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Radical Administrative Law

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ARTICLES

Radical Administrative Law

*Christopher S. Havasy**

The administrative state is under attack. Judges and scholars increasingly question why agencies should have such large powers to coerce citizens without adequate democratic accountability. Rather than refuting these critics, this Article accepts that in scrutinizing the massive powers that agencies hold over citizens, these critics have a point. However, their solution—to augment the powers of Congress or the President over agencies to instill indirect democratic accountability—is one step too quick. We should first examine whether direct democratic accountability of agencies by the citizenry is possible.

This Article excavates the nineteenth-century European intellectual history following the rise of the modern administrative state as inspiration to illuminate how agencies can improve their democratic credentials to justify their powers over the citizenry. While such thinkers might seem far afield of current public law discussions, this unlikely group of nineteenth-century legal and political theorists has already extensively theorized contemporary concerns about agencies coercing citizens without proper democratic accountability. These theorists, whom I call administrative “radicals,” presented a much bolder

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conception of the role of agencies in governance than contemporary critics. Instead of stripping agencies of their powers, the radicals proposed democratizing the administrative state so the citizens could instill direct democratic accountability over the agencies that coerced them. Importantly, the radicals influenced the first generation of American administrative law scholars, who looked to these radicals to figure out how to democratize the nascent American administrative state.

The radical tradition inspires us to transform the relationship between agencies and the citizenry and rethink how agencies fit within the separation of powers and administrative law. Instead of viewing agencies as stuck in the middle of a perpetual tug-of-war between Congress and the President, the radical tradition encourages us to focus on agencies themselves by shaping the relationships between agencies and the citizenry to instill direct democratic accountability. Under this radical separation of powers framework, the people serve as the common source of accountability for Congress, the President, and the administrative state. In doing so, embracing radical administrative law mitigates scholarly and judicial concerns that have inspired the revival of the nondelegation doctrine, elimination of removal protections, and the expansion of the major questions doctrine. The radical tradition also reinvigorates discussions of political equality in administrative law and suggests a reduced judicial role in policing the substance of agency decisions.

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INTRODUCTION

[H]undreds of federal agencies [are now] poking into every nook and cranny of daily life

—Chief Justice Roberts¹

[The bureaucracy] restricts, controls, regulates, oversees and supervises civil life from its most all-encompassing expressions to its most insignificant stirrings

—Karl Marx²

The past decade has brought renewed judicial and scholarly criticism of the administrative state and its underlying separation of powers framework.³ These criticisms are extensive.⁴ However, underlying many of them is a shared concern regarding the magnitude of agency powers to coerce citizens without proper democratic

1. *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

2. KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* (1852), *reprinted in* MARX: *LATER POLITICAL WRITINGS* 31, 68 (Terrell Carver ed. & trans., Cambridge Univ. Press 1996).

3. *See* sources cited *infra* notes 4, 8.

4. *See, e.g.*, PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 355 (2014) (“Administrative law . . . inverts the relationship between the people and their government, reducing the people to servants and elevating government as their master.”); Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 *NOTRE DAME L. REV.* 821, 830 (2018) (arguing the administrative state violates the intent of the Framers); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L.J.* 541, 598 n.216 (1994) (same); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *HARV. L. REV.* 1231, 1231, 1233–49 (1994) (“[T]he post-New Deal administrative state is unconstitutional.”).

accountability.⁵ As Chief Justice Roberts stated in his majority opinion in *Seila Law v. Consumer Financial Protection Bureau*, “The [Consumer Finance Protection Bureau] Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is.”⁶ According to the Chief Justice, this structure threatened the liberty of the citizenry because the Director could “bring the coercive power of the state to bear on millions of private citizens and businesses.”⁷ As a result of this sustained attack on the administrative state, agency powers have been dramatically reduced in recent years.⁸

Rather than refute these critics’ arguments,⁹ this Article accepts their premises while offering a different solution to the problem. Questioning by critics of the democratic bona fides of agencies to hold powers to coerce the citizenry is a welcome return of scrutiny surrounding the direct relationships between agencies and citizens.¹⁰ However, the critics’ proposals to strip agencies of their powers and give those powers to other political institutions, such as Congress or the President, is one step too quick. We should first ask whether we can reconcile agency powers with our democratic system of governance. Thinking of agencies in democratic terms may appear counterintuitive to contemporary lawyers. However, there is a surprisingly deep intellectual history, which has been neglected in contemporary public law, that already modeled how it could be done.

This Article recovers the nineteenth-century European intellectual history concerning how to hold agencies accountable to the citizenry to augment the democratic features of agency policymaking. While such history may seem far removed from current public law debates, this historical examination shows that nineteenth-century theorists reckoned with worries that are strikingly similar to those expressed by contemporary critics of the administrative state. After witnessing the brutal effects of the newly empowered French administrative state on the French citizenry during the French Revolution and its subsequent proliferation across continental Europe by Napoleon,¹¹ lawyers and theorists began to fear administrative power and became obsessed with how to control the nascent

5. *See infra* Section I.A.

6. 140 S. Ct. 2183, 2203 (2020).

7. *Id.* at 2200.

8. For examples of the Court reducing agency insulation, see generally *id.*; *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010). For examples of the Court weakening judicial deference toward agency decisions, see generally *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

9. Other scholars have extensively refuted these arguments. *See infra* Section III.A.

10. *See infra* Section I.B.

11. *See infra* Section II.B.

administrative state.¹² Some lawyers and theorists, whom I call the “institutionalists,” looked to solutions that are now familiar in public law by focusing on giving other political institutions enough powers to instill what I call “indirect democratic accountability” over agencies. Institutionalists included German philosopher G.W.F. Hegel in his later years, Swiss-French lawyer Benjamin Constant, English statesman and theorist John Stuart Mill, and German lawyer and social theorist Max Weber.¹³

However, other nineteenth-century lawyers and theorists had more radical proposals to improve administrative governance. These thinkers had similar concerns about agency coercion and democratic accountability as contemporary critics, which have led these critics to advocate stripping agencies of their powers. However, nineteenth-century thinkers had a much bolder solution—democratize the administrative state so that citizens could have new and direct relationships with agencies, instilling what I label “direct democratic accountability” over them. I call this group of lawyers and theorists the administrative “radicals.” These radical theorists include Hegel in his early years, French diplomat and political scientist Alexis de Tocqueville, German jurist and statesman Rudolf von Gneist, and German philosopher and economist Karl Marx.¹⁴

The radicals proposed various methods to democratize the administrative state.¹⁵ These proposals included introducing local control of administration, adopting universal suffrage in administration, increasing participatory mechanisms for the citizens to engage in agency policymaking, and boosting the power of civic organizations, among others. Regardless of the particular proposal, the central ideas of each radical were the same: (1) fear that administration would become disconnected from the citizenry that it coerced, (2) theorization of the administrative state as a unique institution in democratic governance, and (3) embrace of a relational account of administration to shrink the distance between agencies and citizens so the citizens could have direct relationships with the agencies that coerced them.

Importantly, the first generation of American administrative law scholars, including Woodrow Wilson, Frank Goodnow, and Ernst Freund, were influenced by the radicals due to their tight scholarly and professional connections to continental European legal communities. As

12. *See infra* Section II.B.

13. *See infra* Subsection II.C.1.

14. *See infra* Subsection II.C.2.

15. *See infra* Subsection II.C.3.

a result, these scholars looked to the radicals for inspiration on a number of issues, including how to think about the problem of administrative power, how to theorize administrative law as a unique domain of public law, and how to reconcile administrative powers with America's unique history of self-governance.¹⁶ However, driven by the intellectual success of an alternative group of scholars in the 1930s who viewed administration as simply a subset of constitutional law's separation of powers framework—led by then Harvard Law professor and future Supreme Court Justice Felix Frankfurter—public law lost touch with the radical tradition in the ensuing decades.

Now is the time to revive this radical administrative tradition. The recovery of this tradition provides important theoretical and doctrinal models for how to reframe the political and constitutional status of the administrative state. First, embracing radical administrative law gives administrative defenders new arguments to defend the place of administration in democratic governance derived from the relations between agencies and citizens.¹⁷ Many defenders of administrative governance have either supported the status quo¹⁸ or suggested institutionalist-inspired tweaks to agency powers relative to other political institutions, such as giving agencies less judicial deference or expanding presidential oversight powers.¹⁹ These responses are unsurprising given that our discourse has largely echoed the institutionalist intellectual tradition.²⁰

The radical administrative tradition opens an additional defense of the administrative state in a manner that responds to critics who are concerned with the ability of agencies to coerce the citizenry. Instead of arguing that a complex division of powers between the branches alone will prevent impermissible coercion of citizens, radical administrative law argues that we should also tighten the direct relationships between agencies and citizens to instill direct democratic accountability over agencies. Building these direct connections creates new ways for citizens themselves to preserve their freedom.

Second, the radical tradition suggests a way to break agencies from the perpetual theoretical and doctrinal separation of powers tug-of-war between utilizing Congress or the President to instill indirect democratic accountability over agencies.²¹ Instead, the radicals believed agencies could generate unique and direct democratic relationships

16. *See infra* Section II.D.

17. *See infra* Section III.A.

18. *See infra* note 264.

19. *See infra* note 266.

20. *See infra* Section II.A.

21. *See infra* Subsection III.B.1.

with the citizenry through procedural and structural mechanisms, drawing citizens closer to agencies so they could be involved in administrative policymaking in a democratic manner. By developing these relationships, radical administrative law shows how to establish direct democratic accountability of the administrative state, rather than settling for only indirect accountability through imperfect congressional or presidential oversight. In turn, the radical administrative tradition suggests a radical separation of powers theory in which the people themselves are the common source of direct democratic accountability for all political institutions in democratic governance, including administrative agencies.²²

Third, embracing the radical tradition has important doctrinal payoffs. In reconceptualizing separation of powers doctrine by shifting toward the people as the common source of democratic accountability, the radical tradition suggests there is little reason to revive the nondelegation doctrine and eliminate for-cause removal protections to control agencies.²³ Rather than using these doctrinal tools to instill indirect democratic accountability via Congress or the President, the radical tradition provides a way for the people themselves to specify how they would prefer statutes to be interpreted and administered through their own relationships with political institutions. Radical separation of powers theory argues that the people themselves should be not only the common source but also the common mechanism to hold Congress, the President, and the administrative state accountable.

Fourth, the radical administrative tradition encourages us to widen our understanding of administrative law.²⁴ Instead of thinking of administrative law as focused primarily on balancing the powers of other political institutions over agencies, radical administrative law argues that we should reframe administrative law to also properly shape the relationships between agencies and citizens.²⁵ Given the close

22. While connections between political institutions and the people are the common source of legitimacy for each political institution under the radical separation of powers theory, the structure and form those connections take should vary based on the unique purposes of those political institutions. For example, the franchise must be a central relationship between a legislature and the citizenry given the importance of representation for a legislative institution. Meanwhile, it is conceivable to structure administrative agencies through participatory mechanisms other than the franchise. I call this a “disaggregated conception of democratic legitimacy.” See Christopher S. Havasy, *The Last Invention of Democracy: Legitimizing the Administrative State* (Aug. 25, 2023) (Ph.D. dissertation, Harvard University) (on file with author).

23. See *id.*

24. See *infra* Subsection III.B.2.

25. This Article is part of my overarching agenda of advocating for public law to focus on the relations between agencies and those affected by agency actions when designing public law. For my theoretical and practical account of how to structure such relations in administration, see

relationship between the normative values of democracy and equality, the radical tradition reinvigorates discussions in administrative law about how political equality relates to structuring the ways through which the citizenry actually interacts with agencies during administrative policymaking. This reinvigoration of political equality should bring areas of administrative law concerned with citizens' interactions with agencies, such as *ex parte* communications and lobbying regulations, back to the center of administrative law.

Finally, the radical tradition suggests a reduced judicial role in reviewing agency actions.²⁶ This reduced judicial role stems from the fact that direct democratic accountability can be achieved through *ex ante* citizen participation in both congressional and agency policymaking. With the direct democratic accountability of agencies already achieved through the policymaking process, the *ex post* judicial function can be reduced to a form of political process theory for the administrative state.²⁷ So long as agencies conducted policymaking through the proper *ex ante* procedural mechanisms, which the judiciary should continue to monitor, judges need not scrutinize the substantive agency decisions generated by that policymaking process. Flowing from this reduced judicial role, doctrines of judicial deference to agencies on substantive matters, such as *Chevron* deference, should be encouraged. Meanwhile, judicial doctrines that augment the powers of courts to interrogate substantive agency policymaking, such as the major questions doctrine, should be reduced or eliminated.

This Article will proceed as follows. Part I discusses contemporary criticisms of the administrative state and focuses on their common concern regarding the ability of agencies to coerce the citizenry without proper democratic accountability, which I call the “coercion and accountability” criticism. Part II revives the intellectual history of the radicals to demonstrate that, despite their similar coercion and accountability concerns, the radicals boldly argued for direct democratic accountability over agencies. Part III examines how the radical tradition can inspire changes in contemporary separation of powers and

generally Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. 749 (2023).

26. See *infra* Section III.C.

27. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). While the constitutional law literature regarding political process theory is extensive, there is surprisingly little discussion of it in administrative law outside of standing doctrine. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 217–19 (1992). In a recent article, Ben Eidelson briefly noted one could view the Roberts Court's embrace of reasoned administration as a turn toward a modified political process theory. Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1752 (2021).

administrative law. These reforms include substantiating a radical separation of powers that focuses on the people as the common source of direct democratic accountability for all political institutions, a radical administrative law that focuses on establishing political equality between agencies and the citizenry, and a reduced judicial role that rejects the use of doctrines that augment the power of courts to override democratically generated agency policymaking. A brief conclusion ends the Article.

I. CONTEMPORARY CRITICISM OF AGENCIES

Judicial and scholarly criticism toward the administrative state and the underlying separation of powers framework that allows agencies to exercise their powers has grown significantly over the past decade.²⁸ The collective force of these attacks is so great that some political scientists describe the administrative state as currently being “deconstructed.”²⁹ While multiple different aspects of administrative power are under attack, one prominent line of criticism is repeatedly invoked by critics who hold different underlying ideologies. This criticism revolves around concern over the sheer amount of agency powers to directly coerce the citizenry without proper democratic accountability over agency policymaking, which I call the “coercion and accountability” criticism.

This Part starts from the premise that these critics have a point. The power of administrative agencies to directly coerce the citizenry must be justified in democratic governance—to the extent that power is unjustified, it is problematic.³⁰ In fact, the critics’ focus on the power of agencies over the citizenry marks a welcome return to theorizing the direct relationships between agencies and the citizens they govern within the separation of powers. However, the critics’ solution of removing agency powers and “returning” these powers to other political institutions to restore indirect democratic accountability is one step too quick. Before these critics continue to dismantle the administrative

28. For examples, see *supra* notes 4, 8.

29. See, e.g., David E. Lewis, *Deconstructing the Administrative State*, 81 J. POL. 767, 768 (2019). For skepticism regarding recent cases actually removing agency powers in practice, see generally David Zaring, *Towards Separation of Powers Realism*, 37 YALE J. ON REGUL. 708 (2020).

30. This is a quintessential framing of the problem of democratic legitimacy. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–1802 (2005) (discussing legitimacy as a legal, sociological, and moral concept); Havasy, *supra* note 25, at 764–66 (discussing the descriptive and normative bases of democratic legitimacy); JOHN RAWLS, *POLITICAL LIBERALISM* 224–26 (2005) (“[O]n matters of constitutional essentials and basic justice, the basic structure and its public policies are to be justifiable to all citizens, as the principle of political legitimacy requires.”).

state, we should take a step back to first ask whether we can square the powers of administrative agencies over the citizenry in our democratic system. Alternatively phrased, we should first ask whether direct democratic accountability of agencies by the citizenry is possible.

A. The Fixation of Critics on Agency Powers to Coerce the Citizenry

While scholars have extensively catalogued the distinct types of criticisms lobbied against the contemporary administrative state,³¹ a particular concern runs through much of this criticism—the ability of agencies to directly coerce the citizenry without proper democratic accountability. Agency ability to coerce citizens, on this account, threatens the liberty of the citizenry by disturbing the delicate separation of powers framework created by the Constitution.³² This “coercion and accountability” criticism comes in both legal and normative flavors, which is unsurprising given the centrality of liberty claims to separation of powers jurisprudence.³³ What is unique is that judges over the past decade have increasingly adopted this criticism to roll back agency powers at a rate previously unseen for decades.³⁴ This Section briefly elucidates the legal and normative concerns regarding the ability of agencies to coerce the citizenry without proper democratic accountability.³⁵

31. See Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 373 (2022) (noting the Supreme Court's critiques of the current administrative state target “agencies’ authority to make binding regulations, to interpret law, and to operate without direct presidential control”); Gillian E. Metzger, *Forward: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8–50 (2017) (explaining the current attacks on the administrative state, including the political, judicial, and academic attacks).

32. See, e.g., *Dep’t. of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 75 (2015) (Thomas, J., concurring in the judgment) (“At the center of the Framers’ dedication to the separation of powers was individual liberty.” (citing THE FEDERALIST NO. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961))); *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) (“The Framers did divide governmental power in the manner the Court describes, for the purpose of safeguarding liberty.”).

33. See *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (“This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.”); Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 382–88 (2016) (describing liberty as one of the central normative values underlying separation of powers doctrine).

34. For discussion of how these recent criticisms echo criticisms lobbied at the administrative state during the 1930s, see Metzger, *supra* note 31, at 52–70 (explaining how the “1930s battle bears striking parallels to the current attack”).

35. The purpose of this Subsection is not to critique the theoretical conceptions of liberty and coercion embraced by critics of the administrative state. For such criticism, see STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 16 (2005) (“[I]n the real world, institutions and methods of interpretation must be designed in a way such that [active liberty] is

Legally, scholarly and judicial critics contend that the Constitution does not mention agencies and they hold powers that violate the constitutional separation of powers. As legal scholar Gary Lawson provocatively put it, “The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.”³⁶ Subsequent scholarly critics have explicitly connected its unconstitutionality with the ability of agencies to coerce the citizenry without proper democratic credentials. As Philip Hamburger elegantly put the coercion and accountability criticism: “Can an unelected officer really make law? . . . He is not a representative body, let alone the constitutionally established representative body. So how can he be assumed to legislate with consent of the people? And if without their consent . . . how can his commands have any legal obligation?”³⁷ Underlying this belief is the oft-repeated contention that because the separation of powers is needed for the preservation of liberty, the unique conglomeration of powers held by agencies threatens that liberty.³⁸ As Justice Thomas argued by quoting *Federalist No. 47* in his concurrence in *Department of Transportation v. Association of American Railroads*, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”³⁹

These legally focused critiques of agency powers to coerce the citizenry are often connected to a Framers’ intent version of originalism.⁴⁰ As repeatedly pointed out by Chief Justice Roberts, the “‘vast and varied federal bureaucracy’ . . . now hold[s] [authority] over our economic, social, and political activities” to a degree that “[t]he Framers could hardly have envisioned.”⁴¹ Justice Gorsuch made a similar point in his *Kisor v. Wilke* concurrence arguing for the overruling of *Auer* deference when he stated that the Framers instilled judicial review of executive actions “so that an independent judiciary

both sustainable over time and capable of translating people’s will into sound policies.”); and Emerson, *supra* note 31, at 391–92 (“[O]ne-sided concern for the overweening coercive power of the state, without attention to the coercive power of private actors, arbitrarily tips the scales against governmental action.”).

36. Lawson, *supra* note 4, at 1231 (footnote omitted).

37. HAMBURGER, *supra* note 4, at 355.

38. See, e.g., Lawson, *supra* note 4, at 1248–49 (referring to the modern administrative state as the “Death of Separation of Powers”).

39. 575 U.S. 43, 74 (2015) (Thomas, J., concurring in the judgment) (alteration in original) (quoting THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961)).

40. For a discussion regarding the relationship between liberty-based arguments and originalism, see Metzger, *supra* note 31, at 42–46.

41. *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010)).

could better guard the people from the arbitrary use of governmental power.”⁴² These arguments tend to take the following general form: If agencies wield vast powers to coerce citizens in manners that were not imaginable by the Framers, then these agency powers should be constitutionally suspect as a matter of law.

Critics also hold normative coercion and accountability concerns of agency powers. In general, these critics see something inherently menacing in agency powers to directly coerce the citizenry. As Chief Justice Roberts argued in his majority opinion in *Seila Law*, the liberty of the citizenry was threatened by the Bureau’s independent director because the Consumer Finance Protection Bureau (“CFPB”) Director could “bring the coercive power of the state to bear on millions of private citizens and businesses.”⁴³ He earlier raised a similar concern in his *City of Arlington v. FCC* dissent when he feared “hundreds of federal agencies poking into every nook and cranny of daily life.”⁴⁴ Other Justices have raised similar concerns across many recent administrative law and separation of powers cases regarding the ability of agencies to coerce the citizenry.⁴⁵

Scholarly coercion and accountability-based criticisms of the administrative state have also been extensive. One variant of this normative critique takes a libertarian mold, arguing that the size of contemporary agencies and their powers to coerce citizens threatens the liberty of the citizenry.⁴⁶ Other scholarly critics question the power of agencies to directly coerce citizens given the fact that agency staff are neither elected, nor do they have other direct connections to the people.⁴⁷ For these critics, agencies lack the democratic accountability

42. 139 S. Ct. 2400, 2438 (2019) (Gorsuch, J., concurring in the judgment).

43. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2200 (2020).

44. 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

45. See sources cited *supra* note 8.

46. See, e.g., RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 347–66 (2014) (critiquing the contemporary administrative state on libertarian grounds).

47. See, e.g., Calabresi & Lawson, *supra* note 4, at 830:

[U]nder the original constitutional scheme, all persons who exercise federal legislative or executive power are electorally accountable at some point, either directly or through election of state legislatures.

The New Deal model, by contrast, contemplates a massive exercise of power by executive and independent agency officials who are much farther removed from accountability to the electorate than was even the original Senate.

(footnotes omitted); see also HAMBURGER, *supra* note 4, at 355; DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 18–19 (1993) (“Delegation thus broadens the federal government’s regulatory jurisdiction over our lives, even while it reduces government’s capacity both to protect us from the harms about which we care most and to effect compromises and therefore resolve disputes about what the law should be.”).

necessary to coerce citizens within our wider democratic government. As a result, these critics argue that agency powers to directly coerce the citizenry should be reverted to more democratic institutions, such as Congress or the presidency.⁴⁸ While the ideological motivations of these criticisms are diverse, they share similar normative threads by focusing on the powers of agencies to coerce citizens without adequate democratic accountability.

B. The Welcome Return to Analyzing Agency-Citizen Relationships

The purpose of cataloguing these criticisms is not to deny or rebut them, as defenders of the administrative state have already done.⁴⁹ Instead, this Article takes a different approach to engage these coercion and accountability critics. In fact, this Article takes as its starting position that these critics have a point. Administrative agencies do hold immense powers over citizens, and their democratic bona fides are questionable.⁵⁰ Agency rulemaking now dwarfs statutory lawmaking in the creation of rules that bind and coerce citizens. Indeed, every year, agencies finalize thousands of rules that regulate seemingly every aspect of our social, economic, and political lives.⁵¹ Even defenders of the administrative state admit that it is “an awkward creature”

48. See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58–70 (1995) (arguing presidential control over administration is constitutionally required because it creates an electoral link between agencies and citizens); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1251–54 (1989) (arguing Congress and the President should control agencies because they are the agents of the people).

49. For some recent defenses of the administrative state, see generally, for example, CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* (2020); Emerson, *supra* note 31; Metzger, *supra* note 31; Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016); Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015) (reviewing HAMBURGER, *supra* note 4).

50. Even defenders of the administrative state admit the difficulty of squaring administrative policymaking within our democratic government. See, e.g., Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 312 (2017) (“[A] central tenet of American administrative law [is] that agencies cannot be trusted to responsibly wield their vast discretionary powers. . . .”); Joshua Ulan Galperin, *The Death of Administrative Democracy*, 82 U. PITT. L. REV. 1, 33 (2020) (“Everybody agrees that bureaucrats are unelected and, therefore, without more, lack political legitimacy.”); Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633, 638 (2018) (“Even those who defend the administrative state tend to view it as a distinct second-best, a necessary concession to the complex demands that our society places on government.”).

51. John M. de Figueiredo & Edward H. Stiglitz, *Democratic Rulemaking*, in 3 THE OXFORD HANDBOOK OF LAW AND ECONOMICS: PUBLIC LAW AND LEGAL INSTITUTIONS 37, 38 (Francesco Parisi ed., 2017) (“[A]dministrative agencies in the United States finalized over 2,800 rules in 2013, regulating virtually every corner of American life, from air and water quality, to food quality, to automobile and workplace safety.”).

within the constitutional separation of powers framework.⁵² As will be discussed more in the next Part, there is also a long intellectual history of lawyers and theorists expressing fears over agency powers to coerce the citizenry.⁵³ Therefore, this Article marks these recent coercion and accountability criticisms as a welcome return to analyzing agencies based on the powers they hold over the citizenry within the separation of powers framework of democratic governance.

The predominant solution of contemporary administrative critics has been to propose that agency powers, and the judicial doctrines that insulate them, should be reduced or eliminated. In a panoply of cases over the past decade, the Court has struck down double for-cause protection structures⁵⁴ and independent agency directors,⁵⁵ limited *Auer* deference when reviewing agency interpretations of their own regulations,⁵⁶ and expanded the use of the major questions doctrine,⁵⁷ among other rulings. Scholarly criticism has largely echoed these judicial deregulatory moves by proposing to reduce or eliminate *Chevron* and *Auer* deference,⁵⁸ reduce agency insulation from political institutions,⁵⁹ and bring back the nondelegation doctrine.⁶⁰

These reductions in agency powers are often driven by a specific conception of democratic accountability related to the ability of a

52. Stiglitz, *supra* note 50, at 635.

53. See *infra* Part II.

54. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

55. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

56. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

57. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

58. For attacks on *Chevron* deference, see, for example, Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1197 (2016); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 497–507 (2016); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2131 (2002). For attacks on *Auer* deference, see, for example, Kevin O. Leske, *Chipping Away at the Rock: Perez v. Mortgage Bankers Association and the Seminole Rock Deference Doctrine*, 49 LOY. L.A. L. REV. 375, 395–419 (2016); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 654 (1996). For an overview, see generally Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 15 GEO. J.L. & PUB. POL'Y 103 (2018).

59. These criticisms come from several different angles. For reducing agency insulation by eliminating judicial deference to agency decisions, see sources cited *supra* note 58. For reducing agency insulation from the President, see generally Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599 (2010); Calabresi, *supra* note 48; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); and Pierce, *supra* note 48. For reducing agency insulation from Congress, see Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006); and Brian D. Feinstein, *Designing Executive Agencies for Congressional Influence*, 69 ADMIN. L. REV. 259 (2017).

60. See Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 8–17, 63–67 (1982); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335–43 (2002); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1249–74 (1985).

political institution to directly coerce the citizenry. The net result of these cases has been to remove agency insulation and limit agency interpretive powers, thereby subjecting agencies to the oversight of other political institutions seen as more democratic. For the critics, reducing agency insulation from other political institutions augments political accountability and thereby augments democratic accountability by the people. According to them, the disruption of the separation of powers framework caused by agencies weakens the democratic accountability of agencies by weakening the power of elected politicians to control agency officers.⁶¹

However, it is important to note that these critics are embracing a particular form of democratic accountability over agencies, which I call “indirect democratic accountability.” When augmenting the powers of elected political institutions to monitor agencies, democratic accountability from the citizenry comes via the election of officials that compose that particular political institution. In this sense, the democratic accountability of administrative agencies is “indirect” or “derivative” because it is based on the ability of the citizens to hold their elected representatives accountable. These elected representatives are then supposed to hold agencies accountable in a manner that is responsive to the preferences of their particular electorate.⁶² In contrast, the democratic accountability of the elected political institution is “direct” because citizens have a direct means to exert influence on the actions of their representatives through the franchise. I call this form of accountability “direct democratic accountability.”⁶³

Chief Justice Roberts made the connection between reducing agency insulation and augmenting indirect democratic accountability in *Free Enterprise Fund v. Public Co. Accounting Oversight Board* to strike down double for-cause removal protection as contrary to the

61. See, e.g., *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020) (stating that “the Framers made the President the most democratic and politically accountable official in Government,” in the context of holding that an agency with a single director protected by for-cause removal was unconstitutional). For scholarly defense of this position, see sources cited *supra* note 48.

62. As an empirical matter, congressional or presidential elections do not transmit citizen preferences concerning the administrative state. See de Figueiredo & Stiglitz, *supra* note 51, at 40–42.

63. A few scholars have used the phrase “direct democratic accountability” in passing without defining their conception of the term. See, e.g., Margaret Kwoka & Bridget DuPey, *Targeted Transparency as Regulation*, 48 FLA. ST. U. L. REV. 385, 435 (2021); Peter M. Shane, *Structure, Relationship, and Ideology, or, How Would We Know a “New Public Law” if We Saw It?*, 89 MICH. L. REV. 837, 852 (1991); Christopher J. Sprigman, *Standing on Firmer Ground: Separation of Powers and Deference to Congressional Findings in the Standing Analysis*, 59 U. CHI. L. REV. 1645, 1669 (1992).

Vesting Clause.⁶⁴ In his majority opinion, the Chief Justice connected his constitutional argument to his normative one when he stated that “[t]he growth of the Executive Branch . . . heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”⁶⁵ For critics, Congress and the President serve as the watchdogs of citizens’ liberty by overseeing the powers of the administrative state. Agency structures or processes that lessen the ability of Congress or the President to supervise agencies are then constitutionally suspect.⁶⁶ The role of the citizens is merely to vote in elections to instill indirect democratic accountability over agencies through their elected officials.

However, the solution of administrative critics to chip away at the powers of administrative agencies in order to augment indirect democratic accountability to tame administrative power is one step too quick. Before these critics fully dismantle the post–New Deal administrative state, it is worth asking whether we can square agency powers with our wider democratic system to justify the ability of agencies to directly coerce citizens. Alternatively phrased, we should first ask whether direct democratic accountability of the administrative state is possible.

On its face, this question might seem puzzling given that agency officials are not elected, and agencies often lack other features corresponding to democratic governance. Some administrative defenders admit as much⁶⁷ and therefore appeal to other normative values, such as expertise or welfare gains, to defend the place of agencies in our government.⁶⁸ However, these defenders admit defeat too quickly. In fact, there is a surprisingly deep intellectual history that sought to reconcile agency powers with maintaining direct democratic accountability in governance. The next Part excavates the intellectual

64. 561 U.S. 477, 492, 496 (2010).

65. *Id.* at 499.

66. As Blake Emerson has detailed, the Court has unclearly vacillated between when and how the powers of the other branches should be augmented vis-à-vis agencies. *See* Emerson, *supra* note 31, at 399–407.

67. *See, e.g.,* Josiah Ulan Galperin, *The Life of Administrative Democracy*, 108 GEO. L.J. 1213, 1234–36 (2020); Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2035 (2005) (“Agencies are neither mentioned in the Constitution nor directly responsive to the electorate, leaving their democratic legitimacy unclear.”).

68. For expertise rationales, *see, for example,* ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW 276–77 (2020); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 495 (2010); and Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 157–62 (2003). For welfarist rationales, *see, for example,* CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION 23–24 (2018); and Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 693 (2015).

history of nineteenth-century administrative radicals who sought to instill direct democratic accountability in administration.

II. THE INTELLECTUAL HISTORY OF THE ADMINISTRATIVE RADICALS

At first blush, academic and judicial focus on administrative power may seem a contemporary obsession rooted in ideological responses to the post–New Deal administrative settlement.⁶⁹ Scholars are quick to label it as such, often tracing criticisms of agencies to classical liberal and conservative responses to the rapid buildup of administrative architecture during the New Deal.⁷⁰ However, concerns regarding agency powers over the citizenry and its lack of democratic accountability stretch back much farther in the modern period. In fact, legal and political theorists became fearful of the ability to hold administrative power accountable as soon as the modern administrative state developed in Europe.

One group of legal and political theorists, whom I call the “radicals,” echoed the fears of contemporary critics regarding the ability of agencies to coerce, dominate, and otherwise infringe on the liberty of citizens without proper democratic accountability. Instead of advocating that agencies should be stripped of their powers in order to augment indirect democratic accountability, these administrative radicals had a much bolder proposal. They sought to draw the citizenry closer to the administrative state so that citizens could have a new type of direct democratic relationship with administrative institutions. These new relationships between agencies and citizens would allow the citizenry to directly hold agencies accountable. This Part excavates the intellectual history of these radicals. Part III will subsequently distill what we can learn from the radical tradition to reform, rather than dismantle, our contemporary administrative state.

69. As two commentators recently put it, this focus appears like a “Gunfight at the New Deal Corral.” Paul J. Larkin, Jr. & GianCarlo Canaparo, *Gunfight at the New Deal Corral*, 19 GEO. J.L. & PUB. POL’Y 477, 477 (2021) (reviewing SUNSTEIN & VERMEULE, *supra* note 49; and RICHARD A. EPSTEIN, *THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW* (2020)); *see also* Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State: Political Accommodation and Legal Strategy in the New Deal Era*, 46 BYU L. REV. 147, 148 n.1, 149 n.2 (2020) (collecting citations for the list of administrative critics and defenders focused on the New Deal period).

70. *See, e.g.*, Calabresi & Lawson, *supra* note 4; HAMBURGER, *supra* note 4; D.A. Candeb, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 63–68 (2017); Richard A. Epstein, *The Perilous Position of the Rule of Law and the Administrative State*, 36 HARV. J.L. & PUB. POL’Y 5, 9 (2013).

A. *The Political Climate That Created the Radicals*

During the early modern period,⁷¹ central administration was of mostly negligible importance across Europe. Central administrative staff for European monarchies often numbered in the hundreds to low thousands.⁷² Weak centralization and specialization typified most administrative institutions. In many governments, only fiscal and military departments required basic professional characteristics for candidates, provided regular salaries for officers, and subdivided offices based on specialty.⁷³ In general, European administration was rudimentary, aristocratic, and unprofessional.⁷⁴ One prominent historian describes the British Empire before 1780 as “bureaucratically challenged” given how poorly it structured its administrative offices and functions.⁷⁵

71. Although the exact date range that composes the “early modern period” in European history is up for historical debate, the term denotes the period roughly between the mid-fifteenth to eighteenth centuries. See MERRY E. WIESNER-HANKS, *EARLY MODERN EUROPE 1450-1789*, at 1 (2006). For discussion of the use of the term, see Euan Cameron, *Editor’s Introduction to EARLY MODERN EUROPE: AN OXFORD HISTORY*, at xvii, xvii–xix (Euan Cameron ed., 2001). For a rejection of the use of the term, see generally Jack A. Goldstone, *The Problem of the “Early Modern” World*, 41 J. ECON. & SOC. HIST. ORIENT 249 (1998).

72. Jack P. Greene, *Britain’s Overseas Empire Before 1780: Overwhelmingly Successful and Bureaucratically Challenged*, in *EMPIRES AND BUREAUCRACY IN WORLD HISTORY: FROM LATE ANTIQUITY TO THE TWENTIETH CENTURY* 318, 318–43 (Peter Crooks & Timothy H. Parsons eds., 2016) [hereinafter *EMPIRES AND BUREAUCRACY*] (tracking the number of British civil officials in the domestic and colonial governments from the mid-seventeenth century to 1780).

73. See Christopher Storrs, *Magistrates to Administrators, Composite Monarchy to Fiscal-Military Empire: Empire and Bureaucracy in the Spanish Monarchy*, in *EMPIRES AND BUREAUCRACY*, *supra* note 72, at 291, 310–11 (discussing the reforms of King Charles III in eighteenth-century Spain to centralize and professionalize military and fiscal officers).

74. See HANS ROSENBERG, *BUREAUCRACY, ARISTOCRACY AND AUTOCRACY: THE PRUSSIAN EXPERIENCE 1660–1815*, at 137–38 (1958) (describing Prussian government in the eighteenth century as dominated by the aristocracy); *id.* at 154 (describing the French aristocracy’s use of the judiciary to reduce the King’s authority); BERNARD S. SILBERMAN, *CAGES OF REASON: THE RISE OF THE RATIONAL STATE IN FRANCE, JAPAN, THE UNITED STATES, AND GREAT BRITAIN 19–31* (1993) (describing decentralized and aristocratic patronage of British offices in the eighteenth century). There was typically limited centralized administration in European governments. John Gillingham, *Bureaucracy, the English State & the Crisis of the Angevin Empire, 1199–1205*, in *EMPIRES AND BUREAUCRACY*, *supra* note 72, at 197, 211–16 (discussing how medieval England had a centralized and specialized Exchequer and supporting Chancery office). Some non-European monarchies had far more advanced administration. See Patricia Ebrey, *China as a Contrasting Case: Bureaucracy and Empire in Song China*, in *EMPIRES AND BUREAUCRACY*, *supra* note 72, at 31, 40–42 (discussing the attributes of the Song Dynasty’s administrative system).

75. Greene, *supra* note 72, at 318; see also G.E. Aylmer, *From Office-Holding to Civil Service: The Genesis of Modern Bureaucracy; The Prothero Lecture*, 30 *TRANSACTIONS ROYAL HIST. SOC’Y* 91, 96, 106 (1980) (observing that “in eighteenth-century administration[,] anomaly was the norm” and administration was “an extraordinary patchwork”). See generally JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY, AND THE ENGLISH STATE 1688–1783* (1989) (discussing British administration during the period).

It is not surprising then that legal and political theorists prior to the eighteenth century paid little attention to administration. Many early modern theorists, most notably Thomas Hobbes, assumed administrative staff were fully subsumed into the Sovereign, who could perfectly surveil administrative actions to exercise managerial control over administrators.⁷⁶ According to Hobbes, any power held by an administrator resulted from the delegation of responsibility by the Sovereign, who could delegate or take away that power at will.⁷⁷ Hobbes envisioned that the Sovereign could perfectly oversee administration, thereby mitigating agency costs. Writing later in the seventeenth century, John Locke was almost identical to Hobbes in his minimal conception of the role of administration in the state. He simply assumed the legislature could appoint, change, or remove officials at any time and could always intervene in the execution of the laws at any time.⁷⁸

Prussia and France engaged in modest administrative reforms in the mid-eighteenth century, but these reforms were uneven and prone to backsliding. Frederick William I forced Prussian administration to undergo rapid expansion, professionalization, and specialization, especially in finance, economics, and military departments.⁷⁹ Even at its best, however, the Prussian administrative system was a marriage between a patronage- and merit-based system, which subsequently backslid into a hereditary-based system later in the century.⁸⁰ French monarchs attempted to imitate Frederick William I to professionalize and centralize French administration, but the system was riven by sinecures, privileges, and exemptions that ravaged its efficiency.⁸¹

It is unsurprising then, given the state of administrative development, that the administration is almost entirely absent from

76. THOMAS HOBBS, *LEVIATHAN* 166–67 (Richard Tuck ed., 1991) (remarking that administrators simply “resembleth the Nerves, and Tendons that move the severall limbs of a body naturall”).

77. *Id.* Hobbes did accept the ability of administrators operating in the name of the Sovereign to have broad executive powers. See RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY* 86–108 (2015).

78. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 369 (Peter Laslett ed., 1988) (1689).

79. See ROSENBERG, *supra* note 74, at 39–41, 63–64, 89.

80. See HERMANN BECK, *THE ORIGINS OF THE AUTHORITARIAN WELFARE STATE IN PRUSSIA: CONSERVATIVES, BUREAUCRACY, AND THE SOCIAL QUESTION, 1815–70*, at 17 (1995) (discussing the “refeudalization” of Prussian administration after King Frederick William I).

81. See HAROLD G. BROWN, *WAR, REVOLUTION, AND THE BUREAUCRATIC STATE: POLITICS AND ARMY ADMINISTRATION IN FRANCE, 1791–1799*, at 20–21 (1995) (discussing the late ancien régime in France as marred by sinecures, tax exemptions, monopolies, and other aristocratic privileges); CLIVE H. CHURCH, *REVOLUTION AND RED TAPE: THE FRENCH MINISTERIAL BUREAUCRACY, 1770–1850*, at 38–41 (1981) (discussing how French bureaucracy was undermined by sinecures, privileges, and exemptions).

Montesquieu's *The Spirits of the Laws*, first published in 1748.⁸² According to Montesquieu, the law should be perfectly laid out by the legislature so anyone can follow it. This perfect articulation of the law obviated the need for administrative interpretation of laws or the promulgation of regulations to implement them.⁸³ By envisioning a minimal need for administration in governance, Montesquieu provided an even more simplistic account of administration than Hobbes and Locke in the previous century.⁸⁴

However, Montesquieu's contemporaries were quick to jump on his absence of administration in his *trias politica* based on their own observations of the modest Prussian and French administrative reforms. For example, in July 1765, Franco-German journalist and critic Baron de Grimm joked in a letter to French philosopher Denis Diderot that "[t]he true spirit of the laws of France is this bureaucracy."⁸⁵ More charitably, German jurist and economist J.H.G. von Justi was perplexed by Montesquieu's lack of discussion of centralized administration given von Justi's observation that good economic administration was necessary for a well-functioning economy.⁸⁶ Recognizing that administration could be a threat to the liberty of the citizenry, von Justi argued that Montesquieu's separation of powers needed to be extended into administration.⁸⁷ Already before the United States' founding, European lawyers and theorists criticized Montesquieu's oversight in failing to include the role of administration in his separation of powers framework.

82. Anne M. Cohler, Basia C. Miller & Harold S. Stone, *Translators' Preface* of MONTESQUIEU, *THE SPIRIT OF THE LAWS*, at xxiv, xxxv (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., Cambridge Univ. Press 1989) (1748). Montesquieu has a curious discussion in Book 26 concerning police activities, meaning activities of administration. *Id.* at 494–518. He notes police behavior does not fit into his *trias politica* because it is the magistrate who punishes according to regulations, not the laws. However, Montesquieu does not recognize how administrators acting based on their regulations might alter his *trias politica*. He brushes off the issue because "[m]atters of police are things of every instant, which usually amount to but little . . ." *Id.* at 517.

83. See MONTESQUIEU, *supra* note 82, at 66.

84. Hobbes and Locke were at least cognizant of the need for administration to apply the general laws to specific circumstances.

85. Letter from Baron de Grimm to Denis Diderot (July 15, 1765), in 4 CORRESPONDANCE LITTÉRAIRE, PHILOSOPHIQUE, ET CRITIQUE DE GRIMM ET DE DIDEROT DEPUIS 1753 JUSQU'EN 1790, at 314, 326 (Jules-Antoine Taschereau & A. Chaudé eds., 1829). Unless otherwise noted in the citation, all translation of French resources are my own.

86. See ERE NOKKALA, FROM NATURAL LAW TO POLITICAL ECONOMY: J.H.G. VON JUSTI ON STATE, COMMERCE AND INTERNATIONAL ORDER 103–04 (2019).

87. Von Justi proposed an elaborate system of checks and balances to integrate administration into Montesquieu's separation of powers system. See 1 JOHANN HEINRICH GOTTLÖB VON JUSTI, DER GRUNDRISSE EINER GUTEN REGIERUNG 217 (1759). For discussion, see ULRICH ADAM, THE POLITICAL ECONOMY OF J.H.G. JUSTI 20 (2006).

As the French Revolution and Napoleonic Empire brought immense and rapid modernization across Europe, administration transformed from something of relatively minor importance for European lawyers and theorists to an essential component of governance.⁸⁸ From its inception, the French Revolution began to change administration through the abolition of venality and noble privileges, which reduced the aristocracy's hold on administration.⁸⁹ Existing French ministerial departments were then reorganized, and new departments were created, augmenting the size and power of the central government.⁹⁰ French administration also began to gain a distinct political identity during the turmoil of the Revolutionary and Directory Years because the new separation of powers system resulted in tension between the legislature and executive. This tension generated space for the administration to politically maneuver between the branches.⁹¹ Given the political instability of the period, local and federal officers looked to the ministries for stability based on their administrative expertise and continuity in structure and personnel.⁹²

While the Committee of Public Safety attempted to reaffirm governmental control over administration, it ultimately relied on French administration to implement the Terror. This reliance quickly augmented the administration through the development of centralized agencies, implementation of a hierarchical supervision system, and professionalization of officials.⁹³ During the roughly ten months that

88. I do not intend to take a position regarding the threshold question of when the modern administrative state was first formally developed. Instead, I look to this time as a pivotal period in the development of modern administration, which spurred the first sustained intellectual theorization about administration.

89. NICHOLAS J. RICHARDSON, *THE FRENCH PREFECTORAL CORPS 1814–1830*, at 1 (1966) (“The first prerequisite for fully centralized government was . . . the suppression of any rival influence in the provinces. This was achieved by the abolition of privileges, territorial and corporate as well as personal . . .”).

90. *Id.*; CHURCH, *supra* note 81, at 53–65, 72–74 (describing the changes to ministerial departments during various stages of the French Revolution). Further, field services were created and staffed for many important government services, including the army, food distribution, financial organization, and technical services. This led to the rapid expansion of centralized staff in the French ministerial bureaus from roughly six hundred in 1789 to over seven thousand in 1799. Philippe Bezes & Gilles Jeannot, *The Development and Current Features of the French Civil Service System*, in *CIVIL SERVICE SYSTEMS IN WESTERN EUROPE* 185, 189 (Frits M. van der Meer ed., 2d. ed. 2011). The total size of the French bureaucracy reached over 250,000 officials during the French Revolution, a five-fold increase over staff in 1788. CHURCH, *supra* note 81, at 72.

91. See BROWN, *supra* note 81, at 12–13; see also CHURCH, *supra* note 81, at 113–17 (discussing the powers of the bureaucracy during the Directory Years).

92. During the period, the administration gradually shifted by becoming first decoupled from the executive, then partially dependent on the legislature, and then a source of distinct continuity and stability for the government. BROWN, *supra* note 81, at 265, 288.

93. See BROWN, *supra* note 81, at 174 (describing how Committee members increasingly got involved in administrative affairs to control executive institutions during the Terror); CHURCH,

revolutionary Maximilian Robespierre was on the Committee during the Terror, the French state gained between thirty and ninety thousand jobs,⁹⁴ while roughly three hundred thousand people were arrested,⁹⁵ fifteen thousand were executed,⁹⁶ and tens of thousands more died in prison.⁹⁷

The result was a more centralized and professionalized French administration with strict internal hierarchies and an increased amount of power that neither other political institutions nor the citizenry could adequately check. While not fully autonomous, French administration during the Revolution held a degree of institutional independence that was previously unheard of in France, stoking near constant political outcry and denunciation.⁹⁸ As Jacobin lawyer and politician Jacques-Paul Fronton Duplantier summarized in August 1798, “The bureaucracy has become . . . a power that often defies the supreme authority of government, and denatures its intentions and good will.”⁹⁹ The French central bureaucracy was so strong by the end of the century that the spring 1799 elections turned into a backlash against the bureaucratic authoritarianism of the Directory.¹⁰⁰

With the French Revolution having washed away the ancien régime and begun the process of modernizing French administration,¹⁰¹ Napoleon quickly established a French state “defined by the organization of administration” after seizing power in late 1799.¹⁰² As a prominent historian of the period concisely remarked, Napoleon created the “perfection of bureaucratic authoritarianism.”¹⁰³

Napoleon solved several administrative problems in his growing empire. First, he created a strict centralized system of local leadership selection and hierarchy to solve the problem of regional

supra note 81, at 89–94 (describing the actions taken by the Committee to centralize the bureaucracy and subject it to hierarchical supervision).

94. CHURCH, *supra* note 81, at 94.

95. ROBERT SOBEL, *THE FRENCH REVOLUTION: A CONCISE HISTORY AND INTERPRETATION* 110 (1967).

96. J.F. BOSHER, *THE FRENCH REVOLUTION* 192 (1988).

97. HUGH GOUGH, *THE TERROR IN THE FRENCH REVOLUTION* 2 (2010).

98. One of the great paradoxes of the Revolutionary period is that despite politicians consistently speaking out against the bureaucracy as antithetical to democracy, each successive regime relied on a successively stronger and more centralized administration to achieve their political goals. While this reliance on the bureaucracy was beneficial for the short-term factional interests, it eroded public trust in the revolutionary regimes. BROWN, *supra* note 81, at 284.

99. *Id.* at 230 (quoting Jacques-Paul Fronton Duplantier, Commission des Dilapidations).

100. *Id.* at 10.

101. RICHARDSON, *supra* note 89, at 1.

102. SILBERMAN, *supra* note 74, at 104.

103. BROWN, *supra* note 81, at 264.

administration.¹⁰⁴ Second, with the disappearance of the legislature to register public opinion,¹⁰⁵ Napoleon championed the administration as representing the nation, which resulted in agencies gaining widespread bureaucratic independence. As he told the newly created Italian legislature after he conquered Italy, “‘Political liberty, which is so necessary to the State, does not consist of this sort of multiplication of authority, but in a visibly stable and secure system of good administration.’”¹⁰⁶ As Napoleon expanded his empire, modern and efficient administration came to be viewed as the most responsible and progressive opinion in government across the Continent.

In addition to elevating the importance of administration, Napoleon created the Conseil d’État in 1799. From its inception, the Conseil has served dual functions as both the supreme court of administrative law in France as well as the highest organ of administrative policymaking.¹⁰⁷ The Conseil quickly developed its own caselaw, which turned administrative law into a distinct area of law from other areas of French public law.¹⁰⁸ As evident from the Conseil, agencies have been structured to blend powers traditionally associated with Montesquieu’s three branches from the beginnings of the modern administrative state. Over two centuries later, this blending of agency powers continues to vex both administrative critics and defenders alike.¹⁰⁹

Napoleon also created a systematic structure of recruitment and training to develop a career structure for senior administrative positions, rather than the previous system of decentralized structure.¹¹⁰

104. SILBERMAN, *supra* note 74, at 105–06.

105. The Constitution of the Year VIII, adopted in December 1799, created a legislature with three houses, but it functionally gave all powers to the First Consul (Napoleon). 1799 CONST. tit. IV (Fr.). The Constitution of the Year X, adopted in August 1802, then amended the Constitution to make Napoleon First Consul for life. 1802 CONST. art. I (Fr.). Finally, the Constitution of the Year XII, adopted in May 1804, transformed France into an empire and made Napoleon the First Emperor of France. 1804 CONST. tit.1 (Fr.).

106. STUART WOOLF, NAPOLEON’S INTEGRATION OF EUROPE 97 (1991) (quoting and translating LIVIO ANTONIELLI, I PREFETTI DELL’ITALIA NAPOLEONICA: REPUBBLICA E REGNO D’ITALIA 236–37 (1983)).

107. See L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW 46–49 (5th ed. 1998).

108. Bezes & Jeannot, *supra* note 90, at 189.

109. See *City of Arlington v. FCC*, 569 U.S. 290, 312, (2013) (Roberts, C.J., dissenting) (“[Administrative agencies] exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules.”); Lawson, *supra* note 4, at 1248 (“The destruction of this principle of separation of powers is perhaps the crowning jewel of the modern administrative revolution.”); Stiglitz, *supra* note 50, at 635 (“The administrative state is an awkward creature in our constitutional system . . .”).

110. SILBERMAN, *supra* note 74, at 109.

Napoleon's elevation of administration, expansion of administrative education, and systemization of hiring and promotion led to the gradual emergence of French bureaucrats as a class of civilian professionals convinced of the potential of modern administration and expert in its application.¹¹¹

This conviction was important because Napoleon gave the bureaucracy responsibility to extend the French administrative model to the rest of Europe. Napoleon believed that new nation-states could be molded top-down through the application of his administrative blueprint. Therefore, once a new region was secure, Napoleon sent in trusted bureaucrats to oversee the application of French administrative institutions and law during the transition period.¹¹²

The flip side of this top-down importation of the French administration was that old administrative systems, many rooted in local *ancien régimes*, were dismantled and rebuilt throughout the conquered states.¹¹³ This change meant that thousands of new administrative posts were available across the First French Empire to local populations who bought into Napoleon's administrative vision. Importantly for post-Napoleonic rule, French transition administrators actively encouraged administrative collaboration with local populations by reserving all but the top administrative posts for the local populations of annexed and satellite territories.¹¹⁴ Napoleon also began to allow the sons of local elite to join the staff of the *Conseil d'État*.¹¹⁵ Napoleon's actions led to the creation of skilled administrators across the Continent who believed that a modernized, centralized, and rationalized administration was key to the development of their home states.

Perhaps most successfully, Napoleonic administration led to the modernization of numerous regions in Europe, including Holland, Bavaria, Baden, and Westphalia.¹¹⁶ This modernization was most evident in Prussia, which was already watching Napoleon's administrative advancements prior to its fall to Napoleon at the Battle of Jena.¹¹⁷ When Prussia was brought under Napoleon's control, French

111. WOOLF, *supra* note 106, at 68.

112. *Id.* at 104–05. Among other French administrative practices that spread across Europe was the French model of public finances. The resulting systems of public expenditure and revenue, and unification and rationalization of public finances, modernized public finance administration across Europe. *Id.*

113. *Id.* at 110.

114. *Id.* at 194.

115. *Id.* at 44.

116. *Id.* at 110, 243.

117. *Id.* at 116 (quoting and translating HELMUT BERDING, *NAPOLEONISCHE HERRSCHAFTS- UND GESELLSCHAFTSPOLITIK IM KOENIGREICH WESTFALEN 1807–1813*, at 117 n.12 (1973) (quoting

and Prussian administrators replaced their collegial model of administration with the French ministerial bureau system.¹¹⁸

As a result of rapid administrative advancement after Napoleon's conquest, the Prussian bureaucracy reached the apex of its power between 1807 and the Revolution of 1848. Before 1848, Prussia had no parliament, no political parties, and no constitution.¹¹⁹ It was governed by a Hohenzollern king who theoretically had absolute power. In practice, however, the bureaucracy made political and administrative decisions,¹²⁰ which resulted in a "dictatorship of the bureaucracy" whereby the authority of the bureaucracy was virtually absolute.¹²¹ Domestic policy rested in senior civil servants with councils of bureaucrats at the very top composed of ministers and other high-ranking officials.¹²² While the king nominally represented a check on bureaucratic power, his reliance on the expertise of ministers to carry out policy neutralized his neutralization as a competitive power source.¹²³ The result was a bureaucracy that was the "most highly developed of its day and age,"¹²⁴ which did not hesitate to use its police powers on Prussian citizens whenever it sought fit.¹²⁵ A frightening state of affairs had begun to cement itself across Europe as continental bureaucracies massively increased in size and power. The next two Sections detail the intellectual responses to the rapid expansion of modern administration that took place during the French Revolution and Napoleonic Empire.

B. Nineteenth-Century Fears of Administrative Power

The twin experiences of the French Revolution's centralized administration of the Terror and the Napoleonic Empire's rationalized administrative expansion were seared in the minds of nineteenth-

Letter from Baron von Küster, Prussian Ambassador in Westphalia, to King Frederick William III (Oct. 23, 1808)) ("The main feature [of the French government] is the felicitous unity of the administration in place of the previous heterogeneous element of states; its simplicity, rapidity and energy cannot fail to achieve full success.").

118. *Id.* at 143.

119. BECK, *supra* note 80, at 37.

120. *Id.*

121. ECKART KEHR, *The Dictatorship of the Bureaucracy*, in ECONOMIC INTEREST, MILITARISM, AND FOREIGN POLICY: ESSAYS ON GERMAN HISTORY 164, 164–73 (Gordon A. Craig ed., Grete Heinz trans., Univ. of Cal. Press 1977) (1965).

122. BECK, *supra* note 80, at 126.

123. *Id.* at 126–27.

124. *Id.* at 37.

125. *Id.* at 210; Rosenberg, *supra* note 74, at 39–40.

century lawyers and theorists.¹²⁶ As a result, these lawyers and theorists felt compelled to reckon with the powers of the bureaucracy.¹²⁷ Many saw the writing on the wall and believed that powerful centralized administrations were inevitable as the state became involved in more complicated domestic policy areas, such as developing welfare programs and regulating industrialized capitalism.¹²⁸ The question was then how to devise a system of governance to tame bureaucratic power.

However, the simplistic, frictionless principal-agent delegation model of Hobbes and Locke would no longer suffice to constrain administrative power. By the early to mid-nineteenth century, it was clear among European lawyers that administration was the independent “fourth power” missing from Montesquieu’s separation of powers. Therefore, administration needed to be adequately theorized and incorporated in any modern separation of powers framework.¹²⁹ As a result, lawyers and theorists recognized that they needed to create new models to shape the relations between administration, other political institutions, and the people.¹³⁰

The strength, independence, and brutality of the bureaucracy during the French Revolution and Napoleonic Empire evoked widespread alarm among theorists. They feared the independence of administration could turn countries into despotic states ruled by bureaucratic officials who could destroy civil freedom, foster dependence among the population, and weaken the minds of the

126. Bernardo Sordi, *Révolution, Rechtsstaat and the Rule of Law: Historical Reflections on the Emergence and Development of Administrative Law*, in *COMPARATIVE ADMINISTRATIVE LAW* 23, 23–37 (Susan Rose-Ackerman, Peter L. Lindseth & Blake Emerson eds., 2d ed. 2017).

127. For a general overview of legal and theoretical engagement with the bureaucracy in nineteenth-century European thought, see generally *id.*

128. See, e.g., 2 MAX WEBER, *ECONOMY AND SOCIETY* 971–72 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1922); BENJAMIN CONSTANT, *PRINCIPLES OF POLITICS APPLICABLE TO ALL REPRESENTATIVE GOVERNMENTS* (1815), *reprinted in* *CONSTANT: POLITICAL WRITINGS* 171, 248–49 (Biancamaria Fontana ed. & trans., Cambridge Univ. Press 1988); *cf.* ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 97–98 (Oliver Zunz & Arthur Goldhammer eds., Arthur Goldhammer trans., Libr. Am. 2004) (1835) (discussing administrative and governmental centrality).

129. See 2 AUGUSTE VIVIEN, *ÉTUDES ADMINISTRATIVES* 24 (Paris, Guillaumin et Cie 1852) (1845); see also 1 CHARLES-JEAN BONNIN, *PRINCIPES D’ADMINISTRATION PUBLIQUE* 96–98 (Paris, Renaudiere 3d ed. 1812) (critiquing Montesquieu for ignoring the bureaucracy in his separation of powers framework).

130. For nineteenth-century discussions about bureaucratic independence, see Karl Marx, *Critique of Hegel’s Philosophy of Right* (1843), in *MARX: EARLY POLITICAL WRITINGS* 1, 12–13 (Joseph O’Malley ed., 1994); 4 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA: HISTORICAL-CRITICAL EDITION* 1208–20 (Eduardo Nolla ed., James T. Schleifer trans., 2010) (1840); and John Stuart Mill, *Centralisation*, 115 *EDINBURGH REV.* 323 (1862), *reprinted in* 19 *COLLECTED WORKS OF JOHN STUART MILL: ESSAYS ON POLITICS AND SOCIETY* 579, 586 (John M. Robson ed., Univ. of Toronto Press 1977).

citizenry. Perhaps surprisingly, these nineteenth-century fears of bureaucratic power coercing the citizenry mimic current judicial and scholarly criticisms of administration discussed in the previous Part.

Nineteenth-century theorists held two main concerns in their fear of bureaucratic powers. The first was that the bureaucracy was gaining too much power, which could result in bureaucratic despotism. Like Chief Justice Roberts in *Free Enterprise Fund*, who warned that agency powers could cause agencies to slip beyond the control of the people,¹³¹ nineteenth-century lawyers and theorists feared that an independent bureaucracy untethered from the state could oppress citizens according to its whims. As the German Brockhaus encyclopedia summarized in 1819, “In every branch of administration bureaux or offices have multiplied, and have been accorded so great a power over citizens that in many countries a veritable bureaucracy, rule by offices, has developed.”¹³² Ever provocative, Marx argued that French bureaucracy had grown into a “fearsome parasitic body, which traps French society like a net and chokes it at every pore”¹³³ and “acquires an all-knowing pervasiveness” so it “restricts, controls, regulates, oversees and supervises civil life.”¹³⁴ Even some bureaucratic officials began to fear their own creations. Prussian jurist Baron von Stein, who was one of the highest administrators in Prussia, later became critical of the bureaucratic system he previously administered. In one letter, he proclaimed, “We are ruled by buralists—salaried, with a knowledge of books, with no cause to support Come rain or sunshine, whether taxes rise or fall, whether long-established rights are destroyed or preserved, it makes no difference to them.”¹³⁵

The second main concern was that increased bureaucratic power would result in cultural problems for democratic society. Tocqueville most strongly leveled this criticism, which he expressed in a similar manner as Chief Justice Roberts’s concerns in his *City of Arlington* dissent.¹³⁶ Tocqueville argued that problems would arise if a democracy

131. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010) (“The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”).

132. MARTIN ALBROW, *BUREAUCRACY* 28 (1970) (quoting and translating 2 BROCKHAUS CONVERSATIONS-LEXIKON: ALLGEMEINE DEUTSCHE REAL 158 (1819)).

133. MARX, *supra* note 2, at 115.

134. *Id.* at 68.

135. ALBROW, *supra* note 132, at 19 (quoting and translating Letter from Baron von Stein to Baron von Gagern (Aug. 24, 1821)).

136. *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) (lamenting the shortcoming of presidential oversight of agencies when “hundreds of federal agencies [are] poking into every nook and cranny of daily life”).

became too centralized because “[s]ubjection in small affairs manifest[ing] itself every day and mak[ing] itself felt indiscriminately by all citizens” causes the people to become dependent on the central power.¹³⁷ This evolution could cause necessary government centralization to drift toward unnecessary administrative centralization, thereby reducing the freedom of citizens. Influenced by Tocqueville during extensive correspondence,¹³⁸ John Stuart Mill shared Tocqueville’s concern that an overly bureaucratized government would cause negative cultural changes in democratic states. In multiple works, Mill argued that bureaucratic power and independence would reduce the capacity of citizens to share political life, thereby “keep[ing] the citizens in a relation to the government like that of children to their guardians.”¹³⁹ Bureaucracy monopolizing political power would then result in both the governors and the governed becoming slaves of the bureaucracy, resulting in the impossibility of subsequent reform.¹⁴⁰ Mill believed that striking the right balance of bureaucratization was “one of the most difficult and complicated questions in the art of government.”¹⁴¹

C. The Radicals’ Solutions to Control Administrative Power

Early nineteenth-century European bureaucracies rapidly grew in size while becoming increasingly independent from other political institutions and the citizenry. As a result, administrative power quickly began to threaten the liberty of citizens. These developments led theorists to fear that modern governance would turn into bureaucratic despotism as bureaucrats became disconnected from the citizenry and other political institutions. Therefore, one of the central questions for nineteenth-century lawyers and theorists became how to hold the bureaucracy accountable in the modern state. I divide theorists in this

137. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 1259 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012) (1835).

138. Mill was influenced by Tocqueville, as they extensively corresponded about the cultural impacts of bureaucracy. See Letter from J.S. Mill to Alexis De Tocqueville (Apr. 27, 1836), in 12 *COLLECTED WORKS OF JOHN STUART MILL: THE EARLIER LETTERS OF JOHN STUART MILL 1812–1848*, at 304, 304 (Francis E. Mineka ed., 1963) (stating that he hoped Tocqueville would teach him more on the influence of democracy “on private life & individual character”); see also Letter from J.S. Mill to Alexis De Tocqueville (May 11, 1840), in 13 *COLLECTED WORKS OF JOHN STUART MILL: THE EARLIER LETTERS OF JOHN STUART MILL 1812–1848*, at 433, 434 (Francis E. Mineka ed., 1963) (emphasizing the “real danger in democracy”).

139. *E.g.*, JOHN STUART MILL, *PRINCIPLES ON POLITICAL ECONOMY* 961 (W.J. Ashley ed., Longmans, Green & Co. 9th ed. 1936) (1848).

140. JOHN STUART MILL, *ON LIBERTY* (1859), *reprinted in* J.S. MILL: ‘ON LIBERTY’ AND OTHER WRITINGS 1, 112 (Stefan Collini ed., 1989).

141. *Id.* at 113.

period based on two general strategies of holding agencies accountable: (1) institutionalism, or (2) radicalism.

1. The Now-Familiar Institutionalists

The first response sought an institutionalized solution to the problem of bureaucratic power by creating a complex set of checks and balances between the administration and other political powers in the state. I call these theorists the “institutionalists” given their Montesquieu-inspired structural proposals. Intellectually, institutionalists sought to update Montesquieu’s checks and balances approach to restraining the power of a specific institution within his separation of powers framework by including mechanisms for the other political institutions to restrain administrative power.¹⁴² Institutionalists, therefore, sought to tie administration to the other branches of government. They include French theorist Charles-Jean Baptiste Bonnin,¹⁴³ Swiss-French lawyer Benjamin Constant, German philosopher G.W.F. Hegel in his later years, English statesman and theorist John Stuart Mill, and German lawyer and social theorist Max Weber.

Institutionalists proposed a variety of mechanisms for other political institutions to hold bureaucratic power accountable. In his most influential work, Hegel’s solution was a separation of legislative and administrative powers, with multiple different institutions checking the power of the bureaucracy.¹⁴⁴ Writing nearly concurrently with Hegel, Constant adopted a similar solution based on a complex system of institutional checks and balances. Compared to Hegel, who focused more on civil society, Constant aimed his scheme to provide adequate powers to the legislature and judiciary to intervene in administration.¹⁴⁵ Constant also believed it was important to strictly delineate the responsibilities of bureaucrats so that everyone in the

142. See MONTESQUIEU, *supra* note 82, at 66 (describing his checks and balances approach to restraining the power of any particular political institution within the state).

143. Bonnin argued that coordination via administrative hierarchy and the use of the Conseil d’État to settle administrative questions can protect against arbitrary administrative abuse. BONNIN, *supra* note 129, at 22–24. For further discussion of Bonnin’s theorizing on administration, see also Havasy, *supra* note 22, at 42, 58.

144. Hegel devised a complex institutional solution to checking administrative power, which included the (i) division of legislative and administrative powers, (ii) independence of corporations and local communities that embody particular interests of social groups, (iii) hierarchical administrative systems, and (iv) values and attitudes of the civil service, which must be open to all citizens and appointed based only on ability. G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 347–49 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1820).

145. *Id.* at 229–40.

state knew the proper scope of bureaucratic powers.¹⁴⁶ Interestingly, Constant noticed the legislature and judiciary are better equipped to deal with different types of ministerial responsibilities, and he argued for a division of supervisory powers between the two institutions based on the type of administrative power at issue.¹⁴⁷

Like Hegel and Constant before him, Mill worked out a set of complex institutional checks and balances and combined them with the uptake of certain professional norms to curtail the strength of the bureaucracy.¹⁴⁸ Similar to Constant, Mill believed that the ability to assign responsibility for all administrative actions was of paramount importance in holding agencies accountable. He advocated for a ministerial model whereby every administrative function should be the duty of a specific individual, rather than the use of collegial boards where responsibility could be diffused among multiple people.¹⁴⁹ Mill also detailed how to structure administration to maximize its epistemic benefits by arguing that the heads of administrative departments should listen to a variety of opinions and have a skilled body of advisors.¹⁵⁰ As a result of his focus on administrative expertise, Mill sought to insulate the bureaucracy from democratic politics through employment security and strict separation between legislative and administrative matters.¹⁵¹

Max Weber created an institutionalist response to bureaucratic power that envisioned a system of checks and balances where the executive and parliament work in tandem to control the bureaucracy and prevent bureaucratic authoritarianism. On the executive side, Weber argued that while bureaucrats maintain a knowledge advantage over the “dilettante” executive, bureaucratic officials still rely on the executive to retain their jobs and aspire for promotions.¹⁵² On the legislative side, he argued that parliament must have enough institutional powers to control action by officials, such as the tools of inquiry and investigation to force the bureaucracy to be transparent with its reasons for action.¹⁵³

146. CONSTANT, *supra* note 128, at 227–41.

147. *Id.* at 234–36.

148. See JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 257–83 (F.A. Hayek ed., Henry Regnery Co. 1962) (1861).

149. *Id.* at 260–61.

150. *Id.* at 262–64.

151. *Id.* at 275.

152. WEBER, *supra* note 128, at 994–95.

153. MAX WEBER, PARLIAMENT AND GOVERNMENT IN GERMANY UNDER A NEW POLITICAL ORDER (1918), reprinted in WEBER: POLITICAL WRITINGS 130, 178–79 (Peter Lassman & Ronald Speirs eds., 1994).

As will be discussed in the next Part, institutionalist proposals likely sound familiar to our contemporary ears because they have become the dominant mode of separation of powers argumentation concerning how to hold agencies accountable. Consequently, the current separation of powers discourse has largely drawn from institutionalist responses.

2. The Administrative Radicals

However, there was a second prevailing response to tame bureaucratic powers during this period that has been relatively ignored in public law. Instead of starting from the Montesquieu-inspired proposition that powers needed to be balanced between political institutions, these theorists started from the direct relationships between agencies and citizens given the coercive powers of agencies over civil society.¹⁵⁴ As a result, this second response sought a more radical solution to the problem of bureaucratic power by theorizing about how to instill direct democratic accountability over agencies.

I call these theorists “radicals” because their responses pushed beyond institutional solutions and instead sought to restructure the nature of politics.¹⁵⁵ The radicals rejected the Montesquieu-inspired separation of powers framework by going to the people to control administration. In short, the radicals sought to control administrative power by reformulating the direct relationships between agencies and citizens to build a new form of direct democratic accountability in the burgeoning administrative state. The main radicals of the period included Hegel in his younger years, French theorist and statesman Alexis de Tocqueville, German lawyer Rudolph von Gneist, and Karl Marx.¹⁵⁶

154. Sordi, *supra* note 126, at 29 (“Calls for decentralization were recurrent in liberal European society from the 1830s onward. There was a palpable desire to re-establish relationships between society, territory, and public power that were less artificial and mechanical than in the Napoleonic era, and therefore more solid and profound.”).

155. A few institutionalists occasionally included radical proposals within their broader institutional separation of powers framework. For example, Mill argued at one point in affinity with radical theorists that the power of the central administration to actively intervene in other political institutions should be limited to compelling local officers to obey the law. MILL, *supra* note 140, at 114. However, Mill subsequently changed his position to argue for national political supremacy over local institutions. MILL, *supra* note 148, at 302.

156. While this grouping of theorists and lawyers may seem surprising, I label each as a “radical” based on their own discursive communities in which they lived and communicated. For example, Gneist was more elitist compared to Marx, but within the Prussian legal community, Gneist’s proposals were “radical” due to his distrust of bureaucratic power, desire to localize policymaking, and proposals to include the citizenry within administrative policymaking. These positions were more “radical” than the status quo in Prussian legal communities during the nineteenth century, which trusted aristocratic bureaucrats to benevolently guide policymaking.

While German philosopher Hegel is often considered a proponent of bureaucratic power, his intellectual trajectory was actually more complicated. Prior to Napoleon's rise, Hegel was much more skeptical of administration.¹⁵⁷ In his earlier years, Hegel was one of the first radicals, advocating for large-scale decentralization, federalism, and democratization to limit bureaucratic despotism. His criticism of centralized bureaucracy led him to believe that freedom from unnecessary central control was a right of citizens.¹⁵⁸ As a result, "Young Hegel" argued that the freedom of the citizenry is expressed in the organs of local and sectional autonomy, not central administration.¹⁵⁹ He therefore advocated that the central government should be confined to the minimum required for the universal interests of the nation.¹⁶⁰

Tocqueville followed Young Hegel in advocating for the devolution of administration to local control and strengthening the powers of the citizenry in administrative governance. He asserted that local administrative bodies should be elected from the citizenry to create space between citizens and the central power of the state. As Tocqueville argued, "Election is a democratic expedient that secures the independence of the administrative official vis-à-vis the central power."¹⁶¹ In this form, Tocqueville desired to use local democratic elections to insulate local administration from the central government.

See MICHAEL STOLLEIS, PUBLIC LAW IN GERMANY: A HISTORICAL INTRODUCTION FROM THE 16TH TO THE 21ST CENTURY 213–16 (Thomas Dunlap trans., 2001) (discussing the mid-nineteenth-century Prussian legal community). Gneist was even more "radical" than many liberal Prussian lawyers, who sought to empower the centralized Prussian bureaucracy to limit the powers of the monarch through rule of law principles, known as the establishment of the *Rechtsstaat*. See *id.* at 207–09 (discussing the goal of Prussian liberals to establish the *Rechtsstaat* to control the powers of the monarch).

157. Hegel switched from radical to institutionalist after observing Napoleon's ability to unite the citizenry under his administrative rule. This observation led Hegel to believe in his later years that administration was the only possible political institution that could unite the plural wills of the citizenry into a public interest. See, e.g., G.W.F. HEGEL, THE PHILOSOPHY OF HISTORY 456 (J. Sibree trans., Dover Publ'ns 1956) (1837) (praising Napoleon for removing the shackles of the ancien régime from Germany and putting it on a path to modernity).

158. G.W.F. HEGEL, THE GERMAN CONSTITUTION (1798–1802) (1893), reprinted in POLITICAL WRITINGS 6, 23 (Laurence Dickey & H.B. Nisbet eds., H.B. Nisbet trans., Cambridge Univ. Press 1999):

[T]he centre, as the political authority and government, must leave to the freedom of the citizens whatever is not essential to its own role . . . of organizing and maintaining authority . . . nothing should be so sacred to it as the approval and protection of the citizens' free activity in such matters, regardless of utility; for this freedom is inherently sacred.

159. Z.A. Pelczynski, *An Introductory Essay* to G.W.F. HEGEL, HEGEL'S POLITICAL WRITINGS 5, 58 (T.M. Knox trans., Oxford Univ. Press 1964).

160. *Id.* at 59.

161. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 311 (Sanford Kessler ed., Stephen D. Grant trans., Hackett Publ'g 2000) (1835).

But local democratic elections alone were not enough for Tocqueville, who also emphasized the importance of civic organizations. These organizations could serve as a bulwark against the centralization of administrative power through their expressions of their own interests to political institutions. Civic organizations' advocacy creates a variety of opinions and interests in civil society, making it difficult for centralized administration to aggregate and unify public opinion toward further centralization.¹⁶² Despite his skepticism, Tocqueville, like Young Hegel before him, conceded that some powers—though limited—are rightly centralized in the federal government.¹⁶³

Tocqueville argued that the decentralization of administration led to multiple benefits for democratic government. First, it allowed citizens to identify their personal concerns with the community around them. Political obedience then comes about through voluntary cooperation within the local community, rather than centralized force imposed on localities by the national government.¹⁶⁴ Second, administrative decentralization creates independent institutions with their own sources of power that can check the majoritarian power of the central government. As Tocqueville put it, "Municipal bodies and county administrators are thus like hidden reefs that turn back or divide the tide of popular will."¹⁶⁵ Finally, it places the spirit of liberty in the culture of the citizenry, which limits "the despotic tendency hidden in the body of society."¹⁶⁶ Tocqueville believed that citizens who are accustomed to participating in self-government will be loath to give up their freedoms to be passively administered by bureaucrats.

While Tocqueville and Mill were concerned with the bureaucracy's effects on civic culture, German lawyers first noticed an important duality in theorizing about bureaucracy that became a running theme among many thinkers—though they feared bureaucratic power, they also recognized its importance to modern good governance.¹⁶⁷ As regional administration continued to mature, German administrative law began to develop as a distinct area of public law separate from constitutional law during the mid-1800s, and German lawyers intensely debated how to respond to the rise of

162. TOCQUEVILLE, *supra* note 128, at 604–09.

163. *Id.* at 97–98.

164. See JACK LIVELY, *THE SOCIAL AND POLITICAL THOUGHT OF ALEXIS DE TOCQUEVILLE* 149–66 (1962) (discussing Tocqueville's evolving perspective on decentralized administration).

165. TOCQUEVILLE, *supra* note 128, at 302; see also SHELDON WOLIN, *TOCQUEVILLE BETWEEN TWO WORLDS* 93–94 (2003) (discussing how Tocqueville believed that such decentralization was "a trade-off between communal liberties and efficiency").

166. 1 ALEXIS DE TOCQUEVILLE, *DE LA DEMOCRATIE EN AMERIQUE* 49 (J.P. Mayer ed., 1951).

167. See generally Robert Mohl, *Ueber Bureaukratie*, 3 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT [JITE] 330 (1846) (Ger.) (discussing this paradox of bureaucracy).

administration.¹⁶⁸ Some of these jurists, such as Prussian legal scholar Lorenz von Stein, believed that administration was not a neutral arbiter of the public interest but rather simply another political site for civil conflict that would become dominated by the wealthy unless proper reforms were introduced.¹⁶⁹ This fear-importance duality in the role of administration in the modern state caused German lawyers to propose several different solutions to the problems associated with administrative power. These proposals included complete judicial oversight of administration, an embrace of parliamentarism, or a complete rejection of external control of agencies, among other positions.¹⁷⁰

A prominent midcentury German jurist and statesman, Gneist criticized German jurists who rejected the involvement of external political institutions to regulate administration. Instead, given his fears of bureaucratic power over citizens, Gneist advocated for judicial control over administration.¹⁷¹ However, institutionalist responses were not satisfactory for Gneist, who, following Stein, lamented that Prussian administration had simply become another site for class warfare.¹⁷² Meanwhile, increased parliamentary powers could not be trusted to remove factional strife in agencies because both English and French parliaments had been taken over by certain social classes for their own benefit.¹⁷³ As British political scientist Bryan Keith-Lucas aptly described, Gneist was “profoundly disturbed by the state of Prussia; he saw a land in which the government was not interwoven with society, but was imposed upon it.”¹⁷⁴ Institutional proposals

168. See STOLLEIS, *supra* note 156 (surveying nineteenth-century German public law debates concerning the rise of administration); see also BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 23–60 (2019) (same).

169. Erich Hahn, *Rudolf Gneist and the Prussian Rechtsstaat: 1862–78*, 49 J. MOD. HIST. D1361, D1362–63 (1977).

170. See STOLLEIS, *supra* note 156, at 208–09 (surveying various proposals); Kenneth F. Ledford, *Formalizing the Rule of Law in Prussia: The Supreme Administrative Law Court, 1876–1914*, 37 CENT. EUR. HIST. 203 (2004).

171. Peter Cane, *An Anglo-American Tradition*, in *THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW* 1, 14 (Peter Cane, Herwig C.H. Hoffman, Eric C. Ip & Peter L. Lindseth eds., 2021).

172. John K.M. Ohnesorge, *Western Administrative Law in Northeast Asia: A Comparativist’s History* 163 (June 2002) (SJD thesis, Harvard Law School), <https://ssrn.com/abstract=3483842> [<https://perma.cc/9HV2-WS42>] (discussing Gneist’s view of Prussian administration).

173. See Hahn, *supra* note 169, at D1364–65 (discussing Gneist’s distrust of parliamentarism from studying French and English politics). Gneist viewed his scholarship as a medium to push political reform, and he knew that proposing increased parliamentary powers was dead in the water given the Crown’s powers and feudal factions in Prussia. See *id.* at D1365 n.12 (discussing Gneist’s fusion of scholarship and politics); see also *id.* at D1366 (discussing the futility of parliamentarism in Prussia).

174. B. Keith-Lucas, *In Defence of Gneist*, 27 CANADIAN J. ECON. & POL. SCI. 247, 249 (1961).

would not solve this problem. Therefore, Gneist sought to reshape the relationship between the administrative state and citizens by drawing agencies closer to the people they governed.

Like other radicals, Gneist sought to mitigate factional bureaucratic domination through a conception of self-government via the localization of administration¹⁷⁵ and active citizen participation in governance by segments of the population.¹⁷⁶ Given the importance of administration in the modern state, Gneist believed that administrators would become the new mediators between the state and civil society.¹⁷⁷ Contrary to institutionalist reformers such as Mill who pushed civil service and salary reforms to insulate agencies,¹⁷⁸ Gneist argued that the citizen involvement in localized administration was the only mechanism to achieve genuine modern self-governance.¹⁷⁹

For Gneist, periodic parliamentary elections of those who would supervise salaried administrators were no substitute for local administration combined with civic participation so the people could actively monitor agency actions.¹⁸⁰ As Gneist framed his reasoning to Prussian statesman Otto von Bismarck in an 1869 memorandum, his proposals would “create an equal counterweight to the bureaucracy, to restore among the propertied classes a sense of responsibility towards the state . . . and to protect the state from being submerged in modern society.”¹⁸¹ Gneist’s conception of administrators within a well-functioning bureaucracy appears similar to the role of representatives in parliament under a trustee model of representation filtered through

175. Gneist’s proposals to localize administration were inspired by his study of the British legal system and the principle of local autonomy. See Sabino Cassese, *The Administrative State in Europe*, in 1 THE MAX PLANCK HANDBOOKS IN EUROPEAN PUBLIC LAW: THE ADMINISTRATIVE STATE 57, 64 (Armin von Bogdandy, Peter M. Huber & Sabino Cassese eds., 2017) (discussing how “Gneist’s appreciation of British local autonomy” shaped his political philosophy).

176. See Hahn, *supra* note 169, at D1366 (discussing Gneist’s proposed reforms). The segments included in local administrative governance included all propertied males in Prussia. *Id.* at D1361, D1364.

177. FRITZ A. SAGER, CHRISTIAN ROSSER, CÉLINE MAVROT & PASCAL Y. HURNI, A TRANSATLANTIC HISTORY OF PUBLIC ADMINISTRATION: ANALYZING THE USA, GERMANY AND FRANCE 31 (2018). Gneist’s view of administration as the new political site to mediate between factions in civil society was inspired by Hegel and German jurist Lorenz von Stein. Hahn, *supra* note 169, at D1362.

178. JOHN STUART MILL, REFORM OF THE CIVIL SERVICE (1854), *reprinted in* 18 COLLECTED WORKS OF JOHN STUART MILL: ESSAYS ON POLITICS AND SOCIETY 205, 207 (John M. Robson ed., 1969).

179. Keith-Lucas, *supra* note 174, at 250.

180. Later in his life, Gneist became concerned that mid-nineteenth-century civil service reforms pushed England closer to becoming a society ruled by bureaucrats. *Id.*

181. Hahn, *supra* note 169, at D1372 (citation omitted).

a form of propertied elitism that was prominent among German liberals during the period.¹⁸²

Perhaps surprising to legal audiences given that New Dealers were often labeled “Marxists,”¹⁸³ Marx was perhaps the nineteenth-century theorist most critical of bureaucratic power.¹⁸⁴ For Marx, the bureaucracy incessantly shaped and restricted the conditions of European civil and political life for partial and class-based reasons. Marx sought to invert what had happened and to dissolve administrative independence from the citizenry. In doing so, Marx called for the abolition (*aufhebung*) of the bureaucracy, perhaps the most radical proposed solution.¹⁸⁵ However, Marx did not call for a general abolition of the bureaucracy as a political institution but rather an abolition of how it operated as an institution that was independent from and unaccountable to the citizenry.

According to Marx, the bureaucracy must be restructured so its power rests with the people, which can only happen when the particular interests of the administrator become the same as the interests of the citizen.¹⁸⁶ In other words, the administration must be forced to consider the interests of the citizenry as a *demos*. This process of recoupling the administration to the people would lead to the abolition of the bureaucracy because the bureaucracy would transform into administration for the universal interest (the people), rather than for the pursuit of the private aims of bureaucratic officers.

Marx substantiated the structural form of this recoupling later in his life. In *The Civil War in France*, Marx critiqued previous French

182. Like many German liberals of the period, Gneist was a political elitist. The tension between German liberalism and democratic governance became especially prominent after Otto von Bismarck rose to power. However, it is unclear whether Gneist's political changes post-Bismarck were due to a genuine shift in ideology or for reasons of self-preservation, given his denunciation of Bismarck before he gained power. From correspondence between Gneist and more leftist political leaders, there is evidence that Gneist adopted more moderate political proposals as a matter of political strategy. *Id.* at D1369 (discussing Gneist's political strategy); *see also id.* at D1369–70 (noting Gneist's fear of Bismarck invoking emergency powers). While Gneist's politics shifted during his life, he never wavered in his twin radical proposals of localizing administration and involving the citizenry in administrative governance as mechanisms to draw the citizenry closer to administration and avoid bureaucratic domination. *See generally id.*

183. For example, O.R. McGuire, who was chairman of the influential ABA Committee on Administrative Law during the late 1930s and early 1940s, called supporters of a strong administrative state “modern disciples of Karl Marx.” O.R. McGuire, *The American Bar Association's Administrative Law Bill*, 1 LA. L. REV. 550, 553 (1939).

184. Although Marx's thoughts on bureaucracy are often overlooked, administration is central to Marx's understanding of the modern state. *See* SHLOMO AVINERI, *THE SOCIAL AND POLITICAL THOUGHT OF KARL MARX* 49 (1968) (noting that “an insistence on the importance of understanding bureaucracy both historically and functionally runs through all of Marx's writings after 1843”).

185. KARL MARX & FRIEDRICH ENGELS, *MANIFESTO OF THE COMMUNIST PARTY* (1848), *reprinted in* MARX: *LATER POLITICAL WRITINGS*, *supra* note 2, at 1, 14–20.

186. *Id.* at 14–15.

administration as claiming “pre-eminence over society itself”¹⁸⁷ as it “apparently soar[ed] high above society.”¹⁸⁸ For Marx, the Paris Commune, a revolutionary government that seized control of Paris in the spring of 1871, was an attempt to replace the illusory nature of centralized bureaucracy with governance that was actually universally oriented through universal suffrage. As he remarked, “The Communal Constitution would have restored to the social body all the forces hitherto absorbed by the state parasite feeding upon, and clogging the free movement of, society.”¹⁸⁹ This removal of the parasite (bureaucracy) was key to the regeneration of French society.

Marx argued that the beauty of the Paris Commune was that it wrested power from centralized French administration and transferred it to local government by subjecting the administration to local elections. This structural change therefore introduced radical democracy into the bureaucracy itself.¹⁹⁰ Public servants would be paid a worker’s wage and could be elected and dismissed by the citizenry. Anticipating capture theory, which developed in the next century, Marx believed that voting was the only true connection between civil society and the state because any indirect institutional mechanism for accountability was prone to socioeconomic capture. As he said in his critique of Hegel’s later, institutionalist proposals: “Voting is the actual relationship of actual civil society to the civil society of the legislative power [V]oting is the immediate, direct relationship of civil society to the political state, not only in appearance but in existence.”¹⁹¹ Public administration based on universal suffrage would result in the gradual disappearance of the distinction between the state and the citizenry.

Importantly, legislative oversight of the bureaucracy was not enough to restore the connection between the citizenry and administration. Instead, direct citizen involvement in government had to be extended into the bureaucracy for true democratic administration. As Marx put it, “Instead of deciding once in three or six years which member of the ruling class was to misrepresent the people in Parliament, universal suffrage was to serve the people, constituted in the Communes.”¹⁹² Just as Gneist feared, Marx was aware that a

187. KARL MARX, *THE CIVIL WAR IN FRANCE* 81 (Elec. Book Co. 2014) (1871) [hereinafter MARX, CIVIL WAR].

188. *Id.* at 78.

189. *Id.* at 82.

190. *Id.* at 85–88.

191. Karl Marx, *Critique of Hegel’s Philosophy of State* (1843), in KARL MARX: *WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY* 151, 202 (Lloyd D. Easton & Kurt H. Guddat eds. & trans., 1997) (emphasis omitted).

192. MARX, *CIVIL WAR*, *supra* note 187, at 81.

legislature could be co-opted, just as administration had been co-opted, by particular factions in society. For Marx, this coupling of the administration to the citizen through the franchise was central to the ability of citizens to be free in modern society. As he provocatively put the issue, “Freedom consists in transforming the state from an agency superior to society into one thoroughly subordinated to it.”¹⁹³ For Marx and the other radicals, true liberty was achieved through localizing and democratizing administrative power in the people, rather than subjecting administration to another political institution and hoping that institution listened to the wishes of the people.

3. The Core Ideas of the Radicals

The radicals proposed many different ways to localize and democratize administration to instill direct democratic accountability. These proposals included the following: (1) increase the powers of local government vis-à-vis the central state, (2) introduce elections, (3) expand the avenues for civic participation in agency policymaking, (4) establish universal suffrage, and (5) boost the powers of civic organizations. Given this diversity of proposals, it is easy to lose track of the similar theoretical commitments held by each radical. This Subsection elaborates on the central ideological and structural moves that run across the administrative radical theorists so the next Part can analyze how the radical administrative tradition can inform contemporary structural public law.

The main goals of the administrative radicals were threefold. First, the radicals feared that the administration would become a fully independent institution disconnected from the citizens that it coerced. Their fears that administration would slip from the hands of the citizenry ran throughout their writings. Importantly, contemporary critics of administration express this concern in remarkably similar terms. Recall Chief Justice Roberts’s worry in *Free Enterprise Fund* that too much agency insulation would result in agencies slipping from the hands of the people.¹⁹⁴ To mitigate this fear, the radicals proposed a variety of mechanisms to draw the citizens themselves closer to administration. While instituting elections for agency staff was the most obvious proposed method of achieving this goal, other measures,

193. Karl Marx, Critique of the Gotha Programme (1875), in MARX: LATER POLITICAL WRITINGS, *supra* note 2, at 208, 221.

194. *Free Ent. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010) (“The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”).

such as subjecting administration to localized control and boosting the power of civic organizations, also served the same goal of tightening the links between administration and the people to instill direct democratic accountability.¹⁹⁵

Second, the radicals focused on the administrative state as a unique political institution within government, rather than merely one to be controlled by external political institutions. In contrast, recall that much like contemporary separation of powers discussions, nineteenth-century institutionalists sought to control the bureaucracy externally by balancing the powers held by other political institutions over administration. In this separation of powers framework, the administration becomes subservient to the external control of other political institutions, perpetually stuck in the middle of a tug-of-war as the other institutions jostle for control over agencies.

The administrative radicals rejected this separation of powers model. Presaging institutional capture debates, the radicals viewed the legislature and executive with skepticism as sites of factional struggle that often merely responded to elite, moneyed, and propertied individuals within civil society.¹⁹⁶ The radicals observed how the democratic fervor of reform in 1848 was often tempered and co-opted by other factional interests in the subsequent decades, leading them to recognize that other institutions could not be trusted to manage administration in the interests of the people.¹⁹⁷ In short, the radicals did not believe other political institutions would instill genuine democratic equality in the administrative state. This observation spurred not only Marx's extremist support of the Paris Commune as the people rising up to wrestle political power from their economic and politic masters but also Gneist's more modest ideas of including the

195. See *supra* Subsection II.C.2 (discussing various proposals by the radical theorists to bring the people closer to administrative policymaking).

196. See *supra* Subsection II.C.2 (discussing the skepticism of the radicals toward legislative and executive institutions).

197. On the attempted neutering of democratic popular impulses by European elites after 1848, see Thomas C. Jones, *French Republicanism After 1848*, in *THE 1848 REVOLUTIONS AND EUROPEAN POLITICAL THOUGHT* 70, 72 (Douglas Moggach & Gareth Stedman Jones eds., 2018) (“Without universal suffrage, a small elite monopolised power for its own ends, at the expense of the wider disenfranchised nation.”); John Breuilly & Iorwerth Prothero, *The Revolution as Urban Event: Hamburg and Lyon During the Revolutions of 1848-49*, in *EUROPE IN 1848: REVOLUTION AND REFORM* 371, 397 (Dieter Dowe, Heinz-Gerhard Haupt, Dieter Langwiesche & Jonathan Sperber eds., David Higgins trans., 2001) (stating that elites in both Lyon and Hamburg “had no wish to see uncontrolled popular action and sought instead to channel politics through the oral culture of clubs and relatively closed political meetings”).

public within localized administrative governance on an equitable basis.¹⁹⁸

Given they did not trust other political institutions to genuinely represent the people, the radicals analyzed the administrative state on its own terms. They recognized that administrative institutions had unique goals and functions from other political institutions. Due to the expertise and power of modern administrative institutions, the radicals believed that no external political institution or combination of institutions could hold agencies accountable and protect the citizenry.¹⁹⁹ As France observed during the Revolution, the expertise of bureaucrats necessarily meant that external political institutions relied on those very same bureaucrats to implement their policies, which generated agency independence even among the very same French revolutionaries who scorned the bureaucracy before they rose to power.

Similarly, the Supreme Court has repeatedly acknowledged how bureaucratic expertise insulates agencies from other political institutions in a string of cases that permitted agency discretion—from matters of agency interpretation in *Chevron*²⁰⁰ and *Auer*²⁰¹ to matters of judicial review of agency policy in *Vermont Yankee*²⁰² and *State Farm*.²⁰³ The radicals saw this process play out during the French Revolution and recognized that indirect democratic accountability of administration through other political institutions could not solve the problems caused by bureaucratic power.²⁰⁴ If one is concerned with the ability of agencies to improperly coerce the citizenry without adequate democratic accountability, then, the radicals argued, one must analyze and structure the administrative state on its own terms to solve this concern.

Related to the previous two points, the radicals viewed the administrative state in what I have previously called “relational” terms,²⁰⁵ not institutional terms. Rather than thinking of separation of powers through an institutionalist lens to balance the powers of

198. See *supra* note 189 and accompanying text (explaining Marx’s support of Paris Commune); *supra* note 175 and accompanying text (explaining Gneist’s advocacy of self-government via localization of administration).

199. See WEBER, *supra* note 128, at 991 (arguing that the legislature and executive were mere “dilettante[s]” in policy matters compared to the expertise of skilled bureaucrats).

200. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

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

202. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

203. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

204. See *supra* note 193 and accompanying text (discussing Marx’s proposal for citizen involvement in bureaucratic administration).

205. See Havasy, *supra* note 25, at 757 (“Relational fairness states that all persons potentially affected by an agency action must have the opportunity to deliberate with the agency during administrative decision-making.”).

different political institutions over agencies, the radicals focused on the direct relationships between agencies and the citizenry so the citizens themselves could hold agencies accountable.²⁰⁶ This focus between agencies and citizens was the motivation behind all their proposals, from administrative elections to the localization of administration and the involvement of citizen participation in administrative policymaking.²⁰⁷ Therefore, the unit of analysis for the radicals was whether citizens were in fact improperly coerced by agency actions, rather than whether the distribution of powers between discrete political institutions was properly balanced in the abstract. In a sense, the theoretical became personal for the radicals because their foremost concern was ensuring that agencies stayed tied to the citizens as much as possible given the demands of modern governance. Most of the radicals rejected Weber's contention that bureaucratic dominance was inevitable²⁰⁸ and looked to create mechanisms whereby the citizens could directly hold agencies accountable to protect their own freedoms.

D. Early American Scholarly Uptake of the Radicals

As American states and the federal government started to build modern regulatory apparatuses in the late nineteenth century,²⁰⁹ these administrative institutions forced American lawyers to grapple with the same questions that Europeans had previously debated regarding the place of administration in government. Given this large-scale reinvention of government, everything was theoretically on the table, including even jettisoning separation of powers entirely as an analytic legal principle.²¹⁰ While much has been written about the intellectual lineage of Progressive and New Deal champions of administration, less has been said about how the first American administrative law

206. See *supra* note 193 and accompanying text (discussing Marx's proposal for direct citizen involvement in bureaucratic administration).

207. See, e.g., *supra* note 175 and accompanying text (explaining Gneist's advocacy of self-government via localization of administration).

208. WEBER, *supra* note 128, at 971 (arguing that the state is "absolutely dependent upon" the bureaucracy due to politicians relying on its expertise to implement their policies).

209. As Jerry Mashaw's magisterial book showed, the United States had administrative structures in place before the late nineteenth century. See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 150–51 (2012) (discussing the emergence of administrative structures during Andrew Jackson's presidency due to increases in scale of government and the classical republican commitment to assure virtue through governmental action).

210. See FRANK J. GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION* 213–14 (1911) (noting Supreme Court holdings that permit a lack of separation of powers in state governments and acknowledging the "widespread movement throughout the country" of abandoning the distinction between legislative and executive authorities in city government).

scholars—Woodrow Wilson, Frank Goodnow, and Ernst Freund—looked to radical theorists for inspiration for how modern democratic governance could accommodate and control administrative institutions.²¹¹ By the time of the New Deal, however, newer administrative law scholars, such as future Justice Felix Frankfurter, rejected their predecessors and instead embraced an institutionalist-inspired view of administrative law grounded in constitutional separation of powers principles.²¹² The radicals and their influence on early American administrative law became gradually forgotten as a path not traveled, waiting for others to recover their arguments.

Scholars have already forcefully argued that Progressives and New Dealers were influenced by Hegel's conception of the state.²¹³ Central to Hegel's view was the importance he placed on the administration, rather than the legislature or liberal constitutionism, as the primary institution to preserve individual freedom.²¹⁴ This concern was evident in American politicians and lawyers as they constructed the foundations of the American administrative state.²¹⁵ In particular, Wilson, Goodnow, and Freud were each influenced by the centrality of administration in Hegel's work when they turned their attention to the nascent American administrative law developing in the late nineteenth century and early twentieth century.²¹⁶ While Wilson

211. Bill Novak recently discussed Wilson's and Goodnow's concerns about administration being sensitive to democracy. William J. Novak, *The Progressive Idea of Democratic Administration*, 167 U. PA. L. REV. 1823, 1836–40 (2019) (arguing that modern administrative law emerged out of the antiformalism brought about by Wilson's and Goodnow's concerns). However, his discussion focused on these concerns as part of the larger antiformalist turn in the Progressive Era, rather than connecting these concerns to their radical sources of intellectual inspiration. *Id.*

212. See *infra* notes 263–267 and accompanying text.

213. See HAMBURGER, *supra* note 4, at 452 (“From this German and even Hegelian perspective, administrative law could have deep moral appeal for progressive American academics in their struggle against trusts, monopolies, and other forms of selfishness.”); EMERSON, *supra* note 168, at 61–112 (discussing the influence of Hegel's view of the state on Woodrow Wilson's writings and eventual presidential policies); RONALD J. PESTRITTO, *WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM* 16–18 (2005) (explaining Hegel's philosophy of the state and noting that Woodrow Wilson's view of civil service and the state correspond with Hegel's); JEAN M. YARBROUGH, *THEODORE ROOSEVELT AND THE AMERICAN POLITICAL TRADITION* 19–24, 44–46 (2012) (discussing Hegel's impact on Theodore Roosevelt and John W. Burgess, Roosevelt's professor at Columbia Law School); JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870-1920*, at 47 (1986) (discussing Hegel's importance to American and European progressives); MARC STEARS, *PROGRESSIVES, PLURALISTS, AND THE PROBLEMS OF THE STATE: IDEOLOGIES OF REFORM IN THE UNITED STATES AND BRITAIN, 1909–1926*, at 26 (2002) (discussing Hegel's importance to early twentieth-century British pluralists and American progressives).

214. See HEGEL, *supra* note 144, at 287.

215. See Sordi, *supra* note 126, at 27–28 (providing statement of Woodrow Wilson that “liberty depends incomparably more upon administration than upon constitution”).

216. See *supra* note 213. Blake Emerson demonstrated how Hegel's work and the subsequent development of the *Rechtsstaat* by nineteenth-century German lawyers influenced American

and Goodnow are both often portrayed as technocrats who sought to minimize the influence of politics over administration,²¹⁷ a closer reading of their writings and intellectual influences shows that they were deeply concerned with how citizens could use democratic mechanisms to shape and control administration.

The fact that Wilson, Goodnow, and Freund looked to French and German legal theorists is unsurprising given how much slower administrative law developed in the Anglo-American world.²¹⁸ In the mid-nineteenth century, French and German public law scholars already noticed the birth of administrative law as a discrete area of public law and quickly created professional societies and law journals to study this new area of law.²¹⁹ This professionalization of administrative law meant that French and German administrative law advanced much more rapidly than in most other parts of Europe and the United States.²²⁰ As a result, late nineteenth- and early twentieth-century American lawyers concerned with administrative power and the role law could play in controlling it looked to French and German administrative law theorists, including Hegel and Gneist, for inspiration.²²¹ German administrative law scholars were particularly influential to Wilson, Goodnow, and Freund because each of them either

Progressives. EMERSON, *supra* note 213, at 19–24. While Emerson argued that American Progressives domesticated the *Rechtsstaat* to increase democratic input in administrative policymaking, this Article shows that there was already a strand of European intellectual thought that focused on democratizing the administrative state. *Id.* at 44–46. The thought of the radicals then influenced the first wave of American administrative law scholars in their proposals to domesticate administration in the United States.

217. See, e.g., JOSEPH HEATH, *THE MACHINERY OF GOVERNMENT: PUBLIC ADMINISTRATION AND THE LIBERAL STATE* 55 (2020) (“On the latter view, expressed canonically by Woodrow Wilson, public administration involves a neutral set of technical skills that can be applied to any goal.”); PIERRE ROSANVALLON, *DEMOCRATIC LEGITIMACY: IMPARTIALITY, REFLEXIVITY, PROXIMITY* 43 (Arthur Goldhammer trans., 2011) (stating that Woodrow Wilson and Frank Goodnow developed a path to the democratic ideal of scientific policy and rational administration ensuring realization of the common good).

218. See Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 201–02 (1887) (discussing how the “science of administration” has been developed “by French and German professors” and “not on this side [of] the sea”).

219. See STOLLEIS, *supra* note 156, at 373–75 (explaining the emerging recognition and establishment of administrative law in Germany).

220. France also developed administrative law as its own body of public law by the early to mid-1800s. For early French administrative law books, see generally, for example, GABRIEL DUFOUR, *TRAITÉ GÉNÉRAL DE DROIT ADMINISTRATIF APPLIQUÉ OU EXPOSÉ DE LA DOCTRINE ET DE LA JURISPRUDENCE* (Paris, Cotillon 2d ed. 1854–1857); and M.F. LAFERRIERE, *COURS DE DROIT PUBLIC ET ADMINISTRATIF* (Paris, Joubert 5th ed. 1860) (1839).

221. Other German administrative lawyers who influenced early American administrative law scholars include Lorenz von Stein and Johann Bluntschli. WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 242 (1996); see also SAGER ET AL., *supra* note 177, at 23 (listing von Stein and Bluntschli among scholars who influenced Wilson and Goodnow).

studied law in Germany themselves (Goodnow and Freund)²²² or were trained by scholars who were trained in Germany (Wilson).²²³

These continental influences led Wilson, Goodnow, and Freund to argue that modern American public law needed to focus its attention on administrative law, rather than constitutional law. As Wilson provocatively put the matter in an early essay on administration in 1885, “[T]he period of constitution-making is passed now. We have reached new territory in which we need new guides, the vast territory of administration.”²²⁴ Goodnow, whose seminal *Comparative Administrative Law* marked the earliest American administrative law textbook when published in 1893, framed the issue similarly in his preface to the book: “The great problems of modern public law are almost exclusively administrative in character. While the age that has passed was one of constitutional, the present age is one of administrative reform.”²²⁵

As a result of their centering of the modern state in administrative law, Wilson and Goodnow both went even further to reject Montesquieu’s separation of powers paradigm as a framework to guide the development of modern public law. Given that Montesquieu used mid-eighteenth-century England as his guide to develop his separation of powers principle, Wilson argued that separation of powers was only helpful to control government powers in a monarchical state with a strong aristocracy.²²⁶ Therefore, he believed it was inapplicable to American popular government and, instead, actively hindered the development of genuine democracy in the United States.²²⁷ Goodnow,

222. EMERSON, *supra* note 168, at 233 n.244 (stating that both Goodnow and Freund studied in Berlin under Gneist). Freund also did graduate work in political science at Columbia under Goodnow. *Id.*

223. DENNIS J. MAHONEY, *POLITICS AND PROGRESS: THE EMERGENCE OF AMERICAN POLITICAL SCIENCE* 22 (2004) (discussing that Wilson’s graduate mentors at Johns Hopkins University, Hebert Baxter Adams and Richard T. Ely, both did graduate work in Germany). It was Ely who turned Wilson onto studying administration, as Wilson attended his short lecture series in 1884–1885 on comparative administration and he privately pushed Wilson to study the topic. Letter from Woodrow Wilson to Ellen Louise Axson (Oct. 6, 1884), in 3 *THE PAPERS OF WOODROW WILSON* 335, 335 n.1 (Arthur S. Link ed., 1967); RICHARD T. ELY, *GROUND UNDER OUR FEET: AN AUTOBIOGRAPHY* 114 (1938) (saying that he convinced Wilson that “the problem in our age is not one of legislation but fundamentally one of administration”).

224. Woodrow Wilson, *Notes on Administration* (Nov. 15, 1885), in 5 *THE PAPERS OF WOODROW WILSON* 49, 52 (Arthur S. Link ed., 1968) (emphasis omitted).

225. 1 FRANK J. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW: ORGANIZATION*, at iv (New York, Knickerbocker Press 1893).

226. See Wilson, *supra* note 224, at 51 (“When [Montesquieu] said that it was essential for the preservation of liberty to differentiate the executive, legislative, and judicial functions of government . . . he was thinking of an undemocratic state in which the executive ruled for life by hereditary right . . .”).

227. See Ronald J. Pestritto, *Introduction to WOODROW WILSON: THE ESSENTIAL POLITICAL WRITINGS* 12 (Ronald J. Pestritto ed., 2005) (“[T]he separation-of-powers system, as Wilson

meanwhile, criticized separation of powers on a more practical level, calling it “unworkable” in the United States given the amount of doctrinal exceptions the Supreme Court had already created by the turn of the twentieth century²²⁸ in cases such as *In re Kollock*,²²⁹ *Boske v. Comingore*,²³⁰ and *Buttfield v. Stranahan*.²³¹ In 1911, Goodnow cheered that these cases signaled the Supreme Court was turning away from a formalistic conception of separation of powers to embrace a functionalist account based on the best mechanisms to control specific government functions.²³²

Given their twin beliefs in the centrality of administration to the modern state and their rejection of separation of powers, the logical next question is how these first administrative law scholars believed administrative power should be controlled in the United States. One obvious answer was to look at the proposals of European scholars who had previously theorized the role of administration, but this presented two problems. First, many European scholars, as previously discussed, adopted institutionalist solutions to taming bureaucratic power that relied on updating Montesquieu’s separation of powers to account for administration.²³³ This solution would not work given the American scholars’ rejection of separation of powers as an organizing principle for modern public law.

Second, many of the German law scholars who Wilson, Goodnow, and Freund relied on in their theorizing of administrative law viewed administration as a benevolent force in government to restrain the power of the monarch under rule of law principles.²³⁴ While they each embraced these rule of law features, Wilson, Goodnow, and Freund were also sensitive to the fact that American democratic self-government needed to be preserved in any workable system to control

understood it, was designed to protect the people from themselves by throwing up as many obstacles as possible to the implementation of their will.”). Obviously, Wilson’s view of who comprised the United States’ “popular” government was narrower than our current vision given his virulent racism. See ERIC S. YELLIN, *RACISM IN THE NATION’S SERVICE: GOVERNMENT WORKERS AND THE COLOR LINE IN WOODROW WILSON’S AMERICA* 67, 159–63 (2013) (explaining “the fundamental racism of Woodrow Wilson” by recounting his defense of racial segregation as efficient government action in a conversation with Black newspaper editor William Monroe Trotter).

228. FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT* 14 (1900).

229. 165 U.S. 526 (1897).

230. 177 U.S. 459 (1900).

231. 192 U.S. 470 (1904).

232. See GOODNOW, *supra* note 210, at 213–14 (“But both as a principle of political science and as a rule of law, its force is being much weakened.”).

233. See *supra* Subsection II.C.1.

234. See, e.g., *supra* note 182 and accompanying text.

administration in the United States.²³⁵ As Wilson framed the issue, “[W]e must Americanize it, and that not formally, in language merely, but radically, in thought, principle, and aim as well. It must learn our constitutions by heart; must get the bureaucratic fever out of its veins; must inhale much free American air.”²³⁶

Tocqueville’s distrust of centralization and his celebration of American federalized government loomed large in American scholars’ concerns regarding how to control administration in the United States. As Wilson put the matter in an early 1879 essay, “One has only to read de Tocqueville[] . . . to get a vivid idea of the omnipresence of [centralized bureaucracy’s] influence. . . . Not content with mere sovereignty, the central government assumed the guardianship of all the interests of the people, of even their most private concerns.”²³⁷ Freund was likewise worried about administrative centralization, stating, “discretionary administrative power over individual rights” by a centralized administrative power is “undesirable per se and should be avoided as far as may be.”²³⁸ Similar to the radical administrative tradition, the first American administrative law scholars’ fears of administrative power led their search for mechanisms to control it.

The work of Gneist particularly stood out to Wilson and Goodnow because Gneist’s work pointed to a manner in which administrative law could fit within an American system of democratic governance. Gneist’s influence on the development of Wilson’s thoughts on administration is particularly insightful. Early in his writings on administration—such as his pathbreaking article “The Study of Administration,” written in November 1886 and published in 1887—Wilson had already rejected separation of powers to control administration and had begun looking to European public law scholarship to inform his work,²³⁹ but he was unclear about how such scholarship could be Americanized. He tentatively stated in his article

235. See Ernst Freund, *The Law of the Administration in America*, 9 POL. SCI. Q. 403, 407–08 (1894) (“Our theory is this: not only are the people the source of governmental power, but they exercise that power themselves.”); FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 229 (1905) (“The participation of numerous citizens in the work of administering government tends to increase, by the sure method of practice, the political capacity of the people.”).

236. Woodrow Wilson, *The Study of Administration* (Nov. 1, 1886), in 5 *THE PAPERS OF WOODROW WILSON*, *supra* note 224, at 359, 363–64.

237. Woodrow Wilson, *Self-Government in France* (Sept. 4, 1879), in 1 *THE PAPERS OF WOODROW WILSON* 515, 519 (Arthur S. Link ed., 1966).

238. Ernst Freund, *Historical Survey*, in *THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* 9, 22–23 (1923) (emphasis omitted).

239. See Wilson, *supra* note 236, at 364–66 (analyzing European government administration); *id.* at 363 (stating that Americans must look to “French and German professors” to learn about administration); *id.* at 373 (rejecting Montesquieu’s separation of powers).

that “administration in the United States must be at all points sensitive to public opinion,”²⁴⁰ and he embraced the importance of localizing administration,²⁴¹ but he did not yet have any concrete mechanisms to advance these goals.

This tentativeness stemmed from the fact that Wilson was in the middle of teaching himself German and therefore could not yet read Gneist, whose scholarship was not translated into English.²⁴² Thus, Wilson’s readings of European administrative law scholarship were limited to those authors whose works had been translated into English, or whose works had been told to him secondhand by his mentors at Johns Hopkins University who were trained in Germany and could read German. By 1887, however, Wilson had taught himself German and began vociferously reading Gneist’s oeuvre, among other German scholars.²⁴³

By the time Wilson gave his annual lectures on administration at Johns Hopkins in February and March 1888,²⁴⁴ he had multiple lectures on localizing administration in the United States at the state and municipal levels. At least one of these lectures was entirely based on Gneist’s writings about his successful efforts to localize administration in Germany in the mid-1870s.²⁴⁵ As Wilson framed the problem in an earlier lecture, the question was how to devise a system

240. *Id.* at 376.

241. *See id.* at 380 (discussing the importance of preserving local self-government).

242. *See* Letter from Woodrow Wilson to Edwin Robert Anderson Seligman (Apr. 19, 1886), *in* 5 THE PAPERS OF WOODROW WILSON, *supra* note 224, at 163 (declining to review Gneist’s new book because “I am self-taught, and *recently* self-taught, in German”).

243. Wilson’s first mention of Gneist’s scholarship is in a review of another German scholar’s book. Woodrow Wilson, Book Review, PRESS (Phila.), Apr. 17, 1887 (reviewing H. VON HOLST, 1 THE CONSTITUTIONAL LAW OF THE UNITED STATES OF AMERICA (Alfred Bishop Mason trans., Chicago, Callahan & Co. 1887)), *reprinted in* 5 THE PAPERS OF WOODROW WILSON, *supra* note 224, at 490, 495. By the time Wilson created his first working bibliography in 1890, four of his twenty-six works on administration were by Gneist. Woodrow Wilson, A Working Bibliography, *in* 6 THE PAPERS OF WOODROW WILSON 563, 563–66 (Arthur S. Link ed., 1969).

244. Wilson gave an annual lecture series on administration at Johns Hopkins University from 1888 to 1896. Wilson Launches His Lectures on Administration at the Johns Hopkins (Feb. 17, 1888), *in* 5 THE PAPERS OF WOODROW WILSON, *supra* note 224, at 668, 668 (discussing the 1888–1890 lectures); *Editorial Note* to Wilson’s Lectures on Administration at the Johns Hopkins, 1891–93, *in* 7 THE PAPERS OF WOODROW WILSON 112, 112–14 (Arthur S. Link ed., 1969) (same for 1891–1893); Woodrow Wilson, Notes for Lectures at the Johns Hopkins (Jan. 26, 1893 to Feb. 13, 1896), *in* 8 THE PAPERS OF WOODROW WILSON 81, 81 (Arthur S. Link ed., 1970) (same for 1893–1896).

245. For discussions of local administration in Wilson’s notes for the February 25, March 2, and March 16 lectures in 1888, *see* Woodrow Wilson, Notes for Two Classroom Lectures at the Johns Hopkins (Feb. 24–25, 1888), *in* 5 THE PAPERS OF WOODROW WILSON, *supra* note 224, at 691, 693–95 [hereinafter Wilson, Feb. 25 Lecture]; Woodrow Wilson, Notes for a Public Lecture at the Johns Hopkins (Mar. 2, 1888), *in* 5 THE PAPERS OF WOODROW WILSON, *supra* note 224, at 697, 697–705 [hereinafter Wilson, Mar. 2 Lecture]; Woodrow Wilson, Notes for a Public Lecture at the Johns Hopkins (Mar. 16, 1888), *in* 5 THE PAPERS OF WOODROW WILSON, *supra* note 224, at 711, 711–13 [hereinafter Wilson, Mar. 16 Lecture].

of administration whereby the law-giving power resided in the central government but administrative power was localized.²⁴⁶ The answer for Wilson, based on his readings of Gneist, was to both revitalize local administration and develop a system whereby the citizen actively aids in administration.²⁴⁷ Calling out Baltimore progressive reform organization One Hundred, Wilson implored, “Establish, therefore, self-government; make the voter an administrator. Take your committees of One Hundred into your govts [sic]; convert their transient zeal into permanent duty: harness the community to the State.”²⁴⁸ In Wilson’s later lectures on public law in 1892, after he firmly conceived of administration as an area of public law, Wilson went even further to propose what appeared to be a substantive canon of construction that the interpretation and implementation of laws by local authorities should be read liberally to ensure local administrative autonomy.²⁴⁹ Wilson continued to advocate for these reforms during his annual lectures on administration at Johns Hopkins from 1888–1896,²⁵⁰ as well as during his touring public lectures across the Northeast during the 1890s.²⁵¹

Gneist also loomed particularly large in Goodnow’s proposals to control administrative power. In fact, both Goodnow and his mentor at Columbia University, political scientist John Burgess, studied under Gneist in Berlin, and Goodnow openly acknowledged his debt to Gneist’s “published works and personal influence” in his works.²⁵² In his first book on administrative law, *Comparative Administrative Law*, Goodnow advocated that administration should be organized so “that the people from whom the governmental power comes and for whose benefit it is to be exercised, should have a control over the bureaucracy in order that the deliberate wishes of the community may have their

246. See Wilson, Feb. 25 Lecture, *supra* note 245, at 695 (suggesting principle that law should be centrally given but localized power ought to be retained).

247. See Wilson, Mar. 2 Lecture, *supra* note 245, at 705 (“The administration of the laws outside the capital is controlled entirely by local officials locally elected, and whose responsibility is only to their constituents, not to the central authorities . . .”); *id.* at 712 (arguing to “make the voter an administrator”).

248. Wilson, Mar. 16 Lecture, *supra* note 245, at 712 (emphasis omitted).

249. See Woodrow Wilson, Notes on Administration (Feb. 1, 1892), in 7 THE PAPERS OF WOODROW WILSON, *supra* note 244, at 381, 385, 390 (“Local authorities must be allowed, if they are not to be smothered, to move freely within liberal limits of law, not under direction, but only under a limiting supervision.”).

250. See sources cited *supra* note 244.

251. See sources cited *supra* note 244.

252. GOODNOW, *supra* note 225, at vi; MAHONEY, *supra* note 223, at 21–22 (discussing Burgess studying under Gneist in Germany).

expression in the action of the administration.”²⁵³ His solution to instill self-government over administration directly followed Gneist by proposing the localization of administration combined with the active participation of the citizenry in all levels of administration.²⁵⁴ Goodnow continued this dual localization and participation proposal in his later work on American administrative law *Principles of Administrative Law in the United States* (1905), which is arguably the first American casebook focused on American administrative law.²⁵⁵ Goodnow extended these proposals in his other famous work on American administration *Politics and Administration*, where he followed Hegel and Gneist to argue that civic organizations in the United States, especially political parties, needed to be strengthened and democratized so that they can transmit the preferences of the citizenry to state and federal administrations.²⁵⁶

Following the radical tradition, these first-generation American administrative law scholars viewed administrative law on relational terms. Both Goodnow and Freund framed administrative law as being centrally concerned with the relationship between administration and the freedoms of individuals.²⁵⁷ As Goodnow stated, “Individuals further are so at the mercy of administrative officers, who have behind them the entire power of the state, that some protection must be offered against the violation of private rights. The administration is often thrown into relations with individual citizens which must necessarily be hostile.”²⁵⁸ Freund, similarly, viewed administrative law as the mechanism to “settle the conflicting claims of executive or administrative authority on the one side, and of individual or private

253. 2 FRANK J. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW: LEGAL RELATIONS* 13 (New York, Knickerbocker Press 1893).

254. *See id.* at 11–13 (discussing citizen participation in administration); GOODNOW, *supra* note 225, at 38–39 (discussing that state and municipal administration should be on equal standing with national administration).

255. GOODNOW, *supra* note 235, at 170, 229 (discussing the importance of local administration and citizen participation in administration, respectively). Bruce Wyman published a book on administration in 1903, but he ignored legislative and judicial controls over agencies. *See* BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS*, at v–x (1903) (showing table of contents including chapters on the law, position, independence, powers, duties, membership, organization, theory, authority, execution, legislation, regulation, adjudication, processes, and jurisdiction of the administration).

256. *See* GOODNOW, *supra* note 228, at v–vi (arguing for the “subjection of the political party, as a political organ recognized by law, to an effective public control, in the hope of making the party and its leaders more responsive to the public will”).

257. *See* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 *YALE L.J.* 1362, 1461 (2010) (“For Goodnow, the law fixing the competence of administrative authorities and that fixing the rights of individuals in relation to those authorities, were but two sides of the same coin . . .”).

258. GOODNOW, *supra* note 235, at 368.

right on the other.”²⁵⁹ As a result of their relational view of administrative law, both Goodnow and Freund examined administrative law at all levels of American government, devoting substantial sections of their casebooks to municipal, state, and federal administrative law to document all of the manners in which the modern state interacted with individual citizens.²⁶⁰ For these first-generation administrative law scholars, and those influenced by them in the early 1900s, the relationships between administration and the citizen were central to their conception of administrative law as a unique domain of public law.²⁶¹

However, a competing conception of administrative law among early twentieth-century lawyers, drawn from the institutionalist tradition, subsequently sprouted in the ensuing decades. These lawyers viewed the province of administrative law as primarily structural and constitutional in nature, rather than individual and local as discussed above. Presaging this intellectual development, Harvard Law professor Bruce Wyman’s 1903 textbook on administration considered administrative law to simply be the “complement to constitutional law” in that administrative law focused on smaller scale and more technical questions of how to “govern the executive department in administering the law.”²⁶² Picking up on this structural strand of administrative law, Frankfurter and J. Forrester Davison viewed administrative law in their pathbreaking 1932 casebook as inexorably linked to constitutional law.²⁶³ Given its constitutional focus, Frankfurter and Davison largely ignored municipal and state administrative law. Instead, over two-thirds of the book discussed U.S. Supreme Court decisions to emphasize both separation of powers and federal judicial review of administrative actions.²⁶⁴

Indeed, Freund and Frankfurter had a near decade long debate before Freund’s death on the proper scope of administrative law as a

259. ERNST FREUND, *CASES ON ADMINISTRATIVE LAW: SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS* 1 (1911).

260. *See id.*; GOODNOW, *supra* note 225, at xi–xii (table of contents showing sections addressing these topics).

261. For example, Harvard Law professor Adolf Berle cited Freund’s definition of administrative law in his 1917 article on the expansion of administrative law. A.A. Berle, Jr., *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430, 432 n.4 (1917).

262. WYMAN, *supra* note 255, § 6, at 23.

263. *See generally* FELIX FRANKFURTER & J. FORRESTER DAVISON, *CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW* (1932) (devoting over two-thirds of their casebook to the constitutional questions related to agencies).

264. *Id.*

domain of public law.²⁶⁵ In dueling book reviews of each other's casebooks, Frankfurter first criticized Freund in 1924 for failing to recognize that "our administrative law is inextricably bound up with constitutional law."²⁶⁶ Freund's retort in his 1932 book review criticized Frankfurter and Davison for omitting the relationship between the citizen and the common law, municipal administrative law, and state administrative law.²⁶⁷ However, the next wave of administrative law textbooks in the late 1930s to early 1940s—including those by Georgetown Law professor Robert Adam Maurer, Michigan Law dean E. Blythe Statson, and Columbia Law professor and architect of the Administrative Procedure Act ("APA") Walter Gellhorn—followed Frankfurter and Davison by focusing on the constitutional law aspects of administrative law and judicial review of administrative processes.²⁶⁸ In an ironic twist, Harvard Law professor Louis Jaffe, while reviewing Gellhorn's new casebook in 1942, criticized Freund's view of administrative law as striking "a conservative picture of a system" for failing to emphasize that "the impressive growth of non-traditional administrative functions had made it uncomfortably evident that the basic assumptions concerning the distribution of powers were being cruelly tried."²⁶⁹ Thus by the 1940s, this scholarly group that sought to update separation of powers to account for administration had won the intellectual battle in American legal circles.²⁷⁰ Meanwhile, the radical tradition, which influenced the first generation of American administrative law scholars in Wilson, Goodnow, and Freund, was ultimately forgotten along the way as the American administrative state developed during the twentieth century.

265. For an in-depth discussion of the professional and scholarly debate between Frankfurter and Freund, see generally Daniel R. Ernst, *Ernst Freund, Felix Frankfurter, and the American Rechtsstaat: A Transatlantic Shipwreck, 1894-1932*, 23 *STUD. AM. POL. DEV.* 171 (2009).

266. Felix Frankfurter, Book Review, 37 *HARV. L. REV.* 638, 641 (1924) (reviewing *THE GROWTH OF AMERICAN ADMINISTRATIVE LAW*, *supra* note 238).

267. Ernst Freund, Book Review, 46 *HARV. L. REV.* 167, 170 (1932) (reviewing *FRANKFURTER & DAVISON*, *supra* note 263) ("It is one thing to omit from a casebook on administrative law the law of office and officers, the organization of local government, the position of the chief executive, or the administrative share in enforcement, and quite another thing to omit the common-law system of remedial relief.").

268. See *ROBERT ADAM MAURER, CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW* (1937); *E. BLYTHE STASON, CASES ON THE LAW OF ADMINISTRATIVE TRIBUNALS* (1936); *WALTER GELLHORN, ADMINISTRATIVE LAW: CASES AND COMMENTS* (1940). Some of these casebook authors failed to even mention Freund and Goodnow at all. See Ernst, *supra* note 265, at 185–86 (discussing various casebooks and their commentary, or lack thereof, on Freund and Goodnow).

269. Louis L. Jaffe, Book Review, 54 *HARV. L. REV.* 367, 368–69 (1940) (reviewing *GELLHORN*, *supra* note 268).

270. The other axis of this scholarly debate from the 1920s to 1940s was the contrasting approaches to implementing rule of law principles to reviewing administrative actions. See generally *DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014) (tracing these debates from 1900 to the 1940s).

E. The Purpose of Excavating the Radical Tradition

The purpose of excavating the intellectual history of the radicals given current debates regarding the power of our administrative state is twofold. First, it is important for American lawyers to recognize that contemporary concerns regarding the ability of agencies to coerce citizens without proper democratic accountability are not newfound, nor purely Anglo-American, worries. Rather, these concerns were first raised two centuries ago by an unlikely group of lawyers and theorists at the same time the modern administrative state itself was forged in continental Europe. While some of the radicals proved influential in the development of public law in Europe,²⁷¹ their ideas have been largely forgotten on this side of the Atlantic. The radical tradition helps us recognize that the conversations occurring in public law today regarding administrative power—Is administrative policymaking legitimate? How should we hold agencies accountable? Can agencies fit within democratic governance?—have a much longer and more complex intellectual history than typically acknowledged.

Some of the radical proposals, such as universal suffrage, have largely already been achieved.²⁷² Other proposals, such as elections within agencies, are likely not normatively desirable given the specific relationships between agency officials and private organizations, and the purposes of administration within our wider democratic system.²⁷³ Therefore, the next Part will discuss which of these proposals can inform separation of powers and administrative law in the United States given our Constitution and legal culture.

Second, despite having similar coercion and accountability concerns as contemporary critics, the radicals provide a previously unexplored path forward in analyzing how to square the contemporary administrative state within our separation of powers. As previously discussed, the dominant response from contemporary critics has been

271. Gneist was pivotal to the compromise reached in multiple German states regarding how agency actions should be reviewed to balance the importance of public participation with bureaucratic independence. See STOLLEIS, *supra* note 156, at 377–78 (discussing Gneist's background and impact on law).

272. I use the word “largely” to acknowledge the contemporary renaissance of politically motivated attempts to de facto strip the franchise from certain populations in local, state, and federal elections. See Kevin Morris, *Patterns in the Introduction and Passage of Restrictive Voting Bills Are Best Explained by Race*, BRENNAN CTR. FOR JUST. (Aug. 3, 2022), <https://www.brennancenter.org/our-work/research-reports/patterns-introduction-and-passage-restrictive-voting-bills-are-best> [https://perma.cc/E8VY-83M2] (discussing these legislative attempts); Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 213–19.

273. Given agency reliance on private organizations for information necessary for administrative policymaking, aggregative voting is normatively infirm in the administrative state.

to argue that agencies should be stripped of powers to “return” those powers to other political institutions, thereby augmenting the indirect democratic accountability over agencies.²⁷⁴ The radicals present an alternative approach that has not been previously explored. Instead of stripping agencies of their powers, we should determine whether it is possible to democratize the administrative state so that citizens can form new and direct democratic relationships with administrative agencies. The next Part evaluates how we could better shape separation of powers and administrative law to embrace the radical tradition by tightening the relationships between agencies and the citizenry to instill direct democratic accountability over agencies.

III. CONTEMPORARY RADICAL PUBLIC LAW

Far from being a mere interesting intellectual tradition, this Part shows how the radical tradition can inspire a number of changes to separation of powers and administrative law theory and doctrine. Given the theoretical nature of the administrative radicals and their proposals, their central ideas can be implemented through a variety of different mechanisms. As a result, this Part provides a menu of potentially achievable reforms to break public law out of some of its current doctrinal and policy stalemates rooted in its present focus on court-centric mechanisms that serve to increase indirect democratic accountability over agencies.

For defenders of the administrative state, their arguments have been incomplete given our collective ignorance of the radical administrative tradition. Radical administrative law provides a new basis to support agency powers that is responsive to some of the most important concerns of its critics. Embracing the radical tradition also provides a way out of the perpetual separation of powers tug-of-war between Congress and the President regarding which institution should control agencies to instill indirect democratic accountability over them. Instead, the radical tradition encourages a democratic separation of powers whereby direct relationships with the people instill direct democratic accountability among the legislative, executive, and administrative elements of government. Radical administrative law argues that the value of political equality should be brought back into the center of administrative law given the importance of properly structuring the direct relationships between agencies and citizens. Finally, radical administrative law advocates for a modified judicial review of agency actions that reduces judicial discretion to analyze

274. *See supra* Part I.

substantive agency outcomes and instead focuses the courts on ensuring agencies maintain the proper relations with the citizenry during policymaking.

A. The Incomplete Discourse to Defend the Administrative State

The sustained judicial and scholarly attack on the administrative state has only picked up strength as the Supreme Court has become increasingly receptive to its legal and theoretical arguments. Scholarly defenders of the administrative state have not stayed silent, but their defenses have been incomplete. For these defenders, embracing the radical tradition provides new arguments to defend the administrative state that are responsive to the coercion and accountability concerns of critics.

Recent scholarly defenses of the administrative state are too numerous to comprehensively catalogue. Generally speaking, many prominent defenses have taken one of two forms. First, some scholars defend the status quo regarding the administrative state.²⁷⁵ Many of these defenses have taken a recent historical turn as scholars have marshaled an array of arguments to demonstrate that current doctrines and institutional structures are supported by the Framers and early American practice.²⁷⁶ Second, other defenders have proposed tweaking the relative powers between agencies and other political institutions. Their goal is a complex institutional balance in the hope that a little less *Auer* deference here or a little more presidential control there should mitigate the concerns of administrative critics.²⁷⁷

275. See, e.g., Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1278–79 (2020) (finding constitutional support for the administrative state in the Vesting Clause); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 278–82 (2021) (defending the ability of Congress to grant wide policymaking discretion to agencies); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1455 (2021) (producing similar defenses of Congress); Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 309 (2017) (defending *Auer* deference).

276. See generally Mortenson, *supra* note 275 (Vesting Clause); Mortenson & Bagley, *supra* note 275 (describing how the Framers understood the delegation doctrine); Parrillo, *supra* note 275 (examining early understandings of delegation through early federal taxation).

277. For scholars who suggest narrowing *Auer* deference, see Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 47, 102–06 (2015); Kevin O. Leske, *Between Seminole Rock and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 235–37 (2013); and Kevin M. Stack, *The Interpretive Dimension of Seminole Rock*, 22 GEO. MASON. L. REV. 669, 672 (2015). For scholars who suggest increasing presidential control over agencies, see John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 465–66 (2008); Kagan, *supra* note 59, at 2363–82; and Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 57–83 (2009).

These types of responses are unsurprising given that contemporary separation of powers scholarship largely echoes the institutionalist intellectual tradition. As the separation of powers and administrative law literatures have made this recent historical turn given the ascendancy of originalist modes of constitutional interpretation on the Supreme Court, scholars and judges from both sides have increasingly turned to theories from the institutionalists to support their positions.²⁷⁸ This situation has been especially prominent in debates concerning the origins of the nondelegation doctrine, where scholars have debated the interpretation and merits of a select few eighteenth- and nineteenth-century institutionalist political and legal theorists.²⁷⁹ As previously discussed, the institutionalists believed that agency powers can be controlled through properly balancing the relative powers between different political institutions. Early theorists either followed simplistic principal-agent delegation models of agency oversight, such as John Locke, or ignored the role of administration, such as Montesquieu.²⁸⁰ Many institutionalists, such as John Stuart Mill, were cautiously optimistic about the potential for administrative power to improve governance.²⁸¹

While institutionalist debates and institutionalist-inspired proposals are undoubtedly important, public law has been stunted by failing to also look to the radical administrative tradition to defend the administrative state.²⁸² Embracing the radical tradition opens a new way to defend the administrative state in a manner that is directly responsive to the concerns of its sharpest critics. This meeting of the minds is possible because both the radicals and contemporary critics

278. For criticism of this phenomenon, see Christopher S. Havasy, Joshua C. Macey & Brian Richardson, *Essay, Against Political Theory in Constitutional Interpretation*, 76 VAND. L. REV. 899, 901–06 (2023); and Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 727 (2000) (“[This Article] will serve its purpose if it jogs us out of ritualistic incantations of Madison and Montesquieu. The separation of powers is a good idea, but there is no reason to suppose that the classical writers have exhausted its goodness.”).

279. *See, e.g.*, Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1305, 1310–14 (2003) (discussing originalist views of legislative power and examining Locke, Montesquieu, and Blackstone); Mortenson & Bagley, *supra* note 275, at 293–300 (discussing early theories of legislative delegations); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1518–20 (2021) (discussing Locke’s theories). Scholars have also looked to the institutionalists in other public law issues, such as judicial deference to agency interpretations. *See, e.g.*, Manning, *supra* note 58, at 646–48 (“[S]eparation of lawmaking from law-exposition also limits arbitrary government by providing legislators an incentive to enact rules that impose clear and definite limits upon governmental authority . . .”).

280. *See supra* Section II.A.

281. *See supra* Subsection II.C.1.

282. Given our underlying constitutional structure, embracing the radical tradition should be seen as supplementing institutionalist-inspired proposals, not replacing them.

start from a position of concern about agency powers over the citizenry without proper democratic accountability. Given this fear of agency powers, both the radicals and critics then ask how to improve democratic accountability over agencies to constrain agency power within democratic governance. But whereas the critics seek to strip agencies of their powers to augment indirect democratic accountability, the radicals challenge the critics to ask whether agencies themselves can be structured so the people themselves can protect their liberties. It is only here where the radicals depart from the critics by arguing that direct democratic accountability over agencies is both possible and normatively desirable.

This being said, this Article's proposals to embrace the radical tradition are not without contemporary intellectual kin, as they share affinities with some recent proposals in administrative law. The radical goal to refocus administrative law toward the relationships between agencies and citizens broadly aligns with Jerry Mashaw's longstanding arguments that administrative law should look inside administrative agencies to instill democratic values.²⁸³ While administrative defenders have long adopted the rhetoric of technocratic expertise to justify agency powers,²⁸⁴ some scholars have also recently suggested that administrative participation should be democratized in specific domains of agency policymaking.²⁸⁵ Other scholars have proposed reforms similar to the specific proposals of particular radical theorists to reduce the distance between agencies and citizens. For example, Daniel Walters's recent proposal to harness civil agonism to propel administrative policymaking echoes the proposals of Young G.W.F. Hegel, Alexis de Tocqueville, and Rudolph von Gneist, who argued that civil society should be empowered to participate with agency officials to

283. See JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 165–77 (2018). Radical administrative law departs from Mashaw as to the faith he places in bureaucrats to fulfill their democratic obligations. See Havasy, *supra* note 25, at 789 n.209 (discussing Mashaw's "reasoned administration" theory). Jon Michaels has made similar arguments by proposing that agencies should contain internal separation of powers to lessen our concerns about external separation of powers. See generally Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016).

284. Expertise-driven justifications for administrative power stretch back to the New Deal. See JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 136, 142 (1938) (conveying early understandings of agency expertise). Its intellectual lineage stretches back even further, as Mill used expertise arguments to argue for insulating well-structured agencies from direct political control. MILL, *supra* note 148, at 266. Technocratic expertise remains a popular theory to justify administrative powers. See *supra* note 68.

285. See, e.g., EMERSON, *supra* note 168, at 165–75 (discussing the importance of participation by affected parties in rulemaking); K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 15 (2017); Havasy, *supra* note 25, at 782–83 (discussing how "relational fairness" principles cut in favor of including those potentially affected by a rule in the rulemaking process).

augment the direct democratic accountability of agency policymaking.²⁸⁶ Meanwhile, Yishi Blank and Issi Rosen-Zvi's suggestions regarding regional federal agency offices and David Fontana's advocacy for federal decentralization to bring agency policymaking closer to the citizenry and augment its democratic pedigree echo the proposals of Young Hegel and Tocqueville to localize administration.²⁸⁷

Even more importantly, recent empirical scholarship has shown that direct relationships between agency officials and citizens already help to hold agencies accountable in practice.²⁸⁸ Given that these direct relationships have largely been ignored in contemporary constitutional and administrative law, however, public law currently lacks the doctrinal and policy tools to instill a rich form of direct democratic accountability over agencies.²⁸⁹ The next Section demonstrates a number of potential public law reforms to embrace the radical tradition and formalize direct democratic accountability over administrative agencies.²⁹⁰

There are reasons to believe that some contemporary critics might be receptive to proposals inspired by the administrative radicals. Most directly, critics concerned with agencies slipping from the control of the citizenry, such as Chief Justice Roberts in *Free Enterprise Fund*²⁹¹ and unitary executive theorists who argue for establishing a link between the citizens and agencies through the President,²⁹² ultimately ground their criticism in democratic accountability concerns. As a result, they might be responsive to proposals that bring the citizenry closer to agencies to instill direct democratic accountability, rather than

286. See generally Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1 (2022).

287. See generally Yishi Blank & Issi Rosen-Zvi, *Reviving Federal Regions*, 70 STAN. L. REV. 1895 (2018); David Fontana, *Federal Decentralization*, 104 VA. L. REV. 727 (2018).

288. See Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1605–06 (2023) (discussing how deliberation, negotiation, and other practices between agencies and the affected public helps to hold agencies accountable in practice); Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 191–200 (2019) (discussing the relationship between agencies and regulated parties).

289. See Bernstein & Rodríguez, *supra* note 288, at 1651 (describing that informal discussions between agency officials and citizens to hold bureaucrats accountable are “only starting to be explored in existing literature and virtually absent from doctrinal debates”).

290. See *infra* Section III.B.

291. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010) (“The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”).

292. See Calabresi, *supra* note 48, at 59 (providing several “vitally compelling reasons” to support this link).

only looking to mechanisms that augment indirect democratic accountability.

Separation of powers, and the resulting distribution of power between political institutions, is not an end in itself. Rather, the purpose of the separation of powers is to ensure that the government remains responsive to the people to preserve individual liberty.²⁹³ Many critics of administration are concerned with exactly this issue when they question the democratic bona fides of agency actions. The radical tradition takes this challenge head-on by proposing mechanisms to establish a new democratic relationship between agencies and citizens that aligns with other types of nonelectoral mechanisms of direct democratic accountability.²⁹⁴ By meeting the critics on their own theoretical priors, the radical tradition provides a new account of how agencies can remain responsive and accountable to the people in a manner that some critics might find persuasive.

B. Reframing Agencies Within Separation of Powers and Administrative Law

1. Radical Separation of Powers: Direct Democratic Accountability

Reviving the radical tradition is particularly helpful for reframing stagnant discussions about the place of agencies within the separation of powers. Separation of powers discussions regarding agencies have long been reduced to mediating a perpetual tug-of-war between Congress and the President with agencies in the middle.²⁹⁵ The

293. See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1740 (1996) (stating that separation of powers justifications often collapse into concerns regarding “the requirement that government remain accountable to the people”); cf. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944–45 (2011) (“[T]he Constitution adopts no freestanding principle of separation of powers.”).

294. See Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1547 (2018) (discussing the petition process whereby citizens affected by political actions could publicly, formally, and equally participate in governance); RAHMAN, *supra* note 285, at 15 (“While elections and legislatures have long had a pride of place in democratic theory, I suggest that thickening our democratic capacities and experience requires that we turn instead to front-line institutions of governance such as regulatory agencies.”); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011) (“Democracy involves far more than a method of decision making; at root democracy refers to the value of authorship. . . . Democracy is achieved when those who are subject to law believe that they are also potential authors of law.”).

295. See, e.g., Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 671 (1992); David B. Spence, *The Effects of Partisan Polarization on the Bureaucracy*, in CAN AMERICA GOVERN ITSELF? 271, 283 (Frances E. Lee & Nolan McCarty eds., 2019) (discussing how political polarization contributes to this struggle); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 965–66 (1980) (“The issue is not simply a tug-of-war for decisionmaking control between Congress and the President.”).

result of this inertia is that separation of powers reforms largely focus on whether Congress or the President should be given certain powers over agencies in order to instill indirect democratic accountability,²⁹⁶ rather than more fundamentally thinking about the proper place of agencies within the broader separation of powers framework.²⁹⁷

Recent debates concerning the potential revival of the nondelegation doctrine and reduction of for-cause removal protections are emblematic of this discourse. The milder forms of the nondelegation doctrine, after all, concern whether Congress must provide a certain level of detail in its statutory instructions to agencies to direct agency policymaking.²⁹⁸ This form of the nondelegation doctrine would give Congress increased ex ante power to direct agencies and increased ex post power to oversee how the agencies effectuate congressional preferences.²⁹⁹ In turn, executive control over agencies is likely to be reduced as Congress provides a decreased ex ante zone of policy discretion for the President to influence agency policymaking.³⁰⁰ Meanwhile, the reduction in removal protections for agency officials is meant to decrease agency insulation, and thereby increase political

296. See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 579 (1984) (“The theory of separation-of-powers breaks down when attempting to locate administrative and regulatory agencies within one of the three branches; its vitality, rather, lies in the formulation and specification of the controls that Congress, the Supreme Court and the President may exercise over administration and regulation.”).

297. See M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604–05 (2001) (criticizing the lack of general principles within the separation of powers doctrine preventing systematic structural reforms); Manning, *supra* note 293, at 194–45 (providing similar criticisms).

298. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–31 (1935) (holding that Congress must provide some detail or standards in delegating policymaking to agencies to avoid the transfer of the legislative power to the executive); *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 431–33 (1935) (holding that delegation was unconstitutional because it resulted in President having unlimited authority to determine policy).

299. In its more extreme form, the nondelegation doctrine would constitute a per se limit on what Congress can delegate. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (proposing a nondelegation doctrine whereby congressional delegations are constitutional only if they require the executive to achieve specifically delineated ends). How this extreme form of the nondelegation doctrine would alter Congress’s powers depends on your metric for defining congressional power. For discussion of the various possibilities concerning how the revival of the nondelegation doctrine could alter congressional power, see generally Andrew Coan, *Eight Futures of the Nondelegation Doctrine*, 2020 WIS. L. REV. 141. Importantly, the revival of the nondelegation doctrine in either form would also give courts increased power over agencies to enforce the nondelegation doctrine.

300. For discussions of executive powers to influence agency policymaking, see Christopher R. Berry & Jacob E. Gersen, Essay, *Agency Design and Political Control*, 126 YALE L.J. 1002, 1013–14 (2017); William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1096–97 (2002); Kagan, *supra* note 59, at 2284–2303; and Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 294 (2006).

control of agencies, by giving the President increased ability to fire recalcitrant agency administrators.³⁰¹

That we have ended up in this tug-of-war is unsurprising given that administrative law has internalized the institutionalist tradition. Early institutionalists believed that agencies could be harmonized within government so long as parliament or the executive held certain oversight and intervention powers over administrators.³⁰² For example, Benjamin Constant argued that legislatures should carefully and precisely write the laws so that they retained the power to punish ministers if they deviated from the legislative will.³⁰³ Max Weber, meanwhile, advocated that the executive should foster administrative reliance on the executive for issues of hiring, firing, and promotion so the executive could retain power over bureaucrats.³⁰⁴ These are the same arguments made nowadays in favor of the nondelegation doctrine and the removal of for-cause protections, respectively.

The radical tradition provides a new framework to break agencies from this perpetual tug-of-war between the branches. Instead of thinking of separation of powers as trying to properly balance the powers of other political institutions over agencies, the radical tradition encourages us to broaden our focus to include efforts to properly shape the direct relationships between agencies and the citizenry. After all, many separation of powers concerns regarding the proper supervision of the administrative state ultimately stem from anxieties regarding the democratic accountability of agencies.³⁰⁵ The thought of congressional and presidential power proponents is that we can at least assure indirect democratic accountability of agencies through the

301. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 27–30 (2010) (discussing at-will and for-cause removal); Calabresi & Prakash, *supra* note 4, at 598 n.216 (emphasizing the importance of the presidential removal power); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1207–08 (2014); *cf.* *Mistretta v. United States*, 488 U.S. 361, 410–11 (1989) (“[L]imitation on the President’s removal power . . . is specifically crafted to prevent the President from exercising ‘coercive influence’ over independent agencies.” (citations omitted)).

302. See MILL, *supra* note 148, at 307–16 (discussing a potential appointment process for the public service); WEBER, *supra* note 153, at 178–79 (arguing that Parliament must have institutional powers to control action by officials).

303. CONSTANT, *supra* note 128, at 231 (“A minister has the power to cause such great evil, without deviating from the letter of any positive law, that unless you prepare constitutional means to repress this evil and to punish and remove the culprit . . . necessity will find those means outside the constitution itself.”).

304. WEBER, *supra* note 128, at 991, 994.

305. See Flaherty, *supra* note 293, at 1740 (explaining how the ultimate goals of separation of powers often “collapse into . . . the requirement that government remain accountable to the people”); Huq & Michaels, *supra* note 33, at 385–86 (describing democratic accountability as one of the central normative values in separation of powers).

electoral branches so that the people can influence agencies through their elected officials.

The radical tradition encourages us to reject settling for only indirect democratic accountability through Congress or the President. Instead, we should also strengthen the direct relationships between agencies and citizens through democratizing administrative policymaking.³⁰⁶ Under this radical separation of powers theory, the people themselves serve as the common source of direct democratic accountability for all policymaking institutions—Congress, the President, and agencies—in democratic government. The important question regarding democratic accountability for radical separation of powers theory then becomes how to properly structure the direct relationships of the citizenry with each of these political institutions.

Once the proper relationships between agencies and citizens are structured and direct democratic accountability is established, the radical tradition reduces the anxieties that are driving calls to revive the nondelegation doctrine and eliminate removal protections. The concerns that generate the nondelegation doctrine and the elimination of removal protections to ensure indirect democratic accountability over agencies are mitigated once direct democratic accountability is established by properly structuring the relationships between agencies and the citizenry. This mitigation occurs because citizens, through their interactions with both Congress and agencies, themselves specify how they would prefer statutes to be interpreted and administered. Citizens also retain their powers to do the same with their congressional representatives whenever a statute is created or amended that concerns the scope of agency powers. This common ability to directly influence agencies and Congress reduces the need for Congress or the President to serve as proxies to indirectly transmit the preferences of citizens for the citizenry during agency policymaking.

2. Radical Administrative Law: Reviving Political Equality

The natural next question is how the relationships between agencies and the citizenry should be structured. While a comprehensive

306. While this radical vision for separation of powers shares affinities with previous internal separation of powers proponents, the theory pushes internal separation of powers advocates to also consider the relationship between agencies and citizens as central to agency accountability. For discussions of internal separation of powers, see, for example, Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); and Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011).

account of such a structure is beyond the scope of this Article,³⁰⁷ we must discuss one vital consideration. When shifting to a relational account of administrative law inspired by the radical tradition, justifying agency power hinges on establishing the political equality of persons. This stems from the central normative prior that democratic government is, at its core, the establishment of the equality of persons structured within a political state.³⁰⁸ The connection between the equality of persons and democracy is most obvious in voting, where a central tenant of election law remains “one person, one vote”³⁰⁹ and each person’s vote counts the same on the back end when tallying up the electoral results.³¹⁰ While the radicals differed on their particular relationships to democracy,³¹¹ this view was already evident in Marx’s writings, which linked the equality of the franchise to the ability of the administrative state to reflect the citizenry on an equal basis.

This being said, democratic governance is not merely established by any form of equal relations between citizens. If this were the case, then a system where each citizen equally lacked a right to vote might theoretically be considered democratic. Rather, democratic governance is political equality attached to a conception of authorship, whereby citizens have the equal ability to influence the processes of policymaking.³¹² As political theorist Jürgen Habermas forcefully

307. Elsewhere, I provide specific proposals to structure the relationships between agencies and citizens to democratically legitimate the administrative state. See Havasy, *supra* note 25, at 801–26.

308. See Nikolas Bowie, Comment, *Antidemocracy*, 135 HARV. L. REV. 160, 167 (2021) (“[W]hat has historically distinguished democracy as a unique form of government is its pursuit of *political equality*.”); Niko Kolodny, *Rule Over None II: Social Equality and the Justification of Democracy*, 42 PHIL. & PUB. AFFS. 287, 309 (2014).

309. The Supreme Court first stated the “one person, one vote” standard in *Baker v. Carr*, 369 U.S. 186, 237 (1962), and has continued to reaffirm it with subsequent refinement. See, e.g., *Evenwel v. Abbott*, 578 U.S. 54, 78–79 (2016); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964); *Reynolds v. Sims*, 377 U.S. 533, 567–68 (1964).

310. Not that equally weighing votes is not assumed, as there is a long tradition of weighted voting along various metrics, such as property size or tax bill. See generally Ashira Pelman Ostrow, *One Person, One Weighted Vote*, 68 FLA. L. REV. 1839 (2016) (discussing the system of weighted voting that is used in a handful of counties).

311. For example, Gneist viewed it acceptable to discriminate between classes of citizens when determining who should participate in agency policymaking, while Marx called for every citizen in a political state to have the franchise. See Hugh Whalen, *Ideology, Democracy, and the Foundations of Local Self-Government*, 26 CANADIAN J. ECON. & POL. SCI. 377, 379 (1960) (“[Gneist] rejected out of hand the ideal of equality and the practice of an extended franchise.”); Patricia Springborg, *Karl Marx on Democracy, Participation, Voting, and Equality*, 12 POL. THEORY 537, 544 (1984) (“Marx then goes on to argue that . . . the widening of the franchise constitutes the critical element in representation . . .”). Our conception of what composes actual democratic government has rightfully pushed beyond Gneist’s view.

312. See CHARLES R. BEITZ, *POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY* 124 (1989) (discussing how proportional representation reaches these goals); JOSHUA COHEN, *PHILOSOPHY, POLITICS, DEMOCRACY: SELECTED ESSAYS* 270–71 (2009) (“[A] principle of political

articulated, “[T]he modern legal order can draw its legitimacy only from the idea of self-determination: citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees.”³¹³ As a result of the twin values of political equality and authorship, radical administrative law augments its focus toward properly structuring administrative policymaking to substantiate political equality within the citizenry.³¹⁴

Turning attention to the relationships between agencies and the citizenry to instill political equality is not wholly foreign to administrative law. In fact, for some New Dealers, such as future Justice Felix Frankfurter, one of the very purposes of the administrative state was to promote equality in government by providing another mechanism for government to register and implement public preferences.³¹⁵ Similarly, legal scholar Walter Gellhorn, who served as the research director for the Attorney General’s Committee on Administrative Procedure that would generate the draft bills that birthed the APA,³¹⁶ argued that administrative policymaking had the potential to expand the sites of democratic activity in government.³¹⁷ This sentiment was carried into the APA itself through the notice-and-comment requirements of informal rulemaking,³¹⁸ which were proposed in the Committee’s minority bill with the aim of

equality for a democracy [for a democracy] . . . specifies, inter alia, the system of rights and opportunities for free and equal members to exercise political influence over decisions that they are expected to comply with . . .”); Harry Brighouse, *Egalitarianism and Equal Availability of Political Influence*, 4 J. POL. PHIL. 118, 119 (1996) (discussing the importance of equal availability of influence to democracy); Kolodny, *supra* note 308, at 309 (same).

313. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 449 (William Rehg trans., Polity Press 2018) (1992); *see also* Post, *supra* note 294, at 482 (quoting Habermas and others for the concept that the “value of democratic legitimation occurs . . . through processes of communication in the public sphere”); Michael Sant’Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 844 (2021) (discussing theory of democratic accountability).

314. This view accords with recent proposals to incorporate rights-based doctrines, such as antisubordination, into separation of powers doctrine. *See, e.g.*, Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 78, 88 (2021) (calling for the “incorporation of antisubordination into separation-of-powers analysis”).

315. *See* FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 162–63 (1930); *see also* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 428 (2007) (“According to Frankfurter, the administrative state was needed to promote equality, the sine qua non of a democratic state.”).

316. Administrative Procedure Act, 5 U.S.C. §§ 551–559.

317. WALTER GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 123 (1941) (“It is my thesis . . . that the administrative process has enriched rather than destroyed, expanded rather than contracted the area of democratic action.”).

318. 5 U.S.C. § 553.

expanding and equalizing public participation during agency policymaking.³¹⁹

In response to agencies increasingly shifting from adjudications to rulemaking during the 1960s, judges and scholars again set their attention to how to substantiate political equality in agency policymaking.³²⁰ During this period, attention to political equality took the form of questioning what participatory rights should be given to citizens during formal and informal rulemaking.³²¹ Following the scholarly commentary, courts began to read the APA expansively to define the contours of citizen participation in rulemaking in order to ensure it was truly equal and not captured by special interests.³²² However, these procedural innovations seeking to ensure political equality wilted after *Vermont Yankee*,³²³ and they have continued to lay dormant as institutionalist conceptions of agencies have become dominant, as evidenced by the rise of presidential control of administration.³²⁴

319. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1635 (1996) (“[T]he minority bill created an important new requirement: notice and comment rulemaking. . . . [I]t balanced the interests of agencies in speed and efficiency and the interests of the public in participating in the rulemaking process.”). Notice-and-hearing, rather than notice-and-comment, was first proposed in the model bill of the earlier ABA Special Committee on Administrative Law, which was a direct progenitor of the Walter-Logan Bill that President Roosevelt subsequently vetoed. *Id.* at 1582–83.

320. See Ronald J. Krotoszynski, Jr., “*History Belongs to the Winners*”: *The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995, 999–1004 (2006) (comparing Judge Bazelon’s argument for more process to combat judicial incompetence with Judge Leventhal’s argument for more procedures to better evaluate the merits of agency action pursuant to the APA).

321. See, e.g., Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 527 (1972); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 360–62 (1972).

322. See, e.g., *United States v. Nova Scotia Food Prods.*, 568 F.2d 240, 251 (2d Cir. 1977) (requiring agency to make the scientific data on which proposed rule was based available to interested parties); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 387 (D.C. Cir. 1973) (requiring agency to respond to material comments from interested parties); *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 645, 648 (D.C. Cir. 1973) (requiring agency to establish reliability of the methodology used in determining that compliance with the proposed rule was feasible).

323. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

324. See Kagan, *supra* note 59, at 2246, 2248 (examining the recent expansion of presidential control of administration insofar as agency action has essentially become an extension of the president’s own agenda); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 91–99 (1985) (advocating broad delegations of administrative authority); Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 197–98, 221 (1982) (finding that partisan-directed presidential influence impacts regulatory performance). There was a brief period of excitement in the early 2000s around the ability of electronic rulemaking to democratize agency policymaking. See Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 438 (2004) (viewing e-rulemaking as important tool for enabling participatory practice). However, e-rulemaking did little to change the participatory imbalances that existed in notice-and-comment. See Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 395 (2019) (discussing how

Embracing the radical tradition reinvigorates these discussions about how political equality relates to structuring citizen participation in agency policymaking.³²⁵ This shift in focus should move multiple administrative law doctrines back into the center of administrative law, such as *ex parte* communications, lobbying regulations, and other doctrines concerned with who is able to participate with agencies and the relative amounts of participation by different segments of civil society.

Ex parte communications and lobbying rules are important because they are some of the most common means by which interested parties actually engage with agencies during agency policymaking. While the U.S. Court of Appeals for the D.C. Circuit used to carefully monitor agency policymaking for unequal *ex parte* communications,³²⁶ the Circuit has subsequently narrowed its *ex parte* communications doctrines to such an extent that agencies are now largely their own arbiters for how they engage in *ex parte* communications with interested parties.³²⁷

The connection between *ex parte* communications and political equality is readily apparent. If agencies are reaching out to deliberate with some persons at higher levels than others, or if agencies are more receptive to communicating with some groups than others, then citizens will likely have unequal access to and influence over agency

e-rulemaking failed to mitigate lopsided participation in notice-and-comment); Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 339–40 (noting the Open Government Initiative’s lack of progress in making government more participatory and collaborative).

325. See Havasy, *supra* note 25, at 801–17 (discussing how administrative law partially embraces the relations between agencies and affected persons to instill democratic legitimacy in agencies). Kate Andrias and Ben Sachs have recently made similar moves to bring political equality back into discussions of labor and employment law. See generally Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546 (2021).

326. See *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 56–57 (D.C. Cir. 1977) (characterizing the *ex parte* contacts at issue as due process violations due to their lack of transparency generating unfairness between interested parties); *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981) (arguing the utility and permissibility of *ex parte* contacts should vary based on the type of agency action at issue).

327. Subsequent D.C. Circuit rulings narrowed their *ex parte* communications doctrine. See *Elcon Enters., Inc. v. Wash. Metro. Area Transit Auth.*, 977 F.2d 1472, 1481–82 (D.C. Cir. 1992) (“WMATA’s diligent efforts to ensure that Elcon knew of, and had an opportunity to respond to, the negative *ex parte* information cured any defect that might otherwise have resulted from the *ex parte* contacts.”); *Pro. Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 564–65 (D.C. Cir. 1982) (finding that “improper *ex parte* communications, even when undisclosed during agency proceedings,” only void an agency decision if “the agency’s decisionmaking process was irrevocably tainted”); *Dist. No. 1, Pac. Coast Dist., Marine Eng’rs Beneficial Ass’n v. Mar. Admin.*, 215 F.3d 37, 42–43 (D.C. Cir. 2000) (holding *ex parte* contact to be permissible where no statute requires review to be made on record after opportunity for hearing).

policymaking.³²⁸ When summed over multiple regulations and an extended period of time, these inequalities could become so stark that some people might become unable to exert meaningful voice within agency policymaking. This situation would lead to the violation of the authorship condition of democratic governance.

Lobbying, which can include *ex parte* communications, is similarly important given that it involves interactions between agencies and interested parties where the parties are advocating for a policy change.³²⁹ While campaign donations and congressional lobbying are perhaps more well-known forms of lobbying, approximately forty percent of all lobbying occurs after Congress passes a law, which political scientists call “*ex post* lobbying.”³³⁰ Half of this *ex post* lobbying is directed at agencies and executive officials.³³¹ Available empirical evidence demonstrates that lobbying is a particularly effective method for groups to influence agency decisions during regulatory policymaking.³³²

At present, there are stark inequalities in both the relative frequency and amount of lobbying conducted by different groups in the citizenry, which are concerning from the perspective of those seeking to establish political equality in the relationships between agencies and the citizenry. For example, the 2,300-page Dodd-Frank Act³³³ required the SEC and other agencies to engage in over three hundred separate instances of rulemaking.³³⁴ Once the Dodd-Frank Act passed, interest groups engaged in frenzied lobbying of executive and agency officials.

However, this lobbying was starkly unequal. Concerning implementation of the Volcker Rule by five federal agencies, executive and agency officials met with representatives of financial services

328. See 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, 374 (2011) (showing *ex parte* communications before agency issuance of a notice of proposed rulemaking can influence the substance of final rules).

329. See Beth L. Leech, *Lobbying and Influence*, in THE OXFORD HANDBOOK OF AMERICAN POLITICAL PARTIES AND INTEREST GROUPS 534, 535–36 (L. Sandy Maisel & Jeffrey M. Berry eds., 2010).

330. Hye Young You, *Ex Post Lobbying*, 79 J. POL. 1162, 1163 (2017).

331. *Id.* at 1173.

332. See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1387–88 (2010) (discussing the various methods that lobbying groups may use to influence agency policymaking); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 135 (2006) (finding that, when business commenters express desire for more or less regulation, the agency is more likely to change its final rules toward regulation that accords with such desire).

333. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 780); You, *supra* note 330, at 1163.

334. You, *supra* note 330, at 1163.

companies over 350 times before a single regulation was issued.³³⁵ Meanwhile, these same officials met with unions, public interest groups, and other proponents of the rule a grand total of 20 times during the same period.³³⁶ This example highlights a more general trend in lobbying behavior and influence—business groups and trade associations are particularly well-suited to both engage in the practice of lobbying and get their ultimate preferences enacted in rulemaking compared to other groups in society.³³⁷

While more theoretical work is needed to fully comprehend the relationship between lobbying and political equality,³³⁸ such stark disparities are concerning under the radical administrative tradition. The fact that some, namely financial services companies, appear to have much closer relationships with implementing agencies than others directly invokes the worrying likelihood of political inequality in agency relationships with different segments of the citizenry—thus calling into question whether direct *democratic* accountability of agency policymaking is possible.³³⁹

Ex parte communications and lobbying can be shaped in accordance with the radical tradition through several different mechanisms. The first means is through the revival of judicial review of ex parte communications during informal rulemaking. However, the

335. Jean Eaglesham & Victoria McGrane, *Behind Scenes, Battle for Face Time as Regulators Craft Rule's Wording*, WALL ST. J., <https://www.wsj.com/articles/SB10001424052970204450804576625432135278322> (last updated Oct. 12, 2011) [<https://perma.cc/5ST2-FSTC>].

336. *Id.*

337. See FRANK R. BAUMGARTNER, JEFFREY M. BERRY, MARIE HOJNACKI, DAVID C. KIMBALL & BETH L. LEECH, *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* 257 (2009) (discussing the advantages of corporate, trade, and business groups in lobbying); Wagner, *supra* note 332, at 1379 (identifying resource and information disparities between regulated industries and nonprofits as the cause of lopsided participation in EPA rulemaking); Yackee & Yackee, *supra* note 332, at 135 (finding that business comments strongly influence final rules, whereas comments from nonbusiness and government constituencies have “little discernable statistical influence”).

338. See generally Christopher S. Havasy, *Interest Group Lobbying and Political Equality* (July 22, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4162073 [<https://perma.cc/JZ9U-FXE9>] (theorizing the relationship between the concept of political equality and interest group lobbying).

339. For various structural, procedural, and substantive proposals about how to improve political equality during agency policymaking, see, for example, Havasy, *supra* note 25, at 818–27 (suggesting alternatives to notice-and-comment rulemaking); Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104, 128–33 (2021) (demanding that President strengthen overseas relationships; partner with state, local, and tribunal governments; and nurture civil society); Sant’Ambrogio & Staszewski, *supra* note 313, at 831–43 (proposing democratization of rule development); and K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315, 341–45 (2018) (proposing strategic administrative institutional and policy designs based on those of two federal agencies post-financial crisis and two local government boards designed to empower stakeholders).

legality of such judicial monitoring under the APA is uncertain given *Vermont Yankee*,³⁴⁰ and the general desirability for courts to have such expansive powers to alter or add agency policymaking procedures absent explicit statutory power is questionable.³⁴¹ As a result, congressional and agency rules are more promising routes for reform. For example, Congress could establish a statutory default regarding the acceptability of ex parte communications, or lobbying of agencies more generally, in statutes that delegate rulemaking to agencies.³⁴² In the alternative, agencies could self-bind by promulgating regulations concerning ex parte communications, or lobbying more generally, and subject themselves to suit by interested parties when they violate their own regulations.³⁴³ Compensatory mechanisms could also be enacted, such as congressional or agency subsidies to under-resourced groups to engage in increased deliberation with agency officials during rulemaking.³⁴⁴ Relatedly, the structure and function of interest groups becomes more important in radical administrative law to ensure the

340. For the argument that courts have the power to monitor ex parte communications, see Criddle, *supra* note 68, at 485–86 (suggesting White House communications be included in administrative record for judicial review); Rubin, *supra* note 68, at 120 (proposing to ban ex parte contact in notice-and-comment); and Wagner, *supra* note 332, at 1388–89, 1406–16 (highlighting importance of judicial review in various proposed mechanisms for revitalizing pluralistic engagement). For the argument that they do not, see Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 536 (2018) (arguing that such power in informal rulemaking contradicts the APA’s text); Richard J. Pierce, Jr., Response, *Waiting for Vermont Yankee III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 910–20 (2007) (citing a proposed construction of *Vermont Yankee* against judicially imposed limits on rulemaking); and Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1970 (2018) (arguing that ex parte communications during informal rulemaking should not be subject to law’s internal morality).

341. For a back-and-forth on the desirability of courts having broad powers to require altered or added procedural requirements to agency policymaking immediately after *Vermont Yankee*, see Clark Byse, Comment, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823, 1823–24 (1978); and Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1809–11 (1978). For a recent discussion of how wide *Vermont Yankee* does and should sweep to limit judicial modifications of agency rulemaking, see Cass R. Sunstein, Essay, “Practically Binding”: *General Policy Statements and Notice-And-Comment Rulemaking*, 68 ADMIN. L. REV. 491, 505–12 (2016).

342. See Havasy, *supra* note 25, at 810 (making these suggestions).

343. See Richard Murphy, Essay, *Enhancing the Role of Public Interest Organizations in Rulemaking via Pre-notice Transparency*, 47 WAKE FOREST L. REV. 681, 698–702 (2012) (discussing these various self-binding rules). For a discussion of agency self-binding, see Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 860–61 (2009).

344. See Wagner, *supra* note 332, at 1416 (“A less radical approach to increasing balanced engagement in at-risk rulemakings is to subsidize participation on specific rulemakings in which certain sets of interests, such as those representing the diffuse public, will be otherwise underrepresented.”).

preferences of the citizenry can be transmitted to agencies in a democratic manner.³⁴⁵

C. Reforming Judicial Review

Finally, the radical tradition suggests a modified judicial role to ensure agencies are not impermissibly coercing the citizenry. In this modified role, courts should focus on monitoring whether the citizenry can access the proper procedural and structural channels to engage with agencies during policymaking such that the policymaking process can be said to be genuinely democratic. As a result, embracing the radical intellectual tradition provides a new reason to maintain doctrines of judicial deference to agencies on matters of legal and substantive interpretation. Inversely, properly structuring the relationships between agencies and citizens undermines doctrines that strip agencies of substantive decisionmaking powers, such as the major questions doctrine.

On the radical account, the judiciary should not police the substantive outcomes of agency policymaking given properly structured ex ante participation of citizens in agency policymaking. In addition to the comparative expertise of agencies and the interested public over courts on substantive regulatory matters,³⁴⁶ properly structured ex ante participation ensures that the citizenry had a voice during policymaking such that agency policymaking can be labeled democratic. Properly structured relationships between agencies and citizens therefore ensures direct democratic accountability, obviating the need for the judiciary to instill other forms of political accountability. Judicial review of agency decisions can then focus on the comparative expertise of courts—ensuring that the proper procedural and structural processes were followed to safeguard citizens’ ability to deliberate with agencies in a democratic manner during policymaking.³⁴⁷

345. See Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1305 (2016) (arguing interest groups cannot “channel the views of the public majority” absent adopting a proper internal governance model for doing so).

346. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (holding that the EPA Administrator’s interpretation in question was reasonable and therefore entitled to judicial deference, in part due to the technical expertise of the agency); Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1357–58 (2016) (identifying agency expertise as a barrier to agency’s ability to explain reasoning for policy decision to nonexpert courts); Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1773 (2012) (arguing agency expertise gives agencies unmatched scientific and factfinding capabilities).

347. See Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 118 (2015) (“[B]oth sides of the debate over the proper scope of judicial review of rulemaking procedure

In a sense, the judicial role of reviewing agency actions can be reduced to embracing a political process theory for the administrative state.³⁴⁸ So long as agencies maintained the proper relationships with citizens during administrative policymaking, then judges should not determine whether acceptable substantive regulatory policies were reached given the sustained contestation and deliberation between agencies and civil society.³⁴⁹ Doctrinally, for example, this feature suggests that arbitrary and capricious review should focus on ensuring agency decisionmaking was not arbitrary and capricious as a matter of procedure, rather than arbitrary and capricious according to any particular substantive ideology.³⁵⁰

Flowing from this reduced judicial role is the position that some judicial deference doctrines, such as *Chevron* deference, should be encouraged. This position arises from the fact that if agency deliberation is properly structured, then interested parties had ex ante ability to weigh in at both the legislative and agency policymaking stages to deliberate with government officials.³⁵¹ Courts then overriding the preferences of the citizenry, expressed through both elected and agency officials, appears more like judicial usurpation of the democratic process, rather than ensuring agencies follow statutory and regulatory law when issuing a new interpretation.³⁵² Interestingly, this view accords with the view of some “APA originalists,” who argue that

have accepted the premise that courts are well equipped to review agency avoidance of procedural requirements.”)

348. On political process theory, see *supra* note 27 and accompanying text.

349. This view accords with recent work advocating a remodeling of administrative law so agency policymaking can become a site for democratic political contestation. See, e.g., Cristina M. Rodriguez, *The Supreme Court 2020 Term—Foreword: Regime Change*, 135 HARV. L. REV. 1, 8–9 (2021); Walters, *supra* note 286, at 13–15.

350. See Havasy, *supra* note 25, at 804–07 (arguing that an agency decision that both comports with “procedural and relational values of relational fairness and is rationally understandable to all potentially affected parties” is not arbitrary); see also Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 434–52 (2015) (discussing how some judges use arbitrary and capricious review to impart their ideologies into administrative law).

351. See Wendy E. Wagner, Essay, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2027–28 (2015) (describing agency procedures that allow for extensive expert peer review and transparency, subjecting each stage of the process including the final decision to expert and public scrutiny).

352. The radical tradition accords with recent pushes to weaken “juristocratic” understandings of separation of powers by giving the political branches increased powers to set separation of powers limits between institutions. See Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2025–26 (2022) (describing “juristocratic” separation of powers as vastly different from the “republican” separation of powers intended by the Framers); see also Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 NOTRE DAME L. REV. 1475, 1487–93 (2018) (criticizing the judiciary for fashioning remedies that reshape agency design after finding separation of powers violations).

judicial doctrines that usurp agency policymaking grounded in positive law are democratically illegitimate.³⁵³

At a time when *Chevron's* continued existence hangs in the balance,³⁵⁴ it is important to revive the fact that this argument—judicial deference to agencies on matters of statutory interpretation is justified on democratic grounds—was one of the primary initial justifications for *Chevron* deference. While the Court partially justified *Chevron* deference to agencies on comparative expertise grounds, it also highlighted the particular responsibility of agencies to settle complicated matters of policy where there is ideological or political disagreement.³⁵⁵ On this view, the Court in *Chevron* viewed agencies as a locus of democratic political activity in accordance with the radical tradition. As the Court ended *Chevron*:

When a challenge to an agency construction of a statutory provision . . . really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.³⁵⁶

In other words, the Court stated that courts should stay out of policing divisive substantive interpretations reached by agencies after the agency properly deliberated with Congress and interested parties.³⁵⁷

Meanwhile, judicial doctrines that view agency policymaking skeptically and seek to reduce agency discretion on policy matters should be rejected, so long as agencies maintained the proper procedures for engaging with citizens. This position is most important

353. See Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 859–60 (2018) (making this argument about administrative common law); cf. Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 898–99 (2020) (describing “APA originalism” as a product of neoclassicist prioritization of original, positive law, combined with neoclassicist interpretive formalism). Some go further to argue that judges should respect the indeterminacy of the Constitution concerning the interpretation of context-specific separation of powers inquiries and defer to Congress when such indeterminacy exists. See, e.g., Manning, *supra* note 293, at 2017–23 (“By treating as settled what constitutionmakers, in fact, left undecided—or, more accurately, left for Congress to decide—formalism too risks upsetting the lines of compromise in the document.”).

354. This Term, the Supreme Court took up *Loper Bright Enterprises v. Raimondo*, in which the question presented is explicitly an attack on *Chevron*. 143 S. Ct. 2429 (2023) (mem.) (granting certiorari “limited to Question 2”); Petition for Writ of Certiorari at i, *Loper Bright Enters.*, No. 22-441 (U.S. Nov. 10, 2022), 2022 WL 19770137 (listing second question presented as “[w]hether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency”).

355. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 865–66 (1984).

356. *Id.* at 866.

357. The Court does briefly comment that the people only have indirect democratic accountability through the President, *id.* at 865–66, but it is unclear whether the Court meant this as a description of agency policymaking or a normative embrace of presidential administration.

regarding the Supreme Court's recent embrace of a freestanding major questions doctrine, whereby courts assume in matters of agency statutory interpretations involving issues of great "economic and political significance" that Congress did not intend to delegate authority to the agency to answer the question unless Congress included a clear statement on the matter.³⁵⁸ As the Court recently expounded in *West Virginia v. EPA*, the major questions doctrine was created by the Court given the "separation of powers principles and a practical understanding of legislative intent."³⁵⁹ However, as *West Virginia* also makes clear, the doctrine is driven by the Court's need to engage in the substantive policing of agency policymaking—for the Court gets to decide what policy matters are "extravagant statutory power[s] over the national economy"³⁶⁰ enough to warrant rejecting agency power, rather than merely "ordinary circumstances" where agency power would usually be upheld.³⁶¹

While Chief Justice Roberts's majority opinion in *West Virginia* quickly declares the major questions doctrine applicable and then moves on to questions of statutory interpretation, Justice Gorsuch in his concurrence elucidates the importance of the major questions doctrine to the separation of powers. His argument for the major questions doctrine hinges on the belief that Congress should not be able to delegate legislative powers to "a ruling class of largely unaccountable 'ministers.'"³⁶² By maintaining the powers to regulate important matters in Congress, he contends that such important regulatory matters would be "derived from the people."³⁶³ Justice Gorsuch's worry is a similar argument he has invoked elsewhere—such important regulatory matters are a threat to the liberty of the citizenry if the

358. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–160 (2000); *see also* *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

359. 142 S. Ct. 2587, 2609 (2022); *see also* *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 595 U.S. 109, 122 (2022) (Gorsuch, J., concurring) (arguing that, because federal government must "act consistently with the Constitution's separation of powers," the Supreme Court established the rule that Congress will "speak clearly" if it intends to authorize agencies to decide issues of "vast economic and political significance" (internal quotation marks omitted) (quoting *Alabama Assn. of Realtors v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam))).

360. *West Virginia*, 142 S. Ct. at 2609 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

361. *Id.* at 2609 (internal quotation marks omitted) (quoting *Brown & Williamson Tobacco*, 529 U.S. at 159). For a discussion of the Court's recent elaboration of the criteria triggering the major questions doctrine, *see generally* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023).

362. *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (quoting THE FEDERALIST NO. 11, at 85 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

363. *Id.* (quoting THE FEDERALIST NO. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961)).

people do not have the means to check them.³⁶⁴ In such a world, “agencies could churn out new laws more or less at whim.”³⁶⁵

While the radical tradition embraces Justice Gorsuch’s concerns, it should lead us to reject his view of agency policymaking that gives rise to the major questions doctrine. First, the radical tradition rejects the ability of courts to determine which substantive policy matters are “major” or “extravagant” enough to trigger the major questions doctrine for reasons that should now be familiar. The determination of whether to trigger the major questions doctrine is itself a substantive policy decision in an area where the courts lack relative institutional or political expertise compared to Congress and the EPA.³⁶⁶ Unlike Congress, courts do not engage in extensive fact-finding and hearings through the committee system and outreach with constituents. Unlike the EPA, courts do not engage in extensive deliberation with interested parties through the notice-and-comment procedures, *ex parte* communications, and other forms of deliberation with interested groups.

This lack of judicial expertise is also a lack of relative democratic connection to the citizenry compared to Congress and the EPA. In short, if agency policymaking is properly structured, then the people through their representatives and agency officials already had their say on the statutory matter in question.³⁶⁷ Democratic accountability has already been achieved. Interested parties who disagree with the EPA’s interpretation retain an important democratic participatory right—to advocate for Congress to change the Clean Air Act to explicitly rule out the regulatory interpretation at issue. On this view, the Court is itself engaged in an end run of the democratic system by interjecting itself into policymaking.

The radical tradition also rejects Justice Gorsuch’s pejorative view of agencies as unaccountable bureaucrats disconnected from the

364. See, e.g., *Nat’l Fed’n of Indep. Bus.*, 595 U.S. at 124–25 (Gorsuch, J., concurring); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2437–38 (2019) (Gorsuch, J., concurring).

365. *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring).

366. Further, the standard-like current indicia for “majorness” themselves augment the power of the courts over the other branches. Consider the indicia: (1) political significance or controversy of an agency policy, (2) the novelty of a policy, and (3) other theoretically possible agency policies that might accord with the agency’s broader statutory mandate. Deacon & Litman, *supra* note 361, at 1012–13. These indicia make the courts the arbiter of the “political significance” of democratic deliberation and contestation, despite their institutional distance from such contestation. As a result, the current major questions doctrine augments the power of the courts vis-à-vis agencies and Congress along multiple dimensions.

367. Congress can design its separation of powers preferences directly through statutory law. See generally Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378 (2019) (arguing that Congress creates statutory schemes of separation of powers through its delegations to administrative agencies).

people and alien to the separation of powers. Instead, the radical tradition encourages us to view agencies as an exciting area of potential democratic activity whereby the citizenry can hold unique and direct democratic relationships with agencies through agency policymaking. Such engagement, when properly structured, allows for broad and equal forms of participation that encourages the “wide social consensus” and rejects the “[p]owerful special interests” that Justice Gorsuch attributes to only legislative policymaking.³⁶⁸ As the people are the justification for both legislative and agency powers under radical separation of powers theory, Justice Gorsuch’s concern about alienating the people by delegating the legislative power to agencies is muted. Rather, the people engage both political institutions through their specific relationships with each institution to continually engage in and monitor policymaking at all stages. This citizen monitoring of substantive policy runs counter to the major questions doctrine, which requires judicial intervention to delineate which forms of substantive policymaking are proper for the legislature compared to the administrative state. Instead, the radical tradition views agency policymaking not as a break from legislative policymaking but rather as a continuation of the people’s will through a new institutional channel.

CONCLUSION

The contemporary administrative state and the underlying separation of powers framework that supports it remain under sustained judicial and scholarly criticism. This attack has recently picked up steam as the Supreme Court has become increasingly receptive to it. While critics lob a panoply of charges against agencies, many of these criticisms revolve around similar concerns regarding the ability of agencies to coerce the citizenry without proper democratic accountability. Rather than rebut these charges, this Article starts from the position that focusing on agency powers over the citizenry is a welcome return to analyzing the direct relationships between agencies and citizens when discussing democratic accountability. However, the next move of critics to reduce agency powers and redistribute them to other political institutions to instill indirect democratic accountability comes one step too quick. One should first consider whether agencies themselves can be structured to instill direct democratic accountability.

To answer this question, this Article revives the radical administrative tradition from the nineteenth century for inspiration on how to impart direct democratic accountability over agencies. After the

368. *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring).

twin experiences of the Reign of Terror during the French Revolution and the Napoleonic Empire, nineteenth-century lawyers and theorists feared this new bureaucratic power in government. While some thinkers sought now-familiar institutional responses to balance agency powers with other political institutions to instill indirect democratic accountability, the radicals took a different approach. Through a series of proposals, the radicals sought to transform the very structure of administration to bring the citizenry closer to agencies to achieve direct democratic accountability. In doing so, the radicals wanted to alter the relationships between agencies and the citizenry to make administrative policymaking more democratic.

Without knowledge of this radical tradition, contemporary separation of powers theory and administrative law have been at a disadvantage. For one thing, contemporary defenders of the administrative state have been unable to respond to its critics in a manner that is sensitive to the critics' concerns. The radical intellectual tradition provides such argumentation by starting from a similar theoretical position as the critics, focused on agency power over the citizenry without proper democratic accountability. However, embracing the radical tradition results in transforming agency policymaking to inculcate direct democratic accountability, rather than eliminating agency powers and redistributing them to other political institutions to increase indirect democratic accountability.

In separation of powers discourse and doctrine, embracing the radical tradition provides a way out of the perpetual tug-of-war between Congress and the President to instill indirect democratic accountability over agencies. This solution stems from the fact that the radical tradition encourages us to view agencies as directly accountable to the people through properly structured agency policymaking. On this radical separation of powers theory, the people serve as the common source of accountability to Congress, the President, and the administrative state. Once this restructuring occurs, the radical tradition provides new ways to mitigate the concerns that have given rise to recent calls to reinvigorate the nondelegation doctrine and eliminate for-cause removal protections rooted in the fact that agencies will have new direct democratic relationships with the citizenry during agency policymaking. The citizenry, in turn, will have the ability to directly challenge agency overreach with the agency itself, rather than indirectly seeking to influence agency policy through elected politicians. Radical administrative law, in turn, encourages scholars and judges to expand their focus to include practices that establish political equality between agencies and the citizenry, such as *ex parte* communications and lobbying.

Finally, the radical tradition also suggests a reduced judicial review of agency actions. Rather than carefully evaluating the substantive decisions of agencies, courts should instead focus their attention on whether agencies established and maintained the proper relations with citizens during agency policymaking. This role stems from the fact that the citizenry itself can ensure ex ante direct democratic accountability through its interactions with agencies during policymaking. As a result of this new orientation, doctrines of judicial deference on agency substance, such as *Chevron* deference, should be encouraged, while doctrines that remove judicial deference on substantive grounds, such as the major questions doctrine, should be reduced or eliminated.