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## Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory

Blake Emerson

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# Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory

BLAKE EMERSON<sup>†</sup>

*The values of liberty and democracy repeatedly arise in recent Supreme Court opinions on administrative law. The conservative Justices have argued that the power vested in government agencies threatens individual freedom and collective self-government. This Article critiques these Justices' use of political theory. It shows that the Justices do not faithfully and even-handedly apply the complex tradition of American political thought on which they rely. They invoke several different and competing aspects of liberty and democracy to criticize the administrative state. But because the Justices do not disentangle the various aspects of these two values from one another, they draw faulty inferences about how best to protect them. Furthermore, they do not acknowledge the ways in which properly structured administrative power promotes liberty and democracy. They thereby aggrandize judicial power at the expense of the elected branches without effectively promoting individual autonomy.*

*This Article argues for a more rigorous, tailored, and nuanced application of the values of liberty and democracy in public law. It demonstrates that the Court should not rely on these values to justify constitutional rules concerning the balance between legislative and executive power. Because liberty and democracy each have multiple and competing dimensions, it is difficult if not impossible in these contexts for the Court to draw firm, generalizable conclusions about how these values on the whole will best be advanced. Even where certain liberty or democracy interests may be put at risk by legislative delegation to the executive or by legislative insulation of agencies from presidential control, such arrangements at the same time promote other aspects of these same values. The Court would be justified in tailoring judicial deference so as to protect procedural fairness, which falls within the judiciary's core institutional competence. Ultimately, however, the Court should not have exclusive or even primary custody over the meaning and application of liberal and democratic values. It should be a task for the people and the elected branches to safeguard these values in the structures and purposes of government.*

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## INTRODUCTION

The Supreme Court has the administrative state in its crosshairs. Supported by a chorus of scholars,<sup>1</sup> Justices on the Court's conservative wing have argued that administrative agencies wield unconstitutional or unlawful authority. Among the targets of this critique are agencies' authority to make binding regulations, to interpret law, and to operate without direct presidential control.<sup>2</sup> Such arguments turn on claims about the original public meaning of the Constitution as well as the Administrative Procedure Act. According to this line of attack, administrative agencies contravene clear textual requirements concerning the distribution of legislative, executive, and judicial power.<sup>3</sup>

There is another strand of argument, however, that is squarely focused on political theory rather than textual meaning. The conservative Justices explicitly reinforce their criticism of administrative agencies with normative judgments concerning the proper allocation of rights, obligations, and powers amongst citizens and state institutions.<sup>4</sup> For instance, in *Seila Law, LLC v. Consumer Financial Protection Bureau*,<sup>5</sup> the Court ruled that Congress had infringed upon the President's constitutional authority by providing that he could not remove the Bureau's single Director at will.<sup>6</sup> In reaching this conclusion, Chief Justice Roberts emphasized that "liberty"<sup>7</sup> was endangered by the Bureau's independent Director, who could "bring the coercive power of the state to bear on millions of private citizens and businesses."<sup>8</sup> Roberts also focused on the value of popular

1. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Jennifer L. Mascott, *Who Are "Officers of the United States?"*, 70 STAN. L. REV. 443 (2018); Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 FORDHAM L. REV. 2541 (2011); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017).

2. See, e.g., *Collins v. Yellen*, 141 S. Ct. 1761 (2021); *United States v. Arthrex*, 141 S. Ct. 1970 (2021); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring); *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 126 (2015) (Thomas, J., concurring); *City of Arlington v. FCC*, 569 U.S. 290, 312–16 (2013) (Roberts, C.J., dissenting); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010).

3. U.S. CONST. art. I, § 1; *Gundy*, 139 S. Ct. at 2133; U.S. CONST. art. II, § 1, cl. 1; *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020); U.S. CONST. art II, § 2, cl. 2; *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring); 5 U.S.C. § 706; *Kisor*, 139 S. Ct. at 2433 (Gorsuch, J., concurring).

4. By "conservative Justices", I mean Chief Justice John Roberts and Associate Justices Clarence Thomas, Samuel Alito, Brett Kavanaugh, and Neil Gorsuch, as well the late Chief Justice William Rehnquist and the late Associate Justice Antonin Scalia, all of whom were appointed by Republican presidents, and all of whom have contributed to the "anti-administrative" jurisprudence identified by Professor Gillian Metzger. See Gillian E. Metzger, *The Supreme Court 2016 Term: Forward, 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3 (2017). While Justice Amy Coney Barrett may turn out to fall in this category as well, she was not a member of the Court when the major cases discussed in the Article were decided. "Conservative" is an imperfect description for these justices since much of this jurisprudence aims to upend rather than preserve longstanding public law doctrines and governance arrangements.

5. 140 S. Ct. 2183.

6. *Seila Law*, 140 S. Ct. at 2201.

7. *Id.* at 2202.

8. *Id.*

rule, arguing that agencies must be controlled by the President in part because he is “the most democratic and politically accountable official in government.”<sup>9</sup>

Other scholars have noted the turn to political theory on the Roberts Court and the federal bench more broadly.<sup>10</sup> Jon D. Michaels identifies an emergent ethos in which judges act not as neutral umpires but rather as “intellectual partisans in the collective project of constitutional governance.”<sup>11</sup> This trend has been especially pronounced in administrative law. Cass R. Sunstein and Adrian Vermeule observe that the conservative majority on the Roberts Court aims to limit agencies’ discretion on the supposed basis of principles of “political morality.”<sup>12</sup> Kristin E. Hickman has also focused on the “constitutional symbolism” involved in decisions concerning the delegation of legislative power, which appeals to “perceptions of the fairness and legitimacy of government.”<sup>13</sup>

This attention to questions about political legitimacy is welcome. I have argued elsewhere that administrative law raises and is capable of addressing essential questions about democratic self-government.<sup>14</sup> It is to the conservative Justices’ credit that they have surfaced the implications of the administrative state for the longstanding commitments of our constitutional culture. They are reaching back behind the formal strictures of originalism to acknowledge the substantive political values that underlie their decisions.

The problem is that the Justices’ reasoning from these values has been unsuccessful and damaging to the integrity of public law. As Gillian E. Metzger has noted, the political theory of the Court has been “one-sided.”<sup>15</sup> The

9. *Id.* at 2203.

10. See Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 284 (diagnosing a trend of “judicial populism” which “insists that there are clear, correct answers to complex, debatable problems. It disparages mediation that characterize democratic institutions and rejects the messiness inherent in a pluralistic democracy”).

11. Jon D. Michaels, *Baller Judges*, 2020 WISC. L. REV. 411, 414 (2020).

12. See CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* 8, 19–37 (2020); Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, and Future*, 2021 SUP. CT. REV. 83, 86 (2021).

13. Kristin Hickman, *Nondelegation as Constitutional Symbolism*, 88 GEO. WASH. L. REV. (forthcoming 2022) (on file with author) (manuscript at 52). For a critique of rhetorical excess in judicial opinion writing, see Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 5 HOUSTON L. REV. 101 (2021).

14. See BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 150 (2019) (“administrative power is legitimate to the extent that it enables us to be free, in the sense of determining our own commitments and plans. In a context of deep social interdependency, such freedom requires jointly authoring shared norms, and turning those norms into shared social conditions. The *structure* of administrative power is then to be judged by its ability to facilitate rational deliberation over the meaning of public norms that are presumptively valid, yet not fully specified. The *purpose* of administrative power is to make these norms efficacious elements of the social world.”). See generally Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2024 (2018) (arguing that the major questions doctrine is grounded in concerns about democratic legitimacy and relying on democratic theory to argue for the limitation and reform of the doctrine).

15. Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 71 (2019); see JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC* 54–57 (2017).

conservative justices have an “anti-administrative” mentality that is attuned to the risks but not the benefits of administrative power.<sup>16</sup> The Court identifies moral reasons to restrain government but not to enable it. We are left with what Daniel Walters describes as an “asymmetrical” administrative law, which hems in agencies’ authority to act in the public interest but grants them broad discretion to decline to enforce the law.<sup>17</sup> We hear much about how the administrative state undermines liberty and democracy and little about how it may preserve them.

The conservative Justices’ appeals to the values of liberty and democracy have not been adequately contested by their moderate and progressive colleagues. The Court’s most vocal defenders of the administrative state, Justice Kagan and Justice Breyer, tend to wave away the conservatives’ high-altitude critique of the regulatory state.<sup>18</sup> They revert instead to the sort of pragmatic, expertise-oriented analysis that has kept the administrative state afloat since the 1930s.<sup>19</sup> But there is now a new game on the Court. Political theory is in bounds, and all of the Justices will have to learn how to play.

This Article will provide the tools for constructive dialogue and contestation concerning liberty and democracy in the administrative state. It contributes to an already rich literature on the administrative state’s relationship to these ideals,<sup>20</sup> offering a new typology that distinguishes different understandings that are often lumped together in the jurisprudence. My critique of the Roberts Court’s political theory does not presume any particular,

16. Metzger, *supra* note 4, at 3. *But see* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2400 (2020) (Ginsburg, J., dissenting); *see* discussion *infra* Part III.

17. *See* Daniel E. Walters, *Symmetry’s Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 484–509 (2020).

18. Michaels, *supra* note 11, at 428 (“[t]here has been no correspondingly forceful defense, let alone affirmative theory, of administrative state propounded by federal judges.”). Representative in this regard are Justice Kagan’s opinions in *Kisor*, 139 S. Ct. at 2400 and *Gundy*, 139 S. Ct. at 2116 and Justice Breyer’s concurrence in *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2584 (2019); *see also* *Seila Law*, 140 S. Ct. at 2226 (Kagan, J., concurring in part and dissenting in part) (arguing that the majority’s opinion ignores “the need for sound and adaptable governance.”). *Id.* at 2243–44 (sharply criticizing the Court’s attempt to “extrapolate from the Constitution’s general structure (division of powers) and implicit values (liberty) a limit on Congress’s express power to create administrative bodies” and its “lack of interest in how agencies work”). A notable exception is Judge Pillard’s opinion in *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2019); *see* discussion *infra* Part I.A.

19. *See, e.g.*, JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 24 (1938). On the dominant strand of “administrative pragmatism” in the scholarship, *see* Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 875–81 (2020).

20. On liberty, *see, e.g.*, Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 617 (1926); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 470 (2003); Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 398 (473). On democracy, *see, e.g.*, Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (1985); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255, 2269, 2331–39 (2001); Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300 (2016); JERRY L. MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* (2018); Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265 (2019).

philosophically justified conception of these values. Rather, the argument relies on the working understandings that are already at play within the case law. It holds the Justices to the terms of the political theory they have marshalled in defense of their holdings. This political theory has deep roots in American legal thought. It contains enduring, attractive, and widely shared intuitions about how to structure government. But the Justices' use of this theory has been inconsistent, opportunistic, and even confused, thus creating serious distortions in public law.

The conservative Justices use liberty in several different ways, to mean either a power of uncoerced decision, a capacity to act rationally in light of clear and stable rules, or the ability to contest and control the making of the rules. They invoke democracy to refer either to the founding moment when the people created the Constitution, to legislation by elected representatives, or to the execution of law by the elected President. The Justices rely on these various distinct meanings to argue in favor of changes to existing law, namely tightening restrictions on legislative delegation, narrowing judicial deference to agency statutory interpretation, or broadening presidential power to remove executive officers. But they do not keep track of the different aspects of liberty and democracy at issue in each case. They then draw faulty inferences about how each of these aspects will be advanced or undermined.

Consider, for instance, the question of the balance between legislative and executive power in the control of the administrative state. The conservative Justices emphasize the democratic significance of legislation in cases about Congress's delegation of policymaking power to the executive, such as *Gundy v. United States*.<sup>21</sup> They argue that such delegation undermines the people's control over government.<sup>22</sup> By contrast, in cases about the President's power to remove executive officers, such as *Seila Law*,<sup>23</sup> they emphasize the President's democratic credentials, arguing that Congress cannot interfere with the President's popular warrant to control the administration of federal law.<sup>24</sup> In determining the proper scope of the President's administrative powers, however, the Justices do not grapple with the competing democratic authority of Congress to structure the Executive Branch. Nor do they consider the democratic harms that would result from the unelected Court's invalidation of the elected Legislature's design choices. The cumulative effect of this selective and inconsistent emphasis on different aspects of democracy is not to enhance popular control but rather to increase the Court's own—largely non-democratic—power.

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21. 139 S. Ct. at 2142 (Gorsuch, J. dissenting, joined by Roberts, C.J., and Thomas J.).

22. See *infra* Part III.B.

23. 140 S. Ct. 2183 (Roberts, C.J., opinion for the Court, joined by Thomas, Alito, Gorsuch, and Kavanaugh, JJ.).

24. See *infra* Part III.A.

Properly structured administrative power may advance rather than undermine the sorts of liberty and democracy interests the Court has identified. The legislative creation and presidential superintendence of agencies can further democratic legitimacy. Administrative regulation can give people clear rules by which to pursue their individual plans. Public participation in agency policymaking can enable the people to contest and influence the norms by which they are governed. The people experience liberty and practice democracy through, rather than against, the administrative state.

A Legal Realist might think this close examination of the Roberts Court's political theory is a waste of time. Perhaps liberty and democracy are not efficacious concepts in the Court's decisionmaking, but rather rhetorical flourishes that merely bedazzle a politically motivated result. There are certainly some cases where such skepticism is warranted, as when the Justices do not consider an obvious tension between the Executive's democratic credentials and the Legislature's.<sup>25</sup> There is reason to suspect in these instances that the values are not guiding and constraining the reasoning so much as giving a high-minded gloss to a result determined by factional interests and raw political power. But even if the Justices are unlikely to change their ultimate conclusions in these matters, flaws in judicial reasoning concerning freedom and self-government should not go unanswered. The Roberts Court owes our political morality greater care than it has shown to date.

There are other controversies, however, in which the conservative Justices' reliance on political theory seems central to their reasoning. This seems to be the case, in particular, when Justice Gorsuch criticizes judicial deference to agencies' legal interpretations for leaving people "unsure what the law is" and thus undermining their rational liberty to make plans in light of the rules.<sup>26</sup> While Gorsuch is right to identify such problems with retroactive agency policymaking, he fails to acknowledge the ways in which current deference doctrines in fact increase legal predictability relative to the system of *de novo* review he advocates.<sup>27</sup> In these and other instances, pointing out errors in the Justices' reasoning may convince them to amend their conclusions so as to better advance the value in question.

While focusing on the Roberts Court's political theory, this argument points beyond judicial doctrine and into the realms of legislative, administrative, and popular constitutionalism.<sup>28</sup> As an "exemplar of public reason," the Court conveys to citizens the basic commitments of our political system and models

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25. See *infra* Part III.B.

26. *Kisor*, 139 S. Ct. at 2437 (Gorsuch, J., concurring); see *infra* Parts III.C., IV.A.

27. See *infra* Parts III.C., IV.A.

28. See generally Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and the Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943 (2003); Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 *CALIF. L. REV.* 958 (2004); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 *VA. L. REV.* 800 (2010).

rational discourse concerning those values.<sup>29</sup> Even though most people are not likely to read opinions, the central role of the Court in our public life means that the Justices' way of defining problems is likely also to seep into political consciousness by way of legal scholarship and news media. The Justices, therefore, owe the public a balanced assessment of how our structures of government protect as well as risk liberty and democracy.

If the Court proves unwilling or unable to give such faithful consideration, we should be candid about that failure and seek out other venues to implement fundamental political commitments. Legal scholars and the people themselves will have to look beyond the judicial branch, and towards the legislative and administrative process, to develop a public law that adequately protects and expresses individual freedom and collective power. Scholars and citizens will need to reclaim our stake in a legal and political vocabulary that the Court has misappropriated and misused.

The argument proceeds in four parts. Part I shows how the values of liberty and democracy have arisen in cases concerning official removal, legislative delegation, and judicial deference to agency statutory interpretation. This survey reveals that the Justices have more than one meaning in mind with respect to each of those values and that these meanings are often in tension with one another. Part II identifies three different understandings of liberty and democracy: discretionary liberty, rational liberty, and political liberty; and constitutive democracy, legislative democracy, and executive democracy. I articulate these understandings with the help of political theory as well as the historical development of American public law. Part III deploys this framework to critique the Court's jurisprudence. It shows that the conservative Justices have falsely assumed executive democracy reliably promotes discretionary liberty. They have failed to acknowledge the tensions between legislative and executive democracy, and between rational and discretionary liberty, in the authorization and limitation of administrative powers. Part IV shows how administrative law currently promotes rational and political liberty and suggests how it could be reformed to protect these values further. First, the Court would be well-justified to reserve judicial deference for agency policies that are prospective rather than retroactive in their coercive effect in order to protect individuals' rational liberty. Second, the elected branches could address the legitimate liberty concerns raised in the nondelegation jurisprudence by expanding opportunities for public involvement in agency policymaking.

#### I. LIBERTY AND DEMOCRACY IN CONTEMPORARY PUBLIC LAW

This Part introduces the Court's administrative law discourse on liberty and democracy. It shows how the conservative Justices repeatedly invoke liberty and democracy—often in conjunction with one another—in opinions concerning the

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29. JOHN RAWLS, *POLITICAL LIBERALISM* 231 (2005).

administrative state. They appear to use each of these terms in different ways, resulting in unexplained inconsistencies within the case law. The conflicts within the jurisprudence motivate a rational reconstruction of the Court's underlying political theory in the next Part.

#### A. REMOVAL

Within structural constitutional law, the link between liberty and democracy emerged in the late Justice Scalia's landmark dissent in *Morrison v. Olson*.<sup>30</sup> That case concerned the constitutionality of a statute which provided that a Special Counsel with investigatory powers could only be removed by the Attorney General for "good cause."<sup>31</sup> In challenging the constitutionality of this provision as an intrusion on the President's constitutional power to control the Executive Branch, Scalia observed: "The purpose of . . . the unitary Executive . . . was not merely to assure effective government but to preserve individual freedom."<sup>32</sup> He argued that presidential control over prosecution would prevent the abuse of discretion because "[t]he President is directly dependent on the people, and since there is only one President, he is responsible. The people know whom to blame" if subordinate executive officials misuse their power.<sup>33</sup>

A similar logic was on display in *Free Enterprise Fund v. Public Co. Accountability Oversight Board*,<sup>34</sup> where the Court held that Congress could not insulate administrative officers by two layers of for-cause removal protection. Part of the reason Roberts offered for this conclusion was the need to enforce the people's grip on the administrative apparatus: "Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people."<sup>35</sup>

This emphasis on popular control shaded into a concern for liberty. Rejecting Justice Breyer's emphasis on forms of political and managerial control other than removal, Roberts quipped that "the Framers did not rest our liberties on such bureaucratic minutiae."<sup>36</sup> It is not immediately obvious, however, what Roberts meant by "our liberties" here. He might have meant the various legal

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30. 487 U.S. 654 (1988).

31. *Id.* at 657–58.

32. *Id.* at 727 (Scalia, J. dissenting).

33. *Id.* at 729.

34. 561 U.S. 477.

35. *Id.* at 499; *see also Arthrex*, 141 S. Ct. at 1987–88 (holding that Administrative Patent Judges' final decisional authority is incompatible, under the Appointments Clause, with their appointment to an inferior office by a principal officer); *Id.* at 1979 ("[T]housands of officers wield executive power on behalf of the President in the name of the United States. That power acquires its legitimacy and accountability to the public through a clear and effective chain of command down from the President, on whom all the people vote.") (internal citations and quotations omitted).

36. *Free Enter. Fund*, 561 U.S. at 500.

rights that each individual holds, such as rights of property, speech, or religious exercise. Or he might have been referring to the rights that we the people hold to determine how the government acts. Or did he mean both?

Similar ambiguities arose in *Seila Law*, where the Court found it was unconstitutional for Congress to limit the President's power to remove the single Director of the Consumer Financial Protection Bureau.<sup>37</sup> To reach that conclusion, Roberts distinguished sharply between the legislative and executive power where liberty was concerned. On the one hand, "[t]he Framers viewed the [legislature] as a special threat to individual liberty," and therefore bifurcated it into two chambers.<sup>38</sup> Matters were quite different when it came to the Executive: "the Framers deemed an energetic executive essential to . . . the security of liberty."<sup>39</sup> The President's power could not itself be left uncontrolled, however. To "justify and check" his power, "the Framers made the President the most democratic and politically accountable official in government."<sup>40</sup> Roberts then summarized the overarching liberal-democratic structure, stating that "the resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections."<sup>41</sup>

Nothing about this is "straightforward." Democracy justifies and restrains the President's power but seems to play no role in relation to the elected legislature. It remains unclear why electoral representation only enters in to strengthen the hand of the executive but not that of the legislature. Liberty, likewise, cuts against legislative power but towards executive power. Liberty seemed to be at risk in the structure of the CFPB in part because "the CFPB Director has authority to bring the coercive power of the state to bear on millions of private citizens and businesses."<sup>42</sup> Following Scalia in *Morrison*, Roberts assumed that the President's democratic accountability would shield liberty against governmental abuse, whereas the legislature's democratic accountability would generally threaten liberty. Why should we assume that electoral control of the President protects liberty, but electoral control of the Legislature does not?

Then-Judge Kavanaugh drew a similar, puzzling link between liberty and democracy in his dissent in *PHH Corp. v. Consumer Financial Protection Bureau*,<sup>43</sup> where he had concluded that the CFPB's structure was unconstitutional, anticipating the result in *Seila Law*.<sup>44</sup> He began his dissent in

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37. 140 S. Ct. at 2197; see also *Collins*, 141 S. Ct. at 1787 (holding that removal restrictions on director of the Federal Housing Finance Agency were unconstitutional). *Id.* at 1786 ("The President's removal power serves important purposes regardless of whether the agency in question affects ordinary Americans by directly regulating them or by taking actions that have a profound but indirect effect on their lives.")

38. *Seila Law*, 140 S. Ct. at 2203.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 2200.

43. 881 F.3d 75.

44. *Id.* at 164 (Kavanaugh, J., dissenting).

striking terms: “This case is about executive power and individual liberty.”<sup>45</sup> Kavanaugh argued that the single-director structure was unconstitutional because a sole, independent agency head was restrained neither by the democratically accountable president nor by other members of a commission, such as the Federal Trade Commission or Securities and Exchange Commission. Unlike the CFPB, such “multiple-member independent agencies do not concentrate all power in one unaccountable individual, but instead divide and disperse power across multiple commissioners and board members,” which “reduces the risk of arbitrary decision-making and abuse of power, and helps protect individual liberty.”<sup>46</sup> Kavanaugh’s understanding of liberty here seemed to be freedom from administrative interference in private rights. He argued that the CFPB’s structure would fail to provide as strong a “check on the excesses of any individual agency head” as either at-will removal by the President or a commission structure.<sup>47</sup>

The majority opinion authored by Judge Pillard took issue with this conception of liberty:

It remains unexplained why we would assess the challenged removal restriction with reference to the liberty of financial service providers, and not more broadly to the liberty of the individuals and families who are their customers . . . Congress understood that markets’ contribution to human liberty derives from freedom of contract, and that such freedom depends on market participants’ access to accurate information, and on clear and reliably enforced rules against fraud and coercion.<sup>48</sup>

Pillard went into greater detail here than either Kavanaugh or Roberts in explaining what kind of liberty she thought was at issue, namely, a freedom to contract in circumstances that make reasoned decision-making possible. She did so, however, in the course of denying that a “freestanding liberty” value was legally relevant at all, as opposed to merely a background interest that separation-of-powers doctrine promotes.<sup>49</sup> Roberts’ declined this invitation to judicial modesty in *Seila Law* with his insistence on the centrality of liberty to resolving structural constitutional questions.

## B. DELEGATION

Liberty and democracy have also arisen in the context of the nondelegation doctrine. The nondelegation doctrine requires that, when Congress delegates the power to make rules with the force of law, it must provide an “intelligible principle” to cabin its discretion.<sup>50</sup> This doctrine has long been moribund, only

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45. *Id.*

46. *Id.* at 165.

47. *Id.* at 166.

48. *Id.* at 106.

49. *Id.* at 105.

50. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

in vigor at the height of conservative reaction to the New Deal.<sup>51</sup> But it is now poised to make a comeback. In the cases in which it has arisen, Justices Thomas and Gorsuch have invoked underspecified understandings of liberty and democracy to justify the doctrine's revival.

In *Department of Transportation v. Ass'n of American Railroads (Amtrak)*,<sup>52</sup> the Court addressed whether Amtrak was a public or private entity for the purpose of resolving constitutional challenges to its standard-setting authority. One of these challenges asserted that, if Amtrak were private, such authority would constitute an improper delegation of legislative power. In his concurrence arguing for a major strengthening of nondelegation standards, Thomas emphasized the liberty interest at issue in legislative control of the Executive, paraphrasing John Locke's view: "If a person could be deprived of . . . private rights on the basis of a rule (or a will) not enacted by the legislature, he was not truly free."<sup>53</sup> Thomas followed Locke in understanding liberty to mean having "'a standing rule to live by,' and to be free from 'the inconstant, uncertain, unknown, arbitrary will of another man.'"<sup>54</sup> Thomas was not explicit here about why liberty required that rules be promulgated by the Legislature, rather than by the courts or the Executive or private bodies. So long as rules are made, who cares who makes them?

Thomas's view, it seems, was that lax nondelegation standards allowed legislative power to wander from the institution where the people had initially placed it, thus undermining their consent to government.<sup>55</sup> This argument emphasized the need to honor the formal constitutional compact the people had freely entered into. But Thomas closed his concurrence by underscoring a different kind of connection amongst liberty, democracy, and constitutional structure:

We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure. The end result may be that trains run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects.<sup>56</sup>

This reference to "accountability" gestured at some more functional rather than formal advantage of the legislature over executive agencies in remaining controlled by the people. The problem posed by legislative delegation was not

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51. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 448 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); see Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) ("We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).").

52. 575 U.S. 43 (2015).

53. *Id.* at 76 (Thomas, J., concurring).

54. *Id.* at 75–76 (quoting JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 13 (J. Gough ed., 1947)).

55. *Id.* at 73–77.

56. *Id.* at 91.

merely that it violated the people's choice to vest such power in one body rather than another. More than this, delegation from elected to unelected officials would undermine the government's accountability to the citizenry.

The formal underpinnings of the nondelegation revival again took center stage in Gorsuch's dissent in *Gundy*.<sup>57</sup> The case concerned a criminal statute that permitted the Attorney General to "specify the applicability" of provisions requiring registration of sex offenders to persons convicted prior to the statute's enactment.<sup>58</sup> Writing for a plurality, Justice Kagan read the statute narrowly so as to keep the Attorney General's discretion to a minimum and avoid a nondelegation problem. Gorsuch's dissent argued that the nondelegation doctrine should be given sharper teeth, preventing the executive from making "policy decisions when regulating private conduct."<sup>59</sup> He grounded the nondelegation doctrine in the separation of powers, and explained that the latter principle is "about respecting the people's sovereign choice to vest the legislative power in Congress alone. And it's about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law."<sup>60</sup> Here, as in the *Amtrak* case, democracy figured as the people's foundational "choice" to vest the legislative power in Congress. The liberty interests implicated are those of private persons threatened with criminal penalties or other sanctions.

Later in the opinion, however, democracy appeared to advance liberty in a different way. Gorsuch worried that the Court's failure to apply the nondelegation doctrine to strike down the statute "would only serve to accelerate the flight of power from the legislative to the executive branch, turning the latter into a vortex of authority that was constitutionally reserved for the people's representatives in order to protect their liberties."<sup>61</sup> Gorsuch here recognized not only the people's constitutional design choice to vest legislative power in a particular institution but also that the purpose of this design was to protect the people's "liberties." The argument seemed to be that if the "people's representatives" must make all the relevant policy choices, then the people can control what those choices are, and thus protect whatever liberty interests the people think are sufficiently important.

### C. DEFERENCE

The Court's jurisprudence on judicial deference to administrative interpretations of law also raises concerns about liberty and democracy. Consider the landmark case, *Chevron U.S.A. v. Natural Resources Defense*

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57. 139 S. Ct. at 2116.

58. *Id.* at 2122.

59. *Id.* at 2136, 2144 (Gorsuch, J., dissenting).

60. *Id.* at 2135.

61. *Id.* at 2142.

*Council, Inc.*<sup>62</sup> There, the Court rested judicial deference to agencies in part on a theory of legislative intent—that when Congress delegates implementing authority to an administrative agency, it “implicitly” also delegates the agency the authority to “fill” any interpretive “gaps” in the statute.<sup>63</sup> Courts must defer to the agency because Congress intends for the Executive rather than the Judiciary to resolve statutory ambiguities. Why should the courts honor Congress’s choice? The answer might be formal—that Congress holds legislative power and the courts interpret law. But that formal answer also rests on the deeper democratic ground that the people made a choice to vest legislative power with Congress.<sup>64</sup> Honoring the intent of Congress on a particular matter then honors the people’s intent with regard to constitutional structure.

The other democratic foundation for *Chevron* concerns the President. Courts must defer to agencies’ reasonable interpretations because “the Chief Executive” is “directly accountable to the people.”<sup>65</sup> This is the same story we heard from Roberts in *Seila Law*. As the only official with a national constituency, the presidency is well-positioned to “make policy choices” in a way that is responsive to and checked by the people’s interests and values.<sup>66</sup>

Liberty does not explicitly arise in the reasoning of *Chevron* itself. But *Chevron* is no doubt a government-favoring doctrine, tipping the scales in favor of the Executive Branch’s interpretation of law against contrary interpretations offered by courts or private parties.<sup>67</sup> To that extent, it implicates concerns about individuals’ independence from government coercion. Gorsuch raised this concern in his critique of *Chevron* in his opinion for the Tenth Circuit Court of Appeals in *Gutierrez-Brizuela v. Lynch*.<sup>68</sup> The case involved some of the more peculiar and arguably unsettling consequences of the *Chevron* case law, which enables Executive Branch interpretations of statutory ambiguities to supersede contrary judicial interpretations.<sup>69</sup> The petitioner had applied for an immigration status adjustment which would have been allowed under the Circuit’s interpretation of the relevant statutory provision but was denied under the Board of Immigration Appeals’ (BIA) interpretation at the time of petitioner’s application. Writing for the court, Gorsuch held that a presumption against retroactivity applied, making the Circuit’s prior interpretation binding in the petitioner’s case. Even though the BIA had already issued its restrictive interpretation at the time of petitioner’s application for status adjustment, the

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62. 467 U.S. 837 (1984).

63. *Id.* at 843 (quoting in part *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

64. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“[T]he people . . . organizes the government, and assigns, to different departments, their respective powers.”).

65. 467 U.S. at 865.

66. *Id.*

67. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 1 (2017) (reporting that “the circuit courts overall upheld 71% of [agency] interpretations and applied *Chevron* deference 77% of the time”).

68. 834 F.3d 1142 (10th Cir. 2016).

69. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967, 969 (2005).

Circuit had not yet reviewed the BIA's interpretation, so the BIA could not yet enforce the new interpretation against the petitioner.

Gorsuch explained that “due process and equal protection concerns” animated this holding, in a way that implicated both liberty and democracy.<sup>70</sup> But here, unlike in the removal and delegation case law, democracy appears as a threat to liberty, rather than as its protector: “retroactive application of new penalties to past conduct that affected persons cannot now change denies them fair notice of the law and risks endowing a decisionmaker expressly influenced by majoritarian politics with the power to single out disfavored individuals for mistreatment.”<sup>71</sup> Here, Gorsuch underscored the conflict between the petitioner's liberty and the politically-accountable interpretations of the BIA, which sits under the Attorney General within the Executive Branch.

In a concurrence separate from his opinion for the court, Gorsuch went after *Chevron* deference directly. He argued that *Chevron* flew in the face of the Framers scheme of a “government of separated powers,” in which “the avowedly political legislature” made the law, an executive who was “also responsive to the people” implemented it, and judges “insulated from political pressures” interpreted it.<sup>72</sup> Legislation would represent “the collective wisdom of the people's representatives,” whereas judicial independence would “guard against governmental encroachment of the people's liberties.”<sup>73</sup> As elaborated in subsequent case law, *Chevron* undermined this scheme by enabling the democratically accountable executive to interpret law, and then permitting these interpretations to trump certain prior judicial interpretations. He worried that under this line of precedent, “the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster,” but instead to “guess” about how ambiguous terms will be interpreted by agencies and courts.<sup>74</sup>

Gorsuch took up this theme again when he rose to the Supreme Court in his concurrence in *Kisor v. Wilkie*.<sup>75</sup> That case considered the question of whether, and to what degree, courts should defer to administrative agencies' interpretations of their own regulations rather than the statutes they administer. The Court upheld but cabined the existing *Auer* deference standard that these interpretations are “controlling” unless “plainly erroneous or inconsistent with the regulation.”<sup>76</sup> Elaborating on recent precedent that had already trimmed *Auer* back,<sup>77</sup> Kagan's plurality opinion explained that the judiciary should only defer

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70. *Gutierrez-Brizuela*, 834 F.3d at 1146.

71. *Id.*

72. *Id.* at 1149 (Gorsuch, J., concurring).

73. *Id.*

74. *Id.* at 1152.

75. *Kisor*, 139 S. Ct. at 2400.

76. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

77. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 152–56 (2012); Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 *YALE L.J.* 2122, 2189–95 (2019) (describing and generally endorsing this line of cases).

under *Auer* if the regulation is “genuinely ambiguous,” if the interpretation is “reasonable,” if it represents the agency’s “authoritative” position and “fair and considered judgment,” and falls within the agency’s “substantive expertise.”<sup>78</sup> This was a fairly pragmatic opinion that constrained existing deference doctrine without overruling a longstanding precedent.

Gorsuch’s concurrence drew on the due process and equal protection themes he had underscored in *Gutierrez-Brizuela* to criticize the *Auer* doctrine:

[W]hen political actors are left free not only to adopt and enforce written laws, but also to control the interpretation of those laws, the legal rights of litigants with unpopular or minority causes or . . . who belong to despised or suspect classes count for little . . . They are left always a little unsure what the law is, at the mercy of political actors and the shifting winds of popular opinion, and without the chance for a fair hearing before a neutral judge.<sup>79</sup>

Precisely the same objection Gorsuch raised to *Chevron* applied to *Auer*: judicial deference to agency interpretations of regulations, like deference to agency statutory interpretation, expanded democratic political power in a way that could thwart individual agency and risked minority oppression. It undermined the principle of judicial independence, which was meant to “guard the people from the arbitrary use of power.”<sup>80</sup> The liberties of the people as individuals stood in contrast to the collective political power of the people as a group.

#### D. SOME CONFLICTS

These cases show liberty and democracy continuously arising in the conservative Justices’ contemporary critique of the administrative state. But when we place these opinions alongside each other, it becomes less clear what precise understanding of these values the Justices have in mind.

In *Seila Law* and *PHH Corp.*, the President’s democratic accountability protects the people’s liberty by ensuring administrative agencies do not unduly coerce private parties. In his dissent in *Gundy*, by contrast, Gorsuch worried that legislative delegation to the Executive would undermine the authority of the “people’s representatives” in the Legislature.<sup>81</sup> The logic of *Seila Law* and Gorsuch’s *Gundy* dissent are in tension. *Seila Law*’s strengthening of presidential power is justified in part by the claim that the Executive is democratic. But Roberts’ opinion does not acknowledge the competing democratic claims of the elected Legislature to structure and constrain the Executive Branch. Gorsuch’s dissent in *Gundy*, meanwhile, emphasizes the democratic legitimacy of the Legislature as a basis for strengthening the nondelegation doctrine, while ignoring the compensating democratic claims of

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78. *Kisor*, 139 S. Ct. at 2414–18.

79. *Id.* at 2437–38 (Gorsuch, J., concurring).

80. *Id.* at 2438.

81. *Gundy*, 139 S. Ct. at 2142.

the Executive Branch, to which power would be delegated. Gorsuch in *Gundy* emphasizes the democratic credentials of Congress alone, while Roberts' opinion in *Seila Law* emphasizes the democratic credentials of the Executive alone. The competing democratic claims of the one institution against the other are not addressed in either opinion.

Another tension between the cases is the relationship between liberty and democracy. *Morrison*, *Seila Law*, Thomas's *Amtrak* concurrence, and Gorsuch's *Gundy* dissent all treat democracy as a means to protect liberty. *Morrison* and *Seila Law* do so to justify expanding the power of the presidency, whereas Thomas' *Amtrak* concurrence and Gorsuch's *Gundy* dissent do so to tighten requirements for legislative delegation. The critique of judicial deference by Gorsuch in *Gutierrez-Brizuela* and *Kisor*, by contrast, treats democracy as a threat to liberty. It remains unexplained how the courts are to distinguish cases where democracy threatens liberty from those where democracy preserves it.

Democracy is thus a matter of legislation in one context and of execution in another. The executive is presented as defending liberty in some cases and as threatening it in others. Are the Justices simply contradicting themselves? It is not quite that simple. The next Part will show that these incongruities and tensions can be explained to an extent by the complexity of the values of liberty and democracy, each of which have different aspects or dimensions. The problem is that, because the Justices do not articulate these distinctions, their analyses conceal dubious and sometimes mistaken inferences about the effect of institutional designs and judicial doctrines on each of these values. Further, because the Justices do not acknowledge the complexity of liberty and democracy, they overestimate the judiciary's competency to reach a determinate resolution about how best to promote them.

Given these values' importance within our constitutional culture, it is troubling that the Justices do not exercise greater care when they rely on them. Before the Court relies on political theory to justify significant alterations in legal doctrine and existing structures of government, it should ensure that it is crystal clear on the terms of theory it would rely upon. The next Part aims to provide the needed clarity by disentangling three aspects of liberty and democracy that are at work in the conservative Justices' jurisprudence. This reconstruction foregrounds a more detailed critique of the Justices' reasoning and proposals for a narrower, better justified, and more constructive role that these values might play in the reform of the administrative state.

## II. THREE FACES OF LIBERTY AND DEMOCRACY

This Part distinguishes various aspects of the values of liberty and democracy that the conservative Justices' public law jurisprudence deploys. In order to make sense of the different ways in which the Justices use these concepts, the Article looks to relevant resources in political thought and American legal development. At the most general level, this analysis shows that

when we think carefully about liberty and democracy in public law, we confront an intricate pattern of values rather than a simple pairing. Courts and scholars should thus tread with caution when drawing concrete legal inferences from these general values. This Part will indicate some deficits in the way the conservative Justices think about the different dimensions of these two values. This analysis paves the way for a more granular critique of the Court's reasoning in the next Part.

It deserves emphasis that this Article does not argue that these understandings of democracy and liberty are necessarily philosophically correct or exhaustive of all relevant understandings of these values. The project here is to provide an internal critique of the conservatives' Justices' jurisprudence, which reveals their reliance on a political theory that is part and parcel of American constitutional culture. This theoretical groundwork provides the basis for criticizing the Justices' reasoning in concrete cases. In addition, it lays the foundations for an affirmative defense of the administrative state that the conservative Justices ought to accept on the terms they themselves have adopted.

This approach leaves out of consideration other plausible understandings of liberty and democracy, simply because the conservative Justices do not acknowledge them.<sup>82</sup> Likewise, there are other important values within public law that do not enter into the value calculus in these cases, such as equality, social welfare, and governmental "care" for people's material interests and moral values.<sup>83</sup> While one might rightfully criticize the jurisprudence for those omissions, consideration of these other values is beyond the scope of this Article.

#### A. THREE ASPECTS OF LIBERTY

The three aspects of liberty the Court invokes are discretionary liberty, rational liberty, and political liberty. This typology does not perfectly map onto other available distinctions within the political theory literature, such as liberty that is "ancient" or "modern,"<sup>84</sup> "negative" or "positive,"<sup>85</sup> "liberal" or "republican."<sup>86</sup> This Subpart rather aims to capture the aspects of liberty as used in the conservative Justices anti-administrative jurisprudence. Because these dimensions of liberty are grounded in long-running traditions of political

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82. In particular, the American Progressives' positive conception of freedom—understood as the realization of individual capacities through public deliberation and material provision—is altogether ignored, despite its centrality to the modern administrative state. For a discussion of the Progressives' conception of freedom and its intellectual origins, see EMERSON, *THE PUBLIC'S LAW*, *supra* note 14, at 32, 61–111. In addition, the conservatives do not consider a deliberative understanding of democracy, though their concept of political liberty captures some aspects of it. For an account of the administrative state's deliberative-democratic legitimacy, see *id.* at 168–76 and MASHAW, *supra* note 20, at 163–79.

83. See generally Blake Emerson, *Public Care in Public Law: Structure, Procedure, and Purpose*, 16 HARV. L. POL'Y REV. (forthcoming 2022).

84. BENJAMIN CONSTANT, *The Liberty of the Ancients Compared with that of the Moderns*, in POLITICAL WRITINGS 309 (Biancamaria Fontana trans., Cambridge Univ. Press, 1988) (1819).

85. ISALAH BERLIN, *Two Concepts of Liberty*, in LIBERTY 169 (Henry Hardy ed., 2002).

86. PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 17–31 (1997).

thought, I rely on political theory in order to clarify various aspects of freedom these jurists seem already to have in mind.

*1. Discretionary Liberty: “Every Nook and Cranny of Daily Life”*

The first sense of liberty the conservative Justices invoke is an individual’s freedom to do as she wishes without legal command or coercion. This liberty is discretionary in the sense that the individual may choose to act or not to act as she will within a certain range without any obligation to justify her choice or conform it to some standard. This was the kind of liberty Roberts seems to have thought was at risk in *Seila Law* when he referred to the fact that the CFPB Director had “authority to bring the coercive power of the state to bear on millions of private citizens and businesses.”<sup>87</sup> He expressed a similar worry in *City of Arlington v. Federal Communications Commission*<sup>88</sup> about “hundreds of federal agencies poking into every nook and cranny of daily life.”<sup>89</sup> These nooks and crannies are where discretionary liberty has its home. We will see that the Court often seems to implicitly prioritize this kind of liberty over others.

Opinions in administrative law concerned with discretionary liberty worry about “agency overreaching,”<sup>90</sup> where what is reached over and into is a sphere of individual independence apart from the political community as a whole. The area of discretionary liberty is generally marked out by the “private rights” of the individual,<sup>91</sup> in particular their property.<sup>92</sup> Scalia captured this understanding vividly in his dissent in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,<sup>93</sup> in which a group of “small landowners” and others unsuccessfully challenged administrative agencies’ interpretation of the Endangered Species Act as prohibiting certain conduct that harmed protected species’ habitats.<sup>94</sup> Scalia argued that “[t]he Court’s holding . . . imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use.”<sup>95</sup> The “unfairness” at issue is the government’s interference with private property that should instead be left to its owners’ disposition.

This way of thinking about liberty lies at the very foundation of liberal political thought. Consider, for instance, Thomas Hobbes’ definition of the “Liberty of Subjects.”<sup>96</sup> Beyond certain natural rights of self-preservation, Hobbes understood liberty under government to consist in “the Silence of the

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87. *Seila Law*, 140 S. Ct. at 2200.

88. 569 U.S. 290.

89. *Id.* at 315 (Roberts, C.J., dissenting).

90. *Id.*

91. *Kisor*, 139 S. Ct. at 2440 (Gorsuch, J., concurring).

92. *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1963 (2015).

93. 515 U.S. 687 (1995).

94. *Id.* at 692.

95. *Id.* at 714 (Scalia, J., dissenting).

96. THOMAS HOBBS, *LEVIATHAN, OR THE MATTER, FORME & POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVILL* 127 (Ian Shapiro ed., 2010) (1651).

Law. In cases where the Sovereign has prescribed no rule, there the subject hath Liberty to do, or forbear, according to his own discretion.”<sup>97</sup> Legal coercion thus enforces the boundaries of civil liberty.<sup>98</sup> John Locke concurred with Hobbes in defining civil liberty as “a liberty to follow my own Will in all things, where the Rule prescribes not.”<sup>99</sup> He drew the circle of inviolate natural rights more widely than Hobbes did, so as to include not only person but also property. The political discourse of the Revolutionary Era embraced this liberal understanding of freedom as a power to choose within the bounds of the law on the basis of the security provided by rights over property and person.<sup>100</sup>

The exercise of discretionary liberty relies on a “frontier between the area of private life and that of public authority.”<sup>101</sup> Such a fixed legal border between public and private had its jurisprudential heyday in the *Lochner* Era. The Court sought to delineate “the boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty under the Fifth and Fourteenth Amendments,”<sup>102</sup> particularly the liberty of contract. One might attempt sympathetically to understand this jurisprudence as “safeguarding from state intrusion a realm of freedom . . . whose center is located in the rounds of everyday life.”<sup>103</sup>

Since the New Deal, constitutional law has retreated from this effort to mark out a private economic sphere immune from government regulation.<sup>104</sup> But discretionary liberty has continued to influence conservative jurisprudence at the level of administrative law. Such liberty was on Justice Rehnquist’s mind in *Heckler v. Chaney*,<sup>105</sup> where he held that an agency’s decision not to bring an enforcement action was presumptively unreviewable.<sup>106</sup> The case concerned a petition submitted by prison inmates convicted of capital offenses to the Food and Drug Administration (FDA) to take enforcement actions addressing the use of certain drugs in death penalty protocols.<sup>107</sup> In justifying the conclusion that the FDA’s decision not to take action was not reviewable, Rehnquist argued that

97. *Id.* at 133.

98. Hobbes’ definition of the liberty of subjects is not to be confused with his understanding of natural liberty as “the absence of external Impediments.” *Id.* at 80. For an illuminating discussion of the difference between natural liberty and the liberty of subjects, see Quentin Skinner, *Thomas Hobbes on the Proper Signification of Liberty*, 40 TRANSACTIONS OF THE ROYAL HIST. SOC’Y 121, 128–38 (1990).

99. JOHN LOCKE, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT 302 (Peter Laslett ed., 1960) (1690).

100. JOHN PHILIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 115 (1988).

101. *Id.* at 171.

102. *Adkins v. Child. Hosp. of the D.C.*, 43 S. Ct. 394, 403 (1923) (Taft, J., dissenting), overruled in part by *W. Coast Hotel Co. v. Parrish*, 57 S. Ct. 578 (1937).

103. Robert Post, *Defending the Lifeworld, Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1518 (1998).

104. *But see* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016); Jeremy Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016).

105. 470 U.S. 821 (1985).

106. *Id.* at 837–38.

107. *Id.* at 824.

“when an agency refuses to act, it generally does not exercise its *coercive* power over an individual’s liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.”<sup>108</sup> Decisions like this focus judicial review on the protection of regulated parties who are threatened by agency action rather than of regulatory beneficiaries who want to enjoy the protection of agency action. We now hear the increasingly loud echo of the *Lochner* jurisprudence in the Roberts’ Court’s emphasis on protecting “liberty” against the “coercive power of the state.”<sup>109</sup>

While intuitively clear, the concept of discretionary liberty becomes much murkier once we acknowledge how frequently and pervasively legal coercion constrains what individuals may do. As Robert Hale famously observed, where property law carves out a right of one person to exclude the rest of the world from the use of certain resources, such an entitlement enables the right-bearer to work their will on others who need the resources she holds.<sup>110</sup> Discretion for me may be a bond for thee. And depending on how rights are allocated, some people may end up with materially wider zones of discretionary choice than others. Figures like Scalia’s “simplest farmer” may find their options severely limited by larger private enterprises which, as a function of legal rules, may exclude the small farmer’s products from the market.<sup>111</sup> This means that an exercise of legal coercion by the government may increase the discretionary liberty of some parties even as it constricts the liberty of others. Conversely, as Justice Thurgood Marshall observed in his concurrence in *Heckler*, “governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action.”<sup>112</sup> This observation was particularly apt in this case, which concerned the lawfulness of death penalty protocols.<sup>113</sup> The FDA’s decision not to act on death-sentenced prisoners’ petition may have reduced the prisoners’ time to live, and thus whatever discretionary liberty they would have enjoyed under confinement during that period. The prevalence of legal coercion, throughout the system of public and private law, make it difficult to draw any general conclusions about whether government action or inaction will expand or constrict the sphere of choice enjoyed by individuals.

One who values discretionary liberty nonetheless stresses the ultimate or instrumental value in leaving some matters up to the dispersed if unequal control

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108. *Id.* at 832.

109. *Seila Law*, 140 S. Ct. at 2200.

110. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471–72 (1923). On Hale’s significance for legal thought, see generally BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998).

111. Richard Sexton, *Market Power, Misconceptions, and Modern Agricultural Markets*, 95 AM. J. AGRIC. ECON. 209, 211 (2013) (“Close vertical coordination between farming and downstream marketing stages has long been controversial because of its potential implications for the economic freedom of farmers, the exercise of buyer market power, and the survival of small-scale traditional farm.”).

112. *Heckler*, 470 U.S. at 851 (Marshall, J., concurring).

113. *Id.* at 824.

of various individuals. This kind of discretion enables a supposedly “spontaneous order[]” to emerge from isolated individual choices without conscious social planning.<sup>114</sup> Once a scheme of suitably broad private rights has been established, the government ought generally to “withhold[] its legislative hand” and maintain what liberty it can by its silence.<sup>115</sup> The primary threat the administrative state poses, on this view of liberty, is an “excess of law-making” that micromanages the choices that individuals should be able to make on their own.<sup>116</sup> Because, however, there is very little clarity about how much legal coercion is “too much,” invocation of discretionary liberty usually operates as an all-purpose break on the power of government, without any clear limiting principle. Moreover, because discretionary liberty may be thwarted by the exercise of private as well as public legal rights, one-sided concern for the overweening coercive power of the state, without attention to the coercive power of private actors, arbitrarily tips the scales against governmental action.

## 2. Rational Liberty: “The Rug Will Not be Pulled from Under Them”

Liberty as discretion must be distinguished from another, rational sort of liberty that is at play in the conservative Justices’ jurisprudence. This is a pivotal conception of liberty that has not received adequate attention within contemporary public law scholarship. It provides a firm basis on which to conceptualize, assess, and legitimize the administrative state.

Whereas discretionary liberty is measured by the range of options law leaves open to individual choice, rational liberty is measured by the facilities law provides for individuals to understand and pursue the options that are available. Thomas referred to this kind of liberty when he relied on John Locke to insist on the importance of being “free from ‘the inconstant, uncertain, unknown, arbitrary will of another man.’”<sup>117</sup> Rational liberty emphasizes that it is not merely coercion but the *unpredictability* of such coercion that interferes with freedom. Such liberty was at stake when Gorsuch argued in *Kisor* that *Auer* deference would leave people “always a little unsure what the law is,” and that instead independent judicial determination of regulatory terms was necessary to “guard the people against the arbitrary use of governmental power.”<sup>118</sup> Arbitrariness here figures as randomness, as force dissociated from a governing rule. Gorsuch raised similar concerns in *Gutierrez-Brizuela* with regard to *Chevron* deference, noting that “the people . . . are . . . required to guess” about

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114. F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 39–52 (1973).

115. Hale, *supra* note 110, at 470 (quoting W.S. Gilbert, *Iolanthe*).

116. *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting) (quoting THE FEDERALIST NO. 62, at 378 (James Madison)). For a comprehensive critique of this kind of thinking, see Mila Sohoni, *The Idea of “Too Much Law,”* 80 FORDHAM L. REV. 1585 (2012).

117. *Ass’n of Am. R.R.*, 575 U.S. at 75–76 (2015) (Thomas, J. concurring) (quoting JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 13 (J. Gough ed., 1947)).

118. *Kisor*, 139 S. Ct. at 2438 (Gorsuch, J., concurring).

how agencies and courts will interpret the statute, and must “remain alert to the possibility that the agency will reverse its current view.”<sup>119</sup> Abandoning *Chevron*, Gorsuch argues, would instead “promote reliance interests by allowing citizens to organize their affairs with some assurance that the rug will not be pulled from under them tomorrow, the next day, or after the next election.”<sup>120</sup>

To be “free” in these contexts means to be subject to and benefit from certain, coherent, stable rules, which are known in advance. This is the lawyer’s favorite kind of freedom because its exercise often depends on reasoned advice, careful planning, and credible commitments. Rational liberty is different from the discretionary liberty of the isolated hermit. It is rather the freedom of the driver in traffic who can get to her destination because the law tells her and everyone else which side of the street to drive on and what color on the traffic signal means “go.” Freedom of this kind treats law not primarily, in the Hobbesian sense, as “Chains,”<sup>121</sup> but more, with H.L.R. Hart, as “power-conferring.”<sup>122</sup> The law facilitates and channels purposive conduct so that people can achieve their objectives efficiently with little friction against, and often in cooperation with, others.

Rational liberty has its most famous jurisprudential exponent in Lon Fuller and his “morality of law.”<sup>123</sup> The morality of law consists of several attributes that make law genuinely obligatory. This morality provides that rules should: exist; be made public; be imposed only prospectively; be made comprehensible, consistent, and stable over time; be capable of compliance; and be followed by the officials who implement them.<sup>124</sup> Fuller thought these basic procedural principles presumed a particular moral conception: “To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.”<sup>125</sup> The morality of law was therefore at bottom a matter of respecting an individuals’ rational liberty, or what Fuller called their “powers of self-determination.”<sup>126</sup> Fuller thus emphasized the “urgent demand of rationality” in adjudicatory proceedings, in order to shape legal materials into a coherent and understandable set of terms by which reasonable people could lead their lives.<sup>127</sup>

The morality of law is alive and well in administrative law, as Cass Sunstein and Adrian Vermeule have recently argued.<sup>128</sup> They show that many of

119. *Gutierrez-Brizuela*, 834 F.3d at 1152.

120. *Id.* at 1158.

121. HOBBS, *supra* note 96, at 128.

122. H.L.A. HART, *THE CONCEPT OF LAW* 32–33 (3d ed., 2012).

123. LON L. FULLER, *THE MORALITY OF LAW* (1964).

124. *Id.* at 39.

125. *Id.* at 162.

126. *Id.*

127. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 370 (1978).

128. SUNSTEIN & VERMEULE, *LAW AND LEVIATHAN*, *supra* note 12, at 38–115. While Sunstein and Vermeule rely heavily on Fuller’s specific criteria, they do not identify what, exactly, is “moral” about

Fuller's principles have been recognized in legal doctrine, despite having no explicit source in positive law. For instance, it is well established that an agency must follow its own regulations.<sup>129</sup> Likewise, because "retroactivity is not favored in the law," an agency generally may only issue rules that are binding on past conduct if the governing statute expressly grants that authority.<sup>130</sup>

Current administrative law does not in fact embrace all of Fuller's principles, however. Contrary to Vermeule and Sunstein's suggestion, there is currently no general principle condemning agencies if they "fail to make rules in the first place" or if they decide issues "on a case to case" basis.<sup>131</sup> The choice between rulemaking and adjudication is generally up to the agency.<sup>132</sup> And the Court has explicitly rejected the attempt to implement the nondelegation doctrine by requiring agencies to reduce the range of discretion delegated to them by statute.<sup>133</sup>

Gorsuch's and Thomas's reasoning on judicial deference and nondelegation would rely on Fullerian principles to radically reduce or even eliminate agencies' authority to make policy. They see administrative discretion as a danger to individuals' ability to carry out plans in reliance on stable rules. This line of reasoning turns not on originalist interpretations of constitutional text but on a moral reading of the virtues of the rule of law. As I shall argue in Part IV, however, a genuine concern for rational liberty would result in a much more tailored and constructive critique of the way in which administrative agencies make and enforce policy.

### 3. *Political Liberty: "To Enable the People to Govern Themselves"*

The final aspect of liberty public law jurisprudence invokes is political liberty. Political liberty is measured by the opportunities the law affords individuals to influence and challenge the rules by which they are bound. Perhaps the strongest statement of political liberty amongst the conservative justices was offered, outside of the sphere of administrative law, by Justice

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administrative law. They gesture at general concerns about maintaining "a shared constitutional enterprise" ensuring legal "efficacy," giving people "room to maneuver" without fear of coercion, and "maintaining accountability, liberty, and welfare." *Id.* at 7, 39, 63, 88. These sundry benefits are less specified than and largely different from Fuller's own express concern with preserving individual self-determination. The vagueness of Sunstein's and Vermeule's understanding of law's morality may be an artifact of their desire to provide a broadly acceptable set of considerations upon which the two of them, as well as critics and defenders of the administrative state more broadly, could agree. As laudable as that enterprise may be, their approach does not provide enough moral substance or value-differentiation to guide reasoned elaboration of the content and the domain of law's morality. The typology I provide here—grounded in contemporary jurisprudence and the tradition of American political thought—provides necessary content to inform judicial decision-making and scholarly analysis.

129. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265–66 (1954); *see Allentown Mack Sales & Serv. Inc. v. NLRB*, 522 U.S. 359, 376 (1998).

130. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

131. SUNSTEIN & VERMEULE, *LAW AND LEVIATHAN*, *supra* note 12, at 40.

132. *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 202 (1947); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

133. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001).

Scalia in his dissent in *Obergefell v. Hodges*,<sup>134</sup> which recognized same-sex couples' constitutional right to marry. Criticizing what he understood to be the majority's judicial overreach, Scalia stated that "[t]his practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty . . . : the freedom to govern themselves."<sup>135</sup>

Such pleas for judicial restraint are a rarity in administrative law cases at the Court today.<sup>136</sup> The Court nonetheless continues to pay lip service to the value of such political liberty when the Justices criticize the discretion vested in federal agencies. Thomas, in his concurrence in *Seila Law*, described the independent-commission structure as "a direct threat to our constitutional structure and, as a result, the liberty of the American people."<sup>137</sup> Liberty here is tied to the political powers the people exercise through governmental institutions. As Roberts observed in *Free Enterprise Fund*, "[o]ur Constitution was adopted to enable the people to govern themselves, through their elected leaders."<sup>138</sup> Gorsuch also gestures at this understanding in *Kisor* when he referred to "disputes involving the relationship between the government and the people" and to "'policy' judgment by the people and their representatives."<sup>139</sup> He might have referred here instead to "individuals" or "private parties," but invocation of "the people" suggests that a broader kind of liberty is at stake.

Political liberty is about citizens exercising control over the scheme of social cooperation. Such liberty is not identical with the forms of democracy to be described in the next Subpart. To be sure, it includes those electoral rights that give the Legislature and Executive their claim to democratic legitimacy. More than elections, however, political liberty also requires regular popular involvement in and contestation over the exercise of power. Breyer has described this as "active liberty,"<sup>140</sup> which means "not only freedom from government coercion but also the freedom to participate in the government itself."<sup>141</sup>

Such political liberty has ancient origins in republican political thought.<sup>142</sup> Livy described the Roman Republic as a "free nation," insofar as it was

134. 135 S. Ct. 2584 (2015).

135. *Id.* at 2627.

136. For an interesting exception that proves the rule, see the discussion in Justice Thomas' opinion for the Court in *Little Sisters of the Poor*, 140 S. Ct. at 2385, discussed in Part IV.B, *infra*. Scalia himself once advocated judicial restraint in administrative law cases. *Auer*, 519 U.S. at 457–58; *Whitman*, 531 U.S. at 474–75; *City of Arlington*, 569 U.S. at 296. But his views appeared to shift by end of his life and tenure. See *Perez*, 575 U.S. at 109 (Scalia, J., concurring).

137. 140 S. Ct. at 2211 (Thomas, J., concurring).

138. 561 U.S. at 499.

139. 139 S. Ct. at 2425, 2441 (Gorsuch, J., concurring).

140. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 16 (2005).

141. *Id.* at 3.

142. ANNELIEN DE DIJN, FREEDOM: AN UNRULY HISTORY 1–2 (2020) (Western political thought and practice has long "identified freedom not with being left alone by the state but with exercising control over the way one is governed").

“governed by annually elected officers of state and subject not to the caprice of individual men, but to the overriding authority of law.”<sup>143</sup> Liberty, through this lens, was a civic capacity of self-rule through political action, including through participation in lawmaking and adjudication. Whereas discretionary freedom leaves individuals to make choices within the bounds of rules, and rational liberty provides them with rules through which to carry those choices out, political liberty enables them to participate somehow in creating and implementing the rules within which they may act. Without political liberty, the individual is merely left to the benevolence of unaccountable rulers as to whether they will leave space for individual choice or keep a system of stable rules in place.

This understanding of freedom as self-government was particularly prominent in the political thought that informed the Revolution and Founding.<sup>144</sup> In *Cato’s Letters*, Trenchard and Gordon emphasized the importance of “publick liberty,” which required as well as “freedom of speech” and the right to have magistrates’ “deeds openly examined and publickly scanned.”<sup>145</sup> Political freedom could not be maintained through a single moment of popular founding, or by showing up regularly at the polls, but rather required ongoing watchfulness over the officers of government. James Madison accordingly saw that “the genius of republican liberty, seems to demand . . . not only that all power should be derived from the people; but, that those entrusted with it should be kept in independence on the people, by a short duration of their appointments.”<sup>146</sup> This kind of liberty was not, like discretionary liberty, strictly opposed to political power but rather consisted in citizens’ exercise of such power to control and challenge governmental acts.<sup>147</sup>

Political liberty has changed its shape as the state has developed administrative institutions. Bureaucratic systems generally require continuity of personnel and a substantial degree of working independence from partisan political pressures. Fidelity to principles of political liberty therefore requires means of popular control and challenge other than rotation in office.<sup>148</sup> Progressive thinkers sought to supply additional methods of popular participation through administration.<sup>149</sup> Woodrow Wilson argued that

143. LIVY, *THE EARLY HISTORY OF ROME* 107, 2.2 (Aubrey de Séincourt trans., 1960).

144. DE DIJN, *supra* note 142, at 184–96.

145. 1 JOHN TRENCHARD & THOMAS GORDON, *CATO’S LETTERS, OR ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS* 111 (Ronald Hamowy ed., 1995).

146. *THE FEDERALIST* NO. 37, at 234 (James Madison) (Jacob E. Cooke ed., 1961).

147. See HANNAH ARENDT, *ON REVOLUTION* 141–62 (2006) (1963).

148. See William J. Novak, *A Revisionist History of Regulatory Capture*, in *PREVENTING REGULATORY CAPTURE* 25, 46 (Daniel Carpenter & David A. Moss eds., 2014) (drawing connections between the Framers’ republican concern to preserve political liberty against factional corruption and the regulatory reforms of the Progressive Era, which “envisioned an active state apparatus as a continuous, countervailing force to the organization of new forms of economic power in modern American life”).

149. EMERSON, *THE PUBLIC’S LAW*, *supra* note 14, at 61–112.

administrative agencies should be exposed to “constant public counsel.”<sup>150</sup> John Dewey stressed that “the masses” must “have a chance to inform the experts as to their needs,”<sup>151</sup> just as Mary Follett argued for a “process of cooperation between expert and people.”<sup>152</sup> This participatory form of administration was put in practice in agencies such as the Forest Service, which held extensive deliberative public hearings on grazing rights on public lands, bringing to bear “the compelling force of organized opinion to make a careless or arbitrary officer respond to, and to bring a sympathetic officer into harmony with, the groups affected.”<sup>153</sup> The New Deal experimented with this model further in the implementation of agricultural reforms, land-use planning, and other areas.<sup>154</sup> The Administrative Procedure Act’s notice-and-comment rulemaking process imposed a thin form of this participatory model on all informal rulemaking proceedings.<sup>155</sup>

This Progressive understanding of the administrative process as a forum of political liberty gained renewed currency in the 1960s with that era’s focus on civil rights, social reform, and direct democracy. As Charles Reich observed at the time, “the planning process, theoretically the realm of the detached expert, has been made political by the direct action of citizens.”<sup>156</sup> Reich identified administrative law cases that captured then-current judicial receptivity to this political activism, including *Office of Communication of the United Church of Christ v. Federal Communications Commission*.<sup>157</sup> In that case, the D.C. Circuit held that various members of civil rights organizations had a right to intervene in a television broadcaster’s license renewal proceeding before the Federal Communications Commission (FCC). These parties argued that the broadcaster had discriminated against civil rights interests in violation of the fairness doctrine. But the FCC denied them the right to intervene and then renewed the license without holding a hearing. In setting aside the license renewal, then-Judge Burger emphasized that “individual citizens and the communities they compose owe a duty to themselves and their peers to take an active interest in the scope and quality of the television service which stations and networks provide and which, undoubtedly, has a vast impact on their lives and the lives of

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150. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 217 (1887).

151. JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 208 (Ohio Univ. Press, 1954) (1927).

152. MARY FOLLETT, *CREATIVE EXPERIENCE* 218 (1924).

153. JOHN PRESTON COMER, *LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES* 200 (1927).

154. EMERSON, *THE PUBLIC’S LAW*, *supra* note 14, at 118–29; JESS GILBERT, *PLANNING DEMOCRACY: AGRARIAN INTELLECTUALS AND THE INTENDED NEW DEAL* (2015) (describing participatory land use planning during New Deal); WALTER GELLHORN, *FEDERAL ADMINISTRATIVE PROCEEDINGS* 116–44 (1941) (describing “the infusion of lay elements into the administrative process,” including in labor, agriculture, and banking). *But see* Joshua Ulan Galperin, *The Life of Administrative Democracy*, 108 GEO. L.J. 1213, 1217 (2020) (arguing that the “democratic bona fides” of elected administrators in agricultural space are “questionable”).

155. 5 U.S.C. §553(c); KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TEXT* 142 (3d ed., 1972).

156. Charles A. Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1228 (1966).

157. 359 F.2d 994 (D.C. Cir. 1966).

their children.”<sup>158</sup> That obligation of citizenship implied a corresponding right to participate in the administrative process.<sup>159</sup>

Richard B. Stewart famously understood cases like this to represent an “interest representation model” of the administrative process that reached its high watermark when he wrote in the 1970s.<sup>160</sup> Stewart worried, however, that judicial imposition of these procedural requirements rendered the administrative process too burdensome while failing to represent all affected interests fairly.<sup>161</sup> The Supreme Court appeared persuaded by such concerns in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,<sup>162</sup> where it struck back against the D.C. Circuit’s ongoing procedural innovations, which it believed “seriously interfere with that process prescribed by Congress.”<sup>163</sup>

There is indeed considerable tension between judicial elaboration or embellishment of the administrative procedures Congress establishes and the ideal of political liberty itself. Self-rule, after all, consists in the citizens’ control over government, not in government by judges. But there is little doubt that the ideal of self-government continues to animate aspects of the administrative process that the courts superintend. Witness, for example, the 3.7 million comments on the Obama Administration’s proposed net neutrality rule,<sup>164</sup> or the 124,000 comments submitted in response to the Trump Administration’s proposed changes to Title IX sex-discrimination enforcement policy.<sup>165</sup> As a function of the rulemaking process Congress and the courts have designed, citizens continue to avail themselves of the opportunity, sometimes in great numbers, to participate in administrative policymaking.

This is not to say that the administrative process is maximally respectful of political liberty, nor that mass commenting is the most effective means to achieve political influence. To the contrary, powerful regulated parties usually dominate the process over ordinary citizens.<sup>166</sup> Part IV will note some legislative and administrative reforms that would address such problems. But these examples of public involvement in rulemakings nonetheless show the potential of the administrative process to advance political liberty. Administrative procedures create fora, beyond elections, in which persons affected by executive

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158. *Id.* at 1003.

159. *Id.* at 1005.

160. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1728–29 (1975).

161. *Id.* at 1762–76.

162. 435 U.S. 519 (1978).

163. *Id.* at 548.

164. Federal Communications Commission, Protecting and Promoting the Open Internet, Final Rule, 80 Fed. Reg. 19,739, 19,746 (Apr. 13, 2015).

165. Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,044 (May 19, 2020).

166. Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 137 (2006); Cynthia R. Farina, Dmitry Epstein, Josiah Heidt & Mary J. Newhart, *Knowledge in the People: Rethinking “Value” in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1187 (2012).

policymaking can influence and constrain it. The conservative Justices, however, have altogether ignored this potential of the administrative process to protect political liberty. Instead, as I show in Part III, they rely on tools of structural constitutional law that are not well-suited to preserve it.

## B. THREE ASPECTS OF DEMOCRACY

This Section distinguishes three aspects of democracy at work in the conservative Justices' jurisprudence: constitutive democracy, legislative democracy, and executive democracy. As we make our way through each of these aspects of democracy, we will see that American law does not treat the people as univocal. Rather, their authority is dispersed across time and across institutions. This diffusion complicates inferences from democratic values to democracy-promoting legal rules. It cautions against the conservative Justices' confident conclusions that the Court can determine how best to institutionalize democratic power.

### 1. *Constitutive Democracy: "The People's Sovereign Choice"*

Contemporary public law sometimes invokes democracy in terms of popular sovereignty. In this register, democracy refers to the constituent power that brings government into being and defines its fundamental purposes, authorities, and limitations. Consider, for example, Gorsuch's argument in *Gundy* that the nondelegation doctrine rests on "the people's sovereign choice to vest the legislative power in Congress alone."<sup>167</sup> The Constitution, in this view, represents a democratic decision about how government ought to be structured. This modern, popular theory of sovereignty replaced the single monarchical sovereign with the body of the people.<sup>168</sup> That democratic understanding was taken up in the American Founding.<sup>169</sup> As Publius remarked in *Federalist* 49, "the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived."<sup>170</sup>

Whereas Revolutionary-Era republican theory saw the many and the few as antagonistic social groups that needed to share power within a mixed form of government,<sup>171</sup> the Federalists' constitutional theory treated each department of

167. *Gundy*, 139 S. Ct. at 2135.

168. Andreas Kalyvas, *Popular Sovereignty, Democracy, and the Constituent Power*, 12 *CONSTELLATIONS* 223, 238–39 (2005). This concept has origins in Roman law and gained its modern footing in the various forms with Bodin, Grotius, and Hobbes. See generally DANIEL LEE, *POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT* (2016).

169. RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY 181–201* (2015). See, e.g., Philodemus, *Conciliatory Hints, Attempting, by a Fair State of Matters, to Remove Party Prejudice*, in 1 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805*, at 606, 612 (Charles Hyneman ed., 1983) (1784) ("In a true commonwealth or democratic government, all authority is derived from the people at large, held only during their pleasure, and exercised only for their benefit.").

170. *THE FEDERALIST* No. 49 at 339 (James Madison) (Jacob E. Cooke ed., 1961).

171. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 70–71* (rev. ed., 1992).

government as representing the same unified, sovereign people in a different way. Popular sovereignty could then underlie an institutionally “aristocratic” form of government, with an independent, life-tenured judiciary and indirect election of the President and senators.<sup>172</sup> Sovereignty resided in the people as a whole, while the government they erected could depart from majoritarian principles, so long as the people retained the power to alter the basic shape of government.<sup>173</sup>

Constitutive democracy, on its own, is a fairly abstract and episodic form of democracy. Chief Justice John Marshall in *Marbury v. Madison*<sup>174</sup> understood the founding exercise of popular sovereignty to be “a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.”<sup>175</sup> The Constitution does provide formal procedures for amendment under Article V, but these are so onerous as to keep majoritarian, sovereign will from coming into effect.<sup>176</sup> If the people cannot effectively amend the Constitution, then their ability to consent to it in the present is badly impaired.<sup>177</sup> The popular sovereign might then not only be “sleeping,” but in a “coma.”<sup>178</sup>

Originalist scholars nonetheless insist that the people’s choice at the Founding remains binding in the present,<sup>179</sup> while some admit that at least certain constitutional questions might be resolved through democratic political processes.<sup>180</sup> Some living constitutionalists, on the other hand, understand the Constitution to admit ongoing, democratic change, either through occasional constitutional moments of heightened public deliberation,<sup>181</sup> or through broader processes of “popular constitutionalism” that operate through the political branches and broader social contestation.<sup>182</sup> The shared point of convergence

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172. GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC 562 (1969).

173. TUCK, *supra* note 169, 1–5, 209–12. The Founding was not actually inclusive of all “the people.” Women, black people, Native Americans, and many persons without property were excluded. Jamal Greene, *Originalism’s Race Problem*, 88 DENV. U. L. REV. 517, 518 (2011). Theorists of constitutive democracy nonetheless understand the ratification process as a pathbreaking exercise in self-government for property owning white males. *See, e.g.*, AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 5–11 (2005).

174. 5 U.S. (1 Cranch) 137.

175. *Id.* at 176.

176. *But see* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) (arguing that the Article V process is not exclusive); David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2387–88 (2021) (identifying routine departures from and uncertainties concerning Article V’s requirements).

177. David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 683–86 (2017).

178. *Id.* at 687.

179. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6–7 (2015).

180. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 46–47 (2019).

181. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 286 (1993).

182. LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2005); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*,

amongst these theories is that the Constitution's allocation of power, rights, and duties among the branches of the federal government and the states represents a decision of the people themselves.

Though scholars and jurists treat constitutive democracy as a fundamental value, it rarely plays a decisive role in the cases this Article considers. Invocation of the people's sovereign power in administrative law merely ornaments the formal claim that a given rule is constitutionally required with the appealing suggestion that the rule is also democratically legitimate. Whether that claim rings true depends on one's assessment of the democratic credentials of the Constitution and the accuracy of the Justices' divination of the people's sovereign will.

The conservative Justices' repeated emphasis on the democratic foundations of the Constitution is nonetheless important for two reasons. First, this way of justifying legal conclusions admits that democracy is ultimately prior to and constitutive of law within our public legal system and culture. The normative priority of the people over the law that binds them cuts against exclusive judicial determination of what the constitutional ideals of liberty and democracy entail. If constitutive democracy matters to the conservative Justices, they should be reticent to dictate to the people and their elected officials which aspects of liberty ought to be prioritized, or to second-guess the people's representatives' allocation of power between the elected branches, without crystal clear textual warrant. And yet, as we shall see in Part III, the Justices frequently intrude on democratic decision-making in this fashion. They thus undercut and usurp the people's sovereign power to establish the content and boundaries of both fundamental and ordinary law.

The Court's recognition of the democratic foundations of the Constitution are important for a second and related reason. The difficulty of exercising constitutive democracy requires auxiliary organs of regular democratic politics to give effect to the people's voice in the present. If our concern is to understand the democratic character of American law, we must then look beyond the circumstances of the Constitution's ratification and the super-majoritarian process of amendment it prescribes. In the domain of federal public law,<sup>183</sup> we must turn first and foremost to the democratic resources of the elected branches—the legislature and executive. According to the political theory the conservative Justices rely on, it is these branches, rather than the judiciary, that have the primary role of making policy judgments concerning how democratic will should be exercised.

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92 CALIF. L. REV. 1027 (2004). For a political theory of founding along these lines, see ANGÉLICA MARIA BERNAL, *BEYOND ORIGINS: RETHINKING FOUNDING IN A TIME OF CONSTITUTIONAL DEMOCRACY* (2017).

183. On democracy in state constitutions, see Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021).

2. *Legislative Democracy: “The Branch . . . Most Responsive to Popular Will”*

Though popular sovereignty in the American political tradition represents the most fundamental kind of democracy, it is also the most removed from ordinary politics. If the people exercise their authority only in rare moments of constitutional enactment or amendment, the connection between popular will and government policy will be quite weak. Legislation by an assembly of elected representatives creates a more routine, practical connection between the people and government than does the foundational exercise of constituent power.

Such a democratic understanding of legislation arises in the Court’s nondelegation jurisprudence, as a complement to the argument that the people’s sovereign choice was to vest the legislative power with Congress. In an early effort to strengthen delegation restrictions in his concurrence in *Industrial Union Department, AFL-CIO v. American Petroleum Institute* (the *Benzene Case*),<sup>184</sup> Rehnquist argued that the purpose of the doctrine was to “ensure[] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.”<sup>185</sup> Gorsuch struck the same note in his dissent in *Gundy*: “The Constitution promises that only the people’s elected representatives may adopt new federal laws restricting liberty.”<sup>186</sup>

This popular understanding of the Legislature has not always been a source of adulation. The legislatures of the Revolutionary Era were “very much of the democratic kind,” as their elected representatives assumed primacy over the judiciary and the executive, both of which remained associated with British rule.<sup>187</sup> But by 1787 the proponents of the new Constitution had grown wary of the concentration of legislative power, particularly in the lower houses of the state legislatures.<sup>188</sup>

Despite all this jealousy of the people’s power to make law, the Framers could not deny its central place within a republican constitutional scheme.<sup>189</sup> At the Constitutional Convention, James Wilson “contended strenuously for drawing the most numerous branch of the legislature immediately from the people . . . No government could long subsist without the confidence of the people.”<sup>190</sup> The government, in his view, “ought to possess . . . the *mind or sense* of the people at large. The Legislature ought to be the most exact transcript of

184. 448 U.S. 607 (1980).

185. *Id.* at 685 (Rehnquist, J., concurring).

186. *Gundy*, 139 S. Ct. at 2131.

187. WOOD, *supra* note 172, at 163 (quoting Richard Henry Lee).

188. *Id.* at 474.

189. THE FEDERALIST NO. 48 at 334 (James Madison) (Jacob E. Cooke ed., 1961) (“[The Legislature’s] constitutional powers [are] at once more extensive and less susceptible of precise limits” than the Executive’s); THE FEDERALIST NO. 51 at 350 (James Madison) (Jacob E. Cooke ed., 1961) (“In republican government the legislative authority, necessarily, predominates.”).

190. 1 RECORDS OF THE FEDERAL CONVENTION at 49 (James Madison) (Max Farrand ed., 1911).

the whole Society.”<sup>191</sup> The republican ideal of the rule of law gave the lawmaking body a central place within the constitutional order, such that it could only be cabined rather than made subordinate to the others.<sup>192</sup> And the republican requirement that the people check the exercise of power meant that this body had to be responsive to majoritarian interests.<sup>193</sup>

The Legislature’s popular foundations gave it claims against the interference of the other departments. James Thayer, in his influential defense of the presumption of the constitutionality of legislative acts,<sup>194</sup> explained that the courts must presume that legislators are persons “fit to represent a self-governing people, such as our theory of government assumes to be carrying on our public affairs.”<sup>195</sup> The Judiciary must give the Legislature wide discretion in order to respect the unique mandate of popular governance that the Constitution reposes in that body. Justice Holmes took a Thayerian approach in arguing that the Fourteenth Amendment ought not to be used, in the context of judicial review of state legislation, “beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires.”<sup>196</sup> There was no hard and fixed line between a “private” sphere that legislation could not touch and another, “affected with a public interest,” where it had play.<sup>197</sup> Rather, “the Legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it.”<sup>198</sup> This understanding came to predominate in understandings of the federal legislative power, too, with the New Deal Court adopting a Thayerian rational basis approach to economic and social legislation.<sup>199</sup>

Public law today does not treat the democratic claims of the Legislature as absolute, however. Jurists and legal scholars readily identify counter-majoritarian “values” and “matters of principle” requiring judicial protection,<sup>200</sup> if only to save democracy from itself.<sup>201</sup> Public choice theory at the same time deflates idealistic assumptions about legislation, presuming instead that legislators are motivated by self-interest and that statutes strike bargains between

191. *Id.* at 132.

192. *See, e.g.*, 2 RECORDS OF THE FEDERAL CONVENTION at 74 (Max Farrand ed., 1911).

193. *See* 1 RECORDS, at 49 (James Madison) (“Mr. Madison considered the popular election of one branch of the national Legislature as essential to every plan of free Government.”).

194. *See* Mathew J. Franck, *James Bradley Thayer and the Presumption of Constitutionality: A Strange Posthumous Career*, 8 AM. POL. THOUGHT 393 (2019).

195. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 149 (1893).

196. *Truax v. Corrigan*, 257 U.S. 312, 344 (1921).

197. *See Munn v. Illinois*, 94 U.S. 113, 126 (1876).

198. *Tyson & Bro.-United Theatre Ticket Offs. v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting).

199. *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942).

200. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–27 (2d ed., 1986).

201. *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

powerful social groups rather than identify any genuinely public interest.<sup>202</sup> But just as the Framers, suspicious of Legislatures, nonetheless acknowledged their central republican role, today's scholars and jurists continue to pay tribute to legislation's democratic legitimacy. As Daniel Farber notes, the principle of "legislative supremacy" in statutory interpretation is rooted in the "basic social norm of democratic self-government," requiring courts to implement the legislature's intent, at least where that intent can clearly be discerned.<sup>203</sup> The legislature is the people's "most immediate agent"<sup>204</sup> and so statutory law "is meant to embody the people's will."<sup>205</sup>

Both textualist and purposivist approaches to statutory interpretation generally rely on the democratic nature of the Legislature. Textualist interpretation purports to reduce judicial discretion and provides clear rules by which legislative majorities can write their will into the law.<sup>206</sup> Consideration of the underlying purpose of the law, on the other hand, is supposed to enable the Court to carry out the popular will that legislation expresses.<sup>207</sup> As Roberts put it in *King v. Burwell*,<sup>208</sup> "[i]n a democracy, the power to make the law rests with those chosen by the people . . . [I]n every case we must respect the role of the Legislature, and take care not to undo what it has done."<sup>209</sup>

One problem the nondelegation doctrine puts its finger on is that the Legislature often legislates in such broad terms that it is not clear what, precisely, the legislature has "done." If the Legislature can avoid making fundamental policy choices, so the argument goes, then the people's electoral control over legislators will not translate into control over policy. The democratic irony of nondelegation, however, is that it remedies a purported deficit in popular control by empowering unelected judges to invalidate statutes duly enacted by the people's representatives.<sup>210</sup> Moreover, the democratic argument against legislative delegation rarely engages in an analysis of

202. Kenneth A. Shepsle, *Prospects for Formal Models of Legislatures*, 10 LEGIS. STUD. Q. 5, 12–14 (1985) (describing assumption of the self-interested legislator); Steven Croley, *Interest Groups and Public Choice*, in RESEARCH HANDBOOK ON PUBLIC LAW AND PUBLIC CHOICE 49, 72 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) ("[Legislators] heed interest groups' demands because groups provide valuable political resources—most fundamentally votes and money—to legislators who advance groups' legislative preferences.").

203. Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 293 (1989).

204. John F. Manning, *The Supreme Court 2013 Term—Forward: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 5 (2014).

205. BREYER, *supra* note 140, at 94.

206. *United States v. Taylor*, 108 S. Ct. 2413, 2424 (1988) (Scalia, J., concurring in the judgment) (textualism "fosters . . . democratic process"); For critiques of Scalia's view, see Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 530 (1997); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 677 (1990).

207. BREYER, *supra* note 140, at 95 ("[a]n interpretation of a statute that tends to implement the legislator's will help to implement the public's will and is therefore consistent with the Constitution's democratic purpose.").

208. 576 U.S. 473 (2015).

209. *Burwell*, 576 U.S., at 498. On Roberts' opinion as borrowing from some aspects of purposivism, see Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 64 (2015).

210. Sunstein, *supra* note 51, at 327.

comparative democratic-institutional competence. When the legislature delegates, it ordinarily delegates to the executive branch. And the executive branch, too, has claims to democratic legitimacy. As we shall see in Part III, the competing democratic claims of the Executive and the Legislature make it difficult for the courts to draw confident conclusions about how statutory rules concerning delegation and presidential removal powers are likely to effect overall democratic control.

### 3. *Executive Democracy: “The Most Democratic and Politically Accountable Official”*

In explaining why the President must have power to supervise and control executive officers, Roberts claimed that “the Framers made the President the most democratic and politically accountable official in government.”<sup>211</sup> There is no doubt that, today, we usually think of the President as a democratic figure. But that view is not a product of the Framers’ original understanding. Rather, it emerged from subsequent political developments. Executive democracy thus operates within the conservative jurisprudence as a living reinterpretation of the Constitution that favors greater presidential control of administration.

While Hamilton admitted it was “desirable, that the sense of the people should operate in the choice” of the President, he thought it “equally desirable that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favourable to deliberation and to a judicious combination of all reasons and inducements, which were proper to govern their choice.”<sup>212</sup> The electoral college removed the President from direct popular control and deprived him of a claim to popular authority.<sup>213</sup> James Wilson had spoken in favor of direct “election by the people” at the Convention.<sup>214</sup> But his proposal was ultimately rejected in the face of objections such as Elbridge Gerry’s that “a popular election . . . [was] radically vicious” due to the “ignorance of the people.”<sup>215</sup>

The democratic connotations of executive power are therefore not original, as Roberts asserted, but rather historically emergent.<sup>216</sup> Andrew Jackson transformed the office by combining a strenuous defense of unitary executive power with a democratic claim to represent the people as a whole.<sup>217</sup> Jackson understood the President to be “the direct representative of the American

211. *Seila Law*, 140 S. Ct. at 2203.

212. THE FEDERALIST No. 68 at 457, 458 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

213. JAMES W. CAESAR, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT 72 (1979).

214. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 190, at 68.

215. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 192, at 114; see JAMES KLOPPENBERG, TOWARD DEMOCRACY: THE STRUGGLE FOR SELF-RULE IN EUROPEAN AND AMERICAN THOUGHT 400–01 (2016).

216. STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE 36 (2020) (the unitary theory “joins an originalist argument for an expansive reading of the vesting clause to [presidential] selection procedures that have been radically altered in the course of time”).

217. LEONARD D. WHITE, THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 23–28 (1954).

people.”<sup>218</sup> His presidency instituted a system of party government, buoyed by expansive white manhood suffrage, in which citizens participated not only by voting but by occupying patronage posts in executive agencies such as the Post Office.<sup>219</sup> As Jackson’s Attorney General, Roger Taney gave legal reinforcement to Jackson’s brand of popular politics with novel and expansive understandings of presidential control of executive officers,<sup>220</sup> laying early precedents for the contemporary unitary executive theory.<sup>221</sup>

The Progressives built on but reformulated Jackson’s legacy to reconstruct the presidency as a nationally representative office supervising a nascent administrative state. The late-eighteenth century movement for civil service reform sought to supplant the Jacksonian spoils system with a professional, tenured corps of officers.<sup>222</sup> The bureaucratic officialdom would provide the machinery for a new constitutional order centered around the presidency rather than Congress. Theodore Roosevelt’s presidency deployed the civil service to begin to displace the Jacksonian spoils system and “replace party controls over civil administration with independent executive controls.”<sup>223</sup> In the 1912 election contest, both Woodrow Wilson and Roosevelt sought to forge a direct connection to the emerging mass public.<sup>224</sup> As President, Wilson pioneered the “rhetorical presidency,”<sup>225</sup> using his speeches to build support for his major legislative policy program, “The New Freedom.”<sup>226</sup>

The Progressives set the tone for a twentieth century in which democratic authority came to be associated with the President’s electoral mandate and the expansive bureaucratic power of the Executive.<sup>227</sup> Franklin Roosevelt put this vision to work in the New Deal, as administrative agencies combatted the Great Depression.<sup>228</sup> To get a grip on this burgeoning administrative apparatus, the

218. *Id.* at 23 (quoting JAMES D. RICHARDSON, 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1910 at 90 (1911)).

219. Martin Shefter, *Party, Bureaucracy, and Political Change in the United States*, in POLITICAL PARTIES: DEVELOPMENT AND DECAY 211, 221–23 (Louis Maisel & Joseph Cooper eds., 1978).

220. *The Jewels of the Princess of Orange*, 2 Op. Att’y Gen. 482 (1831); *Decatur v. Paulding*, 39 U.S. 497, 516 (1840).

221. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 101–04 (2008) (describing Taney’s views as largely consistent with the authors’ unitary theory of the executive branch).

222. BRIAN J. COOK, *BUREAUCRACY AND SELF-GOVERNMENT: RECONSIDERING THE ROLE OF PUBLIC ADMINISTRATION IN AMERICAN POLITICS* 9–128 (2d ed., 2014).

223. STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920* at 179 (1982).

224. SIDNEY M. MILKIS, *THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY* 8–21 (2009).

225. JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 117–44 (1988).

226. WOODROW WILSON, *THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF THE PEOPLE* (1913).

227. Stephen Skowronek & Stephen M. Engel, *Introduction*, in *THE PROGRESSIVES’ CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE* 1, 6 (Stephen Skowronek, Stephen M. Engel & Bruce Ackerman eds., 2016).

228. MILKIS, *supra* note 224, at 5.

President's Committee on Administrative Management aimed to strengthen presidential responsibility and bureaucratic competence.<sup>229</sup> The Committee understood the president to be “an instrument for carrying out the judgment and will of the people of a nation.”<sup>230</sup> He was, on the one hand, a “political leader—leader of a party, leader of the Congress, leader of a people,” and on the other, a “Chief Executive and administrator within the Federal system and service.”<sup>231</sup>

Despite the growth of managerial capacity in the White House, the mid-century President did not achieve anything like complete and unqualified control over the administrative state. Rather his political capacity depended upon a complex set of considerations including formal powers, personal characteristics and reputation, public standing, and the legal authorities and social constituencies of the subordinate officials and coordinate branches he would aim to “persuade.”<sup>232</sup>

The unitary executive theory that emerged in the Reagan years sought to strengthen the President's hand still further, but now at the expense of the regulatory state that had animated the growth of the Executive Branch since the Progressive Era.<sup>233</sup> While the unitary theory offered a facially originalist argument about constitutional text, it also relied on the living, Progressive understanding that the President was the people's direct representative, which had been largely absent from the Founding.<sup>234</sup> In his partial concurrence and dissent in *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,<sup>235</sup> Rehnquist argued that the President's democratic mandate ought to influence and constrain judicial review of agency policy making: “A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.”<sup>236</sup> This position entered the doctrinal mainstream in *Chevron*, where Justice

229. Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, COLUM. L. REV. 52–53 (forthcoming 2022) (unpublished manuscript) (on file with author).

230. The President's Committee on Administrative Management, *Administrative Management in the Government of the United States* 2 (1937).

231. *Id.*

232. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENT: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 29–32 (1991) (1960).

233. See Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory*, 89 DENV. U. L. REV. 197, 201–10 (2011); Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2096–2100 (2009).

234. Proposed Executive Order Entitled “Federal Regulation, 55 Op. O.L.C. 59, 60–61 (1981) (“[B]ecause the president is the only elected official with a national constituency, he is uniquely situated to design and execute a uniform method of undertaking regulatory initiatives that responds to the will of the public as a whole.”). See SKOWRONEK ET AL., *supra* note 216 at 29–38.

235. 463 U.S. 29 (1983).

236. *Id.* at 59.

Stevens defended judicial deference in part on the grounds that the “Chief Executive,” unlike the courts, is “accountable to the people.”<sup>237</sup>

Roberts’ attribution of democratic motives to the Framers’ theory of the Executive thus reimagines a long line of political development as something that had been there in the constitutional text all along. In doing so, he incorporates a democratic theory of the Executive to strengthen the argument that the President ought to control administrative agencies. Given that the constitutional text alone does not resolve specific questions about issues such as at-will removal, executive democracy buttresses available but contestable textual and structural inferences in favor of heightened presidential power.

### III. FAILURES OF THE ROBERTS COURT: FALSE CONNECTIONS AND UNACKNOWLEDGED TRADEOFFS

The previous Part has disentangled three aspects of liberty and three aspects of democracy that are at work in the Supreme Court’s recent public law jurisprudence. This Part now focuses on shortcomings in the way the Court reasons from these values. These shortcomings lead to significant distortions in public law. The conservative Justices have incorrectly assumed that the Executive will reliably protect individual liberty. They have not squared their emphasis on legislative democracy in cases about nondelegation with their emphasis on executive democracy in cases about removal. And they have not recognized that administrative regulation may increase individuals’ capacity to pursue their plans even if it constrains their discretionary choices. These mistakes, inconsistencies, and unobserved tradeoffs are problematic because they undermine the doctrinal integrity of public law. Political theory seems to be invoked ad hoc, rather than applied evenhandedly across the cases. The Court second-guesses legislative and administrative decisions on the basis of specious reasoning.

The analysis that follows naturally implicates the principle of the separation of powers. While the meaning and concrete legal implications of Montesquieu’s tripartite scheme are heavily contested,<sup>238</sup> the Court frequently treats this structure as implicating liberty and democracy.<sup>239</sup> By looking beneath the separation of powers to the underlying concerns of freedom and self-government, this Part shows that the Court has made bad inferences about how

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237. 467 U.S. at 865.

238. See, e.g., W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGINS TO THE ADOPTION OF THE UNITED STATES CONSTITUTION* 128 (1965) (“separation of powers theorists—and even the same theorist at different times—have not been agreed about the institutional arrangements which satisfy the requirements of the doctrine.”); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 605–06 (2001) (rejecting the traditional focus on “branches” and “powers,” and instead arguing that the more general “diffusion of state power is more than sufficient to put to rest any concerns about dangerous concentrations of government authority”).

239. Aziz Q. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 380–87 (2016) (showing that the separation of powers case law aims to advance norms of liberty, effective administration, democratic accountability, the rule of law, and protection against tyranny).

to promote these values through specific institutional rules. In doing so, it has aggrandized itself at the expense of the elected branches, thus disserving the system of separated power it purports to honor.

#### A. THE DANGEROUS MYTH OF THE LIBERTARIAN EXECUTIVE

The Justices incorrectly assume executive democracy will consistently protect discretionary liberty. Because this assumption is unfounded, the jurisprudence unduly expands executive power.

In arguing against the constitutionality of the CFPB's leadership structure, Roberts quotes Hamilton for the proposition that "the Framers deemed an energetic executive essential to . . . 'the protection of property,' and 'the security of liberty.'"<sup>240</sup> The original passage is more evocative. "Energy in the executive," Hamilton said, is "essential . . . to the protection of property against those irregular and high handed combinations, which sometimes interrupt the ordinary course of justice, to the security of liberty against enterprises and assaults of ambition, of faction and anarchy."<sup>241</sup> The perspective here is very much one of law enforcement, understood as the protection of discretionary liberties against forceful invasion.<sup>242</sup> The view of the President as a policeman out to protect property owners has cropped up through history, for example in the Pierce Administration's implementation of the Fugitive Slave Act,<sup>243</sup> or in the Cleveland Administration's use of federal troops to break a railroad union strike,<sup>244</sup> or the Johnson and Nixon Administrations' campaigns for "law and order."<sup>245</sup> Attorney General William Barr echoed this view of executive power in a speech to the Fraternal Order of the Police: "[W]hat stands between chaos and carnage on the one hand, and the civilized and tranquil society we all yearn for, is the thin blue line of law enforcement. You are the ones manning the ramparts – day in, and day out."<sup>246</sup>

The problem with invoking executive power to protect discretionary liberty is that there are usually discretionary liberties on both sides of social conflict. The slave returned to bondage under the shackles of federal agents certainly lost

240. *Seila Law*, 140 S. Ct. at 2203 (quoting THE FEDERALIST NO. 70 at 471 (Alexander Hamilton) (Jacob E. Cooke ed. 1961)).

241. THE FEDERALIST NO. 70 at 471 (Alexander Hamilton) (Jacob E. Cooke ed. 1961).

242. DE DIUN, *supra* note 142, at 270.

243. MICHAEL J. GERHARDT, THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY 110 (2013) (describing the Pierce Administration's aggressive enforcement of the Fugitive Slave Act). See Gautham Rao, *The Federal 'Posse Comitatus' Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 L. & HIST. REV. 1, 22–26 (2008) (describing federal protection of property in slaves through executive officers, courts, as well as deputized citizens).

244. *In re Debs*, 158 U.S. 564, 577 (1895); Barton C. Hacker, *The United States Army as a National Police Force: The Federal Policing of Labor Disputes, 1877–1898*, 33 MIL. AFF. 255, 258 (1969).

245. ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 63–95, 134–79 (2016).

246. Attorney General William P. Barr, Remarks at the Grand Lodge Fraternal Order of Police's 64th National Biennial Conference, New Orleans, LA (Aug. 12, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-grand-lodge-fraternal-order-polices-64th>.

discretionary freedom at the hands of the Executive. Labor leaders jailed after the Pullman strike lost their liberty as well, even if railroad companies gained some of theirs.<sup>247</sup> The application of executive power to increase the liberty of one set of actors will often squeeze another. It is therefore impossible to say, as a general matter, that protection of one kind of property or liberty interest equates to an overall increase in the discretion of private parties.

Consider the ongoing controversy over contraceptive healthcare coverage under the Affordable Care Act (ACA). The ACA requires that health care plans cover “preventive health care and screening” for women without cost sharing.<sup>248</sup> This provision has been interpreted by both the Obama and Trump Administrations to include contraceptive coverage.<sup>249</sup> The Religious Freedom Restoration Act at the same time strictly limits government’s ability to “burden the exercise of religion.”<sup>250</sup> Some religious groups have expressed a conscience objection not only to providing contraceptive coverage but to becoming in any way “complicit” in the provision of insurance plans that provide such coverage.<sup>251</sup> Over the past decade, the executive branch has sought to balance these statutory mandates, with religious claimants demanding and the judiciary requiring ever wider conscience-based exemptions and accommodations.<sup>252</sup> Most recently, in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*,<sup>253</sup> the Court rejected challenges to a Trump Administration regulation that significantly broadened existing religious exemptions from the contraceptive mandate.<sup>254</sup> Under the Trump Administration’s approach, any “religious nonprofit organization with sincerely held religious beliefs opposed to contraceptive coverage” is exempt from the obligation to submit a “self-certification” of its conscientious opposition to its insurance issuer, which would then require the issuer to provide the contraceptive coverage at no cost to the participants in and beneficiaries of the employer’s plan.<sup>255</sup> The government estimated that somewhere between 70,500 and 126,400 women would lose

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247. ALMONT LINDSEY, *THE PULLMAN STRIKE: THE STORY OF A UNIQUE EXPERIMENT AND OF A GREAT LABOR UPHEAVAL* 282 (1942).

248. 42 U.S.C. § 300gg-13(a)(4) (2010).

249. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act; Final Rule, 77 Fed. Reg. 8725 (Feb. 15, 2012). Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act; Interim Final Rule with Request for Comments, 82 Fed. Reg. 47,792 (Oct. 6, 2017).

250. 42 U.S.C. § 2000bb-1 (2018).

251. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2518 (2015) (stating that the claimants in Hobby Lobby “contended that providing insurance coverage would make them *complicit* with employees who might use the insurance to purchase forms of contraception that the employers viewed as sinful”).

252. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 683 (2014); *Zubik v. Burwell*, 136 S. Ct. 1557, 1559–61. (2016) (per curiam).

253. 140 S. Ct. 2367.

254. *Id.* at 2370.

255. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,796, 47,802 (Oct. 13, 2017).

access to no-cost contraceptive coverage as a consequence of this policy change.<sup>256</sup>

In her dissent, Justice Ginsburg argued that the Court's analysis "casts totally aside" the statutorily protected interests of women "in its zeal to protect religious rights to the *n*th degree."<sup>257</sup> Note how this case pits one set of discretionary liberty interests against another: those of women versus those of employers. Under the Trump Administration's rule, the liberty of women to obtain contraceptive coverage constricts. The discretionary liberty of employers to determine the contents of their health insurance plans simultaneously expands. This adjustment in the spheres of discretion happens not because of purely "private" agreements but because of the way in which legal institutions have purposefully constructed the healthcare system.<sup>258</sup> Private discretion is distributed as it is in part because of the way in which the Executive Branch interprets and implements the law.

The Court's confidence that complete presidential control of administration will result in the protection of liberty is insensitive to these kinds of differential liberty impacts. The Justices rely on what Ganesh Sitaraman and Ariel Dobkin aptly describes as the "Safeguard of Liberty Fallacy," which disregards the competing liberty interests that are typically at issue in administrative action.<sup>259</sup> The conservative wing typically focuses myopically on the governmental constraint of particular classes of private rights, such as property, corporate, religious interests, while giving short shrift to others, such as reproductive autonomy or consumer protection. But it is very difficult if not impossible to generalize about how the exercise of executive power will impact discretionary liberty overall when the law protects many kinds of potentially antagonistic personal interests, and the executive has some choice as to which interests it will protect and how. The example of contraceptive coverage shows how executive agencies' interpretations are likely to shift along with the social and regulatory philosophy of the incumbent President. But these shifts do not promote discretionary liberty interests on the whole in any reliable way.

Even if there were cases where the sum of individual discretion rested squarely on one side and the dictates of government policy on the other, there is no guarantee that presidential power will favor the former over the latter. Some presidents may follow the Reagan paradigm and aim to increase the discretion

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256. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536, 57,578, 57,580 (Nov. 15, 2018); *Little Sisters of the Poor*, 140 S. Ct. at 2401 (Ginsburg, J., dissenting).

257. *Little Sisters of the Poor*, 140 S. Ct. at 2400 (Ginsburg, J., dissenting).

258. Allison K. Hoffman, *Health Care's Market Bureaucracy*, 66 UCLA L. REV. 1926, 1934–36 (2019) (describing how the market-based structure of private health insurance is publicly managed, regulated, and bureaucratized).

259. Ganesh Sitaraman & Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 ADMIN. L. REV. 719, 735–37 (2019) ("We are hardpressed to think of a single regulation that does not at once enhance the liberty of some groups and infringe on the liberty of others."); see also Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 398–99 (2020).

of property holders and decrease the scope and intensity of regulatory controls.<sup>260</sup> Others will follow Franklin Roosevelt's paradigm and limit the discretion of property owners through regulation.<sup>261</sup> Most will do some of both, giving a wide berth to some private rights that they consider most politically valuable and subjecting others to managerial control.

The competing liberties at issue in executive action are most obvious in the realms of prosecution and law enforcement. Justice Scalia recognized "the vast power and the immense discretion that are placed in the hands of a prosecutor."<sup>262</sup> But he goes on to argue that the "the purpose of . . . the unitary Executive" was, in part "to preserve individual freedom"<sup>263</sup> by constraining such prosecutorial discretion through political accountability. That kind of control may work if prosecutors should be foolish (or courageous) enough to enforce the law against some prominent majoritarian interest. But it will provide very little security in the cases where discretionary liberty is most seriously in peril, such as those involving "discrete and insular minorities."<sup>264</sup> If our goal is to protect individual freedom against government overreach, maximizing the enforcement powers of a politically accountable executive is a perverse remedy.

The myth of the libertarian executive has been deployed to justify the accrual of power to the President and the invalidation of statutory provisions that separate enforcement and regulatory decisions from the president's unilateral will. These moves pose all manner of serious threats to the discretionary liberties they purport to protect. A president with unfettered power to control the vast powers of the administrative state as he wishes can target political adversaries, voters, or religious minorities for prosecution, exclusion, or other differential treatment. We have seen some of these worries materialize during the Trump Administration,<sup>265</sup> at times with the Court's approval or at least acquiescence.<sup>266</sup> The Court has failed to reckon with the ways that executive power may threaten the discretionary liberties of private persons.

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260. See generally MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS (2000) (describing deregulatory initiatives during the Reagan Administration).

261. See THEDA SKOCPOL, ANALYZING AMERICAN POLITICAL DEVELOPMENT AS IT HAPPENS, IN THE OXFORD HANDBOOK OF AMERICAN POLITICAL DEVELOPMENT 48, 54 (2016) (comparing the success between Roosevelt and Obama's regulatory agendas).

262. *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting).

263. *Id.*

264. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

265. See, e.g., Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html>; Natasha Bertrand, *Trump's Yearning to Prosecute His Political Enemies*, THE ATLANTIC (Nov. 21, 2018), <https://www.theatlantic.com/politics/archive/2018/11/trump-reportedly-wanted-prosecute-hillary-and-comey/576460>.

266. *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018).

## B. WARRING DEMOCRACIES: THE LEGISLATURE VERSUS THE EXECUTIVE

In their removal and nondelegation opinions from *Morrison* and the *Benzene Case* to *Seila Law* and *Gundy*, the conservative Justices invoke democracy in one of two ways, without acknowledging that a fair accounting of democratic impacts requires consideration of both. In the removal cases, they stress the democratic powers of the President without acknowledging the competing democratic claims of Congress. In the nondelegation cases, they stress the democratic powers of Congress while ignoring those of the President. Using such blinkered reasoning, the Justices improperly aggrandize judicial and presidential power at the expense of the administrative state Congress has enacted through countless rounds of legislation since the Founding.<sup>267</sup>

Recall that Chief Justice Roberts, in *Seila Law*, claims that “the Framers made the President the most democratic and politically accountable official.”<sup>268</sup> As shown in Part II, this claim reflects neither the Framers’ intent nor the Constitution’s original public meaning, since the Constitution as initially conceived insulated the President from popular politics. The democratic features of the presidency today are rather the product of innovations in the Jacksonian and Progressive Era that forged a link between the President and the people as a whole. Without acknowledging this historical pedigree, Roberts aims to institute a unitary executive that promotes democratic control through the President’s electoral accountability to the people. The single-Director structure of the CFPB was particularly problematic because “an unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set against that agenda.”<sup>269</sup> The people’s control of financial regulatory issues would be impaired by the President’s inability to install a Director who agreed with her program.

This argument is reasonable as far as it goes. However, Roberts does not acknowledge the force of democratic considerations weighing against maximizing the President’s control over law’s administration. The CFPB, after all, did not arrive ex nihilo. Congress created the CFPB as an “independent bureau,” insulated from presidential control.<sup>270</sup> And Congress, like the President, has its own claims to democratic legitimacy, which have been recognized in Supreme Court jurisprudence on nondelegation. Justice Gorsuch, who joined Chief Justice Roberts’ opinion for the Court in *Seila Law*, referred in *Gundy* to the importance of maintaining the legislative power that is “reserved for the people’s representatives.”<sup>271</sup> It is in part because of what Justice Thomas calls

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267. See generally JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012).

268. *Seila Law*, 140 S. Ct. at 2203.

269. *Id.* at 2204 (emphasis omitted).

270. 12 U.S.C. § 5491(a), (c)(3) (2018).

271. *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting).

Congress's "accountability" that the conservative Justices stress the importance of Congress making the important policy choices, rather than delegating these to executive agencies.<sup>272</sup> If the Court were consistent in its application of democratic values across public law, it would have to weigh the democratic benefits of Congress's power to structure agencies against the democratic benefits of maximal presidential control. It has not done so.

It is not at all clear how one would conduct such judicial balancing, given that the democratic credentials of both branches are imperfect.<sup>273</sup> The President usually claims a majority of the popular vote, but not always, and especially not since 2000.<sup>274</sup> Historically, constitutional requirements of bicameralism and presentment and dynamics of political competition have usually resulted in "broad majorities" in favor of major legislation, which often reflects a "public mood" of intense mobilization amongst the citizenry.<sup>275</sup> But the Senate is not a majoritarian institution, as the equal representation of the states is likely to skew legislation towards the interests of voters in less populous states.<sup>276</sup> The Senate filibuster compounds the damage.<sup>277</sup> In addition, it is not obvious, without developing a more robust theory of democracy, how to weigh the democratic authority of past publics to make law through Congress with the democratic authority of present publics to make policy through the Executive.

It is well beyond the scope of this Article to resolve such thorny issues. The point is that the Justices have not even acknowledged them. The failure to reckon with legislative democracy in cases concerning removal creates the misleading impression that the people only benefit from enhanced presidential control over the executive. By the lights of the Justices' own positions in other cases, however, there is a direct democratic tradeoff between constitutional rules mandating presidential control over the Executive, on the one hand, and maintenance of the legislative powers of Congress, on the other.

The Court therefore does not promote democracy when it invalidates statutes enacted by the people's representatives to insulate agencies from the elected president. It rather shifts democratic power from general lawmaking to the plebiscitary discretion of the Chief Executive. In relocating authority in this way, the Court simultaneously arrogates power to itself—a body of unelected and tenured officials who are insulated from popular accountability for their

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272. *Ass'n of Am. R.R.*, 575 U.S. at 61 (Thomas, J., concurring).

273. See *Morrison*, 487 U.S. at 711 (Scalia, J., dissenting) (criticizing the majority's functional balancing approach to the separation of powers as lacking manageable standards).

274. Brian J. Gaines, *Popular Myths About Popular Vote-Electoral College Splits*, 34 PS: POL. SCI. & POL. 70, 75 (2001); Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016), <https://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html>.

275. DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002*, 130–35, 159–60 (2d ed., 2002).

276. Thomas L. Brunell, *Partisan Bias in U.S. Congressional Elections, 1952–1996: Why the Senate is Usually More Republican Than the House of Representatives*, 27 AM. POL. Q. 316, 332 (1999).

277. David R. Mayhew, *Supermajority Rule in the U.S. Senate*, 36 PS: POL. SCI. & POL. 31, 31 (2003).

decisions. On the whole, judicial interference here would seem to decrease rather than promote democratic control.

An equal and opposite problem arises in the nondelegation cases. Justices Rehnquist, Thomas, and Gorsuch have all invoked legislative accountability to the people as a reason to restrict Congress's ability to delegate policy choices concerning private rights to the Executive.<sup>278</sup> But the Justices fall silent when it comes to recognizing the value each of them has elsewhere recognized of executive democracy.<sup>279</sup> Consider the reasoning in Gorsuch's dissent in *Gundy*.<sup>280</sup> Joined by Thomas and Roberts, Gorsuch noted that the statute at issue undermined the constitutional requirement that "only the people's elected representatives may adopt new federal laws."<sup>281</sup> Gorsuch claimed the statute subverted this democratic principle because it "purports to endow the nation's chief prosecutor with the power to write his own criminal code."<sup>282</sup> This argument is in serious tension with the reasoning of *Seila Law*, where Gorsuch and Thomas joined Roberts' opinion holding that the President is the nation's "most democratic official," and that the President's power to remove officials means that he has the power to "control" them.<sup>283</sup> The attorney general is removable by the President at will. On these Justices' understanding, then, the attorney general's official action is thoroughly subject to command of the nation's "most democratic official." There should therefore be no meaningful loss to the rulemaking prerogatives of "the people's representatives" if the attorney general "specifies the applicability" of a criminal statute.<sup>284</sup> If we take seriously these Justices' democratic understanding of the President and unitary and hierarchical understanding of the executive branch, then legislative delegation to principal officers like the attorney general whom the president appoints and can remove at will poses little, if any, problem for democratic legitimacy. That is because the President may dictate what these subordinate officers do. Any shortfalls in legislative democracy would then be compensated for by the democratic credentials of the Chief Executive.

It could be argued that the Executive Branch on the whole has weaker democratic credentials than Congress, making legislative delegation to executive officials harmful to democracy. The president, after all, is rarely the

278. *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 685 (Rehnquist, J., concurring); *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting); *Ass'n of Am. R.R.*, 575 U.S. at 61 (Thomas, J., concurring).

279. *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring); *Seila Law*, 140 S. Ct. at 2203 (Roberts, C.J. opinion for the Court, joined by Thomas and Gorsuch).

280. 139 S. Ct. at 2131 (Gorsuch J., dissenting).

281. *Id.*

282. *Id.*

283. See *Seila Law*, 140 S. Ct. at 2203 ("individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President."). *Id.* at 2218 (Thomas, J., concurring, joined by Gorsuch, J.) ("The President therefore must have 'power to remove—and thus supervise—those who wield executive power on his behalf.'"); see also *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

284. *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J. dissenting); *Id.* at 2122 (quoting 34 U.S.C. § 20913).

one to make the relevant executive decisions.<sup>285</sup> Instead, policy decisions are usually made by appointed officials, and these officials rely in turn on the input and expertise of subordinates. That hierarchical structure is arguably less firmly connected to the people than the equal voting rights of the members of Congress and the Senate. On the other hand, individual legislators rarely make policy decisions either, but rather delegate those responsibilities to party leadership.<sup>286</sup> Furthermore, the Senate and the House of Representatives do not always act as a body, but instead delegate many powers to committees, where seniority rules and jurisdictional rights create hierarchies amongst the members.<sup>287</sup> Given these institutional realities, it is not obvious, without relying on a controversial theory of constitutional democracy, that one imperfectly democratic institution is more closely connected to the people than the other.

Suppose it is true that legislation is more closely connected to the people than is executive decision-making. If that is so, the democratic arguments the conservative Justices have deployed in favor of the unitary executive are that much weaker. If even a thoroughly hierarchical and unified executive could not eliminate significant slack between the people's interests and the executive decisions made on their behalf, the superior democratic competency of Congress would justify insulating executive officials from presidential control or otherwise constraining the way in which executive branch decisions are made. It would increase overall democratic legitimacy to tie agencies more closely to congressional preferences than to a president whose democratic credentials are comparatively weaker.<sup>288</sup>

The conservative Justices do not acknowledge the deep tension between their democratic critique of legislative delegation and the democratic critique of statutorily mandated administrative independence from the President. The result of this internally inconsistent reasoning is that the Court unjustifiably enhances its own power to invalidate and revise legislation at the expense of the power of the elected branches to make and implement law. The conservative Justices rely on democratic principles to limit Congress's power to delegate to the executive and to enhance the President's power over administrative agencies. All the while, this democratic rhetoric reallocates power to the branch of government

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285. See *Seila Law*, 140 S. Ct. at 2191 (“Because no single person could fulfill [the obligation to faithfully execute the laws] the Framers expected that the President would rely on subordinate officers . . . .”) (alteration in original).

286. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2337–38 (2006).

287. Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; Or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 143 (1988).

288. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 592 (1984) (suggesting that there “may be a greater intensity of congressional political oversight” of independent agencies over executive agencies. “[A]s a former FTC Chairman recently remarked, the independent agencies ‘have no lifeline to the White House. [They] are naked before Congress, without protection there.’”).

that usually plays what Justice Scalia once called the “undemocratic role” of safeguarding individuals and minorities against majority rule.<sup>289</sup>

The Justices might respond to this line of critique by retreating to a formalist posture. They might assert that rules concerning removal and delegation are based upon the categorically distinct definitions of “legislative” and “executive” power. The problem with such a reply is that it is utterly non-responsive to the political theory arguments the Justices repeatedly rely on. If the only true ground of these opinions are formal conceptions of what powers are supposedly legislative or executive in their nature, then all of the Justices references to “the people,” “democracy,” and “liberty” not only carry no justificatory weight but, worse, have apparently been offered in bad faith. If we take these normative arguments in good faith, by contrast, the formalist response is inadequate to address the underlying issues of political morality. We remain at the mercy of judicially crafted constitutional rules that set the boundaries between legislative and executive power on the basis of inadequate, erroneous, and inconsistent arguments.

Such unwarranted judicial interference with the powers of the elected branches constitutes “encroachment or aggrandizement” by the judiciary “at the expense of” the legislative and executive.<sup>290</sup> The system of checks and balances is meant primarily to be a “self-executing safeguard” rather than a roving license for the courts to second-guess institutional design choices of elected officials in the absence of clear textual violations.<sup>291</sup> Congress and, to a lesser extent, the President have constitutional authority to decide how the execution of law should be structured.<sup>292</sup> Aggressive judicial superintendence of the relationship between the political branches therefore upsets the allocation of institutional roles that the Constitution adopted by the people contemplates.

### C. THE TRADEOFF BETWEEN DISCRETIONARY AND RATIONAL LIBERTY

I showed in Part II that there are some cases where the conservative Justices invoke liberty as discretionary choice where the law is silent, and others where they understand liberty as rational action in reliance on known and stable rules. In cases concerning agency independence, Roberts in *Seila Law* and Kavanaugh in *PHH Corp.* were concerned about how a regulatory agency may infringe on discretionary liberty, in the sense that it may impose new rules on financial

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289. Antonin Scalia, *The Doctrine of Standing as an Essential Element in the Separation of Powers*, 17 SUFFOLK UNIV. L. REV. 881, 894 (1983).

290. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

291. *Id.*; See *Bowsher v. Synar*, 478 U.S. 714, 776 (1986) (White, J., dissenting) (arguing that the majority’s rule against Congressional participation in removal of executive officers is “insensitive to our constitutional role . . . [S]uch matters are for the most part to be worked out between the Congress and the President through the legislative process, which affords each branch ample opportunity to defend its interests”).

292. U.S. CONST. art. I, § 8, cl. 18 (giving Congress power “[t]o make all Laws which shall be necessary and proper to carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”); Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 16 (1974).

transactions between private parties.<sup>293</sup> By contrast, rational liberty was at issue in *Gutierrez-Brizuela*, where Gorsuch was concerned with how judicial deference to agencies' legal interpretations leaves private parties uncertain about legal rules, and to "guess" what they are.<sup>294</sup> These two kinds of liberty place opposing pressures on the structure of administrative agencies and principles of judicial review: Do we want to leave people relatively free from legal coercion, or do we want to coerce them in ways that are known and relatively stable so as to facilitate each person's reasoned decision-making? Administrative regulation often imposes costs on the former discretionary aspect of liberty in order to benefit people's rational liberty to act against the background of specific and enforced norms. The Justices who are the most prone to invoke liberty do not acknowledge this tradeoff, however. As a consequence, the jurisprudence neither acknowledges the ways in which regulation can promote rational liberty, nor develops legal rules that are well tailored to address legitimate threats to this form of liberty.

Consider how rational and discretionary liberty may come apart in transactions in the marketplace. Suppose that a consumer refinances their current fixed-rate mortgage with a complex mortgage product, such as a hybrid adjustable-rate mortgage, to reduce current monthly payments. The consumer has not thought through all the terms and the financial risks associated with this mortgage product, in particular the possibility of considerably higher future payments. Though nothing in the marketing or sales process would constitute fraud, a reasonable person could misunderstand the terms because of the nature of the advertisement, the sales pitch, and the agreement itself. Suppose, further, that the consumer would not have purchased the loan if the mortgage contract and accompanying documents had been clear about the extent to which future payments could increase. The mortgage agreement in this situation would be at the purchaser and seller's discretionary liberty to the extent that both parties chose to enter into the agreement without any specific or willful coercion by the other, and without the government dictating that the loan must be transacted or the precise terms on which it must be transacted. To be sure, both parties operate under the ambient coercive pressures related to the interest rates available, the government's backing of the mortgage market, and the general rules of contract law. Their discretion is far from absolute. But the point here is that there remains some zone of choice in which the consumer may choose to purchase the loan or not, and the seller may choose whether or not to sell. When Roberts and Kavanaugh worry about liberty in the CFPB cases, they are concerned about preserving this kind of liberty of contract from government intrusion. They emphasize the value of letting people do as they please while being forced to accept consequences of what they willingly agree to.

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293. *PHH Corp.*, 881 F.3d at 164 (Kavanaugh, J., dissenting), *abrogated by* *Seila Law v. CFPB*, 140 S. Ct. 2183 (2020); *Seila Law*, 140 S. Ct. at 2200.

294. *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).

It might nonetheless be argued that the purchaser did not really make a “free” choice in the situation just described—they did not completely understand what they were signing up for. This is a concern for what I’ve called rational liberty, the liberty to make and carry out decisions in light of clear and relatively fixed rules. Here the focus is on whether the parties really understood the terms they bound themselves to and the likely future consequences of that choice. To facilitate this kind of liberty, the law might require loan disclosure forms that simply explain the most important and potentially risky aspects of a loan, which might otherwise be underplayed in sales materials or get lost amidst a lengthy, small-print contract.

The Consumer Financial Protection Bureau has in fact issued a regulation simplifying previous disclosure requirements in consideration of “the purposes of improving consumer awareness and understanding of transactions involving residential mortgage loans through the use of disclosures, and the interests of consumers and the public.”<sup>295</sup> This regulation marginally constricts the discretionary freedom of financial services providers, who must now issue certain disclosures that they did not have to before, and who may lose the business of some potential purchasers as a consequence of those mandates. Such costs to the seller’s discretionary liberty is a benefit to the purchaser’s rational liberty insofar as the purchaser learns material facts that had previously been obscured. This rational liberty was what Judge Pillard touched on in *PHH Corp.* when she noted that “freedom of contract . . . depends on market participants’ access to accurate information[.]”<sup>296</sup> Incomplete information constrains rational liberty by preventing individuals from comprehending and acting in light of the terms of the contractual agreements they may enter into.

Regulations may also reduce uncertainty for regulated parties such as financial service providers, and thus increase their rational liberty. CFPB thus solicited comment on whether “the level of detail in the proposed regulations and official interpretations (including a number of examples illustrating what is and is not permitted) will make compliance more burdensome and whether the Bureau should adopt a less prescriptive approach in the final rule.”<sup>297</sup> Most industry commenters wanted more detail, not less,<sup>298</sup> even if this came at the expense of their liberty to implement the disclosure requirements in one way or another. They presumably wanted to know precisely how to comply with the law, not to be left uncertain about whether or not the Bureau would consider their disclosures compliant. That kind of certainty confers rational liberty because it makes it easier for businesses to plan their course of conduct in

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295. Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 79,730, 79,756 (Dec. 31, 2013).

296. *PHH Corp.*, 881 F.3d at 106, *abrogated by* Seila Law v. CFPB, 140 S. Ct. 2183 (2020).

297. Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. at 79,756.

298. *Id.*

conformity with the rules, rather than expend time and money hazarding imperfect guesses about how to comply.

Similar but stronger incentives arose from the Obama Administration's Environmental Protection Agency's regulations setting fuel economy standards.<sup>299</sup> The Trump Administration rescinded those standards and replaced it with much less stringent ones.<sup>300</sup> And yet, several large auto manufacturers signed on to an agreement with the State of California with only "slightly less restrictive" economy standards than the Obama Administration's in order to provide "much needed regulatory certainty."<sup>301</sup> While part of the incentive for this agreement was California's statutory power to set its own standards, the other factor was auto manufacturers' need to make long-range plans in a capital-intensive industry.<sup>302</sup> Auto manufacturers might prefer the Trump Administration's radically lower fuel economy standards, all things being equal. But once they've begun to make investments in low-emissions vehicles based on higher standards, switching to radically less onerous standards no longer has the same appeal. They are willing to trade a degree of discretion measured in miles per gallon for the planning benefits of a durable regulatory requirement. They will give up the prospect of greater discretionary liberty in order to attain greater rational liberty.

Such dynamics are also common beneath the level of regulations when agencies issue nonbinding guidance to private parties concerning how to comply with the law. Critics of guidance complain that these documents often impose "coercive" requirements while avoiding the rigors of informal rulemaking or formal adjudication.<sup>303</sup> But in contexts where an agency has broad enforcement power, or the capacity to keep products off the market altogether, regulated

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299. Environmental Protection Agency and National Highway Traffic Safety Administration, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,623 (Oct. 15, 2012).

300. Environmental Protection Agency and National Highway Traffic Safety Administration, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24, 174 (Mar. 30, 2020).

301. Carol Davenport & Hiroko Tabuchi, *Automakers, Rejecting Trump Pollution Rule, Strike a Deal with California*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/climate/automakers-rejecting-trump-pollution-rule-strike-a-deal-with-california.html>.

302. Umair Irfan, *Trump's EPA is Fighting California Over a Fuel Economy Rule the Auto Industry Doesn't Even Want*, VOX (Apr. 6, 2019), <https://www.vox.com/2019/4/6/18295544/epa-california-fuel-economy-mpg> ("Automakers say that a new car requires about three to five years of development, so car companies have to build for regulations as they'll be in the future. That's why no automakers have publicly supported the rollback of fuel economy rules."); Bill Ford & Jim Hackett, *A Measure of Progress*, MEDIUM (Mar. 27, 2018), <https://medium.com/cityoftomorrow/a-measure-of-progress-bc34ad2b0ed> ("We [Ford Motor Company] support increasing clean car standards through 2025 and are not asking for a rollback . . . We already have charted a course for our future that includes investing \$11 billion to put 40 hybrid and fully electric vehicle models on the road by 2022 as well as responsible development of the self-driving car.") (alteration in original).

303. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1315 (1992).

parties crave guidance like “water in the desert.”<sup>304</sup> Even if the terms of the guidance departs from the regulated parties’ ideal point in preserving their own discretion, the gains in certainty make such non-binding yet coercive communications well worth the cost.

Roberts and Kavanaugh’s reliance on discretionary liberty as a reason to limit administrative power ignores the sorts of rational-liberty gains effective regulation generates. They emphasize the importance of maximizing the options available to financial service providers and consumers while downplaying the importance of enabling people to understand and act in light of a stable system of rules and guidelines. As a consequence, they favor stricter controls over administrative agencies than would be justified by a balanced analysis of the values they themselves have recognized in other cases.<sup>305</sup> A Court that gave rational liberty its fair measure would encourage agencies to issue binding regulations to help guide conduct rather than continuously seek to reduce administrative power in the name of private discretion. The Court’s moderate and progressive Justices would do well to emphasize the rational liberty benefits of administrative regulation when the conservative Justices ignore them.

#### IV. FURTHERING LIBERTY WITHOUT UNDERMINING DEMOCRACY IN THE ADMINISTRATIVE STATE

The previous Part examined how the conservative Justices have failed to apply the political theory they rely on consistently and even-handedly to controversies that concern the administrative state. This Part turns from critique to constructive reform. It describes how the administrative state currently advances liberty. It then suggests legal reforms that would further liberty at minimal costs of democracy.

One might conclude from the previous Part that the values of liberty and democracy are simply too contestable and diffuse to inform constitutional or administrative law. To borrow Justice Holmes’s phrase from a related context, perhaps these values are like “spiders’ webs[,] inadequate to control the dominant facts.”<sup>306</sup> There are indeed sound objections to the Court’s free-wheeling invocation of these values in public law. Because liberty and democracy are “polycentric” values, containing multiple and conflicting interests, particular legal rules are likely to generate competing burdens and benefits for each of these values that cannot easily be weighed and compared.<sup>307</sup>

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304. Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 *YALE J. ON REG.* 165, 185 (2019).

305. *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., concurring, joined by Roberts, C.J. and Thomas, J.) (emphasizing “stability and fair notice” as a reason for the nondelegation doctrine); *Kisor*, 139 S. Ct. at 2438 (Gorsuch, J., concurring, joined by Kavanaugh J. and Thomas, J.) (arguing that *Auer* deference leaves private parties “unsure what the law is”).

306. *Myers v. United States*, 272 U.S. 52, 295 (1926) (Holmes, J., dissenting).

307. Fuller, *supra* note 127, at 394–404 (1978).

Many questions about how best to advance liberty and democracy in the design of the administrative state therefore cannot be resolved by way of “judicially discoverable and manageable standards,” but instead involve “policy determination[s]” that the Constitution assigns to the elected branches rather than the judiciary.<sup>308</sup> In particular, questions about how to strike the optimal balance between legislative and executive democracy, or between private discretion and legal coercion, do not admit precise answers that are generalizable across the full range of government conduct. If the Court presumes to set the balance on its own, the result is likely to be arbitrary.

While the Roberts Court’s use of political theory to date has been inconsistent on its own terms, it will not do to dismiss any and all reliance on liberal and democratic values out hand. These principles animate our political and legal culture and are now entrenched in the case law. The Court’s acknowledgment of the substantive political values that underlie its reasoning also promotes public scrutiny and transparency. The solution to the ails described above is not to cease talking about liberty and democracy altogether but rather to cabin these discussions to matters where judges have specific competence and authority.

This Part therefore identifies those cases where political theory points the way towards constructive judicial reforms. Subpart A describes how the retroactive effect of agency policymaking may undermine rational liberty. This problem falls squarely within the judiciary’s bailiwick as it implicates due process concerns. The Court could address this problem by reserving judicial deference for prospectively rather than retroactively binding administrative policies. Such an approach would minimally alter the design choices of the elected branches. Subpart B acknowledges that legislative delegation of policymaking authority to agencies may undermine political liberty. The judiciary could help to address the issue by strengthening existing opportunities for public participation in the administrative process. The conservative Justices, however, do not seem likely to take up that approach, preferring instead a broad-brushed assault on the administrative state that is more likely to hurt than to help the cause of political liberty. The elected branches instead must act to increase political liberty in the administrative process.

#### A. RATIONAL LIBERTY THROUGH JUDICIAL DEFERENCE TO PROSPECTIVE AGENCY RULES

The rational liberty to act in light of known and stable rules is at issue when Gorsuch criticizes judicial deference to agency interpretation. He argues that liberty is infringed when private parties are left to “guess” what the law is because the agency has significant discretion to interpret the law and change its

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308. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (alteration in original); See Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 5–6 (2013).

interpretation.<sup>309</sup> This is a valid concern, up to a point. If the rules are obscure or perpetually in flux, individuals will not be able to plan around them. As a consequence, they will have difficulty leading purposeful lives as rational agents. But Justice Gorsuch does not attend to the ways in which administrative lawmaking can also facilitate such rational liberty. If agencies make rules that are relatively uniform and stable, individuals are likely to have greater rational liberty than if the courts frequently reverse agency action. Rational liberty does, however, militate against deference to agency actions that undermine predictability and consistency, such as retroactive interpretations and interpretations made without due consideration of significant reliance interests.

Consider a standard case of *Chevron* deference: an agency promulgates a prospective rule with the force of law interpreting an ambiguous statute. The agency's interpretation is not what a majority of judges on the reviewing court would consider the best interpretation of a statute, but it is one that a majority would consider reasonable. Under *Chevron*, the court will uphold the agency's interpretation and, barring other legal infirmities, the regulation will remain in effect.<sup>310</sup> If *Chevron* were eliminated, by contrast, then the court would set aside the rule. *Chevron* thus increases the likelihood that the law will remain consistent between the way the agency interprets it and the way the courts do. In addition, it reduces the likelihood of circuit splits, in so far as each circuit will have to adopt a single federal agency's reasonable interpretation of a statute.<sup>311</sup> *Chevron* therefore promotes rational liberty by increasingly the predictability and consistency of legal rules. Take away *Chevron* and there will be greater uncertainty across jurisdictions and until an often years-long process of judicial review winds its way through the courts.

There are other aspects of judicial deference, however, that do raise genuine problems for rational liberty. The first is the rule in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,<sup>312</sup> authored by Justice Thomas, that an agency's reasonable interpretation of a statute supersedes a court's contrary interpretation.<sup>313</sup> There is logic to the rule in terms of *Chevron* itself: if the statute is ambiguous, then a democratically accountable agency should be able to change its interpretation from time to time within the range of ambiguity, even if a court has previously endorsed a different one of several reasonable interpretations.<sup>314</sup> But that kind of political flexibility imposes a real cost on regulated firms and beneficiaries in terms of their ability to rely on

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309. *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).

310. *Chevron*, 467 U.S. at 843.

311. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for the Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987); *City of Arlington*, 569 U.S. at 307 (Scalia, J.) (Reasoning that eliminating *Chevron* deference for jurisdictional questions would lead to "[t]hirteen Courts of Appeals applying a totality-of-the-circumstances test" which "would render the binding effect of agency rules unpredictable"). I am grateful to Chris Walker for these references.

312. 545 U.S. 967.

313. *Id.* at 983.

314. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009).

interpretations sanctioned by the courts. Rational liberty will be undermined when agencies change regulations in light of which private parties have made their plans. Of course, that cost to rational liberty is arguably imposed by the demands of legislative democracy, as codified in statutory law requiring judicial deference to executive agencies, as well as the demands of executive democracy, which relies on such statutory discretion to make policy changes within the bounds of law.

One way in which administrative law balances legislative and executive democracy against rational liberty is to require agencies and reviewing courts to take into account any “serious reliance interests” generated by the previous policy when considering the lawfulness of an agency’s policy change.<sup>315</sup> That issue proved decisive in the *Department of Homeland Security v. Regents of the University of California*,<sup>316</sup> where the Court set aside the Trump Administration’s rescission of the Obama Administration’s Deferred Action for Childhood Arrivals program (DACA). Chief Justice Roberts observed that the rescission memorandum “failed to address whether there was ‘legitimate reliance’ on the DACA Memorandum.”<sup>317</sup> He noted that “DACA recipients have ‘enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance’ on the DACA program.”<sup>318</sup> The Court’s concern to protect these reliance interests is based on the value of rational liberty. The Court was securing DACA recipients’ ability to make and pursue plans made in light of the government’s previous policy.<sup>319</sup>

Some of the current limits on “*Chevron*’s domain”<sup>320</sup> likewise sound in rational liberty. In *United States v. Mead Corp.*,<sup>321</sup> the Court declined to grant *Chevron* deference to a customs classification ruling. The Court reasoned that these rulings did not have the force of law in part because the Customs Service’s regulations stated that such classification rules would be “conclusive only as between itself and the importer to whom it was issued[.]”<sup>322</sup> The agency itself did not mean, by such classifications, to create rules that all regulated parties knew in advance and could rely on when making their business decisions. The Court further observed that the classifications could not have “legal force” because “46 different Customs offices issue 10,000 to 15,000 of them each

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315. *Id.* at 515.

316. 140 S. Ct. 1891, 1913, 1915 (2020).

317. *Id.* at 1913.

318. *Id.* at 1914 (internal quotations omitted).

319. The reliance interests implicated in administrative action may go beyond pecuniary concerns to include also the interest in the government’s recognition of one’s identity or status or the harms one has suffered. *See* Emerson, *supra* note 77, at 2207–15.

320. Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 835 (2001) (exploring the limits of *Chevron*’s scope).

321. 533 U.S. 218.

322. *Id.* at 233.

year.”<sup>323</sup> Given the diffusion of power to issue classification rulings, granting deference to one ruling could upset the plans of parties who had relied on different advice given by other officials. Whereas deference to a rule issued by an agency head ensures predictability and consistency in the administration of law, deference to each one of thousands of letters issued to particular parties from dozens of offices would risk upending any discernible pattern of customs enforcement.

Justice Kagan’s refinement of *Auer* deference in *Kisor* follows a similar logic in limiting deference to agency interpretations of their own regulations to situations where the interpretation is “authoritative” rather than “ad hoc,” and represents the agency’s “fair and considered judgment” rather than a “convenient litigating position.”<sup>324</sup> These constraints protect the notice and reliance interests of private parties against unpredictable, retroactive, or surreptitious changes in policy.

Kagan would have done well to underscore the liberty interest at issue in these limitations on *Auer* deference.<sup>325</sup> But she shied away from these issues and focused instead on conventional administrative law concerns with bureaucratic “expertise.”<sup>326</sup> Justice Gorsuch then assumed the high ground of liberty, arguing that, because of *Auer* deference, ordinary people would be “left always a little unsure what the law is.”<sup>327</sup> But if deference to agency interpretations of regulations is limited to situations where the interpretation is prospective, authoritative, and relatively durable, the problem of uncertainty will be significantly diminished. Deference to such official interpretations in fact increases certainty relative to a system where the judiciary may lightly set aside the agency’s considered position or where the agency simply delegates wide discretion to low-level officials to avoid the trouble of judicial scrutiny of its guidance.<sup>328</sup>

Retroactivity nonetheless remains a significant problem in some fields of administrative law. Interpretations issued through agency adjudications often enjoy *Chevron* deference.<sup>329</sup> The parties to the adjudication may then become bound by an interpretation that was not previously in force and of which they had no notice. As Kristin Hickman and Aaron Nielson have recently argued, retroactive policymaking raises due process concerns about “the fairness and political legitimacy of agency actions,” even if these worries do not amount to actual due process violations.<sup>330</sup> This was one of the issues Justice Gorsuch

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323. *Id.*

324. *Kisor*, 139 S. Ct. at 2414–18.

325. Metzger, *supra* note 4, at 45 (“Kagan barely engaged Gorsuch’s lengthy constitutional attack on *Auer*, but her dismissive response was largely functionalist.”).

326. *Kisor*, 139 S. Ct. at 2417.

327. *Id.* at 2438 (Gorsuch, J., concurring).

328. See Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 808 (2001).

329. *Mead Corp.*, 533 U.S. at 230.

330. Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L.J. 931, 974 (2021).

identified in *Gutierrez-Brizuela* and is endemic in immigration law.<sup>331</sup> Retroactive policy change through adjudication damages rational liberty because it is impossible to make plans in light of rules that are not currently in effect. And given the gravity of the interests at stake in immigration cases, such as whether a person can lawfully remain in the United States, these impediments to rational agency are quite serious.

Consider, for example, Attorney General Sessions' adjudicatory decision in *Matter of A-B*,<sup>332</sup> in which he reversed the ruling of the BIA that an applicant qualified for asylum.<sup>333</sup> In doing so, the Attorney General relied on *Chevron* to alter the BIA's current caselaw on who could qualify as a "member of a particular social group" for the purposes of asylum applications.<sup>334</sup> For the sake of respecting the rational liberty of the party to the adjudication and any others who had applied for asylum, it would have been preferable if the Attorney General had issued a rule with only future effect, rather than making a retroactive policy change by adjudication.

Scholars have proposed responding to such problems by limiting *Chevron* deference in adjudication. Hickman and Nielson's preference is to eliminate *Chevron* deference altogether for policies issued through adjudication, or at least to restrict deference to congressionally required "formal" adjudicatory procedures.<sup>335</sup> Shoba Sivaprasad Wadhia and Christopher J. Walker have argued that *Chevron* deference ought to be eliminated for immigration adjudication specifically, on the grounds that immigration questions do not involve the usual sort of scientific expertise and immigration adjudication is not particularly deliberative.<sup>336</sup> The analysis developed in this Article would support an approach that is more trans-substantive than Wadhia and Walkers' and less absolutist than Hickman and Nielson's. The Court should encourage agency officials to proceed prospectively by only granting deference to prospectively binding legal interpretations. This would follow the logic of *Mead* and *Kisor* by restricting deference to situations where agency policymaking is less likely to thwart private parties' rational agency.

A global assessment of whether restraining adjudicatory policymaking in this way would be a net benefit for liberal democracy on the whole would have to consider costs to legislative and executive democracy that such a judicially imposed constraint on retroactivity would impose. In the immigration context, Congress has vested interpretive authority in the attorney general.<sup>337</sup> Restricting

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331. See generally Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197 (2021).

332. 27 I&N Dec. 316 (A.G. 2018). Attorney General Merrick Garland vacated this decision in *Matter of A-B*, 28 I&N Dec. 307 (A.G. 2021).

333. *Id.* at 321 (quoting *Matter of A-B*, Decision Denying Asylum Application at \*8, (Immig. Ct. Dec. 1, 2015)).

334. *Id.* at 326–27, 331, 333 (overruling *Matter of A-R-C-G*, 26 I&N Dec. 388 (B.I.A. 2014)).

335. Hickman & Nielson, *supra* note 330, at 964.

336. Wadhia & Walker, *supra* note 331, at 1201–02.

337. 8 U.S.C. § 1103(a)(1) (2018).

that authority would arguably countermand the people's legislative choice. And it would simultaneously undermine executive democracy by limiting the policymaking venues open to a principal officer responsible to the President. At the same time, the costs to legislative and executive democracy would be fairly marginal—an agency can usually choose between making policy by rulemaking or by adjudication.<sup>338</sup> Limiting *Chevron* deference to situations where the agency makes policy prospectively would usually not curtail agencies' power to specify statutory norms but rather would channel that power from adjudication to rulemaking. This approach would also be consistent with the existing principle that it is permissible for an agency to make a new policy through adjudication where the adjudication imposes no "new liability" on the parties as a function of that policy.<sup>339</sup> Courts might continue to defer to adjudicatory policymaking in only those situations where no new liabilities or burdens had been imposed on the parties and there had been no showing of substantial reliance on the prior policy.<sup>340</sup>

Another important consideration in favor of fine-tuning deference rules in this way is that the relevant aspects of rational liberty fall squarely within the judiciary's core institutional competence. Rational liberty is closely linked to due process, as such liberty depends on providing individuals with fair notice of rules and proceedings that may impact their rights and interests.<sup>341</sup> Furthermore, ensuring that the law is relatively predicably, consistent, and respectful of reliance interests goes to the very heart of principles of judicial reasoning, such as *stare decisis*.<sup>342</sup> Judges themselves aim to develop clear standards that will ensure the integrity of adjudicatory decision-making over time.<sup>343</sup> Given that notice and predictability are fundamental to the judicial role and the legal craft, the judiciary has the know-how to rely on such concerns to bound the discretion and deference judicial doctrine affords to agencies.

The situation here is altogether different from cases where the court purports to set the proper balance between legislative and executive power—a question that is far removed from the maintenance of adjudicatory fairness. Whereas the Court should be extremely reticent to second-guess such political

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338. *Chenery*, 332 U.S. at 202; *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 684 (D.C. Cir. 1973); *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 237 (1973).

339. *Bell Aerospace*, 416 U.S. at 295.

340. *Id.*

341. Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 901 (1981) ("predictability, transparency, and rationality are a family of related process values that can make a worthwhile contribution to any process participant's sense of self-respect . . . 'Kafkaesque' procedures take away the participants' ability to engage in rational planning about their situation, to make informed choices among options."); see also Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1280–81 (1975); Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 SO. CAL. L. REV. 455, 455–56 (2000); Hickman & Nielson, *supra* note 330, at 971–77.

342. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1711–12 (2013).

343. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1289–90 (2006).

decisions, it would be well-justified in limiting its own deference doctrines to situations where administrative policy is only prospective in its binding effect. This would protect the rational liberty of parties likely to be affected by the rule, ensuring they have sufficient notice to recalibrate their conduct in light of the rule. The question of whether a rule would impose retroactive liabilities is judicially manageable, at least as compared to the normatively and empirically complex issues that arise in weighing the legislature's democratic competence against that of the executive.<sup>344</sup> The judiciary could intercede here with lesser risk of displacing the lawmaking and executory power of the people's elected representatives.

#### B. POLITICAL LIBERTY FROM NONDELEGATION TO ADMINISTRATIVE PROCESS

The previous Subpart argued for a more nuanced approach to protecting rational liberty within administrative proceedings. This Subpart suggests a similar approach to the protection of political liberty by improving opportunities for public contestation in the administrative process. Given trends in the Court's jurisprudence, however, it seems unlikely the Justices will take the more modest approach suggested. It will rather be up to the elected branches to reform administrative proceedings to promote citizen involvement while shielding agencies' political processes from undue judicial interference.

Recall that political liberty refers to an individual's capacity to influence and contest the rules by which she is governed. In the nondelegation cases, the conservative Justices emphasize the need to maintain such ongoing civic control of the government. Gorsuch defends nondelegation in order to arrest the "flight of power" from "the people's representatives."<sup>345</sup> The concern here is that the delegated authority structures of the administrative state may hamper the people's capacity to constrain and direct the government.

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344. This is not to say that resolving questions around retroactivity is always easy, non-problematic, or detached from other issues of political morality. See SUNSTEIN & VERMEULE, *LAW AND LEVIATHAN*, *supra* note 12, at 61–62 (describing complexities and differences of approach on questions of retroactivity in administrative law); Michael Graetz, *Retroactivity Revisited*, 98 HARV. L. REV. 1820, 1822 (1985) (arguing that the distinction between retroactive and prospective rules is "illusory" because any legal change may alter the economic value of assets); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1067–73 (1997) (characterizing the distinction as a "spectrum" rather than a "binary"). Rather, at least in the administrative law context, the question of whether an agency is making a rule that "attaches new legal consequences to conduct completed before its enactment" is relatively confined, only marginally impacts the discretion of the elected branches, and admits reasoned elaboration. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 270 (1994) (internal citations and quotations omitted); *id.* ("Any test of retroactivity will leave room for disagreement in hard cases . . . However, retroactivity is a matter on which judges tend to have sound . . . instinct[s], and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance."). While it is beyond the scope of this Article to offer a comprehensive account of thorny issues of retroactivity, courts may rely upon the underlying value of rational liberty to inform inquiry at the boundary lines. The essential question is whether changes to the legal status of prior conduct substantially impairs the reasoned decisionmaking of the parties whose legal interests have been impacted. See Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373, 391 (1977) ("A [strongly] retroactive law makes it difficult or impossible to act with knowledge of the applicable law.").

345. *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting).

The general concern with preserving public control over agency decision-making is well-justified, given the coercive power and discretion vested in the administrative state. But nondelegation is an exceedingly poor doctrine to address the issue. The doctrine reallocates the power to make policy decisions from elected officials to courts. In so doing, it undermines both political liberty and legislative democracy, rather than promoting them.

While constitutional case law recognizes the principle that the Legislature may not delegate its legislative power, there is no firm textual basis for such a principle. The Constitution states that the “legislative Powers . . . shall be vested in a Congress of the United States.”<sup>346</sup> It does not say that it must remain there.<sup>347</sup> Nor is it true that the vesting clauses would “make no sense” unless the legislative power were nondelegable.<sup>348</sup> One could, for instance, interpret these clauses to grant each of the branches a sort of public entitlement, which they may use as bargaining chips in constitutional negotiation with one another.<sup>349</sup> Moreover, Julian Davis Mortenson and Nicholas Bagley have recently concluded from exhaustive historical research that the Constitution’s vesting clauses were not understood to create any sort of constitutional rule against the delegation of policymaking authority to the executive.<sup>350</sup> Nicholas Parrillo has identified a particularly impressive statutory example of legislative delegation in the direct tax of 1798.<sup>351</sup> Ilan Wurman pushes back against these scholars’ conclusions, arguing that some of the Founders did support the nondelegation doctrine, and understood that Congress could not delegate “important subjects” to the executive.<sup>352</sup>

It is not necessary to resolve this dispute here. The point for this Article’s purposes is only that the nondelegation doctrine is at best highly contested on an originalist approach to constitutional interpretation. Nor is the nondelegation doctrine adequately justified on the democratic grounds, at least if one adopts the conservative Justices’ unitary theory that the elected president controls the

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346. U.S. CONST. art. I, § 1, cl. 1.

347. *Whitman*, 531 U.S. at 489 (Stevens, J., concurring in part) (the Vesting Clauses of article I and II of the Constitution “do not purport to limit the authority of either recipient of power to delegate authority to others”).

348. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 340 (2002); *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting).

349. Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1621–24 (2014).

350. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 367 (2021); see also Kurt Eggers, *Originalism Isn’t What it Used to Be: The Nondelegation Doctrine, Originalism, and Government by the Judiciary*, 24 CHAPMAN L. REV. 707 (2021) (arguing against the originalist case for the nondelegation doctrine in light of debates concerning the Vesting Clauses, the rejection of a proposed Council of Revision, and John Locke’s lack of influence over the Federalists).

351. Nicholas R. Parrillo, *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, 1302 (2021).

352. See, e.g., Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1494 (2021) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825)).

executive branch.<sup>353</sup> As discussed in Part III, delegating policymaking power from the elected legislature to a principal officer directed and controlled by the elected President would not appear to pose any serious problems for democratic accountability.

The firmest ground for the nondelegation doctrine is rather the value of political liberty. Justice Gorsuch recognized this when he worried that legislative delegation would turn the executive branch “into a vortex of authority that was constitutionally reserved for the people’s representatives in order to protect their liberties.”<sup>354</sup> There is a legitimate concern that, if Congress authorizes agencies to act under very open-ended or vague standards, the connection between the people and their government will get broken or at least badly attenuated. The people cannot control government by electing legislators if the laws enacted do not meaningfully control the conduct of officials. Administrative agencies may respond to the will of the elected President in a general way, which assuages democratic concerns. But the President’s will is only very distantly connected to each individuals’ political interests and judgments on any given topic.<sup>355</sup> Whereas vocal and active citizens might perhaps bend the ear of their representatives in Congress, their individualized influence over executive agencies by way of the elected President is so weak as to be fictional.<sup>356</sup>

If our hope is to enable the people to govern themselves on an ongoing basis, however, the enhanced nondelegation doctrine the conservative Justices propose is a very poor tool. Justice Gorsuch would significantly tighten the nondelegation standards, so as to ensure that Congress has “ma[de] the policy decisions” or at least “announced the controlling general policy,” while leaving the executive only to “fill up the details” or else to make factual findings that trigger legal consequences.<sup>357</sup> The problem with this proposal is that the line between “policy” and “detail” or “fact” is, at best, extraordinarily murky in the regulatory context. The Clean Air Act, for instance, requires the EPA to set “ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [air quality criteria reflecting the latest scientific knowledge] and allowing an adequate margin of safety, are requisite to protect the public health.”<sup>358</sup> Justice Scalia held that this provision set out an

353. See *supra* Part III.A. Elsewhere I have argued that non-delegation, and its cousin, the major questions doctrine, purports to be justified on the basis of popular sovereignty. See Emerson, *Administrative Answers to Major Questions*, *supra* note 14, at 2041–49. I argued that both doctrines do not in fact promote democracy and have suggested procedural alternatives.

354. *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting).

355. MASHAW, *supra* note 20, at 170 (“Voters should not be understood to have ratified all of the president’s pet political projects.”); see also Robert A. Dahl, *Myth of the Presidential Mandate*, 105 POL. SCI. Q. 355, 365 (1990) (“The myth of the mandate fosters the belief that the particular interests of the diverse human beings who form the citizen body in a large, complex, and pluralistic country like ours constitute no legitimate element in the general good.”).

356. On individualized influence and political liberty, see PHILIP PETTIT, ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 229–39 (2012).

357. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

358. 42 U.S.C. § 7408(a)(2), 7409(b)(1).

“intelligible principle” so as to avoid an impermissible delegation of legislative power.<sup>359</sup> But would it fail Justice Gorsuch’s “controlling general policy” standard? The statutory provision certainly contains general policies of “adequate safety” and “public health,” but these are sufficiently open-ended as to leave the EPA’s appointed political leadership a significant degree of discretion over where precisely to set pollution thresholds.<sup>360</sup> How much policy detail is sufficient to be “controlling” but nonetheless “general” would seem to be in the eye of the beholder. In the absence of a bright-line rule, the courts themselves will make discretionary decisions about the best place to draw the line between “policy” and “detail” or “fact.”<sup>361</sup> The courts would then arrogate to themselves a policymaking power, which nondelegation proponents consider to be legislative. This would be delegation by judicial dictate, rather than delegation by Congressional choice—hardly a victory for the project of self-governance.

A much more promising way to secure the people’s freedom from rules over which they have no say is to structure the administrative process in ways that facilitate participation and contestation by affected parties. That way, even if control through legislative standards leaves much to be desired, the public can exercise influence in agency proceedings. A similar approach was once central to the Court’s nondelegation jurisprudence. When the Court in *A.L.A. Schechter Poultry Corp. v. United States*<sup>362</sup> struck down provisions of the National Industrial Recovery Act delegating power to create industrial codes under the highly malleable standard of “fair competition,” the Court emphasized the absence of procedural controls that were present in other extant administrative institutions, such as the Federal Trade Commission (FTC).<sup>363</sup> The FTC had a similarly broad mandate to regulate “unfair methods of competition.”<sup>364</sup> But the Commission’s broad powers did not pose a nondelegation problem in part because it was held to higher standards of procedural rigor, including requirements of “notice and hearing” and judicial review.<sup>365</sup>

Congress responded to this ruling and other constitutional challenges to the administrative process by enhancing the procedural quality of agency decision-

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359. *Whitman*, 531 U.S. at 474.

360. See WENDY WAGER, SCIENCE IN REGULATION: A STUDY OF AGENCY DECISIONMAKING APPROACHES, REPORT PREPARED FOR THE ADMINISTRATIVE CONFERENCE OF THE U.S. 30–41 (Feb. 18, 2013), [https://www.acus.gov/sites/default/files/documents/Science%20in%20Regulation\\_Final%20Report\\_2\\_18\\_13\\_0.pdf](https://www.acus.gov/sites/default/files/documents/Science%20in%20Regulation_Final%20Report_2_18_13_0.pdf) (describing separation of science from policy judgment in the ambient air quality standards process).

361. JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 55 (1927) (“In truth, the distinction between ‘questions of law’ and ‘questions of fact’ really gives little help in determining how far courts will review; and for the good reason that there is no fixed distinction . . . Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law. The knife of policy alone effects an artificial cleavage at the point where the court chooses to draw the line between public interest and private right.”).

362. 295 U.S. 495.

363. *Id.* at 522.

364. *Id.* at 533.

365. *Id.*

making.<sup>366</sup> The Administrative Procedure Act of 1946 (APA) applied such protections generally, requiring more onerous standards in formal adjudication, but nonetheless insisting upon notice, opportunity for comment, and judicial review on the basis of the administrative record in cases of informal rulemaking.<sup>367</sup> As discussed above,<sup>368</sup> the 1960s and 1970s saw the courts elaborating on these statutory protections to secure broad rights to participate in administrative proceedings and to secure judicial review by beneficiaries. Notice and comment then served as a distinctive avenue for the exercise of political liberty. Agencies are required to respond to comments, and the adequacy of their response can be contested upon review.<sup>369</sup> These protections enable affected parties to press their interests before the agency and to insist that the agency's decision be well-reasoned. Concerns that legislative delegation might threaten liberty have been addressed by creating quasi-legislative fora within agencies where parties can assert their rights.

For all the benefits of notice-and-comment rulemaking, however, the process as it exists today is often skewed towards the interests of sophisticated, regulated interests and away from the interests of the general public.<sup>370</sup> There is arguably good reason to condition legislative delegation on further improvements to public participation in administrative policymaking. By reinforcing statutory requirements such as administrative responsiveness to public comments, the judiciary could ensure that affected parties constrain and influence agency regulation.

Recognizing the implicit constitutional function of ordinary administrative law would give significant power to the judiciary to safeguard and modulate the administrative process.<sup>371</sup> But this form of judicial intervention, even when improvidently exercised, would be a much less serious threat to political liberty than the reinvigorated but unbounded nondelegation doctrine advocated by Justice Gorsuch. His proposed nondelegation doctrine would take a scythe to the institutions of government that the people's representatives have erected over the past century and a half. Judicial superintendence of administrative policymaking is much more precise. It may restrict and channel how agencies proceed, and invalidate certain exercises of power, while leaving the administrative state as a whole intact. These more fine-tuned adjustments pose less serious risks to the people's democratic choices, while holding out the

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366. See DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* 137 (2014).

367. 5 U.S.C. § 553–54.

368. See *supra* Part II.A.3.

369. *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 249, 252 (2d Cir. 1977).

370. See sources cited *supra* note 154.

371. On how ordinary administrative law responds to nondelegation concerns, see Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 491 (2010); Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 958–59 (2007).

promise of an administrative process that fosters rather than undermines their political liberty.

The conservative wing of the Court has often moved in the opposite direction, however. It has taken an exceedingly broad view of agencies' discretion, to sidestep the interests of regulatory beneficiaries in cases on standing,<sup>372</sup> on the availability of review,<sup>373</sup> and on agency decisions not to bring enforcement actions.<sup>374</sup> Most recently, in *Little Sisters of the Poor*, Justice Thomas read statutory language providing that health insurers must provide "such additional preventive care . . . as provided for in comprehensive guidelines" issued by the Health Resources and Services Administration as granting that agency "virtually unbridled discretion."<sup>375</sup> This reading is in conflict with the APA, which requires agency action not to be "arbitrary" or "capricious," even where statutory language is broad.<sup>376</sup> Justice Thomas' approach would seem to maximize the threat that administrative arbitrariness poses so as to heighten the perception that agencies' authority is illegitimate. He seemed positively disappointed that "[n]o party has pressed a constitutional challenge to the breadth of the delegation involved here."<sup>377</sup>

The opinion also creates bad precedent on the notice-and-comment rulemaking process. The agency in this case proceeded by issuing an interim final rule rather than going through the usual process of issuing a notice of proposed rulemaking and accepting and responding to comments from the public before finalizing the rule. According to the APA, agencies can only proceed in this manner if they have "good cause."<sup>378</sup> Thomas approved of the agency's use of an interim final rule in lieu of a notice of proposed rulemaking on the grounds that the interim final rule formally met the notice-and-comment requirements by explaining its statutory authority and soliciting comments after the fact from the public.<sup>379</sup>

If generalized, this holding would seriously undermine the APA's informal rulemaking requirements.<sup>380</sup> It would enable agencies to first issue a final, binding regulation, rather than a proposal without binding force, and then solicit

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372. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 556 (1991).

373. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004).

374. *Heckler*, 470 U.S. at 821–22.

375. 140 S. Ct. at 2373, 2380.

376. *Id.* at 2398 (Kagan, J., concurring) ("An agency acting within its sphere of delegated authority can of course flunk the test of 'reasoned decisionmaking.'") (quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015)).

377. *Id.* at 2382 ("No party has pressed a constitutional challenge to the breadth of the delegation involved here.").

378. 5 U.S.C. § 553(b)(B). The Affordable Care Act also specifically authorized interim final rulemaking in this context. 42 U.S.C. § 300gg-2. *See Pennsylvania v. President United States*, 930 F.3d 543, 566 (3d Cir. 2019). But Thomas did not rely on this point at all in his discussion.

379. *Little Sisters of the Poor*, 140 S. Ct. at 2384–86.

380. Kristin E. Hickman, *Did Little Sisters of the Poor Just Gut APA Rulemaking Procedures?*, OF INTEREST: BLOG (July 8, 2020), <https://ofinterest.blog/2020/07/08/did-little-sisters-of-the-poor-just-gut-apa-rulemaking-procedures>.

comment when the rule is already in effect.<sup>381</sup> Interim final rulemaking may be valuable in some contexts, especially if the agency affords greater opportunities for comment and contestation after the rule is issued than it ordinarily would during the comment period.<sup>382</sup> But Justice Thomas' approach does not offer any such compensation. Instead, it simply removes crucial guardrails that protect the political liberty to participate in and challenge the exercise of authority. In doing so, it merely exacerbates the genuine risks to political liberty that Justice Thomas and his colleagues have repeatedly warned about.

Safeguarding political liberty requires more respect for and maintenance of the administrative process that Congress, the courts, and the Executive have created as a space for political contestation and deliberation. Whether the Roberts Court is willing and able to pursue that project is another matter. If the Justices' goal is to ensure that the people maintain the political right to influence the rules by which they are governed, keeping the administrative process open to public input and challenge will be much more effective than invalidating statutes wholesale. If, on the other hand, the Justices are fundamentally motivated to expand the discretionary liberty of some favored private parties, or else simply to throw sand in the gears of the regulatory state, then these benefits to political liberty will not be of real interest to them.

The Court, ultimately, is only one arena. The members of a polity committed to political liberty ought to assume responsibility for their fundamental values rather than leave them in judicial custody. However the Court conducts itself, the elected branches have power to expand opportunities for the public to inform how policy is made. It is not my task here to suggest a comprehensive reform agenda. But consider a few of examples. Mariano-Florentino Cuéllar has suggested creation of administrative juries composed of members of the public to provide comments on rules with the help of "regulatory public defenders."<sup>383</sup> Cynthia Farina, Mary J. Newhart, and others have recommended "online public learning and participation platform[s]" to increase the quality of deliberative public involvement in rulemaking.<sup>384</sup> K. Sabeel Rahman has likewise argued that financial regulatory agencies can serve as fora for robust public involvement, well beyond notice-and-comment rulemaking, taking inspiration from representation-reinforcing features of the Consumer Financial Protection Bureau and the Community Reinvestment Act.<sup>385</sup> Drawing on their study of existing agency outreach practices, Michael Sant'Ambrogio

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381. 5 U.S.C. § 553(d) (stating that the rule must be published 30 days before it goes into effect, unless good cause exception invoked).

382. See EMERSON, *THE PUBLIC'S LAW*, *supra* note 14, at 175 ("Agencies might issue interim regulations quickly with limited or no participation, and subsequently commence an intensive, egalitarian, and deliberative rulemaking process, which would result in a final rule to replace the interim rule.").

383. Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 491 (2005).

384. Cynthia R. Farina, Mary J. Newhart, Claire Cardie & Dan Cosley, *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 396-97 (2011).

385. K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 158-63 (2016).

and Glen Staszewski have proposed formalizing public input not merely after the proposed rule has been issued, but when the proposal is being formulated.<sup>386</sup> There is no shortage of reform proposals that Congress or administrative agencies themselves might adopt to deepen existing opportunities for the public to exercise political liberty within the administrative process.

Reforming the administrative process as a forum for the exercise of political liberty would be costly, however. The more agencies must entertain input and challenges from the affected public, the more time-consuming and contested regulation becomes. One promising solution would be to scale back judicial control of the policymaking process at the same time as we scale up processes that safeguard political liberty. For example, pre-enforcement judicial review of regulations is a creature of statutory law and judicial decision-making.<sup>387</sup> Congress could complement expanded opportunities for robust public involvement with provisions that limit judicial review to the enforcement stage. This would compensate for the increased costs of safeguarding political liberty within the administrative process. It would reduce the opportunities for the judiciary to aggrandize its power at the expense of the people and their representatives, as it has done in cases on removal, and as it threatens to do in cases on the delegation of legislative power.

#### CONCLUSION

This Article has shown that the values of liberty and democracy repeatedly arise in the Court's public law jurisprudence. But these two values are each multifaceted, referring to multiple kinds of individual freedom and popular rule. The Justices' invocations of democracy in cases on nondelegation and removal run at cross purposes and land the Court in policy questions that it is neither equipped nor empowered to handle. Their concern with liberty, on the other hand, points the way toward some relatively modest reforms. To protect individuals' ability to act in reliance on stable rules, the Court would be justified in restricting judicial deference to cases where agencies make policy only prospectively rather than binding parties retroactively. And to protect individuals' ability to participate in the administrative process, they might more rigorously enforce the participation and reason-giving requirements of notice-and-comment rulemaking.

The analysis offered here points beyond the confines of judicial doctrine, however, and towards the wider universe of legal actors who shape the contents of public law—the Legislature, the Executive, and the people themselves. It is perhaps a symptom of our distance from the practice of constitutive democracy

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386. Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 800 (2021).

387. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). For an argument against the presumption of reviewability that *Abbott Laboratories* established, see Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014).

that the judiciary feels the license to pronounce which governmental scheme will best advance democracy and protect liberty. But the language of constitutionalism is not the Court's alone, or even primarily, to wield. The Constitution creates three coordinate branches, and each of them hold constitutional powers. Legislation can therefore structure administration to make it a forum for constitutive democracy, a site in which basic political commitments can be rethought through popular deliberation and contestation. We have seen instances of such "administrative constitutionalism" in the past,<sup>388</sup> as agencies interpreted welfare and regulatory laws in partnership with affected parties to give rise to new understandings of liberty and equality.<sup>389</sup> The Court may resist the effort to experiment with new forms of democracy, or to expand political and rational liberty at the expense of certain private parties' discretion. But the decision is not ultimately theirs. It is rather a political matter for the people to identify what kinds of liberty and democracy we want to prioritize and implement at this moment in the course of our public life.

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388. On public participation in administrative constitutionalism, compare Sophia Z. Lee, *From the History to the Theory of Administrative Constitutionalism*, in *ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW* 109, 115 (Nicholas R. Parrillo ed., 2017) with Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 *B.U. L. REV.* 519, 574–75 (2015).

389. EMERSON, *THE PUBLIC'S LAW*, *supra* note 14, at 149–84.