POPULIST CONSTITUTIONALISM*

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A Supreme Court majority has expressed hostility to administrative agencies. Yet, as this Article explains, agencies provide the primary site in our government for pluralistic contestation among disparate policy views. A political vision we identify as agonistic republicanism—a convergence among deliberative democrats, republican theorists, and agonism supporters—places such multilateral deliberation and debate among differing social groups at the foundation of democracy. A contrary vision, authoritarian populism, imagines a single leader embodying the will of a unified people with little use for the institutional mediation of divergent perspectives. This view, prominent in politics, enters legal theory through the rhetoric of judicial populism, which disparages contestation and the institutions that convene it.

Focusing on three increasingly prominent legal doctrines, we show how judicial populist jurisprudence undermines policy contestation and, with it, the very possibility of true democracy. First, anti-deference: attacking the Chevron *framework for statutory interpretation lets courts choose the meaning of laws that Congress addresses to agencies. Second, nondelegation: limiting the authority statutes can give agencies allows courts to dictate how Congress legislates. And third, major questions: barring agencies from regulating important issues leaves courts to set the scope of public policy. Along with unitary executive theory, these doctrines move power from the government institutions most responsive to pluralistic contestation—Congress and agencies—to those least subject to it—the President and the courts.*

Transferring power to the least contestatory branches stands in clear tension with a commitment to democracy in a pluralistic society. Yet proponents of this style of regulatory jurisprudence paint it as not just neutral but necessary under the

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Constitution—a view naturalized through decades of sociopolitical activism that has transformed our legal culture. To do so, they draw on populist images of a unitary people in need of protection from government bureaucrats, but not from one another. This Article argues instead that administrative action, presidential policy, and judicial doctrine should support the contestatory—and thus democratic—potential of our government.

INTRODUCTION

"Who decides?"[1] So Justice Neil Gorsuch asked as the pandemic-era Supreme Court enjoined a regulation requiring employee COVID-19 vaccination or testing.[2] His concurring opinion framed the question—who should formulate important policies—as a choice between "an administrative agency in Washington" and "the people's elected representatives."[3] Yet those options hardly exhaust the possibilities for what is, after all, the central question of politics. Justice Gorsuch's concurrence, for instance, effectively places courts

1. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring).

2. For discussion and a critical evaluation of this decision, see *infra* Part II.B.3.

3. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 667.

themselves at the apex.[4] This Article takes up Justice Gorsuch's question as well as his answer, contrasting two prominent visions of democratic decision-making. One supports pluralistic debate and deliberation, valuing administrative agencies as well as elected representatives for hosting the contestation that fuels democracy. The other imagines unique leaders speaking for a unified people, and puts courts and chief executives—the less contestatory branches—in charge.

The first vision, which we call *agonistic republicanism*, sees pluralism and contestation as the very foundation of democracy. This vision has become increasingly prominent in political theory and has come to the fore in recent legal scholarship. It reconciles democratic aspirations with the realities of American society—pluralistic and diverse, with a multiracial, class-divided social structure and inequitable power arrangements. In this vision, democratic government convenes many divergent views and interests, providing structures for ongoing deliberation and contestation among them, in an effort to reach provisionally justifiable resolutions of legal and policy disputes.

The second vision chooses another direction: it elides pluralism by claiming a unified popular will on matters of law and policy—a unity that neither exists nor is possible in our society. This fiction echoes the rhetoric of contemporary authoritarian populism, which posits that politics works best when a single leader can intuit and effectuate the will of that unified people. This leader does not convene different positions for negotiation, but represents one already-shared view. In the legal sphere, as we have argued in prior work, this vision emerges in a *judicial populism* that insists on clear, correct answers to questions of law that are, in fact, inherently debatable.[5] Part I of this Article lays out the contrast between these two competing visions and explains how judicial populism undermines the contestatory aspects of both adjudication and policymaking—contestation that, we maintain, lies at the heart of democracy in a pluralistic society.

Part II suggests that judicial populism is especially problematic for the proper functioning of government administration—the primary locus for pluralistic contestation in our system. This part first reviews how contestation permeates U.S. regulatory governance. It then shows the deep influence of judicial populism on jurisprudence about the administrative state. In recent

4. *Id.* ("This Court . . . is charged with resolving disputes about which authorities possess the power to make the laws that govern us . . . ."); Anya Bernstein & Glen Staszewski, *Populism Has Found a Home at the Supreme Court, Too*, N.Y. TIMES (Dec. 17, 2021), https://www.nytimes.com/2021/12/16/opinion/supreme-court-populism.html [https://perma.cc/76DF-QUCN (dark archive)] [hereinafter Bernstein & Staszewski, *Populism at the Supreme Court*].

5. *See generally* Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283 (2021) [hereinafter Bernstein & Staszewski, *Judicial Populism*] (identifying judicial populism as a distinct rhetoric related to political populism).

years, this jurisprudence has started to deconstruct the system of administrative law, established since at least the New Deal, which has led regulatory agencies to serve as our primary national sites of ongoing pluralistic debate. In their place, this jurisprudence has empowered courts and the President—far less pluralistic and contestatory government institutions—as spokespersons for the American people.[6]

Part II focuses on three doctrines that work in tandem to undermine agencies' ability to mediate among divergent interests and viewpoints, threatening to institutionalize the populist vision. First, judicial attacks on *Chevron* deference give courts not just the final but also the initial say in defining statutory terms that Congress authorizes agencies to implement. This move threatens the traditional balance of interpretive power between the judiciary and the administration, insinuating courts into a conversation between Congress and agencies. Second, the nondelegation doctrine purports to limit Congress's power to effectuate its laws. And third, a quickly evolving major questions doctrine toggles between presuming Congress would not want to assign agencies the kind of work Congress creates agencies to do and prohibiting Congress from assigning agencies much of anything at all. We also explain why these three doctrinal trends—which together limit agencies, Congress, and the interaction between the two—go along with unitary executive theory. It may seem puzzling that the same movement seeks to disempower the administration and to empower the President who heads it up. The puzzle is solved once we recognize that judicial populist decisions move power from those parts of government most responsive to pluralistic contestation—Congress and agencies—to those least subject to it—the President and the courts. These separate legal theories thus work together to undermine more contestatory government institutions and empower more unilateral ones in their stead.

The way these doctrines and their rhetoric move power from more contestatory to less contestatory parts of the government fits the populist mold. It also seems clearly at odds with a conception of democracy as fundamentally pluralistic—a conception that recognizes the actual diversity of American society. Yet these populist moves have been presented as neutral, apolitical, and even legally requisite. Part III explains how a sociopolitical movement—the conservative legal movement—has popularized a rhetoric of *constitutional teleology*. Basing its legal arguments on often wobbly historical and semantic claims, this movement deflects attention from the consequences of judicial decisions, portraying their own contestations over power as rising above, or standing beside, politics. It mobilizes vague, contested notions of liberty to portray democracy's central problem as government domination of a

6. *See* Bernstein & Staszewski, *Populism at the Supreme Court*, *supra* note 4.

purportedly unified people, but ignores the government's role in protecting different groups within a pluralistic populace from domination by one another.

To build these images of an apolitical legal necessity to limit government action, the movement draws on prescriptive theories of legal interpretation like textualism and originalism. These theories give legal interpretations the gloss of inevitability, claiming to find eternal meanings in texts that are, by nature, subject to change as their surroundings develop. The movement rejects deliberation and contestation in favor of the alleged certainties and finality these theories offer. Constitutional teleology is thus used to rationalize a jurisprudence that undermines contestatory institutions and radically alters power relations, all the while disclaiming any participation in politics. This jurisprudence supports a populist, not a democratic, vision of government action. The Conclusion proposes some ways to instead support pluralism in our most contestatory government institution: the administrative state.

I. AGONISTIC REPUBLICANISM VS. AUTHORITARIAN POPULISM

Understanding the vision of democracy implicit in a political or legal decision is crucial to evaluating it.[7] This part contrasts two prominent ways democracy is imagined in contemporary political theory and legal doctrine. Both these visions depart from simple models of pure majority rule. Yet they do so in starkly contrasting ways.

A. *Agonistic Republicanism*

What is it that democracy looks like?[8] For one thing, it famously depends on popular sovereignty and the will of the people.[9] Yet the people are a "they," not an "it."[10] Far from a unified body with a single will, any populace includes

7. *See generally* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995) (discussing the importance of democratic theory in judicial statutory interpretation).

8. Julia Paley, *Toward an Anthropology of Democracy*, 31 ANN. REV. ANTHRO. 469, 470 (2002) (discussing the "challenge" scholars face when they try "to turn critical perspectives on democracy emerging from fallen hopes in newly minted or recently returned democratic political systems toward places not undergoing overt institutional change," such as the United States in the early 2000s).

9. *See, e.g.*, U.S. CONST. pmbl. ("We the People of the United States . . . do ordain and establish this Constitution for the United States of America."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."); G.A. Res. 217 (III) A, Universal Declaration of Human Rights Art. 21 (Dec. 10, 1948) ("The will of the people shall be the basis of the authority of government."); *see* Daniel Walters, *The Administrative Agon*, 132 YALE L.J. 1, 8 (2022) ("'Democracy,' from the Greek *demokratía*, concerns the legitimation of government by lodging control of the power (krátos) of the government with the people (*dêmos*).").

10. *See* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 254 (1992).

a diverse range of individuals and collectivities with differing, often contradictory, values and interests.[11] Although a majoritarian decision-making system can sometimes serve as a convenient proxy for something like popular will, the range of interests and viewpoints that a given population likely holds—along with knowledge limitations, differing preference intensities, and uneven stakes—render majoritarianism unequal to the task in many cases. Moreover, unfiltered majority rule notoriously leaves minorities vulnerable to domination by their peers.[12] Achieving legitimate collective decisions thus requires deliberation and mediation among the interests and values of different segments of the public.[13]

A wealth of political theory has built on this factual condition—that any given population will encompass different viewpoints and preferences—to develop a normatively rich vision of democracy beyond simple majority rule.[14] This vision emphasizes the importance of providing ways for individuals and groups to press their views in deliberation and negotiation with one another, in order to reach moderately acceptable decisions that are themselves provisional, subject to further debate and revision as time goes on.[15] It builds a potentially agonistic pluralism into its understanding of democracy.[16] Turning that pluralism into governance requires institutions that help mediate differences within the polity, providing sites and mechanisms for deliberation and debate.[17]

11. *See* CHANTAL MOUFFE, FOR A LEFT POPULISM 91 (2018) [hereinafter MOUFFE, LEFT POPULISM].

12. *See, e.g.*, THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961); Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY, 17, 21–22 (Alan Hamlin & Philip Pettit eds., 1989); Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338, 360–62 (Elly Stein & Jane Mansbridge trans., 1987).

13. *See, e.g.*, Cohen, *supra* note 12, at 22.

14. Rather than relying on any one particular theorist or school of thought, this section synthesizes diverse approaches—including some that oppose one another on some grounds—to highlight their common commitment to pluralistic contestation.

15. *See* Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 164, 180 (Ian Shapiro & Casiano Hacker-Cardón eds., 1999) [hereinafter Pettit, *Republican Freedom*] (discussing the authorial and editorial roles that are played by the people and their representatives in a republican democracy).

16. Daniel Walters has recently provided a helpful synthesis of the political theory of agonism, which has been under-recognized in legal scholarship. *See* Walters, *supra* note 9, at 47–57. We do not attempt a similarly thorough discussion of the strands of literature that contribute to the image we discuss. As noted above, we draw on a few key theories and theorists who have mapped out the contours of a contestatory notion of democracy. These theories sometimes challenge one another, yet we contend that they are compatible in the sense that, together, they contribute to the coherent vision of democracy as pluralistic that we describe here.

17. *See* HENRY RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 213 (2002) (claiming that the legitimacy of decision-making is enhanced "if (1) the process of debate allows for a fair hearing of all; (2) the process is contrived in such a way that majorities . . . need to take account of the views of the others; and (3) the formulation of alternatives and the process of debate is conducted in a way that encourages reasonable compromise among all

This view assumes that it is legitimate for different individuals and groups to have differing views on both normative ends and policy means, and that discussion and even dispute are inherent to democratic governance. In this image, the will of the people is not an enduring object; it is continuously produced through an ongoing, dynamic process with many moving parts, each part subject to change and few parts predictably aligned with each other for long. The results will never be perfect, nor permanent. Democratic institutions aim to come up with broadly acceptable, provisional responses to questions that are enduringly contentious. This view does not look to government institutions for closure, but for ways to keep the conversation—even a heated conversation—going.[18]

This view of democracy is implicit in a range of influential political thought, especially in work responding to what writers see as normatively anemic visions of unfiltered majoritarianism and a failure to grapple with the ongoing disagreement that characterizes any sizeable society. Theorists of republicanism, for instance, have emphasized that democracy necessarily involves coercive authority.[19] It therefore cannot promise the classical liberal conception of freedom as simply noninterference by government in private affairs.[20] Republicanism favors a concept of freedom as nondomination instead.[21] This entails safeguarding people against being dominated by the arbitrary decisions of both the state and private parties.[22] Government can therefore enhance freedom by limiting private domination.[23] This, however,

participants, who may thus view themselves as cooperatively engaged in a process of determining 'what we should do'").

18. *See* BONNIE HONIG, POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS 14 (1993) (identifying contrasting "impulses of political life, the impulse to keep the contest going and the impulse to be finally freed of the burdens of contest").

19. *See* Pettit, *Republican Freedom*, *supra* note 15, at 169 (recognizing that coercive law interferes, and thus "the negative way of thinking about freedom . . . enabled [philosophers] to say, as they all wished to say, that from the point of view of freedom there is no important difference between . . . democratized and undemocratized . . . forms of law").

20. *See* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 17–27 (1997) [hereinafter PETTIT, REPUBLICANISM] (contrasting liberty as noninterference with liberty as nondomination).

21. *See id.* at 51–79 (describing liberty as nondomination); QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 36–57 (1998).

22. PETTIT, REPUBLICANISM, *supra* note 20, at 52–58 (explaining that domination requires one agent to have a capacity to arbitrarily interfere with another, and that arbitrary acts are "chosen or rejected without reference to the interests, or the opinions, of those affected").

23. *See id.* at 12–13, 129–70 (describing "the aims of the republican state in controlling *dominium*"—"the arbitrary sort of interference that individuals and groups may practice against one another"); K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 81–83, 116–38 (2018) [hereinafter RAHMAN, DEMOCRACY] (discussing republican theory's concern with "[t]he problem of private power" or "dyadic domination," which is exemplified by the modern corporation's capacity "to arbitrarily dominate workers," and presenting "anti-domination as a regulatory strategy" for dealing with this concern).

raises the specter of public domination.[24] Avoiding arbitrary rule thus requires mechanisms to ensure that public officials consider the interests and perspectives of ordinary citizens, as well as mechanisms that allow private parties to challenge governmental decisions for failing to do so.[25] Republicanism thus includes participatory and contestatory dimensions.[26] It holds that public officials should give persuasive justifications for their decisions that could reasonably be accepted by citizens with fundamentally different interests or views, and that legal or policy decisions should typically be provisional in nature to allow for changing perspectives and coalitions.[27] One of government's key roles, in this approach, is to responsively mediate among the many different views and interests that our society will predictably host on any given issue.

The republican revival in political and legal theory has corresponded with the emergence of deliberative democratic theory,[28] which seeks to facilitate legitimate collective decisions in the face of ongoing moral disagreement.[29] Deliberative democracy is premised on the notion that citizens and their representatives should justify exercises of authority with reasons "that should be accepted by free and equal persons seeking fair terms of cooperation."[30]

24. *See* PETTIT, REPUBLICANISM, *supra* note 20, at 13, 171–205 (recognizing that efforts to control *dominium* present the possibility of the state becoming "an agent of the sort of domination associated with *imperium*," and discussing the need for mechanisms to protect against this danger).

25. *See* Pettit, *Republican Freedom*, *supra* note 15, at 172–83 (discussing the electoral and contestatory dimensions of republican democracy and explaining that nonarbitrary rule involves taking divergent "interests equally into account").

26. *See* PETTIT, REPUBLICANISM, *supra* note 20, at 12 (claiming that republicanism provides "an exciting way" of thinking about democratic institutions because it replaces "the notion of consent" with "that of contestability").

27. *Cf.* RICHARDSON, *supra* note 17, at 213 (emphasizing the importance of reason-giving and reason-sharing and lodging democratic rule in an ongoing conversation about political ends and policy means that maximizes participation to achieve common orientations on public issues).

28. *See* Philip Pettit, *Deliberative Democracy and the Discursive Dilemma*, 11 PHIL. ISSUES 268, 281–83 (2001) (arguing that in order to ensure the contestability of government action, democratic bodies must "operate in a deliberative mode"). *See generally* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) (describing the republican revival while highlighting powerful versions of republicanism that are not antiliberal at all).

29. *See generally* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996) (addressing the challenge of moral disagreement by exploring a vision of democracy that holds a place for moral discussion in political life). Much of this literature has been deeply influenced by the work of Jürgen Habermas or John Rawls. *See generally* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996) (arguing in favor of deliberative democracy while bridging normative and empirical approaches to democracy); JOHN RAWLS, POLITICAL LIBERALISM (Thom Brooks & Martha C. Nussbaum eds., 1993) (arguing that religious, philosophical, and moral doctrines coexist in modern democratic societies).

30. *See* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 3 (2004) [hereinafter GUTMANN & THOMPSON, DELIBERATIVE DEMOCRACY]; *see also* Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANN. REV. POL. SCI. 497, 498 (2008) ("At the core of all theories of deliberative democracy is what may be called a reason-giving

Because this is a reciprocal obligation that all public officials and citizens owe each other, their reasons should generally be expressed in public and be capable of being understood and accepted by others.[31] Deliberative democratic theory recognizes that societies are pluralistic not just at the moment a decision is made, but also over time: legal or policy decisions in a deliberative democracy are understood as "provisional in the sense that they must be open to challenge at some point in the future."[32] The theory thus embraces core republican values of public participation, reasoned justification, provisionality, and contestation.[33]

Deliberative democratic theory has been criticized for an overly optimistic reliance on consensus in the public sphere, for privileging rational argument over other valuable forms of communicative expression, and for thus having a (perhaps naïve) tendency to legitimize or reinforce existing power arrangements rather than recognizing that it is power arrangements themselves that are the subject of politics.[34] Theorists of democratic agonism have challenged these tendencies, emphasizing that democracy does not depend on a frictionless public sphere in which rational conversation leads to consensus.[35] Rather, they treat irresolvable disagreement as fundamental to democratic practice—not just a challenge but also an essential trait.[36] Agonistic democratic theory sees democracy's central concern not as "arriv[ing] at a consensus . . . without exclusion" of any social participants, but as figuring out how "to defuse the potential antagonism that exists in human relations so as to make human

requirement."); Glen Staszewski, *A Deliberative Democratic Theory of Precedent*, 94 U. COLO. L. REV. 1, 42–46 (2023) [hereinafter Staszewski, *Deliberative Precedent*] (describing deliberative democratic theory's core commitments).

31. GUTMANN & THOMPSON, DELIBERATIVE DEMOCRACY, *supra* note 30, at 4.

32. *Id.* at 6; *see also id.* at 132 (explaining that deliberative democracy "adopts a dynamic conception of political justification, in which change over time is an essential feature of justifiable principles," and claiming that deliberative democratic principles are distinctive because "they are morally provisional (subject to change through further moral argument); and . . . politically provisional (subject to change through further political argument)").

33. *Id.* at 7 (defining deliberative democracy "as a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future").

34. *See, e.g.*, Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?*, 66 SOC. RSCH. 745, 746 (1999) [hereinafter Mouffe, *Deliberative Democracy or Agonistic Pluralism?*] ("[Deliberative democratic theories] identify the democratic public sphere with the discursive redemption of normative validity claims. . . . [W]hat is missing . . . is the dimension of the political."); *see id.* at 755–56 ("[T]he prime task of democratic politics is not to eliminate passions nor to relegate them to the private sphere in order to render rational consensus possible, but to mobilise those passions toward the promotion of democratic designs.").

35. HONIG, *supra* note 18, at 2 (arguing that "[m]ost political theorists are hostile to the disruptions of politics" because they treat politics as something that should, and can, be gotten right once and for all, and aim for a democratic theory that can replace divisiveness with harmony).

36. *Id.* at 205 ("Politics consists of practices of settlement *and* unsettlement, of disruption *and* administration, of extraordinary events . . . *and* mundane maintenances.").

coexistence possible."[37] It assumes that some people and positions will continually strive to be included, to the exclusion of others.[38] Politics inevitably has winners and losers, and we should not expect those who lose out to simply accept that fate.

Agonistic theorists contend that politics cannot overcome this "us/them distinction," but it can make it "compatible with pluralistic democracy" by ensuring "that the 'other' is no longer seen as an enemy to be destroyed, but as an 'adversary,' i.e., somebody with whose ideas we . . . struggle but whose right to defend those ideas we will not . . . question."[39] This contrasts with the Manichean stance of populism: "[a]n adversary is a legitimate enemy, an enemy with whom we have in common a shared adhesion to the ethico-political principles of democracy."[40] The institutional implications of this perspective are just starting to be developed,[41] but agonistic democratic theory clearly places great value on facilitating vigorous dissent, providing mechanisms to contest the status quo, and treating legal or policy decisions as provisional.[42]

Deliberative and agonistic democrats have often emphasized their differences. But synthesizing the theories offers a normatively attractive image of democratic governance. They both recognize that authoritative legal decisions are necessarily coercive in the (predictable) absence of unanimity: even if reasonable people could (or should) agree that a decision is justified on the merits, some may still reasonably disagree with it.[43] Jane Mansbridge expresses the basic tension well: "[r]ecognizing the need for coercion, and recognizing too that no coercion can be incontestably fair or predictably just, democracies must find ways of fighting, while they use it, the very coercion that they need."[44] Deliberative democracy and republicanism tend to focus on legitimate ways for democracy *to use* coercive authority, while agonistic democracy highlights legitimate ways *to fight* it. But both approaches require meaningful public participation, vigorous dissent, and mechanisms for

37. MOUFFE, LEFT POPULISM, *supra* note 11, at 91.

38. *See* Mouffe, *Deliberative Democracy or Agonistic Pluralism?*, *supra* note 34, at 755 ("Politics aims at the creation of unity in a context of conflict and diversity; it is always concerned with the creation of an 'us' by the determination of a 'them.'").

39. *Id.*

40. *Id.*; *see also* Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1337 (2010) (recognizing that disagreement is vital to politics, but that politics goes beyond preference aggregation because it depends on the existence of an agreement by members of the polity to join together in a political association to make collective decisions).

41. *See, e.g.*, Walters, *supra* note 9, at 47–48.

42. *See* Glen Staszewski, Obergefell *and Democracy*, 97 B.U. L. REV. 31, 92–98 (2017) [hereinafter Staszewski, Obergefell] (describing agonistic democratic theory and its relationship to deliberative democracy).

43. *See id.* at 92.

44. *See* Jane Mansbridge, *Using Power/Fighting Power: The Polity*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 46, 46–47 (Seyla Benhabib ed., 1996).

contestation; insist that legal and policy decisions are provisional; and treat nondomination as democracy's central aim. Both also offer an alternative to purely majoritarian or aggregative conceptions of democracy on the one hand, and to the nonmajoritarian, charismatic channeling of an abstract people's will espoused by populism on the other.[45]

Scholars have been developing this broader vision—which we call "agonistic republicanism"—for decades,[46] but it has recently come into focus with new force in legal scholarship. This work on public law and regulatory governance weaves contestation and nondomination into the fabric of our understanding of a democratic legal system. It highlights that democratic legitimation cannot be taken for granted: it is a project that requires ongoing engagement. We see much of this recent work as falling into two broad categories. First, some work uses agonistic republicanism to highlight and enhance the mediating roles of Congress and agencies in administrative law and regulation.[47] This work challenges what it characterizes as the emergent "juristocracy" of the Supreme Court.[48] Second, literature on political economy and participatory democracy draws on agonistic republicanism to challenge prevailing power arrangements and advocate a greater role for the public in governmental decision-making.[49] This scholarship grapples with the inevitable dissonance that characterizes any large polity, especially a multi-ethnic and class-divided one like the United States. Both of these lines of thinking

45. *See* GUTMANN & THOMPSON, DELIBERATIVE DEMOCRACY, *supra* note 30, at 13–17 (contrasting deliberative democracy and aggregative democratic theories); Post, *supra* note 40, at 1337 (contrasting agonistic democracy and aggregative democratic theories).

46. *See* Duncan Bell, *To Act Otherwise: Agonistic Republicanism and Global Citizenship*, *in* ON GLOBAL CITIZENSHIP: JAMES TULLY IN DIALOGUE 181, 182 (2014) (describing the political theorist James Tully's work as "agonistic insofar as it stresses the irreducibility and inevitability of conflict and struggle in the negotiation of political life" and "republican insofar as it seeks to harness the powers of active virtuous citizenship in enacting democratic freedom").

47. *See generally* BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY (2019) (constructing a normative architecture of the administrative state through an intellectual history lens); Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020 (2022) (exploring the republican separation of powers and the constitutional leadership imbued in it); Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. DISC. 418 (2021) (arguing against the use of unilateral executive action and for empowering state and local officials and federal agencies); Walters, *supra* note 9 (emphasizing that maintaining conflict better fosters democratic legitimacy in a deeply divided society).

48. *See* Bowie & Renan, *supra* note 47, at 2056–82.

49. *See, e.g.*, RAHMAN, DEMOCRACY, *supra* note 23, at 88–96; Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 577–86 (2021); K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315, 351–66 (2018) [hereinafter Rahman, *Policymaking*]; K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 689–99 (2020); *see also* Archon Fung, *Varieties of Participation in Complex Governance*, 66 PUB. ADMIN. REV. (SPECIAL ISSUE) 66, 66–70 (2006) (setting forth an influential typology of public participation in democracy).

incorporate pluralism along multiple axes into their visions of democracy. And they emphasize the provisional nature of democratic decision-making and seek ways to broaden the range of perspectives involved to promote a vision of liberty as nondomination.

B. *Authoritarian Populism*

At the same time as political theorists and public law scholars have turned their attention to the contestatory nature of pluralistic democracy, an increasingly influential political and jurisprudential movement has turned to denying it. *Authoritarian populism*, an increasingly powerful force in contemporary politics across the globe, posits the existence of a single people with a unified will that can be realized by a single leader, and denigrates those who disagree as mortal enemies—treating disagreement itself as illegitimate.[50]

The growing literature on contemporary authoritarian populism identifies three key traits that characterize this movement's rhetoric. First, populism is *anti-pluralist*: it imagines the populace as a unified entity with a single will, sufficiently represented by a single leader who implicitly understands or even embodies that will.[51] The leader encompasses the whole unified people with his single will, providing a purportedly universal representation. But of course, in reality, a society—especially a large, diverse society like ours—has no single people with a single will. So this universalizing claim necessarily excludes those who fall outside whatever the populist claims as the norm.[52] Second, populist rhetoric also expresses disdain for institutions that mediate divergent views, like legislatures and agencies. This anti-institutional orientation draws on anti-pluralism: if the single people has a single will, there is no need for mediation.[53] A leader who understands how the people feels suffices. And third, populist rhetoric often employs an us-versus-them, good-versus-evil imagery. This Manichean worldview also draws on anti-pluralism: if the single people has a

50. *See generally* JAN-WERNER MÜLLER, WHAT IS POPULISM? (2016) (arguing that populism is "a moralized form of antipluralism"); NADIA URBINATI, ME THE PEOPLE: HOW POPULISM TRANSFORMS DEMOCRACY (2019) (arguing that "populist democracy is the name of a new form of representative government that is based on two phenomena: a direct relation between the leader and those in society whom the leader defines as the 'right' or 'good' people; and the superlative authority of the audience"); Andrew Arato & Jean L. Cohen, *Civil Society, Populism and Religion*, 24 CONSTELLATIONS 283 (2017) (noting that "[p]opulist movements claim to be the sole legitimate voice of the homogeneous unified authentic people" and summarizing the way populists attack elites and discredit the press); Aziz Z. Huq, *The People Against the Constitution*, 116 MICH. L. REV. 1123 (2018) (identifying three implications of Müller's theorization of populism for U.S. constitutional law); Nadia Urbinati, *Political Theory of Populism*, 22 ANN. REV. POL. SCI. 111, 123 (2019) ("The logic of populism is the glorification of one part.").

51. *See* Bernstein & Staszewski, *Judicial Populism*, *supra* note 5, at 287.

52. *Id.* at 284 ("Populism is thus an exclusionary form of identity politics.").

53. *Id.* at 288–89 ("Populist leaders claim special access to the people's will, which democratic institutions allegedly miss, ignore, or distort.").

single will, then those who disagree or differ must be somehow opposed to the people—enemies of the people, rather than legitimate political adversaries.[54]

While discussions of populism have focused almost entirely on the political sphere, we argued in prior work that authoritarian populist rhetoric has also insinuated itself into the law.[55] Like political populism, *judicial populism* propagates the illusion that the American public unites around a single, correct meaning for law, which only the Court is capable of divining. As with populism's popular will, this single correct meaning is largely divorced from the actual institutions through which decisions in a democracy are made. Writers employing this rhetoric tend to claim that their particular methods of legal interpretation lead to clearly correct, indisputable answers—an attitude that denies the inherent indeterminacy of law and pretends to provide a neutral and uniquely legitimate way to extract law's single truth.[56] Thus, like populist leaders, judges stand in some sense above the fray of democratic contestation, able to divine the true will of the people in the law.

This rhetoric abstracts away from the work of legislatures and agencies, the key institutions that convert differences into decisions. Instead, it lodges the truth of law in sites less amenable to dispute or ongoing contestation. So, writers in this vein might claim that their interpretation channels the views of a law's original audience or the word usages of ordinary speakers—publics that are never actually consulted (nor, usually, available for consultation). Or they might insist that the people's meaning is clearly discernable from the law's text—even when that text itself is the object of contestation in litigation.[57] Like political populism, these methods and doctrines ignore the pluralistic nature of democracy, undercut institutions that mediate differing opinions, and disparage competing views.

This rhetoric, which challenges the legitimacy of disagreement and valorizes impossibly enduring decisions, has become effectively normalized in much legal theory. We have argued elsewhere that the use of familiar logical forms and simplistic arguments have helped obscure its anti-democratic implications. For instance, this rhetoric sometimes uses syllogisms whose premises do not compel a particular conclusion. The familiarity of the syllogistic form lends the argument force even though the syllogism itself is flawed.[58] This rhetoric also privileges particular interpretive methods—especially textualism

54. *Id.* at 289–90 ("[Populism] denies the very possibility of ongoing political engagement among groups with different interests or views; it sees contestants as enemies.").

55. *See id.* at 293–308.

56. *Id.* at 338–44 (identifying the key tropes and stock stories of this rhetorical form and explaining why it is "populist" in nature).

57. *Id.* at 308–24 (discussing how textualist and originalist writings often manifest the anti-pluralist, anti-institutionalist, and Manichean traits of populism).

58. *Id.* at 342.

and originalism[59]—and decries considering the consequences of judicial rulings.[60] Here, the rhetoric draws on the familiar language of judicial minimalism; but this minimalism differs dramatically from that espoused by theorists of "the passive virtues." Passive virtue theory figures courts as normative vanguards who lead through restraint.[61] Judicial populist rhetoric, in contrast, rejects a normative role for courts, seeking to position them as enunciators of a pure truth, standing above democratic argumentation.[62]

59. While originalism and textualism come in many different flavors, judicial adherents of these methods tend to use rhetoric suggesting that the unambiguous meaning of the text is legally dispositive and that most interpretive problems have a single correct answer. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 6 (2012) ("As we hope to demonstrate, most interpretive questions have a right answer."); Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 320 (2017) ("In my own opinions as a judge, I have never yet had occasion to find a statute ambiguous."). To the extent these interpretive methods are variable and discretionary in practice, they allow textualist and originalist judges to adopt their own preferred interpretations of the law while attributing those results to "the People." Both the discretion created by the variability of textualism, and its associated populist rhetoric, were vividly displayed by the three competing textualist opinions in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). *See* Bernstein & Staszewski, *Judicial Populism*, *supra* note 5, at 315–17 (analyzing *Bostock*'s three competing textualist opinions); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 279–90 (2020) (recognizing the variability of textualism).

60. Two decisions from the Supreme Court provide prominent recent examples. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2276–79 (2022) (claiming that considering the harmful societal consequences of overruling *Roe v. Wade* would constitute an abuse of judicial authority); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126–31 (2022) (declining to consider contemporary societal needs and consequences when evaluating the constitutionality of gun control legislation, instead focusing exclusively on text and historical tradition, and claiming that the "Second Amendment 'is the very *product* of an interest balancing by the people' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense. It is this balance—struck by the traditions of the American people—that demands our unqualified deference" (quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008))); *id.* at 2157–59 (Alito, J., concurring) (claiming that the prevalence of gun violence in this country could not possibly be relevant to the Court's decision).

61. Bernstein & Staszewski, *Judicial Populism*, *supra* note 5, at 335–36.

62. *See id.* at 336–38 (quipping that judicial populist rhetoric engages in "*passive virtue signaling*"). Judicial opinions of this nature sometimes claim the mantle of pluralistic contestation by seeking to leave constitutional issues for resolution through the political process or by the people of the states. *See, e.g.*, *Dobbs*, 142 S. Ct. at 2243 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."); Obergefell v. Hodges, 576 U.S. 644, 713 (2015) (Scalia, J., dissenting) ("I write separately to call attention to this Court's threat to American democracy."). However, by refusing to consider the consequences of their decisions and failing to provide persuasive justifications for their positions that could reasonably be accepted by people with fundamentally competing interests or views, those decisions often result in the domination of adversely affected individuals or groups and thereby undermine democracy. *See* Staszewski, Obergefell, *supra* note 42, at 53–60 (arguing that *Obergefell*'s recognition of a constitutional right to marriage equality was democratically legitimate based on principles of deliberative democracy); Staszewski, *Deliberative Precedent*, *supra* note 30, at 67–71 (arguing that *Dobbs* was fundamentally undemocratic and endorsing *Casey*'s undue burden test as a "reasonably justified deliberative compromise" that "gave recognition to the central position of 'both sides' of the debate" while leaving room for ongoing deliberation and contestation regarding the precise scope of the abortion right). The republican idea of freedom as

In general, judicial populist rhetoric has drawn on the popularity and intuitive appeal of formalism to press an image of law as univalent, determinate, and logically deducible through the proper algorithms, or methods—and therefore not properly subject to pluralist debate or consequential reasoning. Because judges necessarily exercise discretion in resolving hard cases, this rhetoric effectively allows judges to attribute their own preferences or choices to the people. And by limiting the range of information and argumentation that courts can take into account, these moves constrain the role of contestation in adjudication. As we show in the following part, they have been used in particular to undermine the primary arenas in which contestation about law and policy happens in our system: legislatures and, especially, agencies. In this way, this approach helps naturalize the noncontestatory vision of populist rule. It funnels authority to less contestatory power nodes: the President and the courts. These political actors are not forced to negotiate about their decisions to nearly the same extent as legislatures and, again, especially agencies. Here, we focus on administrative law and regulatory governance to show how judicial populist rhetoric undermines specifically *administration* as a contestatory institution—an institution increasingly central to the legitimate operation of our republican democracy.

II. AGONISTIC REPUBLICAN ADMINISTRATION AND POPULIST REGULATORY JURISPRUDENCE

Administrative agencies are the primary sites of pluralistic contestation over public policy in the United States. That does not mean, of course, that agencies always take all relevant interests into account. But in our government setup, they are more capable of, and more prone to, mediating among divergent views than any other institution. This part reviews why and how that is. It then explains how several trends in populist regulatory jurisprudence work together to undermine democratic contestation. We focus particularly on the judicial attack on respect for agency competence as expressed in the *Chevron* doctrine; the reinvention of a broad nondelegation doctrine limiting Congress's

nondomination infuses our vision of agonistic republicanism with substantive content, yielding a political theory with both procedural and substantive dimensions. *Cf.* DANIELLE ALLEN, JUSTICE BY MEANS OF DEMOCRACY 12–15 (2023) (advocating a principle of "difference without domination" that gives the procedural aspects of justice a substantive component); Glen Staszewski, *Justice by Means of the Administrative State*, 122 MICH. L. REV. (forthcoming 2024) (manuscript at 1) (on file with the North Carolina Law Review) (arguing that administrative agencies are the best positioned institutions in contemporary American government to promote difference without domination and Allen's broader theory of justice). Accordingly, we are not suggesting that courts should never recognize fundamental constitutional rights or remove issues from the political process, but that those decisions should be justified on the merits and the Court should leave room for further deliberation when possible. *See infra* note 261 (providing examples of approaches to constitutional interpretation that are broadly compatible with this view).

legislative scope; and a nebulous major questions limit on agency authority. We also explain that unitary executive theory mirrors these doctrines that undermine contestatory administration by lodging power in the less contestatory President.

A. *Administration as a Contestatory Site*

The kind of contestation that agonistic republicanism places at the heart of democracy occurs most prominently within the administrative state. This may seem like an odd place to find it. After all, some of our most enduring images of government bureaucracy present it as the opposite of a site for negotiating among disparate perspectives.[63] Instead, it is famous for "melt[ing] individuals into a mass, subordinating them to an unstoppable process" that brooks no dissent.[64] Theorists have distinguished bureaucratic administration—with its ostensible focus on neutral expertise, mechanistic efficiency, and clear conclusions—from that of political action, "where any answer is always subject to further contestation."[65] Bureaucracy can appear—and is often depicted—as a massive, internally undifferentiated monolith.[66]

Yet in the contemporary United States, contestation has been built into administrative governance through statute, practice, jurisprudence, and internal

63. *See* Max Weber, *Legitimacy, Politics, and the State*, *in* LEGITIMACY AND THE STATE 32, 47 (William Connolly ed., 1984) ("'[D]emocracy' as such is opposed to the 'rule' of bureaucracy, in spite and perhaps because of its unavoidable yet unintended promotion of bureaucratization."); *see, e.g.*, FRANZ KAFKA, THE CASTLE *passim* (Mark Harman trans., 2012); HANNAH ARENDT, THE HUMAN CONDITION *passim* (1958); HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL *passim* (1963).

64. Anya Bernstein, *Agency in State Agencies*, *in* DISTRIBUTED AGENCY 41, 41 (N.J. Enfield & Paul Kockelman eds., 2017).

65. *Id.* at 42; *see* HONIG, *supra* note 18, at 116 (discussing Hannah Arendt's view that bureaucracy displaces, instead of actualizing, real politics, and that administration marks a "lack of politics" because it precludes human creativity and action that has unpredictable but vital effects on the world); Bernardo Zacka, *Political Theory Rediscovers Public Administration*, 25 ANN. REV. POL. SCI. 21, 23 (2022) ("Modern states may not be able to govern without large bureaucracies, but the general sentiment toward the latter, among contemporary political theorists at least, has been resolutely circumspect.").

66. William Novak has powerfully argued that the influential ideal-type of bureaucracy developed by Max Weber was a historically specific description of a particularly hierarchical, militaristic instantiation of bureaucracy with no claim to empirical generalization. William J. Novak, *Beyond Max Weber: The Need for a Democratic (Not Aristocratic) Theory of the Modern State*, 36 TOCQUEVILLE REV. 43, 78–79 (2015) (calling the Weberian image of bureaucracy "essentially aristocratic" and "anti-democratic" in the sense of "separating the state from society and its people and re-separating the popular from the sovereignty"). A similar analysis could extend to related preeminent thinkers on bureaucracy, from Franz Kafka to Hannah Arendt to Carl Schmitt. *See generally* Timothy Mitchell, *State, Economy, and the State Effect*, *in* STATE/CULTURE: STATE-FORMATION AFTER THE CULTURAL TURN 76 (George Steinmetz ed., 1999) (arguing for a "different approach to the question of the state and its relationship to society and economy"); Anya Bernstein, *Bureaucratic Speech: Language Choice and Democratic Identity in the Taipei Bureaucracy*, 40 POLAR 28 (2017) [hereinafter Bernstein, *Bureaucratic Speech*] (highlighting "the creative and progressive possibilities hidden within" government bureaucracy).

rule.[67] Agencies react to directives from Congress, implementing the laws that the elected legislature enacts. But that implementation is neither mechanistic nor despotic. It involves negotiation among a range of views and interests, with multiple, differently situated participants engaging in iterative decision-making practices always available for revision.[68] Agencies making binding regulations must engage in a consultative process with the public.[69] They must set forth their plans, respond to comments that anyone may make about those plans, and explain the rationale and projected effects of their final decisions, which must be related to the original plans.[70] Agencies must explain why a rule's benefits outweigh its costs and articulate why the chosen approach is the best way to go, which requires taking into account how a rule will affect different parts of the regulated world.[71] In addition, agencies are specifically required to take into account a rule's potential effects on small businesses,[72] the environment,[73] state and local governments and their budgets,[74] and others.[75] Producing a regulation also requires consultation among agencies with different purviews and missions, leading to internal contestation among government organs themselves.[76] Agencies, in short, cannot promulgate rules without taking into account a wide range of interests and concerns.

67. We do not, of course, make claims about the administration of other states and other times. Administration, like any sociocultural form, can have broad similarities across times and places and yet lack a transcultural, transhistorical essence. *See* Bernstein, *Bureaucratic Speech*, *supra* note 66, at 30 ("It may be more realistic to understand bureaucracy as a loosely defined organizational form that bears some similarities across times and places but is also locally integrated and culturally specific.").

68. *See generally* Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1637–50 (2023) (describing widespread rulemaking practices based on interviews with administrators) [hereinafter Bernstein & Rodríguez, *Accountable Bureaucrat*].

69. *See generally* 5 U.S.C. § 553 (setting forth notice-and-comment requirements for agency rulemaking).

70. *See* Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69, 81–86 (2022) (reviewing a wide range of requirements imposed on agencies through "administrative common law," as part of an argument that the Administrative Procedure Act ("APA") built on, but exceeded, contemporaneous agency practices to make rulemaking broadly inclusive of the general public).

71. *See, e.g.*, Exec. Order No. 12,866, 3 C.F.R. § 638 (1993); Exec. Order No. 13,563, 3 C.F.R. § 215 (2011); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A-4, REGULATORY ANALYSIS (2003).

72. Regulatory Flexibility Act, 5 U.S.C. §§ 601–612.

73. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–347.

74. Exec. Order No. 13,132, 3 C.F.R. § 206 (1999); Unfunded Mandates Reform Act of 1995, Pub L. No. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.).

75. *See* Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533, 536–37 (2000) (providing a chart of the statutes and executive orders that an agency must consider at each step of the rulemaking process).

76. *See* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1841 (2013) ("OIRA frequently operates as a conveyer and a convener."). *See generally* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995) (discussing the development of the interagency review process for rulemaking).

In practice, agencies routinely go beyond these requirements to make decision-making pluralistic. Many agencies engage in extensive interaction with affected groups, incorporating different perspectives into policy development.[77] Policy production also typically involves a multitude of participants with a variety of backgrounds, concerns, areas of expertise, and connections to other parts of the government: career civil servants and political appointees, lawyers and economists and experts in the particular topical area of the regulation, technical specialists, White House representatives, legislative liaisons, old-timers, newcomers, and so on.[78] Of course, not every interest and viewpoint will be represented in any given decision, but the mix involved in standard rulemaking processes is generally varied and dynamic.[79]

Finalized agency decisions are often challenged in court, where an agency must articulate how its action serves what it understands to be the goals of the statute.[80] It must credibly demonstrate that it took into account the statutory mandate, the interests of affected parties, and the plausible alternatives.[81] And it can be challenged on procedural grounds as well as on its choices regarding ends and means.[82] Even while the doctrine instructs courts to give agencies considerable leeway in their decisions, it also demands that courts reject agency action that is legally impermissible or fails to respond in a reasoned fashion to important aspects of the problem.[83] Courts are therefore asked to ensure that agencies engage in rational and rule-bound decision-making.

No other part of our government is required to consider as many views and interests as agencies. And in practice, agencies go beyond those requirements. They are also the most constrained in the decisions they can make, being bound to a standard of rationality, rather than just constitutionality. For instance, agencies must provide reasoned justifications for their decisions to withstand judicial review; courts may not hypothesize a plausible explanation for agency action as they might in rational basis review of

77. *See generally* Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 816–31 (2021) [hereinafter Sant'Ambrogio & Staszewski, *Democratizing*] (reviewing a range of ways agencies involve affected publics in developing policy ideas).

78. *See* Bernstein & Rodríguez, *Accountable Bureaucrat*, *supra* note 68, at 1627–37 (documenting the unique and complementary roles of political appointees and career civil servants in the policymaking process).

79. *See id.*

80. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (holding that the agency must "articulate a satisfactory explanation for its action").

81. *See id.*; United States v. N.S. Food Prods. Corp., 568 F.2d 240, 252–53 (2d Cir. 1977) (holding that the APA requires agencies to respond to significant public comments).

82. *See* 5 U.S.C. § 706.

83. *See* Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1563–66 (2015) (reviewing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014)).

legislative action.[84] Agencies bear continuing responsibility for the statutes under their purview, which entails taking into account developments in related laws, in the facts of the regulated world, and in the opinions and interests of affected publics. All this both requires and enables agencies to act as a site for multilateral, diachronic contestation over specific policy decisions.[85]

The other branches are not required to, and often not equipped to, entertain such a diversity of views. Courts hear adversarial cases, so some contestation is built into the judicial system.[86] Yet that contestation is usually highly limited. It pits two primary parties against each other rather than incorporating a wide range of views that can overlap and diverge at different points. Those parties get to frame the dispute without regard for the interests of others. Litigation focuses on narrow questions in which the parties have specific stakes, not on their wider implications.[87] And although court judgments have policy effects, they do so primarily through evaluating the policies of others, not by constructing complex plans themselves. Agencies, in contrast, encompass a broad swath of views that can differ to different extents and in different ways, rather than standing adversarially opposed on the limited range of issues cognizable by courts. Their temporal range is much longer and more flexible. Extensive consultation with a broad range of people, including intra- and inter-agency review, pushes agencies to consider the effects of their policies not just on a couple of litigants but on affected publics more generally. Agencies also do not have the luxury of simply evaluating others' actions; they must construct reasonably acceptable and defensible policies themselves.

Congress, meanwhile, though also set up to incorporate pluralism, remains less contestatory than agencies. It is generally not required, for instance, to articulate its rationales or to specify and justify the effects of its actions; merely being constitutional suffices. For the most part, only occasional elections effectively constrain members of Congress. Elections, meanwhile, are often identitarian rituals that ask voters to take yes-or-no stances on a highly limited

84. SEC v. Chenery Corp., 318 U.S. 80, 95 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."); *see* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 955–56 (2007) (distinguishing the *Chenery* principle from rational basis review).

85. *See* JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY 177 (2018) (claiming that this process of "reasoned administration" by agencies "may be the most democratic form of collective decision-making in American national political life"); *see also* Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1655 (2018) ("[T]he American bureaucracy is very much a demotic institution, demographically diverse, highly accountable, and lacking financial incentives or caste proclivities to subvert popular will.").

86. *See* Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 WM. & MARY L. REV. 221, 231 (2013).

87. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–62 (1992) (holding that plaintiffs only have standing to sue if they can show concrete, particularized, actual or imminent harms caused by, and redressable by, defendants).

slate of options. Elections offer voters no opportunity to voice their positions on a range of particular policy questions, and so give members of Congress little information about the various viewpoints and interests of their constituencies.[88] And with increasingly safe seats, members of Congress are often not constrained much by elections to begin with.[89] They may be more beholden to their donors or their party than to the diverse publics they are supposed to represent. And they can remain secure in their continued tenure even if they do not take a broad range of viewpoints or interests into consideration.[90]

With their multiple channels for diverse inputs and their strong structural safeguards against arbitrary decisions, agencies are our central institutions for mediating among divergent views and interests.[91] If we agree that contestation is central to the practice of democracy, as suggested in Part I, then agencies are a primary site for democratic governance. Like any human endeavor, the administrative process is also rife with problems, leaving some perspectives unconsidered while overvaluing others, and affecting some parties more negatively than others.[92] Indeed, agencies have done their share to marginalize

88. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2075–98 (2004). *See generally* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253 (2009) (arguing that the presumption "that elected officials are politically accountable for their specific policy decisions because they are selected and potentially removed from office by the voters" is "simply not the case").

89. *See, e.g.*, Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 266 (2006).

90. *See* Brian Feinstein, *Congress Is an It: A New View of Legislative History*, 72 EMORY L.J. (forthcoming 2023) (manuscript at 17) (on file with the North Carolina Law Review).

91. This Article focuses primarily on the distribution of policymaking authority within the American federal government, and we therefore do not articulate any particular theories of federalism. We recognize that state governments, or at least some state governmental institutions, could serve as important sites for pluralistic contestation. That said, recent literature on federalism suggests that contemporary state governments may be operating more as arms of the national political parties and other organized advocacy groups than as "laboratories of democracy." *See* JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS 97–122 (2022); ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESS, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION 1–14 (2019); Jacob M. Grumbach, *Laboratories of Democratic Backsliding*, AM. POL. SCI. REV., Dec. 2022, at 9; Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2187–93 (2022) (highlighting the role of "coordinated networks of third-party organizations (such as interest groups, activists, and funders) that often fuel policy innovation" in the states); David Landau & Rosalind Dixon, Dobbs, *Democracy and Dysfunction* 11–16 (2023) (unpublished manuscript) (on file with the North Carolina Law Review) (arguing that gerrymandering and other electoral dysfunctions in state governments undermine the democratic process). These political dynamics tend to undermine state governments' deliberative and contestatory character and could facilitate arbitrary decision-making and the possibility of domination. We are therefore skeptical that devolving policymaking authority to the states generally promotes pluralistic contestation.

92. *See, e.g.*, Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV'T L. REV. 325, 345–46 (2014) (detailing

and subordinate vulnerable communities, both through differential treatment and through failing to account for inequitable policy effects.[93] Both the general democratic character of the administrative state and the specific practices of particular agencies should be subject to ongoing scrutiny, reform, and improvement. Nonetheless, the practices of federal agencies in the United States today make them our government's key site for the kind of pluralistic contestation that agonistic republicanism, at least, places at the heart of democratic practice.[94]

B. *Judicial Populism in Regulatory Jurisprudence*

The preceding part introduced a populist orientation in law, echoing one in politics, that insists on the existence of single, correct answers to legal or policy questions that have significant effects. Yet in a pluralistic democracy, those issues are often subject to reasonable disagreement that should inform legitimate collective decision-making. The key institution to host such disagreements in the contemporary U.S. system is the administrative state.[95]

ways that cost-benefit and economistic perspectives superseded subject matter expertise in EPA rulemaking). *See generally* Bijal Shah, *Administrative Subordination*, 90 U. CHI. L. REV. (forthcoming) (on file with the North Carolina Law Review) (providing a review of literature detailing agencies' subordination of vulnerable communities).

93. *See generally* Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. 370 (2021) (providing an historical account of how antidiscrimination principles were erased from administrative law); Shah, *supra* note 92 (manuscript at 7) (arguing that an over-focus on "institutional" values like administrative resource conservation, burden avoidance, and discretion maintenance pushes agencies to subordinate the vulnerable).

94. This is not to say that administration will always provide a contestatory center—far from it. There are many other ways of arranging contestation. Take, for instance, a parliamentary system with several political parties, like Germany's, which has semi-proportional representation; coterminous service in the legislature and the administration; and multiple, nested regional and interest-based nodes of political participation and administrative decision-making. There, the primary sites of contestation may more realistically be lodged in the parliament and the party organizations that feed into it. But the U.S. system as currently practiced enables more contestation within the administration than in the other branches. There remains, of course, lots of room for improvement. *See infra* Conclusion (identifying ways to further strengthen agency contestation).

95. It is possible that Congress once played this mediating, contestatory role; but those functions have largely been transferred to agencies. In any event, making government responsive and interactive, yet also somewhat insulated and removed, was contemplated in the constitutional design. *See* David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 132–33 (2000) ("By insulating Senate decisionmakers from direct electoral pressure (through indirect election and six-year terms), the Founders sought to create an environment conducive to deliberation and the development of expertise. . . . [A]dministrative agencies serve the deliberative function that the Senate once did." (citing JOHN A. ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE 171–94 (1986))); Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1547, 1619 (2018) (arguing that the "administrative state [is] an outgrowth of the [congressional] petition process," because older forms of interaction between private parties and the federal government mediated through constitutionally recognized petitions have migrated to administrative procedures).

Administrative agencies participate in the production and implementation of federal law at virtually every stage, so whatever contestation occurs in Congress encompasses them as well.[96] But more importantly, as discussed in the previous section, agencies enable the contestation and provisional resolutions crucial to democratic governance. The expertise commonly attributed to administrative agencies is important not so much because it gives them a neutral or objective vantage from which to make decisions, but because it provides an experienced and knowledgeable basis on which to convene affected publics, understand divergent interests, and address continued disagreements.[97] Agencies are also relatively well-positioned to use their regulatory experience and subject matter expertise to assess the quality of the data, views, and arguments presented by interested members of the public. Agonistic republicanism does not require agencies to accord the same weight to every idea regardless of its cogency, accuracy, or persuasiveness; it allows people to air their views and subject them to the judgment of others—including those who know more.

Judicial populist writing on the regulatory state, in contrast, invokes anti-pluralist, anti-institutional, and Manichean imagery to denigrate and undermine this contestatory side of administration. Disavowing the legitimacy of considering the consequences of government action—something agencies are required to do—this rhetoric instead seeks to ground legitimacy in interpretive methods like originalism and textualism. It presents those methods as reliably leading to correct understandings of the law in ways that constrain judicial decision-making to ensure it reflects the will of the people as expressed through the law. In fact, though, by shutting out relevant considerations and resting interpretation on empirical-sounding but unfalsifiable claims, these methods leave judges largely free to rule as they want: they are the opposite of constraining.

96. *See* CHRISTOPHER J. WALKER, FEDERAL AGENCIES IN THE LEGISLATIVE PROCESS: TECHNICAL ASSISTANCE IN STATUTORY DRAFTING 5–11 (2015); Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 467–83 (2017) [hereinafter Shobe, *Agencies as Legislators*].

97. *See, e.g.*, RAHMAN, DEMOCRACY, *supra* note 23, at 31–39 (criticizing the neutral expertise or managerial model of administrative law in favor of one that focuses on promoting nondomination). *See generally* Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849 (2012) (arguing that political control models are premised on a majoritarian conception of democracy, which contrasts with a deliberative conception that is not wholly technocratic but in fact more fully democratic); MASHAW, *supra* note 85, at 157–58 ("[The] traditional tension between politics and expertise does not put the question in quite the right way [because] . . . [f]or deliberative democrats, . . . administrative policymaking, like all government action, is legitimate just to the extent that it can be justified by reasons."); Bernstein & Rodríguez, *Accountable Bureaucrat*, *supra* note 68, at 1667 (arguing that empirical evidence of deliberation and responsiveness in the regulatory state "belie the insular, expertise-driven conception of agency action that often drives the critique of the unaccountable bureaucrat").

Since there is no single will of a unified people that can be expressed through the law, and since law, like other government action, is inherently subject to pluralistic visions, these methods' failure to deliver on their claims is fairly predictable. Nonetheless, in recent years, courts have increasingly mobilized a rhetoric based on these fictions. This is particularly clear in the jurisprudence on agency statutory interpretation and congressional authorization of agency action—that is, *Chevron* deference, nondelegation, and major questions—as well as in the push to concentrate administrative power in the President instantiated in unitary executive theory. This part discusses each area in turn.

1. Anti-Deference

Most federal legislation is addressed to federal agencies, which continue to effectuate the laws that Congress passes even when the enacting Congress is long gone. In some sense, the central conversation of governance is thus between Congress and agencies.[98] For a long time, Supreme Court doctrine recognized the centrality of agencies to implementing laws, and the slightly peripheral role that implied for courts.[99] That three-way relationship was in some sense standardized with *Chevron v. Natural Resources Defense Council*,[100] which cast courts as boundary managers for agency interpretations of law. *Chevron* rejected a challenge to a Reagan administration policy change that loosened constraints on new polluting structures.[101] Rather than encompassing any structure generating a particular level of pollution individually, as the previous policy had, the new rule took as its object groups of polluting structures operated as part of the same economic or industrial unit.[102] By reinterpreting key terms in the statute, the new rule changed the universe of regulated objects.

98. *See* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 772–74 (2014); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 372–74 (1989).

99. "Courts invoked this principle [of deferring to administrative agencies] throughout the nineteenth century, before the proliferation of administrative tasks had become an issue of major political and legal contention." Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2029–30 (2018) (providing case law citations).

100. 467 U.S. 837 (1984).

101. *Id.* at 842–48.

102. *Id.* at 840 (explaining that the regulation at issue allowed states to define the "stationary source" that was the object of the Clean Air Act's constraints in a "plantwide" way, such that "an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant," thus "treat[ing] all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble'").

Accepting this deregulatory reinterpretation, the Court concluded that the term was "ambiguous," or susceptible to multiple interpretations.[103] "[I]f the statute is silent or ambiguous with respect to the specific issue," the opinion explained, "the question for the court" is not the statutory term's unique or enduring meaning but rather "whether the agency's answer is based on a permissible" or "reasonable" "construction of the statute."[104] Given that an ambiguous term may reasonably have more than one meaning, a "court need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[105] Thus, since the statute did not unambiguously demand either the individual-structure or the economic-unit-wide definition, the Court "conclude[d] that the EPA's use of [the 'bubble'] concept" in its new interpretation was "a reasonable policy choice for the agency to make."[106]

If a term is reasonably susceptible of more than one meaning, then there simply is not "only one" interpretation an agency "permissibly could have adopted,"[107] and courts should not attribute eternal meanings to such inherently malleable terminology. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[108] recognized this implication, holding that if a court upholds an agency's terminological definition as a reasonable interpretation of an ambiguous statutory term, the *Chevron* framework still applies if the agency subsequently changes that definition.[109] At the same time, the case law has

103. *Id.* at 842–43 ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." (internal footnotes omitted)). *Chevron* talks of ambiguity, but something like multivalence more accurately describes the situation. *See* Anya Bernstein, *Differentiating Deference*, 33 YALE J. ON REGUL. 1, 7 (2016) ("With multivalence, there is no single correct answer to the question of what a word refers to, because there are multiple correct possibilities. The term can refer to more than one referent, or it can be agnostic as to which object it refers to, or it can leave open the possibility of referring to one thing now and another thing later. For instance, if I sing, 'He . . . put out the cat, his cigar, and the light,' the multivalent phrase 'put out' correctly refers to several different physical acts." (quoting MICHAEL FLANDERS & DONALD SWANN, THE SONGS OF MICHAEL FLANDERS AND DONALD SWANN 143 (Faber ed. 1977))) [hereinafter Bernstein, *Differentiating Deference*].

104. *Chevron*, 467 U.S. at 843–44.

105. *Id.* at 843 n.11.

106. *Id.* at 845.

107. *Id.* at 843 n.11.

108. 545 U.S. 967 (2005).

109. *Id.* at 980. *Brand X* is sometimes mischaracterized as allowing agencies to overrule court legal interpretations. *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1143 (10th Cir. 2016) (characterizing *Chevron* and *Brand X* as meaning "that an agency may overrule a court"); Note, *Administrative Law* — Chevron *and* Brand X — *Tenth Circuit Holds that Certain Agency Interpretations Have No Legal Effect Until Courts Approve* — Gutierrez-Brizulea v. Lynch*, 834 F.3d 1142 (10th Cir. 2016)*, 130 HARV. L. REV. 1496, 1496 (2017) ("In effect, then, *Brand X* permits agencies to overrule courts

limited the contexts in which courts defer to agency interpretations. The *Chevron* framework comes into play primarily for agency interpretations that emerge from rulemaking subject to notice-and-comment procedures and from formal adjudication, which involves an evidentiary hearing before a relatively independent administrative law judge.[110] These limits leave *Chevron* applicable to those agency policymaking forms that involve the most opportunity for contestation among disparate viewpoints and interests.[111]

Of course, *Chevron* is itself hardly univalent; it can be utilized in different ways. The two-step framework asks judges to accept an agency's reasonable interpretation of a statutory term that the judge has found ambiguous.[112] But judges who are convinced that laws usually have a uniquely correct meaning may be less likely to find statutory terms ambiguous to begin with. Thus, *Chevron*'s contestatory implications can be sidestepped by a judge who claims that her own preferred interpretation of a statutory term is the unambiguously correct one, thereby imposing a single, final judicial construction at *Chevron*'s

when the circumstances are right."). In fact, under *Brand X*, *Chevron* deference does not apply to a new interpretation if a court has determined that the statute unambiguously requires the earlier interpretation. *Brand X*, 545 U.S. at 982. So, *Brand X* does not allow an agency to overrule a court interpretation; it just allows the agency to change its own interpretation, including one that has been countenanced by a court. The mischaracterization seems to rest on a conflation of *may* and *must*. When a court upholds an agency statutory interpretation, call it "X," under *Chevron*'s second step, it holds not that the law must mean X but that the law *may* mean X, among other things—or, in the register of *Marbury*, that "what the law is" encompasses (but is not necessarily coterminous with) X. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). If the agency subsequently produces a new interpretation, "Y," a court might have to decide whether Y is one of those other things that the law encompasses. But the agency's promulgation of a new interpretation does not undermine, much less overrule, the original holding that the law encompasses X, among other things.

110. *See* 5 U.S.C. §§ 553–554, 556–557; United States v. Mead Corp., 533 U.S. 218, 219 (2001). *See generally* VALERIE C. BRANNON & JARED P. COLE, CONG. RSCH. SERV., R44954, CHEVRON DEFERENCE: A PRIMER (2017) (providing an overview of the *Chevron* framework).

111. Scholars have made strong arguments for differentiating these two policymaking forms in the *Chevron* context. *See generally* Kristin Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931 (2021) (arguing that the *Chevron* framework should not apply to agency adjudication); Shoba Wadhia & Christopher Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197 (2021) (arguing that *Chevron* deference is unwarranted in immigration adjudication). While we take no position on those specific arguments here, we think it makes sense to evaluate the *Chevron* framework from the perspective of contestation. Our point here is that *Chevron* applies to the most highly contestatory aspects of policymaking in the agency context—itself the most highly contestatory context in our government system.

112. *See supra* notes 103–07 and accompanying text.

step one.[113] This approach should be particularly attractive to textualists,[114] who treat interpretation "like a puzzle to which it is assumed there is one right answer."[115] As Thomas Merrill has explained, this "active, creative approach to interpretation is subtly incompatible with an attitude of deference toward other institutions—whether the other institution is Congress or an administrative agency."[116] Judge Raymond Kethledge has recently offered a good example of Merrill's claim, asserting that "[i]n my own opinions as a judge, I have never yet had occasion to find a statute ambiguous."[117] In reality, as Merrill explains, "the textualist interpreter does not *find* the meaning of the statute so much as *construct* the meaning."[118]

Despite this escape hatch, the *Chevron* doctrine recognizes that congressional legislation routinely sets broad goals that agencies can work toward in different ways, taking into account a range of information and perspectives. Agencies might, for instance, be influenced by practical circumstances that change the regulated world itself; evolving social relations and understandings that bring different perspectives to bear, give different groups different stakes, and potentially include previously excluded people and ideas; and changing presidential administrations and the diffuse political connection they inject into administration.[119] That pluralistic intersection of many different perspectives, positionalities, and interests creates the conditions for the kind of contestation that can bring democracy to life.

The *Chevron* framework thus helps protect, however imperfectly, the conditions of possibility for contestatory decision-making. Agency policymaking—and especially rulemaking—operates on a longer timescale, involves more pluralistic engagement, and yields more integrated and detailed policy than either majoritarian elections or counter-majoritarian courts can achieve. No surprise, then, that it has become a central target of anti-

113. *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989) (recognizing that, under *Chevron*, textualist judges would not be required to defer to agencies as often as their nontextualist counterparts due to textualism's penchant for finding regulatory statutes unambiguous); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 831–32 (2006) (providing empirical support for this assertion by finding that Justice Scalia was the least deferential justice on the Court in *Chevron* cases).

114. *See* Bernstein & Staszewski, *Judicial Populism*, *supra* note 5, at 309–18 (explaining that textualism sounds in judicial populist rhetoric).

115. Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994).

116. *Id.* ("Such a person will very likely experience some difficulty in deferring to the meanings that other institutions have developed.").

117. Kethledge, *supra* note 59, at 320 ("In my view, statutory ambiguities are less like dandelions on an unmowed lawn than they are like manufacturing defects in a modern automobile: they happen, but they are pretty rare, given the number of parts involved.").

118. Merrill, *supra* note 115, at 372.

119. *See* Bernstein & Rodríguez, *Accountable Bureaucrat*, *supra* note 68, at 1650–66.

contestatory, populist legal rhetoric.[120] Writing in this vein tends to cite concerns about the separation of powers and the inherent responsibilities of government branches, insisting that courts abdicate their constitutional responsibilities when they allow agencies to interpret the statutes agencies implement.[121] Yet the practical implications of overruling *Chevron* would be to diminish contestatory opportunities for provisional determinations of the law, replacing them with substantially stickier and much less pluralistic judicial determinations.

A recent case out of the Third Circuit emblematizes how judicial populist imagery undermines the contestatory role of the administrative state. *Egan v. Delaware River Port Authority*[122] evaluated a Department of Labor ("DOL") interpretation of a Family and Medical Leave Act ("FMLA") provision. Section 2651(a)(1) of the FMLA made it unlawful for "any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under" the relevant part of the statute.[123] A DOL regulation interpreted this to prohibit employer retaliation against the exercise of employee rights under the statute.[124] Under the regulation, an employee could demonstrate retaliation by showing that the "exercise of FMLA rights was 'a negative factor' in the employer's employment decision."[125] That is, the regulation provided that plaintiffs could succeed on a "mixed motive" argument.[126] Using the *Chevron* framework, the court determined that "the term

120. Perhaps it is also unsurprising that the Court's most conservative justices were some of *Chevron*'s biggest fans when the doctrine was first announced, at which point largely liberal federal judges were reviewing the deregulatory initiatives of Republican administrations. The conservative attack on *Chevron* only gained steam during the Obama administration and accelerated as the federal judiciary become more conservative. *See generally* Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 621 (2021) (providing an historical analysis to show that "ostensibly apolitical arguments against *Chevron* are actually part of a recent phenomenon that has mirrored changes in partisan politics"); Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 475 (2022) (providing "a framework for understanding the shifting politics of deference").

121. *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design.").

122. 851 F.3d 263 (3d Cir. 2017).

123. *Id.* at 270 (quoting 29 U.S.C. § 2615(a)(1)).

124. *See id.* at 268 n.1 (quoting 29 C.F.R. § 825.220(c)).

125. *Id.*

126. *Id.* ("Generally speaking, in a 'mixed-motive' case a plaintiff claims that an employment decision was based on both legitimate and illegitimate reasons. Such cases are in contrast to so-called 'pretext' cases, in which a plaintiff claims that an employer's stated justification for an employment decision is false." (quoting Connelly v. Lane Constr. Corp., 809 F.3d 780, 787 (3d Cir. 2016))).

'interfere with' is susceptible to multiple interpretations," and that, "[i]n light of Congress's language and goals," the DOL's reading was "reasonable."[127]

In a separate concurrence in the judgment, Judge Kent Jordan argued that "[t]he doctrine of deference" runs "contrary to the roles assigned to the separate branches of government" and "spread[s] the spores of the ever-expanding administrative state."[128] To support this argument, the opinion misrepresents agency decision-making, making it sound much less constrained and pluralistic than it is. The concurrence describes the DOL regulation as "announced by unelected officials in an administrative agency" "based on the judgment of someone inside the Department tasked with enforcing the FMLA,"[129] and states that the agency could "change its statutory interpretation with minimal justification and still be entitled to full deference from Article III courts."[130] These statements bear elements of truth. Administrators are indeed "unelected"; they do "announce" the results of rulemaking processes; and they are entitled to "change [their] statutory interpretation" of ambiguous terms. Yet these snide descriptions obscure crucial aspects of administrative policymaking that give these truths a different cast. Agency decision-making is highly constrained; it emerges from more substantive interaction with members of diverse affected publics than either legislatures or courts engage in; and the reinterpretation of ambiguous terms is entitled to deference only if rationally justified.[131] The concurrence's misleading assertions ignore the administrative process and make it sound as though government's most constrained and contestatory institution proceeded merely by whim and fiat.[132] But in our

127. *Id.* at 270–71. The court came to this conclusion even though the Third Circuit itself had previously "described, in general terms, § 2615(a)(1) as the 'interference' provision," and the following section, "§ 2615(a)(2)[,] as the 'retaliation' provision." *Id.* at 270 n.3.

128. *Id.* at 278 (Jordan, J., concurring). The language of spores suggests that the part of the government most able to take account of pluralistic positions is some sort of infection or fungal growth. *But see* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 376 (2019) ("The Constitution's separation of powers has no legal bearing on the separation of agency functions.").

129. *Egan*, 851 F.3d at 283 (Jordan, J., concurring).

130. *Id.* at 280.

131. *See supra* Part II.A. The concurrence also implies that recognizing government power is somehow untoward in litigation: "We would never allow a private litigant the power to authoritatively reinterpret the rules applicable to a dispute, yet we routinely allow the nation's most prolific and powerful litigant, the government, to do exactly that." *Egan*, 851 F.3d at 281 (Jordan, J., concurring). This is, of course, not true: every contract that gives a party the authority to impose new terms without notice or consent allows it to reinterpret the rules applicable to a dispute. But even if it were true, the concurrence never justifies the implication that private *litigation* roles should match public *governance*, especially given that one of the main things government does is to construct the terms applicable to disputes. What makes sense of this odd conflation is hostility to regulation.

132. *See, e.g.*, *Egan*, 851 F.3d at 281 n.4 (Jordan, J., concurring) ("The authority that agencies have to create binding law and reinterpret it at will may be heard as an echo of the royal prerogative to issue proclamations and interpret laws.").

system, unelected judges on courts like the Third Circuit are much freer to simply announce their version of the law based on their own judgment.[133]

Indeed, the concurrence suggests as much: it complains that *Chevron* "requires judges to ignore their own best judgment on how to construe a statute, if the executive branch shows up in court with any 'reasonable interpretation made by the administrator of an agency.'"[134] Again, the petulant tone elides the crucial fact that the statute tasks the agency, not the court, with implementing its provisions. There is little reason to think that generalist courts have better judgment regarding employment practices than the agency Congress created specifically to regulate employment practices.[135] The concurrence suggests that deference might serve for "[h]ighly specialized or technical matters," but that those "are far different . . . than the legal matters on which federal courts are now routinely told, in the name of *Chevron*, to bow down and obey the executive branch."[136] This hyperbolic description again ignores that answering questions like the one *Egan* poses involves significant knowledge of empirical realities like market conditions and organizational behavior, not just legal matters.[137]

133. *See supra* Part II.A.

134. *Egan*, 851 F.3d at 278–79 (Jordan, J., concurring) (quoting Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 844 (1984)).

135. The *Egan* concurrence invokes Congress in oddly self-contradictory and unrealistic ways. At one point, it blames agencies for congressional disempowerment: "Even if some in Congress want to rein an agency in, doing so is very difficult because of judicial deference to agency action." *Egan*, 851 F.3d at 280 (Jordan, J., concurring); *see also id.* at 279 ("The deference required by *Chevron* not only erodes the role of the judiciary, it also diminishes the role of Congress."). But deference doctrines limit courts, not Congress; Congress is free to legislate at any level of specificity. Judge Jordan may have found more relevant material on limiting congressional power in the Supreme Court's elimination of the legislative veto, which means that "some in Congress," as Judge Jordan puts it, have no legislative authority outside the full process of bicameralism and presentment. *Id.* at 280; INS v. Chadha, 462 U.S. 919, 959 (1983). At other points, the concurrence laments that deference leaves Congress not too little power, but too much: it "leads to perverse incentives, as Congress is encouraged to pass vague laws and leave it to agencies to fill in the gaps, rather than undertaking the difficult work of reaching consensus on divisive issues." *Egan*, 851 F.3d at 279 (Jordan, J., concurring). In fact, Congress is able to pass vague laws precisely because it does reach consensus on divisive questions about overarching goals. Judge Jordan is, of course, entitled to a personal preference about how specific a statute should be. But others—including Congresses since the founding—could conclude that our government setup argues for entrusting the ongoing implementation of statutes to administration. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 303–13 (2021) [hereinafter Mortenson & Bagley, *Delegation at the Founding*]; 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, 1301 (2020).

136. *Egan*, 851 F.3d at 281 (Jordan, J., concurring).

137. *Id.* at 270 (quoting 29 U.S.C. § 2615(a)(1)). This distinction between "technical" and "legal" matters echoes a proposal one of us made in prior work: that courts should defer more to agency decisions involving evaluations of states of affairs in the world, and less to agency conclusions about issues of law. *See* Bernstein, *Differentiating Deference*, *supra* note 103, at 34–44. But the *Egan* concurrence applies the idea incorrectly: determining what kinds of employer conduct interfere with an employee's assertion of legal rights is a question about the world—the realities of employment, the chilling effects of subtle actions, and so on—rather than a primarily legal question.

The concurrence thus devalues both Congress and agencies in favor of courts. It does so in the name of some lofty values: "individual liberty" and the "preclu[sion of] . . . arbitrary power."[138] It also makes clear that in this case it would, in the absence of *Chevron*, have made showing employer retaliation more difficult.[139] Yet that choice—however reasonable—would not enhance general liberty; its effects would be differentiated. Making retaliation harder to prove would protect the "individual liberty" of employers while restricting that of employees. And it would give employers more opportunities to exert "arbitrary power" over employees, and thus facilitate private domination. It would, at best, increase the liberty of some while constraining that of others. So it is with most choices that have effects in the world. The concurrence instead treats one distinct social group, with its own particular interests, as representing the whole people, with a shared general interest. Such a claim of universal agreement that actually excludes many specific perspectives is a hallmark of populist rhetoric.[140]

The rhetoric of the *Egan* concurrence strikes a populist note, pitting unaccountable, unelected, biased agencies against a victimized people. That people needs a protector. In political populism, that is the political leader; in judicial populism, the judge. Eliminating *Chevron* deference would empower the courts to enunciate what the law really means once and for all—at least until they decide to overturn precedent.[141] This might be a story of virtuous triumph if courts formed the vanguard of legal rectitude. Yet if we see law as part of governance, and democratic governance as pluralist, courts have some obvious drawbacks. They have no role in the production of legislation and so are likely not to be aware of—and have no particular incentive to care about—the larger

138. *Egan*, 851 F.3d at 280 (Jordan, J., concurring) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 629 (1952) (Douglas, J., concurring)).

139. *See id.* at 282 (Jordan, J., concurring) ("Were we free to actually interpret the law rather than merely defer to an executive agency, we might well conclude that the FMLA does not allow for a mixed-motive instruction for Egan's retaliation claim."); *id.* at 283 ("[D]espite the District Court's effort to say what the law is, employers will now face a lower threshold of liability than they would have under the default causation standard."). The concurrence argues that "the default standard of 'but for' causation seems to be applicable and a mixed-motive instruction would seem out of order" for the FMLA, but "because the Department of Labor has interpreted the statute differently, we are obliged to fall in line and adopt a standard for FMLA claims that Congress has never embraced." *Id.* at 282–83. Of course, Congress has also never "embraced" the but-for standard for employment law provisions; courts have imposed it. *See* James MacLeod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 966–71, 1006–12 (2019) (reviewing the development of judge-made causation standards in employment law and discussing experimental evidence that ordinary speakers do not interpret the relevant statutory language to require but-for causation).

140. Bernstein & Staszewski, *Judicial Populism*, *supra* note 5, at 287 ("[Populist] discourse is universalizing—the populist encompasses all. But it is also exclusionary: it does not typically call for greater inclusion of different kinds of groups into the political process.").

141. *See* Staszewski, *Deliberative Precedent*, *supra* note 30, at 8–21 (claiming that horizontal stare decisis does not promote a formal conception of the rule of law and observing that originalists are increasingly privileging their understanding of the Constitution's original public meaning over the Court's presumptive obligation to follow controlling precedent).

legal and policy contexts in which statutes emerge.[142] They do not bear the consequences of their decisions, making them less sensitive to the broad effects that changes in interpretation can have across many fields.[143] And crucially for our purposes, courts are severely limited in enabling contestatory public deliberation about law. Courts suffer from a republican-democratic deficit—not so much because they are counter-majoritarian as because they are noncontestatory.

The absence of different groups of actual people who can talk back to courts as they come to decisions about the effects of the law leaves courts free—certainly freer than agencies—to come to the conclusions they prefer, all while claiming the mantle of an imaginary single people's will. As a practical matter, anti-deference undercuts the contestatory institution of administration and undermines the Congress-agency relationship. Instead, it aggrandizes power to courts, who somehow are supposed to just know what the law really means even absent much practical understanding of what it would take to make law function on the ground. That abstraction away from the realities of governance, and that freedom from the pluralism of the governed, resonates with authoritarian populism.

2. Nondelegation

Where anti-deference focuses on the power of agencies, the nondelegation doctrine turns its sights on Congress itself. Beyond just insinuating courts into the Congress-agency conversation, this theory seeks to impose a constitutional limit on what Congress can say. This "decidedly protean" doctrine has meant a number of things, including that Congress may not delegate authority "to adopt generally applicable rules of conduct," to make regulations that "govern society," to determine what constitutes unlawful conduct, or to make policy on particularly "important" subjects.[144] The unifying claim of the nondelegation doctrine's many versions is that Congress may not give away the "legislative Powers" the Constitution gives it.[145] Proponents argue that such limits preserve the constitutional separation of powers, keeping agencies from usurping

142. *See* Shobe, *Agencies as Legislators*, *supra* note 96, at 524.

143. *See* R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 13–18 (2010).

144. Mortenson & Bagley, *Delegation at the Founding*, *supra* note 135, at 279; *see also* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 86 (2015) (Thomas, J., concurring) (arguing that Congress's delegation of "*any* degree of policy judgment" to non-legislators is impermissible "when it comes to establishing generally applicable rules governing private conduct"); Gundy v. United States, 139 S. Ct. 2116, 2137–38 (2019) (Gorsuch, J., dissenting) (claiming that Congress must resolve the important questions of policy for itself when it seeks to regulate private conduct, and that Congress may only delegate authority to agencies "to fill up the details" of a statutory scheme, find facts, or perform certain "non-legislative responsibilities") (quoting Pan. Refin. Co. v. Ryan, 293 U.S. 388, 426 (1935)).

145. U.S. CONST. art. I, § 1.

congressional power,[146] while keeping Congress from shirking its duty to make legislative decisions.[147] But since no other institution implements congressional directives, the doctrine actually limits Congress's ability to pass efficacious laws. And with its vaguenesses and vagaries, it empowers courts to decide what constitutes the "necessary and proper" legislation that the Constitution empowers Congress to enact.[148] Like anti-deference, then, the nondelegation doctrine undermines more contestatory government institutions in favor of less contestatory ones.[149]

Traditionally, courts have recognized that "Congress may obtain the assistance of its coordinate branches—and, in particular, may confer substantial discretion on executive agencies to implement and enforce the laws,"[150] just "as

146. Some national constitutions explicitly address legislative delegations of discretion to the administration. The German Basic Law, for instance, requires that any agency action be authorized by a statute that specifies the "contents, purpose, and scale" of administrative authorization. Grundgesetz [GG] [Basic Law], art. 80, para. 1 ("Durch Gesetz können die Bundesregierung, ein Bundesminister oder die Landesregierungen ermächtigt werden, Rechtsverordnungen zu erlassen. Dabei müssen Inhalt, Zweck und Ausmaß der erteilten Ermächtigung im Gesetze bestimmt werden."), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html [https://perma.cc/8RCN-EV4P]. *See generally* Uwe Kischel, *Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law*, 46 ADMIN. L. REV. 213 (1994) (comparing the German and United States approaches to delegation and noting that in Germany's parliamentary system, the chief executive is chosen by the governing legislative coalition); *see also The State & Politics: Federal State*, FACTS ABOUT GER., https://www.tatsachen-ueber-deutschland.de/en/politics-germany/federal-state [https://perma.cc/5A4U-AA24] ("[I]t is the parties that make up the government that decide which persons will head the ministries they were allocated in the coalition negotiations."). The United States' Constitution has no provision limiting legislative delegation, instead authorizing Congress to legislate as "necessary and proper" for "carrying [out]" the "Powers vested" in Congress, in "the Government of the United States," and "in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18. *See* Bagley, *supra* note 128, at 374 ("Nothing in the Constitution purports to limit Congress's authority to delegate to agencies.").

147. *See, e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 29, 36 (1995). In contrast, the Supreme Court has ruled that the judiciary generally lacks authority to keep the executive from shirking its duties. *See, e.g.*, Norton v. S. Utah Wilderness All., 542 U.S. 55, 66–67 (2004); Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992); Heckler v. Chaney, 470 U.S. 821, 837–38 (1985).

148. U.S. CONST. art. I, § 8.

149. The nondelegation doctrine has become "the pole star of the conservative legal movement's [reform] project." Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to the Critics*, 122 COLUM. L. REV. 2323, 2323–25 (2022) [hereinafter Mortenson & Bagley, *Response to Critics*]. Not surprisingly, it has garnered a lot of scholarly attention in the last few years. *See, e.g.*, *id.* at 2332 ("[T]he Founders didn't share even an inchoate affirmative belief that congressional delegations of legislative authority were limited by identifiable principles, categories, or impulses."); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1522 (2021) ("[T]here is no direct support for the proposition that there was no nondelegation doctrine at the Founding."); Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. ENV'T L.J. 379, 381–82 (2021) (critiquing the recent positions of the conservative justices). We do not aim to comprehensively review this literature. Our purpose here is to show how this doctrine shifts power from contestatory to noncontestatory institutions in our government, in keeping with other anti-regulatory, judicial populist doctrinal trends.

150. Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)).

long as Congress 'lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.'"[151] On this reasoning, Congress may choose to legislate with specificity, or instead to set out broad goals for agencies to pursue in flexible and variable ways. After all, a given agency may have hundreds or even thousands of employees all working on some particular aspect of law and society, a kind of focus Congress could never achieve.[152] And, as detailed above, agencies have superior convening capabilities, collecting and mediating among a wide range of views on highly specific issues and revisiting decisions over time.[153] When agencies promulgate legislative rules to implement their delegated statutory authority, they can therefore easily be understood as executing the law.[154] Nondelegation proponents, on the contrary, argue that rather than leaving it up to Congress to determine what kind of delegation best achieves its purposes, courts should control how Congress legislates.[155] And because, as Lisa Heinzerling has shown, the available tests for the nondelegation doctrine lack principle and predictability, "a motivated judge" could find "a constitutional problem" with "just about any agency decision."[156] As with anti-deference, such judicial control over Congress would empower noncontestatory courts at the expense of more contestatory legislatures and agencies.[157]

151. *Id.* (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (internal brackets omitted)); *see also id.* at 2129 (noting that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law" (quoting Whitman v. American Trucking Ass'ns, 531 U.S. 457, 474–75 (2001))).

152. *See, e.g.*, *What Kind of People Work at EPA?*, EPA, https://www.epa.gov/careers/what-kind-people-work-epa [https://perma.cc/RSU2-T9MY] (last updated Aug. 24, 2022) (stating that the Environmental Protection Agency employs "15,000+ individuals").

153. *See supra* Part II.A.

154. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1725–26 (2002).

155. *See* Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 472–75 (2023) (arguing that today's nondelegationists justify "strong assertions of judicial power with cynical or declinist views of Congress").

156. Heinzerling, *supra* note 149, at 390–96 (describing "the politics of importance").

157. Nondelegation doctrine proponents claim that this result is required by the Constitution's text and/or original public meaning. *See* Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 TEX. L. REV. 89, 113–14 (2022) (summarizing the legal argument of nondelegation proponents). That claim of constitutional necessity, however, has been undermined by historical evidence of extensive delegations of authority in the early years of the Republic. *See generally* Mortenson & Bagley, *Delegation at the Founding*, *supra* note 135 (discussing numerous instances of delegation and the absence of discussion of nondelegation at ratification); Parrillo, *supra* note 135 (examining a statute delegating sweeping powers to an agency in the early Republic). Textually, the Constitution places no explicit limits on congressional delegations of authority to agencies, but instead authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution" its enumerated legislative powers "and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. II, § 8. The originalist case for nondelegation is thus unstable in significant ways. Indeed, a prominent article in favor of the doctrine claims not to

The populist nature of this project is evident in its rhetoric, which simultaneously obscures and excuses its anti-contestatory effects. It insists on a single correct meaning of the Constitution, which only the Court is capable of divining, provided it uses the proper interpretive methods to identify the unified will of the American people at the founding. Justice Gorsuch phrases this anti-pluralist view with a familiar invocation of a unitary people: "enforcing the separation of powers . . . [is] about respecting the people's sovereign choice to vest the legislative power in Congress alone."[158] Undermining institutional capacity, this rhetoric seeks to prevent Congress and agencies from doing their jobs in what they deem the most efficacious manner, and even disparages their normal operations as tyrannical abdications of constitutional duty. So, when Congress seeks to capitalize on an agency's focus, expertise, and deliberative capacity, it merely "pass[es] the potato" to agencies in order "to claim credit for 'comprehensively' addressing" a problem.[159] And rather than mediating among different interests in a complex legal framework (as discussed in Part II.A), agencies are described in tyrannical terms: they issue "edicts" to enforce their "unbounded policy choices" and allegedly behave in dishonest or disingenuous ways.[160] This Manichean rhetoric portrays originalist judges with the fortitude to carry out their constitutional duty in a battle to protect the people from abuse by rent-seeking legislatures, captured agencies, and liberal activist judges.[161]

Limiting how Congress can legislate, moreover, would not result in increased liberty. Sure, it would enhance the liberty of those people who want to be free from federal regulation—regulated entities such as corporations. But it would also constrain the liberty of those whom regulated entities affect—

show that nondelegation was part of the Constitution's original meaning, but only that "there is no direct support for the proposition that there was no nondelegation doctrine at the Founding." Wurman, *supra* note 149, at 1522. This claim accords with work arguing that the founding generation simply did not concern itself much with the question—and therefore produced no specific doctrine to hand down to us. Mortenson & Bagley, *Response to Critics*, *supra* note 149, at 2326–28. And, of course, judges need not choose to be originalist in the first place. The nondelegation doctrine thus seeks to replace important legislative and administrative decisions with judicial ones.

158. Gundy v. United States, 139 S. Ct. 2116, 2135 (Gorsuch, J., dissenting).

159. *Id.* at 2144.

160. *See id.* at 2143, 2148 (repeatedly referring to the Attorney General's "edicts" in implementing the challenged law, and complaining that the government previously "told this Court that SORNA," the statute at issue, "supplies no standards regulating the Attorney General's treatment of pre-Act offenders," and "[n]ow, when the statute faces the chopping block, the government asks us to ignore its earlier arguments and reimagine (really, rewrite) the statute in a new and narrow way to avoid its long-predicted fate. No wonder some of us are not inclined to play along"). *But see id.* at 2128–29 (plurality opinion) (claiming, in contrast, that the Attorney General has consistently maintained that SORNA requires the registration of all pre-Act offenders).

161. *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 76 (2015) (Thomas, J., concurring) ("We may not—without imperiling the delicate balance of our constitutional system—forgo our judicial duty to ascertain the meaning of the Vesting Clauses and to adhere to that meaning as the law."); *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting) (claiming "the Constitution does not permit judges to look the other way; we must call foul when the constitutional lines are crossed").

regulatory beneficiaries such as workers, consumers, and current or future inhabitants of the environment. The statutory missions of many agencies recognize that the populace consists of many different groups with sometimes opposing liberty interests; statutes are therefore often designed to protect regulatory beneficiaries from domination by regulated entities.[162] A judicial doctrine that impedes the enactment and implementation of such regulatory programs promotes the liberty of some people over others; it cannot plausibly be considered neutral.[163]

Nondelegation doctrine proponents insist that the Constitution requires one specific set of institutional arrangements that we are powerless to change.[164] Picking and choosing from scant historical evidence, they claim that this obligates courts to prevent Congress from enlisting the assistance of our government's most contestatory legal implementers—agencies.[165] But we have no obligation to take this anti-democratic position; we might choose instead to value ongoing democratic contestation. From this perspective, the Constitution establishes a broad framework for government and leaves elected officials with flexibility to craft efficacious legislation. Finding tentative agreement on broad legislative ends without specifying the means of achieving them allows Congress to find provisional reconciliation over incommensurable differences in a pluralistic society. Ongoing decision-making authority to pursue those broad ends is then delegated to agencies, which can engage in deliberation and revision over time and involve changing segments of the public, allowing the legislation to endure long past the enacting legislative coalition.[166]

Lawmakers have, not surprisingly, repeatedly chosen to leverage agencies' contestatory and temporal advantages by delegating extensive responsibility for promoting the health, safety, and welfare of the American people and protecting the nation's environment.[167] While agencies (like all of us) make many missteps, they almost certainly do a better job than could Congress; by many measures, they have been very successful.[168] This system, while far from perfect, gives

162. One prime example is the Consumer Financial Protection Bureau ("CFPB"), an agency set up to protect consumers of financial products from domination by financial product providers. Not coincidentally, the CFPB is also a prominent target of populist regulatory jurisprudence. *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020) (holding that Congress's decision to structure the Bureau with a single director who could only be removed from office "for cause" violated the separation of powers).

163. *See* Heinzerling, *supra* note 149, at 400–01.

164. *See infra* Part III.B (referring to this position as "constitutional teleology").

165. *See, e.g.*, *supra* notes 144, 149.

166. *See* Bernstein & Rodríguez, *Accountable Bureaucrat*, *supra* note 68, at 1668.

167. *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 2–4 (1990); *supra* Part II.A.

168. *See, e.g.*, GREAT POLICY SUCCESSES 1–2 (Paul 'T Hart & Mallory E. Compton eds., 2019); MICHAEL LEWIS, THE FIFTH RISK passim (2018); STEVEN P. CROLEY, REGULATION AND PUBLIC

more contestatory institutions center stage and allows difficult problems to be solved multiple times in different ways, as situations on the ground and available ideas evolve. Nondelegation constraints cut off a major avenue for contestatory public decision-making, instead letting judges decide what constitutes a proper amount of delegation in any given instance. There is little reason to think that judges could set such limits in a principled or consistent way,[169] particularly given their remove from both legislation and regulation. But even if they could find some consistency, courts are not equipped to host the ongoing contestation that agencies provide.

Of course, judicial adjudication involves contestation as well. But theirs is a very different contest. It is instigated only through litigation and involves two primary sides: a winner and a loser. It has no channels for broad public consultation, negotiation among multiple interests, or nuanced policy crafting. Agencies, in contrast, bear continual responsibility for the statutes they implement and are pushed to action by a range of different forces, such as new statutes, new developments in an agency's policy views, new presidential administration priorities, regulatory program review, other agencies, developments in the regulatory world, and instigation from affected publics.[170] And agencies bring into conversation the views of many different people on many different aspects of regulation, from goals to means.[171] Rather than imposing a balanced separation of powers, then, nondelegation sets up a juristocracy.[172] It undermines the ability of a contestatory Congress to have its

INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 11–12 (2008). Perhaps in recognition of the efficacy of this system, courts have traditionally deferred to Congress's judgments about the proper amount of authority to delegate to agencies under a Constitution that is deliberately open-ended.

169. *See* Heinzerling, *supra* note 149, at 379 ("The limit on legislative delegation is said to ensure democratic accountability by forcing Congress, rather than other people or institutions, to make certain decisions. Yet this principle is also said to require enforcement by Article III courts, the one part of our government specially designed to be democratically *un*accountable.").

170. *See* Sant'Ambrogio & Staszewski, *Democratizing*, *supra* note 77, at 806–08; Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 182, 260–61 (2017); Anya Bernstein & Cristina Rodríguez, Activating Statutes 14–39 (2023) (unpublished manuscript) (on file with the North Carolina Law Review).

171. *See* Bernstein & Rodríguez, *Accountable Bureaucrat*, *supra* note 68, at 1644.

172. Nikolas Bowie and Daphna Renan have offered a powerful defense of contestation in separation of powers jurisprudence; our use of the term *juristocracy* draws on their analysis. Bowie & Renan, *supra* note 47, at 2028 ("[T]he separation of powers is a contingent political practice reflecting the policy needs, governance ideas, and political struggles of the moment[,] . . . [a] fundamentally unsettled constitutional framework . . . [that] is a central normative feature of American constitutional government. A provisional constitutional structure, comprised of statutes, advances the normative values of political equality, nondomination, and the rule of law—that is, the values underlying the republican separation of powers. The juristocratic counterrevolution . . . undermines each of these values."); *see also* RAN HIRSCHL, TOWARDS JURISTOCRACY 13–14 (2004) (arguing, based on four case studies, that the constitutionalization of rights tends to result not in a more even distribution of

laws implemented through a contestatory agency, instead shifting power to courts, which provide little contestation or public participation. Moreover, nondelegation only works in one direction: the doctrine gives courts a new way to *prevent* Congress from having its laws implemented but installs no new spigot for *permitting* Congress to have other laws implemented. It simply narrows the flow of effective laws. Nondelegation thus prevents Congress from exercising its constitutional power to make necessary and proper laws that actually govern.

3. Major Questioning

A latecomer to the field of anti-contestatory regulatory jurisprudence, the so-called "major questions doctrine" straddles the line between anti-deference and nondelegation.[173] Like the others, it builds on a presumption that courts should stand between Congress and agencies to determine which of Congress's instructions agencies may follow.[174] The major questions idea started out as a presumption that Congress would not delegate issues of great importance to agencies without making that delegation clear. But it quickly morphed into a constitutionalized limitation on the power of Congress itself to make major policy.

The idea first emerged in Supreme Court jurisprudence around the turn of the 21st century. In 1994, *MCI Telecommunications Corp. v. AT&T Co.*[175] stated that it is "highly unlikely that Congress" meant to grant an agency sweeping authority with statutory terms that convey quite circumscribed action: small-sounding delegations should not be interpreted to grant agencies broad discretion.[176] The idea thus started out as a presumption about congressional

resources or the preservation of positive rights, but in increased power for the judiciary and decreased government regulation of markets, as courts have a "common tendency to adopt a narrow conception of rights, emphasizing Lockean individualism and the dyadic and antistatist aspects of constitutional rights").

173. *See* Emerson, *supra* note 99, at 2021 ("The latest doctrinal expression of th[e] conflicted partnership between democracy and bureaucracy is the major questions doctrine."); *see also* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 990–95 (2013) ("[T]he major questions doctrine [has] been described as '*Marbury*'s revenge,' an effort to reclaim some of the judicial power that *Chevron* shifted to agencies." (quoting Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2602 (2006))).

174. *See* Emerson, *supra* note 99, at 2023–24 ("The doctrine channels constitutional power by reserving to the judiciary, rather than the executive, authority to settle questions that statutory law has left unresolved. . . . The major questions doctrine is best explained as an attempt to reinforce democratic-constitutional values. In practice, however, it undermines such values by failing to respect the deliberative capacities of administrative agencies.").

175. 512 U.S. 218 (1994).

176. *Id.* at 231. In *MCI*, the Supreme Court ruled that the Communications Act of 1934's provision that the Federal Communications Commission ("FCC") could "modify" the requirements that telephone companies publicly file their rate schedules did not allow the agency to waive the rate filing

preferences in legislative drafting—a kind of substantive canon of statutory interpretation.[177] By 2000, it took a slightly different form. *FDA v. Brown & Williamson Corp*.[178] asked whether the Food and Drug Administration's ("FDA") jurisdiction over "article[s] . . . 'intended . . . to affect the structure or any function of the body'" encompassed tobacco products.[179] The Court ruled that, although tobacco was indeed marketed to affect bodily functions, later legislation about tobacco, along with tobacco's prominent place in the national economy, indicated that Congress could not have intended tobacco to fall within FDA's jurisdiction.[180] Justice O'Connor, though writing for only a bare majority, was nonetheless "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[181]

In *Brown & Williamson*, the major questions idea still expressed a presumption about congressional preferences. But it was primarily the activity of subsequent Congresses in later decades, not the words themselves, that rendered the Food Drug and Cosmetic Act's ("FDCA") broad grant of authority "cryptic."[182] The major questions idea in *Brown & Williamson* thus expressed something along the lines of a presumption that congressional action in a broad topic area over time would indicate whether an earlier statute assigned agencies questions of broad political or economic importance. In 1994, the claim was that Congress would not use small-sounding statutory words for broad grants of discretion; in 2000, that broad-sounding statutory words were belied by later congressional action.[183]

By 2014, the substantive canon had turned into a clear statement rule: "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[184] A clear statement rule need not

requirement altogether. *Id.* ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."). *See* Emerson, *supra* note 99, at 2034.

177. *See* Anita Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 833 (2017) ("Substantive canons . . . are principles and presumptions that judges have created to protect important background norms derived from the Constitution, common-law practices, or policies related to particular subject areas.").

178. 529 U.S. 120 (2000).

179. *Id.* at 126 (quoting Federal, Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. at 1041 (1938) (codified as amended at 21 U.S.C § 321(g)(1)(C))).

180. *See id.* at 159–61; Anya Bernstein, *Before Interpretation*, 84 U. CHI. L. REV. 567, 584–88 (2017) (discussing *Brown & Williamson*).

181. *Brown & Williamson*, 529 U.S. at 160.

182. *Id.*

183. *Id.*

184. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U.S. at 160); *see also* Ala. Ass'n. of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489

have led to the result in *Brown & Williamson*, where the FDCA explicitly gave the FDA jurisdiction over "articles . . . intended to affect the structure or any function of the body," and nobody disputed that tobacco products constituted such articles.[185] This lack of fit demonstrates the major questions idea's conveniently amorphous quality. It requires Congress to specify the decisions it wishes to delegate—but at a level of precision that no one can predict.[186] It applies this requirement of unknowable precision to statutes enacted long before such interpretive practices came into vogue,[187] leaving enacting Congresses helpless in the face of newly invented interpretive requirements. Moreover, the United States has a long history of delegating substantive policies about major questions to agency policymaking.[188] The presumption that Congress would be unwilling to do so flies in the face of centuries of actual congressional practice. The major questions idea is thus strangely disconnected from the realities of governance in the United States. The overall effect is to destabilize the Congress-agency relationship and install courts as its arbiters.

Most recently, the major questions idea has evolved into something yet bigger and more amorphous, with one foot in an unsupported presumption about congressional preferences, another in a constriction of congressional authority that merges with the nondelegation doctrine. This emerged with startling effect in the Supreme Court's rejection, in early 2022, of an Occupational Health and Safety Administration ("OSHA") rule mandating that large employers require employees to either be vaccinated for COVID-19 or use masks and submit to regular COVID testing at work.[189] In a per curiam opinion for six justices, the Court issued a preliminary injunction staying the rule not just until the court below had adjudicated the issue on the merits, but also through any subsequent appeal to the Supreme Court.[190] The opinion thus effectively made the rule unenforceable absent Supreme Court blessing (while

(2021) (per curiam). In *Utility Air Regulatory Group*, the Court struck down an Environmental Protection Agency ("EPA") interpretation of the Clean Air Act as allowing the agency to set emissions standards for greenhouse gases, reasoning that this interpretation would significantly enlarge EPA's jurisdiction "without clear congressional authorization." 573 U.S. at 324.

185. *See Brown & Williamson*, 529 U.S. at 126 (quoting Federal, Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. at 1041 (1938) (codified as amended at 21 U.S.C § 321(g)(1)(C))).

186. *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 4) (on file with the North Carolina Law Review) ("Even broadly worded, otherwise unambiguous statutes do not appear good enough when it comes to policies the Court deems 'major.'").

187. *See* Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 856–60 (2014).

188. *See* Gundy v. United States, 139 S. Ct. 2116, 2129 (2019) (explaining that the Court has "over and over upheld even very broad delegations" of policymaking discretion to agencies and providing several examples).

189. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 662–63 (2022); *see* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021).

190. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666–67.

also making it clear that a majority of the Court had already determined that the agency lacked authority to issue it).

The per curiam opinion notes that the Occupational Safety and Health Act ("OSH Act") instructs OSHA to ensure "safe and healthful working conditions" by promulgating rules "reasonably necessary or appropriate to provide safe or healthful employment."[191] Such rules, though normally subject to notice and comment procedures, may also be issued on an emergency basis without them when necessary to protect employees from a new hazard.[192] OSHA passed such an emergency rule requiring employers of more than 100 people to mandate that employees be vaccinated for COVID-19, or wear masks in the workplace and test regularly for the disease.[193] To disapprove the rule, the Court could have concluded that it was not "reasonably necessary or appropriate" to OSHA's mandate to ensure healthful employment. For instance, the Court could have concluded that the rule was not "appropriate" because it only allowed, but did not require, employers to offer the mask-and-test option. Or it could have concluded that the rule was not "necessary" because it encompassed employees who posed significantly lower risk to colleagues because they mostly work outdoors.[194] Instead of just holding that the rule did not fit the requirements of the statute—and thereby giving the agency a chance to revise the rule to fix the problems—the per curiam opinion concluded that OSHA lacked statutory authority to issue such a rule at all, which it characterized as a "broad public health measure[]" outside of OSHA's purview of "*workplace* safety standards."[195] The opinion thus seems to exclude from OSHA's jurisdiction hazards that people face at work—such as infection through contact with colleagues because of physical presence in a workplace required by an employer—insofar as they overlap with the "everyday risk of contracting COVID–19 that all face" whether at work or not.[196] The statute itself does not make this distinction, instead simply telling OSHA to ensure

191. *Id.* at 663 (emphasis in text removed) (quoting 29 U.S.C. §§ 651(b), 652(8)).

192. *Id.*

193. *Id.*

194. The Court noted both of these as problems with the rule. *Id.* at 664.

195. *Id.* at 665. *But see* City of Arlington v. FCC, 569 U.S. 290, 297 (2013) (holding that the *Chevron* framework applies to agencies' interpretations of the scope of their own statutory mandates).

196. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666. The per curiam opinion thus imports the reasoning of litigation standing into the judicial review of agency action. *Compare* Lujan v. Defs. of Wildlife, 504 U.S. 555, 573–74 (1992) (stating that plaintiffs seeking "relief that no more directly and tangibly benefits [them] than it does the public at large" lack standing), *with Nat'l Fed'n of Indep. Bus.*, 142 S. Ct at 665 ("Th[e] kind of universal risk [presented by COVID-19] is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases.").

"safe and healthful working conditions" without asking it to consider risks outside the workplace.[197]

The per curiam opinion does not mention major questions, but that idea seems to be at work in the background, as Justice Gorsuch notes in his concurrence: "The Court rightly applies the major questions doctrine."[198] In the concurrence, major questions is no longer a presumption about congressional preferences regarding judicial interpretations of statutes. Instead, the concurrence characterizes it as a constitutional limit on congressional action. But the concurrence achieves this effect by mischaracterizing agency practice in a way that makes foundational principles of administrative law sound endangered. So, the concurrence states that the major questions doctrine ensures that "[i]f administrative agencies seek to regulate the daily lives and liberties of millions of Americans, . . . they must at least be able to trace that power to a clear grant of authority from Congress."[199] This assertion states a bedrock principle of administrative law: agencies must articulate how their decisions rationally effectuate the statutory scheme Congress entrusts them with.[200] Yet Justice Gorsuch states this foundational principle not to uphold it, but to give it a new and different meaning.

That new meaning draws on the nondelegation doctrine, which the concurrence describes as "closely related to" the major questions idea.[201] Both express separation-of-powers principles that limit how Congress and agencies, the most contestatory branches, may act.[202] Citing himself in dissent, Justice Gorsuch explains that the nondelegation doctrine "ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials," which would "enable intrusions into

197. 29 U.S.C. § 651(b). It is thus, oddly, the *NFIB* per curiam opinion itself that expands OSHA's purview beyond the workplace by asking the agency to calibrate its regulation of working conditions to risks outside the workplace, something the statute does not authorize it to do.

198. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring). Justice Gorsuch reiterates the major questions clear statement rule expressed in 2014, and notes—citing his 2019 dissenting opinion in *Gundy v. United States*—that "[w]e sometimes call this the major questions doctrine." *Id.* at 667 (Gorsuch, J., concurring) (citing Gundy v. United States, 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting)).

199. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring).

200. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

201. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring).

202. *Id.* at 668–69.

the private lives and freedoms of Americans by bare edict."[203] The major questions doctrine "serves a similar function by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power."[204] It "guards against" the possibility that an agency "may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment."[205]

These descriptions again make some quite mundane points: that agency action should be reasoned and deliberative, rather than a "bare edict," and that it needs to be authorized by Congress, which must retain its power to legislate. Yet their thundering tone of urgency implies that the major questions and nondelegation doctrines are all that stand between us and the tyranny of an uncontrollable bureaucracy. In reality, a host of overlapping requirements already force agencies to articulate rational grounding in limited statutory authorizations.[206] In fact, as discussed above, administrative action is the most constrained and most pluralistically contestatory kind of action our government has. Indeed, as Daniel Deacon and Leah Litman have pointed out, the major questions doctrine now kicks in to cut off contestation right when it is highest: "the 'political significance' of a rule," as demonstrated in the "political disagreement" it causes, "is evidence of majorness."[207] Thus, the major questions claim allows courts to step in and decide how a statute should work just when the democratic process gets going.[208] The *NFIB* concurrence's comments about congressional delegation and agency action do not, then, simply make mundane points about administrative law. Instead, their misleading implications set up an argument for the primacy of courts over more contestatory institutions.

We see this when the *NFIB* concurrence explains how the major questions doctrine limits not just agency action, but also Congress's ability to pass laws that effectuate major policies. "OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate."[209] The OSH Act's mandate to ensure "safe and healthful working conditions" by promulgating rules "reasonably necessary or appropriate to provide safe or healthful employment" is, on this reading, not

203. *Id.* at 669. The phrase "bare edict" waves away the pluralistic contestation and deliberation that generally goes into rulemaking, as well as the dense web of procedures that constrain it. *See supra* Part II.A.

204. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring).

205. *Id.*

206. *See supra* Part II.A.

207. Deacon & Litman, *supra* note 186 (manuscript at 5).

208. *See id.* ("[T]he Court's new approach allows . . . political movements . . . to effectively amend otherwise broad regulatory statutes by generating controversy surrounding an agency policy. . . . [I]f a policy is sufficiently 'controversial' due to political resistance, the major questions doctrine operates to effectively narrow the scope of agencies' authority outside the normal legislative process.").

209. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring).

clear enough to encompass rules mitigating the risk of potentially fatal viral infection in the workplace.[210] This leaves dramatically unclear how Congress could make such a mandate clear, short of clairvoyantly predicting the hazards that might threaten the workplaces of the future.[211]

That uncertainty is the point: the major questions doctrine squeezes Congress's ability to legislate in a way that will be effective—that is, effectualizable by the agencies Congress entrusts with statutory implementation. Major questions and nondelegation together create a pincer: "[I]f the [statute] really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority" because it would impose no "specific restrictions" on the exercise of agency authority.[212] Heads regulation loses, tails anti-regulation wins. Or, as Justice Gorsuch puts it, "[w]hichever the doctrine, the point is the same."[213]

The concurrence ends by disclaiming any responsibility for the welfare of the millions of employees the decision affects: "[W]e only discharge our duty to enforce the law's demands."[214] This anti-consequentialist mode is common to much judicial populist jurisprudence, which often reiterates the fiction that courts hover above the fray of the democratic process, and even derides the idea that judges should consider the consequences of their actions. In deciding that OSHA may not promulgate a rule to mitigate danger in the workplace despite Congress's instructions that OSHA ensure workplace safety, the concurrence continues, the Court addresses "the question who may govern the lives of 84 million Americans."[215] The limitations that the major questions doctrine places on congressional power are thus imposed in the name of protecting the people from the government—avoiding the agency overreach that might result from

210. *Id.* at 663 (majority opinion) (emphasis in text removed) (quoting 29 U.S.C. §§ 651(b), 652(8)).

211. Something similar occurred in *West Virginia v. EPA*, where the Court rejected the EPA's interpretation of a statutory authorization to regulate energy generation systems, explaining that, when a major question is concerned, "something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims." 142 S. Ct. 2587, 2609 (2022). These cases make clear that "the new major questions doctrine functions as a kind of carve out to an agency's authority" as delineated in a statute. Deacon & Litman, *supra* note 186 (manuscript at 24); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 611–12 (1992) (noting that clear statement rules require "unambiguous statutory text *targeted at the specific problem*," even if the problem could not plausibly have been anticipated by lawmakers) (emphasis added). This allows courts to impose unilateral, final interpretations of statutes in place of agencies' contestatory, provisional ones.

212. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (quoting Touby v. United States, 500 U.S. 160, 166–67 (1991), even though congressional delegations are evaluated under the "intelligible principle" standard, *see Touby*, 500 U.S. at 165, not a "specific restrictions" standard).

213. *Id.*

214. *Id.* at 670.

215. *Id.*

unfettered delegations. This heroic stance imagines the key conflict in political life as pitting government against people. But the people these decisions affect is not a unified mass. They include employees who want COVID-19 protections in the workplace and those who don't; workers who can't avoid coming into contact with contagious colleagues; and employers who get to decide whether to do something about it. There are more players here than just bureaucrats and a unified people. Indeed, distinctions within the people are exactly what make regulations necessary to begin with.[216] The result in this case, then, was not so much a net increase in individual liberty as a decision to keep decision-making power in the hands of employers. Denying the multiplicity of interests and views within the population of workers and employers, the concurrence draws on the anti-pluralist imagery of populism.

OSHA and other agencies have the capacity to incorporate these differing interests and more in an evolving regulatory environment.[217] The Court, in contrast, need consult with nobody. It is not required to revisit its decisions. And it bears no responsibility for the fallout.[218] In anti-deference, nondelegation, and the major questions doctrines, courts take on a central policymaking role. No longer limited to guarding against arbitrary reasoning, procedural irregularity, or clear violations of the law, courts assume new powers to determine what kinds of laws Congress may pass and how they should be implemented. Transferring power from Congress and agencies to courts, these doctrines give pride of place to the least contestatory branch.

4. Anti-Regulation and Executivism

The doctrines we have discussed so far involve courts edging out more contestatory government institutions to take control over policy formation, in the name of a people who must be protected from government overreach but

216. *See id.* at 667 ("The central question we face today is: Who decides?").

217. The regulation at issue in *NFIB* was promulgated on an emergency basis, without notice-and-comment procedures. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402. Yet based on evidence of agency policymaking practices, it is quite likely that the emergency rule nonetheless involved negotiation among a number of different interests, represented by different segments of the agency as well as, potentially, external publics. *See* Bernstein & Rodríguez, *Accountable Bureaucrat*, *supra* note 68, at 1637–50; Sant'Ambrogio & Staszewski, *Democratizing*, *supra* note 77, at 823–26. Moreover, the emergency rule was a *temporary* standard; the Federal Register notice requested comments on whether it should become a final rule, whether it should change, and related issues. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. at 61403.

218. Elissa Gentry and Kip Viscusi have recently presented empirical evidence that undermines the Court's conjectures and affirmatively supports the findings and linkages that prompted OSHA's concerns. Elissa Gentry & W. Kip Viscusi, *The Misapplication of the Major Questions Doctrine to Emerging Risks*, 61 HOUS. L. REV. (forthcoming 2024) (manuscript at 17–42) (on file with the North Carolina Law Review). Based on this evidence, Gentry and Viscusi contend that the Court's decision "impeded OSHA's attempt to mount an emergency response to a major national threat" and "that this substitution of inexpert conjecture for evidence is not only legally unjustified but deadly in the context of emerging risks." *Id.* at 2.

not from one another. In a related vein, the judicial populist vision has manifested itself also in "unitary executive theory," which holds that the Constitution creates "a hierarchical, unified executive department under the direct control of the President," who "alone possesses all of the executive power and . . . therefore can direct, control, and supervise" all other actors in the administrative state.[219] Unitary executive theory rests on faith that the periodic, limited contestation of presidential elections suffices for democratic governance, by implication rendering further wrangling over policy superfluous.[220] Here, the populist image of a unitary people with a single will, embodied by a unitary executive, comes through clearly: it is the single President, not the contestatory institutions of government, who serves as "a guarantee of public interestedness."[221]

Unlike the other doctrines discussed here, unitary executive theory redistributes power not to the courts but to the President. It may seem strange, therefore, to think that these ideas go together. How can the same doctrinal movement seek to disempower the administration, but also to empower its chief executive? The puzzle is solved when we recognize that all these doctrines siphon power away from the more contestatory parts of government: the legislature and especially the agencies, those parts whose personnel face regular checks from one another and from the public. Instead, these doctrines centralize power in government positions that have minimal responsibility for ongoing, pluralistic public contestation over specific policy issues: the courts and the President.[222] This view of government imagines a strict separation between law

219. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992); *see also* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 5–11 (1994). We draw here on our earlier exploration of the judicial populist aspects of unitary executive theory. Bernstein & Staszewski, *Judicial Populism*, *supra* note 5, at 324–37; *see also* Anya Bernstein & Cristina Rodríguez, *The Diffuse Executive*, FORD. L. REV. ONLINE (forthcoming 2023) (manuscript at 6–7) (on file with the North Carolina Law Review).

220. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010) ("The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws."). *But see* Sanford Levinson, *Our Undemocratic Constitution: Where the U.S. Constitution Goes Wrong (and How We the People Can Correct It)*, 60 BULL. AM. ACAD. 31, 33 (2007) ("Because of the way the Electoral College operates, we have regularly, since World War II, sent to the White House presidents who did not have a majority of the popular vote."). Drawing on studies that show voters often lack accurate understandings of presidential candidate policy positions, and that even well-informed voters often vote for candidates who share some of their policy preferences but not others, Cynthia Farina notes that "[p]olitical scientists have largely abandoned the simplistic account of presidential elections as national policy referenda that can be legitimately interpreted as issue mandates." Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 378–83 (2010).

221. *Id.* at 42; *see also* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 59 (1995) ("[The President is] the only official who is accountable to a national voting electorate and no one else.").

222. *See* Bernstein & Rodríguez, *Accountable Bureaucrat*, *supra* note 68.

and politics. It elevates the President, chosen in a nationwide election, to embody the people's will and rule over the political sphere with little interference, while the Supreme Court, with its power to say what the law is, rules over the legal one. These views have been combined, moreover, to sanction populist judicial decisions that eliminate or impair agency independence and increase the politicization of the bureaucracy.[223] But courts—especially the Supreme Court—and Presidents are much freer than Congress and especially agencies to simply pronounce their views, facing far fewer institutional mechanisms for challenge, compromise, or change.[224] So the doctrines do have a power-sharing component to them—but it is power shared among noncontestatory nodes rather than with a pluralistic public. These doctrines thus work together as a package to undermine deliberation and contestation both within the administrative state and among the branches. That leaves interpreting the law to those who do not need to negotiate with anyone.

III. THE POLITICAL PROJECT OF LEGALISM

As the previous part explained, the key doctrines being developed to limit the government's regulatory power stand in some tension with the realization of democratic aspirations in a pluralist society such as ours. They posit that law and policy are generally susceptible to one final understanding that is best uncovered not through negotiation and deliberation among many different groups, but through interpretive methodologies like textualism and originalism, which purport to yield uniquely correct answers to legal questions.[225] The agonistic republican theories that have increasingly animated political theory over the same time period value broad-based contestation over both the ends and the means of governance, and demand that governing bodies take into account a wide array of incompatible views and interests. These theories put institutions that mediate among divergent positions at the heart of democracy. The doctrines in the preceding part, like other aspects of legal theory done in a judicial populist style, imply a quite different vision.

The authoritarian populist package discussed above displaces democratic contestation, and the institutions that support it, from the center of law and

223. *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020); Lucia v. SEC, 138 S. Ct. 2044, 2054–55 (2018).

224. For example, the Court has held that the President is not subject to the APA, which requires agencies to consult with interested members of the public and provide reasoned justifications for their decisions. *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992). Unlike agencies, Presidents thus have no legal obligation to consider anyone's views, nor to provide a rationale for their decisions.

225. In previous work, we explain how textualism and originalism manifest articulated versions of judicial populist rhetoric. Bernstein & Staszewski, *Judicial Populism*, *supra* note 5, at 308–24; *see also* William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1722–23 (2021).

politics.[226] In the legal sphere, it instead centers courts—institutions that lack the means to employ large-scale, ongoing contestation to make their decisions, being limited to the relatively minimal adversarial aspect of litigation, which involves two sides, at one time, arguing about issues of their own choosing. In the political sphere, the populist package tends to elevate the power of the President, another power center subject to relatively minimal contestation. Populist impulses favor concentrated, unilateral power nodes over dispersed, multilateral ones. Yet this hierarchy undermines the commitments to ongoing debate and deliberation implied in the very idea of democracy in a diverse society—commitments made abundantly clear in contemporary theories that reflect an agonistic republican vision.

This part explains how a contrary political movement popularized ideas about law that helped make this anti-democratic hierarchy seem natural and even necessary. This political movement, known as the conservative legal movement, insists that law and politics are ontologically distinct spheres, and also that law requires a very particular distribution of power in government and society. Power relations are, of course, the quintessential topic of politics: they are the object of contestation in a democratic polity. But by treating law as separable from politics and power relations as primarily legal issues, the conservative legal movement pushed to make the central question of politics appear apolitical.

A. *The Anti-Politics Machine*

Decades of political activism went into popularizing the notion that questions of power distribution have been settled by a preordained order with a fixed meaning—and thus placed outside the realm of political contestation.[227] As recent scholarship has detailed, the conservative legal movement, which came into view clearly with the so-called "Reagan Revolution,"[228] was oriented

226. *See* Bagley, *supra* note 128, at 352 ("Without either agreement or evidence, administrative law has been shaped by a crude and contested assessment of the costs and benefits of vigorous governmental action. What informs that assessment? The stories we tell ourselves about the state. That's why it matters so much that administrative law has been built on a bedrock of distrust.").

227. The phrase "the anti-politics machine" is drawn from James Ferguson, who used it to describe the way that "development" projects in the Global South routinely reframe problems such as poverty and powerlessness as technical, rather than political, issues—at the same time as they often lead to the expansion of governmental power over impoverished and relatively powerless communities. JAMES FERGUSON, THE ANTI-POLITICS MACHINE 256 (1990); *see also* Rajesh Venugopal, *Can the Anti-Politics Machine be Dismantled?*, 27 NEW POL. ECON. 1002, 1002 (2022) ("The authority of supposedly neutral technical expertise is deployed to defuse vibrant social contestations.").

228. *See* Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981-2000*, 89 DENV. U. L. REV. 197, 201–13 (2011); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 548 (2006); Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A*

around a vision expressed in President Reagan's inaugural address—that "government is not the solution to our problem; government is the problem."[229] This movement sought to give an enduring legal foundation to its preferred limits on the government's power to regulate private parties' effects on others.[230]

Movement participants pursued that goal in a variety of ways. President Reagan appointed agency officials with unprecedented loyalty to his agenda and implemented structural reforms to increase White House influence over how agencies exercised authorities that Congress delegated to them.[231] Seeking legal

Development Perspective on the Unitary Executive, 122 HARV. L. REV. 2070, 2073 (2009); Stephen M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 STUD. AMER. POL. DEV. 61, 61–66 (2009) [hereinafter Teles, *Transformative Bureaucracy*]. *See generally* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008) [hereinafter TELES, RISE OF THE CONSERVATIVE LEGAL MOVEMENT] (discussing conservative challenges to legal liberalism starting in the 1970s).

229. Ronald Reagan, U.S. President, First Inaugural Address of Ronald Reagan, *reprinted in* THE AVALON PROJ., https://avalon.law.yale.edu/20th_century/reagan1.asp [https://perma.cc/RJP4-VU9Q]; *see* Paul Baumgardner, *Originalism and the Academy in Exile*, 37 LAW & HIST. REV. 787, 797–800, 802–06 (2019); Hollis-Brusky, *supra* note 228, at 201–13; Teles, *Transformative Bureaucracy*, *supra* note 228, at 63–69.

230. Like any social movement, the conservative legal movement has a history that predates its step into the limelight. *See generally* Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017) (exploring parallels between the anti-administrative rhetoric of the New Deal period and contemporary attacks on the administrative state); Calvin TerBeek, *"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821 (2021) (arguing that the conservative originalism movement grew in the 1950s and 1960s).

231. Among the best known of these reforms, Executive Order 12,291 required executive agencies to seek prepublication review of proposed major rules by OMB's Office of Information and Regulatory Affairs ("OIRA") and required those agencies to provide a regulatory impact analysis of the proposal that included a comparison of its costs and benefits. Exec. Order No. 12,291, 3 C.F.R. § 127 (1981). The order also provided that "to the extent permitted by law, . . . [r]egulatory action shall not be undertaken" unless the potential societal benefits exceeded the societal costs, and "[a]mong alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen." *Id.* While the order did not formally displace agencies' statutory authority to promulgate rules, OMB could delay or prevent the publication of proposed or final rules as a practical matter by refusing to approve an agency's regulatory impact analysis. OMB's regulatory review resulted in the return or withdrawal of approximately eighty-five proposed major rules per year during President Reagan's tenure, and while this amounted to less than four percent of the proposals that were submitted for review, "the rules that provoked OMB's displeasure tended to be among the most important." Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2278 (2001). OMB and the relevant agency often reached subsequent agreements that resolved their differences, but OMB was able to block or modify numerous rules that conflicted with the President's regulatory policies, including major rules involving environmental protection and workplace safety. *Id.* at 2279; THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 274–79 (1991). Reagan was, of course, neither the first nor the last President to pursue this goal. *See generally* Kagan, *supra* (examining the historical relationship between the President and the administrative state). Then-Professor Kagan pointed out that all Presidents face a two-pronged challenge in exercising control over the bureaucracy: an ordinary principal-agent dilemma exacerbated

grounding for the deregulatory agenda, the Department of Justice ("DOJ") under Attorney General Meese became a think tank of sorts for the development of originalism, unitary executive theory, textualism, and formalist theories of separated powers.[232] As discussed in Part II, irrespective of their scattered justifications, the effect of these theories is to shift power to the less contestatory institutions of courts and Presidents, and away from the more contestatory institutions of legislatures and agencies. DOJ's advocacy lent legitimacy to these ideas, which had previously been considered "off the wall" by the dominant legal culture.[233] Reagan administration officials promoted these ideas directly to movement conservatives, the Republican party, and politically engaged citizens.[234] Liberal intellectual legal elites, though often disdainful of these views, nonetheless engaged them seriously, generating attention and lending the theories credence.[235] Many Meese DOJ alumni eventually joined the legal academy, where they promoted and refined these ideas, which secured a foothold in mainstream legal theory.[236]

Over in the civil society part of the movement, the Federalist Society, founded in the early 1980s, created a network of passionate law students and attorneys who could fill executive branch positions and be appointed or elected

by the fact that agencies, by design, have multiple, competing principals. *Id.* at 2273. *See generally* Ashraf Ahmed, Lev Menand & Noah Rosenblum, Building Presidential Administration: From Reagan to Kagan (2023) (unpublished manuscript) (on file with the North Carolina Law Review) (arguing that many contemporaries perceived the centralizing reforms of the Reagan administration as an unauthorized usurpation of congressional power).

232. *See* Baumgardner, *supra* note 229, at 797–800, 802–06; Hollis-Brusky, *supra* note 228, at 201–13. *See generally* Teles, *Transformative Bureaucracy*, *supra* note 228 (discussing Meese's role in the conservative legal movement during the Reagan Administration).

233. Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1444 (2001) ("[T]he question of whether a legal argument is 'on the wall' or 'off the wall' is a matter of social practice and convention."); *see also* Baumgardner, *supra* note 229, at 792–95 (explaining "that originalist scholars and scholarship held marginal and dubious status in the American legal academy for much of the 1970s and 1980s").

234. *See* Baumgardner, *supra* note 229, at 802–03 (noting that "DOJ played a leading role in popularizing originalism within conservative circles," and that "Attorney General Meese and DOJ lawyers traversed the country, actively campaigning for originalism among potential allies"); Teles, *Transformative Bureaucracy*, *supra* note 228, at 81–82 (discussing efforts to gain public support for originalism); *see also* David Fontana, *Has Originalism Become Second Nature?*, 31 DPCE ONLINE 591, 591 (2017) ("Theories go from off the wall to on the wall when they start to become acceptable to name and engage with . . . even if naming and engaging theories is in service of contesting their basic desirability.").

235. *See* Calvin TerBeek, *The Search for an Anchor: Living Constitutionalism from the Progressives to Trump*, 46 LAW & SOC. INQUIRY 860, 879 (2021) ("In the 1980s and 1990s, legal liberals in the upper echelons of the academy made a consequential disciplinary choice: Critical Legal Studies ('CLS') would be contained and then marginalized. The conservative lawyers connected to the Federalist Society would be their theoretical interlocutors.").

236. *See* Baumgardner, *supra* note 229, at 803–05. There is perhaps some irony in the way that calls for the dismantling of agency power came, one might say, from inside the house.

to the judiciary.[237] It worked in tandem with other conservative groups to facilitate impact litigation to limit regulation.[238] These groups soon shifted away from policy arguments about whether it was advisable for government to regulate private parties' effects on others.[239] Instead, using originalism, unitary executive theory, and textualism, they developed constitutional claims that such regulation was simply not permissible.[240] Government and civil society parts of the movement interacted and even merged when the Meese DOJ hired the Federalist Society's founders, bolstering the organization's perceived legitimacy and influence.[241] All this helped move conservative legal movement claims about the Constitution, interpretive methodology, and administrative law from "off-the-wall" to "on the wall" in legal culture.[242]

But to make these ideas seem "natural and completely obvious"[243] required an audience beyond legal elites.[244] Along with popularizing its contentions,[245] the movement developed an alternative conception of the public interest. Instead of viewing government as tasked with regulating the economy in ways that protected different groups of private parties from one another, the movement rallied around the notion that the liberty of an undifferentiated

237. *See* TELES, RISE OF THE CONSERVATIVE LEGAL MOVEMENT, *supra* note 228, at 135–80 (describing the Federalist Society's development and influence).

238. *Id.* at 159–60 (discussing the Federalist Society's role as a "network entrepreneur").

239. Steven Teles has explained that the Federalist Society and conservative public interest groups learned to distance themselves from direct control by business interests, which were often shortsighted and concerned primarily with their immediate bottom lines (and thus welcomed governmental intervention when it lined their pockets), and to be operated and staffed instead by intellectuals, idealists, and true believers who were willing to play the long game. *See id.* at 4–5, 58–89. Those true believers were more inclined to speak and act in relatively principled and consistent ways and be able to present their views as a genuine reflection of the public interest. *See id.* at 135–80. Financial resources to support this movement could be provided by independently wealthy patrons, including conservative foundations and individuals or families who shared the ideological perspectives of the true believers and could thus also be expected to play the long game, rather than ordinary businessmen who demanded an immediate return on their investments. *See id.* at 135–80, 220–81.

240. *See, e.g.*, Hollis-Brusky, *supra* note 228, at 200 (exploring how "actors inside and outside the Executive Branch . . . consciously invested in the UET between 1981 and 2000"); Post & Siegel, *supra* note 228, at 561 ("As a political practice that developed in the 1980s, originalism seeks, more or less blatantly, to alter the Constitution so as to infuse it with conservative political principles."); Teles, *Transformative Bureaucracy*, *supra* note 228, at 75–82 (describing the Meese DOJ's efforts to legitimate and promote originalism).

241. Teles, *Transformative Bureaucracy*, *supra* note 228, at 69–75.

242. *See* Jack M. Balkin, *How Social Movements Change (or Fail To Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 52 (2005).

243. *Id.*

244. *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 708–15 (2009).

245. *See, e.g.*, Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 890 (2013) (reviewing SCALIA & GARNER, *supra* note 59) ("To the extent that lay citizens know about Scalia-style textualism, it is not from his opinions; it is probably not from Scalia himself. It is from the politicians and pundits who repeat the story of textualism's heroism in the battle against 'activist judges.'").

populace was threatened primarily by the government itself.[246] It cast individual rights against "bureaucratic tyranny" and "judicial activism" as its primary concern.[247] This emphasis allowed the movement to deflect substantive debate about whether progressive economic regulation was normatively attractive or practically efficacious. Instead, movement priorities could be expressed in abstract, formalist slogans and presuppositions, such as the insistence that judges should not make policy, or the assumption that bureaucracy is inherently illegitimate.[248] The movement thus presented a vision of a unified people affected by the law in a uniform way, without a need for mediating different reactions to legal strictures, and threatened primarily by high-handed civil servants and activist judges rather than by one another—all claims often seen in populist rhetoric.

The conservative legal movement vision presented democratic society as naturally economically libertarian (though socially controlled), with freedom from interference by the government—at least in economic relations—the central legal concern.[249] Movement rhetoric also drew a sharp conceptual distinction between law and politics, allowing proponents to argue that they were merely enunciating legal requirements, rather than promoting a political agenda.[250] Its preferred means of political action—legal interpretation through originalist and textualist methods that could purportedly arrive at single correct answers (but actually left considerable room for discretion)—supported this claim to objectivity and necessity.[251] As Margaret Lemos has explained, the

246. *See, e.g.*, Skowronek, *supra* note 228, at 2096–2100 (exploring ways in which unitary executive theory was politically advantageous for conservative Republicans who were ideologically hostile to the regulatory state).

247. Consider, for example, Orrin Hatch's characterization of the Federalist Society's philosophy: "The Federalist Society espouses no official dogma. Its members share acceptance of three universal ideas: One, that government's essential purpose is the preservation of freedom; Two, that our Constitution embraces a separation of governmental powers; and, three that judges should interpret the law, not write it." TELES, RISE OF THE CONSERVATIVE LEGAL MOVEMENT *supra* note 228, at 152.

248. *See, e.g.*, Bagley, *supra* note 128, at 369–88.

249. *See id.* at 357 ("The field of modernizing administrative law has been ceded to those—on both the left and the right—who distrust the state.").

250. *See, e.g.*, Lemos, *supra* note 245, at 851 (observing that influential advocates of textualism claimed that this approach "offers protection against ideological judging; a way to separate law from politics"); Post & Siegel, *supra* note 228, at 552 (noting a belief that "[o]riginalism would enable constitutional interpreters to transcend mere politics and rise above partisan squabbles, preserving the Constitution as a domain of law distinct from politics"); *see also* HIRSCHL, *supra* note 172, at 15 (describing a common process in the constitutionalization of rights by which "conflicts involving contentious political issues are treated as primarily legal questions," to be settled by courts rather than by more representative bodies).

251. *See, e.g.*, Lemos, *supra* note 245, at 853 (claiming that "[t]he link between textualism and conservativism was fused in the rise of the New Right in the 1980s, when conservatives embraced textualism in statutory interpretation (together with originalism in constitutional interpretation) as the

focus on method was itself political: "By focusing on the *how* of the law, methodology transcends individual cases and issues; it provides a basis for attacking wide swaths of judicial doctrine at once."[252] Reacting against the unusually liberal Supreme Court decisions of the mid-twentieth century, movement participants used the "neutral language of procedure, not substance" to "challenge entire categories of decisions on purportedly nonideological grounds," launching a "broad-brush critique of the legal status quo."[253]

This also provided a platform on which to decry open, normative discussion about the practical, differentiated effects of laws on a populace with diverse interests. "It would have been one thing to argue to the American people that affirmative action was bad policy," Lemos notes. "Linking that argument to an authoritative theory of law, and of the role of judges in a democracy, broadened and deepened the claim,"[254] giving it a distinct "political payoff": the "ability to justify adventurous conservative decision making within a community ostensibly committed to judicial restraint."[255] This political movement thus rested its legitimacy on its ostensibly apolitical nature.

One central goal of this movement has been limiting the constraints that government places on corporate action. This is sometimes labeled "deregulation," but it may be more productively conceived as seeking particular distributions, rather than a simple diminution, of government restraints. In important areas—controlled substances, immigration, reproductive rights—the conservative legal movement has not called for the lessening of government regulation on individual liberty; sometimes quite the contrary. In other areas, the movement has sought to decrease some constraints on private parties while increasing others. For instance, decreasing allowable constraints on firearm possession has gone along with expanding constraints on private parties' ability

antidotes to the 'judicial activism' of the Warren and Burger Courts," and these methodologies "were united in their appeal to judicial restraint and their challenge to the legal status quo"); Post & Siegel, *supra* note 228, at 554–55 (pointing out that while its leading advocates claimed that "[a] jurisprudence of original intention is necessary to preserve constitutional law from politization," it was obvious to any "politically literate person . . . that the Reagan Administration's use of originalism marked, and was meant to mark, a set of distinctively conservative objections to the liberal precedents of the Warren Court").

252. Lemos, *supra* note 245, at 898 ("[T]he interpretive alternatives in the statutory field are too similar to one another, and too malleable, to drive outcomes in meaningful and predictable ways.").

253. *Id.*

254. *Id.* at 901.

255. *Id.* at 901, 899 ("[D]espite all the talk of restraint, the Scalia-led charge for a change in statutory and constitutional methodology was, in fact, profoundly liberating."); Post & Siegel, *supra* note 228, at 555 ("Originalism empowered conservatives to criticize past Supreme Court decisions as efforts to move public policy choices in a left-liberal direction, and it simultaneously advanced nearly every plank in the conservative platform that might become involved in litigation." (internal quotations and citations omitted)).

to sue firearm manufacturers.[256] The Court's increasingly expansive interpretations of the Federal Arbitration Act have limited individuals' ability to enforce their rights while expanding those of corporations to violate them.[257] Whether that means more regulation or less depends on whether one takes the perspective of the corporation that is liberated from the threat of being sued for legal violations, or of the individuals who are prevented from contesting corporate action in court. The term deregulation, which sounds like a simple freeing of the market, does not capture these complex distinctions.[258] Nor does it capture the central similarity among these efforts, which is the lessening of constraints, whether public or private, on corporations.

The terminology, though, is telling. Deregulation, like a lot of conservative legal movement rhetoric around the idea of freedom, treats the relevant categories as large undifferentiated blocks: there is the public which is regulated, on the one hand, and the government that regulates it, on the other. This framing echoes the populist imagery of the polity as a unified people with a shared will, standing opposed to an elite—often a bureaucratic one. In the political populist image, "the people" is always potentially the victim of bureaucratic oppression. That is why that people needs a strong leader who understands its will implicitly and can overpower bureaucratic obstruction to ensure its will be done. Judicial populism paints an analogous picture. The people is, similarly, the bureaucracy's potential victim. And it needs the court, a law enunciator who understands the true meaning the people give the law, to limit the bureaucracy's power to regulate, in order to protect the people from government overreach.

In treating the people as a unified whole, these visions erase divisions *within* the people itself—class, race, gender, and all the other distinctions that render groups in the polity not just potential victims of the government, but also potential victims of one another. By keeping the spotlight on bureaucratic domination, the judicial populist vision keeps private domination in the shadows. And so it can ignore the government's role in protecting people not

256. *Compare* District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (holding for the first time that the Second Amendment guarantees a private right to possess a gun), *with* Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, §§ 1–4, 119 Stat. 2095, 2095–99 (2005) (codified at 15 U.S.C. §§ 7901–7903) (limiting the right of private parties to sue gun manufacturers).

257. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 703–09 (2018) (arguing that mandatory arbitration provisions for employee rights usually lead not to arbitration, but to employee rights not being adjudicated or enforced in any forum, allowing employers to effectively "nullify employee rights"). *See generally* Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL. REV. 499 (2017) (arguing that consigning ordinary consumer and employee claims to arbitration effectuates a wealth transfer from the relatively disempowered to the relatively empowered).

258. *See generally* BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER (2011) (showing that the notion of a market free of regulation is an ideological construct rather than a description of any actual market).

only from government itself, but from one another. The government—not the corporation or other sites of unequal power—is figured as the only relevant problem.

The anti-regulatory doctrines that limit constraints on corporations may indeed constrain governmental interference with some private action. But it does not decrease the likelihood that power will be exercised arbitrarily, because it leaves private parties free to arbitrarily interfere in one another's options. Indeed, it reduces government's ability to constrain private parties' arbitrary power over one another. If, on the other hand, we think that republican democracy should diminish the possibility of arbitrary rule of anyone by anyone, then simply limiting government constraints on some part of the population will not suffice.[259] Rather, government actors must be sensitive to the different ways that any government action affects different people—the way it may constrain some while liberating others. To mediate among different interests in a dynamic way requires empowering, rather than enervating, contestatory institutions like agencies.

B. *Constitutional Teleology*

The previous section explained how conservative legal movement rhetoric deflects political and normative disagreement by focusing on purportedly neutral methods. A related approach is to argue that the Constitution requires the movement's preferred outcomes.[260] On this reasoning, whatever current political theories may say or however normative political values may have evolved, there is nothing to be done about central issues like the ways that power is distributed within our government and the extent to which authority is mediated among numerous divergent views. All that has been firmly settled, with considerable specificity, by the Constitution.[261] And the Constitution, understood through the correct interpretive methods, works against governmental institutions of contestation, instead empowering less contestatory actors. In this vision, the Constitution has already specified the particulars of

259. *See, e.g.*, PETTIT, REPUBLICANISM, *supra* note 20, at 12–13, 129–70; RAHMAN, DEMOCRACY, *supra* note 23, at 81–83, 116–38.

260. *See generally* Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654 (2020) (exploring the historical development and substantive merits of claims by conservatives that *Chevron* deference violates the Constitution).

261. We do not mean to suggest that the Constitution's text does not authoritatively resolve anything, but we think it is best understood as establishing a basic framework for government and a set of fundamental rights for contemporary society to flesh out and build upon through ongoing deliberation and contestation within political and legal institutions that make decisions that are reasonably justified on the merits and generally regarded as provisional. It undermines pluralistic democracy to pretend that the Constitution resolves the details of government and that courts can divine a single correct answer to most interpretive problems pursuant to originalist methods, and that today's people are stuck with that answer—regardless of the normative consequences—unless they formally amend the Constitution.

government, leaving little room for play in its joints. It does not provide a skeleton with the basic structure of governance, around which successive generations can build different versions of the body politic.[262] Instead, it pre-specifies authoritative final answers for every contingency.

This vision thus performs an odd trick on the old contrast between the rule of law and the rule of man: the rule of law here rests on the rule of a specific historical group of men, while the people of today's polity—different, broader, more diverse—must be sidelined in the name of the purportedly thorough and inflexible system those men set up. Here, history is indeed destiny, and the dead hand of the past is the most democratic hand we can ask to be dealt. Because the Constitution has already settled the important questions, moreover, such results are presented as neutral, objective, and merely legal, as opposed to interested, contestable, or political. The ostensibly apolitical results dramatically narrow the possibilities for political action by establishing a fixed set of power relations that contemporary society is largely powerless to change. We characterize this vision as *constitutional teleology* because its proponents suggest that our government's structure is fixed at the founding in a way that specifically predetermines permissible later developments.[263]

Agonistic republicanism, in contrast, embraces historical open-endedness and the provisional nature of how we got here and where we are going. It relies on contestatory institutions to balance our diverse and dynamic society's needs for continuity while giving today's people a measure of self-determination. This vision embraces multiple determinants of the contents of law and seeks to empower contestatory institutions to resolve legal and policy issues in ways that are both reasonably justifiable for now and subject to ongoing discussion and debate. It thus supports pluralism on multiple fronts and offers a meaningful form of democratic self-government.

262. *See* William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEX. L. REV. 1273, 1273–74 (2009) (arguing that constitutional adjudication is a "horticultural" project of tending to the Constitution's "shared project in a way that allows it to flourish and contribute to the larger public interest," rather than an "engineering" project of maintaining fidelity to the mechanism that an original creator designed); Jack M. Balkin, *The Framework Model and Constitutional Interpretation*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 241, 242 (David Dyzenhaus and Malcolm Thorburn eds., 2016) ("Constitutions are not so much *pre-commitment* devices as *coordination* devices.").

263. We could also aptly describe this vision as *constitutional monism* because its proponents assert that the law has one inherent meaning determinable by a single criterion. *See* Mitch Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1353 (2018) (describing the "monistic aspirations or commitments of originalism" as leading to the prescription that "judges should enforce the original public meaning of the constitutional text *because that original meaning constitutes the law*"). Either way, this vision works to undermine pluralism.

CONCLUSION: LEGITIMATION THROUGH CONTESTATION

Judicial populism purports to restrict the bounds of the political by putting its legal arguments beyond dispute. But placing arguments about power off limits is itself a political move. What judicial populist rhetoric provides, then, is cover for exercising power without justifying its effects. We have argued that this rhetoric has been especially useful in shifting power from contestatory institutions like Congress and agencies to less contestatory ones like Presidents and judges, who can implement their preferences in the name of a single people without considering the pluralist perspectives within any given populace. Instead of defending its decisions on the merits, judicial populism tends to paint critics not as legitimate adversaries but as outsiders, elitists, or activists—in any event, enemies of the true people. The anti-regulatory jurisprudence we have discussed is then presented not as a social movement position, but as the only legitimate, neutral, and objective understanding of law. The conservative legal movement has seized on the simple yet anemic equation of democracy with voting, and of law with text, to claim a moral high ground. But this regulatory jurisprudence is not only optional; it is undemocratic.

As a range of legal and political thinkers have argued, democratic legitimacy depends on ongoing contestation within and among institutions that mediate the diverse interests and views of an always-changing people. So even if the conservative legal movement's concerted efforts to transform administrative law were apolitical, limiting the ongoing contestation within our governmental system would hardly promote democratic legitimacy. Instead of concentrating political power in a single elected President and pretending that courts can divine final answers to debatable legal problems, pro-democracy actors should support, not subvert, contestatory institutions. Those mediating institutions, including Congress and especially agencies, can affirmatively promote democracy by protecting some private actors, like consumers or workers, from domination by others, like the financial industry or employers. Contra populist regulatory jurisprudence, the most important sites for such democratically legitimate decision-making in our system are administrative agencies.

Agencies are our most contestatory institutions. But that does not mean that they have achieved their full democratic potential. Much room remains to further facilitate pluralistic contestation within the regulatory state, and scholars have proposed a range of worthwhile reforms.[264] Some have urged that government rebuild and strengthen the civil service to make up for decades of

264. *See, e.g.*, *supra* notes 47–49 and accompanying text (identifying representative works in administrative law, participatory democracy, and political economy).

neglect culminating in outright attacks by the Trump Administration.[265] This would both improve administrative capacity and inhibit excessive politicization of the bureaucracy.[266] Others have proposed requiring federal agencies to collaborate more with representatives of state, local, and tribal governments in developing policy.[267] A range of proposals seeks to encourage more balanced and informed participation in rulemaking, which tends to be dominated by business interests and other sophisticated stakeholders.[268] Scholars have sought to encourage meaningful public engagement in the early stages of the regulatory process, when agencies set their agendas and develop ideas for rules.[269] Others have suggested appointing designated people to represent the interests of regulatory beneficiaries and other traditionally absent stakeholders,[270] and finding ways to productively handle the occasional deluge of "mass comments."[271] Such proposals are promising insofar as they can enhance the

265. For cogent analyses of the latter development and its broader implications, see, e.g., Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 587–637 (2021); David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753, 786–834 (2022).

266. For a brief discussion of the need to rebuild and center the civil service, and some ideas for how this could be accomplished, see Emerson & Michaels, *supra* note 47, at 119–23.

267. *Id.* at 129–32.

268. *See* Sant'Ambrogio & Staszewski, *Democratizing*, *supra* note 77, at 814–15 (canvassing the empirical literature). Some ambitious projects have targeted traditionally absent stakeholders with relevant experience to participate in mediated online discussions of the regulatory issues. *See* Cynthia R. Farina, Mary J. Newhart, Claire Cardie & Dan Cosley, *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 396–99 (2011) (describing "Regulation Room"). Thus, for example, truck drivers and small trucking companies were targeted for participation in online discussions of a proposed rule by the Department of Transportation to regulate the trucking industry. *See* Cynthia R. Farina, Dmitry Epstein, Josiah Heidt & Mary J. Neuhart, *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1185–88 (2012).

269. Federal agencies have quietly engaged in such efforts on an ad hoc basis through a variety of different tools for years. *See generally* Michael Sant'Ambrogio & Glen Staszewski, Public Engagement with Rulemaking (Nov. 19, 2018) (report to the Admin. Conf. of the U.S.). Making those practices more regular and systematic would help ensure balanced participation and encourage agencies to consider a broader range of interests and views. *See* Sant'Ambrogio & Staszewski, *Democratizing*, *supra* note 77, at 830–54 (describing best practices for democratizing rule development).

270. *See* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1414–16 (2010). *See generally* Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629 (2011) (exploring "the role that 'regulatory contrarians' can play in promoting more adaptive financial regulation"); Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014) (exploring subsidiary offices within agencies that are charged with promoting normative values that go beyond or potentially even cut against their primary statutory missions). There are already successful examples of this model. *See, e.g.*, Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517, 529–30 (2012) (discussing the success of the National Taxpayer Advocate).

271. *See* Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-mail*, 79 GEO. WASH. L. REV. 1343, 1371–80 (2011) (contending that value-based comments from ordinary citizens are often relevant to an agency's statutory mission; they should therefore be acknowledged and can provide a basis for further agency deliberations).

pluralistic, contestatory role of agencies.[272] They can also help empower traditionally disadvantaged groups by providing them with structural levers of influence and policymaking experience. Connecting with agencies can thus bolster the long-term organizational capacity of marginalized constituencies, creating a virtuous circle of nondomination.[273]

The President has a role to play too. The White House is particularly well situated to institute reform, and pursuing a "civic" rather than a "presidential" style of administration would support contestation in policymaking.[274] Instead of concentrating power in one President who purports to embody the will of a unified people, this approach diffuses authority "away from the office of the president in ways that empower the federal bureaucracy, state, local, and tribal officials, and civil society."[275] Such an approach would not bind subsequent Presidents, of course. But it would shift the status quo and affect public expectations in ways that could undermine the perceived legitimacy of more populist styles.[276]

The courts, meanwhile, need not undermine the contestation crucial to democratic governance. They can instead support it. For starters, that means rejecting the anti-regulatory jurisprudence we have discussed: courts should defer to reasonable agency interpretations of ambiguous statutory provisions; let Congress decide how its laws should be implemented; and allow agencies to regulate the spheres over which Congress gives them authority. Courts should particularly favor agency decisions that demonstrate reasoned deliberation with diverse stakeholders and perspectives.[277] And they should not obstruct Congresses and Presidents in structuring the executive branch.[278] For a pro-democracy jurisprudence, the most vital debates in administrative law consider how best to structure legal doctrine to promote pluralistic contestation.[279] For instance, when should courts reject an agency's stated reasons for a decision as

272. For example, Daniel Walters has proposed generating more agonistic contestation in administration by promoting a more tolerant and experimental culture in agency decision-making; using adjudication more often to make policy; relying more transparently on political reasons for policy changes; using more sunset provisions; and amplifying dissent during rulemaking. *See* Walters, *supra* note 9, at 46–84. We are concerned, however, that some of these suggestions could simply add to well-organized and highly resourced stakeholders' existing advantages in the regulatory process, thereby increasing rather than alleviating domination. *See generally* Wendy E. Wagner, *Embracing Conflict and Instability: A New Theory of the Administrative State*, 2022 JOTWELL 1 (2022) (reviewing Walters, *supra* note 9).

273. *See, e.g.*, Rahman, *Policymaking*, *supra* note 49, at 329–33; Andrias & Sachs, *supra* note 49, at 548–77; Kate Andrias, *Confronting Power in Public Law*, 130 HARV. L. REV. F. 1, 1–9 (2016).

274. Emerson & Michaels, *supra* note 47, at 108.

275. *Id.* at 104.

276. *See id.* at 118.

277. *See* Emerson, *supra* note 99, at 2088–89.

278. This suggests courts should consider treating certain separation of powers disputes as nonjusticiable. *See* Bowie & Renan, *supra* note 47, at 2028.

279. *See, e.g.*, Wagner, *supra* note 272, 1–3 (summarizing Walters's proposals to promote agonism).

pretextual?[280] Should agencies receive *Chevron* deference for interpretations made in adjudication?[281] Should they get extra credit for engaging with traditionally absent stakeholders during the early stages of the rulemaking process,[282] or for listening to groups that are particularly responsive to their members?[283] Courts should focus on these kinds of problems to enhance pluralistic contestation and promote democratic legitimacy, rather than deconstructing the regulatory state.

In its own way, each part of the government can support contestation in policymaking. And each part should, because it is through ongoing debate and deliberation among different positions that the democratic potential of our polity can be realized. The agonistic republican vision—shared among deliberative democrats, republican theorists, agonists, and others—recognizes that real democracy involves not obeying a single voice echoing from some small corner of history, but embracing the cacophony of dispute over prevailing policies and power arrangements. This vision is our most promising path to ensuring that our government neither enacts nor allows arbitrary domination. And it will be achieved through regulatory agencies, our government's most contestatory institutions. We should embrace—and demand—agonistic republicanism within the administrative state, rather than pretending that a President or a court could legitimately speak for all of today's people, without even bothering to listen to the very diverse things they say.

280. *Compare* Dep't of Com. v. New York, 138 S. Ct. 2551, 2576 (2019) (concluding that an agency's reasoning was arbitrary and capricious because it was pretextual), *with* Trump v. Hawaii, 138 S. Ct. 2392, 2415 (2018) (upholding a pretextual decision because it was supported by an otherwise valid justification).

281. *See generally* Hickman & Nielson, *supra* note 111 (arguing that *Chevron* deference should be limited to agency interpretations announced in rulemaking and not to those announced in most forms of adjudication); Wadhia & Walker, *supra* note 111 (building on Hickman & Nielson's argument to narrow *Chevron* in the context of immigration adjudication).

282. For proposals along these lines, see, e.g., Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 421–35 (2022); David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81, 81–83 (2005); Sant'Ambrogio & Staszewski, *Democratizing*, *supra* note 77, at 849–50; Wagner, *supra* note 270, at 1407–08.

283. *See* Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1355–63 (2016).