation of something that simply may not exist.

Critics commit another mistake when they invoke a theory of constitutionalism that analytically divides functions that cannot, as either a moral or empirical matter, be disentangled. First, they incorrectly posit two separate, autonomous processes: the collective formation of ends via law-making and the implementation, execution, application, or adjudication of those ends.<sup>37</sup> But we cannot presume that judges and administrators can mechanically apply and enforce the law without importing into the process their own value-laden, and therefore political, judgments.<sup>38</sup> “[T]hey who will the end will the means” is a naïve argument that occludes the power wielded by unelected actors.<sup>39</sup> It is also a mistake to presume that the legislative branch concerns itself only with value-laden final ends, and not with the means required to execute them.<sup>40</sup> Indeed, most of our most bitter political fights are fights conducted precisely over means: how best to grow the economy; how best to care for the sick; how best to mitigate climate change, etc.<sup>41</sup> As a result, the theories overemphasize and distort the purpose of separating powers.<sup>42</sup>

Critics commit yet another mistake when they divorce the constitutional functions of (1) protecting rights and limiting government power, and (2) providing the decision-making procedures necessary for democratic will-formation.<sup>43</sup> They isolate elections and law-making from the process of enforcing rights and the rule of law—as if they have nothing to do with one another. Yet quarantining rights from democracy requires reliance on an outsourced moral order external to the political system itself—a reliance inappropriate for contemporary secular polities.<sup>44</sup> They therefore

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would adequately protect individual rights against arbitrary executive power and preserve the “rule of law”).

<sup>37</sup> RICHARDSON, *supra* note 34, at 114 (dubs this phenomenon “agency instrumentalism”).

<sup>38</sup> *E.g.*, Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in 110 HARV. L. REV. 991, 997–98 (1997) (though most well-known for his “bad man” theory of the law, the essay also argues that law cannot be applied using mechanical logic; that “[b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding”).

<sup>39</sup> RICHARDSON, *supra* note 34, at 116.

<sup>40</sup> *See id.* at 119–27.

<sup>41</sup> *Id.* at 102.

<sup>42</sup> *See, e.g.*, THE FEDERALIST NO. 51 (James Madison).

<sup>43</sup> *See* Habermas, *supra* note 32, at 8–9. For a recent exhaustive historical treatment of how lawyers, judges, lawmakers, and advocates invoked the constitution as an agent of popular law-making, rather than as a limit on popular power, see JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* (Harv. Univ. Press 2022).

<sup>44</sup> Probably the most seminal argument is found in MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., Routledge 2001) (1930). *See also* MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth & Claus Wittich eds., 1968); JURGEN HABERMAS, *LEGITIMATION CRISIS* 101–02 (Thomas McCarthy trans., Beacon Press 1975);

lend judges too many liberal credentials while denying any to mechanisms of popular feedback.

Rather than critiquing agencies for violating the separation of powers, for their over-reliance on unelected technocrats, or for their indifference to universalizable legal principles, this Article argues that administration does indeed carry constitutional liberal democratic credentials—credentials borne out by political theory's "representative turn."<sup>45</sup> By understanding agencies as embedded in a system of representative democracy that aims to set the conditions by which citizens can relate to each other as political equals, we can assess the legitimacy of government agencies without any "idolatrous" commitments to a fictitious popular sovereign or legal formalism.<sup>46</sup> This Article suggests that agency institutions should be measured against the notion that popular sovereignty demands not consensus and consent, but instead institutions that permit citizens to understand themselves as coequal participants in the collective decision-making process.

Part I situates administrative agencies in an understanding of liberal democratic constitutionalism that eschews outmoded notions of popular sovereignty and natural law. It will then explain how adequately conceived notions of the separation of powers and the rule of law cannot serve as infeasible objections to administration. Part II makes a positive case for agency authority by drawing from the insights gained from political theory's representative turn. It will first define this important intellectual development and then explain how administrative agencies might fit comfortably within a representative system. The Article concludes by showing how theories of representation can inform some enduring debates in administrative law and suggesting some changes that might enhance the legitimacy of agency action.

#### I. ADMINISTRATION, POPULAR SOVEREIGNTY AND RIGHTS

Democracy promises the rule of "we the people."<sup>47</sup> Democratic citizens, possessing inalienable rights, are to come together, deliberate,<sup>48</sup> and jointly create the laws that bind them. The administrative agency, with its unaccountable expert technocrats, policymaking autonomy, and immunity from micromanaging judicial review, looks like an unwelcome uncle at the constitutional dinner table.

Intuitively, these knee-jerk objections cannot be quite correct. Agencies carry some obviously democratic credentials. As Adrian Vermeule points out, they are, after all, the creation of statutory law-making.<sup>49</sup> At least as early as 1798, Congress

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*cf.* CARL SCHMITT, *POLITICAL THEOLOGY* 36 (George Schwab trans., MIT Press 1985) ("All significant concepts of the modern theory of the state are secularized theological concepts.").

<sup>45</sup> Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387, 388–89 (2008).

<sup>46</sup> VERMEULE, *supra* note 20, at 56.

<sup>47</sup> *See generally* BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 4 (1998); U.S. CONST. pmb1.

<sup>48</sup> Nathan K. Noh, *Non-Delegation as Non-Deliberation*, 19 N.Y.U.L. REV. 379, 394 (2016).

<sup>49</sup> POSNER & VERMEULE, *supra* note 13, at 9.



has delegated coercive rulemaking power to Federal bureaucracy on matters as diverse as tax inspections, territorial governance, veterans' pensions, mail delivery, intellectual property, and the payment of public debts.<sup>50</sup> In *McCulloch v. Maryland*, the Supreme Court interpreted the “necessary and proper” clause to anticipate Congress' desire to create such agencies—in this case, a national bank.<sup>51</sup> Bruce Ackerman, in his seminal work, argues that our contemporary agencies carry “constitutional” credentials.<sup>52</sup> Many were birthed through multiple hyperpolitical elections and constitutional challenges within the courts.<sup>53</sup> Further, from their very inception, agencies struggled internally to accommodate their actions to constitutional requirements.<sup>54</sup> The Administrative Procedure Act (APA), for example, imposes upon agencies principles of due process and the rule of law.<sup>55</sup>

Regardless, if democratic law-making is to shape the community of those that make it, there *must* be some kind of agent or instrumentality to carry it out.<sup>56</sup> A congressional decision to levy a tax is meaningless without an Internal Revenue Service to collect it.<sup>57</sup> Yet it is impossible to imagine that such agencies might operate like mindless, loyal robots. Whether performed by court or administrator, the application of laws will inevitably involve controversial policy judgments.<sup>58</sup> Law-making is, by its nature, always more abstract than we would like. Such “general propositions do not,” noted Justice Holmes, Jr. in his influential *Lochner v. New York*<sup>59</sup> dissent, “decide concrete cases.” The required elaboration almost always imports values that are not

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<sup>50</sup> See generally Nicholas R. Parillo, *A Critical Assessment of the Originalist Case against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 332–49 (2021); Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449, 1452 (2019).

<sup>51</sup> 17 U.S. 316 (1819); U.S. CONST. art. I, § 8.

<sup>52</sup> ACKERMAN, *supra* note 47, at 4–5.

<sup>53</sup> *Id.* at 279–90, 306–12.

<sup>54</sup> Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1710–28 (2019).

<sup>55</sup> 5 U.S.C. §§ 551–559; see, e.g., Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 438 (2003) [hereinafter *Administrative Law in the Twenty-First Century*].

<sup>56</sup> See Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 212 (1887) (describing administration as the “Deed” that follows democratic will); JURGEN HABERMAS, BETWEEN FACTS AND NORMS 134 (William Rehg trans., 1996) (1992) [hereinafter BETWEEN FACTS AND NORMS].

<sup>57</sup> See Parillo, *supra* note 50. Theodore Sedgwick also noted, in 1791, that though Article I vested in Congress the right to coin money, “if no part of [Congress'] power be delegable, he did not know but [Congressmembers] might be obliged to turn coiners, and work in the Mint themselves.” 3 ANNALS OF CONG. 230–31 (1791) (statement of Rep. Sedgwick).

<sup>58</sup> See *infra* at Section I.C; RICHARDSON, *supra* note 34, at 116; Goodin, *supra* note 28, at 238; Holmes, Jr., *supra* note 38, at 997–98.

<sup>59</sup> 198 U.S. 45, 76 (1905).

clearly and unambiguously identified in any statutory text.<sup>60</sup> The task of accommodating administration to constitutional democracy cannot, therefore, aim at eliminating the agency costs implicit in the application of law. It can only seek to understand how they might comfortably fit within a constitutional order.

The next two sections will elaborate upon these intuitions. Many objections to agency power presume antiquated conceptions of sovereignty and rights. They juxtapose the will of a powerful organ-body sovereign<sup>61</sup> against a governed mass of subjects who hold an array of pre-political liberties that require judicial protection. This all-powerful body is thought to be represented by Congress as the commissioned agent or embodiment of the popular sovereign.<sup>62</sup> To preserve citizens' natural, pre-political liberties, this agent of the popular sovereign is constrained by a separation of powers, checks and balances, a Bill of Rights, etc.—each policed by independent courts capable of identifying and enforcing citizens' inalienable liberties.<sup>63</sup> If this is indeed the rubric of the liberal democratic constitutional state, it is difficult to see how agencies pass constitutional muster. They are not Congress—and so their policy-making cannot be legitimate expressions of the popular will. They often avoid substantial judicial review, and so they might violate natural liberties with impunity. Fortunately, this rubric is wrong.

#### *A. The Mind and Body of the Democratic Sovereign*

True, for much of modern Western history, sovereignty, understood as the supreme, absolute and indivisible power to make law, was thought to be held by a

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<sup>60</sup> Holmes, Jr., *supra* note 38, at 997–98.

<sup>61</sup> See Wilson, *supra* note 56, at 205 (juxtaposing democracy's "corporate, popular will" against the will of an autocrat); Mary E. Guy, *Ties that Bind: The Link Between Public Administration and Political Science*, 65 J. POL. 641, 642 (2003) (administration and law-making is "the expression of the state will" and "the execution of the state will."); Florida v. Becerra, No. 8:21-cv-839-SDM-AAS, 2021 WL 2514138, at \*36 (M.D. Fla. June 18, 2021) (the Constitution is "the organic grant of power from the sovereign people and the sovereign states").

<sup>62</sup> E.g., POSNER & VERMEULE, *supra* note 13, at 8 (calling this idea "legislative primacy"). Examples of arguments that use the idea of legislative primary include: George I. Lovell, *That Sick Chicken Won't Hunt: The Limits of a Judicially Enforced Non-Delegation Doctrine*, 17 CONST. COMMENT. 79, 85 (2000); Christiano, *supra* note 28, at 212; COX & RODRIGUEZ, *supra* note 19, at 2; LOCKE, *supra* note 1, at 362 (ch. XI, ¶ 141); and Stewart, *The Reformation of Administrative Law*, *supra* note 31, at 1672–73 (Legislative primacy "appears ultimately to be bottomed on a contractarian political theory running back to Hobbes and Locke . . . . Since the process of consent is institutionalized in the legislature, that body must authorize any new official imposition of sanctions . . . . The requirement that agencies conform to specific legislative directives . . . legitimates administrative action by reference to higher authority.").

<sup>63</sup> See POSNER & VERMEULE, *supra* note 13, at 1 (calling this idea "liberal legalism"); P.S. ATIYAH & ROBERT S. SUMMERS, *Legal Theories in England and America: 1776*, in FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 229–31 (Oxford Univ. Press 1987); see also JUDITH SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 65 (Harv. Univ. Press 1986).

specific body: the one wearing the crown.<sup>64</sup> To constitute and justify public power, Hobbes, for example, imagined a state of nature full of individuals authorizing and relinquishing their natural liberties to a “Mortall God,”<sup>65</sup> i.e., the modern corporate state, represented (or re-presented) in the flesh-and-blood bodies of the king or legislature.<sup>66</sup> During the democratic revolutions, radical theorists<sup>67</sup> merged the monarch with her subjects.<sup>68</sup> They imagined “the people” not only replacing the king as sovereign, but also governing itself as a subject, thereby creating an identity between ruler and ruled. Rousseau’s *volonté générale*<sup>69</sup> serves as a model for this kind of logic.<sup>70</sup> Montesquieu, whose thinking influenced the American founders,<sup>71</sup> likewise held that “the people as a body . . . have sovereign power” in a republic.<sup>72</sup> Even A.V. Dicey, despite his fame as a rule of law scholar, believed that a representative legislature would “produce coincidence between the wishes of the sovereign and the wishes of the subjects.”<sup>73</sup> It is a sovereign-subject hat trick: the ruled become the ruler, the democratic “people,” understood as a body, a “unitary macro-subject,”<sup>74</sup> come to occupy what was once occupied by the body of the king. Carl Schmitt likewise endorsed a scrupulous identity between governed and governor—with homogenizing and fascist

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<sup>64</sup> E.g., JEAN BODIN, ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH 1–2 (Julian H. Franklin ed., trans., Cambridge Univ. Press 1992) (1576); EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 18–19 (rev. ed. 2013).

<sup>65</sup> THOMAS HOBBS, LEVIATHAN 227 (C.B. MacPherson ed., Penguin Books 1985) (1651).

<sup>66</sup> See generally Quentin Skinner, *Hobbes and the Purely Artificial Person of the State*, 7 J. POL. PHIL. 1 (1999) (for an explanation of the corporate conception of the state as both human and corporate (artificial) person); DANIEL LEE, POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT 11 (Oxford Univ. Press 2016).

<sup>67</sup> See LEE, *supra* note 66, at 4 (the conventional narrative of popular sovereignty couches it as an idea of resistance).

<sup>68</sup> E.g., MORGAN, *supra* note 64, at 87–88; MARGARET CANOVAN, THE PEOPLE 24–29 (Polity Press 2005). See generally RICHARD TUCK, THE SLEEPING SOVEREIGN (Cambridge Univ. Press 2016).

<sup>69</sup> JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 192–95 (G.D.H. Cole trans., Everyman 1993); cf. TUCK, *supra* note 68, at 3–5, 8–9 (arguing that Rousseau and Bodin drew a sharp distinction between (popular) sovereign and government).

<sup>70</sup> Nadia Urbinati, *Continuity and Rupture: The Power of Judgment in Democratic Representation*, 12 CONSTELLATIONS 194, 203 (2005) [hereinafter *Continuity and Rupture*]; ROSANVALLON, *supra* note 13, at 76–77; Habermas, *supra* note 32, at 9; NANCY ROSENBLUM, *Holism*, in ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP 29 (Princeton Univ. Press 2008).

<sup>71</sup> E.g., PAUL M. SPURLIN, MONTESQUIEU IN AMERICA 1760–1801 (1940).

<sup>72</sup> MONTESQUIEU, THE SPIRIT OF THE LAWS 10 (Anne M. Cohler et al. eds., Cambridge Univ. Press 2011) (1748).

<sup>73</sup> ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 81 (8th ed. 1931) (1885).

<sup>74</sup> Andreas Kalyvas, *Popular Sovereignty, Democracy, and the Constituent Power*, 12 CONSTELLATIONS 223, 224 (2005).

implications.<sup>75</sup> For Schmitt, it was impossible to imagine a leader speaking with the voice of the people unless the people themselves first sang in perfect harmony.<sup>76</sup>

There are flaws in this equation. The “people,” understood literally, cannot rule. They do not possess a primordial collective will existing outside and independent of their political institutions.<sup>77</sup> Moreover, the entire population of a diverse community of hundreds of millions cannot be present within those institutions. Nor can that population ever find a unanimous general will, a non-controversial understanding of the common good, no matter how constrained and qualified their public reasoning or how universal and general its aspirations.<sup>78</sup> Thus, no coherent popular will can obtain even after undertaking the decision-making processes of political institutions.<sup>79</sup> Just as the contractual “meeting of the minds” is a legal fiction of private law,<sup>80</sup> a

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<sup>75</sup> CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* 25–30, 32 (Ellen Kennedy trans., 1988) (1923) [hereinafter *THE CRISIS OF PARLIAMENTARY DEMOCRACY*]; see, e.g., CANOVAN, *supra* note 68, at 74–77; ROSANVALLON, *supra* note 13, at 76; Kalyvas, *supra* note 74, at 224; HANNAH ARENDT, *THE HUMAN CONDITION* 57–58 (2d ed. 1998) (1958).

<sup>76</sup> Cf. SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY*, *supra* note 75, at 6.

<sup>77</sup> E.g., STEPHEN HOLMES, *PASSIONS AND CONSTRAINT* 167 (1995); JEREMY WALDRON, *Precommitment and Assurance*, in *LAW AND DISAGREEMENT* 278 (Oxford Univ. Press 1999) [hereinafter *Precommitment and Assurance*]; Lisa Disch, *The End of Representative Politics?*, in *THE CONSTRUCTIVIST TURN IN POLITICAL REPRESENTATION* 10 (Lisa Disch et al. eds., 2019) [hereinafter *The End of Representative Politics?*]; see, e.g., Saward, *Shape-Shifting Representation*, *supra* note 35, at 315–16.

<sup>78</sup> E.g., SCHMITT, *LEGALITY AND LEGITIMACY*, *supra* note 18, at 8; FRANZ NEUMANN, *The Concept of Political Freedom*, in *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 160, 190 (Herbert Marcuse ed., 1957) (1953) [hereinafter *The Concept of Political Freedom*] (Neumann is worth citing because he engaged contemporaneously with Schmitt’s work); Habermas, *supra* note 32, at 10; JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 251–52 (Harper 3d ed. 2008) (1942); see also WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 43 (“It is probably a mistake for any branch of government to assume the mantle of popular sovereign.”); *id.* at 77 (“I am inclined to say there is no such thing as the people. There is just a large array of individual persons, millions of them . . . . And there are innumerable ways of mapping onto that array another array, namely the five or six hundred seats that there are in a given legislative assembly.”); *id.* at 180 (“There is no reason why the theory of democratic accountability should be held hostage to any particular political ontology—‘the people’ as a singular entity, the general will, the will of the people, the majority, and so on.”); Nadia Urbinati, *Representation as Advocacy: A Study of Democratic Deliberation*, 28 *POL. THEORY* 758, 774 (2000) [hereinafter *Representation as Advocacy*] (citing J.S. Mill, arguing that “[w]ith respect to the ‘identification of interest between the rulers and the ruled,’ [Mill] assumed that such an identification could hardly exist; in fact, it did not. If it did, representation, and perhaps government itself, would be unnecessary.”).

<sup>79</sup> E.g., TUCK, *supra* note 68, at 5–8. This is perhaps why jurists like Dicey and Austin separated the concepts of legal sovereignty and political sovereignty. Without a “will,” the people cannot speak and act—literally—through their representatives. There is no feasible way to merge the legal sovereignty exercised by rulers and the popular political sovereignty enjoyed by the people. See MASFERRER & TAITSLIN, *supra* note 36, at 112 nn.36, 40.

<sup>80</sup> See, e.g., Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 *HARV. L. REV.*

popular “meeting of the minds” is a political fiction of public law. As a result, despite the democratic revolutions, the old gap between ruler and ruled remains.<sup>81</sup> In other words, the merger between governed and governor attempted by the democratic revolutions did not remove the danger of heteronomy,<sup>82</sup> even if the offices of government might be staffed by elected representatives and even as constitutional systems split powers and limited legal authority.<sup>83</sup> Some would wield public power, and the rest would be subject to its rules. Even Rousseau downgraded the popular sovereign to a silent, passive actor that left the actual business of governing to functionaries.<sup>84</sup> Like the client of a travel agent, Rousseau’s democratic citizen was meant only to approve or disapprove the prepackaged plans presented by ministers.<sup>85</sup>

Law-making under constitutional liberal democracy is therefore not a question of ascertaining the existence of some non-existent popular “will” to be left in the hands of loyal fiduciaries in government<sup>86</sup> to carry out like mindless automatons. Nor is it comprised of the dictates of a caesarist leader purporting to speak with the unified voice of the sovereign people.<sup>87</sup> Instead, it is a question of developing transparent and accessible collective decision-making procedures that ensure that all citizens can understand themselves as equal participants in their collective ordering; that ordinary people are involved in public life and have a say in their collective destiny.<sup>88</sup> They do not rule. Rather, they are equal players in the game of representative democracy.<sup>89</sup>

Thus, although contemporary notions of constitutional liberal democracy ascribe the highest legitimate source of authority to “the people,” they do not understand “the people” as a reified, homogenous whole with an identifiable will that pre-exists

1 (1894); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); *Hotchkiss v. Nat’l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911) (making a strong case for the objective theory of contract).

<sup>81</sup> E.g., CANOVAN, *supra* note 68, at 28–29 (showing that the American founders, despite their corporate notion of popular sovereignty, recognized a gap between elected legislators and “the people”); Urbinati, *Representation as Advocacy*, *supra* note 78, at 759.

<sup>82</sup> DIETER GRIMM, SOVEREIGNTY: THE ORIGIN AND FUTURE OF A POLITICAL AND LEGAL CONCEPT 31 (2015); CANOVAN, *supra* note 68, at 29; NEUMANN, *The Concept of Political Freedom*, *supra* note 78, at 190.

<sup>83</sup> MORGAN, *supra* note 64, at 53.

<sup>84</sup> TUCK, *supra* note 68, at 5; LEE, *supra* note 66, at 5, 11.

<sup>85</sup> Urbinati, *Continuity and Rupture*, *supra* note 70, at 207.

<sup>86</sup> An example of this kind of thinking is found in LOCKE, *supra* note 1, at 367 (“[T]he Legislative being only a Fiduciary Power to act for certain ends, there remains still *in the People a Supreme Power.*”) and in ROUSSEAU, *supra* note 69, at 235.

<sup>87</sup> See ERNESTO LACLAU, ON POPULIST REASON 159–60 (2005) (probably the most influential contemporary statement of this Schmittian notion); see also Arato, *supra* note 7, at 1111–12.

<sup>88</sup> E.g., GRIMM, *supra* note 82, at 37, 73–74; Urbinati, *Continuity and Rupture*, *supra* note 70, at 215; GRÉGOIRE C.N. WEBBER, THE NEGOTIABLE CONSTITUTION 19–20 (2009); ROSANVALLON, *supra* note 13, at 181–82; HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 56, at 132–33, 169.

<sup>89</sup> See *infra* Part II.



whatever governing apparatus might be laid atop it. Though “popular sovereignty” is a political fiction, it is a useful one—at least if it is used as a standard of justification and critique, not as a proper noun. It is an aspirational, regulative *idea* intended to depersonalize and distribute public power in a way that serves the entire community.<sup>90</sup> It is a Kantian “as if” principle.<sup>91</sup> Namely, if we try to think like a popular sovereign might think, if such a thing could ever exist, we will orient our public reasoning not towards our individual self-interest alone, but in terms of inclusivity, human equality and the public good.<sup>92</sup> Because if the sovereign is a “we,” then governing involves more than the interests and preferences of single individuals. We will therefore demand that political institutions remain accountable and accessible to popular complaints. We will adopt a Weberian politics of responsibility, remembering that our decisions might inflict unforeseen costs upon others.<sup>93</sup>

This figurative idea of popular sovereignty also unlocks the closed doors of power and forces the inclusion of voices previously ignored.<sup>94</sup> Whosoever happens to be governing at any given time, that person is not “the people” *precisely because* “the people” cannot ever be present. As a result, anyone denied an audience can appeal to popular sovereignty as they seek admission to political decision-making. Importantly, popular sovereignty demands, as French philosopher Claude Lefort notes, that this place of power remain an empty one—or at least one with a revolving door—where no body at all is permitted to rule permanently.<sup>95</sup> For to fill that void would allow for a part to speak on behalf of the whole. As political theorist Nadia Urbinati notes “We the People” might become, “Me the People.”<sup>96</sup> It would force homogeneity upon plural societies as leaders with controversial viewpoints purport to represent everyone as they make and implement policy. Moreover, the usurpation of this space would undermine the depersonalization of power inherent in the idea of a *fictional* popular sovereign and, importantly, the rule of law and not of men.<sup>97</sup> If the place of power remains empty because all citizens contribute in some way to law-making, then we can credibly claim that it is law, not our politicians, who rule.

As a result, it can be no objection to agency policymaking that it usurps authority from the popular sovereign. Because if the people take popular sovereignty literally, so, too, do elected representatives. They likewise cannot logically or credibly speak with the voice of the sovereign people.<sup>98</sup> Thus, insofar as theories of non-delegation

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<sup>90</sup> Habermas, *supra* note 32, at 9–10; LEE, *supra* note 66, at 14.

<sup>91</sup> Urbinati, *Continuity and Rupture*, *supra* note 70, at 212–13.

<sup>92</sup> *Id.* at 214.

<sup>93</sup> See MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 41 (H.H. Gerth & C. Wright Mills eds., 1946) (1919).

<sup>94</sup> CANOVAN, *supra* note 68, at 36.

<sup>95</sup> LEFORT, *supra* note 34; see also LEE, *supra* note 66, at 15.

<sup>96</sup> See generally NADIA URBINATI, *ME THE PEOPLE: HOW POPULISM TRANSFORMS DEMOCRACY* (2019).

<sup>97</sup> See LOCKE, *supra* note 1, at 136; ROSANVALLON, *supra* note 13, at 26.

<sup>98</sup> E.g., ROUSSEAU, *supra* note 69, at 229 (sovereignty cannot be delegated).



and legislative primacy rely on an organ-body theory of popular sovereignty,<sup>99</sup> they are misplaced. Attacks against the “technocratic” power wielded by administrative officers may likewise overstate the democratic credentials of the Congressional legislation against which such power is compared—and found wanting. It is at least possible that administrative agencies can be made consistent with the requirements of constitutional popular sovereignty.<sup>100</sup> Namely, the question is whether and to what extent they operate according to procedures that allow citizens to understand themselves as coequal participants in shaping agency action. Finally, that independent administration is “headless” is not, as feared by contemporary New Deal critics, fascist or totalitarian.<sup>101</sup> It may in fact be a necessary precondition for liberal democracy. A Leviathan with a single head with a single mouth, purporting to speak for all, can be monstrous indeed.

### *B. Individual Rights and Rule of Law*

Many objections to agency policymaking and adjudication do not emphasize principles of legislative primacy and non-delegation. Instead, they take aim at administrative “particularism”<sup>102</sup> and the risk it poses to individual liberty and the rule of law. Though they prioritize the Constitution’s function as a check on power over its function to constitute power,<sup>103</sup> these critiques likewise rely on some sovereign

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<sup>99</sup> For examples of organ-body theory see *supra* note 36. Other examples may include Lawson, POSTELL, and EPSTEIN, *supra* note 12. An organ body conception of legislative primacy is also illustrated in Justice Gorsuch’s concurring opinion in *Nat’l Fed. of Ind. Bus. v. OSHA*, 595 U.S. \_\_\_\_ , \*2 (2022) (Gorsuch, concurring). According to the Court, Congress is a body capable of a will; it can “speak clearly.” It is also sovereign: without its clear instructions, its agents cannot act. “[I]f [congress] wishes to assign to an executive agency decisions ‘of vast economic and political significance.’” (quoting *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 594 U.S. \_\_\_\_, \_\_ (2021) (per curiam) (slip op., at 6)). According to Waldron, “[i]n liberal political theory, legislative supremacy is often associated with popular self-government . . . .” WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 196.

<sup>100</sup> As discussed *infra* at Part II, agencies might provide non-electoral forms of democratic representation. See, e.g., Michael Saward, *Authorisation and Authenticity: Representation and the Unelected*, 17 J. POL. PHIL. 1 (2009).

<sup>101</sup> DONALD A. RITCHIE, JAMES M. LANDIS: DEAN OF THE REGULATORS 86 (1980). LEFORT, *supra* note 34, at 19, argues that, indeed, cutting of the head of the king—metaphorically and literally—was necessary for democracy.

<sup>102</sup> Objections to executive “particularism” appear in ROUSSEAU, *supra* note 69, at 229.

<sup>103</sup> For example, HAMBURGER, *supra* note 7, at 17, argues that “[c]onstitutional law developed in the seventeenth century primarily as a means of defeating the absolute prerogative.” *Cf.*, e.g., LEE, *supra* note 66, at 14 (explaining that popular sovereignty developed as a concept not just to contest power, but to legitimately constitute it); WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 23, 34, 284 (constitutions both constitute and limit power; the former is not always emphasized sufficiently); *id.* at 297 (citing HANNAH ARENDT, ON REVOLUTION 148, 154 (2006) (1963)). See also Gerald E. Caiden, *In Search of*

authority *legibus solutus*. This time, though, it is rendered not as *voluntas*, the will of a sovereign body, but instead as moral truth. Some libertarian critiques rest, explicitly or implicitly, on the idea of the “unwritten Constitution”<sup>104</sup> which protects an array of rationally discoverable pre-political liberties<sup>105</sup> that were enshrined into positive law by the Bill of Rights<sup>106</sup> or guarded by the common law and its courts.<sup>107</sup> Rights have an objective existence; therefore, all reasonable people can (or must) consent to them. They accordingly should be identified and protected by impartial, unelected specialist judges.<sup>108</sup>

Other critiques speak in the language of the rule of law. Lending “the rule of law” a definition endorsed by Dicey and Coke, these critiques charge that because agency rulemaking and adjudication occur outside judicial branch courts and Congress, they risk exercising the same kind of absolute, arbitrary power wielded by unelected Stuart and Tudor monarchs.<sup>109</sup> Although couched in terms of black letter constitutional doctrine, the underlying principles motivating this critique, like libertarian rights-based arguments, rely on an idealized moral order that encourages

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*an Apolitical Science of American Public Administration, in* POLITICS AND ADMINISTRATION: WOODROW WILSON AND AMERICAN PUBLIC ADMINISTRATION 51, 55 (Jack Rabin & James Bowman eds., 1984).

<sup>104</sup> These arguments come in several forms. Some hold that the Constitution was never meant to supplant pre-existing judicial power to protect fundamental rights, implicitly protected by principles like “the rule of law” and due process. *E.g.*, HAMBURGER, *supra* note 7, at 22. They can also come in through “inclusive” legal positivist arguments (e.g., RONALD DWORKIN, *LAW’S EMPIRE* 410 (Harv. Univ. Press 1986)) that hold that “outside” moral values should guide judicial discretion. *Id.*

<sup>105</sup> *E.g.*, Richard Schragger & Micah Schwartzman, *Some Realism about Corporate Rights*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 345, 353 (M. Schwarzman, C. Flanders & Z. Robinson eds., 2016); FRANZ NEUMANN, *Types of Natural Law*, in *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 69, 89–90 (Herbert Marcuse ed., 1957) (1939); Douglas Sturm, *A Prospective View of the Bill of Rights: Towards a New Constitutionalism*, 13 *J.L. & RELIGION* 27, 29–30 (1996).

<sup>106</sup> THOMAS MCAFEE, *INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY: THE FOUNDERS’ UNDERSTANDING* (2000); NEUMANN, *The Concept of Political Freedom*, *supra* note 78, at 164; Roscoe Pound, *Liberty of Contract*, 18 *YALE L.J.* 454, 457 (1909).

<sup>107</sup> *E.g.*, MASFERRER & TAITSLIN, *supra* note 36, at 112 (“According to Dicey, the common law checked the state’s arbitrary power through the authority of judges.”). The role of the common law in protecting “natural” rights is also observed in cases like *Lochner v. New York*, 198 U.S. 45 (1905), when “vested” common law property rights were given due process protections under the Fourteenth Amendment. ROBERT DAHL, *A PREFACE TO ECONOMIC DEMOCRACY* 63 (Univ. of Cal. Press 1985) [hereinafter *A PREFACE*].

<sup>108</sup> Christopher Forsyth, *Showing the Fly the Way out of the Flybottle*, 66 *CAMBRIDGE L.J.* 325, 331–32 (2007); HAMBURGER, *supra* note 7, at 45. In his diagnosis of the unlawfulness of administration, Hamburger explicitly relies on norms that transcend Constitutional legal doctrine and could be characterized as a natural law argument. *See, e.g., id.*, at 15, 385, 493; *see also* Lawson, *The Rise and Rise*, *supra* note 12, at 1529–31; Pound, *supra* note 106, at 457–59.

<sup>109</sup> HAMBURGER, *supra* note 7, at 35, 47.

small government. This time, however, that moral order bootstraps itself to the democratic legitimacy provided by Congress.<sup>110</sup> Emphasizing agencies' irregular rulemaking, they conjure the ghost of the Kantian social contract that, in its impartiality and generality, vindicates citizens' equal negative liberty while protecting them from personal tyrannical rule.<sup>111</sup>

According to this view, statutes should arise from a deliberative decision-making procedure that effaces individual interest and consequently produces impersonal rules that permit citizens significant freedoms.<sup>112</sup> The law that rules over them should be a "faceless order that aspires to be universal and eternal, after the example of the divine, and equal to it, an order launched into space and into time, where an anonymous crowd meets invisible generations."<sup>113</sup> In Justice Gorsuch's language, legislation should consist of "generally applicable rules of conduct governing future actions by private persons."<sup>114</sup> If a legislature—Congress—is operating properly, it should promulgate only a small number of abstract, rational and general laws amenable to straightforward application by workmanlike and subordinate judicial and executive bodies.<sup>115</sup> It should, as Locke persuaded, "be conformable to the Law

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<sup>110</sup> Dicey, for example, embraced "parliamentary supremacy." MASFERRER & TAITSLIN, *supra* note 36, at 106. However, his rule of law arguments not aimed at limiting parliamentary power so much as they were aimed at curtailing executive powers. *Id.* at 112.

<sup>111</sup> ROSANVALLON, *supra* note 13, at 25–26; HAMBURGER, *supra* note 7, at 23 (arguing that "Lockean reasons about consent" "lurk[] not far below" the legitimacy of Congressional law-making); *see also id.* at 50, 72; FRANZ NEUMANN, *The Change in the Function of Law in Modern Society*, in *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 22, 25–26 (Herbert Marcuse ed., 1957) (1937) [hereinafter *The Change in the Function of Law*]; WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 153 ("[General legislation] presents itself in the image of morality. . . . To make law [] is not just to exercise power; it is (so to speak) to make a public morality for a particular community."); Laurence Lustgarten, *Socialism and the Rule of Law*, 15 J.L. & SOC'Y 25, 25 (1988); LOCKE, *supra* note 1, at 357, 363–64. An example of this notion of the rule of (deliberative, congressional law) can be found in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654–55 (1952) (Jackson, J., concurring).

<sup>112</sup> *See, e.g., Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting); WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 17, 66.

<sup>113</sup> ROSANVALLON, *supra* note 13, at 27 (quoting Jean Carbonnier, *La passion des lois au siècle des Lumières*, in *ESSAIS SUR LES LOIS* 240 (Paris: Deffrénois, 2d ed. 1995)); *see also* NEUMANN, *The Concept of Political Freedom*, *supra* note 78, at 170; Noh, *supra* note 48, at 394 (citing *The Federalist's* references to impartial deliberation); Lawson, *The Rise and Rise*, *supra* note 12, at 1531; HAYEK, *supra* note 13, at 12. An example of the antithesis of the idea of "general law" is the ratemaking of the Progressive era. For a discussion of the debate between Ernst Freund and Felix Frankfurter on the tension between general, abstract law and "substantive justice," *see* DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA* 11–14 (2014).

<sup>114</sup> *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting).

<sup>115</sup> NEUMANN, *The Concept of Political Freedom*, *supra* note 78, at 170 ("[T]he judge [is] merely 'the mouthpiece of the law,' applying it through a logical process of subsumption."); *see also, e.g.,* MONTESQUIEU, *supra* note 72, at 163; NEUMANN, *The Change in the Function*

of Nature.”<sup>116</sup> It would accordingly preserve freedom because it, as a real-life variety of the Kantian<sup>117</sup> social contract, could only settle on terms that maximized equal (negative) liberty for all. This ideal is juxtaposed to profligate agency decision-making that addresses specific actors in specific situations while addressing specific interests. As under the natural law objection, agencies’ irregular adjudication of this law is likewise objectionable. Only expert judges committed to its neutral application will do.<sup>118</sup>

The rule of law objection therefore often follows the same logic as the natural rights and popular sovereignty objections: there is an unambiguous, pre-constitutional normative framework—the popular sovereign, operating rationally through the social contract to generate objectively good “general legislation”—that should be straightforwardly applied by expert judges in order to constrain executive action. For Franz Neumann, a critical contemporary of Carl Schmitt and associated with the Frankfurt School,<sup>119</sup> this notion of the rule of law “is really a disguised revival of natural law which is now fulfilling counterrevolutionary functions”<sup>120</sup>—despite its ostensibly democratic, secular pedigree. Both the natural rights and rule-of-law variants of this objection to administration conceive the law as something general, simple, self-evident, derived or derivable from the rational consent of the governed, and amenable to non-controversial application to real-life particularities. This conception is mistaken.

First, rights, whether legal or natural, are never so clear and unambiguous that they are capable of application without controversy. The Legal Realist critique<sup>121</sup> of the late nineteenth and early twentieth centuries shows convincingly that the law is often in- or under-determinate<sup>122</sup> and therefore judicial elaboration and application of that law commonly amounts to a *political* choice—a choice that should not be left in the hands of politically unaccountable judges.<sup>123</sup> As a result, privileging

*of Law*, *supra* note 111, at 29–38; ROSANVALLON, *supra* note 13, at 29; FRANK GOODNOW, *POLITICS AND ADMINISTRATION* 24–25 (1900); M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 23 (1967) (citing Aristotle’s *ETHICS* V (10) and *POLITICS* III (16)).

<sup>116</sup> LOCKE, *supra* note 1, at 369.

<sup>117</sup> NEUMANN, *The Change in the Function of Law*, *supra* note 111, at 33–34.

<sup>118</sup> VILE, *supra* note 115, at 22–23; HAMBURGER, *supra* note 7, at 38, 82.

<sup>119</sup> Founded at the Goethe University Frankfurt during the Weimar Republic, this school critiqued capitalism, fascism, and Marxism-Leninism. It is a home of the intellectual “New Left.” Members include, e.g., Theodor Adorno, Max Horkheimer, Herbert Marcuse, Raymond Guess, and Jürgen Habermas. See FRANZ NEUMANN, *BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM*, ix–x (2009).

<sup>120</sup> *Id.* at 53; NEUMANN, *The Change in the Function of Law*, *supra* note 111, at 89.

<sup>121</sup> This critique is addressed in a little more detail in the next section.

<sup>122</sup> CASS SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* 112 (2020); Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 *ETHICS* 278, 295–96 (2001).

<sup>123</sup> WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 232 (“At most, the abstract terms of the Bill of Rights are popularly selected sites for disputes about [about individual and minority rights].”). For a recent discussion of the questionable expertise of judges when it comes to protecting not only minority rights, but also democratic political rights, see

Article III judges as the guardians of liberty may simply swap one unpopular sovereign for another.

Second, contemporary economic and social conditions frustrate the basic ethical claims of both natural rights and the rule of the law. Each targets the protection of equal liberty. Yet applying both to corporate capitalist society often leads to unfreedom and domination.<sup>124</sup> Concurrently with the Legal Realists, Neumann showed that the ideal of liberal parliamentarism—general law-making—was not for monopolistic capitalism and wage labor, but for the bourgeois, competitive and egalitarian market utopias imagined by Adam Smith and John Locke.<sup>125</sup> “The postulate that the state should rule only by general laws,” quips Neumann, “becomes absurd in the economic sphere if the legislator is dealing not with equally strong competitors but with monopolies which reverse the principle of the free market.”<sup>126</sup> Because the private power of big business impacts the public in a unique way, “the state can only regulate [via] individual measures” if it is to achieve substantive social and political equality.<sup>127</sup> Meanwhile, critical scholars demonstrated that the law could never cash out its promise of equal liberty if it dealt with citizens as abstract subjects, not as concrete individuals in all their diversity.<sup>128</sup> Instead, to vindicate citizens’ equal rights in a complex, unequal and changing society, government must inevitably eschew what Rosanvallon dubs “the twin cults of law and democratic impersonality”<sup>129</sup> and instead embrace the particularism liberals once associated with despotism.<sup>130</sup> It must treat differences *differently*.

Third, and relatedly, legislation cannot, and usually does not, achieve a politically noncontroversial and equality-protecting generality. According to Neumann, a society riven by intractable class conflict and amalgamations of private economic power could never unanimously consent to any ostensibly rational general law.<sup>131</sup>

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*generally* Ryan Doerfler and Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. (forthcoming 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3970932](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3970932).

<sup>124</sup> *E.g.*, JOHN DEWEY, LIBERALISM AND SOCIAL ACTION (1999) (1935); Pound, *supra* note 106, at 484; Thomas Hill Green, *Lectures on the Principles of Political Obligation*, in WORKS OF THOMAS HILL GREEN (Vol. II, 2011); Karl Marx, *Capital. Vol. I*, in THE MARX-ENGELS READER 294, 343 (Robert C. Tucker ed., 2d ed. 1978) (1867).

<sup>125</sup> NEUMANN, *The Change in the Function of Law*, *supra* note 111, at 39–40.

<sup>126</sup> *Id.* at 52.

<sup>127</sup> NEUMANN, *The Concept of Political Freedom*, *supra* note 78, at 171–72.

<sup>128</sup> *E.g.*, William E. Scheuerman, *Recent Frankfurt Critical Theory: Down on Law?*, 24 CONSTELLATIONS 113, 121–22 (2017) (describing the work of Axel Honneth); Lustgarten, *supra* note 111, at 30. The current Court’s conservative wing embraces this one-sided understanding of constitutional power in *Nat’l Fed. of Ind. Bus. v. OSHA*, 595 U.S. \_\_\_, \*2 (Gorsuch, J., concurring) (In comparing the plenary power of state and local governments to federal law-making, Gorsuch argues that “[n]ot only must the federal government properly invoke a constitutionally enumerated source of authority . . . . It must also act consistently with the Constitution’s separation of powers”).

<sup>129</sup> ROSANVALLON, *supra* note 13, at 41.

<sup>130</sup> *Id.* at 65–66.

<sup>131</sup> NEUMANN, *The Concept of Political Freedom*, *supra* note 78, at 168.



As a result, whatever law-making results from Congress, it is not what the liberal parliamentarians hoped it might be: universal rules whose application guarantees equal liberty and the public good.<sup>132</sup> Contemporary works on deliberative democracy, along with critiques of Rawlsian notions of justice, support the point.<sup>133</sup> True universality requires the incorporation of *all* marginalized voices—a utopia rarely achieved under conditions of material, social, and cultural inequality.<sup>134</sup>

Natural rights face a similar fate. As Weber diagnosed, the great problem of secular modernity is our lack of confidence in any outsourced, transcendental moral authority.<sup>135</sup> Contemporary liberalism admits the fact that there can be no authoritative notion of moral truth. It therefore quarantines the question, holding instead that the only legitimacy a governing authority can ever *hope* to claim derives from a Rawlsian “overlapping consensus” regarding the norms according to which diverse people can arrange their collective life peaceably together.<sup>136</sup> This overlapping consensus remains, however, more aspirational than real. No longer can we reach to superordinate natural law or social contract theories for instruction. Our social fate is one of ineluctable conflict, dissensus, and plurality.

Finally, these critiques of administration envision a constitution whose purpose is primarily the limitation and division of the regrettable-but-inexorable presence of state power.<sup>137</sup> Rather than empower legitimate decision-making, these critics would hamstring collective action by binding it to an outsourced moral ordering: pre-political natural rights, a primordial common law of “vested” rights, or a rational, epistemic conception of the “general will” that coheres with a deregulatory economic policy. Yet the Constitution is better understood as more than a check on power. It also aims to *constitute* legitimate power by giving citizens an equal say in forming collective political life, thereby cashing out the promise of popular sovereignty.<sup>138</sup> Focusing exclusively on its power-checking features thus focuses only on one side of the coin.

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<sup>132</sup> *Id.*

<sup>133</sup> See generally, e.g., HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 56, at 128–29, 454; SEYLA BENHABIB, THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA (Princeton Univ. Press 2002); Rainer Forst, *The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach*, 120 ETHICS 711 (2010); IRIS M. YOUNG, INCLUSION AND DEMOCRACY 727–30 (Oxford Univ. Press 2000).

<sup>134</sup> See generally YOUNG, *supra* note 133, at 715.

<sup>135</sup> MAX WEBER, *Objectivity in Social Science and Social Policy*, in THE METHODOLOGY OF THE SOCIAL SCIENCES 86 (E.A. Shils & H.A. Finch, eds. & trans., 1949) (1904).

<sup>136</sup> E.g., WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 244–45. For a discussion of this constructivist account of rights in relation to administration, see EMERSON, *supra* note 16, at 13.

<sup>137</sup> See, e.g., HAMBURGER, *supra* note 7, at 46 (“[C]onstitutional law developed in the seventeenth century precisely to bar extralegal power.”).

<sup>138</sup> See, e.g., LEE, *supra* note 66; HOLMES, *supra* note 77; Habermas, *supra* note 32, at 2; WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 34; Edward Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 370 (1989).



The roadblocks offered by these objections to administration can be overcome if one accepts a democratic constructivist account of rights. It is an account that holds that rights and democracy are co-original.<sup>139</sup> Namely, it is an account that holds that citizens should participate in the creation of the legal rights they give themselves.<sup>140</sup> The construction of rights depends upon a decision-making process that attempts to cash out the promise of equal human worth—while always remaining subject to critique along the same terms. Rights therefore begin as abstract concepts,<sup>141</sup> and, in their most inchoate form, they are a right to have equal rights.<sup>142</sup> They are articulated and elaborated by historical democratic polities whose law-making institutions are, hopefully, oriented towards cashing out the promise of equal liberty as citizens themselves understand it.<sup>143</sup> Rights result from social movements that emerge within civil society and are then provisionally codified within the law through regular,<sup>144</sup> constitutional and extra-constitutional procedures.<sup>145</sup> Their content remains contingent and always within the grasp of democratic citizens.<sup>146</sup> Whatever resolution may temporarily arrive, uncertainty about both future factual circumstances and normative commitments precludes any final answer.<sup>147</sup> Consequently, the abstract rights that democratic practice concretizes are not indefeasible principles so much as “mode[s] of problematisation” calling for democratic negotiation and discourse.<sup>148</sup> This uncertainty, and the humility it implies, is no bad thing. For to settle on the truth about their content would mean relinquishing political sovereignty into the

<sup>139</sup> HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 56, at 128–29.

<sup>140</sup> *Id.* has the seminal statement of co-originality. *Id.* (“The principle of discourse can assume the shape of a principle of democracy through the medium of law only insofar as the discourse principle and the legal medium interpenetrate and *develop* into a system of rights that brings private and public autonomy into a relation of mutual presupposition.”) (emphasis in original).

<sup>141</sup> *E.g.*, WEBBER, *supra* note 88, at 1; SEYLA BENHABIB, *Democratic Iterations, in ANOTHER COSMOPOLITANISM* 50–55 (2006) (giving an example: how religious liberty and state neutrality were interpreted in France following the headscarf controversy). Democratic discourse thus contains meta-ideals of equality and liberty. In other words, liberal constitutional democracy relies on an abstract *a priori* concept of equal moral worth.

<sup>142</sup> HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296–97 (1st ed. 1951).

<sup>143</sup> *See supra* text accompanying note 141.

<sup>144</sup> *See, e.g.*, Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE L.J.* 408, 412, 424 (2007) (arguing that many important rights are codified via statutory law).

<sup>145</sup> JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* (1994) (theorizing the creation of rights through social movements); ACKERMAN, *supra* note 47, at 99–119, 160–87 (describing the extra-constitutional creation of the Reconstruction amendments).

<sup>146</sup> NADIA URBINATI, *DEMOCRACY DISFIGURED* 17 (2014); WEBBER, *supra* note 88, at 38, 147–48.

<sup>147</sup> *See* DEWEY, *supra* note 124, at 21–22, 30–31 (tracing the changing meanings of liberalism in regards to economic life); Pound, *supra* note 106 (describing the historical and theoretical contingency of the right to contract).

<sup>148</sup> James Tully, *The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy*, 65 *MOD. L. REV.* 204, 207 (2002).

hands of something else entirely—namely, someone who claims special expertise about the correct interpretation of rights.<sup>149</sup>

Meanwhile, the equal liberty promised by an impersonal rule of law<sup>150</sup> is perhaps better vindicated through a law-making *process* that affords citizens not equal subjection to the same general law, but instead an equal role in the creation of a legal system.<sup>151</sup> Sometimes, the promise of equality and non-domination is best protected not by rational, abstract and general rules but by democratic procedures that allow citizens to speak for themselves about what equal liberty means to them.<sup>152</sup> By incorporating universality and reflexivity into the *process* of public deliberation,<sup>153</sup> rather than into the law's substantive content, democratic polities can ensure the place of power remains empty, a place where laws—not men—rule.<sup>154</sup> But it is a place that can *also* respond to diversity and difference with particular and specific legislation. They need not be general in substance if they are the co-creation of the general population.

There is good reason to believe that American citizens and jurists can and do accept a constructivist account of rights. Indeed, they have demonstrated as much by politicizing and modifying their liberties throughout its history. The right to privacy, ostensibly found under the “penumbra” of the Bill of Rights, is one obvious example.<sup>155</sup> The history of economic freedom provides another. After a Supreme Court majority endorsed “natural” property and contract rights for the first time in *Allegeyer v. Louisiana*,<sup>156</sup> these *Lochner*<sup>157</sup>-era, *laissez-faire* economic freedoms crumbled fifty years later in the face of democratic pressure.<sup>158</sup> Couched as “vested”

<sup>149</sup> *E.g.*, URBINATI, *supra* note 146, at 17.

<sup>150</sup> *E.g.*, Scheuermann, *supra* note 128, at 121; Roger Cotterrell, *The Rule of Law in Corporate Society: Neumann, Kirchheimer and the Lessons of Weimar*, 51 MOD. L. REV. 126, 130 (1988) (for Neumann, the “ethical minimum” promised by the rule of law is a “promise of equality, if only formal equality before the law”); VILE, *supra* note 115, at 25 (rule of law means, *inter alia*, “justice for equals”).

<sup>151</sup> For example, WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 153, speaks of the attractiveness of the rule of law—or general legislation—because it purports to impose rule “for reasons” like impartiality and “treating like cases alike” rather than “arbitrarily or on a whim.” “Generality,” he notes, “connotes reciprocity.” These reasons can be an attribute of the law itself—or of the process by which it is made. One example of this “procedural” understanding of the rule of law is provided by Rubin, *supra* note 138, at 378–80 and ERNST, *supra* note 113, at 27–29 (describing how Charles Evans Hughes thought that “rule of law” in agencies could be accomplished if they adopted judicial procedures).

<sup>152</sup> *E.g.*, Young, *supra* note 144.

<sup>153</sup> *See, e.g.*, Forst, *supra* note 133, at 712.

<sup>154</sup> The phrase “empire of laws and not of men” is credited to James Harrington. PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 173 (2011).

<sup>155</sup> JEAN L. COHEN, *REGULATING INTIMACY: A NEW LEGAL PARADIGM* 64, 6971 (Oxford Univ. Press 2004).

<sup>156</sup> 165 U.S. 578, 589 (1897).

<sup>157</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>158</sup> Pound, *supra* note 106, at 457–64.

and “unenumerated” protections for Lockean “fruits of labor.”<sup>159</sup> natural rights theories underwrote judicial awards of Fourth, Fifth, and Fourteenth Amendment protections to business corporations.<sup>160</sup> But American Progressives successfully challenged this jealous defense of the market.<sup>161</sup> By President Roosevelt’s 1944 State of the Union Address,<sup>162</sup> a proposed second bill of social rights provided justification for an expanded social welfare state—the state that anti-administrativists now challenge.

Thus, agencies cannot be dismissed as illegitimate because courts forsake their duty to expertly police agencies’ treatment of citizens’ natural liberties. Courts hold no monopoly on the interpretation of rights because they are not things that they can “discover” as experts on natural law.<sup>163</sup> Nor can agency regulation be dismissed as illegitimate violations of the rule of law, because Congress does not create abstract, general, universal impersonal laws whose formal application promises to vindicate equal liberty and nonarbitrariness. It is at least possible that when the EEOC elaborates on the meaning of the Fourteenth Amendment, as articulated by civil rights statutes and informed by social movements and NGOs, it takes part in a systemic process of democratic rights-construction that does permit citizens to understand themselves as coequal authors of the rights that protect them.<sup>164</sup>

### C. *The Non-Problem of Separating Powers*

If these arguments are correct, they challenge a separation of powers doctrine that (1) juxtaposes a sovereign law-making body against; (2) an executive that robotically carries out its general will, all subject to; (3) an expert judiciary that mechanically

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<sup>159</sup> *Slaughterhouse Cases*, 83 U.S. 36, 90 (1873) (Field, J., dissenting). For a discussion of the relation between common law and natural rights, see LEE, *supra* note 66, at 289 (in England, the common law is a legal order without a legislator).

<sup>160</sup> *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 553 (1852); DAHL, A PREFACE, *supra* note 107, at 63; ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* 159 (2018); William J. Novak, *The Legal Origins of the Modern American State*, in *LOOKING BACK AT LAW’S CENTURY* 255 (A. Sarat et al. eds., 2002).

<sup>161</sup> MARC A. EISNER, *THE AMERICAN POLITICAL ECONOMY: INSTITUTIONAL EVOLUTION OF MARKET AND STATE* 34 (2011) (citing the creation of the Federal Reserve Bank and Federal antitrust regulation).

<sup>162</sup> Franklin D. Roosevelt, President of the United States, State of the Union Address (Jan. 11, 1944), [http://www.fdrlibrary.marist.edu/archives/address\\_text.html](http://www.fdrlibrary.marist.edu/archives/address_text.html).

<sup>163</sup> Landis, *supra* note 29, at 535. Nor, as Waldron argues, are they suited to do so. WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 222. Many of their debates over rights involve constitutional doctrinal matters that are tangential to the major moral issues at play.

<sup>164</sup> See Gillian E. Metzger, *Administrative Constitutionalism*, 91 *TEX. L. REV.* 1897, 1923 (2013) [hereinafter *Administrative Constitutionalism*] (agencies may have a better understanding of how laws impact pregnant citizens and can therefore better articulate the non-discrimination principles); EMERSON, *supra* note 16, at 13 (progressives theorized administration in way that contributed to democratic public reason).

applies that will while policing it for rights violations.<sup>165</sup> The loss of this doctrinal understanding should not be mourned. Certainly, there are good *instrumental* reasons to separate powers in a system of checks and balances. But commitment to the separation of powers as an end in itself, rather than as a means, is, as Vermeule points out, a kind of idolatry.<sup>166</sup>

First, the doctrine is a device whose functions have changed as social circumstances and values have changed.<sup>167</sup> Notably, it was not always conceived as a way to hamstring government, but instead to *empower* it. The concept, according to Adam Smith, “seems originally to have risen from the increasing business of society,”<sup>168</sup> not so much to limit power as it efficiently divided the labor of governing. It permits collective decision-making to benefit from specialization and “a more efficient distribution and organization of governmental functions.”<sup>169</sup> Second, and more recognizably, it is but one of several useful instruments that can help achieve an end: the obstruction of excessive concentrations of power.<sup>170</sup> Madison admitted that it was a mere “auxiliary” device, an “invention of prudence” that could help “control the abuses of government,” and that, though it was helpful, elections “[are], no doubt, the primary control on the government.”<sup>171</sup>

Those committed to the rule of law generally and the Constitution’s articulation of powers specifically may balk at the contingency implicated in this instrumental conception. But as a matter of logic, the functions of government—law-making, judging, and executing—cannot be separated.<sup>172</sup> Human reason simply cannot be divided up so cleanly. Decision-making, whether performed by a state or an individual, can never be entirely divorced into executive means and legislative ends. Or, put more philosophically, purposive-rational action (instrumental reasoning) and communicative

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<sup>165</sup> NEUMANN, *The Concept of Political Freedom*, *supra* note 78, at 166; *see also* Mortenson & Bagley, *supra* note 50, at 314–15 (describing how the Founders and their intellectual contemporaries likewise embraced this stylized tripartite structure and analogized the “body politic” with the individual human body); Urbinati, *Representation as Advocacy*, *supra* note 78, at 758, notes that one of the reasons why we tend to favor direct, participatory democracy to “indirect” representative democracy is because it “entails a fusion between ‘talking’ and ‘doing’ in political action.” Representation necessarily entails a separation between decision and action. But it is important, she argues, not to overstate this separation.

<sup>166</sup> VERMEULE, *supra* note 20, at 56.

<sup>167</sup> VILE, *supra* note 115, at 17–18.

<sup>168</sup> ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 556 (Mgmt. Lab’y Press 2008) (1776).

<sup>169</sup> HOLMES, *supra* note 77, at 164.

<sup>170</sup> *Cf.* Jeremy Waldron, *Separation of Powers in Thought and Practice*, 54 B.C.L. REV. 433 (2013). *But see* WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 50 (itemizing *instrumental* reasons for separating powers, including, e.g., providing multiple points of contestation for government action and preventing domination by any single individual).

<sup>171</sup> THE FEDERALIST NO. 51 (James Madison).

<sup>172</sup> *E.g.*, *Bowsher v. Synar*, 478 U.S. 714, 749–52 (1986) (Stevens, J., dissenting).

action (moral reasoning) cannot, *pace* Habermas,<sup>173</sup> be so neatly dissected. When we act, we update our ends as we consider the means required to achieve them. We select some ends precisely because they are means for other ends.<sup>174</sup> Administrative agents, like individual agents, will inevitably face the same kind of decisions.<sup>175</sup> “In politics as in ordinary life,” political theorist Yves Sintomer notes, “judgments and will are part of action, which encompasses [them both].”<sup>176</sup> Any differentiation between legislative, executive, and the adjudicative reasoning, therefore, is “sociologically naïve” at worst; dialogical and endogenous, at best.<sup>177</sup>

The conceptual elisions only increase when moving from an individual level analysis to the state. Laws, the ends set by the legislature, necessarily contain some amount of abstraction.<sup>178</sup> Such abstraction invites an admixture of government functions. The product of compromise and consensus-building amongst elected representatives, they are full of open, inclusive language.<sup>179</sup> Even cumbrous spending statutes, weighed down by log-rolls and pork barrels, speak in terms of abstract “interest groups” and not specific individuals.<sup>180</sup> “No legislature or legislative body,” observed Frank Goodnow, “can express the will of the state as to all matters of human conduct so clearly that no dispute as to its meaning may arise.”<sup>181</sup> It was a sentiment he shared with James Madison. In *The Federalist Papers*, Madison admitted that even when laws are “penned with the greatest technical skill,” their meaning would remain “obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”<sup>182</sup> Indeed,

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<sup>173</sup> See HABERMAS, *TOWARD A RATIONAL SOCIETY*, *supra* note 7, at 81–82.

<sup>174</sup> Adrian Blau, *Defending Instrumental Rationality against Critical Theorists*, 74 POL. RSCH. Q. 1067, 1070 (2021); HAYEK, *supra* note 13, at 9; RICHARDSON, *supra* note 34, at 119–27.

<sup>175</sup> RICHARDSON, *supra* note 34, at 118; DAHL, *A PREFACE*, *supra* note 107, at 3; Caiden, *supra* note 103, at 64, 70.

<sup>176</sup> Yves Sintomer, *Nadia Urbinati’s “Democracy Disfigured” and the Crisis of Real Existing Democracies*, 15 CONTEMP. POL. THEORY 230, 232 (2016).

<sup>177</sup> *Id.*

<sup>178</sup> See WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 138–40 (citing NADIA URBINATI, *REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY* (2006)); Frank Lovett, *A Republican Theory of Adjudication*, 21 RES PUBLICA 1, 4 (2015) (citing LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 56–88 (G. E. M. Anscombe trans. 1958)).

<sup>179</sup> WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 138–40. For philosophical explanation of law’s generality, see HAYEK, *supra* note 13, at 11–12; VILE, *supra* note 115, at 26; RICHARDSON, *supra* note 34, at 119; SHKLAR, *supra* note 63, at 29–38; H.L.A. HART, *THE CONCEPT OF LAW* 124 (1961); ROSANVALLON, *supra* note 13, at 86, 135; Stewart, *The Reformation of Administrative Law*, *supra* note 31, at 1684; A.L.A. Schechter *Poultry Corp. v. United States*, 295 U.S. 495, 529–30 (1935).

<sup>180</sup> WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 138–39.

<sup>181</sup> GOODNOW, *supra* note 115, at 72.

<sup>182</sup> THE FEDERALIST NO. 37 (James Madison); *see also* Mortenson & Bagley, *supra* note 50, at 315 (citing *id.*).

Congress must incorporate some vagueness into its legislation if it is to capture the future behavior of innovative business actors. Antitrust law, for example, cannot effectively target future firm behavior if it specifies beyond the “unreasonable” restraint of trade. Adaptable organizations will find a way to skirt rigid rules.<sup>183</sup>

When they apply relatively abstract rules to address life’s particularities, courts and agencies will inevitably interpret and elaborate.<sup>184</sup> They will likewise confront ambiguity when they find themselves applying old law to new and unforeseen cases.<sup>185</sup> In such interpretation and elaboration, value-laden policy choices will be made—choices that at least flirt with the legislative, ends-focused reasoning.<sup>186</sup> As a result, state organs will employ conflicting canons of interpretation that are ripe for politicization precisely because they rely on values that are not themselves identified within the relevant statute.

True, scholars and courts may evade the separation of powers problem by couching all sorts of rulemaking behavior as “non-legislative” because it derives from an “intelligible principle”<sup>187</sup> provided by Congressional statute.<sup>188</sup> As a result, it’s hoped that neither executive agencies nor the courts act as lawmakers as they interpret, elaborate upon, and apply that principle. As Mortenson and Bagley point out though, this move simply substitutes a judge’s reasonably contestable opinion about which language is sufficiently certain to be “intelligible.”<sup>189</sup> “Almost any statute could conceivably flunk a text that mushy,”<sup>190</sup> and a court could then step in as lawgiver. At the same time, the legislative character inherent to the application and execution of law is accepted by progressive and conservative legal scholars alike.<sup>191</sup> Samuel Moyn observes, for example, that “[a]ny interpretation of law is a form of rule, and there is no way—contrary to what many of the founders believed—of disentangling ‘judgment’ and ‘will.’”<sup>192</sup> For Legal Realists, because the law is rationally under-determinate, the available legal reasons to which a court might appeal when justifying its decisions will at least occasionally fail to offer a uniquely correct outcome.<sup>193</sup> Although the Constitution may not “enact Mr. Herbert Spencer’s social

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<sup>183</sup> NEUMANN, *The Concept of Political Freedom*, *supra* note 78, at 172; *see also* PETTIT, *supra* note 154, at 175–76 (such discretion need not unduly risk arbitrariness if other constraints are available).

<sup>184</sup> NEUMANN, *The Concept of Political Freedom*, *supra* note 78, at 171; *see also, e.g.*, Moyn, *supra* note 21; Metzger, *Administrative Constitutionalism*, *supra* note 164, at 1923.

<sup>185</sup> SUNSTEIN & VERMEULE, *supra* note 122, at 111.

<sup>186</sup> *See, e.g.*, Leiter, *supra* note 122, at 295; Holmes, Jr., *supra* note 38, at 99798.

<sup>187</sup> *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>188</sup> Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2103–09 (2004).

<sup>189</sup> Mortenson & Bagley, *supra* note 50, at 287.

<sup>190</sup> *Id.*

<sup>191</sup> Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 399 (1987).

<sup>192</sup> Moyn, *supra* note 21.

<sup>193</sup> Leiter, *supra* note 122, at 284 (citing Carl Llewellyn, *Remarks on the Theory of*



statics,”<sup>194</sup> outside values inevitably wend their way into case law. Vermeule, for his part, points out that “the power to fill in the details [of legislation] is an indispensable element of what ‘executive’ power means.”<sup>195</sup> None other than Carl Schmitt recognized the legislative power exercised in the moment of the inevitably discretionary interpretation and application of the law. He recognized it and then weaponized it to legitimize a demagogic Nazi executive.<sup>196</sup> If execution is political, it should be made by the political actor that speaks with the voice of “the people.” At the other end of the ideological spectrum, libertarian Philip Hamburger notes that “almost all legislation” “must apply to facts that cannot be known at the time of enactment.”<sup>197</sup> Unlike Schmitt, though, he insists, without much conceptual argumentation, that the “discernment” required during the law’s application is not an exercise of legislative will. Instead, the acts of expounding and interpreting are mere functions that ought to be allocated to the judiciary.<sup>198</sup>

Thus, the judicial branch inevitably finds itself engaging in both execution and legislative policymaking. “Before the rise of administration,” notes legal historian Daniel Ernst, “the courts had been the nation’s *de facto* regulators, and they had left to juries the work of applying vague [legislative] standards.”<sup>199</sup> For example, judges went about the piecemeal business of utility rate-setting until the task was given to administrators to execute.<sup>200</sup>

Likewise, Congressional policymaking cannot extricate itself from execution and particularity.<sup>201</sup> Else, the Constitution’s Necessary and Proper Clause,<sup>202</sup> empowering Congress to create the laws needed to execute its powers, would have no purpose.<sup>203</sup> As exemplified by the three-hundred-page CARES Act<sup>204</sup> “[m]aking laws [has]

*Appellate Decision*, 3 VAND. L. REV. 395, 399 (1950)); SUNSTEIN & VERMEULE, *supra* note 122, at 110 (noting that this critique of the separation of powers correlated with the Realists’ support for an expanded administrative state); *see also* Goodin, *supra* note 28, at 238.

<sup>194</sup> *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

<sup>195</sup> VERMEULE, *supra* note 20, at 52–53.

<sup>196</sup> SCHMITT, LEGALITY AND LEGITIMACY, *supra* note 18, at 21.

<sup>197</sup> HAMBURGER, *supra* note 7, at 97.

<sup>198</sup> *Id.* at 52.

<sup>199</sup> ERNST, *supra* note 113, at 14.

<sup>200</sup> Landis, *supra* note 29, at 530.

<sup>201</sup> ROSANVALLON, *supra* note 13, at 57; GOODNOW, *supra* note 115, at 20; Waldron, *The Core of the Case Against Judicial Review*, *supra* note 36, at 133; Rubin, *supra* note 138, at 389–90.

<sup>202</sup> U.S. CONST. art. 1, § 8.

<sup>203</sup> *See McCullough v. Maryland*, 17 U.S. 316 (1819); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935); Lawson, *Delegation and Original Meaning*, *supra* note 12, at 346–50; Merrill, *supra* note 188, at 2129–30 (suggesting that the blending of means and ends within Congressional powers may underpin the Courts’ indifference regarding whether agencies choose to undertake their activities under either rulemaking or adjudication); SUNSTEIN & VERMEULE, *supra* note 122, at 55.

<sup>204</sup> *See generally* The Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-13 (2020).

become just another means of governing.”<sup>205</sup> There’s a good reason why Congress concerns itself with implementation. For any given end, a variety of means will be available to fulfill it, each implicating different values and preferences.<sup>206</sup>

Nor can Congress quarantine itself from the adjudication of conflicting demands according to higher principle. As Madison noted long ago, much of law-making amounts to the resolution of multiparty disputes amongst citizens alleging conflicting claims.<sup>207</sup> Bentham, argued that Parliament, like a common law adversary court, hosted opposing arguments while the people themselves would sit as observing judges.<sup>208</sup> The laws passed by legislatures, like the opinions of courts, are often elaborations and interpretations of higher, pre-existing principles.<sup>209</sup> This is the very model of the deliberative assembly. Political theorist Nadia Urbinati, in an important 2000 essay,<sup>210</sup> describes elected representatives as advocates, pleading the case of their constituents before a tribunal for their judgment.

To be sure, early scholars of administration law believed that politics and administration—will and its execution—could be cleanly separated. Channeling Rousseau and Condorcet, Wilson and his students hoped that administrators could invoke “nomothetic,” or law-like, principles that would permit them to turn administration into some kind of hard science.<sup>211</sup> Scholars of political philosophy are also accustomed to the line drawn between instrumental and substantive reasoning implied by a clean separation of powers.<sup>212</sup> Yet their hopes are belied by reality.

Indeed, some of the most politically contentious debates are those over means, not ends. For example: how different executives choose to exercise their “utterly ordinary constitutional duty” to enforce immigration legislation.<sup>213</sup> As citizens debate the merits and demerits of border walls, child separations, and the deportation of young undocumented immigrants, Congress may very well find itself considering

<sup>205</sup> ROSANVALLON, *supra* note 13, at 57.

<sup>206</sup> RICHARDSON, *supra* note 34, at 123.

<sup>207</sup> THE FEDERALIST NO. 10 (James Madison) (“With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other.”).

<sup>208</sup> Jeremy Bentham, *Essay on Political Tactics* (1791), in 2 THE WORKS OF JEREMY BENTHAM 310 (John Bowring ed., 1865).

<sup>209</sup> VILE, *supra* note 115, at 27; HAMBURGER, *supra* note 7, at 78–79.

<sup>210</sup> Urbinati, *Representation as Advocacy*, *supra* note 78, at 773.

<sup>211</sup> Caiden, *supra* note 103, at 51.

<sup>212</sup> *E.g.*, HABERMAS, TOWARD A RATIONAL SOCIETY, *supra* note 7, at 85 (arguing that instrumental reasoning is ill-suited for democratic discourse because it “is immanently [a discourse] of control”); CHIARA CORDELLI, THE PRIVATIZED STATE 85–86 (2020).

<sup>213</sup> COX & RODRIGUEZ, *supra* note 19, at 2.

new legislation delimiting the tools available to the Presidency. No one can reasonably doubt the political contentiousness of tax cuts and deficit spending, yet both are *means* to achieve the same result: economic growth.<sup>214</sup> Electoral politics, like agency politics, likewise finds itself grappling with “the battle of the experts.” Citizens commonly clash not over their final ends, but how they are best achieved: how to grow the economy, lift people from poverty, and decrease crime.<sup>215</sup> Meanwhile, political associations fail if they fail to find the means that can meet challenges to their security and capacity.<sup>216</sup> Elected leaders find themselves negotiating the constraints of international financial markets and capital flows.<sup>217</sup> As Dahl notes, democracy, if it is to make intelligent choices in a complex society, “require[s] both technical understanding and sensitivity to the values involved.”<sup>218</sup>

As a result, those that attack independent administrative agencies as usurping powers properly belonging to the judicial, executive, or legislative branches often make a category mistake. None of these branches can possibly enjoy a monopoly on the functions of legislation, adjudication, and execution. Folding administration into any one of these branches will inevitably create *another* separation-of-powers problem as they will bring with them all the powers they presently wield. Giving the president more control over the Environmental Protection Agency means giving him power to promulgate pollution regulation and adjudicate superfund claims at the expense of Congress and the Courts. Folding agencies into the Courts by hamstringing their discretion merely swaps some bureaucrats for others.<sup>219</sup> Instead of civil servants, judges will be making the policy.

Rather, a critique based upon the separation of powers should derive from the important purposes that it is meant to fulfill: non-domination, accountability, efficiency, etc. And agencies have responded to such critiques by, for example, adopting the due process and accountability norms set forth in the APA.<sup>220</sup> Independent, professionalized and capable agencies both curb arbitrary presidential power and enable the state’s constitutional obligation to govern.<sup>221</sup> Arguably, it is the independence of agencies against presidential power that curbed many of the Trump Administration’s

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<sup>214</sup> STEPHEN TURNER, *LIBERAL DEMOCRACY 3.0: CIVIL SOCIETY IN THE AGE OF EXPERTS* 4 (2003).

<sup>215</sup> *Id.*; Peter Vervosek, *Public Intellectuals and Experts Cannot Tell Citizens What to Do*, LSEBLOG (Jan. 28, 2020), <https://blogs.lse.ac.uk/brexit/2020/01/28/public-intellectuals-and-experts-cannot-tell-citizens-what-to-do/> [<https://perma.cc/HR94-P5DH>].

<sup>216</sup> See ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

<sup>217</sup> Streeck, *supra* note 7, at 1314; John Pocock, *The Political Limits of Premodern Economics*, in *THE ECONOMIC LIMITS OF MODERN POLITICS* 121 (1990).

<sup>218</sup> Robert Dahl, *Social Reality and “Free Markets”*, *DISSENT MAG.*, Spring 1990, at 224, 227 [hereinafter *Social Reality*].

<sup>219</sup> SUNSTEIN & VERMEULE, *supra* note 122, at 37; Landis, *supra* note 29, at 530.

<sup>220</sup> ACKERMAN, *supra* note 47, at 279–90, 306–12.

<sup>221</sup> Metzger, *1930s Redux*, *supra* note 7, at 7.

abuses.<sup>222</sup> In the next section, this Article details another norm that can be used to assess the legitimacy of agencies: democratic representation. By offering additional fora for representative input and contestation, they help a political regime better vindicate the promise of popular sovereignty: that citizens can play an equal part in forming the laws that govern them.

## II. AGENCIES AND THE REPRESENTATIVE TURN

With a better understanding of popular sovereignty, rights, and the separation of powers, critics of the administrative state cannot make a failsafe argument against agencies' legitimacy. Simply, they cannot rely on agencies' lack of Congressional input and immunity from judicial review. Here, this Article sets forth not a negative defense of administration. Instead, it makes out a positive case. Namely, if agencies operate according to procedures that permit citizens to understand themselves as coequal political participants, it is at least possible that they are compatible with constitutional liberal democracy. Recent conceptual work in political representation bears out this possibility. It also shows how agencies might *improve* citizens' ability to participate equally in collective decision-making. As a result, administration may not be the Constitution's embarrassing uncle after all. It might instead prove indispensable to the fulfillment of constitutional democracy's promises.

### A. Defining the Turn

Democratic representation implies difference. If "the people" actually existed as a homogenous whole with an identifiable will, there would be no need for a multi-member mediating body of partisans.<sup>223</sup> A single demagogue would do.<sup>224</sup> If "the common good" or "natural right" were easily ascertained, there would be no need for a legislature to argue about it incessantly. A philosopher king would serve more easily.<sup>225</sup> Indeed, organ-body sovereignty, natural right and the "rule of general

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<sup>222</sup> Tim Wu, *What Really Saved the Republic from Trump?*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/opinion/trump-constitution-norms.html> [<https://perma.cc/U3JR-FG9D>].

<sup>223</sup> *E.g.*, ROSENBLUM, *supra* note 70, at 6.

<sup>224</sup> CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 46–48 (G. Schwab trans., 2007); SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY*, *supra* note 75, at 8–17, 28–32; CARL SCHMITT, *CONSTITUTIONAL THEORY* 264–67 (J. Seitzer trans., 2008).

<sup>225</sup> Urbinati, *Representation as Advocacy*, *supra* note 78, at 774 (citing J.S. Mill, *Rationale of Representation*, in *ESSAYS IN POLITICS AND SOCIETY* 16–45, 22–23 (1977)); ROSENBLUM, *supra* note 70, at 11 (noting, *inter alia*, that a "party to end parties is the pose of utopian and revolutionary parties" like Jacobins and Communists), 27–28 ("Holism is antipolitical, and holist utopias make this vivid. In every perfectionist community, the absence of political institutions is the ideal. . . . Thus philosophical creators of utopia prescribe anarchy or technical superintendence . . . . [t]wo holist assumptions dictate aversion to politics and therefore to

law” imply a utopianism that can be vindicated in a plural society only through force. Accordingly, if there are any theories of democratic political legitimacy that might avoid these conceptual blunders, it would likely be found within theories of democratic representation.

And so, it is. The representative, or “constructivist,” turn within political theory<sup>226</sup> pushed back against the idea that representative democracy is merely a watered-down version of direct democracy, a pragmatic or elitist alternative to enlist only when the *demos* is too unwieldy or too ignorant for more direct institutions.<sup>227</sup> For a long time, democratic theorists like James Madison, Joseph Schumpeter, and Giovanni Sartori held that elections were a second-best way of ascertaining the “will of the people,” adopted only because incorporating the will of each and every citizen into the law-making enterprise is impossible or undesirable in both a practical and normative sense.<sup>228</sup> Rather than the direct, deliberative, participatory democracy of the ancients, we moderns must sadly settle for a principle-agent model and a political division of labor that will inevitably involve some kind of aristocracy.<sup>229</sup>

In contrast, the new theories of representation hold that representation is no mediocre substitute for democracy, but instead “an intrinsically modern way of intertwining participation, political judgment, and the constitution of *demoi* capable of self-rule.”<sup>230</sup> Eschewing organ-body sovereignty, they do not judge representation according to how well it reproduces a non-existent, pre-political popular will.<sup>231</sup> They reject the common-sense notion that representatives take exogenous citizen preferences as the “bedrock for social choice” in a linear bottom-up process that

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parties: first, that there is an identifiable common good or good of the whole and, second, that no political recognition and arrangement of parts, no dynamic of cooperation, and certainly no dialectic of conflict can illuminate the common good.”).

<sup>226</sup> The inception of this turn is generally credited to Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515 (2003) [hereinafter *Rethinking Representation*]; Andrew Rehfeld, *Towards a General Theory of Political Representation*, 68 J. POL. 1 (2006); Michael Saward, *The Representative Claim*, 5 CONTEMP. POL. THEORY 297 (2006) [hereinafter *The Representative Claim*]; and Urbinati, *Representation as Advocacy*, *supra* note 78, at 774.

<sup>227</sup> E.g., WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 134–35; Urbinati, *Representation as Advocacy*, *supra* note 78, at 758–59.

<sup>228</sup> Urbinati, *Continuity and Rupture*, *supra* note 70, at 196; *see also, e.g.*, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 192 (Wilfrid E. Rumble ed., 1995) (1832) (“Where a sovereign body . . . exercises through representatives the whole of its sovereign powers . . . It may delegate those its powers to those its representatives, subject to a trust or trusts.”).

<sup>229</sup> *See generally* BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 132 (1997); BENJAMIN CONSTANT, THE LIBERTY OF THE ANCIENTS COMPARED WITH THAT OF THE MODERNS (1819).

<sup>230</sup> Urbinati & Warren, *supra* note 45, at 402.

<sup>231</sup> HANNAH PITKIN, THE CONCEPT OF REPRESENTATION 221 (1967); Saward, *The Representative Claim*, *supra* note 226, at 299–300; Urbinati, *Continuity and Rupture*, *supra* note 70, at 197 (citing Sieyes, who held that the “sovereign nation was politically mute outside the electoral booth and [that] its will [is] inexpressible without and outside the representative assembly”).

transmits those preferences into law.<sup>232</sup> Incorporating empirical research showing that citizens' opinions are rarely stable outside the context of electoral politics,<sup>233</sup> they instead hold that representatives help *generate* constituencies and voter demands through the educational process of partisan advocacy.<sup>234</sup> "Parties create, not just reflect, political interests and opinions. They formulate 'issues' and give them political relevance."<sup>235</sup> Often, they will distinguish a group, paint it in a certain light, and then make claims on its behalf. Group members will then either accept or reject those claims based upon their own views<sup>236</sup> and in light of competing messages from other representatives in an ongoing practice of judgment-formation and public deliberation.<sup>237</sup>

Elections do not ham-handedly measure any primordial democratic "sovereign" will.<sup>238</sup> Nor are they an imperfect, real-life reproduction of an idealized social contract whereby citizens expressly "consent" to the laws that bind them.<sup>239</sup> Rather, they structure participation, help constitute political debate, and "make[] citizens *participate in the game* of ridding themselves of governments."<sup>240</sup> Representatives do not simply hew to past campaign promises. They also anticipate and frame voters' future judgments, sometimes on brand new issues.<sup>241</sup> The laws they pass are the outcome

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<sup>232</sup> Lisa Disch, *Towards a Mobilization Conception of Democratic Representation*, 105 AM. POL. SCI. REV. 100, 101 (2011) [hereinafter *Towards a Mobilization*].

<sup>233</sup> Disch, *The End of Representative Politics?*, *supra* note 77, at 1, 16.

<sup>234</sup> *Id.* (relying on Laclau and Mouffe's insights about the symbolic construction of the "people"); Urbinati, *Representation as Advocacy*, *supra* note 78, at 776.

<sup>235</sup> ROSENBLUM, *supra* note 70, at 7.

<sup>236</sup> There is a debate in the literature regarding the exogeneity of voter preferences. Some theorists hold that voters possess pre-political interests that representative politics does not create, but rather simply activates. Some deliberative theorists hold that the outcomes of Rawlsian, consensus-based public discourse motored by, but somewhat independent from, representative politics can take the place of pre-political voter interests with their model. Others, refusing to hitch voter preferences to any outside source, are susceptible to critiques of relativism and the impossibility of distinguishing between autonomous citizen choices and elite manipulation. This Article attempts to bracket the issue. If translated through representative claims, objective voter interests and exogenous preferences are captured in the theory. If they are not, they suggest that political legitimacy is based not on democratic autonomy, but on, for example, objective notions of justice.

<sup>237</sup> Saward, *The Representative Claim*, *supra* note 226, at 976; Lisa Disch, *The Constructivist Turn in Democratic Representation: A Normative Dead-End?*, 22 CONSTELLATIONS 487 (2015); Urbinati, *Representation as Advocacy*, *supra* note 78, at 760, 766.

<sup>238</sup> Monica B. Vieira, *Representing Silence in Politics*, 114 AM. POL. SCI. REV. 976 (2020); Urbinati, *Representation as Advocacy*, *supra* note 78, at 765.

<sup>239</sup> See discussion of majority voting, *infra*; see also WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36 (describing the vote as not some real-life consent theory of government, but as a fair process that lends legitimacy to outcomes).

<sup>240</sup> Urbinati, *Continuity and Rupture*, *supra* note 70, at 196 (emphasis added).

<sup>241</sup> Mansbridge, *Rethinking Representation*, *supra* note 226, at 515–18; Urbinati, *Representation as Advocacy*, *supra* note 78, at 760.



of both formal and informal decision-making procedures that “actually create[s] a framework in which the nation can for the first time have a will.”<sup>242</sup>

For example, elections set agendas for public discussion, motivate organizing by providing discrete targets and timelines, institutionalize “countervailing discourses” through political competition<sup>243</sup> and thus encourage citizens to exercise thoughtful judgments over matters of public concern.<sup>244</sup> They frame continuous, recursive processes of bottom-up demands and representatives’ top-down reactions, permitting citizens to influence law-making.<sup>245</sup> As a result, electoral politics “activate” citizens beyond the formal act of casting a ballot and prevent public discourse from disintegrating into a cacophony of interventions that remain unchanneled towards any common goal.<sup>246</sup> Representatives’ *lack* of a constituent-specific imperative mandate challenges voters to think of themselves as part of a national whole: generally, and in terms of the public good—or, at least, in terms of the abstract interests they purport to represent.<sup>247</sup> At the same time, representatives’ accountability to particular constituencies, along with bicameralism, (1) reinforces the notion that there is no permanent, collective “whole” that speaks with the voice of the sovereign “people” and,<sup>248</sup> (2) ensures that “the specific condition of the individual

<sup>242</sup> HOLMES, *supra* note 77, at 164; *see also* WALDRON, *Precommitment and Assurance*, *supra* note 77, at 277; Disch, *The End of Representative Politics?*, *supra* note 77, at 10; HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 56, at 171 (representative legislative decision-making must be “‘anchored’ in the informal streams of communication emerging from public spheres”).

<sup>243</sup> John S. Dryzek & Simon Niemeyer, *Discursive Representation*, 102 AM. POL. SCI. REV. 481, 482 (2008); ROSENBLUM, *supra* note 70, at 7.

<sup>244</sup> *E.g.*, Urbinati, *Continuity and Rupture*, *supra* note 70, at 194; WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 141–42 (“[S]tructures of representation provide processes for judgment formation and for the deliberative engagement of judgments both among the people and among their representatives.”) (citing Urbinati, *Representation as Advocacy*, *supra* note 78, at 760) (comparing elections favorably to judicial decision-making in relation to stimulating meaningful political discourse); *id.* at 250 (explaining how majority voting is incorporated into deliberative bodies, including those of appellate courts); Urbinati, *Representation as Advocacy*, *supra* note 78, at 768 (the separation of time and space between election campaigns and actual law-making “gives [voters] the chance to reflect by themselves . . . to defer their judgment” and “enables a critical scrutiny while shielding citizens from the harassment of words and passions” that encourages demagoguery).

<sup>245</sup> Jane Mansbridge, *Recursive Representation in the Representative System* 6–9, 21–22, 27–28 (Harv. Kennedy Sch., Working Paper No. RWP17-045, 2017) [hereinafter *Recursive Representation*]; Urbinati, *Representation as Advocacy*, *supra* note 78, at 766.

<sup>246</sup> Urbinati & Warren, *supra* note 45, at 391–92; HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 56.

<sup>247</sup> Urbinati, *Continuity and Rupture*, *supra* note 70, at 210; Urbinati, *Representation as Advocacy*, *supra* note 78, at 761, 764; WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 136.

<sup>248</sup> Urbinati, *Continuity and Rupture*, *supra* note 70, at 210; WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 80.

citizen is not ignored.”<sup>249</sup> Meanwhile, elected representatives take these ongoing discourses and demands with them as they undertake their law-making responsibilities as advocates, enabling their constituents to be “present” in decision-making through their discourses, if not their physical bodies.<sup>250</sup>

Juridically and formally, the vote is not a device that, however clumsily, aggregates voter preferences in order to translate them into statutes. Instead, it serves at least two purposes important for political equality. First, at least when compared to acclamation, it encourages individual citizens, with the aid of public discourse, to form their own individual judgments over public affairs.<sup>251</sup> Each goes alone to the ballot box, and each decides which lever to pull. Second, it provides a “temporary resolution of political conflict”<sup>252</sup> in a manner that respects citizens as moral and political equals. Majority voting is a decision-making mechanism that promises that even if we agree neither to the outcome of our elections, nor with the law-making that follows, we can at least believe that law-making was undertaken on *fair* terms. It is a way, to use Jeremy Waldron’s language, to “give each person the greatest say possible compatible with an equal say for each of the others.”<sup>253</sup> Though the universal franchise is important for maintaining a system of political equality and, importantly, legitimacy,<sup>254</sup> it is but “one particular moment in a much larger decision-making process.”<sup>255</sup>

We should not, therefore, judge representation and other political institutions according to their congruence with voter preferences and public opinion polls, as if such preferences and polls truly reflect the timeless and enduring “will of the people.” The critical yardstick is not “transcribe the will of the people” by having people, literally, transcribe their will into the statute books. The principle of justification (e.g., popular sovereignty) and the technique of decision (direct, unmediated consensus-based democracy) do not have to overlap.<sup>256</sup> Instead, we should judge representative systems according to how well they allow morally equal human beings to affect, in a fair and equal way, the laws that bind them—a fundamental norm that political theorists Nadia Urbinati and Mark Warren call “democratic autonomy.”<sup>257</sup>

<sup>249</sup> Urbinati, *Representation as Advocacy*, *supra* note 78, at 770.

<sup>250</sup> *Id.* at 767.

<sup>251</sup> *Id.* at 761, 765.

<sup>252</sup> Urbinati, *Continuity and Rupture*, *supra* note 70, at 198.

<sup>253</sup> WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 228.

<sup>254</sup> *Id.* at 226 (noting that political legitimacy responds to questions of fairness rather than to questions regarding the justice or “rightness” of particular political decisions—perhaps including those that are “right” precisely because they reflect the “general will”).

<sup>255</sup> Sintomer, *supra* note 176, at 232.

<sup>256</sup> ROSANVALLON, *supra* note 13, at 111; *cf.* Montesquieu, *supra* note 72, at 11–12 (arguing that the people can be the sovereign “monarch only through their wills. The [popular] sovereign’s will is the sovereign himself. Therefore, the laws establishing the right to vote are fundamental in this government.”).

<sup>257</sup> Urbinati & Warren, *supra* note 45, at 395; *see also* WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 228.

There is, as a result, a lot of room for creativity when it comes to the design of representative institutions.<sup>258</sup> Theorists tend to assess these institutions according to whether and what extent they: (1) stimulate public debate and individual judgment, such that a choice to support what is being done in citizens' names is sufficiently considered to amount to their participation in the law-making process;<sup>259</sup> (2) motivate bottom-up demands that are followed by top-down responses (recursiveness or reflexivity)<sup>260</sup> in a manner that orients representatives to the normative—if not ontological—priority of the represented<sup>261</sup> by, for example, (3) permitting and mobilizing contestation;<sup>262</sup> (4) ensuring citizens have some kind of equal influence on decision-making, perhaps with some process of electoral authorization that shows citizen uptake of agency policies,<sup>263</sup> or formal registration and/or accommodation of citizen objections. Each element not only serves democratic autonomy, but also demonstrates the compatibility of this understanding of representation with a systemic, agonistic conception of deliberative democracy.<sup>264</sup> Importantly, each can be and often are served by non-electoral forms of representation.<sup>265</sup> To provide some obvious examples: lobbyists, non-profit public advocacy corporations, and NGOs.<sup>266</sup>

### *B. Accommodating Administration*

The same institutional flexibility that accommodates representative politics within a constitutional liberal democracy can likewise accommodate administrative governance. Those who attack agencies as illegitimate lawmakers mirror the claims that Rousseau levied against democratic representation itself. For Rousseau, the popular sovereign could not be represented. Instead, the law must rise directly from

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<sup>258</sup> WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 78 (“Because there is no such unitary thing as ‘the people,’ there can be no single canonical way of representing it.”).

<sup>259</sup> Disch, *Towards a Mobilization*, *supra* note 232, at 107 (versus choices that primed out of habit, ignorance, or stereotype); Urbinati, *Continuity and Rupture*, *supra* note 70; Samuel Hayat, *Representation as Proposition: Democratic Representation After the Constructivist Turn*, in *THE CONSTRUCTIVIST TURN IN POLITICAL REPRESENTATION* (Lisa Disch et al. eds., 2019).

<sup>260</sup> Mansbridge, *Recursive Representation*, *supra* note 245, at 523; Disch, *Towards a Mobilization*, *supra* note 232, at 111.

<sup>261</sup> Vieira, *supra* note 238, at 976, 979; PITKIN, *supra* note 231, at 140; Disch, *Towards a Mobilization*, *supra* note 232, at 107–08; WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 188, 191; Urbinati & Warren, *supra* note 45, at 399–400.

<sup>262</sup> Disch, *Towards a Mobilization*, *supra* note 232, at 111; Vieira, *supra* note 238, at 983; David Runciman, *The Paradox of Political Representation*, 15 J. POL. PHIL. 93, 95 (2007); Laura Montanaro, *The Democratic Legitimacy of Self-Appointed Representatives*, 74 J. POL. 1094, 1099 (2012).

<sup>263</sup> Vieira, *supra* note 238, at 976–77.

<sup>264</sup> Urbinati, *Representation as Advocacy*, *supra* note 78, at 773–74.

<sup>265</sup> Saward, *The Representative Claim*, *supra* note 226, at 297.

<sup>266</sup> Mansbridge, *Rethinking Representation*, *supra* note 226, at 524.

the people.<sup>267</sup> Representation, therefore, should be confined to a strict principal-agent model, a fiduciary contract whereby the agent is stripped of any policymaking discretion whatsoever.<sup>268</sup> Government is to blindly obey the sovereign's political orders; representatives and other "ministerial," "fiduciary" state officers could only judge and interpret—presumably in a way that did not usurp the sovereign's will.<sup>269</sup>

Echoing Condorcet (administration is a "*roi-machine*") and Sieyès (administration is an "intermediary commission of powers,"),<sup>270</sup> many contemporary anti-administrativists understand agencies as the incurious fiduciaries of Congress—itsself a fiduciary of the people<sup>271</sup>—and so should, "like a machine without a mind,"<sup>272</sup> avoid playing any role in the formation of law and policy.<sup>273</sup> They mimic Woodrow Wilson's<sup>274</sup> pleas to depoliticize bureaucracy and Frank Goodnow's separation of the "organism" of the state into two distinct operations: those "necessary to the expression of its will" and those "necessary to the execution of its will."<sup>275</sup> Likewise, the post-war consensus assumed that agencies should serve simply as a "transmission belt" for legislative policy.<sup>276</sup> Administration must therefore "appear nonpartisan, scientific,

<sup>267</sup> ROUSSEAU, *supra* note 69, at 229–30.

<sup>268</sup> ROSANVALLON, *supra* note 13, at 135.

<sup>269</sup> Urbinati, *Continuity and Rupture*, *supra* note 70, at 203; Sintomer, *supra* note 176, at 232; LOCKE, *supra* note 1, at 367, 369.

<sup>270</sup> ROSANVALLON, *supra* note 13, at 29.

<sup>271</sup> Mortenson & Bagley, *supra* note 50, at 307–09, 337–38, arguing that the Founders could not have believed that legislative power was nondelegable because it was thought, at the time, that that power was, in the first instance, delegated from "the people" to their elected representatives (understood variously as delegates, servants, or trustees).

<sup>272</sup> Quim Brugue & Raquel A. Gellego, *A Democratic Public Administration?*, 5 PUB. MGMT. REV. 425, 426 (2003).

<sup>273</sup> This is the "agency instrumentalist" view discussed in RICHARDSON, *supra* note 34, at 119, adopted by political theorists including, e.g., Christiano and Goodin, *supra* note 28; and PAUL TUCKER, *UNELECTED POWER: THE QUEST FOR LEGITIMACY IN CENTRAL BANKING AND THE REGULATORY STATE* 97–98 (2018). *See also*, e.g., Mansbridge, *Recursive Representation*, *supra* note 245, at 21; POSNER & VERMEULE, *supra* note 13; TURNER, *supra* note 214, at 14; Donald W. Smithburg, *Political Theory and Public Administration*, 13 J. POL. 59, 60 (1951); COX & RODRIGUEZ, *supra* note 19, at 11 (summarizing Justice Kennedy's critique that immigration regulation is "upside down," subverting a separation of powers doctrine in which the legislative makes laws and the executive, "as a dutiful agent," enforces them); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 682, 690–91 (1952) (Vinson, J., dissenting) (arguing that the majority mistakenly treats the executive not as a coequal branch of government, but as an "automaton" and an "agent" of Congress, which is "enthroned in authority" over the President); Gerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 567 ADMIN. L. REV. 501, 505 (2005) (agencies are to be the "faithful agents" of the legislature).

<sup>274</sup> Wilson, *supra* note 56, at 211–12.

<sup>275</sup> GOODNOW, *supra* note 115, at 9.

<sup>276</sup> Livermore & Richardson, *supra* note 17, at 28; Stewart, *The Reformation of Administrative Law*, *supra* note 31, at 1675.

universal, efficient, purposeful.”<sup>277</sup> For if administration starts making its own decisions, it can only interfere with the democratic sovereign—and thus, like Rousseau’s representatives, breach their fiduciary contract. As a result, when it becomes apparent that administration and politics cannot be cleanly separated in any complex legal regime,<sup>278</sup> administration seems to lose much of its legitimacy.

Yet if representation is not an inferior re-presentation of the will of an embodied popular sovereign, but instead an institutional tool that helps citizens understand themselves as coequal participants in law-making, then there is little reason to exclude agencies *ex ante* from the democratic process.<sup>279</sup> They, like formal electoral representation, can be a part of a system of democratic autonomy, a political order that promises to provide everyone the greatest say possible that is also compatible with the equal inclusion of others.

This insight is not unprecedented. French philosopher Pierre Rosanvallon argues that independent agencies can and do serve as representative agents (of the trusteeship variety), and provide the neutrality and impersonality that republicans once sought from deliberative legislative bodies.<sup>280</sup> Richard Stewart, in his seminal 1975 essay,<sup>281</sup> described in U.S. administrative law a turn towards pluralist interest representation and away rigid applications of the separation of powers doctrine. The interest-group politics of administrative policymaking can, like the interest-group politics of Congressional law-making, provide “opportunities for policy proposals to be criticized from a variety of directions, both before and after their implementation.”<sup>282</sup> For Stewart, interest group representation might even serve as a new ground for agencies’ political legitimacy.<sup>283</sup> The legitimacy ascribed through representation seems to be embraced by agencies themselves. In its own educational literature, the “politically independent” Federal Reserve System (The Fed) asserts that “‘decentralizing’ the central bank into twelve districts helped to ensure more voices were represented”<sup>284</sup> as it went about its business.

Of course, Theodore Lowi, in his famous 1969 study of interest group representation in administration, did not celebrate agencies’ pluralist politics. He lamented

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<sup>277</sup> Caiden, *supra* note 103, at 53.

<sup>278</sup> See, e.g., WALDO, *supra* note 20, at 91; Livermore & Richardson, *supra* note 17, at 3.

<sup>279</sup> Smithburg, *supra* note 273, at 66.

<sup>280</sup> PIERRE ROSANVALLON, *DEMOCRATIC LEGITIMACY* 75–86 (2011); see also Caiden, *supra* note 103, at 55 (describing Woodrow Wilson’s plea to transform administration into a “public trust”).

<sup>281</sup> Stewart, *The Reformation of Administrative Law*, *supra* note 31, at 1675–84.

<sup>282</sup> Dryzek & Niemeyer, *supra* note 243, at 482.

<sup>283</sup> J. Benton Heath, *From the Spirit of the Federalist Papers to the End of Legitimacy: Reflections on Gundy v. United States*, 114 NW. U. L. REV. ONLINE 1723, 1732 (2020).

<sup>284</sup> Federal Reserve Bank of New York Communications and Outreach, “The Story of the Federal Reserve,” 6 (2018), <https://www.newyorkfed.org/medialibrary/media/outreach-and-education/comic-books/NewYorkFed-TheStoryOfMonetaryPolicy-WebColor.pdf> [<https://perma.cc/ER64-37WG>].



its “irrational” incrementalism and the influence it lent to powerful industry actors.<sup>285</sup> In contrast, Noh points out that agencies enjoy a better capacity than Congress to achieve ideal representative deliberation, given their smaller constituencies and limited subject matter.<sup>286</sup> With the concurrent rise in public interest advocacy and civil rights legislation, agencies accommodated a growing array of individual rights by incorporating rulemaking procedures that accept input from diverse civil society representatives.<sup>287</sup> More recently, Emerson,<sup>288</sup> Rahman and Gilman,<sup>289</sup> and Mansbridge<sup>290</sup> argue that there is an ongoing, constitutive relationship between administrative agencies and citizens as they collaborate to make regulations. Mary E. Guy, past president of the American Society for Public Administration, characterized the people serving public agencies as “facilitators, interpreters, and mediators of public action”<sup>291</sup>—a characterization that could just as easily be attributed to elected representatives. Even Locke, despite his commitment to an organ-body conception of popular sovereignty, theorized a connection between the executive and representation. In his theory of government, it is up to the prince to create new representative offices if time and social change corrupts the representativeness of extant law-making institutions.<sup>292</sup>

There is a stiff backbone of principle behind these authors’ arguments. As mentioned above, representative systems serve democracy by structuring public contestation, stimulating debate, and provoking judgment. They thereby permit disaggregated and diverse citizens to participate in the process of forming collective purposes. One can observe this dynamic within agency decision-making, demonstrated by public reactions following recent Executive Orders regarding immigration, environmental deregulation, etc. They mobilize objections, enabling citizens to make judgments about agency responses. The public criticism to which agencies are routinely subject are sufficient to limit, at least according to Vermeule and Posner, executive agencies far more effectively than do the tenets of statutory delegation and the separation of powers.<sup>293</sup>

Moreover, agencies serve as fora for the kind of non-electoral political representation that supplements political equality by calling forth previously ignored or silent constituencies.<sup>294</sup> In the past, minority communities excluded from electoral politics

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<sup>285</sup> LOWI, *supra* note 7, at 239–42. Notably, and embarrassingly for Lowi, interest-group bargaining made the welfare state irrational precisely because it brought issues of social justice (like race and gender) into class-based economic policy. *Id.* at 245–55.

<sup>286</sup> Noh, *supra* note 48, at 400–01.

<sup>287</sup> Stewart, *Administrative Law in the Twenty-First Century*, *supra* note 55, at 441–42.

<sup>288</sup> EMERSON, *supra* note 16, at 65.

<sup>289</sup> K. SABEEL RAHMAN & HOLLIE R. GILMAN, CIVIC POWER 13–16, 41–42 (2019).

<sup>290</sup> Mansbridge, *Recursive Representation*, *supra* note 245, at 36.

<sup>291</sup> Guy, *supra* note 61, at 652.

<sup>292</sup> LOCKE, *supra* note 1, at 372–74.

<sup>293</sup> POSNER & VERMEULE, *supra* note 13.

<sup>294</sup> Vieira, *supra* note 238, at 977; RAHMAN & GILMAN, *supra* note 289, at 137; Montanaro, *supra* note 262, at 1102; Raul Carillo, *Our Money Where Our Mouth Is*, CURRENT AFFS.



fruitfully engaged with administrators tasked with implementing social welfare rights.<sup>295</sup> Administrative experiments in participatory budgeting and collaborative governance encourage citizens' engagement in the infrastructure shaping their lives.<sup>296</sup> They can, in Waldron's terms, "secur[e] multiple points of access for citizen input" and thus add to the "housing" of the kind of public deliberation that promises to secure democratic autonomy.<sup>297</sup>

Indeed, administration can, perhaps better than Congress, provide a forum where "conflicts and rendered both comprehensible and solvable" and where the values at stake are sufficiently "specific and understandable to generate opinions and dialogue."<sup>298</sup> Because an elected representative will make a variety of unrelated claims regarding law-making in a generalized arena—Congress—the potential exercise of political power can become obscure. In contrast, an agency with a particular subject matter jurisdiction can attract representatives and generate claims that target the specific policies that impact citizens' lives. They give rise to "affected constituencies," providing "a point of identification around which [citizens] might coalesce as a 'people' or *demos* defined along some dimensions of common interest."<sup>299</sup> Civil society and public interest representatives, for example, have a better opportunity to exercise judgment on and lodge objections to how much pollution is permitted in drinking water (EPA); whether discrimination claims are adequately enforced (Department of Justice); and how policing is executed ("citizen audits" of local departments). In fact, many social movements target their organizing around agency jurisdictions.<sup>300</sup> In other words, agencies provide an opportunity for citizens to form the kind of considered political judgments that new theories of representation value. It is agencies that can provide that *factual* information necessary for citizens who seek to exercise judgment on many matters of public concern.<sup>301</sup> One need only consider the usefulness of CDC scientists to democratic deliberation during a pandemic. As a result, agencies, like electoral politics, facilitate the "circulation of judgment and opinion that should unite state institutions and the citizens."<sup>302</sup>

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(Aug. 20, 2020), <https://www.currentaffairs.org/2020/08/our-money-where-our-mouth-is> [<https://perma.cc/SW5Q-4FEC>]. Notably, Urbinati, *Representation as Advocacy*, *supra* note 78, at 762–65, notes that even purportedly "direct" Athenian democracy involved non-electoral representation. Though each citizen could come to the forum, inevitably only a few would speak, and they would speak on behalf of interest groups.

<sup>295</sup> Karen Tani, *States' Rights, Welfare Rights, and the Indian Problem: Negotiating Citizenship and Sovereignty*, 331 L. & HIST. REV. 1, 2–3 (2015).

<sup>296</sup> RAHMAN & GILMAN, *supra* note 289, at 134, 172.

<sup>297</sup> WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 34.

<sup>298</sup> Brugue & Gellego, *supra* note 272, at 429.

<sup>299</sup> Montanaro, *supra* note 262, at 1099.

<sup>300</sup> RAHMAN & GILMAN, *supra* note 289.

<sup>301</sup> *E.g.*, TUCKER, *supra* note 273, at 94.

<sup>302</sup> Urbinati, *Continuity and Rupture*, *supra* note 70, at 198.

Furthermore, agencies *themselves* serve as representatives of underserved consumer and minority interests.<sup>303</sup> For example, the Consumer Financial Protection Bureau (CFPB), created in response to the capture and fragmentation of financial regulators in the aftermath of the 2008 crisis, was tasked to protect the consumers of financial products.<sup>304</sup> Typically, consumers are poorly situated to influence banking regulation through normal channels. Accordingly, the CFPB serves not as a neutral bureaucracy, but as consumers' "proxy advocate" (representative!) that solicits the input of veterans, students, and pensioners.<sup>305</sup> Meanwhile, financial institutions receive (more than) equal representation in other policymaking locations. The CFPB both educates and solicits the opinions and complaints of those who do not normally possess the capacity to make their voices heard when lawmakers turn their attention to high finance.<sup>306</sup> Indeed, the Progressives who supported New Deal agencies created them precisely to balance public might against the already over-represented "aristocracy of wealth."<sup>307</sup> An agency, serving as a counterpower capable of breaking up monopolies or safeguarding labor rights,<sup>308</sup> can speak for the consumers and workers neglected by elected politicians.<sup>309</sup> President Franklin D. Roosevelt, in a 1932 campaign speech, expressed this idea in colorful language. He dubbed regulators the "Tribune[s] of the people."<sup>310</sup> During Reconstruction, federal agencies spoke for those recently freed from slavery when local governments did not.<sup>311</sup>

### C. Implications

The lesson offered by the representative turn within political theory is that agencies should be democratized. The goal, however, is not to transform administrative bodies

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<sup>303</sup> Stewart, *The Reformation of Administrative Law*, *supra* note 31, at 1761; *see also* DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 449 (Alfred A. Knopf, Inc. 1951); Skocpol & Finegold, *supra* note 31, at 260 (arguing that the state successfully beat back demands of capitalists in the interests of labor during the New Deal).

<sup>304</sup> *See* RAHMAN & GILMAN, *supra* note 289, at 143–44.

<sup>305</sup> *Id.* at 146–48.

<sup>306</sup> *Id.*

<sup>307</sup> Landis, *supra* note 29; Joseph Fishkin & William Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 677 (2014).

<sup>308</sup> JAMES K. GALBRAITH, *AMERICAN CAPITALISM* (Routledge, 1st ed. 2017) (1952); K. SABEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (Oxford Univ. Press 2016); *see also* VERMEULE, *supra* note 20, at 62.

<sup>309</sup> This departure from procedural equality mirrors much recent work on anti-oligarchy constitutionalism. *See, e.g.*, JEFFREY EDWARD GREEN, *THE SHADOW OF UNFAIRNESS: A PLEBIAN THEORY OF LIBERAL DEMOCRACY* (2016); JOHN P. MCCORMICK, *MACHIAVELLIAN DEMOCRACY* (2011).

<sup>310</sup> FRANKLIN D. ROOSEVELT, *CAMPAIGN ADDRESS IN PORTLAND, OREGON ON PUBLIC UTILITIES AND DEVELOPMENT OF HYDRO-ELECTRIC POWER*, <https://www.presidency.ucsb.edu/documents/campaign-address-portland-oregon-public-utilities-and-development-hydro-electric-power> [<https://perma.cc/3RDR-K38J>].

<sup>311</sup> MATTHEW HOLDEN, JR., *CONTINUITY AND DISRUPTIONS: ESSAYS IN PUBLIC ADMINISTRATION* 225 (Univ. Pitt. Press 1996).

into deliberative mini-publics. Instead, it is to take advantage of the strengths of representative systems: effective decision-making in a manner that respects the normative priority of the represented while remaining sensitive to individuals' equal political and social dignity. Assessing administration in terms of democratic autonomy can allow us to understand problematic agency decisions in a new and productive light. In this section, this Article will discuss at what such critiques and reforms might look like.

### 1. Non-Delegation as a Problem of Equal Representation

Many critiques of administrative discretion are perhaps more aptly described as problems of representativeness than as impermissible delegations of legislative power. In *A.L.A. Schechter Poultry Corp. v. United States*,<sup>312</sup> the Supreme Court held that the National Industrial Recovery Act improperly delegated legislative power to the Executive. At the same time, the Act, despite goals of incorporating labor and consumer interests, became captured by business leaders through: the direct appointment of industry officers to rulemaking bodies; the nontransparency of business operations; and the state's reliance on industry organizations to implement any new rules.<sup>313</sup> As a result, the early New Deal is objectionable not because of broad and vague statutory mandates. It is objectionable because of its lack of democratic representativeness. Many citizens did not enjoy an equal chance to affect regulation because their representatives were shut out of the process.

The Supreme Court's recent opinion in *Seila Law LLC v. Consumer Financial Protection Bureau*<sup>314</sup> faces similar critique. Giving the president the power to fire the CFPB's chief without cause deprives the agency of independence from those already well-positioned to influence financial law, that is, those with access to the presidential ear. It is a problem likewise echoed during the late eighteenth-century Post Roads Debate.<sup>315</sup> Certain Congressional representatives balked at assigning the president broad discretion to establish the locations of new postal roads and offices. Such discretion would give the president "a dangerous power of establishing offices and roads in those places only where his interest would be promoted."<sup>316</sup> The concern was not over presidential power as such, but that the president would remain deaf to the concerns of others whom his policies might affect.<sup>317</sup>

Agency failures to achieve equal representation include not just the lack of formal inclusion of interests in decision-making. Within agency decision-making procedures, inequalities in wealth and experience may reproduce the same distortions of political

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<sup>312</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>313</sup> Skocpol & Finegold, *supra* note 31, at 265.

<sup>314</sup> *See generally* *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

<sup>315</sup> For a summary of this debate, see Mortenson & Bagley, *supra* note 50, at 349–56.

<sup>316</sup> 3 ANNALS OF CONG. 235 (1791) (statement of Rep. Vining).

<sup>317</sup> *See* Mortenson & Bagley, *supra* note 50, at 355–56 (pointing out that these "others" included those that lived at Montpelier and Monticello, who, despite low population numbers, demanded and received a postal road).

equality that disfigure electoral politics.<sup>318</sup> Agencies are accused of capture for good reason. Given lobbyists' outsized role in rulemaking and the self-appointment of interest group leaders, it is at best unclear whether agencies remain oriented towards the normative priority of the represented in an equal way.<sup>319</sup> It therefore may make sense to, where practicable, decentralize policymaking authority, establish countervailing agencies as points of access, and to populate agency boards with both citizen and public representatives in structures of collaborative governance.<sup>320</sup> If constituents are granted formal rights of authorization (e.g., to elect such representatives), they can ensure agencies orient themselves in the right direction.<sup>321</sup> Further, staffing offices with representatives drawn from underserved constituencies may further the kind of descriptive representation that encourages mutual education, authorization and uptake.<sup>322</sup> They might take on employees whose internal motivations appear consistent with citizens' judgments through a version of gyrosopic representation.<sup>323</sup> For example, an agency tasked with consumer financial protection could draw its staff from consumer advocacy groups.

Agencies can also play a role in improving democratic representativeness more broadly by helping to create new constituencies from those previously excluded. Electoral politics privileges citizen voice over silence. They therefore privilege those with more cultural and material resources.<sup>324</sup> But agencies can be a bit more attentive to those left out of the traditional campaign circus. Recently, the mayoralities of New York City and Boston adopted on-the-ground, campaign style outreach programs that created new, underserved constituencies around enrollment in Pre-K and neighborhood development programs.<sup>325</sup> Agencies can "generate and mobilize awareness of structural oppression, disruptive claims, and reform."<sup>326</sup> Assembled into newly educated constituencies, excluded citizens might then demand more attention from elected politicians. Further, because many agencies actively distribute resources, they can alter the "background distribution of local political power"<sup>327</sup> that presently serves to cement political inequality.<sup>328</sup> Parents benefitting from free universal Pre-K might use their newly freed resources to engage more actively in politics.

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<sup>318</sup> EMERSON, *supra* note 16, at 76; *cf.* RAHMAN & GILMAN, *supra* note 289, at 119; LOWI, *supra* note 7, at 23540; ROSANVALLON, *supra* note 13, at 135.

<sup>319</sup> Stewart, *The Reformation of Administrative Law*, *supra* note 31, at 1792.

<sup>320</sup> RAHMAN & GILMAN, *supra* note 289, at 138–39.

<sup>321</sup> *Id.* at 132–35.

<sup>322</sup> YOUNG, *supra* note 133, at 14153.

<sup>323</sup> Jane Mansbridge defines this as the selection of representatives based on voters' judgment of the whether the representative's internal motivations and goals are congruent with their needs. Mansbridge, *Rethinking Representation*, *supra* note 226, at 526.

<sup>324</sup> Vieira, *supra* note 238, at 977.

<sup>325</sup> RAHMAN & GILMAN, *supra* note 289, at 2730.

<sup>326</sup> Vieira, *supra* note 238, at 987.

<sup>327</sup> RAHMAN & GILMAN, *supra* note 289, at 140.

<sup>328</sup> Blake Emerson helpfully discusses a "bureaucratic vanguard" model proposed by DuBois. EMERSON, *supra* note 16, at 7172.

## 2. Technocracy, Non-Delegation and Representation

Given the potential of capture, it is tempting to inoculate agencies from interest group pressure by granting them political independence.<sup>329</sup> Indeed, this “juridical” solution was suggested by the early twentieth-century Progressive Legal Realists,<sup>330</sup> and the technocratic “good governance” reformers of the 1990s and 2000s.<sup>331</sup> Under this kind of scheme, agencies can only credibly claim to vindicate democratic sovereignty if (1) there is a clearly identified and consensus-based public interest, or “will” that (2) neutral expert agency officials, as fiduciaries, can be trusted to fulfill.<sup>332</sup> Yet finding consensus is often difficult, if not impossible. Moreover, experts commonly disagree and these disagreements may implicate questions of morality and ethics.<sup>333</sup> Of all the lessons of the 2008 financial crisis, one of the most important is that not even central banking is a matter of apolitical, non-controversial scientific management.<sup>334</sup> Ascribed an open-ended duty to expertly manage employment levels and price stability,<sup>335</sup> the Federal Reserve System is perhaps the strongest example of a violation of the non-delegation doctrine.<sup>336</sup> What’s more, for the past dozen years, the Fed’s decisions can no longer credibly be described as merely technocratic.<sup>337</sup> It engages in distributional politics as it decides to divert public resources to some actors but not to others.<sup>338</sup> Regardless, any choice between inflation, which tends to harm

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<sup>329</sup> Nicholas Lemann, *What Transactions Can’t Do*, THE TANNER LECTURES ON HUM. VALUES 149 (2012); Caiden, *supra* note 103, at 53.

<sup>330</sup> ERNST, *supra* note 113; Fishkin & Forbath, *supra* note 307, at 685–87; Caiden, *supra* note 103, at 58; GOODNOW, *supra* note 115, at 39; NEUMANN, *The Concept of Political Freedom*, *supra* note 78, at 191–92. LOWI, *supra* note 7, at 68–84 also offers a juridical solution to agency capture by big business interests. See Lemann, *supra* note 329.

<sup>331</sup> RAHMAN & GILMAN, *supra* note 289, at 118; Stewart, *Administrative Law in the Twenty-First Century*, *supra* note 55, at 443.

<sup>332</sup> See TUCKER, *supra* note 273, at 101.

<sup>333</sup> RICHARDSON, *supra* note 34, at 118; Elizabeth Anderson, *Democracy, Public Policy, and Lay Assessments of Scientific Testimony*, 8 EPISTEME 144 (2011); Dahl, *Social Reality*, *supra* note 218, at 227.

<sup>334</sup> See, e.g., *supra* note 7 and accompanying text.

<sup>335</sup> The Federal Reserve Act, 12 U.S.C. § 226, Pub. L. No. 63-43 (1913).

<sup>336</sup> See, e.g., Jens van’t Klooster, *The Ethics of Delegating Monetary Policy*, 82 J. POL. 587, 590–91 (2020).

<sup>337</sup> See, e.g., *id.*, at 587–88; TUCKER, *supra* note 273, at 405; Trevor Jackson, *The Sovereign Fed*, DISSENT MAG. (Apr. 16, 2020), [https://www.dissentmagazine.org/online\\_articles/the-sovereign-fed](https://www.dissentmagazine.org/online_articles/the-sovereign-fed) [<https://perma.cc/2DPS-AZRW>]; Adam Tooze, *The Death of the Central Bank Myth*, FOREIGN POL. (May 13, 2020), <https://foreignpolicy.com/2020/05/13/european-central-bank-myth-monetary-policy-german-court-ruling/> [<https://perma.cc/CN8J-6EEZ>].

<sup>338</sup> Carillo, *supra* note 294; Nathan Tankus, *The Federal Reserve’s Coronavirus Crisis Actions, Explained: Riots, Municipalities and Monetary Policy*, NOTES ON THE CRISIS (May 9, 2020), [https://nathantankus.substack.com/p/the-federal-reserves-coronavirus-468?utm\\_source=url](https://nathantankus.substack.com/p/the-federal-reserves-coronavirus-468?utm_source=url) [<https://perma.cc/U6ZW-ZDTJ>].



wealthy asset-holders and benefit debtors, and unemployment (benefitting labor) has distributional consequences.<sup>339</sup> It thus makes value-laden political choices—choices that, given the complexity and importance of macroeconomic management, many feel uncomfortable placing into the hands of the vagaries of popular lay sentiment.<sup>340</sup>

The good news is that because representative democracy requires only democratic autonomy and not universal consent, it can tolerate barriers to popular input. It might even include those barriers erected by complex issues that only experts can fully understand. Rather than throwing the technocratic baby out with the non-delegation bath water, constitutional democracies can achieve both the benefit of expertise and citizen participation through representative politics.<sup>341</sup> Recall that democratic autonomy does not require that citizens, literally, transcribe their wills into law as a public “general will.” Instead, it only requires that citizens play an equal role in creating the rules that bind them. They can participate equally by: (1) electing the regulatory experts that set policy, or, more feasibly; (2) seeing that their particular interests are represented on the Fed board. Seats might be staffed not only by financial industry players and academic macroeconomists, but also by labor and consumer advocates.

Further, experts themselves can serve as competing democratic representatives. They might present citizens with alternative views of what is desirable and possible and thereby stimulate public debate and feedback.<sup>342</sup> Elite expertise can be countered by competing expertise to prevent a monopolization of public discourse.<sup>343</sup> Moore, for example, proposes a theory of critical elitism that would provide ongoing opportunities for citizens to oppose, scrutinize, and protest expert conclusions within a system of deliberative democracy.<sup>344</sup> Rahman argues that there can be a way to “embed” expertise within democratic institutions and democratic reason.<sup>345</sup> Administrative specialists can “engage in ethical reasoning, not as a cloistered group of enlightened experts, but rather as partners with affected persons.”<sup>346</sup> Congress itself specifically seeks expert opinions from agencies because policy goals might be ill-served by

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<sup>339</sup> For a good summary of this and other political, distributional consequences of monetary policy, see J. Lawrence Broz, *The Domestic Politics of International Monetary Order: The Gold Standard*, in INTERNATIONAL POLITICAL ECONOMY 223 (Jeffrey A. Frieden et al. eds., 5th ed. 2010).

<sup>340</sup> See, e.g., van't Klooser, *supra* note 336, at 588–89, 593–94.

<sup>341</sup> For examples of how experts can be integrated into individual democratic reasoning, see Anderson, *supra* note 333; and Coran Stewart, *Expertise and Authority*, 17 EPISTEME 420 (2020).

<sup>342</sup> Brugue & Gellego, *supra* note 272, at 439; see WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 90–91 (embracing the notion of an elected aristocracy, where voters consider the specific functions to be performed by the official).

<sup>343</sup> NORBERTO BOBBIO, THE FUTURE OF DEMOCRACY 60 (Richard Bellamy trans., 1987).

<sup>344</sup> ALFRED MOORE, CRITICAL ELITISM: DELIBERATION, DEMOCRACY, AND THE PROBLEM OF EXPERTISE 9–10, Ch. 3 (2017).

<sup>345</sup> *Supra* note 18, at 102.

<sup>346</sup> EMERSON, *supra* note 16, at 64.

reliance on lay opinion.<sup>347</sup> Democratic citizens can use representative expert guidance not only as they consider agency actions, but also in engaging in the kind of deliberation and considered judgment that representative theory endorses more generally.<sup>348</sup>

To be sure, an expert's claim to possess truth and knowledge can also amount to a claim for authority that competes with democratic legitimacy.<sup>349</sup> The truth should govern, no matter other people's opinions about it. Experts' claims can therefore lead to an undemocratic concentration of power.<sup>350</sup> What's more, there is a kind of latent totalitarianism implied by claims to comprehend the entire world.<sup>351</sup> A belief in one's own perfect understanding of society will also tempt one to remake it without popular input. Yet we should not allow such worries to paralyze us. Knowledge is also liberating. Vacuum cleaners, washing machines, and other technological improvements allow us more choices in life. As Neumann observed, it is only armed with science and knowledge—however imperfect—that citizens can overcome the anxiety associated with an uncertain and unpredictable world and free themselves of the constraints of necessity.<sup>352</sup> “The realization of freedom,” he reminds us, is not always “at the disposal of man's free will.”<sup>353</sup> Only knowledge can expand the zone of such realization. The democratic function of increased knowledge of both nature and humankind is that it can both show us new possibilities and how to achieve them.<sup>354</sup>

Less abstractly, the importance of agency effectiveness, and thus the salience of technological expertise, only grows once democratic publics append positive social and economic rights to their menu of negative liberties.<sup>355</sup> It is one thing to

<sup>347</sup> TUCKER, *supra* note 273, at 92–107; van't Klooster, *supra* note 334.

<sup>348</sup> See, e.g., WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 90–91.

<sup>349</sup> E.g., Hannah Arendt, *Truth in Politics*, THE NEW YORKER (Feb. 17, 1967); TURNER, *supra* note 214, at 26. For a contemporary example of an argument in favor of epistocracy, or rule by experts, see Jason Brennan, *Does the Democratic Objection to Epistocracy Succeed?*, 25 RES PUBLICA 53 (2018).

<sup>350</sup> MOORE, *supra* note 344, at 181. See Mark Blythe and Matthias Matthijs, *When Is It Rational to Learn the Wrong Lessons? Technocratic Authority, Social Learning, and Euro Fragility*, 16 PERSP. POL. 110–26 (2018) for an application of this point to European monetary policymaking.

<sup>351</sup> Andrew Jainchill & Samuel Moyn, *French Democracy between Totalitarianism and Solidarity: Pierre Rosanvallon and Revisionist Historiography*, 76 J. MOD. HIST. 107, 123 (2004). As seen in TURNER, *supra* note 214, at 21 (citing Friedrich Engels), the idea also has an affinity with the Marxist “administration of things” that would succeed communist revolution, and, of course, is the target of Friedrich A. Hayek's *THE ROAD TO SERFDOM* (1944).

<sup>352</sup> See NEUMANN, *The Concept of Political Freedom*, *supra* note 78, at 180–84.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.* at 181; MOORE, *supra* note 344, at 5–6.

<sup>355</sup> EMERSON, *supra* note 16, at 67 (“[R]ights-focused constitutionalism and federal administrative intervention were often co-original. Reconstruction is a paradigm case for this simultaneous expansion of bureaucratic power and private right.”) (citing Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 14 COLUM. L. REV. 1083 (2014));

promise full employment; it is quite another to fulfill this promise. Realizing rights requires the use of experts and the collection of data. This is why Italian political theorist Norberto Bobbio was able to argue that “[a]ll states which have become more democratic have simultaneously become more bureaucratic.”<sup>356</sup> Administration is, per Jurgen Habermas, “not just a functionally necessary supplement to the system of rights but implications already contained in rights.”<sup>357</sup> The protection and vindication of individual rights are perhaps “best addressed by officials who, through repeated encounters with a particular class of disputes, understood their origins.”<sup>358</sup> The affinities between expertise and rights is why anti-administrative attacks against bureaucratization at least occasionally conceal attempts to “if not dismantle democratic power, then certainly to reduce it to within clearly circumscribed limits.”<sup>359</sup> Without experts, rights are really just parchment promises.

Moreover, Emerson suggests that the tension between democratic autonomy and expertocracy can be a productive, constitutive one.<sup>360</sup> Citizens (and their representatives) routinely challenge received truths from would-be Guardians. For example, after the 2008 financial crises, many recognized that purportedly neutral, technocratic economic reasoning often rests on debatable values and debatable science. One need only observe the fruitful work on MMT<sup>361</sup> and heterodox Keynesianism<sup>362</sup>—indeed, Keynesianism itself<sup>363</sup>—to know that expertise is fruitfully politicized. The field of inquiry where “reason compels a unique result”<sup>364</sup> is smaller than one might expect—and getting smaller.

### 3. Representation and the *Chevron*<sup>365</sup> Shuffle

Theories of representation can also inform an enduring problem of administrative law: whether and to what extent courts should permit agencies to interpret their

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KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE (2016); Novak, *supra* note 160, at 264–65.

<sup>356</sup> BOBBIO, *supra* note 343, at 38.

<sup>357</sup> *Supra* note 56, at 134.

<sup>358</sup> ERNST, *supra* note 113, at 33 (addressing the work of Charles Evans Hughes).

<sup>359</sup> *Id.*; see also Robert Dahl, *The Science of Public Administration*, 7 PUB. ADMIN. REV. 1, 3 (1947); Wilson, *supra* note 56, at 200.

<sup>360</sup> *Supra* note 16, at 63.

<sup>361</sup> See, e.g., STEPHANIE KELTON, THE DEFICIT MYTH: MODERN MONETARY THEORY AND THE BIRTH OF THE PEOPLE'S ECONOMY (2020).

<sup>362</sup> See, e.g., HETERODOX MACROECONOMICS: KEYNES, MARX AND GLOBALIZATION (Jonathan Goldstein & Michael Hillard eds., 2009).

<sup>363</sup> For a superb discussion of the politics of Keynes, see Geoff Mann, *In the Long Run We Are All Dead: Keynesianism, Political Economy, and Revolution* (Sept. 26, 2019). For Keynes' own words about the politicization of the gold standard, see JOHN MAYNARD KEYNES, ESSAYS IN PERSUASION (Martino Publishing 2012) (1932).

<sup>364</sup> WILLIAM GALSTON, LIBERAL PLURALISM 69 (2002).

<sup>365</sup> *Chevron, U.S.A., Inc. v. Nat. Resources Def. Couns.*, 467 U.S. 837 (1984).

own implementing statutes.<sup>366</sup> Theories of representation, which privilege democratic autonomy, suggest that, at the very least, agencies should not provide an opportunity to relitigate *de novo* the hard compromises already settled by Congress in regular law-making.<sup>367</sup> Whatever democratic autonomy is vindicated through Congressional law-making, that autonomy should not be undermined by agency decisions taken behind citizens' backs. As a result, whether an agency interpretation is "reasonable" and whether Congress' intent is "clear"<sup>368</sup> should be informed by whether and what extent that party seeks to undo what Congress has done.

Historically, those enjoying an unequal share of resources have exploited agency rulemaking processes to undo laws they find repugnant.<sup>369</sup> This is particularly true during periods of divided and polarized party government when agencies are the only fora amenable to new policy initiatives.<sup>370</sup> As a result, major policy reversals made exclusively within the ambit of agency decision-making may deprive many of their ability to understand themselves as coequal political participants.<sup>371</sup> Unless agencies are opened to some kind of regular popular feedback mechanism, such relitigation may threaten political equality or amount to a form of corporatism that leads to the privatization of public functions.<sup>372</sup>

This superficial commitment to statutory formalism is not based on the principles of non-delegation. Congress is not the source of the general will (*legibus solutus*). It is rather to acknowledge that Congressional statutes can reflect the exercise of democratic autonomy<sup>373</sup> and that agency action should not contradict them—not unless it has a stronger claim to democratic autonomy. And it is quite possible that agency decision-making might at least occasionally *better* vindicate the principle of

<sup>366</sup> See generally Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 5101 (1989).

<sup>367</sup> See *id.*

<sup>368</sup> *Chevron*, 467 U.S. at 842–44.

<sup>369</sup> E.g., Michael Beckel, *Lobbying Push Targeting Federal Regulatory Agencies Continues on Wall Street Reform Fight*, CTR. RESPONSIVE POL., June 1, 2011. See generally Tom Holyoke, *Theodore Lowi, The End of Liberalism: The Second Republic of the United States*, in THE OXFORD HANDBOOK OF CLASSICS IN PUBLIC POLICY AND ADMINISTRATION (M. Lodge et al. eds., 2015).

<sup>370</sup> Livermore & Richardson, *supra* note 17, at 46.

<sup>371</sup> See WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 128–29 (describing the illegitimacy of litigants wanting to “steal a march” on one’s political opponents by pursuing legal reform through the courts rather than through “a forum that everyone knows is the place to go to reach decisions about whether and how the law should be changed,” *viz*, the legislature.).

<sup>372</sup> See NEUMANN, *The Concept of Political Freedom*, *supra* note 78, at 192.

<sup>373</sup> WALDRON, *The Core of the Case Against Judicial Review*, *supra* note 36, at 126, 128 (legislatures are presented to citizens as where law-making is done, and therefore where they should direct their energy when it comes to law-making), 154. See generally AMY C. OFFNER, *SORT OUT THE MIXED ECONOMY: THE RISE AND FALL OF WELFARE AND DEVELOPMENTAL STATES IN THE AMERICAS* (2019).

democratic autonomy. In a partisan era of omnibus legislation accomplished through the budget reconciliation process, agencies might provide a more accessible point of entry for representative politics.<sup>374</sup> Moreover, if the policies at issue impact only a small subset of the population, agencies with representative decision-making processes might be better placed to serve democratic autonomy of affected constituents. Finally, it is not unusual for Congress to punt contentious political issues to agencies for resolution (or the avoidance thereof).<sup>375</sup> Unless those agencies include some kind of representative decision-making procedure, what policies result may lack any legitimacy whatsoever.

Rather than assigning to administration the task of execution and to Congress the task of promulgating “clear” and detailed implementing statutes, it may make more sense to divide responsibilities according to the contentiousness of the issues involved—regardless of whether we characterize those issues as “means” or “ends.” When citizens mobilize around an issue, resolving their conflict in a forum that allows each (more) direct influence in a single national conversation may best serve democratic autonomy.<sup>376</sup> To illustrate, we might encourage Congressional representative politics when undertaking a highly politicized decision to increase the deficit to stave off depression. The choice involves deeply rooted moral and technical conflicts. On the other hand, we might insulate CDC doctors and IRS accountants unless and until a significant opposition is mobilized.

#### CONCLUSION

As the left flank of the Democratic Party spitballs ideas about a Green New Deal, the nationalization of health care, anti-monopoly, and other business regulation, it is perhaps more urgent than ever to find legitimate ground for the public bodies that will inevitably be tasked to implement them. Vague instructions to “democratize” administration are insufficient. Instead, institutional design should remain sensitive to extant political structures and how they serve democratic autonomy. We should ask how agencies can and do help citizens understand themselves as coequal participants in making the laws that bind them. This may mean that some agencies should not, in fact, be fully democratized—particularly if they are to act as partial

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<sup>374</sup> See WALTER J. OLESZEK ET AL., CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 61–65 (10th ed. 2016); ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 268 (2007); BARBARA SINCLAIR, UNORTHODOX LAWMAKING 121–28, 138–40 (4th ed. 2012) (noting use of reconciliation to enact controversial policies).

<sup>375</sup> George I. Lovell, *That Sick Chicken Won't Hunt: The Limits of a Judicially Enforced Non-Delegation Doctrine*, 17 CONST. COMMENT. 79 (2000); Rubin, *supra* note 138, at 384.

<sup>376</sup> This logic is the reverse of that found in *Food and Drug Admin v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (the question is of such political and economic magnitude that Congress would be unlikely to delegate it). Congress may fail to speak on any number of things for any number of reasons—not just because Congress lacked an “intent” to regulate.



representatives themselves or if they aim to exploit the advantages of expertise. A labor board should not allow itself to be captured by corporate leadership. Additionally, monetary policymakers should not take direction from unfiltered social media posts. Hotly contested issues might best be left for resolution in Congress through national elections. Meanwhile, tax authorities and CDC officials might be insulated from political pressure unless and until their actions become politicized. By understanding the lessons of political theory's representative turn, it is possible to embed agencies within constitutional, democratic decision-making institutions. And it is possible that they can also be embedded in a way that vindicates their virtues of effectiveness and expertise—while also ensuring that citizens enjoy an equal chance to shape their collective goals. It is time to bring administration home from its constitutional exile.