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The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State

ABSTRACT. A perennial challenge for the administrative state is to answer the “democracy question”: how can the bureaucracy be squared with the idea of self-government of, by, and for a sovereign people with few direct means of holding agencies accountable? Scholars have long argued that this challenge can be met by bringing sophisticated thinking about democracy to bear on the operation of the administrative state. These scholars have invoked various theories of democracy—in particular, pluralist, civic republican, deliberative, and minimalist theories—to explain how allowing agencies to make policy decisions is consistent with core ideas about what democracy is.

There is a weakness to these theories—a weakness exposed by the deep political polarization surrounding American administrative law and the institutional fragmentation that characterizes much of the administrative state. Each of the conventional democratic theories in one way or another assumes that the goal of democracy is to reduce or settle political conflict, and that it is coherent to speak of accountability to a single mass of people we call the *dêmos* only after conflict has been settled. Relying on this shaky and unrealistic assumption to build an account of the administrative state’s democratic legitimacy has always been problematic, but the weakness of this standard approach is particularly glaring in the light of our polarized, conflictual politics, which makes it difficult to imagine that the assumption would be realized in administrative practice.

This Article charts a different way of looking at the democracy problem and provides a roadmap for reinforcing and building legitimacy in administrative processes. It draws on democratic agonism, an overlooked theory of democracy that assumes that political conflict is ineliminable and recognizes that every decision made in a democracy must by its very nature exclude some people or perspectives from full inclusion in the governing *dêmos*. With this recognition, agonism turns the conventional approach on its head. Instead of prescribing democratic processes to reduce conflict and undergird a settlement that maps onto the preferences of the people, agonism seeks to build processes that unsettle decisions and promote friendly contestation over government policies, drawing the excluded back into a conflictual process of defining the *dêmos* anew. Agonism’s emphasis on conflict maintenance better fosters democratic legitimacy in a deeply divided, pluralistic society like ours, where it is impossible to please every constituency with government decisions. Moreover, its resistance to settlement provides built-in safeguards against growing authoritarianism and plebiscitary presidentialism that are falsely held out as possibilities for finally settling political conflict.

Turning from theory to practice, I argue that we can imagine an “administrative agon” that incorporates agonistic elements into the institutions and practice of administrative law and public



administration. The theory has prescriptions for a range of issues—from public participation to judicial review of agency action to the design and independence of agencies. In some of these areas, the agonistic democratic lens reveals ways that the administrative state might be working better than we think, at least according to agonistic metrics. In other areas, it highlights deficiencies. By bringing agonistic democratic theory into conversation with the administrative state, I aim to challenge the growing malaise about how the administrative state can fit into our conflictual politics and to point the way to reforms that could make the administrative state more genuinely democratic in practice.

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INTRODUCTION

James Oliver Freedman wrote almost a half century ago that the administrative state has faced a recurring sense of democratic crisis over its lifetime.¹ That sentiment rings truer than ever today, as the administrative state finds itself under immense, perhaps even existential, political stress.² This condition is evident in several parallel developments, any one of which would have been the nation's leading political drama in a prior era.

There is, to start, the unprecedented attack on the administrative state from within the executive branch during the Trump Administration. Whether we call it “administrative sabotage,”³ “maladministration,”⁴ or “structural deregulation,”⁵ the bottom line is that President Trump opposed the administrative state, evidenced most clearly in his occasional allusions to the idea of a “deep state” out to thwart the will of the people.⁶ Although the Trump Administration failed to

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1. JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 9 (1978).
 2. For recent examples of articles, book reviews, and books claiming a crisis of democratic legitimacy in the administrative state, see Ryan Calo & Danielle Keats Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L.J. 797, 845 (2021); JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL (2012); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 5-6), <https://ssrn.com/abstract=4164125> [<https://perma.cc/6324-T6K9>]; Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 719 (2016), which reviews DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940 (2014); NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940 (2013); K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1672 (2018), which reviews JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC (2017); Jed Handelsman Shugerman, *The Legitimacy of Administrative Law*, 50 TULSA L. REV. 301, 302 (2015), which reviews JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012); and Louis J. Virelli III, *Science, Politics, and Administrative Legitimacy*, 78 MO. L. REV. 511, 511 (2013).
 3. David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753, 753 (2022).
 4. Michael Sant'Ambrogio, *Presidential Maladministration*, 46 OHIO N.U. L. REV. 459, 460-61 (2020).
 5. Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 586 (2021).
 6. STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE 3 (2021); Jon D. Michaels, *Trump and the “Deep State”: The Government Strikes Back*, 96 FOREIGN AFFS. 52, 52-53 (2017).

undermine the administrative state fundamentally,⁷ the wider populist antipathy toward government institutions that motivated the administration's actions is alive and well, both domestically and internationally.⁸

A related but distinct line of attack persists in the federal courts. There, some judges have impugned the administrative state as antithetical to our constitutional democracy, the rule of law, and the liberties of individuals and businesses

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7. Cary Coglianese, Natasha Sarin & Stuart Shapiro, *The Deregulation Deception* 1 (U. Pa. Carey L. Sch. Pub. L. & Rsch. Paper Series, Paper No. 20-44, 2021) <https://ssrn.com/abstract=3723915> [<https://perma.cc/EVA9-A9LK>]. Much of the failure stems from the fact that, to meaningfully undermine the administrative state, the Trump Administration would have had to promulgate a significant number of durable rules and regulations. This is an increasingly difficult task, especially for one-term Presidents. See Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 3, 5 (2019) (describing Trump's use of "rollback tools," such as the Congressional Review Act, and highlighting that "[f]uture presidents, including for these purposes Trump himself, will need to face the possibility that their regulatory output could be undone"). Indeed, that is just what has happened in the Biden Administration. See *Tracking Regulatory Changes in the Biden Era*, BROOKINGS INST. (Sept. 12, 2022), <https://www.brookings.edu/interactives/tracking-regulatory-changes-in-the-bidenera> [<https://perma.cc/TFZ9-XGXN>] (compiling regulatory changes, including actions rescinding Trump's regulatory and deregulatory actions).
 8. See Michael W. Bauer & Stefan Becker, *Democratic Backsliding, Populism, and Public Administration*, 3 PERSPS. ON PUB. MGMT. & GOVERNANCE 19, 19 (2020). The idea of populism is often given a pejorative connotation, but the negative side emerges only when populists claim a mandate and veer into authoritarianism and xenophobia. See David Fontana, *Unbundling Populism*, 65 UCLA L. REV. 1482, 1485-86 (2018).

alike.⁹ A few have even discussed tearing out congressional delegation, the foundation for the administrative state, root and branch.¹⁰ At the same time, progressive activists critique the administrative state for its contributions to structural inequalities and its failures to use its authority to root out injustices.¹¹ Progressive populists worry that “captured” agencies¹² with cultures and personnel at odds with the current administration, like Immigration and Customs Enforcement, will resist the initiatives of the Biden Administration or the Congressional Progressive Caucus.¹³

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9. See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (“[T]he Constitution’s rule vesting federal legislative power in Congress is ‘vital to the integrity and maintenance of the system of government ordained by the Constitution.’ It is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable ‘ministers.’” (citations omitted)); *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) (“[T]he citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, ‘in the public interest’—can perhaps be excused for thinking that it is the agency really doing the legislating. And with hundreds of federal agencies poking into every nook and cranny of daily life, that citizen might also understandably question whether Presidential oversight—a critical part of the Constitutional plan—is always an effective safeguard against agency overreaching.”). For academic commentary on these trends in judicial opinions, see Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 4 (2017); Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 869-71 (2020); and Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 41-45.
 10. See *Gundy v. United States*, 139 S. Ct. 2116, 2135-42 (2019) (Gorsuch, J., dissenting) (arguing for a new test for nondelegation and urging its enforcement); Daniel E. Walters, *Decoding Nondelegation After Gundy: What the Experience in State Courts Tells Us About What to Expect when We’re Expecting*, 71 EMORY L.J. 417, 419-41 (2022) (recounting contemporary debates on the Court about whether to resuscitate the nondelegation doctrine, which has otherwise rarely been invoked, in order to limit the power of the administrative state).
 11. See *Racism, Regulation, and the Administrative State*, REGUL. REV. (Oct. 26, 2020), <https://www.theregreview.org/2020/10/26/racism-regulation-administrative-state> [<https://perma.cc/NEC2-9K7B>]; *Symposium on Racism in Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (2020), <https://www.yalejreg.com/topic/racism-in-administrative-law-symposium> [<https://perma.cc/LGH9-DWP4>].
 12. The idea of “capture” has long captured the imagination of observers of administrative agencies. It refers to the idea that “as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.” George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971); see also William J. Novak, *A Revisionist History of Regulatory Capture*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 25, 25-48 (Daniel Carpenter & David A. Moss eds., 2014) (tracing the concept over time).
 13. These concerns are not unfounded. See Zolan Kanno-Youngs & Charlie Savage, *Trump Official’s Last-Day Deal with ICE Union Ties Biden’s Hands*, N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2021/03/18/us/politics/trump-officials-last-day-deal-with-ice-union-ties-biden-s-hands.html>.

These growing anxieties about the administrative state span the political spectrum and are in some sense epiphenomenal of deeper societal fracturing. The United States is fundamentally divided on key questions of national political valence,¹⁴ and various constituencies grow increasingly frustrated over the imperviousness of established institutions to fundamental change.¹⁵ These political tensions have thus drawn attention to problems concerning the democratic legitimacy of the administrative state—long-existing problems that our current conditions spotlight.

“Democracy,” from the Greek *demokratía*, concerns the legitimation of government by lodging control of the power (*krátos*) of the government with the people (*dêmos*).¹⁶ As the most practically important institution for making and implementing government policy,¹⁷ the administrative state is where we must

www.nytimes.com/2021/02/01/us/politics/cuccinelli-biden-ice.html [https://perma.cc/7VEV-KU6C] (reporting on a last-minute deal by Trump Administration officials with Immigration and Customs Enforcement union leaders to “tie Mr. Biden’s hands”). The broader phenomenon of “agency burrowing” has long been recognized, see Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. Rev. 557 (2003), but it has been particularly notable in the most recent transition, see Alice Miranda Ollstein & Megan Cassella, *The ‘Deep State’ of Loyalists Trump Is Leaving Behind for Biden*, POLITICO (Jan. 19, 2021, 4:30 AM EST), <https://www.politico.com/news/2021/01/19/trump-loyalists-burrowing-biden-460238> [https://perma.cc/3DQ3-LS5T].

14. For just a sampling of the voluminous literature on polarization, see, for example, EZRA KLEIN, *WHY WE’RE POLARIZED* (2020); ALAN I. ABRAMOWITZ, *THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP* (2018); DANIEL J. HOPKINS, *THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED* (2018); LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* (2018); and ASHLEY JARDINA, *WHITE IDENTITY POLITICS* (2019). Increasingly, this polarization also bleeds into legal debates. See David E. Pozen, Eric L. Talley & Julian Nyarko, *A Computational Analysis of Constitutional Polarization*, 105 CORNELL L. REV. 1, 4-5 (2019).
15. See CAN AMERICA GOVERN ITSELF? 2-3 (Frances E. Lee & Nolan McCarty eds., 2019); FRANCES MCCALL ROSENBLUTH & IAN SHAPIRO, *RESPONSIBLE PARTIES: SAVING DEMOCRACY FROM ITSELF* 1-3 (2018); MARC J. HETHERINGTON & THOMAS J. RUDOLPH, *WHY WASHINGTON WON’T WORK: POLARIZATION, POLITICAL TRUST, AND THE GOVERNING CRISIS* 48-50 (2015).
16. See Josiah Ober, *The Original Meaning of “Democracy”: Capacity to Do Things, Not Majority Rule*, 15 CONSTELLATIONS 3, 3 (2008); see also Sarah Song, *The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State*, 4 INT’L THEORY 39, 39 (2012) (noting that the idea of democracy presents questions of “rule” and about the “boundary problem” of who counts as part of the *dêmos*).
17. Owing to existing practices of congressional delegation, few statutes are self-implementing. See Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 853 (2012) (“Although an agency’s governing statute will sometimes identify certain factors that shall or shall not be taken into consideration, there will almost always be a host of other logically relevant considerations that are not specifically addressed by the agency’s statutory mandate.”). Most statutes leave great discretion to administrative agencies not only to enforce the law, but also to flesh it out through legislative and interpretive rules.

look to know whether the *dêmos* truly controls government decision making. On its face, the administrative state seems to present democratic difficulties: it lacks any direct link to electoral inputs,¹⁸ and it possesses a stability and autonomy designed to make it resistant to democratic control.¹⁹ More fundamentally, it is not clear how, in a pluralistic, deeply fractured society like ours, the decisions that administrative agencies make could represent all or even most of “the people” most of the time. The perennial tension between administration and democracy – what I call the “democracy question” – increasingly feels unresolved and, perhaps, unresolvable. As a result, there is a real danger that frustration with the administrative state from all corners will only continue to grow until it experiences significant democratic delegitimation and institutional atrophy.²⁰

Scholars have attempted to deal with the democracy question by drawing on a canon of traditional democratic theories.²¹ Their accounts have a common core: the idea that certain features of the administrative process help resolve or settle political conflicts that would otherwise make it difficult to say that administrative decisions represent the whole of “the people.” They argue, in other words, that the administrative state can serve as a site for “‘political will-formation’ in the public sphere,”²² although they differ on precisely how that process does and should take place. For instance, civic republicans and deliberative

See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1513 (1992).

18. See Joshua Ulan Galperin, *The Life of Administrative Democracy*, 108 GEO. L.J. 1213, 1216 & n.13 (2020) (collecting citations supporting the claim that “bureaucrats are unelected and therefore unaccountable”). This concern is nowhere close to convincing on its own, as the Constitution does not require that all officials be elected. But it has certainly become a frequently invoked trope.
19. See Christopher R. Berry & Jacob E. Gersen, *Agency Design and Political Control*, 126 YALE L.J. 1002, 1010-12 (2017). Even on the level of personnel, because the bureaucracy is committed to insulating its career civil servants from political control, it is almost hardwired to be impervious to the violent swings of factional democratic politics. See PARRILLO, *supra* note 2, at 125-27 (discussing civil-service reforms that liberated bureaucrats from loyalty to fee payers). Indeed, these reforms have often effectively moderated political preferences in the career bureaucracy. See Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) (arguing that the preferences of civil servants should be more moderate than those of elected and appointed officials).
20. Political scientists have long recognized that the legitimacy and efficacy of the administrative state is politically constructed, see DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928, at 11-13 (2001), and it therefore can be politically deconstructed, too.
21. See *infra* Section I.B.
22. Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2027 (2018); see also WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 21 (2022) (noting

democratic theorists assert that certain features of the administrative process – including notice-and-comment rulemaking and agencies’ duty to provide reasons for their decisions – foster deliberation that, ideally, results in agreement (or, at least, in less disagreement).²³ Other theories posit that administrative processes collectively function as a marketplace for influence by allowing all interested parties to participate.²⁴ On this account, agencies set policy that is at least somewhat responsive to the expressed preferences of interested parties. Still other theories seek to ground administrative legitimacy in a more direct connection to electoral inputs on the theory that elections are a kind of democratic settlement (for a time, at least) and that bureaucrats are ultimately subject to presidential control.²⁵

This Article argues that these standard approaches cannot democratically legitimize the administrative state. It is unrealistic to assume that disagreement over policy could be substantially ameliorated through administrative processes or through accountability to elected officials, such that it would be coherent to speak of a “general will” embodied in administrative action. Consider, for example, the experience of the Biden Administration’s vaccine-or-test mandates – a recent example of an attempted administrative settlement that proved to be anything but. Invoking long-standing statutory authority to issue emergency temporary standards, the Department of Labor (DOL), via the Occupational Safety and Health Administration (OSHA), issued a regulation affecting any employer with over one hundred employees.²⁶ To decrease the risk that workers would

the centrality of the “general will” for democratic theories of administration); GANESH SITARAMAN, *THE GREAT DEMOCRACY: HOW TO FIX OUR POLITICS, UNRIG THE ECONOMY, AND UNITE AMERICA* 95-96 (2019) (“For a democratic community to succeed, the people must be relatively united. There must be some degree of solidarity The central premise of democracy is that the people themselves should determine their own fate. We the people decide our future together.”).

23. See Seidenfeld, *supra* note 17, at 1529; Staszewski, *supra* note 17, at 886-87. Arguably, this “reason-giving” norm maps onto core features of administrative law, such as the notice-and-comment rulemaking process. See JERRY L. MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* 50 (2018).
24. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 33 (1985) (describing pluralist accounts of interest-group competition as assimilating political ordering to market ordering).
25. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 *N.Y.U. L. REV.* 461, 463-68, 485-91 (2003); see also Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 *UCLAL. REV. DISCOURSE* 418, 423-31 (2021) (arguing that presidential administration has been a failed experiment that has made us less democratic and more authoritarian).
26. See COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 *Fed. Reg.* 61402, 61403 (Nov. 5, 2021).

expose each other to COVID-19, affected employers had to require their employees either to be vaccinated against the virus or to undergo weekly testing.²⁷ There was immediate opposition to the rule.²⁸ Just days after the policy was finalized, challengers in the U.S. Court of Appeals for the Fifth Circuit obtained a nationwide stay of enforcement of the policy.²⁹ Although the stay was vacated by the Sixth Circuit,³⁰ the Supreme Court intervened on short notice in a landmark shadow-docket opinion to hold that OSHA and DOL had likely exceeded their statutory authority.³¹ In the meantime, much of the population has stubbornly resisted the efforts of public-health experts to encourage vaccination,³² drawing the ire of “vaccinated America.”³³ None of the traditional democratic justifications of administrative action could alter this deep well of resistance. President Biden’s election, to the extent that it was even accepted as legitimate,³⁴ was not enough. Neither was the societal deliberation on vaccines or the voluminous record and thoroughly reasoned final rule issued by OSHA.³⁵ Nor, apparently, was

27. *Id.* at 61449.

28. Tom Latek, *OSHA Vaccine Policy Being Met with Resistance, Including from Two Kentucky Seminaries*, TIMES-TRIB. (Nov. 6, 2021), https://www.thetimestribune.com/news/osha-vaccine-policy-being-met-with-resistance-including-from-2-kentucky-seminaries/article_fb84eaa6-3e9e-11ec-be88-5751d1940ae7.html [<https://perma.cc/LK5F-9BAD>]. In fact, the resistance began even before the announcement of the rule, after President Biden asked the Occupational Safety and Health Administration (OSHA) to issue it. See Timothy Noah, *Why Won't the Chamber of Commerce Support Biden's Vaccine Mandate?*, NEW REPUBLIC (Sept. 14, 2021), <https://newrepublic.com/article/163648/chamber-commerce-support-vaccine-mandate> [<https://perma.cc/U57W-NPRD>].

29. *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 619 (5th Cir. 2021).

30. *In re MCP No. 165*, 21 F.4th 357 (6th Cir. 2021).

31. *Nat'l Fed'n of Indep. Bus. v. DOL*, 142 S. Ct. 661, 663 (2022) (per curiam).

32. See Daryl Austin, Opinion, *COVID Vaccine Resistance Is Nothing New. Anti-Vaxxers Are as Old as Vaxxing Itself*, NBC NEWS (Nov. 27, 2021, 12:41 PM EST), <https://www.nbcnews.com/think/opinion/covid-vaccine-resistance-nothing-new-anti-vaxxers-are-old-vaxxing-nca1284828> [<https://perma.cc/ESP4-M7RK>] (reporting that thirty-two percent of Americans are unlikely to ever vaccinate against COVID-19).

33. David Frum, *Vaccinated America Has Had Enough*, ATLANTIC (July 23, 2021), <https://www.theatlantic.com/ideas/archive/2021/07/vaccinated-america-breaking-point-anti-vaxxers/619539> [<https://perma.cc/8A3D-R2LT>].

34. See FiveThirtyEight Staff, *60 Percent of Americans Will Have an Election Denier on the Ballot This Fall*, FIVETHIRTYEIGHT (Oct. 17, 2022, 12:04 PM), <https://projects.fivethirtyeight.com/republicans-trump-election-fraud> [<https://perma.cc/X369-H9BR>] (documenting persistent and widespread “election denialism”).

35. See COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021).

it persuasive to antivaxxers (or the Supreme Court) that a clear majority of people supported the rule.³⁶ The idea that notice-and-comment processes could have led OSHA to a version of the policy that would have increased public acceptance of a mandate is similarly Pollyannaish. If democratic legitimacy is supposed to lead to substantial acceptance of government policy by an identifiable and singular “public,” then the administrative state clearly lacks democratic legitimacy.

These kinds of practical experiences of failure to ameliorate deep social conflict are underscored by the theoretical concern that the basic assumption of traditional democratic theories is a pipe dream in the context of administrative law. Social choice theory has long shown that under exceedingly minimal assumptions, a rational and stable form of preference aggregation is impossible, even in elections.³⁷ Even when agencies try sincerely to aggregate the preferences of citizens, their efforts are guaranteed to devolve into arbitrariness. Deliberative theory seeks to avoid this problem by changing preferences rather than simply aggregating them.³⁸ Yet, this project has its own problems born of ineradicable pluralism. As many commentators note, even though deliberative theories strive to be truly inclusive of all perspectives,³⁹ in practice, the administrative state routinely makes decisions that are flatly rejected as illegitimate by one mainstream political or religious camp or another.⁴⁰

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36. Jeffrey M. Jones, *Majority in U.S. Supports Biden COVID-19 Vaccine Mandates*, GALLUP (Sept. 24, 2021), <https://news.gallup.com/poll/354983/majority-supports-biden-covid-vaccine-mandates.aspx> [<https://perma.cc/QH56-CRLZ>].
 37. See Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2128-43 (1990).
 38. See AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 13-21 (2009) (critiquing the “aggregative conception,” which “takes . . . preferences as given” and “seeks only to combine them in various ways that are efficient and fair”).
 39. See, e.g., Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347, 351 (1997) (noting that “in its best or truest form, deliberation is a process of political discussion that excludes no one”).
 40. Although there are innumerable examples of this phenomenon, ground zero has undoubtedly been in the immigration-policy debate over how to treat people who are present in the United States but lack documentation. Unable to rely on comprehensive immigration-reform legislation, the Department of Homeland Security tried to develop policies to extend legal status to some of these individuals, reversed itself to disallow legal status, then reversed itself again. See generally ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* (2020) (chronicling the convoluted and tumultuous recent history of immigration law and policy across presidential administrations). At each turn, the political pushback has been swift and contentious. See Kevin R. Johnson, *Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 U.C. DAVIS L. REV. 343, 378 (2018) (noting the “political controversy” that attached to both Obama’s original Deferred Action for Childhood Arrivals (DACA)

Moreover, the standard answers to the democracy question—for example, rendering agencies subject to strict, hierarchical, principal-agent control by democratically accountable actors—are at odds with leading descriptive and empirical work about administrative institutions and processes.⁴¹ The picture that emerges from this work is of a bureaucracy engineered for conflict: it is often internally fragmented, interminably complex, and irreducibly diverse.⁴² Scholars generally praise these features of the bureaucracy, highlighting how they protect liberty or reinforce core constitutional values that underlie the separation of powers or lead to effective governance.⁴³ Whatever the merits of these accounts, it is unclear how they are *democratic* defenses of the administrative state, and they are often orthogonal to the consensus-oriented project of democratic legitimation envisioned by conventional democratic theories.⁴⁴ They paint a descriptive picture of an internally contest-prone administrative state that mires policy initiatives in layers of institutional combat—a picture that sits uncomfortably with the emphasis that stock democratic theories place on social consensus and public will.

These weaknesses of the traditional approaches to the democracy question might not doom the administrative state, but they do demand that we rethink democratic legitimacy and administration. We should no longer insist that some feature of the extant administrative state renders the decisions it makes congruent with the preferences or values of an identifiable *dêmos* that will accept and support those decisions. Rather, a convincing democratic theory must be consistent with the deep and enduring pluralism that marks American politics.

policy and Trump's rescission); Zolan Kanno-Youngs, *Biden Administration Fights in Court to Uphold Some Trump-Era Immigration Policies*, N.Y. TIMES (Mar. 13, 2022), <https://www.nytimes.com/2022/03/13/us/politics/biden-trump-immigration.html> [<https://perma.cc/N2G8-6U7U>] (describing President Biden's actions on immigration and the pushback the Biden Administration has received even from ostensible ideological allies).

41. See, e.g., ALEJANDRO E. CAMACHO & ROBERT L. GLICKSMAN, *REORGANIZING GOVERNMENT: A FUNCTIONAL AND DIMENSIONAL FRAMEWORK* 2-3, 31-52 (2019) (discussing dimensions of "centralization, overlap, and coordination" in terms of agency and program design, all of which complicate hierarchical models of political control of the bureaucracy).
42. See *infra* Part II.
43. Anya Bernstein and Cristina Rodríguez have shown that the on-the-ground practice of administration is marked by complex systems of shared power between career and political officials. See Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. (forthcoming 2023) (manuscript at 23-33), <https://ssrn.com/abstract=4067359> [<https://perma.cc/HJT6-TAVR>].
44. Here, Bernstein and Rodríguez's recent account provides a notable exception, linking these institutional features to concepts of democratic accountability. *Id.* (manuscript at 42-45). Their account, however, draws on the general notion of democratic accountability and sets aside the need to adjudicate between different theories of democracy.

In this Article, I argue that agonistic democratic theory—agonism, for short—provides better democratic grounding for the administrative state than the conventional theories do.⁴⁵ Agonism does not seek to elide political conflict through achievement or declaration of a consensus. Instead, it emphasizes the inevitability of conflict and builds democratic legitimacy around it.⁴⁶ In essence, agonism turns the traditional democratic theories on their head: rather than asking what we should or must do to generate law that reflects widespread societal acceptance and then engineering administrative institutions to facilitate that buy-in, agonism finds legitimacy in “unsettlement” of the law.⁴⁷ In the struggle against any temporary settlement on a particular law or policy, agonists find a different kind of democratic legitimacy—namely, the opportunity for winners and losers alike to practice democracy by defending and critiquing the status quo.⁴⁸ In the commitment to this contestation, an actual *dêmos* is forged around a commitment to live together despite (or even because of) our irreconcilable conflicts. In short, agonists celebrate political conflict and seek to foster and sustain it, even when it does not emerge naturally.

Envisioning the administrative agon—that is, the administrative process as a meeting of administration and agonistic democracy—challenges us to rethink basic design features of the administrative state.⁴⁹ The administrative agon

45. See *infra* Part III. Agonistic democratic theory has made small inroads into the broader legal literature. See, e.g., Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 394-95 (2016); Bernadette Meyler, *Accepting Contested Meanings*, 82 FORDHAM L. REV. 803, 816-18 (2013); Scott Skinner-Thompson, *Agonistic Privacy & Equitable Democracy*, 131 YALE L.J.F. 454, 457 (2021); Glen Staszewski, *Obergefell and Democracy*, 97 B.U. L. REV. 31, 92-101 (2017).

46. See *infra* Part III.

47. See *infra* Part III.

48. See, e.g., BONNIE HONIG, *POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS* 210-11 (1993) (discussing an agonistic embrace of a “politics of augmentation” that “acknowledg[es] the remainders of the will to closure, extending to them a magnanimity and gratitude that seem to be beyond the reach of most liberals and communitarians”); CHANTAL MOUFFE, *AGONISTICS: THINKING THE WORLD POLITICALLY* 119-20 (2013) [hereinafter MOUFFE, *AGONISTICS*] (describing a “crisis of representation” in democracies today and prescribing reforms to representative institutions that would “create the conditions for an agonistic confrontation where the citizens would be offered real alternatives”).

49. See *infra* Part IV. In her recent *Harvard Law Review* Foreword, Cristina M. Rodríguez hinted at the need to develop an agonistic model of administration to address current legitimacy crises. See Cristina M. Rodríguez, *The Supreme Court, 2020 Term—Foreword: Regime Change*, 135 HARV. L. REV. 1, 8 (2021) (identifying “agonistic struggle” as a key part of what makes “regime change” democratically legitimate); see also Ashraf Ahmed & Karen M. Tani, *Presidential Primacy Amidst Democratic Decline*, 135 HARV. L. REV. F. 39, 41-42, 45 (2021) (associating Rodríguez’s theory of regime change with agonism and acknowledging its potential benefits for thinking about administration and democracy, but questioning whether Rodríguez’s President-centric account is normatively desirable). Here, I take the next step of fleshing out that

would focus much more than existing administrative processes on forcing agencies to continually justify “settled” decisions and promote robust adversarial contestation.⁵⁰ In exchange for this “unsettling” of decisions, which make it possible for multiple constituencies to “prevail,” agencies would be permitted to make decisions with far less procedural constraint than they currently can, which would in turn allow agencies to quickly pivot in response to the ebb and flow of political contest. To ensure that this contestation truly represents the diverse views of the *dêmos*, the administrative agon would also take far more seriously the perspectives of marginalized groups and individuals, giving them a voice in the decision making process even when they lack practical access to the levers of power.⁵¹ And, in contrast with theories that seek to clarify lines of authority tying administrative action to oversight by electorally accountable officials, the administrative agon would structure democratic legitimacy around a flattened bureaucratic hierarchy that fosters intra- and interagency competition.⁵² These design features would depart from conventional intuitions in many ways, but they also highlight the fact that certain existing administrative practices and institutions that have troubled theorists in the past are actually consonant with established democratic theory.

My account of the administrative agon proceeds as follows. Part I unpacks the democratic theories that have conventionally been invoked to justify the administrative state. In Part II, I highlight the many ways in which these conventional theories fail to provide a satisfying answer to the democracy question. Part III presents agonistic democratic theory as an alternative to conventional democratic theories. Then, Part IV develops a more practical account of the administrative agon, emphasizing features of the contemporary administrative process that are already agonistic while pointing the way to more thoroughly agonistic processes that have not yet been adopted or considered. Part V concludes by discussing payoffs for thinking about administration agonistically, as well as some of the drawbacks and limitations of such a conceptual shift.

model, but my account differs from Rodríguez’s in critical respects. Much like Ahmed & Tani, *supra*, I resist Rodríguez’s celebration of presidential administration on agonistic grounds and point to the ways that agonism is better instantiated through decentered administration. See *infra* Part IV.

50. See *infra* Part IV.

51. See *infra* Part IV.

52. See *infra* Part IV.

I. DEMOCRATIC THEORY AND THE ADMINISTRATIVE STATE: A BRIEF HISTORY

Democracy, though an essentially contested concept,⁵³ is central to modern government.⁵⁴ Scores of recent accounts lament that commitment to democracy is eroding in the United States and abroad.⁵⁵ But whatever the empirical validity of those accounts, the presumption remains: government is legitimate only insofar as it meets some democratic criterion, however minimally defined.

This presumption is relevant not only to the elected branches of various governments—legislatures, parliaments, chief executives, and so on—but also to what is commonly referred to in the United States as the “administrative state.”⁵⁶ Although the administrative state is not directly mentioned in the Constitution,⁵⁷ it is arguably the central institution in modern American governance, as

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53. Essentially contested concepts “inevitably involve[] endless disputes about their proper uses on the part of their users.” W.B. Gallie, *Essentially Contested Concepts*, 56 *PROCS. ARISTOTELIAN SOC’Y* 167, 169 (1956). Many scholars have observed that democracy is such a concept. See, e.g., David Collier, Fernando Daniel Hidalgo & Andra Olivia Maciuceanu, *Essentially Contested Concepts: Debates and Applications*, 11 *J. POL. IDEOLOGIES* 211, 222 (2006); Michael W. Spicer, *What Do We Mean by Democracy? Reflections on an Essentially Contested Concept and Its Relationship to Politics and Public Administration*, 51 *ADMIN. & SOC’Y* 724, 726 (2019).
54. See CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* 4-5 (2016).
55. See, e.g., STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 2 (2018); ANNE APPELBAUM, *TWILIGHT OF DEMOCRACY: THE SEDUCTIVE LURE OF AUTHORITARIANISM* 16-20 (2020); TIMOTHY SNYDER, *ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY* 10-13 (2017).
56. See Sharon B. Jacobs, *The Administrative State’s Passive Virtues*, 66 *ADMIN. L. REV.* 565, 574 (2014) (defining the administrative state as “a vast bureaucracy of agencies and commissions in which the majority of law formation, interpretation, and enforcement actually takes place”).
57. See Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 *FLA. L. REV.* 1215, 1221 (2015) (“With the written Constitution largely silent on the subject of administration, administrative law has evolved to perform the functions ordinarily associated with constitutions . . .”); see also BRIAN J. COOK, *THE FOURTH BRANCH* 128 (2021) (arguing that the Constitution should be amended to “make administration an independent fourth branch”). There may be more in the U.S. Constitution that presupposes an administrative state than we have appreciated. See Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 *YALE J. ON REGUL.* 90, 93 (2021) (“[T]he constitutional structure of [a ‘department’ as identified in Article II] provides a foundation for the administrative state that is separate from the President’s executive power.”).

it is worldwide.⁵⁸ Given society's commitment to democratic forms of government and the importance of administrative institutions to the exercise of government power, it is no surprise that many observers expect the administrative state to have some grounding in democratic norms.⁵⁹ Indeed, the progressive thinkers who conceived of the modern administrative state were fairly obsessed with the question of whether the burgeoning administrative state could be squared with democracy, even though their answer was, by modern standards, naive.⁶⁰ Many more recent accounts view the administrative state's compatibility with democratic theory as much more inscrutable and have devoted substantial energy to explaining why the administrative state is nevertheless consistent with democracy.⁶¹

This Part synthesizes these attempts to use conventional democratic theories to legitimate the administrative state's exercise of political power. I describe each theory and link it to key institutional practices that previous accounts have emphasized in arguing that the administrative state is compatible with democracy.

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58. See K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 144 (2017) (“Even when legislatures function well, agencies are, in practice, the primary sites of policymaking, giving specificity and concreteness to broad legislative directives.”). For accounts that generalize this necessity for bureaucracy and delegation across the globe, see SUSAN ROSE-ACKERMAN, *DEMOCRACY AND EXECUTIVE POWER: POLICYMAKING ACCOUNTABILITY IN THE US, THE UK, GERMANY, AND FRANCE* 5 (2021), which notes that “delegation to bureaucracies is a practical reality” in democracies across the globe, including the United States, France, the United Kingdom, and Germany; and Daniel A. Bell, *Reforming the Administrative State: A View from China*, 5 *AM. AFFS.* 170, 173 (2021), which states that “[t]he need for bureaucracy and rule by experts becomes even more pressing as countries become economically complex and socially diverse. So it’s not surprising that China has reestablished a strong form of bureaucratic rule since the period of economic reform in the late 1970s”
59. See BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 150 (2019) (arguing that “administrative power is legitimate to the extent that it enables us to be free,” and that “[i]n a context [of] deep social interdependency, such freedom requires jointly authoring shared norms, and turning these shared norms into shared social conditions”); Nicholas Bagley, *The Procedure Fetish*, 118 *MICH. L. REV.* 345, 369-70 (2019) (collecting statements from leading administrative-law scholars to the effect that administrative law and procedures can help save administration from a democratic deficit). Nicholas Bagley, however, takes issue with the empirical claim that most people expect administrative agencies to be democratic institutions. See Bagley, *supra*, at 381 (“[C]laims about legitimacy tacitly ascribe the lawyerly anxiety about procedural irregularity to the broader public – a public that, as it happens, is mercifully unaware of picayune debates over administrative procedure.”).
60. See *infra* Section I.A.
61. See *infra* Section I.B.

A. *The Democracy Factory*

The earliest thinking about the modern administrative state⁶² is often characterized as envisioning a depoliticized role for bureaucracy. American thinkers in the Progressive Era, running roughly from the late 1800s through the 1920s, drew heavily from perceptions about the more mature bureaucracies of European nations.⁶³ As described by Max Weber, these bureaucracies were designed to be efficient at completing programmed tasks.⁶⁴ In this, American observers saw a model that could permit the development of a state apparatus capable of efficiently and professionally managing the growing number of tasks that the whole government assigned to it.⁶⁵

For some advocates of a modern administrative state, democracy was the domain of politics while administration was the domain of instrumental rationality in implementing political decisions made elsewhere.⁶⁶ A popular metaphor for the administrative process was a “transmission belt” that would efficiently implement whatever mandates emerged from the real democratic process in Congress.⁶⁷ To the extent that agencies crossed the line, judicial review would be

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62. Legal historians have largely debunked the idea that the American state was “laggard” in the sense that it is underdeveloped compared to other Western nations’ states. See William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752, 754 (2008). Following convention, I mark the beginning of the modern administrative state at the creation of the Interstate Commerce Commission. See STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 15 (1982) (“The great departure in American institutional development came between 1877 and 1920, when new national administrative institutions first emerged free from the clutches of party domination, direct court supervision, and localistic orientations.”). Even before that, American government managed to “regulate” extensively, even if it did not always take the familiar form of administrative agencies promulgating regulations. See WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 1-2 (1996) (discussing the extensive system of regulation that governed American life during the pre-administrative era).
63. See Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 201-02 (1887) (encouraging the development of a “science of administration” on “this side of the sea” and lamenting that European thinkers had occupied the field).
64. See MAX WEBER, ECONOMY AND SOCIETY: A NEW TRANSLATION 350-51 (Keith Tribe ed. & trans., 2019). For literature connecting Max Weber’s ideas to modern debates in public administration and administrative law, see Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 467 (2012).
65. Wilson, *supra* note 63, at 200-01.
66. See Shapiro et al., *supra* note 64, at 486-87.
67. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

available to draw them back to some identifiable congressional intent.⁶⁸ This strict dichotomy between politics and administration conveniently bracketed the difficult questions that would emerge when agency officials were charged with making political decisions for themselves.

Of course, some Progressive Era thinking about the administrative state took the democratic challenge more seriously. Blake Emerson and William J. Novak have shown that thinkers like John Dewey, Mary Follett, W.E.B. Du Bois, Frank Goodnow, and Woodrow Wilson envisioned bureaucracy as a democratic institution committed to a kind of participatory ethic that would afford the public an opportunity to forge a community of laws that would in turn promote community freedom.⁶⁹ This participatory state would “bring the people into the state as partners in the interpretation and implementation of freedom.”⁷⁰ But it was the Weberian, instrumental, apolitical account of administration that caught on.⁷¹ Leading midcentury public-administration scholars like Herbert Kaufman championed concepts of “neutral competence” that envisioned a limited role for administrators in making political decisions.⁷²

Despite the usefulness of rhetoric about the “transmission belt” and “neutral competence,” the line between politics and neutral administration was chimerical.⁷³ Even from the beginning, it was clear that administrators would indeed have to make political decisions. In the New Deal era, which was marked by aggressive delegations of power from Congress to a corps of new agencies, thinkers like James M. Landis attempted to update the politics/administration dichotomy so that broad delegations of authority would not necessarily fall on the political

68. Seidenfeld, *supra* note 17, at 1516.

69. See EMERSON, *supra* note 59, at 3 (threading together the works of these thinkers with Hegelian thought); NOVAK, *supra* note 22, at 1-2 (arguing that between 1866 and 1932, the Progressive Movement self-consciously crafted a “central nation-state built on new positive . . . and . . . new democratic . . . conceptions of politics and administration” (emphasis omitted)).

70. EMERSON, *supra* note 59, at 7.

71. See *id.* at 3 (acknowledging that Weber’s account “shaped scholarly understandings of the American public law system”).

72. Herbert Kaufman, *Emerging Conflicts in the Doctrines of Public Administration*, 50 AM. POL. SCI. REV. 1057, 1060 (1956).

73. See Seidenfeld, *supra* note 17, at 1517 (“The transmission belt conception is seriously flawed. Arguably, it recognizes that even when Congress provides a detailed statutory prescription, agencies must exercise some judgment in implementing and enforcing it. The notion, however, that an agency can exercise judgment in implementing statutes without influencing and reshaping the political balance struck by Congress is, in most instances, a fiction.”).

side of the ledger.⁷⁴ Landis's thinking is often associated with the idea that the expertise of administrators would help to render apolitical even discretionary decisions.⁷⁵ Mark Seidenfeld, summarizing Landis, explained that "[a]lthough an agency's discretionary decisions do alter the ends promoted by a statutory scheme, the expertise justification implicitly assumes that if only everyone had the same information and expertise possessed by the agency, everyone would agree that such alterations execute the 'will of the people.'"⁷⁶

Yet, this and other efforts to adapt old theories to new reality failed, and it became clear that the line was untenable.⁷⁷ One response to this failure might have been to embrace the positive side of Progressive Era thought—that is, to organize administration around participation and its capacity to contribute to the production of democracy.⁷⁸ But the New Deal generation had, by the middle of the century, passed the torch to a new generation of theorists who developed new ways of grappling with the democratic implications of a politically empowered administrative state.

B. *Domesticating Administrative Politics*

The New Deal laid bare the political, discretionary role of the administrative state, and there would be no going back. Attention shifted from whether administrative agencies could be sequestered from politics to whether agencies engaged

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74. See James M. Landis, *Perspectives on the Administrative Process*, 14 ADMIN. L. REV. 66, 70 (1961) (demarcating the “procedural phase of the administrative process” from the “substantive laws entrusted to administrative agencies”); see also Seidenfeld, *supra* note 17, at 1518-19 & nn.31-36 (describing James M. Landis's views on the separation between politics and administration).
75. See Seidenfeld, *supra* note 17, at 1518-19 (describing a New Deal “agency expertise” model associated with Landis, among others, that counsels “insulation from political and legal constraints that only get in the way of good government”); RAHMAN, *supra* note 58, at 6-7 (describing Landis's model as “managerialism” that calls for “economic policy to be made through bodies that are centralized, expert-led, and politically insulated, free to make policy on the basis of morally neutral scientific knowledge”).
76. Seidenfeld, *supra* note 17, at 1519.
77. Some scholars continue to argue that it is possible to frame administrative law around the goal of ensuring that the bureaucracy is “competent for the purposes assigned to it by Congress.” ELIZABETH FISHER & SIDNEY A. SHAPIRO, *ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW* 22 (2021).
78. See EMERSON, *supra* note 59, at 7 (linking “Progressive thought and practice” to efforts to open bureaucracy to public participation while retaining efficacy); NOVAK, *supra* note 22, at 15 (“The progressives’ distinctly pragmatic vision of democracy—focused as it was on the ends, outcomes, and consequences of effectuating social change, equalizing resources, and enhancing human life in a modernizing society and economy—hinged on generalizing the capacities of the American state.”).

in politics could nevertheless be tamed to make their legal power consistent with (perhaps reinforcing of) democratic features of our political system. This subtle shift led to a flowering of democratic theorizing about the administrative state. Scholars drew inspiration from classical models of democracy to argue that certain features of the administrative process were reconcilable with, if not required by, long-standing democratic thought.

1. *Pluralism and the Interest-Group Theory of Administrative Law*

The earliest answer to the domestication question came from political science. In the New Deal era, most political scientists adhered to a theory of democracy called “pluralism.”⁷⁹ The central goal of almost all classical democratic theories is to implement the common good, however it is defined and measured. The empirical realism of political science made it difficult to maintain that the common good was self-evident: there was no getting around the fact that the “American people were an irreducibly diverse bunch, with an array of opposing interests, and efforts to bridge divisions in the service of a supervening common good were destined to fail. Americans simply did not come together as one when it came to matters of policy.”⁸⁰ But the pluralists did not despair. From a democratic perspective, what mattered was that policy outcomes matched the result of fair competition among the concerned interests in a marketplace for influence. In a sense, the pluralists took James Madison’s vision in *Federalist No. 10* of a world in which factions are mutually checked⁸¹ and argued that it had come to fruition. No one group could easily “dominate across the board”⁸²—a condition described by pluralists as “polyarchy,” literally meaning government by many.⁸³ In this way, the pluralist tradition redefines the common good so that it no longer means what the people as a whole want but rather those things for which subsets of the people are willing to mobilize. If, empirically, the demands for government are satisfied and there are no objections, then the common good is realized.

79. Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 613 (2016).

80. *Id.* at 614.

81. THE FEDERALIST NO. 10 (James Madison).

82. Mathews, *supra* note 79, at 615.

83. See, e.g., ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 8 (1971).

While these perspectives about American democracy were not focused exclusively on the administrative process,⁸⁴ they left an indelible mark on it. Courts and Congress responded to concerns about the lack of competition in the policymaking market with a programmatic “reformation” of American administrative law. The goal was to make agencies more open to public participation from diffuse regulatory beneficiaries – what Richard B. Stewart famously referred to as the “interest representation model” of administrative law.⁸⁵ For its part, Congress supplied a plethora of new statutes – dubbed the “new social regulation” by critics⁸⁶ – designed to ameliorate social problems in areas ranging from the environment to health, worker safety, and civil rights. This “rights revolution”⁸⁷ not only expanded the scope of the administrative state’s regulatory authorization but also came with various procedural innovations. The citizen-suit provisions embedded in many of these statutes empowered “private attorneys general” to enforce the law against private parties or force agencies to act against violators.⁸⁸ Moreover, Congress began to impose strict deadlines for rulemaking during this period, again on the theory that captured agencies could not be trusted to follow congressional mandates unless there was an enforceable legal obligation for which a court order could be obtained.⁸⁹

In federal courts, many of the now familiar doctrines in administrative law took their form in this period. For instance, although the Supreme Court would later rein in the practice in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,⁹⁰ the appellate courts fleshed out previously bare-bones procedural requirements for notice-and-comment rulemaking in Section 553 of the Administrative Procedure Act (APA). By requiring agencies to describe their proposals in detail before seeking public comment, the circuit courts enabled more groups to know their stake in the rulemaking and to have enough

84. Some accounts did merge pluralist theory with a concern for public administration. See, e.g., SAMUEL KRISLOV & DAVID H. ROSENBLUM, REPRESENTATIVE BUREAUCRACY AND THE AMERICAN POLITICAL SYSTEM 22-26 (1981); Brian J. Cook, *The Representative Function of Bureaucracy: Public Administration in Constitutive Perspective*, 23 ADMIN. & SOC’Y 403, 410 (1992).

85. See Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 441-43 (2003); Stewart, *supra* note 67, at 1760-61.

86. William Liley III & James C. Miller III, *The New “Social Regulation,”* 47 PUB. INT. 49, 53 (1977).

87. CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE, at v (1990).

88. See SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 62-63 (2010).

89. See R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 7-9 (1983).

90. 435 U.S. 519 (1978).

information to participate effectively.⁹¹ Additionally, courts developed the “arbitrary and capricious” standard in Section 706 of the APA into a probing test of agencies’ justifications of policy choices. The language itself suggests that judicial review should be quite permissive, but courts began instead to give agency choices a “hard look,” in part to ensure that agencies had adequate incentives to take the new participation seriously.⁹² Finally, courts liberalized barriers to litigation by allowing more groups to obtain standing to sue and challenge agency action.⁹³

The net result of these innovations was an invigoration of public participation in the administrative process and somewhat circumscribed agency autonomy.⁹⁴ The hope was that, through these various new mechanisms, interest-group participation would serve as a “surrogate for the political process,” thereby imparting democratic legitimacy on the administrative state.⁹⁵ It is clear that the era of pluralist reform of the administrative process left a mark that even today looms in what Nicholas Bagley calls the “procedure fetish” — or, the tendency of some to believe that more process is necessarily better.⁹⁶

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91. For instance, agencies were required to disclose the materials that they relied upon in formulating a proposed rule so that potential commenters could understand the agency’s thinking (the so-called Portland Cement doctrine). See *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 401-02 (D.C. Cir. 1973). They were also required to respond to all significant comments. See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977); *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 252-53 (2d Cir. 1977). Finally, and perhaps most counterproductively, the courts required agencies to start over again with the notice-and-comment process if they wanted to make significant changes to the proposal after receiving comment (the so-called logical-outgrowth doctrine). See *S. Terminal Corp. v. EPA*, 504 F.2d 646, 659, 682 (1st Cir. 1974). Several of these doctrines have come in for heavy criticism in recent years because they lack much mooring in the Administrative Procedure Act’s text. See Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 *GEO. MASON L. REV.* 733, 737-38, 742-44 (2021).
92. Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 *ADMIN. L. REV.* 753, 757-66 (2006).
93. Stewart, *supra* note 67, at 1723-34.
94. In truth, many of these reforms were purely formal. While opening processes to all comers, they did not guarantee that the processes would be used by broader constituencies, and in practice there are still massive disparities in who participates. See *infra* Section II.A.
95. See Stewart, *supra* note 85, at 445.
96. Bagley, *supra* note 59, at 347-49. But see Aaron L. Nielson, *Optimal Ossification*, 86 *GEO. WASH. L. REV.* 1209, 1210 (2018) (arguing that even if procedure slows the agency decision making process, such delay can be helpful). Not all are so sanguine about procedure as Nicholas Bagley suggests. Scholars have long highlighted the risks of ossification and informational capture. See, e.g., Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 *DUKE L.J.* 1321, 1351-62 (2010) (showing that many of the reforms that came out of the

Despite these changes, some empirical evidence gives reason to doubt that these adjustments improved the democratic legitimacy of administrative processes.⁹⁷ Indeed, the empirical basis for pluralism's rosy view of political competition was always questionable both inside and outside the administrative state. Critics showed that the pluralists had a narrow, incomplete understanding of political power that caused them to overlook how distribution of power was skewed toward particular interests.⁹⁸ As the critic E.E. Schattschneider put it, the "flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent."⁹⁹ From a different starting point, public-choice scholars converged on the same critique: the competition for policy was not likely to be a fair fight due to differences in the distribution of incentives to compete.¹⁰⁰ Both of these critiques caused later pluralist theorists to rebrand as "neopluralists" who believed that competition among interests was not perfectly balanced but that policymaking processes could be adapted to facilitate a polyarchy by expanding opportunities to participate in government decision making.¹⁰¹ But the underlying critique of pluralism – that it is insufficiently attentive to power imbalances in public participation – remains strong and rings true in the context of conventional administrative-law processes where power imbalances abound.

pluralist era led to informational capture because regulated entities could overload participatory processes with their resources and expertise); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60-62 (1995) (discussing concerns about ossification caused by judicial review and other procedural constraints).

97. Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 ANN. REV. POL. SCI. 37, 45-48 (2019) (discussing research showing participatory imbalances in rulemaking processes that cast doubt on the idea that notice-and-comment rulemaking provides for fair competition between interests).
98. Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 952 (1962); STEVEN LUKES, *POWER: A RADICAL VIEW* 10 (1974).
99. E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 35 (1960).
100. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 2-3 (2d ed. 1971). Public-choice scholars played an outsized role in generating the idea of agency capture, which holds that agency "regulation is acquired by the industry and is designed and operated primarily for its benefit." Stigler, *supra* note 12, at 3.
101. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 56-60 (1998) (describing neopluralist theory and noting a common baseline that the "problem of illicit interest-group influence is not intractable, but may be solved by adjusting the regulatory decisionmaking apparatus"); STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* 3-4 (2009); Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1398 (2000).

2. *Civic Republicanism and Deliberation*

The 1980s saw the rise of a new strand of democratic theory of the administrative state.¹⁰² This strand drew on a classical revival of civic-republican theory inspired by the work of J.G.A. Pocock and Quentin Skinner.¹⁰³ Republican theory makes several amendments to democratic theory that matter for our purposes. The most important of these is a greater emphasis on a common good that does not reside in the aggregation of the actual preferences of citizens, as it does with pluralist theories, but rather in some ideal notion of the common good.¹⁰⁴ For republican theorists, what makes the coercive force of law and government legitimate is that all self-governing, civically engaged citizens will assent to it because they recognize that it is good for the polity as a whole.¹⁰⁵ In other words, republicanism rejects the direct democracy of ancient Greek city-states, which it views as a potentially debased form of government.¹⁰⁶ Whereas most democratic theory concerns itself with the problem of aggregating preexisting preferences of citizens, whether through elections or, as we saw with the

102. See generally Symposium, *The Republican Civic Tradition*, 97 *YALE L.J.* 1493 (1988) (discussing the revival of civic republicanism in constitutional and political theory).

103. See generally J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION*, at vii-viii (2d ed. 2003) (discussing the history of “the Machiavellian moment,” which “denotes the moment, and the manner, in which Machiavellian thought made its appearance . . . [and] is a name for the moment in conceptualized time in which the republic was seen as confronting its own temporal finitude”); 1 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE RENAISSANCE*, at ix-x (1978) (outlining the development of “the modern concept of the State . . . the idea that there is a separate legal and constitutional order, that of the State, which the ruler has a duty to maintain”). For a more recent intellectual history and collection of sources, see PHILIP PETTIT, *ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY* 3, 6 nn.1-2 (2012).

104. See Mathews, *supra* note 79, at 622-23; MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 5-6 (1996). Another strand of civic republicanism is, on some accounts, nondomination: the idea that the good republic is one where people are not subjected to the arbitrary will of others. See PETTIT, *supra* note 103, at 2 (“The idea that citizens could enjoy this equal standing in their society, and not have to hang on the benevolence of their betters, became the signature theme in the long and powerful tradition of republican thought. Familiar from its instantiation in classical Rome, the idea was reignited in medieval and Renaissance Italy; spread throughout Europe in the modern era, sparking the English Civil War and the French Revolution; and inflamed the passions of England’s American colonists in the late eighteenth century, leading to the foundation of the world’s first modern democracy.”).

105. PETTIT, *supra* note 103, at 149-52.

106. DAVID HELD, *MODELS OF DEMOCRACY* 54-55 (3d ed. 2006).

pluralists, a system of interest-group competition for government attention, republican theory concerns itself with designing public institutions that are likely to result in good government.

While republican theorists are all over the map when it comes to defining the “good,”¹⁰⁷ the most influential strand, at least in modern times, equates it with the government action that citizens would want if they had to come to a consensus through real or imagined deliberation about the good.¹⁰⁸ The contrast with the pluralist school could not be more apparent: republican (and deliberative theorists, discussed below) do not presuppose that all forms of participation in the political process are equal. There is an ideal form of participation—the dialectic process of offering reasons that are then subjected to critical engagement—and that form of participation should be privileged such that a consensus about the common good can emerge.¹⁰⁹ Republicans do not deny the existence of disagreement in society. Rather, they argue that these disagreements could be limited or bracketed through a process of deliberation, if only we were to make the institutions that could provide a platform for public-minded engagement.¹¹⁰ If this were the result, then the central goal of democracy—basing government and law on the common good—would be a simple task of following the emergent consensus. No math problems.

The turn to deliberation defined the field of democratic theory for several subsequent decades.¹¹¹ Theorists identified ingenious methods for allowing not just participation but meaningful, consensus-oriented deliberation. These included methods like deliberative polls—structured group discussions with polling before and after deliberation to show the progress toward understanding and

107. For a recent, but contested, statement of what the common good entails and how it should be engrafted in constitutional and administrative law, see ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* 26-51, 136-54 (2022).

108. See GUTMANN & THOMPSON, *supra* note 38, at 27-28.

109. Deliberative democratic theorists offer several devices that regulate deliberation to ensure that it achieves its purpose of identifying an underlying consensus. For instance, thinkers like John Rawls and Jürgen Habermas devoted significant effort to elaborating notions of “public reason” or “ideal speech situations,” which are, on their accounts, preconditions for deliberation because all deliberative partners would be able to accept these ground rules. See JOHN RAWLS, *POLITICAL LIBERALISM* 212-54 (1993); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 305-06 (William Rehg trans., 1996). As we will see, agonists heavily critiqued the exclusive effects of limiting deliberation to certain kinds of acceptable reasons that not all people are likely to endorse.

110. GUTMANN & THOMPSON, *supra* note 38, at 60-61.

111. See, e.g., Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 *ANN. REV. POL. SCI.* 497, 498-500 (2008); Simone Chambers, *Deliberative Democratic Theory*, 6 *ANN. REV. POL. SCI.* 307, 307 (2003).

consensus¹¹²—and more society-scale approaches like deliberation days, during which people could come together in small groups to discuss issues of concern.¹¹³

Just as with pluralist theory, civic-republican and deliberative theory had a major impact on the administrative state and administrative law. To some degree, scholars merely noted that the processes of participation and justification encoded into administrative law—processes like notice and comment and “hard look” review—were descriptively congruent with deliberative or republican models of democracy.¹¹⁴ These processes were, in fact, not treated as a plebiscite (as pluralist theory might have predicted) but as opportunities for citizens and agencies to learn from deliberative engagement and adopt regulatory and social policies that could withstand the test of reason and support the common good.¹¹⁵ And, as Mark Seidenfeld argued, if such processes were to serve as the lodestar for democratic legitimacy, then there is an argument that the administrative process is a *better* instantiation of civic-republican and deliberative principles than the statutory politics that preceded it.¹¹⁶ Congress, after all, is hardly deliberative and is more concerned with the pork-barrel politics associated with pluralist processes.¹¹⁷ On this account, the delegation problem is solved: it is not illegitimate for Congress to delegate decision making discretion to agencies; in fact, it is legitimizing insofar as the administrative process will take broad delegations of authority and make them more consonant with the common good than could Congress left to its own devices.¹¹⁸

Civic-republican and deliberative theory also had more programmatic reform implications, many of which have resulted in lasting changes to administrative processes. Perhaps most visibly, some civic-republican theorists, in their search for a universal mode of analysis and reasoning, have broadly endorsed cost-benefit analysis (CBA). CBA purports to be capable of abstracting regulatory analysis to the point of synoptic rationality. The decision rule it yields—do things that increase net social benefits after considering any social costs—is sometimes presented as the only universalizable notion of the common good. It

112. James S. Fishkin & Robert C. Luskin, *Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion*, 40 ACTA POLITICA 284, 288 (2005).

113. BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY 3 (2004).

114. Seidenfeld, *supra* note 17, at 1560-61.

115. See Mathews, *supra* note 79, at 627.

116. Seidenfeld, *supra* note 17, at 1541.

117. *Id.* at 1544-46.

118. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95-99 (1985).

is no surprise, then, that the rise of civic-republican theory, in particular, coincided with a flourishing of what Cass R. Sunstein calls the “cost-benefit state.”¹¹⁹ Executive Order No. 12291, issued by President Reagan in 1981, institutionalized CBA and centralized review of CBA analyses in major agency rulemakings.¹²⁰ President Clinton in 1993 issued his own review order, Executive Order No. 12866, which reinforced the commitment to CBA but placed greater emphasis on regulatory benefits.¹²¹ Every President since has basically embraced CBA, albeit with different openness to the consideration of unquantified regulatory benefits and distributional effects.¹²² Although *civic* republicans who emphasize participation and deliberation may find fault in the actual practice of White House review of agency CBA,¹²³ the ideology of this long-standing institutionalization of CBA is indeed republican in nature (insofar as it attempts a universalizable definition of the common good). Sunstein, who served as Administrator for the Office of Information and Regulatory Affairs (OIRA) under President Obama and who also has written on civic republicanism, argues that the process of re-

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119. See CASS R. SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION*, at ix (2002).
120. Exec. Order No. 12291, 3 C.F.R. 127 (1982), *revoked by* Exec. Order 12866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2018).
121. Exec. Order No. 12866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2018).
122. See Susan Dudley, *A Decade of Political Swings, and Consistency*, REGUL. REV. (Sept. 30, 2020), <https://www.theregreview.org/2020/09/30/dudley-decade-political-swings-consistency> [<https://perma.cc/G7RZ-3KRS>]; MICHAEL A. LIVERMORE & RICHARD L. REVESZ, *REVIVING RATIONALITY: SAVING COST-BENEFIT ANALYSIS FOR THE SAKE OF THE ENVIRONMENT AND OUR HEALTH* 4 (2020) (noting uses of cost-benefit analysis (CBA) by Presidents Reagan, H.W. Bush, Clinton, W. Bush, and Obama). *But see* LIVERMORE & REVESZ, *supra*, at 5 (noting that President Trump “ignore[d], without justification, norms and practices that were constructed through a slow and deliberative process by good-faith actors in both parties for decades”). President Biden’s own memorandum on regulatory review similarly “embrace[d] continuity on important components” but also “provide[d] a significant blueprint for much-needed reform.” Richard L. Revesz, *A New Era for Regulatory Review*, REGUL. REV. (Feb. 16, 2021), <https://www.theregreview.org/2021/02/16/revesz-new-era-regulatory-review> [<https://perma.cc/SQ7X-EQNJ>]. For instance, the memorandum highlights the importance of distributional analyses of costs and benefits as a means of promoting equity and justice in regulatory outcomes. See Joseph R. Biden, Jr., *Memorandum for the Heads of Executive Departments and Agencies: Modernizing Regulatory Review*, WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review> [<https://perma.cc/AFG5-VEEH>]. This feature, in particular, might hint at a conception of the purpose of CBA that is more realistic about the difficulties of finding the “common good” through technocratic exercises like it.
123. See Simon F. Haeder & Susan Webb Yackee, *Out of the Public’s Eye? Lobbying the President’s Office of Information and Regulatory Affairs*, 9 INT. GRPS. & ADVOC. 410, 414-17 (2020) (showing evidence of rampant lobbying by certain interest groups during Office of Information and Regulatory Affairs (OIRA) review).

view of agency regulations helps to coordinate the federal government's regulatory activities and marry them to standards of the common good on which all can agree.¹²⁴

There is some evidence that deliberative methods can appreciably improve ordinary people's understandings of issues and of other people's perspectives, and that it can even foster some shared perspectives on divisive issues.¹²⁵ But there are also realist critiques of deliberative democracy that note that deliberation does not always yield consensus or even greater knowledge or mutual respect,¹²⁶ and also that the methods that are proven are not easily scalable from "minipublics" to mass participation.¹²⁷ Partly in response to these critiques, republican and deliberative theorists shifted their emphasis away from the implementation of deliberative schemes at the ground level to questions about the ideal conditions for deliberation to occur. For instance, John Rawls argued that true deliberation oriented toward the common good could occur if deliberators limit themselves to invoking "public reason" – that is, reasons that "all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational" – to justify "fundamental questions" of government.¹²⁸ What Rawls refers to as "comprehensive doctrines" would have to be excluded from public deliberation because they cannot be accepted by all.¹²⁹ Jürgen Habermas¹³⁰ and, later, Joshua Cohen,¹³¹ reframed the inquiry

124. See Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840 (2013) [hereinafter Sunstein, *OIRA Myths and Realities*]; CASS R. SUNSTEIN, *THE COST-BENEFIT REVOLUTION* 24 (2018).

125. Thompson, *supra* note 111, at 512; Michael X. Delli Carpini, Fay Lomax Cook & Lawrence R. Jacobs, *Public Deliberation, Discursive Participation, and Citizen Engagement: A Review of the Empirical Literature*, 7 ANN. REV. POL. SCI. 315, 325 (2004).

126. See Tali Mendelberg, *The Deliberative Citizen: Theory and Evidence*, in 6 POLITICAL DECISION MAKING, DELIBERATION, AND PARTICIPATION 151, 158 (Michael X. Delli Carpini, Leonie Huddy & Robert Y. Shapiro eds., 2002) (showing how deliberation backfires).

127. See Ramon van der Does & Vincent Jacquet, *Small-Scale Deliberation and Mass Democracy: A Systematic Review of the Spillover Effects of Deliberative Minipublics*, 2021 POL. STUD. 1, 13-14.

128. John Rawls, *The Idea of Public Reason*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 93, 96-97 (James Bohman & William Rehg eds., 1997).

129. RAWLS, *supra* note 109, at 36-37.

130. 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* 25 (Thomas McCarthy trans., 1984) (1981). For a helpful discussion of Habermas's theory of the ideal-speech-situation concept and its conditions, see Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 96-100 (1989).

131. Joshua Cohen, *Deliberation and Democratic Legitimacy*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS, *supra* note 128, at 67, 67-68.

around ideal speech procedures, as opposed to content.¹³² The assumption that either substantive limitations on public reasoning or regulation of deliberative processes could promote real consensus has been forcefully criticized as unduly exclusive of the full range of political disagreement,¹³³ and the list of conditions identified by deliberative theorists has been reduced to a more “minimalist” list of conditions.¹³⁴ But the force of the critique of deliberative conceptions of democracy as unrealistic and restrictive remains.

Some proponents of deliberative democracy, like Amy Gutmann and Dennis Thompson, have in turn acknowledged that there might be limits to what deliberative democracy can realistically achieve once we move from abstractions to actual issues.¹³⁵ For some issues, mainly ethical dilemmas or those involving religious views or matters of conscience, the preferences or interests of disagreeing groups might be so divergent that deliberation cannot bridge the gap. In such situations, Gutmann and Thompson concede that the only thing we can hope for is a posture of mutual respect and accommodation *despite* differences that we cannot understand.¹³⁶ Unfortunately for proponents of civic republicanism and deliberation in the administrative state, many issues fit this billing. As Nina A. Mendelson points out, “agencies often must resolve value-laden policy questions

132. To some extent this “proceduralist” turn in deliberative theory reflected a split between deliberative theory and republican theory, with the latter being criticized by Habermas as struggling with “ethical overload.” Jürgen Habermas, *Three Normative Models of Democracy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 21, 21 (Seyla Benhabib ed., 1996).

133. See Chantal Mouffe, *Democracy, Power, and the “Political,”* in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL*, *supra* note 132, at 245, 248–55. Habermas himself seemed to recognize the force of this critique and in later work distanced himself from the idea that the ideal speech situation must be institutionalized for deliberation to be legitimate. See Steven K. White, *Habermas: Think Again*, 46 *POL. THEORY* 963, 968 (2018) (reviewing STEFAN MÜLLER-DOOHM, *HABERMAS: A BIOGRAPHY* (Daniel Steuer trans., 2016)).

134. See Jane Mansbridge, *A Minimalist Definition of Deliberation*, in *DELIBERATION AND DEVELOPMENT: RETHINKING THE ROLE OF VOICE AND COLLECTIVE ACTION IN UNEQUAL SOCIETIES* 27, 36 tbl.2.1 (Patrick Heller & Vijayendra Rao eds., 2015).

135. AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 17–18 (1996).

136. *Id.* at 43. This recognition that some issues may not realistically be resolved through deliberation leads Amy Gutmann and Dennis Thompson to the conclusion that while “a decision must stand for some period of time, it is provisional in the sense that it must be open to challenge at some point in the future.” GUTMANN & THOMPSON, *supra* note 38, at 6. This spin on deliberative theory is quite close to agonism. See discussion *infra* Part III. Perhaps the two theories can be reconciled, see John S. Dryzek, *Deliberative Democracy in Divided Societies: Alternatives to Agonism and Analgesia*, 33 *POL. THEORY* 218, 220, 223 (2005) (arguing for a “discursive democracy” that takes disagreement more seriously than most deliberative theory but does not go as far as agonism in rejecting the possibility of fully inclusive deliberation), but Gutmann and Thompson recognize that “[t]his characteristic of deliberative democracy is neglected even by most of its proponents,” see GUTMANN & THOMPSON, *supra* note 38, at 6.

in issuing a rule.”¹³⁷ In these situations, deliberation might have limited value in helping to legitimize agency choices that end up privileging one set of values over others.

3. *Minimalism and Electoral Accountability*

More recently, Jud Mathews introduced yet another strand of democratic theory to the administrative-law literature: democratic minimalism.¹³⁸ The minimalist tradition can be traced to Joseph A. Schumpeter,¹³⁹ but, in reality, Schumpeter’s ideas about democracy are similar to an average person’s thinking about what democracy is and how it works.¹⁴⁰ Schumpeter disputed the necessity of sustained participation and engagement from citizens to a defensible concept of democracy.¹⁴¹ If these were truly necessary, as pluralists, civic republicans, and deliberative theorists would argue, then, empirically speaking, democracy exists nowhere. Citizen engagement in democratic politics is abysmally low, has always been so, and likely always will be. But Schumpeter believed that societies were democratic if they had an “institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”¹⁴² Put differently, what is important in a democracy is the opportunity for election of leaders. For this reason, it is sometimes called “elite” democracy or “leadership democracy.”¹⁴³ On this account, virtually every decision made by a duly elected official is democratic by virtue of passing through a procedural process that meets certain criteria. Questions of power and the common good are confined to episodic exercises of collective control of a cadre of engaged decision makers.

The minimalist theory has some advantages relative to the other two traditional theories. Most obviously, it squares much better with actual practice in

137. Nina A. Mendelson, *Should Mass Comments Count?*, 2 MICH. J. ENV’T & ADMIN. L. 173, 173 (2012).

138. Mathews, *supra* note 79, at 609.

139. *Id.* at 636-37.

140. For a recent overview of Joseph A. Schumpeter’s democratic thought, see Sean Ingham, *Popular Rule in Schumpeter’s Democracy*, 64 POL. STUD. 1071, 1072-75 (2016).

141. Mathews, *supra* note 79, at 637.

142. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 269 (3d ed. 1950).

143. See Gerry Mackie, *Schumpeter’s Leadership Democracy*, 37 POL. THEORY 128, 129 (2009).

societies that are conventionally understood to be democratic.¹⁴⁴ It also simplifies the math problem of aggregating the preferences of citizens. Pluralists struggle mightily with this question, but minimalists resolve it by appeal to the simple device of majority rule. Further, Ian Shapiro has argued that minimalism's commitment to regular exercises of popular control through competitive referenda on the performance of elected officials is sufficient to vindicate a core democratic value of nondomination¹⁴⁵—a value shared by republican theorists. On this account, it is difficult for any one set of interests to dominate the electoral arena permanently, and cycles of competition protect against extreme interference with liberty.

Like both pluralism and civic-republican theory, minimalism can be understood to describe and justify much of the administrative process. Arguments in this vein might take one of two tracks. First, Jud Mathews has argued that Shapiro's reinterpretation of Schumpeter as furthering nondomination is reflected in judicial review of agency action. According to Mathews, courts should operationalize the standard of review so that its intensity is keyed to the risk of domination.¹⁴⁶ Most of the time, as Jacob Gersen and Adrian Vermeule have shown, judges employ a form of "thin rationality" review.¹⁴⁷ Yet, they also frequently increase the intensity of their review when fundamental interests in nondomination are presented. For instance, one way to interpret the Supreme Court's decision in the "DACA [Deferred Action for Childhood Arrivals] case"¹⁴⁸ is as ramping up the stringency of arbitrariness review to protect against the persecution of a minority group.¹⁴⁹ When judicial review is attuned to the risk of domination, it can reinforce democratic processes by intervening to protect the powerless.

144. See Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in DEMOCRACY'S VALUE 23, 23 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999) (noting and agreeing with Schumpeter's empirical claim that minimalism is "truer to life," and suggesting that it might be possible to jump from an empirical finding that elections are sufficient for democracy to a normative evaluation). *But see* HELD, *supra* note 106, at 152-53 (refuting the idea that this supplies a normative defense of Schumpeter's minimalist theory).

145. See IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 3, 6 (2006) (arguing that democracy is "better thought of as a means of managing power relations so as to minimize domination" and linking this with the "Schumpeterian impulse to control power by making it the object of electoral competition").

146. See Mathews, *supra* note 79, at 644-45.

147. Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1361 (2016).

148. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

149. Cf. Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1761 (2021) (arguing that the ramping up of arbitrariness review in *Regents* acts as an accountability-forcing mechanism).

Second, although Mathews does not make the case, one could argue that Schumpeterian minimalism's emphasis on competitive elections and majoritarianism has informed structural constitutional law, in turn affecting administrative law.¹⁵⁰ Of course, most administrators are unelected,¹⁵¹ but a major trend in administrative law over the past few decades has been a move toward rendering more administrative decisions subject to direct lines of accountability to elected officials.¹⁵² One can see this most plainly in the context of appointments and removal jurisprudence, where the Supreme Court has refashioned doctrine to prioritize the President's ability to oversee and remove officers all the way down the bureaucratic hierarchy.¹⁵³ More generally, the electoral-accountability standard has motivated much of the move toward presidential administration—the argument being that the President, as the only official elected by the nation as a whole, is best suited to ensure that the output of the administrative state reflects the collective judgment of the people.¹⁵⁴ The emphasis on electoral accountability can also be seen in the Court's—or at least certain Justices'—occasional flirtations with the nondelegation doctrine, where a principal argument for reviving the doctrine centers on Congress's alleged efforts to escape accountability to the voters by delegating to agencies.¹⁵⁵

Despite minimalism's simplified appeal, it ultimately hollows out the core concept of democracy—the idea that the polity will meaningfully follow the will

150. See Bressman, *supra* note 25, at 478-85.

151. See Galperin, *supra* note 18, at 1216.

152. See Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 380-82 (2020); Jerry L. Mashaw, *Of Angels, Pins, and For-Cause Removal: A Requiem for the Passive Virtues*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), <https://lawreviewblog.uchicago.edu/2020/08/27/seila-mashaw> [<https://perma.cc/EJW2-NU4Q>].

153. Sitaraman, *supra* note 152, at 380-82. Whether civil servants are to be swept up in this quest for accountability is more contested. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 506 (2010) (excluding employees and civil servants from a holding that inferior officers cannot be insulated by dual for-cause removal protections).

154. See, e.g., *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (“Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.” (quoting *Free Enter. Fund*, 561 U.S. at 514)); see also Bressman, *supra* note 25, at 466.

155. See *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) (arguing that delegation creates “opportunities for finger-pointing [that] might prove temptingly advantageous for the politicians involved, but [those opportunities] would also threaten to ‘disguise . . . responsibility for . . . the decisions’” (quoting Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1478 (2015))).

of the people.¹⁵⁶ The act of retrospective voting allows the people to say that they do not like the way things have been going and would like a change, but this is far from having any meaningful say in actual governance. Much will depend on the alternatives put to the electorate. By emphasizing only the moment of voting, minimalism tends to obscure power dynamics that form the slate of choices and understates potential arbitrariness through voting cycling.¹⁵⁷ Minimalism has been called an “elite conception of democracy”¹⁵⁸ for a reason. It sees little role for ordinary citizens in actually determining the direction of policymaking by the state.

II. THE MISMATCH BETWEEN THEORY AND REALITY

The idealized theories of democracy discussed in Part I differ from each other in fundamental ways,¹⁵⁹ but they share an implicit baseline assumption: that the purpose of democratic institutions is to reduce or ameliorate political conflict over government policy through processes that convince people that government-made law is responsive to their concerns and therefore legitimate.¹⁶⁰ Democratic institutions, including the administrative state, should be judged according to their ability to identify the will of the *dêmos* and make policies that reflect that working consensus, however defined.

156. Minimalism’s concerns are instead primarily about nondomination, though even on this front the theory seems much less substantively robust compared to, for instance, the theory of non-domination offered by K. Sabeel Rahman, which critiques the “accumulation of unchecked, arbitrary economic or political power over others” facilitated by gross agglomerations of corporate and private power. K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism*, 94 TEX. L. REV. 1329, 1331 (2016).

157. See SHAPIRO, *supra* note 145, at 59–60.

158. John Medearis, *Schumpeter, the New Deal, and Democracy*, 91 AM. POL. SCI. REV. 819, 819 (1997).

159. One major dividing line is “aggregative” versus “deliberative” democratic theories. See Jack Knight & James Johnson, *Aggregation and Deliberation: On the Possibility of Democratic Legitimacy*, 22 POL. THEORY 277, 277–78 (1994).

160. See George Vasilev, *The Uneasy Alliance Between Consensus and Democracy*, 77 REV. POL. 73, 73 (2015) (“Consensus has a close affinity with democracy. Democracy provides a set of criteria for collective action based on mutual convictions, and this activity of joining with others to make a proposal publicly acceptable serves as a pathway for the realization of democratically prized values tied to freedom and respect. By aspiring to win others’ support, one is seeking to rule with them, not over them. And by making claims openly justifiable to those potentially bound by them, one is going beyond self-interest to orient oneself to a common good.”).

In this Part, I argue that, by these metrics, the modern administrative state is a failure. This might be a controversial statement, but it is important to appreciate the mismatch between theory and reality.¹⁶¹ Doing so forces us to recognize that no current, agreed-upon model can convincingly ground our actual administrative state in democratic theory, at least as the conventional theories define the core aims of democracy.

A. *Political Conflict and Inequality in Administrative Practice*

Efforts to operationalize classical theories of democratic administration in our current political environment encounter a significant problem: social fracturing. As scores of studies have shown, Americans are highly politicized and at risk of verging into “radical partisanship” with a violent edge.¹⁶² These trends extend to the administrative and regulatory domain. The two major political parties are divided over specific regulatory programs and often about regulation and deregulation writ large. Thomas O. McGarity likens modern regulatory and administrative politics to “blood sport.”¹⁶³ Others have noted the rise of “hardball” tactics in constitutional and regulatory politics.¹⁶⁴ Even those who believe they don’t have much of a dog in the fight can find themselves nauseated by seesawing political polarity.¹⁶⁵ Of course, these trends in administrative law and regulatory politics are ultimately rooted in broader political trends, such as a rise

161. Arguably, the mismatch has not always existed. At different times in the history of the administrative state, classical theories were more suited to legitimize administration. Mine is a temporally situated account. See *infra* Section V.C. On the importance of mismatches between theory and reality in administrative law more generally, see Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1137 (2014); and Walker, *supra* note 91, at 735-36.

162. NATHAN P. KALMOE & LILLIANA MASON, RADICAL AMERICAN PARTISANSHIP: MAPPING VIOLENT HOSTILITY, ITS CAUSES, AND THE CONSEQUENCES FOR DEMOCRACY 156-58 (2022); see *supra* note 14 and accompanying text.

163. Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1671 (2012).

164. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 915 (2018); David E. Bernstein, *Constitutional Hardball Yes, Asymmetric Not so Much*, 118 COLUM. L. REV. ONLINE 207, 207 (2018).

165. See Richard J. Pierce, Jr., *The Combination of Chevron and Political Polarity Has Awful Effects*, 70 DUKE L.J. ONLINE 91, 92 (2021).

in affective and negative polarization,¹⁶⁶ growing political extremism and violence,¹⁶⁷ extreme levels of economic and racial inequality,¹⁶⁸ and declining trust in social institutions.¹⁶⁹

It will always be more difficult to find a working consensus, no matter how one attempts to generate it, in an environment of pervasive conflict and endemic marginalization. These problems need not be fatal, though. Indeed, some of the best work on deliberative democratic theory recognizes that there might be substantial conflicts over certain questions, especially those involving divergent values and cultures.¹⁷⁰ To some extent, we can incrementally alter otherwise neutral institutional prescriptions, such as how we use notice-and-comment rulemaking,¹⁷¹ to alleviate conflicts. But when conflict and inequality are extreme, as they are in our current political environment, these incremental modifications to pluralistic, deliberative, and electoral institutions might not maintain buy-in from those who view themselves as losers or outsiders in attempted settlements.

Take the example of notice-and-comment rulemaking, which Kenneth Culp Davis once called “one of the greatest inventions of modern government,”¹⁷² and which has been central to several theories of democratic administration.¹⁷³ In practice today, notice-and-comment rulemaking is heavily burdened by conflict and inequality. Recent years have seen the rise of mass-commenting campaigns

166. See Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129, 130 (2019).

167. See David Rohde, *The Growing Threat of American Political Violence*, NEW YORKER (Oct. 15, 2020), <https://www.newyorker.com/news/daily-comment/who-is-a-domestic-terrorist> [<https://perma.cc/N6QW-R2DB>].

168. See Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, 1. *Trends in Income and Wealth Inequality*, PEW RSCH. CTR. (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality> [<https://perma.cc/2WE8-P237>]; Hedwig Lee, Michael Esposito, Frank Edwards, Yung Chun & Michal Grinstein-Weiss, *The Demographics of Racial Inequality in the United States*, BROOKINGS INST. (July 27, 2020), <https://www.brookings.edu/blog/up-front/2020/07/27/the-demographics-of-racial-inequality-in-the-united-states> [<https://perma.cc/CE2W-TH63>].

169. See Lee Rainie & Andrew Perrin, *Key Findings About Americans' Declining Trust in Government and Each Other*, PEW RSCH. CTR. (July 22, 2019), <https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other> [<https://perma.cc/WVE5-5KN9>].

170. See GUTMANN & THOMPSON, *supra* note 135, at 43 and accompanying text.

171. Matthew Cortland & Karen Tani, *Reclaiming Notice and Comment*, LPE BLOG (July 31, 2019), <https://lpeproject.org/blog/reclaiming-notice-and-comment> [<https://perma.cc/R5DN-3PGA>].

172. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 6.15, at 283 (Supp. 1970).

173. See *supra* Part I.

and even notice-and-comment fraud.¹⁷⁴ The vast majority of this torrent of participation in rulemaking processes consists of form comments – often simple expressions of support or opposition for the agency’s proposal that the submitter most likely would think of as a “vote” of sorts.¹⁷⁵ While at least one administrative-law scholar has argued that agencies ought to take such comments into account,¹⁷⁶ most have rejected the idea that mass comments should “count.”¹⁷⁷ That position accords with certain classical democratic theories – notice-and-comment procedures are only valuable for the opportunity for agency-public deliberation that they create¹⁷⁸ – but it does not accord with how commenters themselves understand their participation, which is sometimes as an act of defiance or dissent.¹⁷⁹

Nor does notice-and-comment rulemaking seem capable of reducing conflict in highly politicized domains. For two straight presidential administrations, the Department of Homeland Security skipped notice-and-comment rulemaking in promulgating policies on deferred action for certain immigrants.¹⁸⁰ These choices seem to have had no real impact on the popularity of deferred-action policies: Democratic voters still overwhelmingly favored the Obama-era policies and overwhelmingly disfavored the Trump-era policies, and Republicans vice versa.¹⁸¹ Despite the Fifth Circuit’s decision in *Texas v. United States* forcing notice and comment over one deferred-action program, it seems highly unlikely

174. See Steve Balla, Reeve Bull, Bridget Dooling, Emily Hammond, Michael Herz, Michael Livermore & Beth Simone Noveck, *Mass, Computer-Generated, and Fraudulent Comments* 3 (Apr. 2, 2021) (unpublished manuscript) (on file with Administrative Conference of the United States) https://www.acus.gov/sites/default/files/documents/Draft%20Report_Mass%20Computer-Generated%20and%20Fraudulent%20Comments_04022021.pdf [<https://perma.cc/FLQ9-MF6G>].

175. *Id.* at 20, 23.

176. See Mendelson, *supra* note 137, at 175.

177. See Emily Bremer, *Richard J. Pierce, Jr. on the Harmful Public Misperception that Rulemaking is a Plebiscite* (ACUS Update), YALE J. ON REGUL.: NOTICE & COMMENT BLOG (July 15, 2021), <https://www.yalejreg.com/nc/richard-j-pierce-jr-on-the-harmful-public-misperception-that-rulemaking-is-a-plebiscite-acus-update> [<https://perma.cc/782Y-PRXG>]. One advantage of taking this stingier position is that it can avoid dealing with the tricky problems that might arise from “fraudulent” comments – that is, comments submitted by bots or by spamming campaigns. See Michael Herz, *Fraudulent Malattributed Comments in Agency Rulemaking*, 42 CARDOZO L. REV. 1, 18 (2020) (describing mass comments but arguing that they are not a problem in part because “notice-and-comment should not be understood as a vote”).

178. See *supra* Section I.B.2.

179. Balla et al., *supra* note 174, at 23.

180. See COX & RODRÍGUEZ, *supra* note 40, at 211-13.

181. See Karlyn Bowman & Eleanor O’Neil, *Public Opinion and DACA: What Do the Polls Say?*, AEI (Sept. 12, 2017) <https://www.aei.org/politics-and-public-opinion/polls/public-opinion-and>

that the litigant, Texas, would have been prepared to accept the policy had it gone through this process.¹⁸² Now that the Biden Administration has undertaken notice-and-comment processes in its attempt to revive the DACA policy,¹⁸³ little has changed. Republicans remain bitterly divided about the program, and Democrats still support it.¹⁸⁴ Notice and comment has not led, and probably should not have been expected to lead, to anything resembling public-minded deliberation synthesizing disparate preferences. Political preferences about DACA and many other programs are more or less baked into our political identities, and the game is zero sum. When agencies make these kinds of decisions in this kind of politically charged environment, little should be expected of notice and comment. E. Donald Elliott is still right that notice and comment is Kabuki theater,¹⁸⁵ but not because most important decisions are made during the pre-comment period. Instead, Elliott is right because most important decisions are made when a new administration comes to town bearing the flag of one party or another.

The democratic potential of notice-and-comment rulemaking is also frequently diminished by economic, racial, and cultural inequalities. As Brian D. Feinstein has observed, the core assumption of notice and comment—that formal equality of opportunity to comment legitimates administrative action on democratic grounds by giving people a voice—is fatally flawed.¹⁸⁶ Simply opening the door to all comers guarantees that the only attendees are those with systemic advantages in politics, and it virtually ensures that marginalized perspectives and interests will be either underrepresented or entirely unrepresented.¹⁸⁷ Recent systematic research in the financial-rulemaking domain confirms this

-daca-what-do-the-polls-say [https://perma.cc/NYS7-QTX7] (reporting that a majority of Democrats support DACA while a majority of Republicans do not).

182. See Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 254-55 (2017).

183. Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736 (proposed Sept. 28, 2021).

184. Jens Manuel Krogstad, *Americans Broadly Support Legal Status for Immigrants Brought to the U.S. Illegally as Children*, PEW RSCH. CTR. (June 17, 2020), <https://www.pewresearch.org/fact-tank/2020/06/17/americans-broadly-support-legal-status-for-immigrants-brought-to-the-u-s-illegally-as-children> [https://perma.cc/NMV2-W9VR].

185. See E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

186. See Brian D. Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, 90 GEO. WASH. L. REV. 1, 1, 8-13 (2022).

187. *Id.* at 12-13.

suspicion, uncovering striking evidence that well-heeled organizations dominate the process and wield substantial influence.¹⁸⁸

The problem is not that agencies are taking public comment. Participatory democracy is neither good nor bad in the abstract. Rather, what matters is what unfolds in these democratic processes. On that front, there are reasons for concern that the snapshots of public views that come in during comment periods are unrepresentative. Participation in notice-and-comment processes is systematically skewed; industry and other highly organized and motivated interests dominate the process and might not articulate anything close to the “will of the people” or even a representative cross section of interests and communities impacted by the agency action.¹⁸⁹ Marginalized communities by and large have not been able to mobilize to use commenting.¹⁹⁰ In theory, notice and comment is open enough that these skewed participatory dynamics might seem susceptible to change with reforms that could inspire marginalized communities to engage.¹⁹¹ The reality, however, is that procedural innovations around notice-and-comment rulemaking, such as greater use of electronic interfaces and dynamic comment periods, have generally failed to stoke higher-quality commenting and rectify inequalities in participation.¹⁹²

There is also little evidence that other, more explicitly deliberative procedural innovations celebrated by classical theories of democratic administration are up

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188. Daniel P. Carpenter, Angelo Dagonel, Devin Judge-Lord, Christopher T. Kenny, Brian Libgobber, Steven Rashin, Jacob Waggoner & Susan Webb Yackee, *Inequality in American Democracy: Methods and Evidence from Financial Rulemaking 3* (Aug. 1, 2022) (unpublished manuscript), <https://judgelord.github.io/finreg/participatory-inequality.pdf> [https://perma.cc/XDF5-3Q9G].
189. See *id.*; Michael Sant’Ambrogio & Glen Staszewski, *Public Engagement with Agency Rulemaking*, ADMIN. CONF. OF THE U.S. 2 (Nov. 19, 2018), <https://www.acus.gov/sites/default/files/documents/Public%20Engagement%20in%20Rulemaking%20Final%20Report.pdf> [https://perma.cc/TAX2-M9KY] (“The absence of many stakeholders from the regulatory process can undermine the goals of public participation in rulemaking.”).
190. Feinstein, *supra* note 186, at 12-13.
191. There are many good ideas on this front, many of which would qualify as “agonistic,” as I define the concept in Part III. See Cortland & Tani, *supra* note 171; Nancy Chi Cantalupo, Matthew Cortland & Karen Tani, *Reclaiming Notice and Comment: Part II*, LPE BLOG (Aug. 2, 2019), <https://lpeproject.org/blog/reclaiming-notice-and-comment-part-ii> [https://perma.cc/N95L-AB9D]; *Creating an Administrative System for All*, REGUL. REV. (Mar. 7, 2022), <https://www.theregreview.org/2022/03/07/creating-an-administrative-system-for-all> [https://perma.cc/66VN-PE4K]; Amy Widman, *Inclusive Agency Design*, 74 ADMIN. L. REV. 23, 47-48 (2022). For a particularly creative example of a reimagining of rulemaking that would be less technocratic and more accessible, see James Goodwin, *Can Hip Hop Save Rulemaking?*, REGUL. REV. (Aug. 5, 2019), <https://www.theregreview.org/2019/08/05/goodwin-can-hip-hop-save-rulemaking> [https://perma.cc/U2LX-J9VP].
192. See Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 943-44 (2006).

to the task of dealing with today's pervasive partisan polarization and inequality. Proponents of negotiated rulemaking, for instance, have argued that more consensus around agency rules could be produced by carefully guiding a deliberative process involving representatives of the relevant "stakeholder" groups.¹⁹³ Those promises have always fallen short of expectations. Negotiated rules are no less likely to be challenged in court,¹⁹⁴ and the negotiating committees are often unrepresentative, especially when the rulemaking treads into deeply polycentric territory.¹⁹⁵ Similarly, the Federal Advisory Committee Act's (FACA's) process for forming advisory committees to provide preproposal expert feedback has not promoted consensus the way proponents might have envisioned.¹⁹⁶ In fact, as Brian D. Feinstein and Daniel J. Hemel have shown, there is significant evidence that political appointees form and staff FACA committees in order to leverage outside constituencies that will support partisan initiatives.¹⁹⁷

There are, of course, many ideas for improving these procedural institutions.¹⁹⁸ Maybe implementing some of them at scale would produce better results. But then again, maybe not. As Nicholas Bagley has argued, administrative lawyers often have a "procedure fetish."¹⁹⁹ But because procedures are not costless, impulses to layer on more should be tempered by an honest assessment of

193. See Phillip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 7 (1982); Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, in 2 MULTI-PARTY DISPUTE RESOLUTION, DEMOCRACY AND DECISION-MAKING 459, 462 (Carrie Menkel-Meadow ed., 2012).

194. See Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1261 (1997).

195. See Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1210 (1994).

196. See David Faure, *The Federal Advisory Committee Act: Balanced Representation and Open Meetings in Conflict with Dispute Resolution*, 11 OHIO STATE J. ON DISP. RESOL. 489, 490 (1996).

197. Brian D. Feinstein & Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 GEO. L.J. 1139, 1145 (2020) ("We find strong evidence that political appointees across administrations utilize advisory committees as counterweights to the career bureaucracy.").

198. See, e.g., BETH SIMONE NOVECK, WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL 148-61 (2009); see also *Forum on Underserved Communities and the Regulatory Process*, ADMIN. CONF. OF THE U.S., <https://www.acus.gov/meetings-and-events/event/forum-underserved-communities-and-regulatory-process> [<https://perma.cc/3WZE-R6ET>] (collecting panels on compliance with Executive Order No. 13985, which the Biden Administration issued to advance equity in government and require agencies to "pursue a comprehensive approach to advancing equity for all," including communities "that have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality" (quoting Exec. Order No. 13985, 86 Fed. Reg. 7009, 7009 (Jan. 20, 2021))).

199. See Bagley, *supra* note 59, at 345.

what they can actually deliver.²⁰⁰ It should come as no surprise, then, if adding more procedures to enable participation offers no solution for producing consensus in our “new Gilded Age” of pervasive conflict and extreme inequality.²⁰¹ More than in most times in the history of the administrative state,²⁰² attempted settlements are likely to be unresponsive to at least some constituency, if not to half of the electorate.

B. Institutional Fragmentation and the Impossibility of Accountability

If administrative-law processes for incorporating public participation fail to live up to the hopes of conventional democratic theories, perhaps the structure of the administrative state could pick up the slack. This is the pretense of a vast literature on political control of the administrative state that hopes to ground democratic legitimacy in “accountability” to elected officials.²⁰³ Central to this justificatory model is a Weberian ideal of a bureaucracy in service of political will. But for this model to carry weight, our bureaucracy would need to resemble the prototypical Weberian bureaucracy, which is marked by little internal or external conflict complicating ends-means rationality and introducing goal ambiguity.²⁰⁴ This prototype of a bureaucracy hardly describes the American administrative

200. See Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 320 (2008).

201. See David B. Grusky & Tamar Kricheli-Katz, *Introduction* to *THE NEW GILDED AGE: THE CRITICAL INEQUALITY DEBATES OF OUR TIME* 1, 1-16 (David B. Grusky & Tamar Kricheli-Katz eds., 2012); JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* 379 (2022) (illustrating the socioeconomic reasons behind the wealthy’s “climb to the heady unequal heights of the new Gilded Age”).

202. I do not claim that we have never been this polarized. After all, we did fight a civil war. But until recently, we have had a remarkable level of social consensus over the legitimacy of government power. Historians call this period, which substantially overlaps with the advent of the administrative state, the “liberal consensus,” because both conservatives and liberals largely accepted the idea of managed capitalism. See Robert Mason & Iwan Morgan, *Introduction* to *THE LIBERAL CONSENSUS RECONSIDERED: AMERICAN POLITICS AND SOCIETY IN THE POSTWAR ERA* 4 (Robert Mason & Iwan Morgan eds., 2017). Clearly, that is an inappropriate moniker for present times.

203. See, e.g., ROSE-ACKERMAN, *supra* note 58, at 15. Without this kind of electoral accountability, the idea of a Weberian bureaucracy evokes antidemocratic themes, such as Weber’s own “iron cage” idea. See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 123 (Talcott Parsons trans., 2005) (1930).

204. On the Weberian account, bureaucracies are thought to be bureaucracies precisely because they are designed to pursue predefined or objective goals in the most efficient manner possible. See Eugene Litwak, *Models of Bureaucracy Which Permit Conflict*, 67 AM. J. SOCIO. 177, 178-79 (1961) (discussing the Weberian model of bureaucracy and how it depends on rigid hierarchies, uniform goals, and other features that eliminate conflict).

state, which is sprawling, parochial, competitive, and imbued with great discretion via delegation from Congress.²⁰⁵ The American administrative state is not Weberian; it is endemically fragmented.

Institutions and trends in administrative law reflect this feature. At the internal level, scholars have documented a dense web of overlapping delegations of authority,²⁰⁶ such as regulatory authority over the food system to both the U.S. Department of Agriculture and the Food and Drug Administration (FDA)²⁰⁷ and regulatory authority over the energy system to the Federal Energy Regulatory Commission (FERC), the Department of Energy, and the Commodity Futures Trading Commission.²⁰⁸ They have also noted the existence of conflicts within individual agencies, as when different bureaus hold different opinions about the best way to approach particular problems, or when lower-level civil servants disagree fundamentally with policies favored by higher-ups, or when agencies pursue multiple, conflicting goals at the same time.²⁰⁹ These internal disagreements are tolerated and sometimes celebrated.²¹⁰ The administrative state is also rife with external conflicts. Agencies answer to multiple principals, including Congress and its dense network of committees (which may have their own conflicts about policies pursued by agencies under their shared oversight), the courts, and the White House.²¹¹

The typical normative response to the conflict inherent in American bureaucracy is to seek reduction of the potential for conflict by clarifying and simplifying lines of accountability. After all, institutional fragmentation can obscure

205. See Bernstein & Rodríguez, *supra* note 43 (manuscript at 33) (“[R]ather than being structured as a topdown hierarchy with an agent following commands from a principal, many policy-making processes are rife with multilateral, negotiated interactions.”).

206. See Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 182 (2011); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 210; Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1134-36 (2012); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 847-48 (2015).

207. Grant Gerlock, *Our Food-Safety System Is a Patchwork with Big Holes, Critics Say*, NPR (Mar. 30, 2015, 3:41 PM ET), <https://www.npr.org/sections/thesalt/2015/03/30/396360395/our-food-safety-system-is-a-patchwork-with-big-holes-critics-say> [<https://perma.cc/H64C-C3WA>].

208. See Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378, 407-08, 441 (2019).

209. See Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENV'T L. REV. 1, 6 (2009); Brian D. Feinstein & Abby K. Wood, *Divided Agencies*, S. CAL. L. REV. (forthcoming 2022) (manuscript at 3-4), <https://ssrn.com/abstract=3925861> [<https://perma.cc/N2U6-9LSR>].

210. See Bernstein & Rodríguez, *supra* note 43 (manuscript at 25-26).

211. Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119, 120-25 (1996).

whether bureaucratic outputs conform with whatever social consensus might exist under conventional democratic theories. Many of the same scholars who recognize and document the pervasive conflicts ensconced in the fabric of the administrative state urge consolidation and coordination.²¹² According to Cass R. Sunstein, this has become the de facto mission of OIRA's centralized regulatory review.²¹³ Moreover, some scholars celebrate the efforts of agencies to organically replicate this process of interagency coordination through the promulgation of joint rules and other methods.²¹⁴ This impulse also manifests in the constitutional theory of separation-of-powers formalism. Formalists bemoan the administrative state in part because its place within the tripartite federal government is ambiguous.²¹⁵ Agencies appear to exercise both executive and legislative power,²¹⁶ which raises questions about who should have oversight powers. Formalists increasingly insist that these questions be resolved by treating agencies as purely executive and properly directed by the President, to the extent that delegations of policymaking power are permitted.²¹⁷ In short, the general trend is to make the American administrative state more like the prototypical Weberian bureaucracy: organized, subordinate, comprehensively rational, and internally without conflict. At the very least, proponents might say, this would comport with a "minimalist" theory of democracy based on electoral competition for the chief executive office.²¹⁸

But some theorists pursue an interesting intuition at odds with the impulse to consolidate and coordinate. These theories celebrate our distinctively conflictual bureaucracy. Take, for instance, Daniel A. Farber and Anne Joseph O'Connell's critical response to the literature on interagency coordination. Noting that "much of [the] literature has denigrated agency conflict"²¹⁹ and "focused on, and often celebrated, agency cooperation,"²²⁰ they argue that "[c]oordination is not

212. See, e.g., Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1384 (2017) (arguing against this trend in the literature).

213. See Sunstein, *OIRA Myths and Realities*, *supra* note 124, at 1838.

214. See, e.g., Freeman & Rossi, *supra* note 206, at 1155-81.

215. See generally MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* (1995) (exploring the intersection of political structure, issues of individual liberty, and judicial review).

216. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 581-96 (1984).

217. See SAIKRISHNA B. PRAKASH, *THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS* 223-26 (2020); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-66 (1992).

218. See *supra* Section I.B.3.

219. See Farber & O'Connell, *supra* note 212, at 1383.

220. *Id.* at 1384.

always desirable” and that “conflict plays an important and often productive role in the functioning of the modern administrative state.”²²¹ Farber and O’Connell highlight this productive friction in the workings of agencies and emphasize adversarial dispute-resolution mechanisms.²²² A similar argument about the virtues of interagency divergence animates Emily S. Bremer and Sharon B. Jacobs’s call to give agencies ample room to innovate in “*Vermont Yankee’s* ‘white space.’”²²³ Some scholars have identified a “cycling” between rules- and standards-based approaches in the Court’s separation-of-powers doctrine, a dynamic that has allowed for this great “pluralism” and “thick political surround”²²⁴ to develop and that seems consciously adopted for managing, rather than eliminating, complexity.²²⁵

Scholars also celebrate external conflict with the other branches. For example, Jon D. Michaels argues that an administrative separation of powers has replaced the original tripartite separation of powers.²²⁶ Rivalries between politically appointed agency officials, politically insulated civil servants, and civil society substitute for the Madisonian system of rivalries among the branches.²²⁷ Gillian E. Metzger has argued for an “internal separation of powers” that institutionalizes conflict in service of broader constitutional norms.²²⁸ Similarly, scholars writing about “administrative constitutionalism” have argued that agencies are and ought to be coequal partners with the other branches in elaborating on the meaning of the Constitution.²²⁹ They argue that when agencies step out in front of the other branches in recognizing rights under the Constitution, conflict is a legitimate, essential part of constitutional construction.²³⁰

221. *Id.* at 1384–85.

222. *Id.* at 1408–09, 1416–29.

223. Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in Vermont Yankee’s White Space*, 32 J. LAND USE & ENV’T L. 523, 523–24 (2017).

224. See Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 351–52 (2016).

225. *Id.* at 346 (“Doctrinal cycling between rules and standards could be used, at least in theory, to manage normative pluralism and police this ‘thick political surround’ when simpler, more straightforward regulatory strategies would fail.”).

226. See MICHAELS, *supra* note 2, at 8.

227. *Id.* at 9.

228. See Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 426–37 (2009).

229. See Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 520 (2015); Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1706 (2019).

230. See Ross, *supra* note 229, at 520; Lee, *supra* note 229, at 1706.

These scholarly currents in favor of conflict and decentralization have many advantages. Take, for instance, Farber and O’Connell’s defense of adversarialism in the administrative process. In their view, adversarialism might be worth preserving because it improves regulatory outcomes.²³¹ Michaels’s account is also instrumental. He argues that the internal separation of powers is desirable because, like the traditional separation of powers, it limits government abuses of authority.²³² According to Michaels, one of the ills associated with privatization is a loss of this check on abuse of authority.²³³ In short, the chief advantage of these features of the administrative state is that they accurately reflect and respond to the concerns of our era, especially the great authoritarian danger in consolidating power under a unitary executive.²³⁴

But these are not democratic defenses under the terms of the conventional democratic theories. In fact, institutional fragmentation in the bureaucracy is at odds with the basic goal of the classical theories of democratic administration to reduce conflict and promote consensus in order to harmonize democratic expectations and administrative policymaking.²³⁵ Missing from these pro-conflict theoretical accounts is a democratic theory that can tolerate, if not embrace, the kind of internal fragmentation and conflict they promote on instrumental grounds. To the extent that the expectation persists among the people that agencies will be democratically accountable, presidential populism – along with robust notions of presidential power over the bureaucracy – will be comparatively attractive to any model of the administrative state that purposely fragments and diffuses power.²³⁶

231. See Farber & O’Connell, *supra* note 212, at 1416-29.

232. MICHAELS, *supra* note 2, at 69 (describing the “administrative separation of powers” as “the institution that effectively constrains and domesticates the initially unfettered administrative juggernaut”).

233. See *id.* at 136 (“The effects of marketization thus should be apparent enough, facilitating more politically (specifically, presidentially) dominated, less expert, and overall less rivalrous administrative governance.”).

234. See SKOWRONEK ET AL., *supra* note 6, at 11-12 (discussing a trend toward the “raw personalization of presidential power, one that a theory of the unitary executive has gussied up and allowed to run roughshod over reason and the rule of law”). For other treatments of accumulating presidential power and its dangers for democracy, see PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 3-4, 21 (2009); Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 75-78 (2022); Kathryn E. Kovacs, *From Presidential Administration to Bureaucratic Dictatorship*, 135 HARV. L. REV. F. 104, 113 (2021); and Emerson & Michaels, *supra* note 25, at 429-31.

235. See *supra* Part I.

236. See PETER M. SHANE, DEMOCRACY’S CHIEF EXECUTIVE: INTERPRETING THE CONSTITUTION AND DEFINING THE FUTURE OF THE PRESIDENCY, at xii-xiii (2022) (describing the origins and appeal of unitary theories).

One can see this, for instance, in Cristina M. Rodríguez's account of regime changes.²³⁷ Like many administrative-law scholars influenced by Elena Kagan's *Presidential Administration*,²³⁸ Rodríguez argues that elections should matter for bureaucratic outputs and advances a variety of reforms to normalize regime change to facilitate this kind of democratic accountability.²³⁹ Rodríguez's account is powerful because it cuts so close to the quick: our administrative state is one engineered for unaccountability, and we lack any good democratic reason to resist the argument that the presidency should have much more say over the outputs of agencies. Existing theories cannot address the problem that people want action from their government but disagree vehemently about what that action should be. It should come as no surprise, then, that presidential populism and claims of unitary executive power to fix the bureaucracy's lack of accountability have mass appeal. By failing to offer any *democratic* theory to counter this impulse and defend the internal institutional fragmentation of the existing administrative state, we leave the door dangerously open to plebiscitary authoritarianism.

III. THE AGONISTIC ALTERNATIVE

The mismatch between theory and reality highlights serious deficiencies in the traditional accounts of democratic administration. These theories view democracy as a method for settling conflicts in a way that allows us to say confidently that government decisions represent the will of the *dêmos*.²⁴⁰ But the premises of these theoretical defenses fail if administrative agencies must make decisions that cannot please everybody.²⁴¹ If we want a theory within traditional democratic frameworks that accords with reality, we are forced to fall back on thin or minimalist notions of majoritarianism, populism, and presidential ad-

237. See Rodríguez, *supra* note 49, at 8.

238. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2000).

239. Rodríguez, *supra* note 49, at 8. Similar arguments in favor of something that might be characterized as plebiscitary agonism exist. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 204-205* (2010) ("In one version of tyrannophobia, liberal legalists fear a 'plebiscitary presidency,' but this is if anything too weak a description of the executive in the administrative state; rather than responding merely to periodic plebiscites, the executive is constantly buffeted by the latest poll numbers and opinion cascades. Ironically, the plebiscitary presidency is constrained, not tyrannical.").

240. See Vasilev, *supra* note 160, at 73.

241. See Cary Coglianese, *Does Consensus Work? A Pragmatic Approach to Public Participation in the Regulatory Process*, in *RENASCENT PRAGMATISM: STUDIES IN LAW AND SOCIAL SCIENCE* 180, 180-82 (Alfonso Morales ed., 2003).

ministration. This move has serious problems, most notably a risk of sliding towards presidential authoritarianism as unscrupulous presidents claim to represent the nation better than all other institutions,²⁴² but some might say that it at least sounds in majoritarian democracy. Furthermore, it can be implemented by reducing our evaluation of administrative outcomes to our evaluation of whether there was a fair national election.²⁴³ It solves the democracy problem, but not in a way that ought to make us proud, given the obvious problems with elections and their rapidly diminishing legitimating authority. Nor is the solution likely to be sustainable if social conflict continues to worsen.

In this Part, I suggest that there is a better, heretofore overlooked, democratic theory that poses none of the problems of the conventional accounts. Agonistic democratic theory, or agonism for short, rejects the unifying assumption of conventional democratic theory that conflict can or should be extinguished in the lawmaking process.²⁴⁴ Whereas conventional democratic theory thinks of process (deliberative, electoral, or otherwise) as an investment in the durability of an attempted settlement of conflict in the form of law, agonism views the process of contestation itself as intrinsically valuable and constitutive of democracy. Just as important, it views durable settlement as undesirable and even dangerous. In the agonistic view, legitimacy stems not from having convinced people that settlement is good, but from the opportunity to resist settlement when it fails to represent the entire *dêmos*.

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242. See SHANE, *supra* note 236, at 4 (arguing that President Trump, “aided and abetted by lawyers willing to make extreme arguments in support of presidentialism,” could have “subvert[ed] constitutional democracy”); SKOWRONEK ET AL., *supra* note 6, at 11-12 (arguing that the “American people have been enlisted in an eerie face-off” between concerns about a “Deep State conspiracy” and a “raw personalization of presidential power,” and that these are the “phantom twins of a beleaguered republic” that “left untamed . . . will continue to pull American government apart”); Rosenblum, *supra* note 234, at 76-78 (discussing the risk in presidential administration of becoming nothing more than “an extension of the personality of the chief executive” and the risk of fascism inherent in that institutional condition); Kovacs, *supra* note 234, at 113 (suggesting that the embrace of presidential administration “greas[es] the skids for the United States’ slide toward authoritarianism”); Emerson & Michaels, *supra* note 25, at 429 (2021) (discussing a host of weaknesses of presidential administration as a form of democratic governance, and emphasizing that it is “downright dangerous” because it “centers national politics around a single, charismatic leader who claims a democratic mandate (regularly with less than 50 percent of the popular vote), and acts decisively to implement it”).
243. See, e.g., Rodríguez, *supra* note 49, at 64 (“[O]ne of the primary means by which the workings of government stay connected to the evolving views and demands of the public is through the implementation of ideas associated with a newly elected regime by the people who join it.”).
244. See, e.g., HONIG, *supra* note 48, at 2 (critiquing a “mysterious phenomenon: the displacement of politics in political theory” and noting that “[t]hose writing from diverse positions – republican, liberal, and communitarian – converge in their assumption that success lies in the elimination from a regime of dissonance, resistance, conflict, or struggle”).

Few readers outside the discipline of political theory will be familiar with the tenets of agonism,²⁴⁵ and the literature is new enough that it is still sorting itself out, making any generalizations difficult.²⁴⁶ Accordingly, in this Part, I provide a brief exegesis of the most important strands of the approach. In the next Part, I build upon this foundation a grounded application of the theory that can legitimize our conflict-ridden administrative state far better than classical theories of democratic administration. This move reveals that the administrative state is much less democratically suspect than many contemporary critics suggest and points to a fresh slate of reforms that could amplify agonism—and, therefore, democracy—in administration.²⁴⁷

A. *Agonism's DNA*

The best entry point into agonistic thinking about democracy is the writing of Chantal Mouffe, the most prominent, most pragmatic, and most institutionally minded agonistic theorist.²⁴⁸ Building on the work of the German constitutional theorist Carl Schmitt,²⁴⁹ Mouffe theorized politics in overtly realist terms: democratic politics is war. For Mouffe, communities and constitutional orders

245. Strands of agonistic thinking have, however, appeared in some debates in constitutional theory. For instance, Robert Post and Reva Siegel have advanced a theory of “democratic constitutionalism” that seems to draw critical insights from agonistic theory. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007); see also Martin Loughlin, *The Constitutional Imagination*, 78 MOD. L. REV. 1, 15 (2015) (arguing that “[c]onstitutions are agonistic texts that contain within them the seeds of dissonance”); Staszewski, *supra* note 45, at 92 (evaluating the Supreme Court’s ruling in *Obergefell v. Hodges*, 576 U.S. 644 (2015), through an agonist democratic lens).

246. Andrew Schaap, *Introduction to LAW AND AGONISTIC POLITICS* 1, 1 (Andrew Schaap ed., 2009) (noting that there are “various conceptualizations of agonism,” including “pragmatic, expressive and strategic” formulations).

247. See *infra* Part IV.

248. See, e.g., ERNESTO LACLAU & CHANTAL MOUFFE, *HEGEMONY & SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS* (1985); CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* (2000) [hereinafter MOUFFE, *THE DEMOCRATIC PARADOX*]; CHANTAL MOUFFE, *THE RETURN OF THE POLITICAL* (1993); MOUFFE, *AGONISTICS*, *supra* note 48.

249. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 26 (George Schwab trans., Univ. of Chi. Press 2007) (1932) (laying out the distinction between “friends” and “enemies” as central to politics). Schmitt is infamous for two other things: first, the theory of the “exception,” and second, his unabashed Nazism and support of the Third Reich. See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1098–99 (2009). Whether Schmitt’s fascism can be exorcised from his constitutional and democratic theory is a difficult and controversial academic question. For my purposes—that is, for thinking about Mouffe, who in turn relies on Schmitt to develop her own independent theory—I believe that there is a degree of separation that eliminates any concerns about facilitating the spread of bad ideas.

are, at best, a temporary formation of an “us” against a “them.”²⁵⁰ This is the nature of democracy, which is, in essence, a form of popular sovereignty for a defined group of people.²⁵¹ Democracies are therefore constantly involved in a definitional project to determine who or what the “we” stands for,²⁵² which echoes the consensus-seeking goal of conventional democratic theories. But Mouffe emphasizes something other theories do not: that defining the “we” inevitably excludes some ideas, policies, or even people.²⁵³ It is simply impossible to realize a “full totalization of society” or “a society beyond division and power.”²⁵⁴ For Mouffe, then, “[a]ny order is always the expression of a particular configuration of power relations.”²⁵⁵ Because those ideas, policies, or people excluded from that order have no reason to honor it, there is an omnipresent danger for democracy that exclusion will result in “antagonism,” which is the reemergence of politics in the Schmittian sense – the dissolution of the *dêmos* and, perhaps, a state of actual civil war.²⁵⁶ In sum, the great power of democracy to self-determine an order always runs up against the exclusions that those decisions create, sowing the seeds of the order’s own destruction.

250. MOUFFE, THE DEMOCRATIC PARADOX, *supra* note 248, at 4.

251. In this sense, Mouffe puts her finger on a “chicken-and-egg problem” that “lurks at democracy’s core”: “Questions relating to boundaries and membership seem in an important sense prior to democratic decision-making, yet paradoxically they cry out for democratic resolution.” Ian Shapiro & Casiano Hacker-Cordón, *Outer Edges and Inner Edges*, in DEMOCRACY’S EDGES 1, 1 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999); *see also* Song, *supra* note 16, at 40 (describing the “boundary problem” in democratic theory).

252. MOUFFE, THE DEMOCRATIC PARADOX, *supra* note 248, at 4-5.

253. *See* MOUFFE, AGONISTICS, *supra* note 48, at 5 (“[O]nce we understand that every identity is relational and that the affirmation of a difference is a precondition for the existence of any identity – i.e. the perception of something ‘other’ which constitutes its ‘exterior’ – we can understand why politics, which always deals with collective identities, is about the constitution of a ‘we’ which requires as its very condition of possibility the demarcation of a ‘they.’”).

254. *Id.* at 1.

255. *Id.* at 2.

256. *Id.* at 5 (“[T]here is always the possibility that this ‘us/them’ relation might become one of friend/enemy. This happens when the others, who up to now were considered as simply different, start to be perceived as putting into question *our* identity and threatening *our* existence.”). Mouffe’s account here is similar to Barbara F. Walter’s discussion of “anocracy” and civil war: that is, democracies begin to slip into anocracy when they begin to fail to allow nonviolent avenues for political change, and it is in a state of anocracy that most civil wars begin. *See* BARBARA F. WALTER, HOW CIVIL WARS START: AND HOW TO STOP THEM 11-12 (2022).

Thus, for Mouffe, “one of the main challenges for pluralist liberal democratic politics consists in trying to defuse the potential antagonism that exists in human relations.”²⁵⁷ Mouffe, however, sees the response from conventional democratic theory to this inevitability of exclusion and conflict²⁵⁸ as inherently unconvincing and impossible. As Mouffe describes it, the problem is that “a consensus reached without exclusion . . . would require the construction of an ‘us’ that would not have a corresponding ‘them.’”²⁵⁹ It would deny the very purpose of democracy, which is, in fact, to determine for what the *dêmos* stands and for what it does not.

Given the inevitability of deep and incommensurable conflict in a pluralistic society, the best we can hope for is a safety valve²⁶⁰ that protects the ongoing project of democracy from a descent into antagonism. Mouffe finds this in what she terms “agonism.”²⁶¹ Whereas conventional democratic theories seek to avoid conflict and confrontation by finding a democratic “will” that can legitimately ground the exercise of government power, agonism posits that “[t]oo much emphasis on consensus, together with aversion towards confrontations, leads to apathy and to a disaffection with political participation.”²⁶² By asserting a false consensus, we lay the ground for “various forms of politics articulated around essentialist identities of a nationalist, religious or ethnic type, and for the multiplication of confrontations over non-negotiable moral values, with all the manifestations of violence that such confrontations entail.”²⁶³ Furthermore, alienation is especially likely for those who are persistently marginalized and excluded from attempted settlements and who might seriously entertain antagonism as a political strategy. Instead of wishing or defining conflict away, agonism accepts that “there will always be disagreement” and aims to develop a “democratic outlet”

257. MOUFFE, *AGONISTICS*, *supra* note 48, at 6.

258. More specifically, the response that we need to “overcom[e] . . . the we/they opposition” altogether through aggregation of preferences or deliberation about the common good that resolves conflict in favor of unity. *Id.* at 6–9.

259. *Id.* at 6.

260. Cf. Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 10–11 (2008) (discussing the “safety-valve” justification for expansive protections for minoritarian speech under the First Amendment). Although there might be substantial payoff from thinking agonistically about free speech, that discussion is beyond the scope of my project.

261. MOUFFE, *AGONISTICS*, *supra* note 48, at 5–9.

262. *Id.* at 7.

263. *Id.* at 8.

where differences can be contested and “conflictual consensus” can be maintained²⁶⁴—that is, where adversaries (not enemies) can coexist as part of an evolving, pluralistic democratic society.²⁶⁵

Mouffe’s central concern about extremist politics and her desire to turn antagonism into agonism has led some to label her a “pragmatic” agonist.²⁶⁶ Ironically, Mouffe wrote her foundational agonistic texts in response not to growing political conflict but to growing political consensus, at least in rhetoric from world leaders. She worried that the consensus-oriented appeals to a “third way” and the self-satisfied claims of the “end of ideology” in the wake of the collapse of the Soviet Union were suppressing real (if latent) political conflict and competing aspirations for politics’ futures, and that this suppression risked the “return of the political” in the form of extremist political movements.²⁶⁷

264. *Id.*

265. MOUFFE, *THE DEMOCRATIC PARADOX*, *supra* note 248, at 13 (noting that agonism “involves a relation not between enemies, but between ‘adversaries’, adversaries being defined in a paradoxical way as ‘friendly enemies’, that is, persons who are friends because they share a common symbolic space but also enemies because they want to organize this common symbolic space in a different way”).

266. Schaap, *supra* note 246, at 1. Besides Mouffe’s pragmatic agonism, there are several other strands of agonistic theory and criticism, many of which are less interested in maintaining social cohesion. For instance, agonistic theory has been employed by “expressive” theorists more concerned with using “agonistic contest” as a “force that disturbs, relativizes and denaturalizes the fixity of established identities, allowing for a more hospitable and inclusive attitude toward the other.” *Id.* at 32–33. Most prominent among these theorists is Bonnie Honig, who articulated a form of agonistic *virtù* that prizes enclaves of resistance toward the dominant cultures or norms of a society. For Honig, virtually any order entails the creation of a “remainder” that is excluded. See HONIG, *supra* note 48, at 3. For agonistic politics to thrive, the order must be made aware of the fact of the remainder through any means that are available, and the *agonistes* who do that work, often through playful contestation with prevailing attempts to impose juridical order, are practicing *virtù*. Following Honig’s lead, expressive agonists have articulated all sorts of modes of being that range from irreverent and playful to revolutionary and deconstructive. Schaap, *supra* note 246, at 3. There are also more radical “oppositional” agonists, including Jacques Rancière, who argue that agonistic democracy is incompatible with the state because any temporary settlement by definition eliminates the possibility of alternatives to that settlement: democracy is always “fugitive” and fleeting, emerging at moments of revolution but otherwise giving way to something else. See ED WINGENBACH, *INSTITUTIONALIZING AGONISTIC DEMOCRACY: POST-FOUNDATIONALISM AND POLITICAL LIBERALISM* 44–45 (2011). All of these agonistic strands of theory have their crosshairs on undermining the “closure” of the political negotiation between irreconcilable ideals through a false consensus institutionalized in law and in life.

267. This aspect of Mouffe’s thinking can be understood as part of a broader critique of neoliberalism, which is an antipolitical, antidemocratic ideology that many see as foundational to the post-Cold War state. See, e.g., WENDY BROWN, *IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST* 86 (2019); Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 *YALE L.J.* 1784, 1835 (2020).

Yet, Mouffe’s theory is applicable not only in a period of an actual false consensus and depoliticization but also in one where outright antagonism is already widespread. The key logic in Mouffe’s thinking is that antagonism must be reduced and that the best way to reduce it is to recognize and embrace conflict. This is a sort of empirical hypothesis about what style of democratic engagement is most likely to help us ameliorate the destructive potential of our disagreements: addressing those conflicts head on and sharing power with a “friendly enemy,” in the case of agonism, or aspiring to a resolution or settlement of political differences, in the case of the conventional theories. It also bears mentioning that, although it is difficult to test these empirical hypotheses, there is ample evidence from the real world that the agonistic approach is well calibrated to reduce the most destructive forms of antagonism.²⁶⁸ Although it is counterintuitive to embrace conflict to prevent greater conflict, the alternative – maintaining “the hope of winning a definitive victory over your opponent” – leads people to dehumanize and otherize their opponents, leading to a much greater chance of antagonism taking hold.²⁶⁹

Of course, as with much of democratic theory, it is easy to see some conceptual and practical overlap between agonism and more conventional democratic theories, even when they are posed as opposites. For instance, agonism bears some resemblance to Schumpeterian notions of competitive democracy, but it is different in that it is decisively *not* minimal or elitist. Similarly, agonists are not

268. See, e.g., AMANDA RIPLEY, *HIGH CONFLICT: WHY WE GET TRAPPED AND HOW WE GET OUT* 3-6 (2021) (collecting stories and case studies that demonstrate how “healthy” conflict can be a constructive way out of “high conflict,” the latter of which is virtually indistinguishable from the agonistic concept of antagonism in its extremely negative affective dimensions); JOHN D. INAZU, *CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE* 6-7 (2016) (arguing for “confident pluralism” where people with starkly different beliefs learn to coexist while maintaining and freely expressing “firmly held convictions”). Agonistic interventions have also occasionally been studied in fraught political scenarios, such as urban planning and gentrification, see, e.g., Cameron McAuliffe & Dallas Rogers, *Tracing Resident Antagonisms in Urban Development: Agonistic Pluralism and Participatory Planning*, 56 *GEOGRAPHICAL RSCH.* 219 (2018), and in the classroom, see, e.g., Jane C. Lo, *Empowering Young People Through Conflict and Conciliation: Attending to the Political and Agonism in Democratic Education*, 25 *DEMOCRACY & EDUC.* 1 (2017). In fact, some link the agonistic ethos with truth and reconciliation committees, see, e.g., Darren Bohle, *The Public Space of Agonistic Reconciliation: Witnessing and Prefacing in the TRC of Canada*, 24 *CONSTELLATIONS* 257 (2017), which have had some success in ameliorating antagonism in deeply divided societies with a legacy of injustice, see Bonny Ibhawoh, *Do Truth and Reconciliation Commissions Heal Divided Nations?*, *CONVERSATION* (Jan. 23, 2019, 3:44 PM EST), <https://theconversation.com/do-truth-and-reconciliation-commissions-heal-divided-nations-109925> [<https://perma.cc/K5VY-YDXB>].

269. Yascha Mounk, *How to Resolve a Conflict When You Hate Your Opponent’s Guts*, *N.Y. TIMES* (Apr. 9, 2021) (reviewing RIPLEY, *supra* note 268), <https://www.nytimes.com/2021/04/09/books/review/high-conflict-amanda-ripley.html> [<https://perma.cc/F2BW-SBCU>].

opposed to dialogue per se; they simply resist the move of some deliberative theorists to define narrowly the kinds of reasons that can be accepted as legitimate in deliberation and deliberative theorists' overall orientation toward consensus.²⁷⁰ Some deliberative theorists have responded to the agonistic critique of deliberative democracy by broadening the kinds of discursive moves permitted in deliberation. Iris Marion Young, for instance, endorses a deliberative ideal that she calls "communicative democracy" but suggests the need to be far more open about the kinds of communications that are entitled to be voiced in deliberative forums, which are often so artificially limited that they exclude political discussion by ordinary citizens.²⁷¹ For instance, "greeting, rhetoric, and storytelling" would be more welcome among other culturally situated voices than in the idealized fora envisioned by Rawls and Habermas.²⁷² By tightly controlling the kind of communication or the reasons deemed legitimate in deliberation, ideal speech situations limit the political potential of a more inclusive discursive process. Agonists resist that artificial closure of the "political imaginary."²⁷³ Similarly, Jane Mansbridge argues that agonistic features can coexist with liberal ones, such as free-speech rights and the rule of law, that inevitably involve the closure of *some* forms of political disagreement.²⁷⁴

Yet, for all of these overlaps, agonism, at its core, is a real alternative to the conventional democratic theories that seek to aggregate preferences or generate consensus in the hope of settling conflict. What really separates agonism from conventional democratic theories is an ethos that highlights the ontological impossibility of reconciling many forms of political conflict on neutral, consensus-based grounds²⁷⁵ and its commitment to celebrate and practice political conflict as a means to prevent the antagonism that will result from attempting to settle

270. *But see* Andrew Knops, *Debate: Agonism as Deliberation – On Mouffe's Theory of Democracy*, 15 J. POL. PHIL. 115, 116-18 (2007).

271. Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL, *supra* note 132, at 120, 120.

272. *Id.* at 129.

273. Seyla Benhabib, *Introduction* to DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL, *supra* note 132, at 3, 9 ("Where deliberative-democratic politics, in its strong proceduralist form defended by Habermas, immunizes politics against the forces of cultural and ethical life, theorists of agonistic politics view democracy as the incessant contestation over such ethical and cultural questions.").

274. *See* Jane Mansbridge, *Using Power/Fighting Power: The Polity*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL, *supra* note 132, at 46, 46-47.

275. *See* Eva Erman, *What Is Wrong with Agonistic Pluralism?: Reflections on Conflict in Democratic Theory*, 35 PHIL. & SOC. CRITICISM 1039, 1042 (2009).

the fundamental disagreements we have.²⁷⁶ Even when agonism and more conventional theories can converge in approval or disapproval of particular manifestations of democratic practice, agonism stands out in drawing attention to the inevitability, and even the desirability, of friendly adversarialism. If agonism had a mantra, it would be: “Take ineradicable disagreement seriously.” If it had a metaphor, it would be a controlled burn to prevent greater conflagration—or perhaps a low-grade conflictual fever that protects us from democratic illness.

B. Institutionalizing Agonism

It is necessary now to highlight what some might consider an oxymoron: the idea of institutionalizing this agonistic ethos in the structures of the state. Unlike more conventional theories of democratic politics, all of which start from a procedural standpoint and are associated with certain types of democratic institutions, agonism is a more inchoate concept that is, in some sense, antithetical to institutionalization.²⁷⁷ Institutionalization implies juridical rules and order: precisely the things that agonists—particularly those of the postmodern or expressive variety—are likely to resist.²⁷⁸ They are likely to resist them precisely because institutionalizing something through rules, procedures, and order closes

276. See HONIG, *supra* note 48, at 3–4.

277. “Oppositional agonists” would say that democracy is destroyed with any state institutionalization and that the entire point is to resist the freezing of politics that occurs in institutions. See Sheldon S. Wolin, *Norm and Form: The Constitutionalizing of Democracy*, in *ATHENIAN POLITICAL THOUGHT AND THE RECONSTRUCTION OF AMERICAN DEMOCRACY* 29, 55 (J. Peter Euben, John R. Wallach & Josiah Ober eds., 1994) (describing democracy as a “political moment”); see also Manon Westphal, *Overcoming the Institutional Deficit of Agonistic Democracy*, 25 *RES PUBLICA* 187, 188 (2019) (“An important problem of agonism is that it suffers from an *institutional deficit* . . . Agonists elaborate on the nature of what may be called ‘informal’ institutions—for instance, they describe a need for certain ethico-political commitments on the part of political actors. By contrast, the structure of the polity and the ‘formally organized institutions that define the context within which politics and governance take place’ . . . have been rather absent from agonistic theorizing.”); Andreas Kalyvas, *The Democratic Narcissus: The Agonism of the Ancients Compared to that of the (Post)Moderns*, in *LAW AND AGONISTIC POLITICS*, *supra* note 246, at 15, 34.

278. See Kalyvas, *supra* note 277, at 34.

off certain manifestations of political activity.²⁷⁹ The goal, for these kinds of agonists, is to develop “subaltern counterpublics” in civil society that resist public power of any kind.²⁸⁰

Nevertheless, some agonistic theorists believe that the idea of institutionalized agonism is not an oxymoron. On this reading, agonism is a “theory of conflict regulation” rather than a purely “subversive ethos,”²⁸¹ and it can serve as a guide for a “critical assessment of institutional design” where good institutions prevent the artificial closure of politics.²⁸²

One can see this theory of conflict regulation most clearly in Mouffe’s work. Mouffe claims that an agonistic institution is one that “creates a space in which [agonistic] confrontation is kept open, power relations are always being put into question and no victory can be final.”²⁸³ A space of contestation must remain forever open, and efforts to end that cycle of contestation must not gain too much traction.²⁸⁴ Such a space would allow an institution to “foster inclusion, secure plurality, and safeguard differences.”²⁸⁵

The challenge, which Mouffe recognizes to a greater degree than do some agonists, is to make room for conflict while remaining skeptical of it, as agonism can always devolve into a destructive antagonism.²⁸⁶ Reflexive contestation

279. See Lida Maxwell, *Law and Agonistic Politics*, 11 CONTEMP. POL. THEORY e1, e2 (2012) (reviewing LAW AND AGONISTIC POLITICS, *supra* note 246) (noting arguments by Jacques Rancière and Bonnie Honig that “the assumption that common rules can constitute a political sphere where participants are equal (and can equally contest rules) obscures the inevitable exclusiveness of such a sphere and thus also the conflictual ‘processes of politicization’ through which excluded groups claim equality”).

280. Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, 25/26 SOC. TEXT 56, 67 (1990).

281. Westphal, *supra* note 277, at 189.

282. *Id.*; see also MOUFFE, AGONISTICS, *supra* note 48, at 9 (“In an agonistic politics, however, the antagonistic dimension is always present, since what is at stake is the struggle between opposing hegemonic projects which can never be reconciled rationally, one of them needing to be defeated. It is a real confrontation, but one that is played out under conditions regulated by a set of democratic procedures accepted by the adversaries.”).

283. MOUFFE, THE DEMOCRATIC PARADOX, *supra* note 248, at 15. Again, this can possibly be squared with certain deliberative theories that highlight practical limits on deliberation over certain matters and encourage decisional provisionality as a means of preventing the premature closure of deliberation. See GUTMANN & THOMPSON, *supra* note 38, at 6.

284. GUTMANN & THOMPSON, *supra* note 38, at 56.

285. Kalyvas, *supra* note 277, at 33.

286. See CHANTAL MOUFFE, ON THE POLITICAL 20 (2005); Monique Deveaux, *Agonism and Pluralism*, 25 PHIL. & SOC. CRITICISM 1, 5, 15 (1999); Kalyvas, *supra* note 277, at 34 (noting that “contemporary discourses on agonism, with the exception of Chantal Mouffe,” disregard the possibility that excess “[p]oliticization could lead to polarization, the polemization of political contests, to hostility and aggression, and finally to factionalization and violent dissolution”).

could produce pathologies in the political process, including hyperpoliticization and gridlock. This awareness leads Mouffe to focus on the nature of legal or institutional rules. For Mouffe, “[t]he moment of rule is indissociable from the very struggle about the definition of the people, about the constitution of its identity,”²⁸⁷ meaning that legitimate rules can exist but are inherently unstable. Institutions are at their best when they create rules that are contingent, provisional, and responsive to contestation. Thus, embracing conflict, as all agonists do,²⁸⁸ would provide the power to keep the wheels of politics turning—but it is the contingency, provisionality, and responsiveness of agonistic institutions that would serve as the axle grease that keeps the wheels from locking up.

In other words, members of the *dêmos* must have effective ways of coercing political institutions to add items to the agenda and to reconsider any and all policies, including, and perhaps especially, long-standing ones. Even when leaders are uninterested, the system must self-regulate to prevent uncritical acceptance of the status quo. Law and institutions cannot stale and ossify, even when the impulse for settling is strong. And when a decision is made to change the status quo, institutions must be free to effectuate that decision, even if it requires the creation of a new configuration of winners and losers. This is because agonistic institutions rely on political countermobilization against the new status quo to check bad decisions rather than attempting, through procedural assimilation, to avoid the consequences of decisions.

For precisely these reasons, the possibility of institutionalizing agonism in the state requires a theory of law and institutions that is significantly more temporally circumscribed than the traditional theories often associated with the “rule of law.” Law and institutions must be capable of facilitating “constituent moments,” wherein agonists act decisively but also highlight exclusion and pave the way for the eventual displacement of the settlement of the day.²⁸⁹ The inviolability of law must therefore be circumscribed when agonistic claims advance. This may be a bridge too far for some. For theorists like Lon L. Fuller, the fundamental desiderata of the rule of law include consistency and stability, and the space for contestation and conflict envisioned by agonists requires some tradeoff on these dimensions.²⁹⁰ Law is often celebrated because of its resistance to

287. MOUFFE, THE DEMOCRATIC PARADOX, *supra* note 248, at 56.

288. Embrace of conflict is, perhaps, the only universal feature of agonistic theory. See Schaap, *supra* note 246, at 6.

289. See Jason Frank, *Staging Dissensus: Frederick Douglass and “We, the People,”* in LAW & AGONISTIC POLITICS, *supra* note 246, at 87, 89-94 (highlighting Frederick Douglass’s speech on the 4th of July as an example of this agonistic mode).

290. LON L. FULLER, THE MORALITY OF LAW 79-80, 91-93 (1969). A recent attempt to bring Fullerian thinking into discussion with contemporary administrative-law problems exists. See, e.g.,

change.²⁹¹ Yet, it is clear that consistency and stability are not always maximized in a system of law recognized as such; systems that sacrifice these values to some degree may achieve other goals – such as intelligibility, practicability, and congruence – without losing the overall “morality” of law.

It is worth considering, for instance, the argument for “democratic constitutionalism” – a close analog to the institutionalized agonism I have discussed. Democratic constitutionalists like Robert Post and Reva Siegel argue that the “authority of the Constitution depends on its democratic legitimacy, upon the Constitution’s ability to inspire Americans to recognize it as *their* Constitution,” but part of this involves citizens’ rights to “make claims about the Constitution’s meaning and to oppose their government – through constitutional lawmaking, electoral politics, and the institutions of civil society – when they believe that it is not respecting the Constitution.”²⁹² Post and Siegel identify “historically recurring patterns of resistance” to courts and other institutions that create space for democratic constitutionalism to flourish.²⁹³ In a similar vein, Daphna Renan and Louis Michael Seidman, among others, talk about “unsettlement” as a prime virtue of the American brand of constitutional democracy.²⁹⁴

This dialectic process of democratic constitutionalism, as unstable and inconsistent as it may be, does not rob constitutional law of its status as law. There is no reason that the same should not be true in other areas of law. Squaring agonistic theory with law and institutions might require a different operationalization of law than some legal systems currently entail, but it would not necessarily render the law unrecognizable as law. In fact, this different operationalization of law may be the key for making the administrative state work as a democratic institution. The next Part makes this case.

CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* 42, 91 (2020) (“[W]e invoke the Fullerian idea of the rule of law as a way of understanding how a system of administrative law might function well as law, not in order to make contentious jurisprudential claims. . . . Current administrative law is partly, but only partly, consistent with Fuller’s understanding of the limited domain of law’s morality.”).

291. See, e.g., Rodríguez, *supra* note 49, at 7.

292. Post & Siegel, *supra* note 245, at 374.

293. *Id.* at 375.

294. Daphna Renan, “*Institutional Settlement*” in a *Provisional Constitutional Order*, 108 CALIF. L. REV. 1995, 2003 (2020); LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2001).

IV. THE ADMINISTRATIVE AGON

The previous Part introduced a theory of democracy that is ascendant in political-theory circles but heretofore unexplored in administrative-law scholarship. In this Part, I bring the burgeoning but rather abstract theory of agonistic democracy into conversation with the nitty-gritty world of the administrative state.²⁹⁵ My goal is to envision an “administrative agon” that institutionalizes agonistic features into the day-to-day work of administrative law. This vision entails three features that fulfill the overall goal of institutionalizing conflict maintenance: 1) the incorporation of provisionality and contingency in certain agency actions to facilitate dynamic agency decision making; 2) identity- and interest-conscious balancing of participatory opportunities; and 3) the flattening of the bureaucratic hierarchy and the introduction of internal checks as a means of creating intra-bureaucratic contestation. Some of these features exist, to some degree or another, in administrative practice, albeit without a wholly satisfactory grounding in conventional democratic theories. Others would need to be engrafted through conscious reforms, and in fact are in tension with current trends in administrative law.

By highlighting certain features and reforms, I do not mean to suggest that there are no alternative ways to bring agonistic democratic theory into the administrative state. Instead, I hope to highlight prominent blind spots in current administrative practice that evince too little concern for the issues that agonistic theory highlights. I hope that others will identify other blind spots and flesh out additional institutional reforms that could improve the agonistic qualities of administration.

A. Provisionality and Contingency as Sources of Dynamism

A central pillar of agonistic democratic theory is its prescription for provisionality and contingency of decisions – that is, cabining the duration and scope of policy actions so that they are not likely to remain permanent or be sticky when a decision is made to change them. This preference for dynamism and responsiveness to conflicts is a large part of what makes agonism different from classical theories of democratic administration. Committing to it in the context of the administrative state would involve significant reforms of existing administrative-law doctrine. Such reforms would also help resolve some of the biggest

295. See generally Seidenfeld, *supra* note 17 (arguing that civic republicanism provides the best justification for American bureaucracy and proposing some applicable reforms in the realm of administrative law); Stewart, *supra* note 67 (outlining the “interest representation model,” which built on pluralist assumptions); Mathews, *supra* note 79 (offering a “minimalist” theory of democracy to justify the administrative state).

concerns that people have about the administrative state (for instance, that it is where democracy goes to wilt, if not die). Before making this case, however, it is necessary to cover some basic facts about administrative law and the administrative process in order to understand how administrative-law doctrine often strait-jackets agencies and insulates decisions once made from revisitation.

1. *A Primer on Administrative Law*

As all administrative-law students learn, agency action is divided into two ideal types: rulemaking and adjudication.²⁹⁶ Rulemaking under the APA produces a “rule,” defined as “the whole or a part of an agency statement of general or particular applicability and future effect.”²⁹⁷ Adjudication is defined as everything that is not rulemaking.²⁹⁸ In two famous cases, *Londoner v. City & County of Denver* and *Bi-Metallic Investment Co. v. State Board of Equalization*, the Supreme Court drew a more functional line, highlighting the nature of the issues and the extent to which they turn on individual facts instead of more generally applicable policy considerations.²⁹⁹ Under long-standing case law, agencies possess almost unfettered discretion to choose whether to proceed in making policy choices through individualized adjudications or through more generalized rulemaking proceedings.³⁰⁰ Generally, whether agencies engage in adjudication or rulemaking, they are likely to do it informally—another categorical distinction in the APA’s infrastructure.³⁰¹ Moreover, the APA allows agencies to produce so-called “subregulatory guidance” that interprets existing statutes, regulations, or

296. See, e.g., Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 144 (2019).

297. 5 U.S.C. § 551(4) (2018). The consensus of administrative-law experts is that this definition is deeply flawed in referring to “future effect”—rules need not be, and often are not, prospective, and administrative-law practice focuses much more on the criterion of general applicability. See, e.g., Ronald M. Levin, *The Case for (Finally) Fixing the APA’s Definition of ‘Rule,’* 56 ADMIN. L. REV. 1077, 1078-79 (2004).

298. 5 U.S.C. § 551(6)-(7) (2018).

299. *Londoner v. City & Cnty. of Denver*, 210 U.S. 373, 385-86 (1908); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915).

300. See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

301. See, e.g., Walker & Wasserman, *supra* note 296, at 149. Yet, the labels of “informal” rulemaking and “informal” adjudication may mislead the uninitiated. In practice, informal rulemaking, or notice-and-comment rulemaking, has become an elaborate process that can take several years to complete. See Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 528 (1997). And Congress and agencies have often layered on additional procedures for informal adjudication to address concerns about due process. See Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L.J. 931, 945-46 (2021).

adjudications without going through even the process for informal rulemaking or adjudication.³⁰² Some of the thorniest questions in this framework concern whether and how agency decisions can change over time. There are competing perspectives here, and the case law is muddled, but the edge has consistently gone to consistency over dynamism, to the status quo over change.

To start, many judges and commentators have demanded that agencies make greater use of rulemaking than of adjudication (and especially of subregulatory guidance).³⁰³ They argue that rulemaking lends itself to efficiency, clarity, notice, fairness, and stability compared to a hodgepodge of administrative adjudications that collectively establish a common-law policy.³⁰⁴ A policy enunciated within an adjudication has a limited scope and can be changed in any of the innumerable adjudications that an agency engages in afterward, leaving agencies in a position to advance policy only incrementally.³⁰⁵

While adjudication can be inefficient, the very features that make it so attune it to individuation and context. Much the same can be said about agency use of subregulatory guidance, though such guidance may function much like a rule in providing a generalized stance.³⁰⁶ In contrast, policymaking by rulemaking can

302. See Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 168-69 (2019) (explaining that “agencies can issue guidance without any such process”); Susan Webb Yackee, *Guidance on Regulatory Guidance: What the Government Needs to Know and Do to Engage the Public*, IBM CTR. FOR THE BUS. OF GOV’T (2021), <https://www.businessofgovernment.org/sites/default/files/Guidance%20on%20Regulatory%20Guidance.pdf> [<https://perma.cc/TVE8-42HY>] (discussing non-binding agency “guidance”).

303. Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L. REV. 185, 189 (1996) (noting that “many judges and justices joined with scholars in urging agencies to increase their reliance on rules”); Parrillo, *supra* note 302, at 169 (discussing the “fear and controversy” that have “burned for decades” over alleged abuses of subregulatory guidance).

304. See, e.g., *Nat’l Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 681 (D.C. Cir. 1973) (“[T]here is little question that the availability of substantive rule-making gives any agency an invaluable resource-saving flexibility in carrying out its task of regulating parties subject to its statutory mandate. More than merely expediting the agency’s job, use of substantive rule-making is increasingly felt to yield significant benefits to those the agency regulates. Increasingly, courts are recognizing that use of rule-making to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication.”); Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference’s Effects on Agency Rules*, 119 COLUM. L. REV. 85, 87 (2019) (“Much of the development of American administrative law in recent decades has aimed to promote and fine-tune notice-and-comment rulemaking under the Administrative Procedure Act [] as a means of reducing discretion in the administrative state and making law more certain.”).

305. See Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 401 (1981).

306. See Parrillo, *supra* note 302, at 184-231.

generally be redirected only through further rulemaking and the drawn-out process of taking comment,³⁰⁷ which limits the opportunities for revisiting decisions to those instances in which substantial inertia is overcome. Moreover, policymaking by rulemaking abstracts from individual circumstances and creates unanticipated errors, often necessitating “back-end adjustments” and “unrules.”³⁰⁸ Nonetheless, there is a nearly universal preference among observers for policymaking through rulemaking over policymaking through more individualized adjudications or guidance – and this preference encodes administrative law with a bias toward stability that ultimately makes it unnecessarily difficult for agencies to change policies.³⁰⁹

Even within the category of rulemaking, courts have not always made it easy for agencies to change direction. Instead, they have limited the role that political considerations can play in justifying a change in policy. Under *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance*, agencies can rescind preexisting rules, but they must do so through notice-and-comment processes and offer reasons that are sufficient to withstand arbitrary-and-capricious review in court.³¹⁰ Courts sometimes are skeptical of changes in direction motivated or explained by political reasons,³¹¹ even though the Court in *FCC v. Fox*

307. Nat’l Fam. Plan. & Reprod. Health Ass’n v. Sullivan, 979 F.2d 227, 235 (D.C. Cir. 1992) (“It is a maxim of administrative law that . . . ‘an amendment to a legislative rule must itself be legislative.’” (quoting Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 396)).

308. Cary Coglianese, Gabriel Scheffler & Daniel E. Walters, *Unrules*, 73 STAN. L. REV. 885, 911 & n.109 (2021) (citing and quoting Robert L. Glicksman & Sidney A. Shapiro, *Improving Regulation Through Incremental Adjustment*, 52 U. KAN. L. REV. 1179, 1222 (2004)).

309. See Aaron L. Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. 943, 947-48 (2017) (discussing how policymaking through adjudication, which is permitted under the *Chenery* doctrine, is worse than vague rulemaking because it provides even less notice to regulated parties of what is permitted); Diver, *supra* note 305, at 403-04. To be sure, the stabilizing effect of rules is moderated by deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which allows agencies to freely change interpretations of ambiguous statutes in their rules. See Pierce, *supra* note 165, at 93-95. Even the *Chevron* doctrine contains some bias toward stability, though. After the Supreme Court’s decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), informal adjudication is less eligible for *Chevron* deference, which in effect channels more agency action into the rulemaking category. See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1468 (2005). As a result of this channeling, agencies can amend rules only through cumbersome notice-and-comment processes.

310. 463 U.S. 29, 42 (1983).

311. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 6 (2009) (explaining that, since *State Farm*, “agencies, courts, and scholars alike generally seem to have accepted the view that influences coming from one political branch or another cannot be allowed to explain administrative decisionmaking”).

Television Stations, Inc. said that politics can motivate agency decision making.³¹² As a result, even if agencies are motivated to change a rule because of a change in public opinion, they are incentivized to offer other, more technical reasons to justify the change. Offering these other reasons not only resembles subterfuge but also adds to the costs of rulemaking, making it less likely that agencies will revisit old rules.³¹³

Less obvious, but no less important, is that administrative law vests the decision to revisit old policies almost exclusively in agency officials. There are limited mechanisms in the APA for forcing an agency's hand, but courts generally have not required agencies to act on petitions.³¹⁴ And despite the occasional congressional calls for regulatory revisions, courts have been reluctant to allow litigants to micromanage agency agendas.³¹⁵ As a practical matter, this means that an agency's decisions about prior decisions are mostly discretionary – a doctrinal black hole traditionally justified by paeans to agencies' expertise about the best way to allocate scarce resources.³¹⁶ Agency agenda-setting processes are poorly

312. 556 U.S. 502, 523 (2009).

313. See WENDY WAGNER & WILL WALKER, *INCOMPREHENSIBLE!: A STUDY OF HOW OUR LEGAL SYSTEM ENCOURAGES INCOMPREHENSIBILITY, WHY IT MATTERS, AND WHAT WE CAN DO ABOUT IT* 158-203 (2019).

314. See Jason A. Schwartz & Richard L. Revesz, *Petitions for Rulemaking: Final Report to the Administrative Conference of the United States*, ADMIN. CONF. OF THE U.S. 21-24 (Nov. 5, 2014), <https://www.acus.gov/sites/default/files/documents/Final%2520Petitions%2520for%2520Rulemaking%2520Report%2520%25B11-5-14%25D.pdf> [https://perma.cc/KD4E-9ZU5].

315. See Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 809 n.77, 810 n.83, 818 n.121 (2021) (noting that courts only "periodically enforce" claims under 5 U.S.C. § 706(1) to "compel agency action unlawfully withheld or unreasonably delayed" and tend to defer to agencies in cases challenging denials or delayed petition responses); Michael Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1388 (2011) ("In the absence of express statutory timelines, and sometimes even with them, courts struggle to assess the timing and pace of agency decisionmaking."); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1657-61 (2004) (observing the "Supreme Court's reluctance to allow judicial review of . . . inaction" and arguing that first principles of administrative law do not support this approach, even though "current law provides an obstacle").

316. See Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 27 (2008); Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 458 (2020).

understood,³¹⁷ but lodging the decision in the hands of agency officials, as opposed to diffusing agenda control through a broader array of constituencies, is sure to lead to inertia.³¹⁸

The result of this is often ossification.³¹⁹ Once agency policies are on the books, usually in the form of legislative rules, they are likely to remain, often long after the problem that motivated them has been resolved or has evolved to the point that the rule is no longer optimal.³²⁰ While agencies sometimes revise existing policies as political circumstances change or as new information emerges,³²¹ there are constant complaints that agencies are not doing enough.³²²

It is no accident, of course, that a thumb has been consistently placed on the scale to harden commitments and to impede anyone but agency officials from deciding whether to revisit them. Quite the contrary: it demonstrates the traditional democratic theories' preference for the closure of political conflict.³²³ The resistance to reopening decisions is driven by a deeply engrained belief that there must be an end to contestation if government is to go on.³²⁴ Tight control of access to the agenda and built-in barriers to policy revisitation help insulate decisions from the vicissitudes of agonistic democracy. Under the traditional democratic theories, reopening decisions is unnecessary, especially if the process of decision making was originally democratic. Indeed, the (illusory) hope is that we can do it once and do it right.

317. Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 865, 868-69 (2016).

318. See Sant'Ambrogio & Staszewski, *supra* note 315, at 847-48 (explaining that "federal agencies are often reluctant to make major changes to proposed rules" after they publish a Notice of Proposed Rulemaking).

319. See Bagley, *supra* note 59, at 357 (citing Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992)).

320. See Daniel Byler, Beth Flores & Jason Lewris, *Using Advanced Analytics to Drive Regulatory Reform*, DELOITTE CTR. FOR GOV'T INSIGHTS 3, <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/public-sector/us-ps-using-advanced-analytics-to-drive-regulatory-reform.pdf> [<https://perma.cc/5JX8-9JPB>] (finding that "[s]ixty-seven percent of all CFR sections currently on the books have never been edited since they were originally created").

321. See Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183, 202-13 (2017) (showing that agencies do revise their rules, and outlining the kind of revisions made).

322. See Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. ON REGUL. 57, 59 (2013); Reeve T. Bull, *Building a Framework for Governance: Retrospective Review and Rulemaking Petitions*, 67 ADMIN. L. REV. 265, 265 (2015).

323. See discussion *supra* Part I.

324. Cf. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) ("It appears to us that to put the question is to answer it. There must be a limit to individual argument in such matters if government is to go on.").

As discussed in Part III, agonistic theories of democracy place a premium on avoiding the closure of democracy and thus may strike a different balance when it comes to revisiting old policy decisions and proactively combatting the dead hand of the past. An agonistic approach would seek to eliminate barriers to change of existing policies, disperse agenda-setting power more broadly, and even incorporate mechanisms that trigger automatic revisitation of existing policy choices—in other words, to manufacture conflict where democratic conflict is likely to be artificially suppressed. I discuss each of these reforms in turn.

2. *Eliminating Barriers to Changing Policy*

The administrative agon would reduce friction and inertia that inhibit agencies from experimenting with, revising, and reconsidering existing policies. But what, exactly, would that entail?

First, it would entail a purely doctrinal shift to abandon or weaken the preference for rulemaking that is encoded in administrative law. Before the 1960s, many agencies preferred to operate by adjudication rather than by rulemaking,³²⁵ much as they now are accused of preferring subregulatory guidance to rulemaking.³²⁶ Scholars and judges, though, saw great advantages in more reliance on rulemaking, sometimes precisely because it lends stability to the administrative process and pushes agencies to use their discretion to choose rulemaking over adjudicatory or subregulatory policymaking.³²⁷ This project has been an almost unmitigated success—so much so that agencies now generally undertake major initiatives through the rulemaking process even when they are not required to do so.³²⁸ Agencies might even see advantages to locking in programs

325. See David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 944 (1965); Diver, *supra* note 305, at 401. Of course, in some cases agencies deviated from this pattern and pushed the envelope in seeking out greater rulemaking authority. The Federal Trade Commission (FTC), for instance, famously pushed for rulemaking authority, which the courts finally recognized in *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

326. Parrillo, *supra* note 302, at 168-70.

327. See *supra* notes 304-306 and accompanying text.

328. The major exceptions are the National Labor Relations Board and FTC, which for various historical and legal reasons have shied away from rulemaking and favored adjudication and enforcement in setting policies. See Rohit Chopra & Lina M. Khan, *The Case for 'Unfair Methods of Competition' Rulemaking*, 87 U. CHI. L. REV. 357, 359-60 (2020); Keahn Morris, John Bolesta & James Hays, *Breaking with Tradition, the Current NLRB Is on a Rulemaking Tear: Election Procedures, Recognition Bar, and 9(a) Collective Bargaining Relationships*, LAB. & EMP. L. BLOG (Aug. 13, 2019), <https://www.laboremploymentlawblog.com/2019/08/articles/national-labor-relations-act/rulemaking-tear-election-procedures> [https://perma.cc/R8T9-B47W].

and preventing “successor exit.”³²⁹ From an agonistic standpoint, it would be far better to discount any justification for this preference that hinges on benefits of stability, because these qualities represent the closure of political conflict.³³⁰ Agencies may, of course, still find rulemaking preferable for other reasons, such as the superior notice that the process provides of decisions that agencies inevitably will make. But agonists would resist the normative democratic commitment to stability.

A second doctrinal change to open decisions to further revision or reconsideration would be to permit political reasons, without more, to justify policy changes. As Kathryn A. Watts recognized, “the blanket rejection of politics in administrative decision making has been casually accepted as the status quo by courts, agencies, and scholars alike,” particularly in the domain of arbitrary-and-capricious review.³³¹ Despite *Fox*, it is still taboo for agencies to transparently assert political justifications for their decisions, and the Trump Administration’s dismal record in court likely heightened that taboo.³³² Likewise, there is a clear trend in the Supreme Court’s recent decisions toward eradicating deference to agency interpretations of law, which greatly limits agencies’ discretion to bring political logic to a determination about whether to revisit existing interpretations of law.³³³

But this is all wrong from an agonistic perspective. On this view, political reasons for changing policy are just as valid as reasons arrived at through expert judgment or rational deliberation. And subordinating political justifications in the process of policymaking interferes with democracy in service of a consensus that does not exist. Consequently, the administrative agon would be a place where agencies could make decisions without having to dress them in ostensibly

329. See Sarah E. Light, *Regulatory Horcruxes*, 67 DUKE L.J. 1647, 1650–54 (2018).

330. Of course, such instability has major costs both for agencies and for regulated parties and the public. By emphasizing the virtues of instability from an agonistic perspective, I do not mean to give short shrift to these costs, and in Section V.C, *infra*, I acknowledge that considerations of cost may counsel less than a maximal implementation of the recommendations here.

331. Watts, *supra* note 311, at 7.

332. See Bethany A. Davis Noll & Christine Pries, Opinion, *The Administration’s Record in the Courts*, HILL (Nov. 3, 2020, 11:30 AM ET), <https://thehill.com/opinion/white-house/524016-tired-of-winning-trumps-record-in-the-courts> [<https://perma.cc/5Q6T-K233>]. Especially notable was the Trump Administration’s loss in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), in which the Supreme Court refused to credit a manufactured reason—enforcing the Voting Rights Act—to uphold the Administration’s politically motivated attempt to add a citizenship question to the census.

333. See Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 523–34 (2022); Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 174 (2022).

neutral—but in fact value-tinged³³⁴—reasons for courts to accept them as rational.

Finally, procedural changes could also afford agencies greater latitude to experiment with alternative approaches and to update and adjust rules more proactively. Currently, both the preference for rulemaking and deeply entrenched norms of equal treatment under rules prevent agencies from adopting an experimentalist posture in policymaking.³³⁵ That is, agencies cannot typically design policies *for* change. There are, of course, exceptions to this general characteristic: in ecosystem governance, some agencies have adopted policies using the framework of adaptive management;³³⁶ and in fintech regulation, agencies have used the idea of “regulatory sandbox[es]” to respond to concerns that technologies are evolving too quickly for policies promulgated and revised the old-fashioned way to keep up.³³⁷ But this kind of approach to adaptive and experimental regulation, through which agencies would be encouraged to learn and incorporate new knowledge into relatively costless program improvements, is quite rare. Similarly, a perennial preoccupation of administrative lawyers is smothering opportunities to issue subregulatory guidance,³³⁸ which would potentially be a device for pursuing experimental policymaking strategies. An agonistic perspective would offer democratic bona fides to such experiments and encourage a restructuring of norms and processes that currently prevent agencies from adopting them.

In a more general sense, agonism counsels a revival of “a strain of thinking that connects the legitimacy of the administrative state to its ability to satisfy public aspirations.”³³⁹ Agonism, in stark contrast to more conventional theories, finds democratic legitimacy in unleashing, rather than constraining, agencies.

334. See WAGNER & WALKER, *supra* note 313, at 158–203.

335. For instance, the Administrative Conference of the United States (ACUS) issued a recommendation to agencies that they find creative ways to introduce variation, but explicitly cautioned agencies to give “due regard for legal, ethical, practical, and fairness limitations.” Adoption of Recommendations, 82 Fed. Reg. 61738, 61741 (Dec. 29, 2017); see also Zachary J. Gubler, *Experimental Rules*, 55 B.C. L. REV. 129, 154–62 (2014) (using “public choice theory to explain the dearth of experimental rulemaking”); Michael Abramowicz, Ian Ayres & Yair Listokin, *Randomizing Law*, 159 U. PA. L. REV. 929, 961–74 (2011) (discussing cost, ethical, and equality concerns with experimental lawmaking).

336. See J.B. Ruhl, *Regulation by Adaptive Management—Is It Possible?*, 7 MINN. J.L. SCI. & TECH. 21, 32–33 (2005).

337. William Magnuson, *Regulating Fintech*, 71 VAND. L. REV. 1167, 1216 (2018).

338. See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1312 (1992).

339. Bagley, *supra* note 59, at 400.

3. *Opening the Regulatory Agenda*

A second way of lifting the dead hand of the past would be to eliminate agencies' near monopoly over the regulatory agenda. While the forces that shape the regulatory agenda are not well studied,³⁴⁰ one of the persistent findings across a range of studies is that agencies do not act on many, or even most, issues that are brought to their attention. For instance, rulemaking petitions are the most basic form of public participation in regulatory agenda building, yet agencies frequently ignore petitions or deny them with little explanation.³⁴¹ Even privileged actors, like Congress, can see their calls for regulation fall through bureaucratic cracks. Jason and Susan Webb Yackee found that agencies respond to statutory calls for rulemaking less than half of the time.³⁴² William F. West and Connor Raso, in perhaps the most comprehensive study of regulatory agenda setting to date, found that a majority of rules promulgated by agencies are "discretionary" and typically involve incremental adjustments to existing programs in response to concerns raised by affected parties.³⁴³ There is also an empirical basis for fearing that organized beneficiaries of the status quo can and do mobilize to kill regulatory proposals in the cradle.³⁴⁴ In short, the regulatory agenda-setting process is riddled with vetoes and interest-group politics that make it difficult for all but the most organized to shape what agencies decide to focus on.

Making agenda control more "open access" would force agencies to engage questions that they might otherwise ignore, thus furthering the agonistic goal of forcing contestation even where agencies would prefer to paper over conflict by ignoring issues. In some sense, this pathway for agonistic reform builds on the

340. See generally Coglianese & Walters, *supra* note 317, at 866 ("[B]oth real and perceived difficulties in carrying out empirical research have generally kept researchers interested in regulation and administrative law from explicitly studying agenda-setting dynamics."); William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC'Y 576, 577 (2009) (describing agency proposal development as a "black box" and concluding that this aspect of agency business "deserves much more attention than it has received").

341. See Daniel E. Walters, *Capturing the Regulatory Agenda: An Empirical Study of Agency Responsiveness to Rulemaking Petitions*, 43 HARV. ENV'T L. REV. 175, 207 fig.4 (2019).

342. Jason Webb Yackee & Susan Webb Yackee, *From Legislation to Regulation: An Empirical Examination of Agency Responsiveness to Congressional Delegations of Regulatory Authority*, 68 ADMIN. L. REV. 395, 426 tbl.1 (2016).

343. William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J. PUB. ADMIN. RSCH. & THEORY 495, 504-06 (2013); see also Wagner et al., *supra* note 321, at 190 (finding that adjustment of existing rules in response to concerns from affected parties is the norm in rulemaking).

344. Susan Webb Yackee, *The Politics of Ex Parte Lobbying: Pre-Proposal Agenda Building and Blocking During Agency Rulemaking*, 22 J. PUB. ADMIN. RSCH. & THEORY 373, 388 (2012).

pluralist model by making it easier for a diverse spectrum of outsiders to influence agency decision making. But it is also deeper than the pluralist model. It recognizes the importance of non-decision making, or what social scientists call the “less apparent . . . face of power,”³⁴⁵ and of latent conflict, which Steven Lukes considers in his “three-dimensional view of power.”³⁴⁶ That is to say, agencies often exercise power by deciding not to decide. They also exercise power by endorsing preferred (but not universally shared) ideologies, such as a commitment to utilitarianism. This kind of power tends to exclude certain viewpoints. Of course, some degree of agenda control is needed for any institution to function. A complete free-for-all could be a cure worse than the disease—for instance, strategic actors could debilitate an agency by flooding it with issues that the agency lacks resources to deal with. These are legitimate concerns, and indeed, concerns about interference with agencies’ resource allocation decisions are a major reason why administrative law has shied away from interfering with agency agenda setting.³⁴⁷

Yet certain reforms, many of which are already employed by agencies on a limited scale, could meaningfully open regulatory agendas to public contestation without destroying an agency’s ability to operate. Michael Sant’Ambrogio and Glen Staszewski have recently collected a list of mechanisms that agencies have employed to cede some control of the agenda to stakeholder groups.³⁴⁸ Many of these devices—such as rulemaking petitions, advisory committees, focus groups, listening sessions, and internet forums—are familiar to administrative-law scholars, but Sant’Ambrogio and Staszewski show that they can be effective if they are implemented with care and attention to participatory imbalances. Unfortunately, agencies have deployed them only fleetingly and with only moderate success.³⁴⁹ A key focus in building an administrative agon would be to institutionalize and enforce a commitment to use these existing but underutilized tools in a far broader swath of agency business. For instance, the Internal Revenue Service (IRS) has a practice of annually requesting guidance from the public on what its regulatory priorities should be.³⁵⁰ The result of this solicitation of public

345. Bachrach & Baratz, *supra* note 98, at 949.

346. LUKES, *supra* note 98, at 11, 24-25.

347. Biber, *supra* note 316, at 35-38.

348. See Sant’Ambrogio & Staszewski, *supra* note 189, at 35-62; see also Sant’Ambrogio & Staszewski, *supra* note 315, at 816-31 (recapping their ACUS study findings but focusing more on opening agenda setting to the public).

349. Sant’Ambrogio & Staszewski, *supra* note 315, at 826-30.

350. Coglianese & Walters, *supra* note 317, at 887.

input is the IRS’s “Priority Guidance Plan,” which comprehensively lists the action items that the agency plans to undertake over a twelve-month “plan year.”³⁵¹ FERC has taken important steps in this direction as well with its creation of an Office of Public Participation (OPP). OPP is tasked with “improv[ing] . . . existing Commission processes in a manner responsive to public input, with the goal of ensuring processes are inclusive, fair, and easy to navigate.”³⁵² Of particular interest is OPP’s exploration of an intervenor funding program, which aims to make it easier for members of the public to insert their unique and underrepresented perspectives into otherwise narrow matters between regulated utilities and developers and the Commission.³⁵³ The Administrative Conference of the United States (ACUS), following on the Sant’Ambrogio and Staszewski study, has likewise recommended that agencies take steps to engage the public—especially “affected groups that often are underrepresented in the administrative process and may suffer disproportionate harms”—on regulatory alternatives at the earliest possible stage.³⁵⁴

These are all encouraging steps toward a more agonistic process of agenda setting. With continued steps to make methods and institutions like these more systematically applicable and mandatory, there would be much less risk that agency officials would artificially close off political contestation over what agencies prioritize.

4. *Hardwiring Conflict*

Perhaps most controversially, the administrative agon would prevent the closure of politics by hardwiring conflict into the everyday work of agencies, even when no one has voiced dissent or a desire to contest policy. An agency that is hardwired for conflict would not simply take whatever conflict naturally emerges; instead, it would build in contestation as a routine and ensure that it occurs by seeking out excluded arguments and perspectives, however off the wall

351. See, e.g., Off. of Tax Pol’y & Internal Revenue Serv., *2021-2022 Priority Guidance Plan*, U.S. DEP’T OF TREASURY (Sept. 9, 2021), <https://www.irs.gov/pub/irs-utl/2021-2022-pgp-initial.pdf> [<https://perma.cc/VR2H-6LG9>].

352. *Office of Public Participation*, FED. ENERGY REGUL. COMM’N, <https://ferc.gov/OPP> [<https://perma.cc/8SRE-Z546>].

353. Ethan Howland, *FERC’s Office of Public Participation Eyes Options for Intervenor Funding*, UTILITYDIVE (Apr. 4, 2022), <https://www.utilitydive.com/news/ferc-office-public-participation-intervenor-funding-compensation/621406> [<https://perma.cc/32CP-5GYX>].

354. *Administrative Conference Recommendation 2021-3: Early Input on Regulatory Alternatives*, ADMIN. CONF. OF THE U.S. (June 17, 2021), <https://www.acus.gov/sites/default/files/documents/Early%20Input%20on%20Regulatory%20Alternatives%20FINAL.pdf> [<https://perma.cc/UEZ6-992V>].

they might be. Arguably, the dimension that most distinguishes pluralism from the agonistic perspective on democracy is how each interprets silence: for the pluralist, silence indicates that all relevant interests have been appeased and there is nothing left to consider; for the agonist, silence indicates probable disenfranchisement and a false consensus. The challenge is to prevent the hegemony of this false consensus, including by institutionalizing checks and balances that search out and voice latent dissenting perspectives.

In other words, agencies must actively cultivate contestation to ensure that policy (even relatively uncontroversial policy) is adequately tested against the full range of political perspectives. They need to do this in two ways. First, they must ensure that no decision is presumptively permanent, which is to say that agency decisions must be subject to regular and continuing reevaluation. Second, agencies must ensure that when these regular episodes of reevaluation occur, the full range of potential perspectives is represented. Such an approach, if implemented, would ensure that inertia does not stifle conflict. It would also demonstrate to the public that agencies take all ideas seriously, even if there are no participants willing to go on the record to air them. “Self-censorship” (not saying what one believes because of a fear of political or social consequences) and “preference falsification” (saying something different than what one believes because of a fear of political or social consequences) are common phenomena in America that have concerning links with democratic decline.³⁵⁵ Agencies must be cognizant of the ways that public participation is likely to be skewed because of self-censorship and preference falsification that hides deeper dissensus, and they need to counteract that.

The idea that agencies might proactively cultivate regular contestation over policies is not as radical as it might sound. Many existing institutions and proposed reforms in the administrative state have this conflictual ethos at their core. For instance, retrospective review is a commitment to review existing policies at specified points in time regardless of whether there are specific complaints about the policy. In fact, a large part of the idea of retrospective review is to *find* things to complain about and fix them.³⁵⁶ This is very much in the spirit of agonism. Likewise, sunset provisions for regulations, which automatically require reauthorization after a certain period,³⁵⁷ program agonistic conflict maintenance into

355. See James L. Gibson & Joseph L. Sutherland, *Keeping Your Mouth Shut: Spiraling Self-Censorship in the United States 1-2* (May 18, 2021) (unpublished manuscript), <https://ssrn.com/abstract=3647099> [<https://perma.cc/FAN6-6M63>] (documenting a rise in self-censorship in the United States); *A Conspiracy of Silence*, HIDDEN BRAIN, at 37:40-39:15 (Nov. 30, 2020) <https://hiddenbrain.org/podcast/a-conspiracy-of-silence> [<https://perma.cc/XGW4-DXMP>] (discussing the links between preference falsification and democratic decline).

356. See Coglianese, *supra* note 322, at 57.

357. See Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 247 (2007).

the administration of regulatory programs. Every time a regulation sunsets, the default is to trigger a new round of political conflict over the rule, keeping regulatory law updated and adapted. While both retrospective review and sunseting have been deployed on a limited basis in regulatory programs,³⁵⁸ the administrative agon would centralize them in the strategy for preventing the closure of political contestation over regulatory policies. In addition, some agencies have built-in “regulatory contrarians” such as ombudsmen or independent inspectors general that serve to highlight blind spots in agency decisions.³⁵⁹ This model is much more common in state-level utility regulation, where there are often offices dedicated to representing consumers and other groups that are unlikely to be organized enough to influence regulatory decision making.³⁶⁰

Agencies will never be able to recreate the full spectrum of perspectives that are relevant to any decision. Doing so would require them to perform history and political-theory seminars before making regulatory decisions. Nor will they be able to max out reevaluation of preexisting decisions. At an extreme, that would make any decision effectively advisory since it could be undone five minutes later. But in the administrative agon, agencies would aspire to move

358. See, e.g., Martin Totaro & Connor Raso, *Agencies Should Plan Now for Future Efforts to Automatically Sunset Their Rules*, BROOKINGS INST. (Feb. 25, 2021), <https://www.brookings.edu/research/agencies-should-plan-now-for-future-efforts-to-automatically-sunset-their-rules> [<https://perma.cc/6C7G-WAKX>]. Regulatory sunsets are often associated with deregulatory agendas, as with the Department of Health and Human Services (HHS) sunset rule that would have automatically retired existing regulations if HHS failed to undertake retrospective review required under the Regulatory Flexibility Act. See Charles Yates & Adi Dynar, *The Biden Administration Should Not Sunset the Sunset Rule*, REGUL. REV. (Apr. 4, 2022), <https://www.theregreview.org/2022/04/04/yates-dynar-biden-administration-should-not-sunset-the-sunset-rule> [<https://perma.cc/33DG-ZBGL>]. But sunsets need not be purely deregulatory if they are combined with other reforms associated with the administrative agon that would clear roadblocks to agencies enacting new policies to replace policies that have sunset provisions. Much of the deregulatory impact of sunsets stems from difficulties in promulgating new policies in the first place, creating asymmetric pressure on proregulatory actors to defend existing regulations that they might consider suboptimal in a frictionless world. Likewise, regulatory sunsets could be paired with their opposite, regulatory hammers. Hammers impose consequences—an automatic reversion to a stringent, categorical policy if agencies fail to develop a more nuanced policy within a certain amount of time. See M. Elizabeth Magill, *Congressional Control over Agency Rulemaking: The Nutrition Labeling and Education Act’s Hammer Provisions*, 50 FOOD & DRUG L.J. 149, 150 (1995). Hammers, like sunsets, could force agencies to undertake review of existing regulations with an eye not simply to rolling back regulations, but to adapting them in an agonistic fashion.

359. See, e.g., Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629, 1653-68 (2011) (elaborating on a typology of “regulatory contrarians”); Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 60-62 (2014).

360. See *Who We Are*, NAT’L ASS’N STATE UTIL. CONSUMER ADVOCs., <https://www.nasuca.org/about-us> [<https://perma.cc/ESQ3-E7A3>].

more in this direction, acknowledging that the current processes that agencies employ do not adequately find and engage conflict.³⁶¹ Hardwiring conflict is core to the agonistic ethos of resisting the closure of politics,³⁶² and it requires an inversion of agencies' natural tendencies to seek consensus and avoid conflict.

5. *Nationwide Injunctions and Agonistic Percolation*

In recent years, federal district court judges have commonly granted nationwide injunctive relief when they believe that a challenge to an administrative rule or guidance is likely to succeed. For instance, during the Obama Administration, Judge Hanen in the Southern District of Texas enjoined the implementation of the Deferred Action for Parents of Americans program not just in Texas, and not just in the Fifth Circuit, but throughout the United States.³⁶³ During the Trump Administration, the ideological choreography changed, but the dance remained the same: Judge Robart of the Western District of Washington issued a nationwide injunction of the Trump Administration's so-called Muslim travel ban.³⁶⁴ For the next four years, courts in more liberal-leaning districts repeatedly imposed nationwide preliminary injunctions, prompting conservative critics to accuse those judges of playing politics.³⁶⁵ But the politics of the nationwide injunction shifted again when President Biden took office. In 2021, Judge Hanen made headlines again when he granted a preliminary injunction in a case challenging President Biden's order to agencies to delay deportations of certain people.³⁶⁶

361. Again, there is significant evidence that most agency action is oriented toward incremental adjustment of existing regulatory frameworks in response to a very limited cross section of political perspectives. See Wagner et al., *supra* note 321, at 190; West & Raso, *supra* note 343, at 504-06.

362. See *supra* Part III.

363. *Texas v. United States*, 86 F. Supp. 3d 591, 677-78 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015).

364. *Doe v. Trump*, 288 F. Supp. 3d 1045, 1085-86 (W.D. Wash. 2017).

365. See, e.g., *DHS v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring) (explaining a decision to stay a lower court's nationwide injunction on the grounds that nationwide injunctions encourage plaintiffs to seek friendly forums); see also Andrew Chung, *Challenging Judges' Orders, Trump Aims to Enlist Supreme Court*, REUTERS (Dec. 14, 2018, 7:02 PM), <https://www.reuters.com/article/us-usa-court-injunctions-analysis/challenging-judges-orders-trump-aims-to-enlist-supreme-court-idUSKBN1OD2RN> [<https://perma.cc/K9SZ-EWJ5>] (discussing conservatives' criticisms of nationwide injunctions).

366. Rachel Treisman & Vanessa Romo, *The Biden Administration Vows to Appeal a Federal Ruling Deeming DACA Unlawful*, NPR (July 17, 2021, 11:46 AM ET), <https://www.npr.org/2021/07/16/987132269/federal-judge-rules-daca-unlawful-but-current-recipients-safe-for-now> [<https://perma.cc/QP5M-7PSL>]. Adding to the politicization, the Supreme Court declined to stay a national injunction halting Biden's attempt to roll back the Trump Administration's

Whether the practice of granting nationwide injunctive relief is entirely new or not,³⁶⁷ it does appear to be gaining steam as it is conscripted into ideological lawfare between the political parties.

Scholars have not converged on a consensus about the practice.³⁶⁸ The central concern from a legal perspective is that injunctive relief has traditionally been a remedy to the parties to the litigation.³⁶⁹ Nationwide injunctions affect everyone in the country without regard to whether the issuing court has coercive authority over the entire country. Circuits routinely disagree, and when they do, people pay most attention to the court encompassing the geographic territory in which they live. Nationwide injunctions allegedly invert these standard principles, making every individual district court judge into a sort of national administrative tribunal.³⁷⁰ On the other hand, some scholars have pushed back, arguing that the nationwide injunction is defensible on issue-preclusion grounds,³⁷¹ that it might be the only way to provide effective relief to individual plaintiffs when an agency advances a nationwide policy,³⁷² and that, in terms of policy coherence, it is preferable to allowing judges across the nation to issue a patchwork of injunctions that kill regulations by a thousand cuts.³⁷³

“Remain in Mexico” policy, despite its rhetoric in prior cases during the Trump Administration. See *Biden v. Texas*, 142 S. Ct. 926 (2021); Robert Barnes, *Supreme Court Says Biden Administration Must Comply with Ruling to Restart “Remain in Mexico” Program for Asylum Seekers*, WASH. POST (Aug. 24, 2021, 9:28 PM EDT), https://www.washingtonpost.com/politics/courts_law/supreme-court-remain-in-mexico/2021/08/24/6bba350a-0507-11ec-a654-900a78538242_story.html [<https://perma.cc/89F7-XVHY>].

367. There is some debate as to whether the practice is new. See Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920, 924-26 (2020) (arguing that the universal injunction is not a recent invention). The pedigree of the practice is not critical to my argument.
368. For a helpful overview of the many legal and policy issues surrounding national injunctions, see JOANNA R. LAMPE, CONG. RSCH. SERV., R46902, NATIONWIDE INJUNCTIONS: LAW, HISTORY, AND PROPOSALS FOR REFORM (2021).
369. See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 464-65 (2017).
370. See Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1071-72 (2017).
371. See Zachary D. Clopton, *Nationwide Injunctions and Preclusion*, 118 MICH. L. REV. 1, 42-44 (2019); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 90-92 (2019).
372. See Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1065-66 (2018); Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 49-50 (2017).
373. See Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1184 (2020); see also Michael Coenen & Seth Davis, *Percolation’s Value*, 73 STAN. L. REV. 363, 363-64 (2021) (arguing that percolation—a value prized by those who resist nationwide injunctions—is unlikely to deliver benefits that outweigh the costs in a wide range of cases).

Here, I focus on this final defense of nationwide injunctions. It appeals to the idea that policy determined by a national bureaucracy ought to be administered nationwide for the sake of clarity, consistency, and other traditionally bureaucratic virtues.³⁷⁴ Moreover, there is a democratic angle to this defense: insofar as national agencies are issuing national policies, judges that interfere with partial equitable relief obscure the actual reach of the policy, frustrating the public's ability to hold accountable elected officials overseeing the policy rollout in the next election.³⁷⁵ Indeed, administrative-law scholars have long understood that there are strong arguments for an agency "maintain[ing] a uniform administration of its governing statute at the agency level."³⁷⁶

But this rationale has never been understood as a trump card. Samuel Estreicher and Richard L. Revesz, in analyzing the closely analogous problem of inter-circuit nonacquiescence,³⁷⁷ concluded that agencies ought to be free to engage in this practice, despite the potential for nonuniformity in policy administration.³⁷⁸ It is easy to see how one could weigh the relevant policy considerations differently, however, and conclude that inter-circuit nonacquiescence and piecemeal equitable relief would unduly complicate the project of national administration, especially when considering the ways in which these practices blur the lines of democratic accountability. One could argue that it is better to have clarity about the status of a national policy than to leave the people unsure about what the law is or who is responsible for it.

Notwithstanding these arguments, looking at the issue through the lens of agonistic democratic theory provides a different perspective on the value of uniformity and clarity in administration. From this standpoint, there is value in courts limiting equitable relief to the parties immediately involved because doing so multiplies the opportunities for plaintiffs to contest agency policy and to obtain more particularized relief. Importantly, this point is analytically distinct from another sometimes made against nationwide injunctions – namely, that nationwide injunctions impede the virtuous percolation of arguments through the legal system.³⁷⁹ The percolation argument points to the benefits of conflict, but only on an instrumental level. Percolation is thought to allow the cream to rise to the top so that the Supreme Court can focus on carefully curated arguments

374. See Sohoni, *supra* note 373, at 1184.

375. See *supra* Section II.B.

376. Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 683 (1989).

377. Intercircuit nonacquiescence is essentially an agency practice of refusing to comply with limitations on the administration of programs outside of the circuit that issued the limitation. See *id.*

378. *Id.* at 735-41.

379. See Coenen & Davis, *supra* note 373, at 365.

at the core of a dispute. The goal, in other words, is to aid the eventual resolution of a legal dispute on as consensual a basis as possible. This is almost the opposite of the agonistic praise of contestation for contestation's sake—for the agonist, nationwide injunctions are objectionable because they short circuit the democratic process of contestation between agencies and individual people.

To be sure, this agonistic perspective on nationwide injunctions is not a policy slam dunk. Serious distributional considerations attend this perspective, including the fact that not everyone can afford legal representation to advance their interests in court.³⁸⁰ To some degree, nationwide injunctions ameliorate this distributional concern: they permit virtual representation by the first plaintiff who has the resources to litigate on behalf of a class of similarly situated individuals. Eliminating nationwide injunctions might mean that those without the means to litigate will lose this virtual representation. These are legitimate concerns, but rather than allowing the de facto class representative to short-circuit other opportunities to contest agency policies in the name of distributional concerns, it might be better to preserve opportunities for democratic participation of this sort and to subsidize them through more effective legal aid. This is a close call, but agonistic democratic theory would undoubtedly counsel extreme caution in endorsing any practice that has the effect of diminishing the opportunities that ordinary citizens have to contest both agency policies and court decisions issued prior to their day in court. All else equal, it is quite difficult to square the nationwide injunction with the administrative agon.

B. Representational Balancing and Identity-Conscious Process

Recent years have seen both greater recognition of the systemic injustices built into public law and attempts to center society's attention on these concerns.³⁸¹ Legacies of racism, colonialism, sexism, and other forms of systemic injustice reside in all areas of the law.³⁸² Scholars have started thinking about how administrative law might be refashioned to facilitate a reckoning with these issues.³⁸³

380. See Frost, *supra* note 372, at 1094–98.

381. These injustices are too numerous to list, but consider, for instance, the Federal Housing Administration's role in redlining. See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA*, at xiii (2017).

382. See Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 *STAN. L. REV.* 821, 830–47 (2021) (discussing critical race theory and other critical strands of scholarship and tying them to current controversies).

383. See *supra* note 11 and accompanying text.

One unfortunate feature of much of this inequity is that it was perpetrated by coalitions of decision makers who held what might at the time have been considered a democratic license.³⁸⁴ Today, the hopes of administrative-law theorists to democratically legitimize the administrative state render them vulnerable to arguments for a more populist or plebiscitary administrative state, one that might once again purposely ignore or demean potential inequities and injustices borne by minority groups. All of this is to say that fighting injustice and inequity is not necessarily a democratic project; in fact, fighting these problems might limit more plebiscitary forms of democracy. In other words, there is a potential tension here that might force people to choose sides – will the rights of excluded and wronged groups be elevated above the unjust but strongly felt will of the people? Put in these zero-sum terms, the fight for equity and justice in the regulatory state might be traded off against democracy conventionally defined.

Agonistic democratic theory, however, offers a resolution for the potential tension between equity and justice reforms on the one hand and democracy on the other. Agonism reserves a place for the excluded and wronged and frames their resistance and insistence on inclusion as an act of democratic politics. Thus, wronged individuals or groups demanding justice could be conceived of as constitutive of democracy. Given this, one could argue that it is no limit on democracy for administrative law to institutionalize processes designed to remediate systemic injustices, even if those processes prevent an ostensible majority from exercising power. Recognizing that there is no necessary trade-off between democracy and justice or equity – and perhaps even no real difference between them – in turn bolsters the case for remediating inequities and injustice in public law.

Operationally, broadening access to equity and justice for marginalized groups in a conception of democracy requires more expansive thinking about participatory processes in the administrative state. A signature democratic feature of the administrative process, on conventional accounts, is an opportunity for all comers to make their voices heard by submitting written or oral comments to an agency after a proposed rule.³⁸⁵ Indeed, “it is hard to imagine a government decision-making process more open and accessible to the public, at least formally,” than notice-and-comment rulemaking.³⁸⁶ Ideally, agencies not only take this raw democratic input but also deliberate with it in a kind of simulated town

384. See *supra* Part I.

385. See David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 *FORDHAM L. REV.* 81, 84 (2005).

386. Sant’Ambrogio & Staszewski, *supra* note 189, at 2.

hall.³⁸⁷ But, even in these ideal scenarios, notice-and-comment processes are not nearly as democratic as they could be, and an agonistic lens helps us understand why. Most view notice and comment and other similar participatory mechanisms as devices for assimilating public input rather than seeking out conflict. From this perspective, it is good when agency proposals fail to stoke significant commenting activity and bad when they induce mass-commenting campaigns that add little technocratic information that could support or improve agency proposals.

The agonistic fix is relatively simple: repurpose notice and comment so that it no longer seeks to sample the public passively with the goal of reaching poly-archal settlements but instead seeks to find and amplify dissenting perspectives. This recalibration would require a much more active hand in identifying interests, communities, and perspectives that are likely to be absent, marginalized, or unrepresented in open comment processes and ensuring that those voices and perspectives are heard through formalized institutional mechanisms. Consciously amplifying marginalized voices would ensure that a false consensus is not reified through skewed participatory structures and, in turn, that political contestation occurs.

Theorists are already turning to this task, albeit without an explicit grounding in agonistic democratic theory. For instance, Brian D. Feinstein shows that while “identity-conscious” participatory mechanisms are not the norm, they are hardly absent in administrative processes.³⁸⁸ One overlooked mechanism is the federal advisory committee, which, pursuant to FACA,³⁸⁹ must be “fairly balanced in terms of the view represented.”³⁹⁰ Often, federal advisory committees reserve certain seats for members that act as representatives for specific groups: patient representatives in FDA Advisory and Medical Device Committees,³⁹¹

387. See Fontana, *supra* note 385, at 82. A number of administrative-law scholars have attempted to push in the direction of more deliberative comment periods. For instance, Cynthia Farina and her team at Cornell University’s e-Rulemaking Initiative created the “Regulation Room” project to pilot technologies and features that could enhance participation and deliberation in comment periods. See *Regulation Room*, CORNELL UNIV., <http://regulationroom.org/about/overview> [https://perma.cc/J25J-RPTZ]. Others have suggested implementing more dynamic, interactive elements into comment periods so that commenting is more akin to a dialogue. See, e.g., Connor Raso & Bruce R. Kraus, *Upvoting the Administrative State*, BROOKINGS INST. (Apr. 2, 2020), <https://www.brookings.edu/research/upvoting-the-administrative-state> [https://perma.cc/L3JC-RBR3].

388. Feinstein, *supra* note 186, at 1.

389. 5 U.S.C. app. §§ 1-16 (2018).

390. 5 U.S.C. app. § 5(b)(2) (2018).

391. See *FAQs About the FDA Patient Representative Program*, U.S. FOOD & DRUG ADMIN. (June 20, 2019), <https://www.fda.gov/patients/about-office-patient-affairs/faqs-about-fda-patient-representative-program> [https://perma.cc/DPG6-HBHL].

representatives of Indian tribes and other affected groups on Bureau of Land Management resource advisory councils,³⁹² and so on. Other times, as with the National Environmental Justice Advisory Council, committees are constituted specifically to advance a particular perspective within an agency's more general policymaking process, counteracting a perceived lack of voice in normal processes.³⁹³ Feinstein also highlights that some multimember commissions have seats reserved for members with certain characteristics who are likely to contribute underrepresented perspectives to commission decision making.³⁹⁴

Extending these design principles to the notice-and-comment process would be another effective way of infusing administrative processes with agonistic virtues, and it would help solve some of the problems created by the advent of mass commenting. Some agencies do this already to varying degrees, and the ACUS has recommended that agencies build on these experiments.³⁹⁵ Other agencies have "conducted targeted outreach to important stakeholder communities" to ensure that important perspectives are likely to be heard in the comment period.³⁹⁶ Still others supplement the formal comment process with focus groups to identify members of particular groups purposively and "gauge participants' reactions to information, ideas, messages, or proposals, and to begin to identify preferred alternatives or potential concerns."³⁹⁷ From an agonistic standpoint, it is necessary to systematize this kind of outreach and solicitation of perspectives so that agencies are forced to grapple with the implications of their proposals even when no one voices critical perspectives.

This recommendation from the agonistic perspective has some similarities to deliberative democratic theory and civic republicanism's prescriptions insofar as all of them seek to make the process of consulting the public more meaningful. The agonistic prescription, however, would also reject approaches to this task that seek to forge consensus, as deliberative mechanisms often try to do. Not only do these efforts often fail, as they did in the case of "negotiated rulemaking,"³⁹⁸ but they are also anathema to the purpose of the targeted outreach, which brings conflict (that otherwise might not emerge naturally) out into the

392. 43 C.F.R. § 1784.6-1(c) (2021).

393. *National Environmental Justice Advisory Council*, U.S. ENV'T PROT. AGENCY (June 4, 2021), <https://www.epa.gov/environmentaljustice/national-environmental-justice-advisory-council> [<https://perma.cc/FBS2-K5WE>].

394. Feinstein, *supra* note 186, at 3.

395. *Public Engagement in Rulemaking*, ADMIN. CONF. OF THE U.S. (Dec. 20, 2018), <https://www.acus.gov/sites/default/files/documents/Recommendation%202018-7%20%28Public%20Engagement%20in%20Rulemaking%29.pdf> [<https://perma.cc/3WAJ-946H>].

396. Sant'Ambrogio & Staszewski, *supra* note 189, at 53.

397. *Id.* at 48.

398. Coglianese, *supra* note 194, at 1261, 1309-10.

open. Agencies adopting an agonistic standpoint should not try to convince participants that the agency's proposal is good for everyone, whether participants feel that way or not. Rather, they should forthrightly acknowledge that the proposal may not be good for everyone and ensure that all are forced to confront that fact and accept the consequences, knowing that there will be ample opportunities to force revisitation of that temporary settlement. This kind of honest outreach is more likely to earn the respect of political opponents than an effort to convince everyone of the reasonableness of the agency's preferred approach.

C. *Flattening the Bureaucratic Hierarchy*

For decades, judges and scholars have attempted to use structural constitutional law to fortify the President's power within the administrative state in the name of increasing agency accountability.³⁹⁹ For instance, in *Seila Law LLC v. Consumer Financial Protection Bureau*,⁴⁰⁰ the Supreme Court struck down a statutory provision that prohibited the President from removing the head of the Consumer Financial Protection Bureau (CFPB) except for cause. The Court re-framed its traditional approach to reviewing removal restrictions, holding that the President has "unrestricted removal power" under Article II of the Constitution subject only to two narrow exceptions.⁴⁰¹ This presumptive removability was justified in large part by the Court's belief that the removal power is an essential means of ensuring that agencies are accountable to the President.⁴⁰² Since the CFPB director was neither a principal officer nor part of a multimember commission exercising nonexecutive power, the Court held that the President could remove the director at will.⁴⁰³

At the same time, the Court appears poised to rework its Appointments Clause jurisprudence to incorporate a similar logic of accountability. In *United States v. Arthrex, Inc.*, the Court held that Patent Trial and Appeal Board decisions

399. For background on the so-called "unitary executive" theory, which holds that the Constitution grants all executive power to the President, see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008).

400. 140 S. Ct. 2183, 2201, 2211 (2020).

401. The first exception applies when an agency is a "multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was not said to exercise any executive power." *Id.* at 2199-2200. The second applies when the officer in question is an "inferior officer" rather than a "principal officer" of the United States. *Id.*

402. *Id.* at 2203-04.

403. *Id.* at 2211.

by inferior officers⁴⁰⁴ were an exercise of “significant authority” that was inconsistent with their status as inferior officers.⁴⁰⁵ Again, the Court emphasized the need for a direct line of accountability between the agency and the President. It further reasoned that the vesting of unreviewable power throughout the bureaucracy blurred those lines.⁴⁰⁶ Although the Court was not prepared to expand the category of principal officers to include officers like administrative patent judges, its remedy of limiting a statutory provision that limited principal-officer review of administrative patent-judge decisions established a clearer hierarchy for ultimate accountability to the chief executive.⁴⁰⁷

The Court’s accountability-based logic is more than a matter of separation-of-powers formalism.⁴⁰⁸ It is also a core part of a democratic theory; it is essentially a minimalist democratic theory⁴⁰⁹ that says that national presidential elections are sufficient to legitimate the administrative state.⁴¹⁰ More sophisticated theoretical arguments have been made to bolster the appeal of this democratic theory – namely, that the President is the only elected official who faces a national electorate and thus stands the least chance of being captured by particularistic interests, so if what we want is good government that is responsive to the will of the people as a whole, presidential control of agencies achieves that.⁴¹¹ But this democratic theory works only if two conditions are met: 1) the President controls administrative decision making and can replace or remove officials who refuse to follow the President’s lead in the exercise of executive powers, and 2) there is real

404. Inferior officers are officers who are “directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.” *Edmond v. United States*, 520 U.S. 651, 663 (1997).

405. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986-87 (2021).

406. *Id.* at 1979.

407. *Id.* at 1987-88.

408. See Martin H. Redish, *Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine*, 51 *LOY. U. CHI. L.J.* 363, 408 (2020) (“[T]he pragmatic formalist model performs the vital functions of the nondelegation doctrine: to preserve the separation of powers, prevent tyranny, and preserve democratic accountability.”).

409. See *supra* Part I. It might also be consistent with civic-republican theories insofar as the President’s use of OIRA to impose a cost-benefit mandate on agencies is consonant with the public interest.

410. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020) (“The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President.”).

411. See Mashaw, *supra* note 118, at 95-99.

competition for the presidency, such that if citizens are unsatisfied with the output of administrative agencies (attributable to the President by condition one), then they can vote the President out of office in the next election.⁴¹²

The Court's recent removal- and appointments-power cases are efforts to reform elements of the bureaucracy that empirically clash with the first condition. And it is not just the Court: starting with President Reagan and increasing almost monotonically ever since, presidential administrations of both parties have ramped up their use of unilateral presidential control over the administrative state, deploying centralized White House review of all significant regulations,⁴¹³ making personnel maneuvers to maximize control over agency decisions,⁴¹⁴ and more. Thus, the growth of the administrative presidency, no less than the Court's structural constitutional formalism, aims to make the President the lodestar for the democratic accountability of the administrative state.⁴¹⁵

Here, again, agonistic democratic theory would push back against the dominant trend toward an increasingly powerful President who will oversee the bureaucracy in the name of democracy. A consequence – really, the point – of the presidential control model⁴¹⁶ is to reduce the reach of politics to a moment of election from which all democratic accountability flows. In other words, the presidential control model seeks to simplify and purify the administrative system by tying it to the pedigree of the closest thing we have to a national election. But agonists would see this move as an entirely artificial and unduly narrow limitation on the scope of political contestation.⁴¹⁷ Agonists would see the messiness of the administrative state and its ambiguous ties to any one moment of political

412. Much less serious attention has been paid to condition two, which is empirically dubious. See generally Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U. L. REV. 989 (2018) (demonstrating empirically that elections do not necessarily hold Presidents accountable).

413. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1261-63 (2006).

414. DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 30-43 (2008).

415. It also borders an explicitly populist idea of presidential accountability, where, by populism, we mean the false claim that the President, by virtue of election, represents the whole of the people in a kind of personal way, and therefore has a license to govern at will. See WILLIAM G. HOWELL & TERRY M. MOE, *PRESIDENTS, POPULISM, AND THE CRISIS OF DEMOCRACY* 7-10 (2020).

416. The phrase “presidential control model” is attributable to Lisa Schultz Bressman’s work on these issues. See Bressman, *supra* note 25, at 485-91.

417. See Anya Bernstein & Glen Staszewski, *Populist Constitutionalism and the Regulatory State* 1-2 (2022) (unpublished manuscript) (on file with author) (discussing trends toward populist empowerment of the President and the courts, and contrasting that populist impulse with (1) a tradition of “agonistic republicanism” in Congress and (2) an administrative state that celebrates “contestation” and a “thick notion of democratic functioning”).

action as a virtue, not a vice.⁴¹⁸ For agonists, the friction that naturally emerges—between agencies and society, between agencies and other agencies, between agencies and other branches of government, and, of course, between agencies and the President—is desirable because it multiplies the sites at which political contestation and democratic mobilization can occur. Moreover, it puts these sites into contest with each other, as when there are disputes between Congress and the President over what agencies ought to be doing. The multiple and multi-directional lines of authority and accountability that result in this system may be anathema to the simplistic theory of accountability that the Court has embraced,⁴¹⁹ but it actually enhances democratic accountability in the agonistic sense. Establishing multiple sites at which political actors inside and outside of government can mobilize to further their cause or to resist policies with which they disagree would allow people to act as democratic citizens more meaningfully than does reducing democracy to a plebiscite every four years.⁴²⁰

The administrative agon would therefore look much different than the administrative state that the Supreme Court wants to build. It would start by unwinding the Court's structural recalibration of the executive branch. This would

418. *But see* Rodríguez, *supra* note 49, at 7-8 (arguing for relatively unencumbered regime change, as when one administration turns over to another, on agonistic democratic grounds). For Rodríguez, elections should matter for administration, and legal doctrines that frustrate regime change are suspect. *Id.* To be sure, Rodríguez does not unqualifiedly endorse presidential administration. It is clear, for instance, that Rodríguez wants to at least partially “decenter the presidency in the picture of regime change, by attempting to show that top-down presidential control need be but one feature of its realization.” *Id.* at 60; *see also* Bernstein & Rodríguez, *supra* note 43 (manuscript at 3-4) (finding that “accountability within the American administrative state often implicates elections only indirectly, if at all,” and that there are “numerous structures, relationships, and practices within the state that produce accountability, even where the electoral connection is absent or only dimly in the background”). It is not clear from Rodríguez’s account how one would balance decentered agonism and President-centric agonism. I would resolve that tension by giving the nod to the decentered form of agonism. This preference for decentering aligns better with agonism’s abiding concerns about the closure of political conflict, although perhaps if presidential terms were shorter and elections more frequent, a regime-change model would be more consistent with the agonistic approach set forth in this Article.

419. *See supra* Part II.

420. Consider a practical example: the fight between the Federal Communications Commission (FCC) and the Federal Aviation Administration (FAA) over the rollout of 5G networks near airports. While FCC dismissed concerns that 5G would interfere with aircraft radar altimeters, FAA insisted that it was a safety issue. In the end, FCC’s dogged resistance to changing its policy led FAA to act to ground flights until the issue was resolved. The public now is paying attention. *See* Brian Fung, *How Last Week’s 5G Deployment Went so Wrong*, CNN BUS. (Jan. 28, 2022, 8:58 AM ET), <https://www.cnn.com/2022/01/28/tech/5g-faa-fcc/index.html> [<https://perma.cc/ASF5-2YZM>]. The opportunity for conflict occasioned by separate delegations of overlapping authority allowed for genuine politics to play out in a way that they would never have in a national election.

permit Congress to enhance opportunities for politics by vesting significant authority in officers accountable to more than just the President. Congress has found creative ways to diversify the constituencies to which agency officials answer⁴²¹ and to subject agency decision making to adversarial checks at multiple levels,⁴²² so the Court need only allow Congress to experiment further in this area.⁴²³ Beyond this, the administrative agon would also require Congress to increase its efforts to disperse accountability.⁴²⁴ For instance, both Congress and the Court have eliminated a powerful check on agency action and inaction: private-citizen enforcement.⁴²⁵ Private-citizen enforcement empowers individual citizens to bring litigation against regulated parties or even the agency itself when the agency refuses to take a particular action. It is easy to see how giving anyone in civil society the power to act as a private attorney general would frustrate the prevailing effort to lodge undiluted accountability in elected officials.⁴²⁶ Such mechanisms are frequently criticized as meddling.⁴²⁷ But from an agonistic perspective, this is just another lever that forces public decision making

421. See Jennifer L. Selin & David E. Lewis, *Sourcebook of United States Executive Agencies*, ADMIN. CONF. OF THE U.S. 88-106 (Oct. 2018), <https://permanent.fdlp.gov/gpo126123/ACUSSourcebookofExecutiveAgenices2ded.508Compliant.pdf> [<https://perma.cc/DL6F-69UE>] (reviewing features in certain agencies that insulate them from presidential control).

422. See Farber & O'Connell, *supra* note 212, at 1383-84 (collecting the relevant literature).

423. For a similar argument, see Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2029 (2022), which argues that the Constitution specifies no "essential or immutable separation of powers" but rather leaves the precise nature of the separation of powers largely to Congress to determine under the Necessary and Proper Clause.

424. A model for these efforts could be found by carefully studying Bernstein and Rodríguez's immersive audit of decentered accountability processes in the administrative state and amplifying those mechanisms that work best. See Bernstein & Rodríguez, *supra* note 43 (manuscript at 33-45).

425. For a description of the development of private-citizen enforcement mechanisms, see FARHANG, *supra* note 88. Part of the trend of cutting back such suits has been the eradication of standing to sue to enforce causes of action recognized by statute. Just two terms ago, for instance, the Supreme Court denied standing to plaintiffs seeking to bring a class action to enforce provisions of the Fair Credit Reporting Act on the grounds that their injuries were not recognized as "concrete" by the law, see *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2212 (2021), even though Congress arguably sought to exercise its constitutional power to define the violation of those rights, however nonconcrete, as injuries, see *id.* at 2218-19 (Thomas, J., dissenting); *id.* at 2225 (Kagan, J., dissenting).

426. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992).

427. See Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321, 323-24 (2010).

back into the thicket of genuinely democratic politics.⁴²⁸ For the agonist, genuine democracy is messy and confrontational, and flattening the administrative state—not hierarchizing it—is the best way to preserve this messiness and give conflict a chance to thrive as part of the day-to-day business of the administrative state.

V. AGONISM'S PAYOFF

The preceding Part looked at several areas of administrative law through the lens of agonistic democratic theory. This exercise aimed to bring the theoretical construct of agonistic democratic theory into conversation with specific issues in administrative law, showing some of the concrete ways that agonistic virtues could be and sometimes are institutionalized in the administrative state. While the idea of agonistic democratic theory may be foreign to many readers, the preceding Part shows that agonistic thinking about the administrative process is not only possible, but in many cases the best way to understand existing practices and institutions. Taking these agonistic features and going a few steps further would make what is already (occasionally) an agonistic administrative state more clearly an administrative agon.

In this Part, I extend these practical insights to a more conceptual and theoretical level. My aim is to provide an account of why it pays to think about administrative law agonistically. Simply put, agonistic democratic theory is useful because it provides a democratic grounding for much of the existing administrative apparatus—an apparatus that has been subject to significant critique on democratic grounds over its history. To be sure, as the last Part suggested, there is room for yet more agonism, but these reforms are not strictly necessary to realize some of the benefits of thinking agonistically about administration. A major benefit comes from just recognizing that our administrative state is, in all of its complexity and conflict, already quite democratic by agonistic metrics. Recognizing this can take some of the wind out of the sails of ostensibly democratic—but ultimately demagogic and dangerous—notions of presidential administration and administrative deconstruction.

428. When used this way, citizen suits are distinct from the way in which they might be used under Texas's controversial abortion law, which removes from enforcement of the law any government role and instead gives all enforcement powers to private citizens—"bounty hunters"—in order to avoid preliminary injunctions against the law. See Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 107 CORNELL L. REV. (forthcoming 2023) (manuscript at 22), <https://ssrn.com/abstract=3915944> [<https://perma.cc/9P29-MKUW>]. Outside of the context of such "rights suppressing laws," citizen suits play an important role in ensuring that government responds to demands for action of the government, which is far less antidemocratic. *Id.*

To be sure, our administrative agon comes with drawbacks as well as payoffs. When we descend below the thirty-thousand-foot level, where agonism has substantial appeal, there may be a need for moderating agonistic features – especially in contexts where other values cut against the wisdom of pursuing agonistic administration. An inescapable conclusion that is often lost in contemporary democratic critiques of the administrative state is that the need for a democratic grounding in administrative practice is contextual. No democratic theory is so perfect that it needs to be maximized in every setting. Indeed, this has been a significant problem with classical theories of democratic administration, which elevated consensus or preference aggregation above other values. It is important to retain a pragmatic orientation toward democracy, and this principle applies to agonistic administration.

A. *Answering the Democracy Question*

This Article opened with the recognition that what I call the “democracy question” has been a perennial matter of concern.⁴²⁹ Indeed, it might not be an exaggeration to call it an obsession. One answer has been to resist elevating the question by giving it credence. On this account, the democracy question is a distraction from the pressing challenge of modern governance, and, all too often, it is trumpeted by those using democratic rhetoric to achieve a specific policy agenda that involves far less regulatory power.⁴³⁰ For some, the democracy question is an anachronism.⁴³¹

There is something true about this pushback on the democracy question. For most people, questions about the administrative state simply do not register as important questions. Surveys routinely show that most people claim to want government that functions well with as little unnecessary impact on the public as possible.⁴³² This might suggest considerable comfort with administration that is disconnected from the people’s input; it might even suggest that administrative distance is preferable to democratic administration.

429. See *supra* note 20 and accompanying text.

430. See Ian Milhiser, *The Supreme Court’s Coming War with Joe Biden, Explained*, VOX (Mar. 27, 2021, 9:00 AM EDT), <https://www.vox.com/22276279/supreme-court-war-joe-biden-agency-regulation-administrative-neil-gorsuch-cpa-nondelegation> [<https://perma.cc/F2PE-P9TX>].

431. See EDWARD L. RUBIN, *BEYOND CAMELOT* 120–25 (2007).

432. See JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS’ BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* 127 (2002); AMY E. LERMAN, *GOOD ENOUGH FOR GOVERNMENT WORK: THE PUBLIC REPUTATION CRISIS IN AMERICA (AND WHAT WE CAN DO TO FIX IT)* 66 (2019) (reviewing surveys that suggest that Americans desire government that is “effective” and does not “waste taxpayer dollars”).

But as much as these realities about Americans' bandwidth for controlling administrative minutiae should give us pause before we take the democracy question too seriously, there are countervailing reasons to believe that the question deserves serious attention. While perhaps most heated debates about the democratic bona fides of administration are confined to political and legal elites' social and professional circles, those elites exercise outsized influence on our institutions and do much to determine the level of compliance with regulation.⁴³³ To the extent that these elites believe that the democracy question is important, that alone would counsel taking their concerns seriously. Moreover, these elite opinions are likely to diffuse into public opinion,⁴³⁴ and indeed, they already have to a significant degree – debates about regulation and administrative power are migrating from the realm of pure technocracy to the realm of mass politics.⁴³⁵

Agonism could play three important roles in answering heightened anxieties about the democratic status of the administrative state. First, agonism could be more successful in moderating people's expectations about the degree to which government will follow their preferences or a majority of the population's preferences. To the extent that people "see" the administrative state, it is usually because they were negatively impacted in an acute way⁴³⁶ – perhaps they were told they could not do something that they wanted to do, like travel on an airplane during a pandemic without a mask. Rather than telling these dissidents that their anger and frustration is out of place because a majority supports such restrictions or because an election has consequences, agonism would tell them that

433. See BENJAMIN VAN ROOIJ & ADAM FINE, *THE BEHAVIORAL CODE: THE HIDDEN WAYS THAT LAW MAKES US BETTER . . . OR WORSE* 102-21 (2021).

434. See Marc J. Hetherington, *Resurgent Mass Partisanship: The Role of Elite Polarization*, 95 *AM. POL. SCI. REV.* 619, 619 (2001).

435. Issues surrounding regulation and the administrative state are now routinely appearing in politicians' communication with the public. See, e.g., *President Trump's Regulatory Relief Helps All Americans*, TRUMP WHITE HOUSE ARCHIVES (July 16, 2020), <https://trumpwhitehouse.archives.gov/articles/president-trumps-regulatory-relief-helps-americans> [<https://perma.cc/H64S-RY7Q>] (touting President Trump's efforts to eliminate "needless anti-growth measures" and these efforts' beneficial effects on "Americans previously left behind"). Americans also seem to be absorbing this antiregulatory rhetoric. See, e.g., Emily Ekins, *Wall Street vs. the Regulators: Public Attitudes on Banks, Financial Regulation, Consumer Finance, and the Federal Reserve*, CATO INST. (Sept. 19, 2017), <https://www.cato.org/survey-reports/wall-street-vs-regulators-public-attitudes-banks-financial-regulation-consumer> [<https://perma.cc/4E59-27EG>] (discussing polling on public attitudes toward financial regulators that found overall negative opinions); Karlyn Bowman, *Where Is the Public on Government Regulation?*, FORBES (Oct. 23, 2017, 10:38 EDT), <https://www.forbes.com/sites/bowmanmarsico/2017/10/23/where-is-the-public-on-government-regulation> [<https://perma.cc/239D-3WQ2>] (discussing partisan divides on the question of whether there is too much regulation).

436. See PAMELA HERD & DONALD P. MOYNIHAN, *ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS* 2 (2018) (categorizing the different types of "administrative burdens" that people experience when interacting with agencies).

they are right to be frustrated. They have been burdened, and they will have substantial opportunities to pursue redress, even if those opportunities may ultimately prove futile. In some sense, agonism in this mode functions as a device of procedural justice,⁴³⁷ or of “cooling the mark out.”⁴³⁸ A perception that the process of developing regulation is legitimate, even if we disagree with its substance, is a major contributor to willingness to comply.⁴³⁹

Second, agonism could also change people’s intuitions about the amount of democracy that is necessary in the administrative state. As I discuss in Section IV.C, a side effect of agonistic institutionalization may be greater friction in accomplishing significant changes in policy, because policy may oscillate far more quickly, thus undermining any enduring change. Precisely because agonism aims to reflect the true diversity of preferences in administrative policy, when there is substantial diversity, it may be that little can be done that lasts. But preferences are an endogenous variable: the diversity of preferences is determined, at least in part, by perceptions about the likelihood that one’s particularistic preferences will become the law of the land.

Thus, if we live in a time of hyperpolarization where many or most people are likely to be upset about the actions of the administrative state, then perhaps the best way to induce change in peoples’ preferences is to make it more difficult for anyone to do anything lasting. Agonism could, in other words, recalibrate our preferences by imposing real consequences for failing to engage constructively with those with whom we disagree. One could certainly embrace the endless politics of the administrative agon and refuse to adapt their preferences to reduce conflict, but it seems likely that many people would eventually come to realize how little there is to gain when any “win” is ephemeral.⁴⁴⁰

Finally, and relatedly, agonism could help to rectify the perception that the administrative state persistently favors entrenched or favored interests. These perceived patterns of influence, which in many cases might be accurate,⁴⁴¹ probably contribute to expectations that the administrative state ought to, but does not, make policy that benefits most people or that rights wrongs committed against marginalized constituencies. Expanding the scope of political conflict

437. See Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 379-80 (2006).

438. Erving Goffman, *On Cooling the Mark Out: Some Aspects of Adaptation to Failure*, 15 INTERPERSONAL & BIOLOGICAL PROCESSES 451, 452 (1952).

439. See VAN ROOIJ & FINE, *supra* note 433, at 106.

440. This prediction is consistent with evidence from political science that people are, in general, averse to politics and conflict. See generally HIBBING & THEISS-MORSE, *supra* note 432 (using survey data to show that most Americans prefer decision makers who are simply empathetic and not self-interested, not necessarily responsive).

441. See Sant’Ambrogio & Staszewski, *supra* note 315, at 797.

would give ample opportunities for these marginalized groups to counter entrenched groups, which would not only challenge this narrative but might also alter the power dynamics that currently define administrative politics.

Agonism does not perpetuate the convenient fiction that it is possible to capture most people's preferences and thus achieve consensus in public policy. It also, in turn, rejects the idea that shortcomings on this front indicate that our administrative state is simply not currently constituted to achieve the ideal of consensus. Instead, agonism would reinforce more realistic expectations about what is possible and desirable in a democracy like ours.

B. Providing an Alternative to Presidential Administration

Across the political spectrum, major debates have arisen about the growing power of the presidency vis-à-vis the administrative state. To some degree, these debates reflect reactions to the Trump Administration's highly visible and unusual attempts to wield the power of the presidency for personal gain; for those on the right, they reflect the Obama Administration's second-term push to use a "pen and phone" strategy to advance the President's agenda without enacting new legislation.⁴⁴² But it would be a mistake to chalk all this concern up to a reflexive reaction to two Presidents who did not shy away from accumulating and wielding power over the administrative state. In fact, these debates run much deeper. They are based in an unresolved tension between, on the one hand, a plebiscitary and unitary model of the presidency embraced by some for its responsiveness to electoral appraisals, and, on the other hand, a so-called "deep state" prized by others precisely for its steadiness in the face of increasingly volatile electoral appraisals.⁴⁴³ Between these two alternatives, if one is committed to prioritizing democracy above other values such as expertise, one would seem to have to choose growing presidential administration (with its attendant risks of abuse of power and authoritarianism).

Looking at this debate through the lens of agonistic democratic theory complicates the picture. What we have is not a debate between democracy and something else that we value, but rather a debate between different conceptions of what democracy looks like. On this account, there is a democratic alternative to the constant agglomeration of presidential power. Presidents may have the backing of a national electorate and may have to stand for periodic reelection; they may also bring a synoptic, optimizing perspective to regulation that represents what a rational deliberation would yield; they may even have strong claims to represent most people at a given moment in political time. Yet, these features,

442. Lisa Heinzerling, *A Pen, a Phone, and the U.S. Code*, 103 *GEO. L.J. ONLINE* 59, 59 (2013).

443. See SKOWRONEK ET AL., *supra* note 6, at 193.

which in terms of traditional democratic theories are advantages for the President, are liabilities from the perspective of agonistic democratic theory, which views claims to perfect representation of the *dêmos* with suspicion. As agonists have observed, there is always a political remainder; there are always interests, perspectives, and identities that are excluded.⁴⁴⁴ This is where the deep state plays an affirmatively democratic role, insofar as it resists attempts at presidential populism and ensures that the political remainder is not repressed. As Anya Bernstein and Cristina Rodríguez argue, accountability can also flow from “diffuse, rather than concentrated, forms of political control,” from the “prevalence of non-hierarchical organizational structures,” and from a “range of practices that keep agencies attuned to affected publics and the regulated world.”⁴⁴⁵ At a time when presidential power is generally perceived to be both a threat to democracy⁴⁴⁶ and an answer to democratic deficits,⁴⁴⁷ countervailing and widely dispersed institutional power in the bureaucracy provides a real democratic alternative.

The difficult choice between these competing understandings of democracy is arguably most stark in the discussion about civil-servant disobedience.⁴⁴⁸ Essentially, the question is what civil servants should do, as an ethical and legal matter, when they fundamentally disagree with commands emanating from either the President or political appointees. As administrative theorists have long noted, this is not an uncommon situation.⁴⁴⁹ Civil servants typically serve over several administrations, including ones with diametrically opposed policy agendas. At times, outgoing Presidents have burrowed civil servants in the ranks of the bureaucracy in an effort to complicate the implementation of an incoming President’s agenda.⁴⁵⁰ Conflict of this sort is hardwired into the very idea of the civil service.⁴⁵¹

444. See *supra* Part I.

445. Bernstein & Rodríguez, *supra* note 43 (manuscript at 5).

446. See PRAKASH, *supra* note 217, at 246-47; SHANE, *supra* note 234, at 3.

447. See Rodríguez, *supra* note 49, at 60; Kagan, *supra* note 238, at 2252; HOWELL & MOE, *supra* note 415, at 159-65.

448. See Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 139-40 (2018); Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349, 349-53 (2019).

449. See, e.g., Marissa Martino Golden, *Exit, Voice, Loyalty, and Neglect: Bureaucratic Responses to Presidential Control During the Reagan Administration*, 2 J. PUB. ADMIN. RSCH. & THEORY 29, 29-32 (1992).

450. See Mendelson, *supra* note 13, at 559-68.

451. See MICHAELS, *supra* note 2, at 45.

Jennifer Nou's work on civil-servant disobedience is representative of the internally conflicted views of administrative-law scholars about the value of disobedience in the bureaucracy.⁴⁵² Her argument cautiously recognizes value in civil-servant disobedience even within a model that gives the President and political appointees presumptive democratic legitimacy.⁴⁵³ In other words, Nou recognizes that there is something valuable in having civil servants ready to push back against presidential directives, but she does not attempt to ground her prescriptions for civil-servant disobedience in terms of a tension between democratic theories. Rather, Nou's prescriptions are, like the defenses of internal separation of powers discussed above, grounded in process concerns.⁴⁵⁴ As a result, her prescriptions end up significantly curtailing the role of civil-servant disobedience, recognizing its legitimacy only in a handful of situations and only as a last resort, such as when statutes require political appointees to give due regard to civil-servant perspectives.⁴⁵⁵

An embrace of agonistic democratic theory would change the terms of the debate and simplify the evaluation: civil-servant disobedience is tolerable, even necessary, when presidential directives would leave a political remainder. Put differently, civil servants have a duty to resist Presidents in order to keep democratic politics churning. Contra Nou's understanding, this duty is perhaps at its height when the President has a strong claim to represent the *dêmos*. For the agonist, these claims to represent the *dêmos* are always mistaken and must be resisted. Civil servants, because of their job protections, are well-suited to serve this function.

In sum, a turn to agonism points to potential democratic benefits of a shift away from a President-centric administrative law. Of course, the President will always have a role to play,⁴⁵⁶ but if contestation and conflict are the goal, the President cannot have complete or even substantial control. The President must instead be one of many competitors in a multifarious and evenly balanced contest to determine policy for the nation.⁴⁵⁷

452. See Nou, *supra* note 448, at 349.

453. *Id.* at 353, 362-67.

454. *Id.* at 366-67.

455. *Id.* at 373-78.

456. See Rodríguez, *supra* note 49, at 70-77.

457. See Bernstein & Rodríguez, *supra* note 43 (manuscript at 15-33).

C. *Critically Assessing the Administrative Agon*

We can acknowledge that the case for the administrative agon is strong without exalting it as the only answer to the democracy question. There are substantial downsides to agonism that might suggest that its implementation in the administrative state should be carefully managed.

One of the most glaring downsides is the risk that agonistic friction, by drawing attention to what divides us, might morph into antagonistic combat.⁴⁵⁸ Some have highlighted that in practice it can be difficult to determine whether a specific action is productive agonism or destructive antagonism. This would make it difficult to track whether the embrace of conflict within institutions is improving or worsening the risk of delegitimation.⁴⁵⁹ Another serious concern about institutionalizing agonism involves the high cost of both the procedures that agonism prescribes⁴⁶⁰ and the regulatory uncertainty and instability that might result.⁴⁶¹ These are not negligible concerns, even if there are strong reasons to believe that agonistic contestation can sometimes be an effective way of handling deep conflict.⁴⁶² Acknowledging these and other drawbacks, the administrative agon should be implemented with considerable care. Trans-substantive good government agencies, such as ACUS and the U.S. Government Accountability Office, could play an important role in studying the practical effects of agonistic experiments in agencies, suggesting improvements to agencies, and establishing processes for soliciting feedback on the public's experience with new agonistic agency practices.

It might also make sense to sometimes refrain from implementing agonism altogether. There may, for instance, be certain areas of the administrative state where agonistic features are unsuited to solve an actual legitimacy problem. In

458. Although this concern is valid, it also seems less pressing when the risk of antagonism is already high than when a false consensus exists that needs to be disrupted. In the former case, there is arguably little to be lost by attempting to deescalate already existing conflict through agonistic means.

459. See, e.g., Emma A. Jane, 'Dude . . . Stop the Spread': Antagonism, Agonism, and #Manspreading on Social Media, 20 INT'L J. CULTURAL STUD. 459, 468 (2017).

460. See Bagley, *supra* note 59, at 345 (noting the costs of procedure and its effects on effective administrative decision making); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414, 1417-19 (2012) (collecting sources for the ossification thesis, which posits (contrary to the Yackees' evidence) that onerous procedural rules cause agencies to produce fewer rules and at a slower pace).

461. See Rodríguez, *supra* note 49, at 77-88 (describing the value of stability and critiques of perceived volatility in administration).

462. See *supra* notes 275-276 and accompanying text.

certain technical areas—regulation of the electric transmission grid, management of systemic risk in financial markets, and protection of national security, for instance—agonism might present risks of dysfunction that cannot be justified by the potential payoff in legitimacy. In fact, there may not be so acute a legitimacy crisis in these areas compared to values-laden domains like immigration law, healthcare policy, and public-safety and health regulation.⁴⁶³

The prospects for agonism can easily be evaluated on a case-by-case basis by assessing the nature of the questions a regulator is deciding and whether they are the kinds of questions where it is possible to imagine antagonism taking hold. Likewise, the prospects for the administrative agon can and should be evaluated on a temporal basis. Some of the variables that can increase or lessen agonism's appeal can change over time.⁴⁶⁴ For instance, the case for agonism may be quite strong where there is deep and incommensurable conflict in society about regulatory questions, as there arguably is now. But in times of more social consensus, when there is very little risk of antagonism resulting from administrative decision making, it might be possible to get by with less agonism.⁴⁶⁵ In other words, agonism may be the right democratic theory for our especially conflictual times, but we should not rule out more standard approaches to reinforcing democracy as circumstances change.⁴⁶⁶

There is a deeper point here about the importance of a pragmatic approach to questions of democracy. Democracy is a difficult concept to pin down. As John Dewey noted,

[E]very generation has to accomplish democracy over again for itself [I]ts very nature, its essence, is something that cannot be handed on from one person or one generation to another, but has to be worked out in terms of needs, problems and conditions of the social life

463. Even in the more technical areas, of course, values debates do inevitably come up. For instance, there is no escaping consideration of climate change in financial regulation and grid governance. See Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 937 (2019); Alexandra Klass, Joshua Macey, Shelley Welton & Hannah Wiseman, *Grid Reliability Through Clean Energy*, 74 STAN. L. REV. 969, 974-78 (2022).

464. See *supra* notes 437-441 and accompanying text.

465. Some agonists would likely resist this statement because they value conflict and dissent for their own sake. See *supra* note 266. But a pragmatic agonist like Mouffe would likely accept it, at least as long as the consensus was real and did not suppress latent disagreements, since the ultimate goal of agonism is to avoid reversion to antagonism. See *supra* notes 265-267 and accompanying text.

466. See *supra* Part I.

of which, as the years go by, we are a part, a social life that is changing with extreme rapidity from year to year.⁴⁶⁷

We ought to be skeptical of attempts to reduce fundamental questions about the design of government institutions, such as the administrative state, to abstract questions divorced from context. We must identify when one or another theory can make more of a contribution to a particular democratic enterprise at a particular point in time and with respect to a particular problem facing democratic institutions.

With that said, agonism makes sense in our time because conventional theories of democracy are showing signs of stress amid substantial social conflict. Democracies around the world, even established and leading ones like the United States, are experiencing a four-alarm fire. Suzanne Mettler and Robert C. Lieberman, for instance, identify four threats that have plagued American democracy—political polarization, racism and nativism, economic inequality, and excessive executive power—and note that, for the first time in our history, all four threats are manifesting at the same time.⁴⁶⁸ Americans, Reeve T. Bull observes, have a “general anxiety . . . that they have lost the ability to influence government policymaking and instead are subject to the whims of elitist bureaucrats who, like the Caesars of Ancient Rome, dictate policy from a distant capital with little to no interest in the everyday concern of their public charges.”⁴⁶⁹ Around the world, many of the same challenges are emerging,⁴⁷⁰ leading to increasing momentum for populist parties, domestic terrorism and insurrection, and the election of autocratic leaders who offer promises to unleash the animal spirits of democracy. It is easy to dismiss instances of these problems when they occur episodically, but when they begin to cross borders and persist across election cycles, it becomes difficult to maintain complacency.

What agonism offers is a forthright acknowledgment of these trends as a matter of shared social fact, a diagnosis of the root causes of the trends (namely, a failure of democratic institutions to be sufficiently responsive to the diverse demands of the *dêmos*), and a method of maintaining a democratic social order in the face of powerful forces that delegitimize and splinter democratic societies.

467. 13 JOHN DEWEY, *THE LATER WORKS OF JOHN DEWEY, 1925-1953: 1938-1939, ESSAYS, EXPERIENCE AND EDUCATION, FREEDOM AND CULTURE, AND THEORY OF VALUATION* 300 (Jo Ann Boydston ed., 1988).

468. SUZANNE METTLER & ROBERT C. LIEBERMAN, *FOUR THREATS: THE RECURRING CRISES OF AMERICAN DEMOCRACY* 5-6, 14-26 (2020).

469. Reeve T. Bull, *Making the Administrative State “Safe for Democracy”: A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611, 614 (2013).

470. LEVITSKY & ZIBLATT, *supra* note 55, at 204-05.

Mouffe's observations about the tendency toward radical antagonism seem descriptively accurate, and the mechanism she identifies—disillusionment with democratic institutions' capacity to represent their views—can be easily found in the rhetoric of movements threatening our institutions of democracy.⁴⁷¹ It is somewhat unfair for these movements to become disillusioned with the responsiveness of democratic institutions at a time when people's demands for democratic action are so incommensurable, yet this is the situation in which democracy finds itself. Evidence abounds that the people are unmistakable about their own inefficacy.⁴⁷²

Agonism promises a way out of this delegitimation crisis that more conventional democratic theories ignore: the institutionalization of political conflict. Paradoxically, institutions designed for maintaining competitive conflict stand the best chance of binding members of the *dêmos* to one another in friendly contest as opposed to winner-take-all warfare.

CONCLUSION

One of the most persistent critiques of the administrative state is that it is out of step with our constitutional democracy. This Article challenges that narrative. To be sure, it shows that the administrative state *is* out of step with conventional thinking about democracy. But agonistic democratic theory, by contrast, provides both a legitimating perspective for many features of the administrative state that have troubled scholars and commentators in the past, as well as a new lens for understanding what needs to change. This Article has not exhausted the possibilities of applying agonistic insights to this age-old problem in administrative law, but it has opened the door for future consideration of the administrative agon.

If it is true that administration and regulation are increasingly the subjects of “blood sport,”⁴⁷³ then perhaps the solution is, counterintuitively, to acknowledge that conflict and to create a space for it in the administrative agon. This conceptual shift—from thinking of the administrative process as a place for smoothing over conflict to thinking of it as a place for amplifying conflict—can change the way we see the administrative state. It can transform it from something that looks like an invading force when the “other side” is in control to

471. These sentiments go back a while. See SANDEL, *supra* note 104, at 3 (describing a similar phenomenon in 1996).

472. See ACHEN & BARTELS, *supra* note 54, at 21–51; Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 575 (2014) (showing systematic departures in public policy away from the preferences of median voters and toward substantial alignment with elites' preferences).

473. See McGarity, *supra* note 163 and accompanying text.

something that we associate with the practice of democratic citizenry and the airing of the conflicts that divide us.

To be clear, in sketching out this alternative understanding of how democracy might fit into administration, I do not mean to suggest that the administrative agon is the only way of doing administration. It just so happens that agonism makes sense in our conflictual times. Consensus might be a worthwhile goal in the long term; in the short term, it is illusory. There will be no true consensual agreement between the warring factions over administrative policies on the use of critical race theory,⁴⁷⁴ or over the federal government's vaccine rollout,⁴⁷⁵ or over whether the administrative state should exist at all.⁴⁷⁶ Doubling down on consensus in this polarized environment is bound to lead to disappointment, and disappointment to further disenchantment with the democratic project of administration.

Herein lies the real payoff of viewing administration agonistically. If we cannot soon quell foundational disagreements in society about what administration and regulation should look like, then only a democratic theory that acknowledges and accommodates those disagreements can legitimate administrative action. That is where agonism succeeds – and any serious attempt to deal with the democracy question needs to grapple with its alternative vision for the administrative state.

474. See Fabiola Cineas, *Critical Race Theory, and Trump's War on It, Explained*, VOX (Sept. 24, 2020, 2:20 PM EDT), <https://www.vox.com/2020/9/24/21451220/critical-race-theory-diversity-training-trump> [<https://perma.cc/4X5V-AJJ4>].

475. See Ashley Kirzinger, Grace Sparks, Liz Hamel, Lunna Lopes, Audrey Kearney, Mellisha Stokes & Mollyann Brodie, *KFF COVID-19 Vaccine Monitor: July 2021*, KAISER FAM. FUND (Aug. 4, 2021), <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-july-2021> [<https://perma.cc/4DAW-MTCU>] (finding little evidence that those who are unvaccinated will change their mind depending on what the Food and Drug Administration does).

476. Compare HAMBURGER, *supra* note 2, at 4 (questioning the legality of the executive's "exercise of binding legislative and judicial powers" through the administrative state), with Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1548 (2015) (reviewing HAMBURGER, *supra* note 2) (critiquing Hamburger's work as "premised on simple, material, and fatal misunderstandings . . . masquerading as legal theory").