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Politicizing Regulation: Administrative Law, Technocratic Government, and Republican Political Theory

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TABLE OF CONTENTS

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I. INTRODUCTION

In today's divisive and fractious politics, one of the most damning insults a politician can hurl is that another politician is politicizing something that should remain apolitical. Typically, accusations of politicization are made in response to politicians who use a high-profile event to underscore a need for action that fits their political agenda. For example, when gun violence begets calls for gun control, the National Rifle Association is likely to accuse those responses as politicizing the issue.[1] While the word, meaning "to give a political tone or character to,"[2] is neutral on its face, in practice it suggests a person has taken an event or topic for which there was common consensus and deployed it in a way that appeals to only those citizens of a particular political bent. Thus, politicization is in the eye of the beholder.[3]

For many, the election of Joe Biden as President of the United States signaled a welcome repudiation of the Trump Administration's

1. *See, e.g.*, *NRA Criticizes Presidential Candidates After Mass Shootings*, REUTERS (Aug. 8, 2019, 2:39 PM), https://www.reuters.com/article/us-usa-shooting-politics/nra-criticizes-presidential-candidates-after-mass-shootings-idUSKCN1UY2L9 [https://perma.cc/66BG-S6EP].
2. *Politicize*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/politicize [https://perma.cc/E58G-GKFZ] (last visited Aug. 24, 2021).
3. Chris Tognotti, *How "Politicize" Became Such a Dirty Word*, BUSTLE (Nov. 1, 2017), https://www.bustle.com/p/what-does-politicize-even-mean-how-the-term-turned-into-a-dirty-word-3201398 [https://perma.cc/7ED7-UC6L].

use of federal regulatory policy for purely political goals and a long-awaited return to data-driven, science-based regulatory policy. Throughout his campaign for President and as President-elect, Joe Biden consistently affirmed that scientific evidence would guide his policy decisions regarding public health, the environment, and a host of other areas. One of President Biden's first executive orders declared that his Administration would "listen to the science" and that the promulgation of regulations would be "protected by processes that ensure the integrity of Federal decision-making."[4]

Approaching policy decisions with science and data at the forefront appears to have been an effective campaign position after four years of the particularly feckless and anti-science Trump Administration. But what does it mean to listen to the science? For that matter, what public policy decisions require listening to the science? Consider a timely topic. Given that studies show masks that cover a person's nose and mouth are generally effective at reducing the spread of everything from the common cold to COVID-19,[5] what role should this science play in determining whether there should be a public mask mandate? Does spotlighting science to the near exclusion of all other considerations disguise the complexity in making public policy decisions that require evaluation of competing values: human life versus comfort, health versus convenience, or communal solidarity versus individualism? Much public discourse about masks—along with many other contentious policy debates—obscures these fundamental value choices in favor of attributing the reasons for difficult public policy decisions to science. While perhaps an attractive framing useful for politicians, this practice has a corrosive effect on our ability to govern ourselves, and no part of government exemplifies this effect more than the administrative state.

American administrative law frequently discounts or ignores participation by ordinary citizens without specialized knowledge or expertise. Regulatory policymakers are often expected to justify agency decisions on scientific, or at least technical, grounds in response to notice and comment procedures or judicial review. There is a certain logic to these demands when applied to an administrative state simultaneously buffeted by concerns over its ability to legitimately impose value judgments and entrusted with increasingly politically salient decisions. However, that logic reveals something fundamental about administrative law that too often goes unexamined: Science cannot dictate policy. Policy—whatever it happens to be—relies inescapably on contentious moral commitments to the values the policy is intended to fulfill, including commitments to other citizens, one's country, the

4. Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021).

5. *See, e.g.*, Yafang Cheng et al., *Face Masks Effectively Limit the Probability of SARS-CoV-2 Transmission*, 372 SCIENCE 1439 (2021).

environment, fairness, justice, and so on. This may seem like a simple and obvious point, but it is a powerful one. For if it is obvious that administrative regulation is based not solely on science but also on political values, then agencies must be able to justify their exercise of political power based on more than just science or expertise. By relying too heavily on the justificatory power of scientific reasoning, we lose sight of the important and necessary role of self-government in settling contentious moral questions at the center of regulatory policy. Put differently, in exclusively listening to the science, the administrative state displaces everyday people from active public engagement with contemporary issues.[6] Citizens have lost the ability to control the fate of their political community because they are unable to contest, and ultimately choose, the values that will govern their community through common action.[7]

This Article argues that one reason Americans remain so distrustful of their own government, despite the astounding advancement of the administrative state's technical and scientific abilities, is that technocratic justifications deny virtually any role for democratically determined moral judgments in administrative rulemaking and mask the part those moral judgment do play.[8] Though administrative rulemaking has been defended on the inoffensive "good government" shibboleths of political neutrality, rationality, and technocratic expertise, distrust in American government has never been higher. In fact, according to the Pew Research Center, only seventeen percent of Americans had faith in the federal government "to do the right thing" in March 2019.[9] In sharp contrast, seventy-three percent of Americans had trust and confidence in the federal government in 1958.[10] Notwithstanding a few temporary reversals, that trust has been steadily eroding since 1958, and has remained below twenty-five percent for the last eleven years.[11]

6. Tina Nabatchi et al., *Public Administration in Dark Times: Some Questions for the Future of the Field*, 21 J. PUB. ADMIN. RSCH. & THEORY i29, i33 (2011).

7. *See* Donald J. Maletz, *Making Non-Citizens: Consequences of Administrative Centralization in Tocqueville's* Old Regime, 33 PUBLIUS 17, 35 (2003) ("If the political dimension of the administration is overlooked, if the day-to-day affairs of a community become nothing but opportunities for the exercise of administrative paternalism, the individuality that modern democracy wishes to ensure is likely to turn into . . . radical separateness.").

8. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2353 (2001) (commenting on the tension caused by unelected bureaucrats making "essentially political choices" for which they have "neither democratic warrant nor special competence").

9. *Public Trust in Government: 1958–2021*, PEW RSCH. CTR. (May 17, 2021), https://www.pewresearch.org/politics/2019/04/11/public-trust-in-government-1958-2019/ [https://perma.cc/M7CC-BXPQ].

10. *Id.*

11. *Id.* One might argue that the Trump Administration's disdain for professionalism and expertise in the administrative state caused the lack of faith in American

Many factors undoubtedly contribute to Americans' lack of faith in their government, including great convulsions like Watergate, the wars in Iraq and Afghanistan, and the Great Recession. Less sudden, but no less significant, are facts of everyday life: income inequality, stagnant wages, environmental degradation, crumbling infrastructure, and disintegrating communities. But since March of 2019, the situation has markedly worsened. Distrust in government has morphed into conspiracy theories about the deep state, persistent claims that the 2020 presidential election was stolen, a total lack of faith in the judges and civil servants who found no evidence of voter fraud, and culminated in the storming of the Capitol Building on January 6, 2021.[12]

The creation of policy by the relatively insulated administrative state is associated with a decrease in citizens' perception of the value of government and what it provides,[13] making citizens vulnerable to populist, anti-establishment political movements and further stoking the public's distrust.[14] Populist and anti-establishment politicians have seized on citizens' dwindling trust in and estrangement from government and each other[15] by sounding a call to take government back from bureaucrats and political insiders and return it to the people.[16] In an effort to satisfy his supporters and solidify his political position, then-President Trump promised to deconstruct the adminis-

government today. However, despite the Obama Administration's public effort to place professionalism and expertise at the center of its policy choices, *see* Memorandum on Scientific Integrity, 74 Fed. Reg. 10,671, 10,671 (Mar. 11, 2009), trust in government during the Obama Administration never rose above twenty-five percent, *Public Trust in Government: 1958–2021*, *supra* note 9. It remains to be seen whether President Biden can reverse this trend.

12. *See* Timothy Snyder, *The American Abyss: A Historian of Fascism and Political Atrocity on Trump, the Mob and What Comes Next,* N.Y. TIMES MAG. (Jan. 9, 2021), https://www.nytimes.com/2021/01/09/magazine/trump-coup.html [https://perma.cc/CE83-X7V9].

13. Robert F. Durant & Susannah Bruns Ali, *Repositioning American Public Administration? Citizen Estrangement, Administrative Reform, and the Disarticulated State*, 73 PUB. ADMIN. REV. 278, 279 (2013) (noting that the current design of administrative structures has a negative effect on citizens' sense of political efficacy, "reduc[ing] the propensity of citizens to pay attention to government, value what it does for them, participate in the political process, and be mobilizable for political action").

14. Yascha Mounk, *The Undemocratic Dilemma*, 29 J. DEMOCRACY 98, 100 (2018).

15. About six in ten Americans have little or no confidence in the ability of their fellow citizens to make political choices. Michael Dimock, *How Americans View Trust, Facts, and Democracy Today*, PEW TR. MAG. (Feb. 19, 2020), https://www.pewtrusts.org/en/trust/archive/winter-2020/how-americans-view-trust-facts-and-democracy-today [https://perma.cc/9VZ4-3FUP].

16. *See, e.g.*, Nadia Urbinati, *The Pandemic Hasn't Killed Populism: After Lockdowns, Demagogues Will Likely Resurge*, FOREIGN AFFS. (Aug. 6, 2020), https://www.foreignaffairs.com/articles/united-states/2020-08-06/pandemic-hasnt-killed-populism [https://perma.cc/LD26-SV97].

trative state.[17] He also publicized portrayals of himself as personally in control of regulation content,[18] prompting Democrats to accuse him of politicizing the federal bureaucracy and further eroding trust in government.[19] As a result, liberals and Democrats pushed to insulate the administrative state from populist political incursions as an expert and professional check on a President's raw political interests.[20] While insulating the administrative state may protect it from the President, it fails to address Americans' growing sense that they are no longer in control of their political lives and thus fails to discourage determined populist incursions.

Although numerous theories have been proposed as a foundation for the administrative state,[21] modern commentators typically advo-

17. *See* Z. Byron Wolf, *Steve Bannon Outlines His Plan To 'Deconstruct' Washington*, CNN (Feb. 24, 2017, 1:28 AM), https://www.cnn.com/2017/02/23/politics/steve-bannon-world-view/index.html [https://perma.cc/UU78-HBLM] (noting that one core pillar of President Trump's platform is "deconstruction of the administrative state"); CNN, *Steve Bannon Makes Rare Public Remarks at CPAC*, YOUTUBE, at 10:28 (Feb. 23, 2017), https://www.youtube.com/watch?v=OLzpv7D_xLs [https://perma.cc/93V3-9ZHB]; Jon Michaels, *How Trump Is Dismantling a Pillar of the American State*, GUARDIAN (Nov. 7, 2017, 8:36 AM), https://www.theguardian.com/commentisfree/2017/nov/07/donald-trump-dismantling-american-administrative-state.

18. *See, e.g.*, Matthew Yglesias, *Trump's Tweets About Saving the "Suburban Lifestyle Dream," Explained*, VOX (Aug. 3, 2020, 10:10 AM), https://www.vox.com/2020/8/3/21347565/suburban-lifestyle-dream-trump-tweets-fair-housing [https://perma.cc/A6XQ-WTRU]; Kelsey Brugger, *Trump Unveils Landmark Rewrite of NEPA Rules*, E&E NEWS (Jan. 9, 2020, 1:35 PM), https://www.eenews.net/stories/1062036913; Lucas Manfredi, *Trump Unveils Safer Affordable Fuel-Efficient Vehicles Rule*, FOX BUS. (July 16, 2020), https://www.foxbusiness.com/money/trump-unveils-safer-affordable-fuel-efficient-vehicles-rule [https://perma.cc/8D3A-FPXB].

19. Zolan Kanno-Youngs & Jesse McKinley, *Meet the Official Accused of Helping Trump Politicize Homeland Security*, N.Y. TIMES (Aug. 4, 2020), https://www.nytimes.com/2020/08/04/us/politics/trump-homeland-security.html [https://perma.cc/9VDL-4Z58]; Lisa Friedman & Brad Plumer, *Trump's Response to Virus Reflects a Long Disregard for Science*, N.Y. TIMES (Oct. 7, 2020), https://www.nytimes.com/2020/04/28/climate/trump-coronavirus-climate-science.html [https://perma.cc/8DXM-V8RN]; Sharon LaFraniere et al., *F.D.A. Allows Expanded Use of Plasma To Treat Coronavirus Patients*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/2020/08/23/us/politics/fda-plasma-coronavirus.html?action=click&module=top%20Stories&pgtype=homepage [https://perma.cc/77LX-LXRL].

20. *See* Robinson Meyer, *Trump's Interference with Science Is Unprecedented*, ATL. (Nov. 9, 2018, 5:16 PM), https://www.theatlantic.com/science/archive/2018/11/experts-warn-trump-epa-meddling-scientific-method/575377/ [https://perma.cc/VVE5-2Y8V]; Press Release, Steny H. Hoyer, Congressman, House of Representatives, House Democrats Re-Introduce Bill To Stop Research Agency Politicization and Relocation (Feb. 14, 2019), https://hoyer.house.gov/content/house-democrats-re-introduce-bill-stop-research-agency-politicization-and-relocation [https://perma.cc/K6KQ-CRBL].

21. *See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) (describing responses to problems with the

cate for presidential involvement in rulemaking, relying to greater and lesser degrees on the professionalism and expertise of agency staff to control political influence.[22] However, modern legal scholars have ignored the role of the administrative state in driving populist and anti-establishment politics. Recognizing this link makes clear the need to truly address the tension between the administrative state and populism and the way that technocratic justification for regulation contributes to this tension by supplanting the ability of ordinary citizens to participate in the process by contesting the values embodied in administrative rules. Thus, this Article adds to the debate by proposing a theoretical framework from which to critique scholars' continued faith in the politically neutral, technocratic approach to societal problems, and arguing that the administrative state should be reoriented toward widespread democratic political control over its decisions.

To respond to the twin problems of unsatisfying technocratic justifications for agency discretion and the destabilizing political backlash that follows, this Article offers an alternative theory of political engagement based on a robust form of republicanism that supports widespread and direct participation in administrative decisions to legitimize the value choices inherent in regulatory policy. By placing the power to decide regulatory policy in the hands of the people, this

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traditional model of administrative law, including alternative solutions and judicial efforts to curtail agency discretion by increasing interested parties' participation in administrative decisions); Kagan, *supra* note 8, at 2245–385 (presenting the canonical presidential control model for the administrative state).

22. On one end of the spectrum, scholars like then-Professor Elena Kagan and Professor Kathryn Watts advocate for fairly robust involvement of the President in rulemaking with some technocratic limits. *See* Kagan, *supra* note 8, at 2319–83; Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 40 (2009) (advocating for courts to make some room for presidential political control in rulemaking, using technocratic rationality as a guardrail to excessive influence). Somewhere in the middle, scholars understand the relative electoral legitimacy of presidential involvement in rulemaking but construct elaborate controls on presidential influence. *See* Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1452 (2013) (arguing in favor of a highly limited form of presidential control over agency rulemaking tempered by technocratic constraints). On the other end, scholars see the independence of administrative agencies as an important check on presidential overreach. *See* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 582 (2015) (arguing in favor of a more independent administrative state reliant on the professionalism and expertise of its staff to act as a check on the President's political preferences); Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 83 (2017); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 515 (2003) (arguing that administrative law should focus more on controlling arbitrary agency action and less on subjecting agency decision-making to electoral accountability through control by the President).

framework has the potential to emancipate the administrative state from both technocratic insularity and dangerous political incursions by unscrupulous Presidents. To guide this argument, I use a rough-and-ready definition of legitimacy to mean a collective instinct that a government action, by virtue of its enactment through certain procedures, commands our obedience and respect.[23] Understood in this way, legitimacy turns on a common understanding of the governed and the collective moral sentiments of that political community.

Part I discusses the failure of notice and comment rulemaking to engage the public in substantive agency policymaking by continuing a commitment to technocratic government and examines the effect of judicial expectations and ever-shifting standards of review for rulemaking. Part II discusses how procedural liberalism is expressed in the commitment to technocratic government we see today and the ways technocratic government exacerbates the legitimacy problem it attempts to solve. Part III addresses how presidential political control is reintroduced, which further compounds problems of legitimacy. Part IV addresses earlier attempts to apply republican political theory to the administrative state and discusses why those attempts ultimately failed to distinguish themselves from liberal proceduralist accounts of the administrative state. Part V argues that a stronger form of republicanism will be able to tackle the failures of earlier accounts of administrative law and pave the way for more effective reform of the administrative state. And, finally, Part VI suggests possible reforms to the administrative state.

II. "A BROKEN VENDING MACHINE": THE SHORTCOMINGS OF NOTICE AND COMMENT AND JUDICIAL REVIEW OF AGENCY ACTION

This Part examines the limited role the public currently plays in the selection of values at the heart of regulations and how that insulation permits concentrated economic interests and powerful political actors to make value choices that are best left to the public to decide. The administrative state faces extreme pressure from regulated industries, members of Congress, the President's staff in the Office of

23. My definition of legitimacy is drawn primarily from that given by Lord Jonathan Sumption in his Reith Lectures. *See generally* Jonathan Sumption, *The Reith Lectures 2019: Law and the Decline of Politics—Lecture 2: In Praise of Politics*, BBC RADIO 4 (May 28, 2019), https://www.bbc.co.uk/programmes/m0005f05 [https://perma.cc/82A8-Y6HG]; *see also* JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 10 (1978) ("The subject of legitimacy is concerned with popular attitudes toward the exercise of governmental power. Such attitudes focus upon whether governmental power is being held and exercised in accordance with a nation's laws, values, traditions, and customs."); Hanna Pitkin, *Obligation and Consent—II*, 60 AM. POL. SCI. REV. 39, 39 (1966) ("[L]egitimate authority is precisely that which *ought* to be obeyed . . . .").

Management and Budget, and even the President. Yet, regardless of the actual reasons—political or otherwise—for an agency to regulate in a certain manner, agencies continue to publicly justify their actions by resorting to technocratic rationales. Agencies have both political and legal incentives to disguise value judgments as expert or professional judgments. By doing so, agencies narrow the space left for the public to influence the true values behind the regulations and, at the same time, open those values to influence from Executive Branch politics and concentrated economic interests with the resources to couch their positions in professional analyses.

A. Notice and Comment and Agency Technical Justifications

Public participation in rulemaking is relatively limited and often ineffectual; "few modern observers idealize existing methods of consultation" with the public.[24] Notice and comment is the only direct and formal way for the public to participate in regulatory lawmaking.[25] Though some call it "refreshingly democratic,"[26] notice and comment has been variously likened to Kabuki theater[27] and a charade.[28] Despite its democratic purpose, notice and comment provides the general public little, if any, influence over the substance of federal regulation in practice.

Empirical studies show that regulated industries participate in far more rulemakings than public interest organizations or the general public.[29] In their study of public participation in federal rulemaking, Professor Wendy Wagner and her colleagues collected data regarding engagement with hazardous air pollution rules promulgated by the

24. Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 423 (2005). Notice and comment is not "an ideal means of harvesting public reactions to regulatory policies." *Id.* at 424.

25. Of course, there are other indirect and informal ways to influence agencies. For instance, individuals or groups that meet with agency staff can help shape regulatory policy. Additionally, members of Congress and the President and their staff can impact agency rulemaking by asserting political pressure. However, the vast majority of citizens do not have access to these avenues of influence.

26. Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, 57 LAW & CONTEMP. PROBS. 127, 129 (1994).

27. E. Donald Elliott likened notice and comment to "Japanese Kabuki theater" because it is "a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues." E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

28. David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 231–32 (2001).

29. *See* Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 128–29 (2011); Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 951 (2006) (noting that few ordinary citizens participate in rulemaking).

Environmental Protection Agency (EPA)[30] and found that industry groups participated in the formal comment period for every single hazardous air pollution rule, submitting over eighty-one percent of total comments.[31] In contrast, public interest groups participated in about half of those same rules and accounted for, on average, only four percent of comments filed.[32] Professor Wagner's study also revealed that greater industry group participation led to greater influence on the substance of the rule.[33] Eighty-three percent of significant changes weakened the final rule in favor of the regulated industry, and the data showed that the greater the number of industry comments, the greater the number of weakening changes to a particular rule.[34] Comments seeking to strengthen rules were "not only fewer in number, but less successful."[35]

Other empirical studies on the participation and influence of regulated industries are consonant with Professor Wagner's findings.[36] In a study of forty rulemakings across four agencies, Professors Jason Webb Yackee and Susan Webb Yackee found that business interests submitted over fifty-seven percent of comments, while public interest groups submitted only six percent.[37] The study also found that comments from business interests were much more likely to change the substance of the rule.[38]

30. These particular rules were selected for study because the standards were required by statute, *see* 42 U.S.C. § 7412(d), which provided specific deadlines, and because of the standards' typicality. Wagner et al., *supra* note 29, at 119.
31. Wagner et al., *supra* note 29, at 128.
32. *Id.* at 129.
33. *Id.* at 130–31 ("Specifically, on average each rule involved twenty-two significant issues raised by commenters in their comments and the EPA made changes in response to slightly more than half (thirteen) of these comments and rejected the rest.").
34. *Id.*
35. *Id.* at 132 ("[W]hile EPA rejected about one-third of the comments intended to weaken the rule, it rejected more than half of the comments to strengthen the rule.").
36. *See* Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 131, 133 (2006). According to a study of the significant EPA hazardous waste rules from 1989 to 1991, industry groups filed nearly sixty percent of all comments, while individual citizens only filed six percent of comments. Coglianese, *supra* note 29. This disparity was also evident in rulemaking proceedings, where at least one comment was received from industry groups in ninety-six percent of proceedings compared to only forty percent from citizens. *Id.* Further, in a study of eleven randomly selected rulemaking proceedings across three federal agencies, 66.7%–100% of the comments were submitted by corporations, public utilities, or trade associations. Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RSCH. & THEORY 245, 251–53 (1998).
37. Yackee & Yackee, *supra* note 36, at 133.
38. *Id.* at 135 ("The implication of our empirical results is relatively clear: agencies appear to alter final rules to suit the expressed desires of business commenters,

Even when the public participates significantly in rulemaking, agencies often ignore individual citizen comments. In an evaluation of recent rulemakings in which agencies received extensive comments from individual citizens, Professor Nina Mendelson found that "agencies generally appear[ed] to be impatient with and unresponsive to value-focused commenting" and "very rarely appear[ed] to give [lay comments] any significant weight."[39] Although the final rules noted the extensive comments filed by public citizens, agencies "pass[ed] over those comments lightly, saving detailed responses for more sophisticated or technical comments."[40] Agencies' disregard for value-focused public comments is particularly worrisome because "laypeople nearly always raise concerns that are relevant to the agency's legal mandate."[41]

Take just one example of this practice. In 2002, the National Park Service (Park Service) embarked on a rulemaking that would permit jet skis in certain areas of Assateague National Seashore.[42] Of the 7,600 comments submitted, "7,264 support[ed] a complete ban on [jet ski] use within the national seashore boundary. An additional 43 individuals support[ed] banning [jet ski] use within the entire National Park System."[43] The final rule never addressed the overwhelming number of comments opposing jet skis,[44] even though the Park Service's legal mandate gives it the discretion to engage in such an in-

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but do not appear to alter rules to match the expressed preferences of other kinds of interests.").

39. Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1361–65, 1367 (2011). According to Professor Mariano-Florentino Cuéllar, "Agency staff frequently note whether a concern was raised by few or many commenters, tabulate form letters separately, and imply that they do not necessarily merit the sort of response that an individualized letter does." Cuéllar, *supra* note 24, at 422 n.39 (citing Concession Contracts, 65 Fed. Reg. 20,630, 20,631 (Apr. 17, 2000) (indicating that the National Park Service did not respond to duplicative comments)).

40. Mendelson, *supra* note 39, at 1363 (citing Cuéllar, *supra* note 24, at 433 n.39).

41. Cuéllar, *supra* note 24, at 414. It is worth noting that discretion is a problem for all agencies since "no regulatory statute is free of gaps or ambiguities." David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1466 (2013). As Professor David Arkush explained, "[T]he problem is even greater under the broad statutory mandates that have rapidly become the norm for modern administrative agencies." *Id.* The upshot is that most public comments—unsophisticated though they may be—are actually relevant to the agency's decision. Cuéllar, *supra* note 24, at 414.

42. *See generally* Mendelson, *supra* note 39, at 1364.

43. Assateague Island National Seashore, Personal Watercraft Use, 68 Fed. Reg. 32,371, 32,372 (May 30, 2003).

44. *See id.*; *see also* Mendelson, *supra* note 39, at 1364 n.118 (stating that although the Park Service alleged it responded to comments regarding the environmental assessment in the "Finding of No Significant Impact" section of the regulation, it was unclear whether comments opposing jet skis were included in this category).

quiry.[45] Instead, the Park Service discussed technical issues, including safety and crowding, that might arise from jet ski use.[46] Ultimately, the Park Service allowed use of jet skis in the areas under consideration.[47]

Although the Park Service's decision can only be described as a value choice regarding how we should treat and use our public lands, this does not support the argument for plebiscitary regulation. Scholars have identified a number of problems with conducting rulemaking in this fashion, including the ability of a small number of people to generate large numbers of comments, thus skewing the reliability of comments as a gauge of citizen values.[48] Here, the agency effectively sidelined public participation by justifying its decision on technocratic grounds. This example does show why public values must be taken seriously when agencies make political or ethical decisions, and that notice and comment falls short of ensuring that agencies pay attention to public values.

Some scholars argue that agencies give individual commenters short shrift and pay closer attention to industry comments because agencies have a "bureaucratic ethos"[49]—the tendency to see regulatory problems as primarily problems of technocratic analysis.[50] Com-

45. 54 U.S.C. § 100751(a) ("The Secretary shall prescribe such regulations as the Secretary considers necessary or proper for the use and management of System units.").

46. *See* Mendelson, *supra* note 39, at 1364.

47. 36 C.F.R. § 7.65(c) (2007).

48. Known as the "Chicago model of civic participation: 'Vote early and often.'" Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENV'T & ADMIN. L. 123, 142 (2012) (citing Stuart W. Shulman, *The Case Against Mass E-Mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1 POL'Y & INTERNET 23, 35–36 (2009)). Another concern with plebiscitary rulemaking is that commenters simply do not have the information necessary to make a nonarbitrary decision about the desirability of any given regulation. *See id.* at 143.

49. Bureaucratic ethos is defined as a focus on "values such as efficiency, efficacy, expertise, loyalty, and hierarchy." Nabatchi et al., *supra* note 6, at i35–i36.

50. "[A]gency officials may see themselves as operating in an atmosphere of rational, technocratic analysis." Mendelson, *supra* note 39, at 1371. This is due to a societal embrace of "management, experts, and the scientific method as rationalizing and executive-centered forces" that generally tends "to turn political questions into technical questions." Durant & Ali, *supra* note 13, at 279. This tendency "still resonates widely today." Curtis Ventriss et al., *Democracy, Public Administration, and Public Values in an Era of Estrangement*, 2 PERSPS. ON PUB. MGMT. & GOVERNANCE 275, 280 (2019). As Professor Nabatchi notes, "[P]olicy and decision making have been increasingly dominated [by] technocrats [and] experts who generate and analyze statistical data at the expense of judgment, opinion, and understanding." Tina Nabatchi, *Addressing the Citizenship and Democracy Deficits: The Potential of Deliberative Democracy for Public Administration*, 40 AM. REV. PUB. ADMIN. 376, 382 (2010) (citing DANIEL YANKELOVICH, COMING TO PUBLIC JUDGMENT: MAKING DEMOCRACY WORK IN A COMPLEX WORLD (1991)).

ments from ordinary citizens often express simple value judgements but offer no sophisticated legal, scientific, or technical information.[51] Through this lens, a quantitative and qualitative comparison between industry and public engagement leads to the assumption that citizens are apathetic and unsophisticated, which circularly "lend[s] credence to accounts emphasizing the technical and scientific dimensions of regulatory problems, not political or ethical ones."[52] This is fortified by the further assumption that were the public to have the knowledge, skill, and professionalism of the regulators, they would come to the same, or a similar, conclusion.[53] But by casting regulatory problems as solvable by politically neutral technocratic analysis, agencies discount ordinary public participation "as inconsistent with a notion of rulemaking as a 'technocratically rational' enterprise."[54]

Agencies also have a political incentive to recast value judgments as questions of technocratic government. Agencies may engage in this kind of reframing in order to "conceal the underlying social compromise . . . under the veneer of scientific truth."[55] Reformulating regulatory problems in this way may help agencies sustain legitimacy by masking the subjectivity of the regulatory endeavor.[56] Some commentators have surmised that justifying agency action with purportedly objective technocratic measures, like cost–benefit analysis, may also gain support with the public because it appears to limit the exercise of agency discretion.[57] Since rationality is assumed to be an internal constraint on discretion,[58] the public's fear of unaccountable agency staff making discretionary decisions is assuaged when officials are purportedly bound by a technocratic (i.e., rational) process that results

51. *See* Cuéllar, *supra* note 24, at 426.

52. *Id.*

53. *See* Farina et al., *supra* note 48, at 143. "Would mass public commenters maintain the same preferences were they to have more complete information about the facts, the variety of competing interests and values, and the range of regulatory outcomes the agency might adopt short of either banning the activity completely or leaving it entirely unregulated?" *Id.* Studies show that "reasonably full and balanced information about complex policy questions can change citizens' policy preferences," though not invariably. *Id.* at 143–44 (describing several studies demonstrating this shift).

54. Mendelson, *supra* note 39, at 1346.

55. Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1653 (1995).

56. *See id.* at 1654 n.142; Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENV'T L. REV. 433, 467 (2008); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1292–93 (1984) ("This rhetoric can assure its advocates and their audience of the legitimacy of bureaucratic power only as long as its manipulability is concealed.").

57. *See* Wagner, *supra* note 55, at 1654 & n.142.

58. *See* Frug, *supra* note 56, at 1322–23.

in politically neutral, legitimate exercises of expertise.[59] Though the public may believe that this expert-driven process keeps "[s]ubjectivity, personal bias, or private judgment or opinion" at bay,[60] in reality, this framing only obscures the discretionary, subjective value choices at the heart of most regulatory decisions.[61] The imposition of cost–benefit analysis on so-called significant agency regulations[62] can be understood in part as a quest to publicly limit agency discretion through technocratic means and ultimately bolster the legitimacy of regulations.[63]

Supporting decisions with complex technical reasoning has the added effect of shielding agency decisions from "unwanted review" by nonexperts.[64] Those with an economic stake in the outcome of the

59. *See* Wagner, *supra* note 55, at 1667.

60. Shapiro & Schroeder, *supra* note 56, at 467. "It is even better if [rules limiting the exercise of discretion] can be rules of quantification, which by resemblance can borrow on the esteem in which most people hold science. . . . 'Quantification is raised up as a neutral, objective language, a basis for minimizing arbitrariness, and hence for overcoming suspicion and winning allies.'" *Id.* (quoting Theodore M. Porter, *Objectivity as Standardization: The Rhetoric of Impersonality in Measurement, Statistics, and Cost-Benefit Analysis*, *in* RETHINKING OBJECTIVITY 197, 210 (Allan Megill ed., 1994)).

61. *See* Howard Latin, *Good Science, Bad Regulation, and Toxic Risk Assessment*, 5 YALE J. ON REGUL. 89, 93–94 (1988)); Wagner, *supra* note 55, at 1653–54.

62. Review by the Office of Information and Regulatory Affairs (OIRA) within the Executive Office of the President (EOP) is limited to "significant regulatory action." Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993), *reprinted as amended in* 5 U.S.C. § 601 app. at 101–05 (2019). Significant regulatory action means any regulatory action that may (1) "have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;" (2) create inconsistencies with other regulations; (3) "materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof;" or (4) raise novel issues of law or policy. *Id.* Significant regulatory actions must be accompanied by extensive cost–benefit analysis. *Id.* at 51,740–41. OIRA reviews the cost–benefit analysis to determine if the rule's benefits justify its costs. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011), *reprinted in* 5 U.S.C. § 601 app. at 115–16 (2019). Some scholars have criticized OIRA's determination of which rules to review as "baffling." *See* Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV'T L. REV. 325, 347 (2014) (noting that most of the rules reviewed by OIRA during the Obama Administration were not economically significant, and instead OIRA reviewed only the rules it wanted to and often for arbitrary reasons).

63. *See* Wagner, *supra* note 55, at 1653–54. "[T]he concept of 'expertise' could be invoked to suggest the possibility of an organization that constrains the exercise of subjective discretion within the bounds of professional objectivity." Frug, *supra* note 56, at 1293.

64. Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2032 (2015); *see also* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1771 (2013) (stating that agencies strategically increase the cost of review, mak-

rulemaking, however, can use the technical and scientific focus of the agency's public reasoning—and their access to paid experts—to flood the agency with information and analyses that the agency ignores at its peril.[65] The studies mentioned above make plain that the participation of regulated industries armed with legal and technical experts has a quantifiable effect on the content of regulations, whereas public participation does not.[66]

Because agencies have construed their role in technocratic terms, the notice and comment process in large part has failed to engage the public in the regulatory process and given economic and political elites enormous influence over policy decisions. Nevertheless, agencies are not the only institutional actor to blame for their bureaucratic ethos. The judiciary plays an important role in pushing agencies to offer technocratic justifications for regulations.

B. The Judiciary's Role in Promoting Technical Justifications for Agency Rulemaking

The judiciary has played a pivotal role in encouraging agencies to prioritize the technocratic aspects of rulemaking.[67] The advent of "hard look" review of agency actions has led to courts' expectation that agencies justify regulations with technocratic rationality.[68] To avoid reversal on appeal, agencies have an incentive to address the volumes of scientific or technical information—provided more often than not by regulated industries—for fear that a reviewing court will second-guess agency reasoning based on outside information. This section discusses selected administrative law cases to show how the judiciary's hard look arbitrary and capricious review jurisprudence has pressed agencies to address the technical aspects of rulemaking and ignore or bury the political value choices that often lie at the heart of rulemaking.

In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance Co.*, the Supreme Court engaged in a searching review in

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ing review more difficult and insulating their decisions); Watts, *supra* note 22, at 40 (noting the incentive to hide political influence behind technocratic terms).

65. *See* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1324–25 (2010). This phenomenon is referred to as "information capture." *Id.* at 1325.

66. *See supra* notes 29–41 and accompanying text.

67. *See* Watts, *supra* note 22, at 84.

68. Agencies are expected to produce data-driven cost and risk analyses,

> to identify the facts they consider relevant and entertain claims that these facts are wrong or incomplete, to assess alternative approaches, to respond to questions and criticism, and to explain why their proposed solutions are the best choices within the bounds of what their statutory authority says they can, must, or may not consider.

Farina et al., *supra* note 48, at 135.

determining whether the National Highway Traffic Safety Administration's (NHTSA) rescission of a rule requiring certain cars to be equipped with either airbags or automatic seatbelts was proper.[69] Stating that under the arbitrary and capricious standard, an agency "must examine the relevant data and articulate a satisfactory explanation for its action,"[70] the Court focused almost entirely on the technocratic justifications that the NHTSA used to justify its decision.[71] Ultimately, the Court found that the NHTSA failed to fully analyze and adequately explain the revocation of the restraint standards.[72] With this decision, the Supreme Court ushered in the hard look standard—a data-driven test for agency rules.[73] Under this standard, courts must compare the decision to the available data to ensure that the agency has not "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[74]

Nevertheless, the Court also described this review as "narrow" and cautioned that courts should not substitute their judgment for that of the agency.[75] In contrast to *State Farm*, *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.* is a prime example of the way courts can dial down their review to a "soft review."[76] In upholding the Nuclear Regulatory Commission's rule regulating the environmental effects of a nuclear power plant's fuel cycle, the Court declared: "It is not our task to determine what decision we, as Commissioners, would have reached. Our only task is to determine whether the Commission has considered the relevant factors and articulated a rational connection between the facts found and the choice

69. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 34–39 (1983).
70. *Id.* at 43.
71. *Id.* at 51–57.
72. *Id.* at 57.
73. Kagan, *supra* note 8, at 2372.
74. *State Farm*, 463 U.S. at 43.
75. *Id.* ("We will, however, 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" (quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974))).
76. Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983); *see also* Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 736–37 (2011) (stating that super deference is "sometimes noted for the role it plays in judicial vacillation between 'hard' and 'soft' review").

made."[77] Some commentators have deemed this kind of soft review of agency science "super deference."[78]

While there is some debate around whether super deference accurately describes how courts approach agency decision-making,[79] there seems to be little debate that the arbitrary and capricious review standard is malleable "based on [the court's] assessment of contextual factors in a particular case."[80] There are, of course, no clear lines between expertise and policy judgments or between policy judgments and politics.[81] Courts are left to muddle through the task of drawing lines between appropriate exercises of policy judgment and inappropriate political influence. *State Farm* gave courts the latitude to "dial their scrutiny up and down,"[82] but hard look review is not required, as shown in *Baltimore Gas*. Consequently, agencies can only guess how a court would review a regulation if it were challenged, and therefore it behooves agencies to produce a voluminous record of scientifically

77. *Baltimore Gas*, 462 U.S. at 105 (first citing *Bowman Transp.*, 419 U.S. at 285–86; then citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)). The NRDC challenged the rule because the agency did not consider health, cumulative, and socioeconomic effects, but the Court determined that it was not arbitrary and capricious for the agency to set a net value based on generic costs and benefits for use in individual proceedings where case-specific information would be considered as well. *Id.* at 93, 101–04.

78. Meazell, *supra* note 76, at 733.

79. *Compare* Carla Mattix & Kathleen Becker, *Scientific Uncertainty Under the National Environmental Policy Act*, 54 ADMIN. L. REV. 1125, 1158 (2002) (arguing that super deference is a part of arbitrary and capricious review), *with* Meazell, *supra* note 76, at 738 (arguing that courts are moving "away from super deference toward hard-look review").

80. Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 35 (2019). This flexibility causes "significant unpredictability in the applicable standard of review." Wagner, *supra* note 65, at 1359–60 (citing JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 181 (1999); *see also* Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 411 (1987) ("The Court has vacillated over the degree of deference to be accorded agency decisions under the APA.").

81. *See* Holly Doremus, *Science Plays Defense: Natural Resources Management in the Bush Administration*, 32 ECOLOGY L.Q. 249, 290 (2005) ("Political choices cannot be removed from the process [of administrative decision-making]."); Thomas O. McGarity, *Our Science Is Sound Science and Their Science Is Junk Science: Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities*, 52 U. KAN. L. REV. 897, 932 (2004) ("[P]olicy nearly always drives the inferences that an expert draws from scientific studies."); Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 ADMIN. L. REV. 491, 513 (2019) ("Both the presidential-control and expertise models of agency decisionmaking rely on traditional conceptions of rationality that assume technical judgments can be separated from political judgments.").

82. Metzger, *supra* note 80.

and technically framed justifications for every component of a rule to stave off or defend against challenges.[83]

These two approaches were on display more recently in dueling opinions by Chief Justice Roberts and Justice Breyer in *Department of Commerce v. New York* after New York challenged the decision to add a citizenship question to the 2020 census.[84] According to the majority opinion authored by Chief Justice Roberts, the decision to include a citizenship question was ultimately left to the Secretary of Commerce by statute, though that decision was informed by the technical analysis provided by the Census Bureau.[85] The Secretary thus had the discretion to determine that the Census Bureau's analysis of whether inclusion would depress response rates was inconclusive.[86] Chief Justice Roberts also wrote that the Court should not privilege the Census Bureau's expertise and data modeling "as touchstones of substantive reasonableness" over the Secretary's discretion to consider the Bureau's evidence along with other "incommensurables under conditions of uncertainty."[87]

In contrast, Justice Breyer's dissent meticulously reviewed the multiple Census Bureau analyses of response rates to determine that it was unreasonable for the Secretary to include the question when the experts at the Census Bureau recommended that the question be left out.[88] Justice Breyer's dissent characterized the decision as almost entirely one of technocratic analysis,[89] while Chief Justice Roberts' opinion cast it as primarily one of policy and discretion delegated to the Secretary by Congress.[90] Both opinions, no less, claimed they were straightforwardly applying the arbitrary and capricious review standard set out in *State Farm*.[91] And both have a good claim to being right. Though Justice Breyer's dissent is more in line with the Court's searching review in the *State Farm* case itself,[92] in general the Supreme Court's arbitrary and capricious review is less searching than often acknowledged.[93] As the different approaches of Chief Justice

83. *See* Wagner, *supra* note 65, at 1359–60.
84. Dep't of Com. v. New York, 139 S. Ct. 2551 (2019).
85. *Id.* at 2561.
86. *Id.* at 2571.
87. *Id.* The Court ultimately remanded the decision back to the agency because although the Court found the Secretary's decision objectively reasonable, his reasons for that decision were a pretext. *Id.* at 2575–76.
88. *Id.* at 2584, 2587–93 (Breyer, J., concurring in part and dissenting in part).
89. *Id.*
90. *Id.* at 2568–69 (majority opinion).
91. *See id.* at 2567–68; *id.* at 2585 (Breyer, J., concurring in part and dissenting in part).
92. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983).
93. *See* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1358–59 (2016).

Roberts and Justice Breyer demonstrate, questions susceptible to being posed in scientific terms, such as whether to include a citizenship question on the census, are inevitably shot through with questions of policy.[94] Neatly separating the two is an impossible task, leaving courts with plenty of latitude to frame the issue before them.[95]

The broader point here, however, is that while courts certainly recognize that partisan politics play a role in agency decisions and that some statutes leave the ultimate choice up to policymakers, it is not always clear when a court will conduct a searching, meticulous review of the agency's decision or characterize the decision as a policy judgment sufficiently informed by expert analysis. Relatedly, courts are uncomfortable when politics appear to play too overt a role in agency decisions,[96] as appears to be the case in *Department of Commerce*.[97] As a result, agencies have an incentive to conceal value judgments behind scientific or technical justifications for all rules because of the unpredictability of the application of the arbitrary and capricious standard. Professor Jerry Mashaw likens the courts to "robed roulette wheels churning out results—either 'case dismissed' or 'remanded to the agency for further development'—in a fashion that approximate[s] chance."[98] If the agency draws a judge that engages in a hard look review in the mold of *State Farm* or the dissent in *Department of Commerce*, the agency has no chance to win if it has not stocked its reasoning with technical analysis.[99] Even if the reviewing court conducts a soft look review, as in *Baltimore Gas* or *Department of Commerce*, construing the regulated problem as complex and technical can only help the agency avoid scrutiny, whereas revealing political considerations can lead to reversal.[100] Judicial review simply adds another reason for agencies to conceal important value judgments that drive agency regulations under the "unassailable mantle of science."[101]

94. Examples of these types of questions include the biological effects of very low-dose contaminant exposures, the probability of extremely improbable events, the judgment that must be used to make decisions when thorough data is unavailable, and the value choices between different types of science.

95. Meazell, *supra* note 76, at 746 (noting that policy choices "cannot be avoided" in scientific inquiry).

96. *See* Watts, *supra* note 22, at 42–43 ("[H]ard look review currently incentivizes agencies to disclose only *certain* decisionmaking factors—scientific, technical, or statutory factors—that are likely to gain judicial approval.").

97. Dep't of Com. v. New York, 139 S. Ct. 2551, 2574–76 (refusing to ignore the inconsistency between the agency's action and its explanation).

98. MASHAW, *supra* note 80, at 181; *see also* Bressman, *supra* note 22, at 485 (calling judicial review a "moving target").

99. *See* Wagner, *supra* note 65, at 1360.

100. *See, e.g.,* Massachusetts v. EPA, 549 U.S. 497, 533–35 (2007) (remanding to the EPA its decision not to regulate carbon dioxide emissions from cars due, in part, to its reliance on policy considerations).

101. Meazell, *supra* note 76, at 736.

Agencies, accordingly, have little political or legal incentive to seek out and take seriously the values of the general public. In the end, most people have no opportunity to participate in the bulk of decisions that their own government makes. As Michael Lind recently put it, "[C]asting votes is like putting coins into a broken vending machine. When there is no response, frustrated people tend to kick the machine."[102] It is no wonder, then, that there is frustration with the lack of access to agency decision-making processes where (unlike elections) there is no obvious way for ordinary citizens to influence the substance of national policy. The vending machine of the administrative state, to extend Michael Lind's colorful metaphor, is not just broken—it isn't designed to accept the coins inserted. The commonly held notion of political engagement with the administrative state through individual comments does not fit comfortably with conflicting notions about the value of neutral and objective regulation expected by the courts and practiced within agencies. The flawed, but powerfully attractive, philosophical underpinnings of this tension is the focus of the next Part.

III. "THE RULE OF NOBODY": THE PROCEDURAL REPUBLIC AND THE ADMINISTRATIVE STATE

Over twenty years ago, Michael Sandel argued that the lack of faith in the legitimacy of American government institutions was the product of a liberal "public philosophy" that manifested itself in what Sandel called the procedural republic.[103] The administrative state is, at its core, an outgrowth of this procedural republic and has assumed its delegitimizing features, which contribute to antiestablishment and populist movements. This Part will explore the philosophical connections between the modern liberal account of government and technocratic administration.

A. The Neutrality of the Liberal State

The liberal public philosophy with which Sandel was concerned holds that government should be neutral among moral claims, relegating foundational moral questions to personal conviction.[104] Government neutrality, the argument goes, is necessary to respect the moral agency of each individual.[105] Rather than providing the forum for the

102. Michael Lind, *Saving Democracy from the Managerial Elite*, WALL ST. J. (Jan. 10, 2020, 11:15 AM), https://www.wsj.com/articles/saving-democracy-from-the-managerial-elite-11578672945?mod=HP_listc_pos4.

103. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 4 (1996).

104. *Id.* at 12.

105. Michael J. Sandel, *The Political Theory of the Procedural Republic*, 93 REVUE DE MÉTAPHYSIQUE ET DE MORALE 57, 67 (1988).

development of the character of its citizens, government exists to secure a neutral framework of rights and procedures so that people can exercise their moral agency to choose their own ends. In the procedural republic, people are "freely choosing, individual selves."[106] Consequently, the moral constraints of family, religion, or country have no claim on the morality of the ends chosen by any individual, and thus cannot be a legitimate basis for regulation by the state. "Freed from the dictates of nature and the sanction of social roles, the human subject is installed as sovereign, cast as the author of the only moral meanings there are."[107] Thus, the only moral imperative for government is to ensure that the right to choose one's own ends is preserved by neutral procedures.[108] Government should, as it were, stay out of the business of defining the common good.[109] A commitment to the procedural republic permits "politics and government [to] live[ ] side by side, but touch[ ] almost nowhere."[110]

In this way, however, the ideal of state neutrality "is not morally self-sufficient but parasitic on a notion of community it officially rejects."[111] The very choice to deem individuals as the only rightful claimants to their moral ends as an animating principle of government depends on the anterior assumption that we, as a political community, have *already* decided that government must respect the sole moral autonomy of the individual. To be sure, this view is attractive as the basis for government because it appears to be no choice at all. Rather, it flows from pre-political rights that attach to individuals by virtue of their existence. But the ideal of state neutrality is *itself* a value judgment about the moral agency of the individual that, according to this liberal philosophy, each individual—as a citizen—should be free to reject or accept. In a world in which the state must remain neutral, however, individuals could never have chosen that value collectively as a governing principle because to do so would improperly impose a particular morality on every citizen. The notion of state neutrality ineluctably trades on a moral commitment to a shared value that denies the ability of the political community to act collectively to

106. Michael J. Sandel, Democracy's Discontent: America in Search of a Public Philosophy, Keynote Address (1997), *in* 85 GEO. L.J. 2073, 2080 (1997) (but noting the procedural republic may cause certain unwanted dependencies).

107. Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 87 (1984). Liberalism conceives of "the individual as something given, complete in itself, and of liberty as a ready-made possession of the individual, only needing the removal of external restrictions in order to manifest itself." John Dewey, *The Future of Liberalism*, 32 J. PHIL. 225, 226 (1935).

108. *See* Sandel, *supra* note 105, at 60; *see also* SANDEL, *supra* note 103, at 12–13 (arguing the capacity to choose between competing values is essential).

109. *See* SANDEL, *supra* note 103, at 54.

110. KURT VONNEGUT, PLAYER PIANO 120 (The Dial Press 2006) (1952).

111. Sandel, *supra* note 107, at 91.

affirm that commitment. The procedural republic, accordingly, exaggerates the extent of consensus on contested moral values.

The administrative state currently buys in to the liberal assumption that choosing neutrality (i.e., choosing to justify its actions on technocratic rationality) is itself a neutral choice. By assuming the valuelessness of liberal neutrality, the administrative state masks values in neutrality and replicates the false assumption of consensus on regulatory policy. The administrative state does not see a need for the public to assert common values in regulations because it perceives regulation as neutral, allowing individuals' private ordering of their own moral ends without disruption. In fact, public inclusion through democratic control over regulatory policy is dangerous to individual freedom because a value-neutral result cannot be guaranteed.[112] The state can—and indeed must—simply recede into the background as a mechanism for aggregating individuals' private values in search for a neutral perspective from which to regulate.[113] Hannah Arendt pointedly called this kind of government "the rule of nobody."[114] Paradoxically, the individual is lost in the commitment to neutrality, which renders particular persons "abstract" and "outside of time."[115] And unlike democratic politics, the administrative state acts as if it can ensure neutrality, but there is little reason to see this assumption as legitimate unless neutrality is first secured as the common public value to guide all regulatory decisions.

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112. *See, e.g.*, Bressman, *supra* note 22, at 496, 498 (noting arbitrary government threatens individual liberty, and that elected officials sometimes act in their own self-interest); DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 49–50 (2010) (noting the attractiveness of a method of regulation that imposes no value judgment but perfectly aggregates individual preferences because it is free of the "oppressive potential" of other forms of political organization); *see also* Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1813 (2020) ("The affirmative idea that a market order secures an important form of the liberal value of neutrality interacts here with the negative idea that any political judgments about which social interests to secure or advance are likely to involve capture, entrenchment, and spurious claims to a (probably non-existent) 'public interest . . . .'").

113. *See* KYSAR, *supra* note 112, at 45 (describing the search for an objective "view from nowhere" from which to regulate).

114. HANNAH ARENDT, THE HUMAN CONDITION 45 (2d ed. 2018).

115. KATRINA FORRESTER, IN THE SHADOW OF JUSTICE: POSTWAR LIBERALISM AND THE REMAKING OF POLITICAL PHILOSOPHY 245 (2019) (discussing Judith Shklar's critique of liberal philosophy in her seminal book *Ordinary Vices*); KYSAR, *supra* note 112 (arguing that in the search for objective justifications for action, we lose the particular individual moral reasons for acting). According to John Dewey, liberalism is an ahistorical philosophy "in which . . . particular ideas of individuality and freedom were asserted to be absolute and eternal truths; good for all times and all places." Dewey, *supra* note 107.

B. The Liberal Proceduralist Administrative State

The liberal goal of state neutrality manifests itself in each regulatory decision. The administrative state's commitment to technocratic rationality as the justification for agency actions only conceals what are, in reality, value-laden decisions.[116] Pursuit of the appearance of neutrality in the administrative state is a form of this same public philosophy Sandel identified as the source of discontent in the current political arrangement.[117] Regulating on the basis of the public's moral judgment is out of the question because it would impose the moral judgment of others on individuals who may not share it. On the other hand, justifying regulatory action on objective facts and rational analysis appears to ensure that decisions made by the administrative state do not interfere with an individual's ability to choose their own ends. The administrative state cannot infringe upon the ability of an individual to choose their own moral ends because no one can deny the objective state of the world.[118]

Nonetheless, any rational, technocratic means–ends methodology is a social construction that is "neither objective nor unbiased."[119] The pervasive use of market-oriented methods, like cost–benefit analysis, to set regulatory policy is a prime modern example of the attempt to maintain state neutrality. Market-oriented regulations use price signals from real markets or, where no relevant market exists, create artificial markets by surveying and aggregating private price preferences to select regulations. For proponents of market-oriented regulation, "the market proves a unique site in which to determine and achieve social good in liberal societies: the consenting individual is the author of the norms under which she will live . . . . without requiring anyone to consent to a comprehensive account of the social good."[120]

116. *See* Farina et al., *supra* note 48, at 131–32 ("Increasingly, we recognize that regulatory decisions are heavily value-laden, even when they also require deployment of scientific or other specialized knowledge."); Nabatchi, *supra* note 50; Meazell, *supra* note 76, at 736; Sidney Shapiro & Richard Murphy, *Public Participation Without a Public: The Challenge for Administrative Policymaking*, 78 MO. L. REV. 489, 495 (2013) ("Administrative policymaking demands that agencies make value choices, and in a democracy, the agency should be politically accountable for its choices.").

117. *See* SANDEL, *supra* note 103, at 4–7.

118. *Cf.* HANNAH ARENDT, BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 141 (Penguin Books 2006) (1961) ("For to live in a political realm with neither authority nor the concomitant awareness that the source of authority transcends power and those who are in power, means to be confronted anew, without the religious trust in a sacred beginning and without the protection of traditional and therefore self-evident standards of behavior, by the elementary problems of human living-together.").

119. Shapiro & Schroeder, *supra* note 56, at 446.

120. Britton-Purdy et al., *supra* note 112, at 1814–15. Elizabeth Anderson has similarly argued that "unlaundered private preferences are not the best input into

Cost–benefit analysis, however, is not neutral because "[i]t expresse[s] a particular view of power and legitimacy"[121] and necessarily incorporates certain moral assumptions that are often not publicly acknowledged.[122] Cost–benefit analysis rests on the questionable assumption that costs and benefits are commensurable and monetizable—that is, that they can be measured accurately in the same units: dollars and cents.[123] Yet it is controversial on moral grounds to place an explicit dollar value on the things we value for nonmonetary reasons—for example, the continued existence of a particular species,[124] the value of a human life,[125] or a society free of discrimination.[126] The attempt to assign value in a purportedly scientifically objective way for a cost–benefit analysis "avoid[s] engagement with the fundamental questions of value that are necessarily implied in political judgments about what should count as 'costs' and 'benefits.'"[127] Replacing political judgment with scientific rationality threatens to flatten individual liberty by smuggling in values that end up animating regulation.[128]

Cost–benefit analysis exemplifies the broader problem of the pervasive "trans-scientific" issues agencies are asked to address.[129] A trans-scientific issue is one that can be asked in scientific terms but cannot be truly addressed by science because its answer necessarily

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democratic decision-making, precisely because . . . they do not constitute a public interest, even in aggregate." Elizabeth Anderson, *The Epistemology of Democracy*, 3 EPISTEME 8, 11 (2006).

121. Britton-Purdy et al., *supra* note 112, at 1806.
122. *See* Roesler, *supra* note 81, at 520–22.
123. Michael J. Sandel, What Money Can't Buy: The Moral Limits of Markets, Address at Brasenose College for the Tanner Lectures on Human Values (May 11–12, 1998), *in Lecture Library*, TANNER LECTURES, https://tannerlectures.utah.edu/_resources/documents/a-to-z/s/sandel00.pdf [https://perma.cc/7NYZ-QUZJ] (last visited Aug. 27, 2021); *see also* Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1557–59 (2002) (discussing how cost–benefit analysis monetizes the protection of the environment and problematically attaches price tags to priceless things); Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 931, 948 (2000) (arguing that equating market-centered contingent valuations for the preservation of the environment to a private commodity that can be purchased disregards important social choice options).
124. *E.g.*, KYSAR, *supra* note 112, at 213–14 (discussing the EPA's attempt to place a monetary value on fish and other organisms that would be killed by being sucked into cooling water intakes at power plants across the country).
125. *E.g.*, Reeve T. Bull, *Making the Administrative State "Safe for Democracy": A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611, 615 (2013).
126. *E.g.*, Lisa Heinzerling, *Quality Control: A Reply to Professor Sunstein*, 102 CALIF. L. REV. 1457, 1464 (2014).
127. Britton-Purdy et al., *supra* note 112, at 1805.
128. ARENDT, *supra* note 114. Arendt argues that social and behavioral sciences "aim to reduce man as a whole, in all his activities, to the level of a conditioned and behaving animal." *Id.*
129. Roesler, *supra* note 81, at 521 (citing Wagner, *supra* note 55, at 1629).

rests on value judgments.[130] The question of how much ozone is safe can be posed, evaluated, and purportedly solved in scientific terms. But the underlying risk assessment, i.e., what level of safety is acceptable, cannot be answered by any scientific inquiry. That the Obama EPA could set an ozone standard that the Bush EPA rejected, based on the same administrative record, highlights the inherently value-laden choice at the center of many regulatory decisions.[131] The scientific justifications for both standards only mask, but do not replace, the underlying value choices.[132] No matter what the state of the world *is*—something expert analysis may be able to tell us accurately—it cannot tell us what to *do* about it.[133] Decisions among possible regulatory actions differ as much on moral or ideological grounds as they do on matters of factual and technical expertise, even if agencies and courts only acknowledge the latter.[134]

In this account of the administrative state, public comment procedures are the obverse of the neutral state. The opportunity to comment recognizes the freely choosing individual's procedural right to participate. The right to participate, however, is necessarily limited by the commitment to neutrality. Participation can never be allowed to affect the substance of policy except in highly limited ways that formally respect the rationality of the decision. As such, participation must be limited to providing inputs (facts, technical data, etc.) required for the neutral decision-making process. "But of course, in modern society every particular individual is weak and in no position to demand rights or recognition."[135] Without the financial ability to hire experts, or the political clout to influence the President or their political appointees, individuals are left with only a hollow procedural

130. *See* Alvin M. Weinberg, *Science and Trans-Science*, 10 MINERVA 209, 209–13 (1972).

131. *See generally* Thomas O. McGarity, *Science and Policy in Setting National Ambient Air Quality Standards: Resolving the Ozone Enigma*, 93 TEX. L. REV. 1783 (2015) (describing the administrative record and noting the difference in rulemaking outcomes between the Bush Administration and the Obama Administration).

132. *See id.* at 1798. Professor McGarity notes that sometimes value choices are embedded so deeply in the agency's scientific assessment that it is difficult for observers to determine which values the agency is basing its decision on. *Id.*

133. *See, e.g.*, BERTRAND RUSSELL, HUMAN SOCIETY IN ETHICS AND POLITICS 3–4 (1955). "[E]thics is bound up with life, not as a physical process to be studied by the biochemist, but as made up of happiness and sorrow, hope and fear, and the other cognate pairs of opposites that make us prefer one sort of world to another." *Id.* at 4.

134. *See* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 107–08 (3d ed. 2007).

135. John Ferejohn, *Two Views of the City: Republicanism and Law*, *in* REPUBLICAN DEMOCRACY: LIBERTY, LAW AND POLITICS 128, 149 (Andreas Niederberger & Philipp Schink eds., 2013).

right, while political and economic elites contest the substance of regulatory policy.[136]

C. The Liberal Proceduralist Administrative State Fosters Anti-Establishment Politics

As the empirical studies cited in Part I demonstrate, expert participation on behalf of business interests shapes the substance of regulation in favor of those interests.[137] Pursuit of technocratic rationality, often in the form of market-oriented regulations, "has reinforced a very non-neutral drift toward elite control of government, increasingly described by political scientists as 'oligarchy.'"[138] Indeed, justifying regulation on technocratic grounds may make agencies uniquely susceptible to industry manipulation because the methodologies used are highly complex, superficially objective, and fact-intensive.[139] Outside experts hired by private interests can provide data or technical analyses that advance their own agenda in a way that is far from transparent.[140] This state of affairs is possible precisely because agencies—regardless of how they actually make decisions—publicly justify their actions by resort to a bureaucratic ethos, thereby ensuring that the public cannot compete within the constraints of bureaucratic rationality, while private interests can.

Professor Yascha Mounk labels this problem "undemocratic liberalism," which describes a regime wherein formal rights are respected and even cherished, but the vast majority of decisions are not subject to democratic control.[141] Mounk notes that the United States' "commitment to liberal rights remains deeply ingrained. But the form this liberalism takes is increasingly undemocratic."[142] Important decisions are made by bureaucrats or judges largely insulated from political

136. *See* Shapiro & Murphy, *supra* note 116, at 497; Barron & Kagan, *supra* note 28 (arguing that notice and comment "tends to promote a conception of the regulatory process as a forum for competition among interest groups, rather than as a means to further the public interest"); Mendelson, *supra* note 39, at 1371 (explaining that comments discussing value judgments receive less attention because agencies are hyper-focused on technocratic analysis); *see also supra* notes 24–46 and accompanying text (asserting that generally the political and economic elites are the only members of society to truly influence and alter regulatory policy).

137. *See supra* Part I.

138. Britton-Purdy et al., *supra* note 112, at 1823–24.

139. *See* Shapiro & Schroeder, *supra* note 56, at 495. The more technical the issues in a rulemaking, the more likely well-funded interests will participate in information capture. Wagner, *supra* note 65, at 1325.

140. *See* Shapiro & Schroeder, *supra* note 56, at 495.

141. *See generally* YASCHA MOUNK, THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT 53–98 (2018).

142. *Id.* at 92.

control.[143] The administrative state is an undemocratic liberal regime that is far more responsive to economic and political elites, preventing the public from informing the agency of its conception of the common good. "Even though debates about proposed laws seemingly retain significance, an unfair policy making process gives ruling elites a huge advantage in advancing their own interests."[144] By "unfair," Mounk means a policy process that gives undue access and influence to economic or political elites such that policy is skewed in their favor.[145] On Mounk's account, ordinary citizens find this state of affairs intolerable.[146]

Unsurprisingly, political scientists have linked the exclusion of the public from rulemaking to the estrangement and distrust citizens feel toward government.[147] Citizen estrangement has been further linked to the balkanization or tribalization of American politics by denying citizens a public forum to make collective decisions.[148] Once it becomes clear that agencies are, in fact, making value judgments and those value judgements are subject to intense private interest lobbying, the ground is primed for antiestablishment politicians to exploit citizens left out of self-government.[149]

"[A]s the theory of cultural cognition teaches us, we can't help but draw on our cultural values to evaluate the impact policies will have on the attainment of society's secular ends,"[150] and as Mounk suspects, burying the value choices made by regulators underneath a patina of neutrality contributes to the political outbursts we see today.[151] Expecting those in power to justify public policy impartially cannot make public officials actually impartial, "[i]t can only make them less *aware* of the influence that our cultural commitments exert on their

143. *Id.*

144. *Id.* at 93.

145. *Id.* at 92–93.

146. *Id.* at 35. Control of the administrative state by elites rather than the public "inspires a deep distrust in the political system that grows more corrosive with each passing year." Mounk, *supra* note 14.

147. *See* Durant & Ali, *supra* note 13. Citizens may become disengaged from the political process because they believe the system would not be responsive to their participation. Mounk, *supra* note 14, at 107; Mendelson, *supra* note 39, at 1373 ("[T]o the extent members of the public perceive that the opportunities to participate are not authentic, they may be deterred from engaging in the government process.").

148. Nabatchi, *supra* note 50, at 383 (first citing ROBERT J. SAMUELSON, THE GOOD LIFE AND ITS DISCONTENTS: THE AMERICAN DREAM IN THE AGE OF ENTITLEMENT, 1945-1995, at 236 (1995); and then citing ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY 18 (1992)).

149. *See* MOUNK, *supra* note 141, at 34–35, 60–61, 94; Mounk, *supra* note 14, at 108.

150. MOUNK, *supra* note 141, at 144.

151. *See* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 144–45 (2007).

policy preferences."[152] The public, however, is cognizant of how values influence policy, making "the smug insistence of their adversaries that such policies reflect a neutral and objective commitment to the good of all citizens" a particularly infuriating and disingenuous claim.[153] It is no wonder that appeals to facts, science, or cost–benefit analysis sway few people to believe that any given regulatory policy is the right policy. Whatever the policy, it is broadly seen as the imposition of one set of values over another at the hands of whatever group happens to control the levers of regulatory policy. Just as the procedural republic is formally neutral but in fact inextricably bound up with value choices that are no longer open to democratic deliberation and contestation, so too is the administrative state.

IV. IF YOU DON'T LIKE THE WEATHER NOW, JUST WAIT A FEW MINUTES: THE PROBLEMS OF POLITICAL CONTROL THROUGH THE EXECUTIVE

With the fundamental flaw of the modern administrative state squarely laid out, it becomes clear that reintroduction of politics to the administrative state is an integral part of knitting the public and its government back together. Before turning to what I argue should be done to address the fundamental flaw laid out above, it is necessary to confront the most obvious, but problematic, way to introduce politics into administrative decisions—the President.

Advocates for returning administrative policy to political control have argued that the President, as a nationally elected figure, is uniquely positioned to impose public values on at least some important agency decisions.[154] The President, after all, can be held accountable by voters for the policies emanating from their administration in a way that courts and agency staff cannot.[155] Proponents of this idea argue that "[o]nce Congress relinquishes the power to determine the

152. *Id.*

153. *Id.* at 144–45.

154. *See* Kagan, *supra* note 8, at 2335. "[B]ecause the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests." *Id.*

> Doubtless, the President's willingness to take political responsibility, even for generally popular rulemaking initiatives, reflects our growing awareness and acceptance that rulemaking is not simply a technocratic process performed in neutrality by objective experts; rulemaking has a distinctly political cast, and that may make the President's actions seem even comforting.

Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 967 (1997); *see also* Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 715 (2016) (noting that President Obama's public involvement with certain regulatory initiatives increased political accountability of those policies).

155. *See* Kagan, *supra* note 8, at 2335; Strauss, *supra* note 154.

details of regulatory policy, the President must assume it because the Constitution permits no other option. . . . [T]he Constitution requires an elected, focused governmental official to exercise that power rather than a bunch of bureaucrats."[156]

But tying the legitimacy of the administrative state to the electoral accountability of the President poses a host of theoretical and practical problems that are as likely to erode legitimacy as they are to enhance political accountability. Responses to these well-known shortcomings rely on the professionalism and technocratic rationality of the bureaucracy to limit political influence that is deemed illegitimate, but those responses cannot avoid the intrinsic legitimacy problems of technocratic rationality.[157]

There is little debate today that the modern Presidency exerts immense control over the administrative state. The President's formal control over the administrative state can take a number of forms: from presidential directives commanding agencies to undertake certain regulatory actions, to review of regulations by the Office of Information and Regulatory Affairs (OIRA) within the Executive Office of the President (EOP), to the President's authority to fire political appointees. The Supreme Court has repeatedly validated the President's extensive control of the administrative state because the President is uniquely accountable to the electorate.[158] As multiple scholars have pointed out, however, majoritarian accountability cannot do all the work required to justify the President's control.[159] Consider that four of the last eight presidential elections were won by a plurality of the votes cast,[160] and in both 2000 and 2016, the candidate who won received fewer votes than the candidate who lost.[161] The majoritarian argument for presidential control simply breaks down when Presidents can, and do, get elected without securing a majority of votes.

Even more troublesome for supporters of presidential control is that, once in office, Presidents may have a greater incentive to please their political contributors and allies than to appeal to the majority of

156. Bressman, *supra* note 22, at 489.

157. *See supra* Parts I–II.

158. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513–14 (2010); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191–92 (2020).

159. *See* Bressman, *supra* note 22, at 466, 493–95 (collecting sources) (arguing that constitutional scholars question whether majoritarianism best explains the structure of the Constitution).

160. The winning candidate was elected by a plurality of votes cast in the 1992, 1996, 2000, and 2016 presidential elections. *See The American Presidency Project: Statistics*, U.C. SANTA BARBRA, https://www.presidency.ucsb.edu/statistics/elections/2016 [https://perma.cc/M3LA-X5WZ] (last visited July 13, 2021).

161. *See id.*

Americans.[162] In today's polarized political landscape, playing to one's base is often a better electoral strategy than appealing to a wider audience.[163] Presidential candidates also have financial incentives to appeal to individuals in their base due to their increased reliance on individual donors, who are more likely to be partisan.[164]

The problems with presidential administration have become starkly evident in the policy gyrations across the last four presidential administrations.[165] Climate change regulation is a good example. The Bush Administration refused to regulate carbon dioxide under the Clean Air Act, going so far as to tell the EPA that OIRA would not even open the email containing the proposed rule meant to regulate carbon dioxide.[166] The Obama Administration reversed that stance by first finding that carbon emissions threatened public health and welfare,[167] and then issuing the Clean Power Plan and vehicle emissions standards to curb greenhouse gas emissions.[168] The Trump Administration repealed the Clean Power Plan and replaced it with the Affordable Clean Energy Rule, a much weaker regulation, and also repealed

162. Bressman, *supra* note 22, at 493 (citing DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 21–24 (1991)).

163. *See, e.g.*, Ronald Brownstein, *Trump Settles on His Reelection Message*, ATL. (Mar. 7, 2019), https://www.theatlantic.com/politics/archive/2019/03/trumps-2020-strategy-double-down-his-base/584350/ [https://perma.cc/2W5X-LWVB] (arguing that President Trump's reelection strategy will be to continue to appeal to his most loyal supporters); Michael Tomasky, *Biden's Journey Left*, N.Y. REV. (July 2, 2020), https://www.nybooks.com/articles/2020/07/02/joe-bidens-journey-left/ [https://perma.cc/54TL-B3L3] (noting that Joe Biden's presidential campaign moved farther to the left to secure the democratic base in the general election).

164. *See* Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 826–27 (2014).

165. *See* Kagan, *supra* note 8, at 2336; Watts, *supra* note 154, at 693; Strauss, *supra* note 154; Sharece Thrower, *Policy Disruption Through Regulatory Delay in the Trump Administration*, 48 PRESIDENTIAL STUD. Q. 517, 518–21 (2018) (listing a number of directives issued by President Trump in various policy areas requiring agency heads to delay, review, or rescind Obama-era regulations); Zeke Miller & Aamer Madhani, *On Day One, Biden Targets Trump Policies on Climate, Virus*, AP NEWS (Jan. 20, 2021), https://apnews.com/article/joe-biden-inauguration-day-one-d6637de1ce993d272108337c1030b79d [https://perma.cc/P2X8-TB27].

166. Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1153 (2010) (citing Felicity Barringer, *White House Refused To Open Pollutants E-Mail*, N.Y. TIMES (June 25, 2008), https://www.nytimes.com/2008/06/25/washington/25epa.html [https://perma.cc/K2N3-V83Z]).

167. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1).

168. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

the more stringent Obama-era vehicle emissions standards.[169] States and environmental groups challenged both repeals.[170] The D.C. Circuit vacated and remanded the Affordable Clean Energy Rule back to the EPA,[171] while litigation surrounding the vehicle emissions standards is on pause until the Biden Administration decides whether to rescind the Trump Administration rule.[172] To borrow from Mark Twain, presidential policy making looks a lot like New England weather: if you don't like it now, just wait a few minutes. Given these shortcomings, it is difficult to maintain the argument that the President has anything but a coincidental incentive to consider national preferences, the public interest, or the common good in regulatory policy.[173]

Supporters of presidential control are not blind to these shortcomings. Recently, scholars have attempted to design ways to moderate the President's influence on the administrative state so that only legitimate political involvement is permitted.[174] Disclosure of presidential

169. *See* Katherine McCormick, *How Clean Is Clean?: An Analysis on the Difference Between the Affordable Clean Energy Rule and the Clean Power Plan and Why States Should Adhere to Stricter Emissions Standards*, 37 PACE ENV'T L. REV. 103, 125 (2019) ("The finalized [Affordable Clean Energy] rule will do little to decrease the United States' contribution to worldwide emissions."). Climate change regulation is not the only area that has experienced wild policy swings across administrations. Financial, healthcare, housing, and education policy have all seen policy reversals from administration to administration. *See* Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L.J. 1, 48–49 (2019); Thrower, *supra* note 165, at 521 (noting the longstanding practice of freezing unpublished regulations at the beginning of a new administration). President Biden has continued—and by some accounts even expanded—the practice of undoing the regulatory agenda of a previous president of a different political party. *See* Zachary B. Wolf, *On Executive Actions, Biden Is Blowing His Predecessors out of the Water*, CNN (Feb. 8, 2021, 7:59 AM), https://www.cnn.com/2021/02/06/politics/what-matters-february-5/index.html [https://perma.cc/2HPE-S9VY].

170. *See, e.g.*, Am. Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir. 2021) (challenging the Affordable Clean Energy Rule); Petition for Review, Union of Concerned Scientists v. Nat'l Highway Traffic Safety Admin, No. 19-1230 (D.C. Cir. Oct. 28, 2019) (challenging vehicle emissions standards).

171. *Am. Lung Ass'n*, 985 F.3d at 995.

172. Order, *Union of Concerned Scientists*, No. 19-1230 (D.C. Cir. Feb. 8, 2021). The Biden Administration appears poised to resurrect some form of greenhouse gas emission regulation. *See* Sabrina Shankman et al., *Biden Signs Sweeping Orders To Tackle Climate Change and Rollback Trump's Anti-Environment Legacy*, INSIDE CLIMATE NEWS (Jan. 21, 2021), https://insideclimatenews.org/news/21012021/biden-executive-orders-climate-change/ [https://perma.cc/E6RW-2FN5].

173. *See, e.g.*, McGarity, *supra* note 131, at 1785–98 (noting that the Obama Administration and the Bush Administration set two different ambient air quality standards based on the same administrative record and both standards were reasonable).

174. *See, e.g.*, Watts, *supra* note 154, at 726–45 (arguing that presidential influence in rulemaking should be tethered to the statute at issue, raw political partisanship should not be a permissible consideration, and presidential influence should be

involvement[175] and review by the judiciary have been touted as two solutions to constrain inappropriate presidential interference with agency regulations.[176]

A. Disclosure of Presidential Involvement

Though modern presidents have made a show of publicly directing agencies to carry out their political preferences,[177] many regulatory initiatives are carried out behind closed doors through the OIRA process,[178] which hampers political accountability. Successive executive orders have empowered OIRA to review proposed regulations deemed "significant" or that raise novel legal or technical issues,[179] and OIRA review often prompts agencies to change or withdraw proposed rules.[180] The OIRA review process centralizes political power within the EOP, giving the President and their staff control over regulatory

made transparent to reduce reliance on impermissible considerations); Mendelson, *supra* note 166, at 1163–65 (arguing that presidential influence on rulemaking should be disclosed to increase electoral accountability and reduce improper political influence); Watts, *supra* note 22, at 83 (arguing for greater disclosure of presidential influence in rulemaking, but suggesting that courts should police whether presidential influence is legitimate or an exercise of raw partisanship); Kagan, *supra* note 8, at 2351 (arguing that courts should constrain presidential influence in areas not permitted by statute and that Congress should draw delegations narrowly if it does not want to give the President wide policy latitude).

175. For the purposes of this Article, presidential involvement is defined as including involvement from staff of the EOP, which includes the Office of Management and Budget (OMB) and OIRA.

176. Mendelson, *supra* note 166, at 1159–66 (advocating for publicly disclosing presidential involvement).

177. *See, e.g.*, Peter Nicholas & Ted Mann, *Trump Highlights Record on Rolling Back Obama Regulations*, WALL ST. J. (Apr. 25, 2017, 8:14 PM), https://www.wsj.com/articles/trump-showcases-record-on-rolling-back-obama-regulations-1493163001 [https://perma.cc/3P3G-EC2P] (reporting that the Trump Administration drew significant attention to its rollback of Obama-era regulations as an achievement marker for President Trump's first 100 days in office); Watts, *supra* note 154, at 692–706 ("Obama, however—taking a cue from Clinton—has also relied heavily on overt command, trying to turn the regulatory state into an extension of his own political agenda by frequently issuing written directives and publicly claiming ownership of regulatory policy.").

178. *See* Watts, *supra* note 154, at 699 ; Mendelson, *supra* note 166, at 1151–54 (noting how Executive influence exerted through the OIRA review process can be difficult to discern and providing examples).

179. *See* Exec. Order No. 12,866, *supra* note 62 (issued by President Clinton); David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 364 (2006) (noting the Bush Administration's use of President Clinton's executive order regarding regulatory review); Exec. Order No. 13,563, *supra* note 62 (issued by President Obama); CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION 20 (2018) (noting that President Trump retained President Obama's executive order imposing cost–benefit analysis).

180. *See, e.g.*, Mendelson, *supra* note 166, at 1151 ("[O]ver 90 percent of economically significant rules underwent some change or withdrawal during the OIRA review process.").

policy,[181] but since OIRA reviews are rarely made public, such policy priorities are obscured.[182] OIRA's interactions with and influence over proposed rules are decidedly secretive and difficult to track[183] and have been criticized as political[184] and byzantine.[185]

Scholars claim that disclosure would require the agency to publicly declare and describe the interactions it had with the President or any staff from the EOP in every rulemaking, thus revealing the effect of the President's political influence on the final regulation.[186] More specifically, disclosure would reveal the influence of the President's staff (primarily, but not exclusively, OIRA) on proposed agency rules.[187] Disclosure of these interactions would supposedly increase accountability by exposing to the public and Congress the value choices the President prioritized in the regulation.

Scholars further argue that disclosure would constrain the President's political influence over agencies by exposing, and thus deterring, any special treatment of parochial interests through the manipulation of the agency's technical analysis. This last point is premised on the assumption that the President would pay a political price, rather than receive a political reward, for favoring special interests. But in today's polarized political climate, it is not entirely clear that this assumption is accurate. Whether disclosure alone could bolster electoral accountability given the current mechanics of presidential elections has also yet to be seen. Finally, an effective congressional response to public disclosure of presidential influence is unlikely to materialize because Congress would have to pass a bill with a supermajority of both houses to overcome a likely presidential veto.[188]

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181. For a discussion of the OIRA review process, see *supra* note 62.

182. Mendelson, *supra* note 166, at 1157.

183. *See id.* Official records in the Bush Administration understated the influence of OIRA on agency rulemakings. *Id.* at 1154. Further, there is little to no public information about the Clinton Administration OIRA or the Obama Administration OIRA. *Id.*

184. *See* Daniel A. Faber et al., *Reforming 'Regulatory Reform': A Progressive Framework for Agency Rulemaking in the Public Interest*, 12 ADVANCE: J. ACS ISSUE BRIEFS 3, 11 (2018) (finding that OIRA selects rules to review based on their "novelty or sensitivity," which is often a political decision); *see, e.g.,* Watts, *supra* note 154, at 699.

185. *See, e.g.*, Heinzerling, *supra* note 62, at 342–44 (explaining that when submitting a proposed regulation to OIRA for review, the EPA may not be able "to tell who exactly was in charge of making the ultimate decision"); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1855 (2013) .

186. Mendelson, *supra* note 166, at 1163–66.

187. *Id.*

188. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2320 (2006) (citing Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON.

B. Judicial Review of Presidential Involvement

Judicial review, in addition to its traditional role of evaluating the rationality of agency decision-making, would be enlisted to enforce disclosure requirements and evaluate whether the political reasons revealed through disclosure requirements are legitimate.[189] As it turns out, legitimate political influence is difficult to define. Professor Kathryn Watts has advanced a somewhat nebulous definition that designates political influence as legitimate if it reinforces "accountability, public participation, and representativeness."[190] Accordingly, this definition likely rules out "[t]he President said so" as a reason, but a statement that a given regulation "better aligns with the administration's goals and comprehensive strategies" would pass muster.[191] Surely only the politically inept would be unable to characterize a decision as something that fits within the administration's view of the public good. It is not clear what such an open-ended definition adds to the already ambiguous definition of legitimacy. Professor Nina Mendelson, on the other hand, has argued that we should not define political legitimacy *ex ante*. Rather, disclosing political influence in rulemaking will prompt a debate within the judiciary (and the public at large) on what constitutes legitimate political influence.[192]

Regardless of how legitimate political influence is defined, asking the judiciary to act as the legitimacy referee to the President's political priorities raises a host of problems. As a practical matter, courts are often reluctant to pass judgment on the political priorities of Congress and the President—the so-called political branches. Recall the Supreme Court's recent decision in *Department of Commerce*. Even with the issue of political influence squarely before the Court, the Court scrupulously avoided passing judgment on the wisdom of the Secretary of Commerce's political choices. Instead, the Court remanded the decision to the Secretary on the grounds that the Secretary's stated reason was pretextual.[193] Yet, there was nothing stopping the Court from also passing judgment on the Secretary's true political motiva-

& ORG. 132 (1999)) ("The veto power thus becomes a tool to entrench presidential decrees, rather than one that blocks congressional misadventures. And because Congress *ex ante* appreciates the supermajority-override rule, its members do not even bother to try to check the President, knowing that a small cadre of loyalists in either House can block a bill.").

189. Mendelson, *supra* note 166, at 1166; Kagan, *supra* note 8, at 2377.

190. Watts, *supra* note 22, at 83 (citing CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 21 fig.1, 196–97 (1990)).

191. *See* Mendelson, *supra* note 166, at 1176 (arguing that justifying a regulatory policy as consistent with executive policy preferences is "more legitimate . . . because [it is] less arbitrary than '[t]he President said so'"); Watts, *supra* note 22, at 73.

192. *See* Mendelson, *supra* note 166, at 1177.

193. Dep't of Com. v. New York, 139 S. Ct. 2551, 2575–76 (2019).

tions. By choosing to stop short, the Court intentionally kept itself out of a highly charged political dispute.[194]

There is good reason for the Court's hesitation to become embroiled in political disputes. Like agency staff, judges have no special claim to deciding questions of values. They are neither political experts with a greater understanding of the public interest or the common good nor are they popular representatives.[195] Though no one seriously believes that judges call balls and strikes,[196] as the now-famous phrase goes, the judiciary's ability to command popular support and the obedience of the other branches is based in no small measure on the rickety myth that courts really do take the law as they find it.[197] To live in a world where that "noble lie"[198] no longer holds sway would be to live in a world in which the conventional role of the judiciary in our constitutional structure would be uncertain at best.[199] Just as agencies have an incentive to portray their decisions as neutral and objective,

194. There are, of course, prominent examples of the Court wading into charged political issues. The decision in *Bush v. Gore* is the prime modern example. Bush v. Gore, 531 U.S. 98 (2000). Nevertheless, those decisions are likely to cause delegitimization of the Court in the eyes of the public. Many judges, Chief Justice Roberts among them, undoubtedly view cases like *Bush v. Gore* with some trepidation. Chief Justice Roberts' majority opinion in the political gerrymandering case *Rucho v. Common Cause*, wherein the Court held that political gerrymandering is a political question and thus nonjusticiable, is an example of this wariness to involve the Court in highly charged political disputes. Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019).

195. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 74 (1996) (describing the "insight" of Supreme Court justices "into . . . great issues" as "not spectacularly special"). At the same time, Dworkin was a defender of judicial review, *see* Ronald Dworkin, *What Is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1, 29 (1987) (arguing that judicial review is consistent with democracy and praising its ability to increase the accuracy of political decisions), and argued that when judges fail to reach the "right" result, the losing party has been treated unjustly, *see* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1108 (1975).

196. Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1051 (2006) ("No serious person thinks that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires. The rules are created by the judges themselves.").

197. *See* MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE 31 (1964) (noting the importance of "popular and professional expectations of 'neutrality'" to the Supreme Court's "prestige"); *see also* Jason Iuliano, *The Supreme Court's Noble Lie*, 51 U.C. DAVIS L. REV. 911, 964–65 (2018) ("[T]he Justices operate at the grace of the people. In the absence of broad public support, the Court is powerless to compel the President or Congress to abide by its rulings.").

198. Iuliano, *supra* note 197, at 960–62 (comparing the Supreme Court's maintenance of the lie that justices apply the law mechanistically to Plato's myth of the metals, otherwise known as the noble lie).

199. *See* Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Litigation*, 32 CLEV. ST. L. REV. 385, 388

the judiciary has ample reason to preserve the noble lie, even if few take it literally. Seeking to preserve the myth likely entails a healthy dose of judicial restraint in deciding nakedly political disputes.

Recent proposals that rely on judicial review to increase administrative accountability as a valuable check to presidential political influence must contend with the problems inherent in judicial review of political priorities. In doing so, the proposals have failed to meaningfully distinguish themselves from the current arbitrary and capricious review standard. Expanding on then-Professor Kagan's position in her seminal piece, *Presidential Administration*, Watts argues that if agencies publicly disclose presidential political priorities in the rulemaking process, then courts should permit the agency to rely on those priorities[200] in choosing among regulations that "the relevant statute, evidence, and science would support."[201] Thus, were an agency deciding between two potential rules, both of which were aligned with statute and existing evidence, the agency could consider the President's stated preference for one over the other.[202] Under Watts' proposal, a court could credit consideration of the President's political priorities as determinative and sustain the regulation on those grounds only when science and evidence do not rule out particular courses of action—if they ever could.[203]

For instance, both a decision to regulate greenhouse gas emissions and a decision not to regulate such emissions appear to be within the range of the current arbitrary and capricious review standard. The former hypothetical falls squarely in the hard look category, placing expert-driven analysis at the forefront of agency regulation. The latter is more akin to the soft look embodied by the *State Farm* Court's oft-repeated warning to courts not to substitute their judgment for that of the agency.[204] In both cases, the technical aspects of the agency's decision play the primary role in either determining the content of the regulation or measuring the ultimate policy choice against the agency's technical review.

Supporters of a more formalized role for the President's political priorities in agency rulemaking are caught between Scylla—vesting too much power in the Executive—and Charybdis—subsuming politics to technocratic rationality. As in mythology, neither option is palatable. The latter suffers all the problems that accompany a reli-

(1983) ("[A] surprisingly large number of people, both within and without the legal community, question [judicial lawmaking's] legitimacy in *any* form.").

200. *See* Watts, *supra* note 22, at 32–33.

201. *Id.* at 72–73.

202. *Id.* ("[T]he agency should *not* be allowed to rely upon political considerations alone . . . .").

203. *See id.* at 73.

204. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).

ance on technocratic government, as explored in Parts I and II.[205] The former risks handing power to "the most dangerous branch"[206] with few truly effective options to constrain arbitrary power.[207] It is a course of muddling through that may never get at the heart of the legitimacy problems of the administrative state because it fails to prioritize reforms that permit citizens to determine their own political fate and therefore is unlikely to improve the administrative state's standing in the eyes of the public.[208] The remaining Parts will discuss how a republican theory of politics can point the way toward a more inclusive, publicly-minded, and publicly-directed administrative state.

V. FREEDOM AS NONDOMINATION OR FREEDOM FROM POLITICS? THE DELIBERATIVE MODEL AND TWO VERSIONS OF REPUBLICANISM

Now that the dilemma of technocratic governance and presidential control has been explored, this Part begins the discussion of a republican approach to administrative decision-making that resolves the dilemma. Republican political theory first made an explicit appearance in administrative law scholarship with the development of the deliberative model of administrative rulemaking.[209] The deliberative model originated in the late 1980s and early 1990s as an answer to concerns about agency legitimacy.[210] By this time, older justifications for the administrative state's lawmaking discretion, like the expertise model,

205. *See supra* Parts I–II.

206. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 219 (1994).

207. *But see* Evan D. Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 GEO. L.J. 1, 41–44 (2019) (arguing that the Take Care Clause in Article II could function as a meaningful restraint on arbitrary presidential decision-making).

208. A related point applicable to both disclosure and judicial review proposals is that the President and their staff do not personally get involved in every rulemaking. *See* Bressman, *supra* note 22, at 514 (noting presidential involvement "is sporadic at best"). The rulemakings not subject to the President's personal involvement or the involvement of EOP staff are thus left to the ordinary technocratic rulemaking process.

209. Professor Mark Seidenfeld's 1992 article, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992), is the most comprehensive exposition of the deliberative model, and although more recent articles have continued to debate and refine the deliberative model, *see* Seidenfeld, *supra* note 22, at 1397; Arkush, *supra* note 41, at 1477; Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849 (2012), the structure laid out in Seidenfeld's 1992 article is still the touchstone for the deliberative model.

210. *See, e.g.*, Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617 (1985); MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION 26–34 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Seidenfeld, *supra* note 209.

had worn thin (at least in academic circles), and newer justifications for agency legitimacy, like the interest group (or pluralist) account, could not conclusively put to rest serious doubts about the proper role of private interest in government.[211] As noted deliberative model proponent Professor Mark Seidenfeld put it, "[I]n the modern state, many agency decisions involve political choices that 'make law,' even though agencies exist outside traditional conceptions of our tripartite national government."[212] Drawing on republican political theory, deliberative model proponents were suspicious of government due to the role of private interest groups in creating regulatory policies. They sought to answer questions about legitimacy by resorting to a theoretical framework for government regulation based on the common good with agency procedures designed to promote such regulation.[213]

With its suspicion of the role of private interest in government, the deliberative model at least nominally recognizes the value of public participation and deliberation; however, the theoretical underpinning of the deliberative model fails to take public participation in deliberation seriously or, worse, discounts it entirely.[214] This contradiction between the superficial goals of the deliberative model and its theoretical foundation prevents the deliberative model from serving as a solution to the problems caused by the liberal proceduralist view of the administrative state. Indeed, Seidenfeld has gone so far as to argue that a lack of incentives, time, and resources means the general public is insufficiently informed to contribute meaningfully to policy making deliberation.[215] In some versions of the deliberative model, providing public-regarding reasons for government action is consid-

211. *See* Stewart, *supra* note 21, at 1681–88, 1762–70 (discussing the inability of older concepts of administrative law, like the expertise model, to account for agency discretion and critiquing the interest, or pluralist, representation account of administrative law as susceptible to private interests); Seidenfeld, *supra* note 22, at 1407–09 (noting the various ways the pluralist account of administrative law may bias regulations in the favor of powerful private interests); Seidenfeld, *supra* note 209, at 1536 ("[P]luralism invariably produces political distortions that serve to perpetuate existing bases of economic and political power.").

212. Seidenfeld, *supra* note 209, at 1513; *see also* Staszewski, *supra* note 209, at 851–53 (acknowledging that even under the deliberative model, political motivation cannot be easily divorced from agency decision-making); SHAPIRO, *supra* note 210, at 24 (noting that even judges cannot make entirely neutral decisions on issues of public policy).

213. *See* Seidenfeld, *supra* note 209, at 1528, 1533–34, 1541–42.

214. *See, e.g.*, *id.* at 1558 (stating that agencies fail to take into account the values of the minority); SHAPIRO, *supra* note 210, at 34 ("Surely the people want right administrative decisions, so as long as the administrators arrive at policies by careful deliberation, the people will approve their policies."); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1284 (2009) (arguing that reason-giving can replace electoral politics as a way to generate accountability).

215. Seidenfeld, *supra* note 22, at 1445.

ered enough to satisfy the republican demand that government actions track the common good.[216] In all versions, agency staff deliberate with minimal input from the public through notice and comment.[217] And because regulatory policy is often solidified before a proposed rule is released for comment, deliberative model theorists suggest that notice and comment serves the even more limited role of ensuring that no important interests were missed.[218]

By failing to classify widespread participation in deliberation as necessary, versions of the deliberative model associate too closely with the liberal proceduralist account of government and its pitfalls.[219] In the absence of vigorous participation and deliberation in the rulemaking process by ordinary citizens, the deliberative model might produce regulations that track the common good, but only by happenstance. Even if public comment procedures provide agencies with some information about values held by individuals, without the institutional structure necessary to actually participate in deliberation and decide policy, citizens are unable to define the common good.

Despite the deliberative model's promise to fashion a more stable foundation for the administrative state, our inquiry has led us back to where we started: an administrative state hostile to the inclusion of the political considerations of the public. The deliberative model must be examined more closely to identify which of its features are drawn from republican political theory and to determine whether a more robust adoption of republicanism paves the way toward firmer ground for agency legitimacy.

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216. *See, e.g.*, Staszewski, *supra* note 214.

217. *See id.* at 1288; SHAPIRO, *supra* note 210, at 34; Seidenfeld, *supra* note 209, at 1540; Staszewski, *supra* note 209, at 887–88.

218. Seidenfeld, *supra* note 22, at 1447. Deliberative model proponents have recognized that agency decisions cannot be neatly separated from political considerations. *See id.* at 1428–29; *see also* Staszewski, *supra* note 209, at 893 (arguing that political preferences have a role in the deliberative model and asserting that voting functions as a legitimization of those preferences). Like the proponents of presidential control examined in Part III, *supra*, Seidenfeld sees the benefit of considering the President's political preferences in the decision-making process. *See* Seidenfeld, *supra* note 22, at 1452–53. Notwithstanding, Seidenfeld cannot shake his distrust of political influence and argues in favor of restricting the President's influence. *See id.* at 1453. He suggests that Presidents should only have the ability to choose between predetermined alternatives selected by agency experts. *See id.* Where a President makes the choice, a reviewing court would be expected to discount the President's political preferences altogether and apply more rigor to the decision to ensure that the agency can defend the regulation on its rationality alone. *See id.* at 1456–57.

219. For a discussion of the liberal proceduralist account and its pitfalls, see *supra* Part II.

A. A Brief Background on Republican Political Theory

The deliberative model draws its requirement that regulations be consistent with the common good and public-minded sensibilities from republican political theory.[220] Because this Article is not a review of modern and historical republican theories, it will suffice to recognize two relevant forms of republican political theory.[221] These are the main two modern branches of republican political theory, and each is associated with its respective historical progenitor.

The first branch has its roots in the political theory of Aristotle and classical Athenian politics,[222] as described by J.G.A. Pocock in *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*,[223] and is often associated with modern theorists like Hannah Arendt and Michael Sandel. Aristotelian republicanism has, at its heart, a belief that participation in communal self-government is the true nature of human beings and the only way to live freely.[224] Only through active participation in the public life of the community can humans realize the good life, and the virtues required for active participation—namely those required to distinguish between private interest and the common good—must be cultivated.[225] Sandel refers to the government effort to encourage citizens to cultivate certain virtues, which are both good in themselves and because they facilitate the kind of participation and deliberation necessary for self-government, as the "formative project."[226] This "robust" form of republicanism ultimately relies on "the basic . . . tenant that the freedom of the political community must depend in the last resort on the public virtue of the citizens."[227] In this way, the robust form of repub-

220. Seidenfeld, *supra* note 209, at 1528.

221. While I will only mention two forms of republicanism, it should be noted that this is a highly simplified approach. *See* Marco Geuna, *The Tension Between Law and Politics in the Modern Republican Tradition*, *in* REPUBLICAN DEMOCRACY: LIBERTY, LAW AND POLITICS 5, 8–9 (Andreas Niederberger & Philipp Schink eds., 2013).

222. *See* SANDEL, *supra* note 103, at 26 (noting the "strong version" of republicanism goes back to Aristotle).

223. *See generally* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 66–67 (Princeton Classics ed. 2016) (1975) ("[T]hat tradition (which may almost be termed the tradition of mixed government) is Aristotelian, and the *Politics* . . . form[s] the earliest and greatest full exposition of it . . . .").

224. *See id.* at 67–68.

225. ARISTOTLE, POLITICS 23–24 (C.D.C. Reeve trans., Hackett Publ'g Co. 1998) (c. 350 B.C.E.).

226. SANDEL, *supra* note 103, at 5–6, 323.

227. David Miller, *Republicanism, National Identity, and Europe*, *in* REPUBLICANISM AND POLITICAL THEORY 133, 140–41 (Cécile Laborde & John Maynor eds., 2008).

licanism holds fast to the belief that citizens cannot delegate ultimate control over their political community to anyone but themselves.[228]

The second main branch of republicanism is associated with the political institutions of ancient Rome.[229] Quentin Skinner, among others, developed the modern account of this form of republicanism as a critique of the historical and theoretical continuity of the Aristotelian republicanism described by Pocock.[230] This form of republicanism "is not a form of Aristotelian politics."[231] Instead, it describes a particular "form of negative liberty" that conceives of participation in public life by citizens not as the natural end of existence, but as a way to guard against the arbitrary exercise of government power.[232] Thus, participation ensures liberty insofar as it is a bulwark against a government of private interest.[233] Philip Pettit, the most famous modern expositor of this kind of republicanism, defined the primary goal of this brand of republicanism as "freedom as nondomination."[234] Under this framework, individuals are free to choose their own ends so long as society commits to and avoids domination that would subject individuals to the arbitrary control of another.[235] This form of republicanism also promotes the cultivation of certain civic virtues that are required for the maintenance of the commitment to freedom as nondomination. These virtues, unlike in the Aristotelian form, are not the ultimate goal of life—they are merely instrumental in protecting private liberty preserved by nondomination.[236] Because the primary

228. *See* Ferejohn, *supra* note 135, at 148 ("The Roman (classical [republican]) bargain . . . amounted to giving, or better, yielding to the people (or to nonelites) control over the law in return for elite control over policy. Laws and law-making at Rome were therefore direct or popular . . . ."); Miller, *supra* note 227, at 141.

229. *See, e.g.*, QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 5 (2012); Quentin Skinner, *Freedom as the Absence of Arbitrary Power*, *in* REPUBLICANISM AND POLITICAL THEORY, *supra* note 227, at 83, 85–87. The relationship between this form of republicanism and the operation of the Roman Republic of classical antiquity is still subject to debate. *See* John P. McCormick, *Republicanism and Democracy*, *in* REPUBLICAN DEMOCRACY: LIBERTY, LAW AND POLITICS 89, 99–100 (Andreas Niederberger & Philipp Schink eds., 2013) (noting modern forms of this type of republicanism have been less than enthusiastic about reviving institutions like the Roman Tribunate, which held veto power over any legislation introduced in the Senate).

230. Geuna, *supra* note 221, at 6–11.

231. *Id.* at 7.

232. *Id.*; *see* Henry S. Richardson, *Republicanism and Democratic Injustice*, 5 POL. PHIL. & ECON. 175, 179 (2006).

233. *See* Philip Pettit, *Reworking Sandel's Republicanism*, *in* DEBATING *DEMOCRACY'S DISCONTENT*: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY 40, 52 (Anita L. Allen & Milton C. Regan, Jr. eds., 1998).

234. *Id.* at 49.

235. *See id.* at 49, 54–55 (referring to this quasi-neutral position as "shared-value neutralism," meaning that the only societal requirement is that all share the value of nondomination after which one is free to live as they please).

236. *Id.*

goal of instrumental republicanism is to preserve negative liberty so that individuals may choose their own ends, it is less concerned about the cultivation of the character (or public virtue,[237] as some might call it) of citizens through participation in self-rule.[238] Instrumental republicanism is, as a result, often skeptical of politics, relying on depoliticized expert commissions in policy areas where theorists believe ordinary politics will produce the wrong result.[239] This is why instrumental republicanism has been described as "a kind of quasi-liberal theory that is grounded on the kind of individualism on which liberalism is founded."[240] It is this similarity that makes this kind of republicanism a poor vehicle for addressing the legitimacy problems of the administrative state.

B. The Deliberative Model and Its Unexamined Connection to Instrumental Republicanism

The deliberative model's similarity to the instrumental form of republicanism renders it incapable of bolstering the legitimacy of the administrative state. To see how the deliberative model mirrors instrumental republicanism, we need only consider the problem both seek to solve and the institutional arrangement chosen to solve it. Both are concerned that politicians will be too responsive to popular politics, and both therefore attempt to preserve the common good within depoliticized, expert-led institutions.[241] In a telling passage, Seidenfeld explains that "one cannot subject decisionmakers to more direct political pressure without threatening the civic republican ideal that decisionmakers act deliberatively."[242] At bottom, both theories believe that policy should reflect the common good but are doubtful

237. *See* Miller, *supra* note 227.

238. *See* Pettit, *supra* note 233, at 54–55.

239. *See* Philip Pettit, *Depoliticizing Democracy*, 17 RATIO JURIS 52, 55–56 (2004) (citing criminal sentencing policy and prostitution as two examples where policy cannot be entrusted to democratic politics); *cf.* Ferejohn, *supra* note 135, at 148 (discussing Pettit's assertions); McCormick, *supra* note 229, at 105–12 (critiquing Pettit's framework); Miller, *supra* note 227; Michael Sandel, *Reply to Critics*, *in* DEBATING *DEMOCRACY'S DISCONTENT*: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY, *supra* note 233, at 319, 325–26 (arguing against the instrumental version of republicanism).

240. Ferejohn, *supra* note 135, at 148. Pocock describes this kind of republicanism as "an empire of laws" that denies humans the chance to "shape themselves." POCOCK, *supra* note 223, at 558–59.

241. Seidenfeld, *supra* note 209, at 1576 (explaining that administrative agencies "fall between the extremes of the politically over-responsive legislature and the under-responsive courts" and arguing that as a result, administrative agencies can "check majoritarian tyranny"); Pettit, *supra* note 239, at 53 (arguing that if certain electoral interests are involved, politicians "cannot be reliably expected to decide . . . issues by reference just to considerations of the common good").

242. Seidenfeld, *supra* note 209, at 1541.

that the general public has much of value to say about the content of that common good.[243]

Accordingly, the major difference between instrumental republicanism and the deliberative model turns out to be only superficial: Instrumental republicanism explicitly establishes a primary value to set the bounds of government action—freedom as nondomination—whereas the deliberative model does not.[244] In practice, this is a distinction without a difference. Understanding this superficial distinction reveals why minimalist republican theories, like the deliberative model, cannot rise to the challenge the administrative state faces today. Because the deliberative model has absorbed the expertise model of the administrative state wholesale, it has done implicitly what instrumental republicanism does explicitly—adopted an objective conception of the common good. For the deliberative model, the common good amounts to whatever agency staff determine it is, as based on technocratic policy analysis. Democratic politics cannot guarantee the outcomes demanded by the deliberative model any more than it can guarantee the outcome demanded by instrumental republicanism. Yet each theory is unable to address the problems raised in this Article because the ends they seek—nondomination or rationally-supported policy—are unlikely to be determined without democratic contestation in the first place.[245]

Take, for example, criminal sentencing laws. Philip Pettit argues that leaving criminal sentencing laws up to elected representatives will necessarily lead to harsher criminal sentences because ordinary morals, driven by unthinking passion, will always favor harsh punishment for those who commit crime.[246] Leaving aside the fact that today the dominant political movement is toward more lenient sentencing laws,[247] Pettit assumes that the *only* end to criminal sentencing—that

243. *See* Seidenfeld, *supra* note 22, at 1445; Farina et al., *supra* note 48, at 142–44.

244. Pettit, *supra* note 233, at 51–54; Seidenfeld, *supra* note 209, at 1528 (noting that the form of civic republicanism drawn on by the deliberative model does not "posit[ ] some external conception of the common good"). *But see* Staszewski, *supra* note 209, at 899 (arguing that the deliberative process should be held to the arbitrary and capricious standard). In effect, though not in rhetoric, Seidenfeld's proposals are not meaningfully different from those advanced by Staszewski. *See* Seidenfeld, *supra* note 22, at 1456–57 (arguing that courts should completely disregard political considerations when reviewing regulations and examine them on their rationality alone).

245. *Cf.* Sandel, *supra* note 239, at 327 ("And just as people of differing moral and ideological persuasions disagree about the meaning of civic virtue and the qualities of character self-government requires, so people disagree about what counts as domination . . . . [H]ow to identify and cope with the sources of domination in the modern world is an intensely political questions that too often goes unaddressed in our politics.").

246. Pettit, *supra* note 239, at 54.

247. *See, e.g.*, Bill Rankin, *Nathan Deal's Criminal Justice Reforms Leave Lasting Legacy*, ATLANTA J.-CONST. (Dec. 21, 2018), https://www.ajc.com/news/local/deal-

is, the common good—is a policy whereby incarceration rates are kept as low as possible while crime rates are also kept low.[248] Accordingly, criminal sentencing policy should be left to depoliticized expert commissions that can rationally deliberate about the facts and design a policy consistent with the common good.[249] Pettit's description of criminal sentencing policy is certainly laudable—indeed, it may even be the common good—but a policy that reduces incarceration rates but leads to no increase in crime is not necessarily the right policy. Some people believe that criminal sentences should be harsh to demonstrate society's moral condemnation of certain crimes,[250] while others believe any kind of incarceration is immoral.[251] Without first establishing the political community's common good, no set of facts about the effects of one policy versus another can decide which one truly tracks the common good. What goals we should pursue and why we should pursue them are matters for the judgment of politics, not panels of experts.

Another example further illustrates the threat instrumental republicanism poses to repairing the estrangement of ordinary people from the administrative state. Seidenfeld references the 1997 rulemaking process by the National Highway Safety Administration (NHTSA) concerning whether to allow car dealerships to install an on–off switch for airbags.[252] The NHTSA received 600 comments from the general public, nearly all of which favored allowing the installation of the on–off switches as a matter of personal choice.[253] The agency, reasoning "that the public did not understand the costs and benefits of airbags," maintained its position that the switches should be restricted.[254] Ultimately, the NHTSA promulgated a rule that severely limited airbag switch installation and simultaneously launched a public information campaign.[255] The campaign aimed to educate

criminal-justice-reforms-leaves-lasting-legacy/ZMwb2vG7C4LurWoFESw46O/ [https://perma.cc/4WDB-NQEU]; Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next [https://perma.cc/L8ZU-DG78].

248. *See* Pettit, *supra* note 239, at 54–55.

249. *Id.* at 55.

250. *See, e.g.*, Matthew Haist, *Deterrence in a Sea of "Just Desserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism,"* 99 J. CRIM L. & CRIMINOLOGY 789, 793–94 (2009) (noting that some believe that society is morally obligated to punish wrongdoers).

251. *See, e.g.*, Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1239 (2015).

252. Air Bag On-Off Switches, 62 Fed. Reg. 62,406 (Nov. 21, 1997) (codified at 49 C.F.R. pts. 571, 595).

253. *Id.* at 62,413–16.

254. Seidenfeld, *supra* note 22, at 1433.

255. *See id.* at 1432–33 (citing Mendelson, *supra* note 39, at 1366). The agency's education campaign was designed to inform the public about the costs and benefits of

the public on the "proper" perspective of the risks and benefits of airbags, which, as Seidenfeld notes, does not appear to have altered the public's view of the issue.[256]

Seidenfeld and Pettit approach these policy dilemmas from the assumption that the general public is hopelessly backward in their understanding of the true costs and benefits in of all kinds of policy, but especially policies that implicate some important value judgments—personal autonomy in the case of airbag switches and just deserts in the case of criminal sentencing. If the public had the professional training of an economist (or some similar profession), they would understand that a rational person would only choose the policy chosen by the experts.

The mistake lies in the assumption that value judgments are not a proper basis for choosing one policy over another. It is simply not true, however, that those who favor one position do so because of some unthinking moral reaction, while those who reach the opposite conclusion do so by rationally weighing the facts in the absence of moral considerations. Both positions rely to some inescapable extent on moral commitments. Moral considerations are part and parcel of what the common good is. Claiming that shared moral commitments play no role in public policy just opens the door to submerging moral decisions under purportedly apolitical justifications. They are still there; they are just not up for debate.

These two examples demonstrate the ways in which the deliberative model has become a conduit for the fundamental flaw of the procedural republic. Notwithstanding the rhetoric about the deliberative model, it has taken on this character in practice because it is committed to an imagined objective, expert-derived common good in service of private ends.[257] The deliberative model asks little of citizens (and at times demands citizens to keep out) but requires their tacit acceptance of the values it installs as the common good. The stance that agencies have no need for public input "can have a corrosive effect on civic life" and "may preempt what potential exists for the creation or discovery of shared commitments and public values."[258] In circumstances where agencies eschew public input, nothing binds those who disagree with the policy to regard it as legitimate.[259] "For such policies are then supported not by community consensus but only by debatable facts, inference, and tradeoffs,"[260] making the disconnect between citizens and

airbag switches as the *agency* understood them in the hopes that the public would adopt its assessment that "there were few instances in which a switch to turn off airbags was warranted." *Id.*

256. *Id.* (citing Mendelson, *supra* note 39, at 1366).
257. *See* Pettit, *supra* note 233, at 49–50.
258. Reich, *supra* note 210, at 1637.
259. *See id.*
260. *Id.*

the administrative state and the resulting political upheavals all the more likely.[261] The deliberative model's "common and easy resort to [agency staff] . . . dwarf[s] the political capacity of the people, and . . . deaden[s] its sense of moral responsibility. It is no light thing to do that."[262] The deliberative model is, therefore, less likely to be stable because it has no way to resolve debate between agencies and the people about the nature of the common good.[263]

The deliberative model's similarities with instrumental republicanism ensure that it cannot solve the problem of the legitimacy of administrative agencies. If the deliberative model's embrace of a modest form of republicanism fundamentally cannot rise to the modern challenge to administrative agencies, a more robust form of republicanism—one that recognizes the necessity of the formative project—very well may be able to.

VI. FROM INDIVIDUALS TO CITIZENS: AN ARGUMENT FOR ROBUST REPUBLICAN POLITICS

The argument I have advanced thus far prioritizes politics because—unlike law, facts, or technocratic administration—only politics can accommodate the divergent interests of citizens, provide a forum for the expression of those interests, encourage the development of qualities needed to express interests to fellow citizens, promote the formation of common interests above private ones, and show the way toward a consensual understanding of the common good. By giving up on politics, as the deliberative model and other modern accounts of administrative law have, theories of administrative legitimacy have had to content themselves with the unavoidable tension between, on one hand, a large, active bureaucracy as the locus of most lawmaking and, on the other, a political structure that defines legitimacy in democratic terms. Leaving this tension unresolved has led to unfortunate consequences. Lack of faith in the ability of government to meet the challenges society faces in a rapidly changing world, the rise of anti-establishment political movements, and the divisive politics of our time are likely the bitter fruit of the unresolved legitimacy of our most active sector of government. In Tocqueville's words, the administrative state has taken a form in which "liberty can only advance by revo-

261. *See* Kahan, *supra* note 151.

262. Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1007 (1924) (quoting JOHN BRADLEY THAYER, JOHN MARSHALL 103–10 (De Capo Press 1974) (1901)). Both Justice Frankfurter and Professor Thayer were describing the corrosive effects of judicial review on questions of constitutionality. *See id.* at 1007–08. Nevertheless, the sentiment applies equally powerfully here.

263. *See* Sandel, *supra* note 239.

lutions."[264] And if this is the problem we face, then only a recommitment to politics is up to the challenge. Only through frequent participation "under conditions of responsibility" can regulatory policy escape the shadow of illegitimacy that comes with rulemaking by an agency expert or the President.[265]

At an abstract level, a robust form of republican politics must be a politics wherein freedom consists in common self-government, not just individual self-determination. As a corollary, minimalist republican theories "must broaden their focus . . . beyond government institutions. A civic republican conception of citizenship supposes that people must be engaged in framing the rules and administering the institutions that govern all aspects of their communal lives."[266] Citizens can be free only when self-government rests not on the parochial interests of someone else but on the common good, as informed by the shared values and mutual ideas about what is best for the political community as a whole.[267] These bonds between citizens are formed not through majoritarian government but instead through true self-government, which requires engagement with and deliberation of matters of public concern over and over again.[268] Undoubtedly, the path to shared values will be hard-fought and contentious, and whatever notions about the common good that coalesce will be ephemeral and open to future debate. Yet, for all its indeterminacy, "public deliberation helps transform individual valuations into social values; it helps forge collective purposes, and, even more important, helps define and refine public morality. Through such deliberations, individuals become *citizens.*"[269] Over time and with repeated engagement, individuals can form a political community of citizens.

But even more than creating shared bonds and shared values, engagement in politics cultivates the virtues required to live in a self-

264. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 68 (Phillips Bradley ed., Henry Reeve trans. & Francis Bowin rev. trans., Alfred A. Knopf 1945) (1835).

265. Sandel, *supra* note 239, at 326.

266. Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1626 (1988).

267. *See* JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 146, 189, 215 (Swallow Press 1954) (1927) (asserting that organization of government officials should be done so as to secure public—not private—ends and arguing that the public should be organized to participate actively in decisions of public ends); Anderson, *supra* note 120, at 13 (noting that Dewey emphasized the value of bringing citizens together to define public problems and public solutions through discussion). Relegating the public to purely electoral means and excluding it from actual participation in governmental action to determine public ends amounts to a "form of coercion and suppression [that] is more subtle and more effective than . . . overt intimidation and restraint." JOHN DEWEY, THE MORAL WRITINGS OF JOHN DEWEY 265 (James Gouinlock ed., 1994).

268. *See* Reich, *supra* note 210, at 1632.

269. *Id.*

governing society. "Sharing in the governance of a political community that controls its own fate calls forth distinctive human capacities—for judgment, deliberation, persuasion, and action—that would otherwise lie dormant."[270] Without the practice that comes with frequent engagement and judgment with other citizens on issues that have real consequences, members of a political community cannot develop the capacities—including the feeling of responsibility for the fate of the community—required for genuine self-rule.[271] The challenge and the promise of republican theory is as Goethe famously put it: "When we take people . . . merely as they are, we make them worse; when we treat them as if they were what they should be, we improve them as far as they can be improved."[272] It is the engagement in active deliberation and participation with consequences that calls forth and trains the qualities of a citizen, making self-government possible and conferring legitimacy on policy decisions.[273]

Through regular engagement with fellow citizens wherein their collective decisions are dispositive, citizens can develop the virtues required to deliberate with each other in good faith, build common moral bonds, put aside purely individual interests in favor of what they believe is the common interest, and take responsibility for the fate of the community as directed by their decisions. As citizens engage in deliberation and action together on issues important to the political community, they not only can be said to live freely in that they have a direct hand in governing themselves but also can build consensus around the actions of the government. By doing so, citizens can develop a "common purpose" that builds solidarity, empowering citizens to voluntarily accept the decisions of the community and making government action more effective and legitimate.[274]

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270. Sandel, *supra* note 239, at 325.

271. JOHN DEWEY, *Liberalism and Social Action*, *in* 2 JOHN DEWEY: THE LATER WORKS, 1925–1953, at 44 (Jo Ann Boydston ed., 2008)); Sandel, *supra* note 239, at 326 ("Deliberation under conditions of collective impotence does not cultivate the sense of responsibility and moral burden associated with genuine self-rule."). As John Stuart Mill put it, a "political act to be done only once in a few years, and for which nothing in the daily habits of the citizen has prepared him" is worthless. JOHN STUART MILL, ESSAYS ON POLITICS AND CULTURE 229 (Gertrude Himmelfarb ed., 1963). Similarly, T.B. Bottomore expressed, "It does not seem to me that a man can live in a condition of [complete and] unalterable subordination during much of his life, and yet acquire the habits of responsible choice and self-government which political democracy calls for." T.B. Bottomore, *The Insufficiency of Elite Competition*, *in* FRONTIERS OF DEMOCRATIC THEORY 127, 135 (Henry S. Kariel ed., 1970).

272. 2 JOHANN WOLFGANG VON GOETHE, WILHELM MEISTER'S APPRENTICESHIP AND TRAVELS 219 (Thomas Carlyle trans., 1824) (1795).

273. Sandel, *supra* note 239, at 326.

274. Danielle Allen, *A More Resilient Union: How Federalism Can Protect Democracy from Pandemics*, 99 FOREIGN AFFS. 33, 36 (2020). A common purpose is "a practical tool that allows people to achieve something together." *Id.* According to Pro-

A. The Role of Science in the Robust Republican State

What should be the role of scientific inquiry and expert evaluation if politics is to take center stage in regulatory policy? Quite clearly, we cannot hope to achieve our political goals without the help of relevant experts. Yet, to respect the values and goals of the political community, technocratic forms of government should be subordinated to political control. Science should be rightly celebrated for its expansion of human potential, but it cannot be the sole guide of human political thinking; rather, it can only aid and advise citizens in their engagement in politics.[275] As Dewey put it: "No government by experts in which the masses do not have the chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few."[276] To turn over decisions to scientific inquiry alone denies citizens the forum "to realize their distinctive capacities" and to form the common purpose that makes self-government possible.[277] To Tocqueville, the science of forming civic associations for common action "is the mother of *all* knowledge since the success of all the others depends upon it."[278] For it is these associations, Tocqueville argued, that "ensure that men remain or become civilized."[279]

There is still room for science in policy, however. Science and the experts that interpret its findings are essential to the proper functioning of government. In an advisory role, scientific analysis can help clarify the facts surrounding an issue of deliberation and debate in a political community, and engagement with these facts—as best as we can know them, given the limits of scientific inquiry—is a critical part of engaging in politics in good faith with other citizens under conditions of responsibility. The political community must understand the state of the world to knowingly take responsibility for its collective decisions. Even when the consequences of a policy cannot accurately

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fessor Danielle Allen, it "is perhaps the most powerful tool in the democratic toolkit, particularly in a crisis, because it can yield the solidarity that induces people to do hard things voluntarily rather than through authoritarian compulsion." *Id.*

275. *Cf.* ARENDT, *supra* note 114, at 45, 53. Arendt argues that modern society's reliance on behavioral and economic science destroys the public political realm and replaces it with "housekeeping" concerns. *Id.* at 45. She further suggests that by replacing the public realm with housekeeping, science has removed the space that separates our private lives from our public lives but also united people with something tangible—the public sphere. *Id.* at 45–46.

276. DEWEY, *supra* note 267, at 208.

277. *See* MICHAEL J. SANDEL, PUBLIC PHILOSOPHY: ESSAYS ON MORALITY IN POLITICS 189 (2005); *see also* Allen, *supra* note 274, at 37–38 (arguing that scientism has sapped Americans' ability to engage in political judgment or participate in civic life).

278. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA AND TWO ESSAYS ON AMERICA 600 (Gerald E. Bevan trans., Penguin Books 2003) (1835) (emphasis added).

279. *Id.*

be predicted, knowing the likelihood of a particular outcome is still valuable information. The political community can accept making a best guess under circumstances of uncertainty because the political process is open, contestable, and iterative—or, in Dewey's terms, "experimental."[280] In other words, "[d]emocratic decision-making needs to recognize its own fallibility" so that new information can be used to devise better solutions.[281] While understanding the limits of scientific analysis is of paramount importance to the vitality of self-government, the aid of experts—who, with the right approach, can help define the proper limits of science—is a necessary ingredient of functional self-government.

B. A Brief Response to the Utopian Critique

It is common to call this kind of politics utopian.[282] Given the sorry state of political participation today (social media posts notwithstanding),[283] critics argue that it would be impossible to get people to participate in this way, and even if it were, it would be dangerous to try.[284] Skeptics of republican politics believe that ordinary people have so little information, ability, and interest that any decisions they would make about complex regulatory policy would rest on arbitrary,

280. By "experimental," Dewey meant "not just messing around nor doing a little of this and a little of that in the hope that things will improve." Dewey, *supra* note 107, at 228 ("Just as in the physical sciences, it implies a coherent body of ideas, a theory, that gives direction to effort. What is implied, in contrast to every form of absolutism, is that the ideas and theory be taken as methods of action tested and continuously revised by the consequences they produce in actual social conditions.").

281. Anderson, *supra* note 120, at 12.

282. *See, e.g.*, Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 859 n.201 (1993) (arguing that modern forms of republicanism can be criticized as utopian); Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 592–93 (claiming that modern republican theories either "have a utopian quality, or they have a general reformist cast"); *see also* Jeremy Waldron, *Virtue en Masse*, *in* DEBATING *DEMOCRACY'S DISCONTENT*: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY, *supra* note 233, at 32, 36–37 (arguing that it is completely implausible to believe that traditional civic virtue makes any sense as a governing mechanism in a world as large and impersonal as the one we live in).

283. *See* EITAN HERSH, POLITICS IS FOR POWER: HOW TO MOVE BEYOND POLITICAL HOBBYISM, TAKE ACTION, AND MAKE REAL CHANGE 3–10, 109–116 (2020) (arguing that spending time reading or watching the news, posting on social media, and watching political video clips is political hobbyism rather than actual political participation).

284. *See* Seidenfeld, *supra* note 22, at 1431–35 (noting the ways public participation would skew regulatory policy toward irrelevant or unthinking positions); Farina et al., *supra* note 48, at 142–44 (arguing that regulators justifiably ignore a majority of comments from the general public because they often suffer from fundamental defects like erroneous information, failure to take into account competing arguments, or inability to consider more nuanced outcomes).

emotional reactions or a mistaken understanding of the advantages and disadvantages of the policy.[285] Such decisions would lead to ineffective government that would fail to deliver the results citizens expect and further erode trust and legitimacy. But the skeptics' position fails to directly address the challenge of reconciling agency discretion with the legitimate exercise of political authority.

To put these criticisms in perspective, it is first useful to see that reliance on expert or agency staff as the oracles of the "right" or "best" policy is just as idealistic as the politics I have outlined above.[286] Agency staff have no claim to defining the common good merely by virtue of their professional training.[287] It is just as likely that they would misinterpret a private or parochial interest common to professionals as the common good.[288] Professional agency staff are, moreover, just as (and possibly more) susceptible to the issues that already divide the public.[289] Agency staff have no direct way to compare their positions against those of the public's as a whole. There is simply no reason to believe that agency staff magically uncover a fully formed, objective common good through technocratic methods. Whatever the common good might be, there is generally a healthy measure of disagreement about what it is.

The deliberative model, like its cousins, has no answer for how to forge the kind of agreement that is needed for regulation to be both effective and legitimate. It is unclear how the deliberative model can avoid politics in its decisions about policy unless it simply ignores politics altogether. Unless one truly believes that identifying the common good is a purely technical exercise in finding an objective fact, it seems unobjectionable to favor a politics that, though difficult to achieve, fosters the qualities and basic structure necessary for public control over government policy.

Nevertheless, to implement this kind of politics would mean a radical change in how citizens, politicians, and agency staff understand their roles and a radical change in the operation of the administrative

285. *See, e.g.*, Farina et al., *supra* note 48, at 142–44.

286. *See* McCormick, *supra* note 229, at 112 ("Is it more utopian to expect, on the one hand, such [mini-citizen assemblies] to make generally good decisions or, on the other, to expect elites to behave in a consistently impartial and depoliticized fashion?").

287. In fact, the opposite might be true. *See* Ventriss et al., *supra* note 50. Even Hegel recognized the need for both expertise and "direct *education in ethics and in thought*" for bureaucrats. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 335 (Allen W. Wood ed., H.B. Nisbet trans., 1991).

288. *See* McCormick, *supra* note 229, at 112.

289. *See* HERSH, *supra* note 283, at 35 (finding that individuals who follow the news and are highly educated are more partisan than individuals who do not follow the news and have less education).

state. The following Part will attempt to provide a few thoughts on how some of this project could be implemented.

VII. "COUNCILS, GREAT OR SMALL": SOME POSSIBLE REFORMS OF THE ADMINISTRATIVE STATE

The following Part is meant only to sketch out some possible reforms that might pave the way for the republican politics I describe above. It is by no means comprehensive. Much work remains to build the structures that would permit the public to control regulatory policy and, in turn, bolster the legitimacy of the administrative state. Still, a couple of examples may help light the way toward a more inclusive and public-minded administrative state.

The EPA's attempt to facilitate public deliberation about national emissions standards of inorganic arsenic (known as the Asarco case) is an encouraging example of an agency attempting to foster strong republican politics.[290] To understand why, a brief summary of the substance of the regulation is required. Section 112 of the Clean Air Act requires the EPA to promulgate national emissions standards for hazardous air pollutants.[291] In setting those limits, Section 112 permits the EPA to consider costs, non-air quality health and environmental impacts, and energy requirements.[292] The EPA is also permitted to set limits within an "ample margin of safety."[293] Congress gave the EPA no direction on how to balance those competing considerations or how to determine what constitutes an ample margin of safety. In 1983, EPA Administrator William Ruckelshaus announced three public workshops in Tacoma, Washington, and the surrounding area to afford residents a forum to wrestle with setting the arsenic limit and the tradeoffs that various restrictions would require.[294] Tacoma was chosen because a major source of inorganic arsenic, the Asarco copper smelter, was located in the area. At each workshop, experts from the EPA presented the details of the pollution, its effects, and the expected consequences of different limits.[295]

The effects of the experiment on EPA policy were ultimately limited. Falling copper prices shuttered the smelter before the EPA could set a limit.[296] Nonetheless, we can learn important lessons from the

290. *See generally* Reich, *supra* note 210, at 1632–34 (describing the Asarco case); ESTHER SCOTT & RICHARD INNES, MANAGING ENVIRONMENTAL RISK: THE CASE OF ASARCO (1988).

291. 42 U.S.C. § 7412.

292. *Id.* § 7412(d)(1).

293. *Id.* § 7412(d)(4).

294. Reich, *supra* note 210, at 1632–33.

295. *Id.* at 1633.

296. *Id.* at 1634–35.

attempt.[297] The public workshops forced participants to come face to face with those who held different positions, and personalizing the issue in this way may have shifted the focus from "'winning' to finding a solution most appropriate to the special character of the community."[298] Ruckelshaus recalled that residents exposed to the pollution but without a financial or employment stake in the issue grew interested in solutions that involved halting both the pollution and the loss of jobs as "a feeling of citizenship began to infiltrate even the expressions of advocacy."[299] In other words, participants began to discover existing public values and create new public values through deliberation over the uneven effects of any course of action.[300] Observers noted that through this process, citizens were able—however briefly—to "transcend their narrower self-interests" by "identify[ing] what they value most about the community" and "uncover[ing] [common] goals and commitments" to achieve that community.[301]

The workshops were also beneficial for the agency. Regional EPA officials believed that the experience of the workshops "increased the sensitivity of EPA leaders to the problems faced by agency employees."[302] EPA staff learned how best to present scientific or technical information to facilitate fruitful deliberation, and as a result, the regional staff came to understand local dynamics.[303] Tellingly, regional officials kept their colleagues from Washington from leading the public workshops because their overly technical approach was ineffective with local residents.[304]

The Asarco example is by no means perfect. It was time-consuming,[305] and though not related to the experiment itself, the fact that nothing came of the workshops probably did not foster enthusiasm for another attempt. Nevertheless, the experiment provides insight into how to structure public control over regulatory decisions. First, some decisions might benefit from being made at a local or regional level. Second, and equally important, if members of a community who hold different political positions interact consistently, they may foster a greater sense of community that can respond to thorny policy issues.

297. *See id.*

298. *Id.* at 1635.

299. *Id.* (quoting Interview by Robert B. Reich with William Ruckleshaus (Feb. 27, 1985)).

300. *See id.* at 1636.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* at 1639.

A. Small Councils: The Promise of Local Control of Regulatory Policy

The belief that some decisions are better left to local, rather than national, bodies is an old one in American politics, and the Asarco experiment demonstrated the promise of delegating certain decisions to local control. The Constitution itself enshrines principles of federalism, leaving to states the bulk of lawmaking.[306] Thomas Jefferson was famously in favor of local wards to engage every person in government.[307] Lately the pendulum in the American administrative state has swung too far toward placing regulatory authority with national bodies. In response, some modern republican theorists have proposed pushing more government decisions down to the local level—not only to engage citizens in their government but also because at that level, citizens can interact with each other to form opinions about public issues and common desires or hash out divergent views in hopes of discovering new public values.[308] It is in these interactions where citizens can develop and practice the virtues required for collective action. As Tocqueville put it, local "institutions are to freedom what primary schools are to knowledge: they bring it within people's reach and give men the enjoyment and habit of using it for peaceful ends."[309] It is also at the local level where the scale of government becomes manageable for the individual because the public values of the individuals that compose the community can be identified in the actions of government. It is obviously much more difficult on a national, or even regional, scale for individual citizens to see themselves in the actions of their government, but certain regulatory decisions that have primarily local (or possibly regional) effects could be delegated to local assemblies open to all and entrusted with developing and deciding on the appropriate regulation.

Some legal scholars have also advocated for federal decentralization of certain government functions. For example, Professor David Fontana has argued that "federal decentralization makes local majorities into *neighbors* of federal officials, rather than *servants* to them. . . . Federal officials hear more and hear better about the concerns of locals once they live amongst them and come to care more about addressing their concerns."[310] Though Fontana does not go so far as to propose handing over control of some decisions to local coun-

306. *See* U.S. CONST. amend. X.

307. Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), https://founders.archives.gov/documents/Jefferson/03-09-02-0286 [https://perma.cc/Z92P-53BW].

308. SANDEL, *supra* note 103, at 346–47; HANNAH ARENDT, ON REVOLUTION 256–57 (3d prtg. 1966).

309. TOCQUEVILLE, *supra* note 278, at 73.

310. David Fontana, *Federal Decentralization*, 104 VA. L. REV. 727, 771 (2018).

cils or assemblies, the sentiment is similar. Citizens far from Washington want to see their particular concerns and interests represented in the content of the laws and regulations that govern their lives. "If all or the most important parts of the federal government were in Washington, then the rich diversity of the large American republic would be neglected, and a narrow group of individuals would control the country."[311] Permitting some decisions to be made by local participatory political bodies would ensure that local concerns tend to govern issues of local import.[312]

Determining which decisions could be made at the local level would be a difficult, but not an impossible, task. After all, numerous federal statutes already make these kinds of distinctions. The Clean Water Act,[313] the Clean Air Act,[314] the Telephone Consumer Protection Act,[315] and a host of others all rely on "cooperative federalism," which divides some duties between local authorities and the federal bureaucracy.[316] Though not made pursuant to a cooperative federalism statute, the Park Service's decision regarding jet ski regulation in Assateague Island National Seashore is another possible candidate for local control.[317]

How to structure the local assemblies poses another difficult, but not insurmountable, problem. As the Asarco example reveals, local assemblies can be conducted in a fashion where technical information is conveyed effectively to participants. Participants should be permitted to hold an informed and serious debate on what to do with that information. With the right training, local or regional agency officials can act both as facilitators of discussion within the assemblies and technical staff of the assembly, gathering—and if need be, conducting—research on the topic at issue.

The operation of this kind of assembly could be modeled off of the citizen assembly called in British Columbia in 2001 to redesign the provincial electoral system.[318] One hundred sixty members of the pub-

311. *Id.*
312. One of Professor Fontana's primary concerns is the concentration of power in the Executive Branch. *See id.* at 789–90. He proposes federal decentralization as a complement to the federal separation of powers to further diffuse concentrated executive power. *Id.*
313. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1388.
314. Clean Air Act, 42 U.S.C. §§ 7401–7671q.
315. Telephone Consumer Protection Act of 1991, 47 U.S.C. § 277.
316. *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 815 (1998) (describing "cooperative federalism" as cooperation between state and local governments and the federal government in a large number of policy areas).
317. *See supra* Part I.
318. *See generally* John Ferejohn, *The Citizen's Assembly Model, in* DESIGNING DELIBERATIVE DEMOCRACY: THE BRITISH COLUMBIA CITIZEN ASSEMBLY 192, 197–200

lic were randomly chosen to participate in the assembly.[319] The assembly was tasked with producing a recommendation on changes to the electoral system that would be put to a referendum.[320] The assembly was designed so that its members had access to a professional staff and the ability to call expert witnesses to testify about the competing courses of action.[321] Professional staff assigned to the assembly organized the meetings, set the agenda, and helped shape the list of experts called to testify.[322] Though assembly members were chosen randomly from the public, they asked "probing and difficult questions" of the witnesses.[323] The substance of these questions demonstrated that assembly members gained a technical knowledge of electoral systems.[324] Political scientists who observed the deliberations concluded that "ordinary citizens" were capable of deliberating about electoral systems "in an intelligent and informed way."[325] Ultimately, the assembly's recommendation carried nearly sixty percent of the vote in the referendum.[326]

Four points about the structure of the British Columbia assembly should be noted. First, at times the professional staff made decisions that might have changed the direction of deliberations in the assembly in a way that was not always known to the assembly members.[327] One reason why professional staff pushed deliberations in a particular direction may be that the assembly members were, at least at first, relatively inexperienced. Were these kinds of assemblies adopted widely, professional staff would likely take on less of the operation of the assembly over time because citizens would become experts in assembly procedure and in certain areas of regulation. Second, the chair of the assembly was a professional public servant, and his rulings were final and not appealable to the entire assembly.[328] That arrangement might be appropriate for a one-off assembly, but for citizens more practiced in the art of participating in an assembly, the rulings of the chair of the assembly should be open to appeal to the entire body.

(Mark E. Warren & Hilary Pearse eds., 2008) (describing the citizen assembly that took place in British Columbia).

319. Kevin O'Leary, *The Citizen Assembly: An Alternative to the Initiative*, 78 U. COLO. L. REV. 1489, 1497–98 (2007).
320. Ferejohn, *supra* note 318, at 197–98.
321. *Id.* at 198–99.
322. *Id.* at 199.
323. *Id.* at 198.
324. *Id.* at 199.
325. *Id.* at 200. "Their deliberations were intense and serious: members came with open minds and did in fact change their views and arguments over the course of the proceedings." *Id.*
326. Dennis Pilon, *The 2005 and 2009 Referenda on Voting System Change in British Columbia*, 4 CANADIAN POL. SCI. REV. 73, 73–74 (2010).
327. Ferejohn, *supra* note 318, at 199.
328. *Id.*

Third, the assembly in British Columbia was populated by random selection.[329] Whether this should be a universal feature of these types of assemblies is an open question. For local decisions, no restrictions may be needed.[330] For decisions made on a regional level, a random selection may be required to keep the number of participants manageable. If the latter course is chosen, assemblies must be held often enough and with enough participants so that every citizen would have the chance to participate multiple times in their adult lives. A one-time affair would not give citizens the repeated interactions that are needed to foster the kind of habits necessary for self-government. Finally, the assembly in British Columbia only had the power to propose a policy to then be submitted to a referendum.[331] Due to the frequency of regulatory decisions, and to foster the conditions of responsibility required to cultivate the virtues of citizenship, the assembly should have the power to both propose the regulation and decide on it.

B. Great Councils: How a National Popular Assembly Might Work

What of decisions to be made at the national level? Certain regulations have such great national importance and have national effects that the proper place for their development and promulgation is at the national level. For example, certain financial regulations affecting all publicly traded companies and regulations like the Waters of the United States rule, which sets the jurisdiction of the Clean Water Act across the entire nation,[332] should be developed nationally. In these instances, a similar citizen assembly model can be used. Each agency could convene its own assembly of a few hundred citizens drawn at random. Those selected would be required to attend by law, but their expenses (including dependent care) would be covered by the government for as long as the assembly was in session.[333] Their employers would be reimbursed for their salary and would be prevented by law from penalizing or firing an employee who was called to partici-

329. *Id.* at 197.

330. There have been longstanding criticisms of purely volunteer public bodies. For a comical, but unsettling, account of the perils of volunteer fee-for-service juries in classical Athens, see ARISTOPHANES, WASPS (Alan H. Sommerstein ed. & trans., 2004) (422 B.C.E.). Nevertheless, the New England town hall meeting as described by Tocqueville provides an apt counterexample. *See* TOCQUEVILLE, *supra* note 278, at 73–82.

331. Ferejohn, *supra* note 318, at 198.

332. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053 (June 29, 2015) (codified in scattered parts of C.F.R. ch. 33 and C.F.R. ch. 40).

333. *See generally* Lawrence Lessig, *Rendering Sensible Salient*, 27 GOOD SOC'Y, 171, 175 (2018) (describing a proposal for citizen assemblies to decide on issues for a constitutional convention). The proposals Lessig suggests are clearly applicable to the kind of assembly I have proposed for regulatory policy.

pate.[334] Similar to the British Columbia citizen assembly, these assemblies convened by agencies would rely on professional staff to facilitate the deliberation, but they would also have the ability to call expert witnesses not employed by the agency. Interested parties could submit proposals to the assembly but could not directly lobby the members. At the end of the assembly, the participants would compose and then vote on the regulation. Again, enough of these assemblies with enough participants should be convened so that every American has a real chance of participating in at least one national assembly once in their lifetime. Combined with participating in local or regional assemblies, each citizen would have numerous opportunities to develop habits of self-government and influence the content of regulations.

These proposals are not meant to be exhaustive. Much work still needs to be done on how to give the public a dispositive role in administrative decisions. The first step is to see the value in cultivating citizens—not only for the stability and effectiveness of government but also for the ability to live freely by realizing their distinctive capacities through self-government.

VIII. CONCLUSION

Questioning the legitimacy of the administrative state has become something of a modern American pastime.[335] In that sense, this Article continues a long and august tradition of finding fault with the so-called fourth branch. That debates about the administrative state continue to this day is, however, good evidence that our forebearers have failed to put to rest fundamental questions about the source of legitimacy of agencies' lawmaking power. In our own time, this challenge comes most squarely from populist and antiestablishment political movements that are suspicious that the professionalism, independence, and technocratic know-how of agencies are only a deceptive carapace for the policy preferences of economic and political elites. The populist critique is too blunt, but it is not entirely mistaken. Modern administrative law scholars have not taken this critique seriously enough, often overlooking how the pathologies of a liberal rationalist administrative state have contributed to the populist critique today.

Agencies are far more receptive to technical comments than comments from the general public. Their continued public commitment to a rationalist liberal conception of government opens agencies to the

334. *See id.*

335. *See* Cynthia R. Farina, *Against Simple Rules for a Complex World*, 72 CHI.-KENT. L. REV. 987, 987 (1997) (likening critiques of the administrative state to an "awkward family heirloom" that "is handed down from generation to generation"); FREEDMAN, *supra* note 23, at 9 (describing how each successive generation has sought to quell new concerns about the legitimacy of the administrative state).

views of economic elites but denies the general public a place to debate and contest regulatory policy. The result is that although agencies publicly justify their lawmaking power on neutral technocratic expertise, they in fact make value judgments that are not open to democratic control and consequently shutter the public space in which citizens develop the capacities to come together to debate and decide public values that are at the heart of so many regulatory decisions.

By turning away from the liberal rationalist approach to government and toward a robust republican account of administration, the importance of democratic control over regulatory decisions becomes clear. Creating the space for citizens to debate and deliberate with each other will allow those citizens to develop judgment, deliberation, persuasion, and action—the very qualities that make self-government possible.