The Public Trust: Administrative Legitimacy and Democratic Lawmaking

Katharine Jackson

Follow this and additional works at: https://digitalcommons.lib.uconn.edu/law_review

Part of the Administrative Law Commons, and the Constitutional Law Commons
The Public Trust: Administrative Legitimacy and Democratic Lawmaking

KATHARINE JACKSON

This Article argues that recent United States Supreme Court decisions invalidating agency policymaking rely on a normatively unattractive and empirically mistaken notion of democratic popular sovereignty. Namely, they rely upon a transmission belt model that runs like this: democracy is vindicated by first translating and aggregating voter preferences through elections. Then, the popular will is transposed by members of Congress into the statute books. Finally, the popular will (now codified), is applied mechanically by administrative agencies who should merely “fill in the details” using their neutral, technical expertise. So long as statutes lay down sufficiently “intelligible principle[s]” that permit their application without significant discretionary remainder, regulation will carry democratic legitimacy because they who will the ends—the people—will the means.

Although the transmission belt model comes in procedural, deliberative, and populist varieties, each occludes the inescapable facts of political intermediation and social conflict. No matter how participatory and rational, governance will involve some officials somewhere making decisions that some citizens will dislike. Even after citizen preferences are massaged by public reason or netted out through compromise, it is impossible to speak of a single, identifiable popular will that is capable of translation into legislative codes and regulations. Collectively, voters do not behave in a way that makes them a plausible principle to a government agent.

Given these empirical problems, the transmission belt model carries several unsavory undemocratic implications. For example, it can lead to a Schmittian repression of social difference, should a demagogic leader claim to speak with the (fictional) voice of the (fictional) people. It may lead to juristocracy, as judges and technocrats claim unique insight into the substantive contents of public reason.

The Article suggests instead that models of democratic political representation serve as better criteria to assess agency legitimacy. Theories of representation recognize and take advantage of the institutional mediation of democratic input. They protect and accommodate social conflict. They recognize, unlike pluralist,
deliberative, and transmission belt theories of democracy, that there will always be a gap between ruler and ruled and that there will always be officials making decisions that people may not like.

Drawing from theories of political representation within political science and political theory, the Article argues that administrative agencies themselves can serve as democratic representatives because they (1) incorporate citizen presence in their decision-making while (2) preserving the normative priority of the citizen. The Article then suggests that the oft-maligned trustee model of representation, although often associated with the paternalism of Edmund Burke and Federalist 10, can serve as an appropriate evaluative standard. Agencies’ historical commitment to an inclusive notion of the public good, as well as their dedication to the public interest (qua beneficiary) over the often partial and self-serving commands of elected officials and powerful lobbyists (qua authorizers), make the trustee model an attractive starting point. With some democratic modifications that account for deliberation and debate about the meaning of the public good, the trustee model shows why agency decision-making has strong democratic credentials.

The Article concludes by offering some modifications to the legal doctrine used by courts to assess the legitimacy of agency action, to interpret agencies’ organic statutes, and to shape the presidential removal power. If we demand that administration provide good trustee representation, we will not expect it to mechanically carry out the orders of elected representatives. Rather, we will give them sufficient autonomy to carry out their authorized mandates diligently, loyally, and in good faith.
ARTICLE CONTENTS

INTRODUCTION ........................................................................................................ 5

I. DISASSEMBLING THE TRANSMISSION BELT MODEL ......................... 13

II. DEMOCRATIC POLITICAL REPRESENTATIVE AND ADMINISTRATION .................................................. 21
    A. THE DEMOCRATIC POLITICAL REPRESENTATION: A SURVEY .................. 21
    B. REPRESENTATION’S RELEVANCE TO ADMINISTRATIVE LEGITIMACY .............................................. 30
    C. AGENCIES NOT AS PLATFORMS FOR REPRESENTATIVE POLITICS,
       BUT AS POLITICAL REPRESENTATIVES THEMSELVES ..................................................... 32

III. ADMINISTRATION AS TRUSTEE REPRESENTATION ............................................. 34
    A. DEFINING THE POLITICAL MODEL OF TRUSTEE REPRESENTATION ... 36
    B. THE ANATOMY OF THE TRUSTEE REPRESENTATIVE: DISCRETION
       AND CONSTRAINT .............................................................................................................. 37
    C. EMBRACING THE DISQUIETING NATURE OF TRUSTEE ANATOMY ..... 40
    D. THE PUBLIC AND ITS HIGHLY DEBATABLE AND CONSTRUCTED
       INTEREST ............................................................................................................................. 44
    E. DELIBERATIVE RATIONALITY VS. THE PUBLIC INTEREST .............. 46
    F. DEMOCRATIC AUTHORITY AND TRUSTEE AUTHORIZATION .......... 49

IV. TRUSTEE REPRESENTATION AND ADMINISTRATIVE LEGITIMACY ................................................. 51
    A. ADMINISTRATIVE PRACTICE AS PUBLIC TRUSTEESHIP ............. 51
    B. THE PUBLIC INTEREST AND AGENCIES’ INCLUSIVE COGNITIVE
       ORIENTATION ...................................................................................................................... 58
    C. CONSTRAINING ADMINISTRATIVE AUTONOMY ....................... 60
    D. THE GUARDIANS OF DEMOCRATIC AUTONOMY ...................... 64
    E. SOME CIRCUMSPECT DEMOCRATIC AMENDMENTS TO THE
       TRUSTEE MODEL OF ADMINISTRATION ........................................................... 66
V. THE UPSHOT FOR LEGAL DOCTRINE: QUESTIONS OF AGENCY DELEGATION, ARBITRARY AND CAPRICIOUS REVIEW, AND PRESIDENTIAL APPOINTMENTS......................................................... 72

A. NONDELEGATION .............................................................................. 73

B. INTERPRETATION OF AGENCIES’ ORGANIC STATUTES............... 74

C. JUDICIAL REVIEW OF AGENCY ACTION ............................................ 79

D. PRESIDENTIAL ACCOUNTABILITY .................................................... 81

CONCLUSION: THE IMPORTANCE OF MAKING A POSITIVE CASE FOR THE ADMINISTRATIVE STATE................................................................. 83
The Public Trust: Administrative Legitimacy and Democratic Lawmaking

KATHARINE JACKSON*

INTRODUCTION

Recent judicial interventions restricting the scope of administrative policymaking authority rest upon an appealing but problematic theory of political legitimacy. It was recently articulated by Justice Gorsuch in his Gundy v. United States dissent: from the premise that “sovereignty belongs not to a person or institution or class but to the whole of the people,” the Constitution therefore “entrusted all of the federal government’s legislative power to Congress.”1 David Schoenbrod weighed in with a similar idea: “governments derive ‘their just powers from the consent of the governed,’” and, as a result, the lawmaking power ought to be vested in the body most subject to electoral consent.2 “On the conventional telling,” argues constitutional law scholar Jud Mathews, “the exercise of public power in a democracy is legitimate only to the extent that it can be traced back to ‘the people,’ who are ultimately sovereign.”3 And because the elected legislature is the governmental body most closely connected to the people, it is the body most suited to pass laws.4 The idea of popular sovereignty captured by these statements is one traditionally attributed to John Locke’s three-hundred-year-old Two Treatises of Government: “The legislative cannot transfer the

* Assistant Professor of Law, University of Cincinnati College of Law. Ph.D. (political theory), Columbia University (2019); J.D., William & Mary Marshall-Wythe School of Law (2005); L.L.M., Temple University (2011). I wish to thank Mark Seidenfeld and Glen Staszewski for their very helpful and detailed comments, Blake Emerson and Daniel Walters for their pointed questions, as well as the faculty (Profs. Gillian Metzger and Nicholas Parrillo), staff, and students of the New York Historical Society’s Reiss Graduate Institute for Constitutional History Fall 2022 course, American Bureaucracy and the Constitution, from the Founding Era to the Post New Deal, for the excellent discussion and insights that helped me develop this paper.

1 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting). Of course, under Gorsuch’s analysis, he would then go on to bind the legislature he just empowered with bicameralism, presidential veto, and other counter-majoritarian tactics that ensure that when Congress passes any laws at all, they are few and far between. Ironically, they also like to be general and, therefore, lack the specificity required to pass muster under the major questions doctrine. Kate Jackson, All the Sovereign’s Agents: The Constitutional Credentials of Administration, 30 WM. & MARY BILL RTS. J. 777, 792–93 (2022).

2 David Schoenbrod, Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce, 43 HARV. J.L. & PUB. POL’Y 213, 214–15 (2020). See also JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE’S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 174 (2017) (“American constitutionalism had firmly established that all lawmaking was to be done by representatives that were elected by the people as a basic principle.”).


4 Id.
power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others.\(^5\) Legal scholar Adrian Vermeule and retired appellate judge Richard Posner dub this intuition “legislative primacy.”\(^6\)

The upshot is that because agency officials are not elected, agency lawmaking will violate the people’s sovereignty unless some very specific conditions occur. These conditions are determined by a model that political theorists and legal scholars call transmission belt (or congruence) theory.\(^7\) The model runs something like this: democracy is vindicated by first translating and aggregating voter preferences through elections. Then, the popular will is transposed by members of Congress into the statute books. Finally, the popular will (now codified), is applied mechanically by administrative agencies who should merely “fill in the details” using their neutral, technical expertise.\(^8\) So long as statutes lay down sufficiently “intelligible principle[s]” that permit their application without significant

\(^5\) John Locke, Two Treatises of Government 167 (Rod Hay ed., McMaster Univ. 1823) (1690). This theoretical foundation is discussed in, e.g., Gundy, 139 S. Ct. at 2131–48 (Gorsuch, J., dissenting); Ilan Wurman, Nondelegation at the Founding, 130 Yale L.J. 1490, 1518–20 (2021). Ironically, Locke also gives the executive the right, amongst other things, to re-draw electoral maps and call new legislatures into session because “[w]hatsoever cannot but be acknowledged to be of advantage to the society and people in general, upon just and lasting measures, will always, when done, justify itself; and whenever the people shall choose their representatives upon just and undeniably equal measures, suitable to the original frame of the government, it cannot be doubted to be the will and act of the society, whoever permitted or proposed to them so to do.” Locke, supra note 5, at 175.

\(^6\) Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic 8 (2010). Examples of arguments that use the idea of legislative primary include: George I.洛vell, That Sick Chicken Won’t Hunt: The Limits of a Judicially Enforced Non-Delegation Doctrine, 17 Const. Comment. 79, 85 (2000); Thomas Christiano, Democracy and Bureaucracy, 71 Phil. & Phenomenological Rscil. 211, 212 (2005) (reviewing Henry S. Richardson, Democratic Authority: Public Reasoning about the Ends of Policy (2003)); Adam B. Cox & Cristina M. Rodriguez, The President and Immigration Law 2 (2020); Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1672–73 (1975) (explaining that legislative primacy “appears ultimately to be bottomed on a contractarian political theory running back to Hobbes and Locke . . . . Since the process of consent is institutionalized in the legislature, that body must authorize any new official imposition of sanctions . . . . The requirement that agencies conform to specific legislative directives . . . legitimates administrative action by reference to higher authority[,]”). This legislative primacy, however, rarely extended so as to disempower the courts—at least in terms of their authority to overrule the legislature. See Robert L. Rabin, Federal Regulation in Historical Perspective, 38 Stan. L. Rev. 1189, 1210–11 (1986) (indicating that “notwithstanding the attachment to British traditions, the notion of legislative absolutism—let alone final authority in the new upstart administrative agencies—was antithetical to American legal thought. As Chief Justice Waite, the author of Munn [v. Illinois], later noted, the courts regarded it as their constitutional duty to ensure that the power to regulate was not used to destroy or confiscate.”) (citations omitted).

\(^7\) Mark Seidenfeld, The Role of Politics in a Deliberative Model of the Administrative State, 81 Geo. Wash. L. Rev. 1397, 1403 (2013); Stewart, supra note 6, at 1675.

\(^8\) Gundy, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1927); Gundy, 139 S. Ct. at 2137–42. See also Dep’t of Transp. v. Ass’n of Am. R.Rs., 575 U.S. 43, 78–79 (2015) (Thomas, J., concurring) (arguing that agency discretion should be limited to factual determinations and foreign policy). See Schoenbrod, supra note 2 (providing a transmission-belt model of administrative legitimacy and arguing that it is a constitutional norm).
discretionary remainder,\(^9\) regulation will carry democratic legitimacy because they who will the ends—the people—will the means. Accordingly, administration, given its unelected bureaucrats, is to be a “machine without a mind”\(^10\) that should not make contestable value judgments. So long as they do, the people cannot object to their actions because they have already consented to them.

Thus, the people’s will travels on the back of the franchise from voter to administrator with, it is hoped, little disfiguration. Former president Woodrow Wilson, for example, imagined government administration operating according to “nomothetic” law that would carry out the orders of democracy’s “corporate, popular will.”\(^11\) The possibility that Congress and administrators might serve as autonomous mediators, standing between the citizens and their laws, recedes behind the folkish notion that it is the sovereign people that are ruling.

This way of thinking about administrative legitimacy is evident in both the recently revitalized nondelegation doctrine and its newer cousin, the major questions doctrine (MQD).\(^12\) Nondelegation holds that federal lawmaking power is held exclusively by Congress and that it may not, therefore, delegate policymaking authority to its bureaucratic agents.\(^13\) “The nondelegation doctrine,” according to Justice Kagan, “bars Congress from

---

\(^9\) See J.W. Hampton, Jr. & Co., 276 U.S. at 409 (laying down the intelligible principle doctrine); Mistretta v. United States, 488 U.S. 361, 372 (1989); Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 474 (2001); Gundy, 139 S. Ct. at 2119 (explaining that “[o]nly after a court has determined a challenged statutes meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I.”); id. at 2137–42 (Gorsuch, J., dissenting) (arguing that the “intelligible principle” standard, because it has been applied too broadly and thus permits agencies too much lawmaking discretion, should be abandoned in favor of a standard that demands more specificity from Congress). For a discussion of the judiciary’s role in policing the transmission belt, see Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 HARV. L. REV. 1511, 1516 (1992).


\(^11\) Woodrow Wilson, The Study of Administration, 2 POL. SCI. Q. 197, 205 (1887).

\(^12\) Recent opinions applying the MQD include: Texas v. United States, 809 F.3d 134, 181 (5th Cir. 2015), aff’d, 136 S. Ct. 2271 (2016) (despite an explicit grant of policymaking discretion to the agency, the Court used the MQD to deny it); Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor, 142 S. Ct. 661 (2022) (vaccine-or-test mandate application); Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (describing its application during an eviction moratorium); West Virginia v. Env’t Prot. Agency, 142 S. Ct. 2587 (2022) (generation-shifting climate regulation); King v. Burwell, 576 U.S. 473 (2015) (reviewing tax credits pertaining to the Affordable Care Act). It arguably first emerged in Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 468 (2001) (Justice Scalia argued that an agency couldn’t make a “radical” or “fundamental” change to tariff filing requirements because “Congress . . . does not . . . hide elephants in mouseholes.”). This argument became indispensable to Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000), where the Court opined that the FDA did not have the authority to classify and regulate tobacco as a drug. See also Ronald J. Pestritto, Constitutional and Legal Challenges in the Administrative State, 38 SOC. PHIL. POL’Y 6, 18 (2021) (“The [FDA v. Brown] Court finds it implausible that Congress would intend to make major policy determinations by means of saying nothing about such determinations in a statute.”). See Cass R. Sunstein, Chevron Step Zero, 92 VA. L. REV. 187, 191 (2006) (discussing how legal fictions regarding the applicability of Chevron deference have led to what has ultimately become the MQD).

\(^13\) Gundy, 139 S. Ct. at 2121.
transferring its legislative power to another branch of Government."\textsuperscript{14} Only Congress is both elected and vested by the Constitution with the power to legislate.\textsuperscript{15} The MQD is its avoidant cousin,\textsuperscript{16} and is a technique used by courts to rescue Congress from improper delegation.\textsuperscript{17} The technique assumes that Congress does not delegate power unless it produces precise instructions to administrative agencies—at least for questions of a major political and economic import.\textsuperscript{18} Thus, Congress must “speak clearly” about what it expects the Center for Disease Control (CDC) to do about landlords and tenants during a pandemic before the CDC can impose an eviction moratorium.\textsuperscript{19} To hold otherwise would interrupt the seamless transit of the popular will from voter to representative to administrative policy.

It is not just conservative jurists skeptical of the administrative state that bank on the transmission belt model. Neither have many political scientists and philosophers managed, as Foucault observed,\textsuperscript{20} to cut off the head of the king. Instead, they simply crown “the people” rather than the monarch, hand-waiving away the possibility that there may not be any assortment of institutions and norms that would enable the multitude to govern as if it were a single person.\textsuperscript{21} It is a philosophical find-and-replace.\textsuperscript{22} “There is a persistent tendency,” notes political theorist Joseph Heath, “to imagine the state as a single vertically integrated hierarchy, in which all major decisions are taken at the apex of power.”\textsuperscript{23} This idea then “leads to an overwhelming emphasis on legislatures as the primary locus of public decision-making.”\textsuperscript{24}

\textsuperscript{14} Id.
\textsuperscript{15} U.S. CONST. art. I, § 1.
\textsuperscript{16} Nicholas R. Parrillo, A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s, 130 YALE L.J. 1288, 1297 (2021). See also Blake Emerson, Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation, 102 MINN. L. REV. 2019 (2018); Wurman, supra note 5, at 1502 & n.57; King, 575 U.S. at 485–86 (arguing that judges should not defer to agency statutory interpretations that concern questions of “deep economic and political significance”).
\textsuperscript{18} Id.
\textsuperscript{19} Emerson, supra note 16, at 2037; Deacon & Litman, supra note 17, at 1012–14.
\textsuperscript{20} Michel Foucault, Power/Knowledge: Selected Interviews and Other Writings 1972–77, 120–22 (Colin Gordon ed., 1980).
\textsuperscript{21} Id.
\textsuperscript{24} Id. at 17–18. See also Posner & Vermeule, supra note 6, at 8; Beau J. Baumann, Americana Administrative Law, 111 GEO. L.J. 465, 471–73 (2023).
Like the Court, they remain skeptical of any policymaking power that is not tied directly to the authority of voters and their elected representatives.\textsuperscript{25} Like originalist jurists, the political theories they conscript for their arguments are those most popular in the 17th and 18th centuries.\textsuperscript{26} As a result, agencies are supposed to be the sovereign’s Hobbesian “nerves and tendons,” not a mind capable of judgment.\textsuperscript{27} Indeed, many theorists take their cue from Weber and identify democracy with “an imagined domain of rational deliberation, direct participation, or public reason that stands apart from and steers machine-like administrative structures.”\textsuperscript{28} Deliberative democratic models, in other words, too often crown as king the deliberative process itself, burying the business of actual governance behind analysis of ideal speech conditions. Moreover, political science scholarship, like legal scholarship, commonly describes the relationship between legislature and administration as one involving a commanding sovereign principal and its obedient agent.\textsuperscript{29}

Likewise, theorists that support executive control over agencies rely on a transmission belt model. This variety, however, links agency legitimacy not to the democratic collective decision-making of Congress, but to the immediate connection between the Presidency and the people.\textsuperscript{30} Chief Justice Roberts, for example, argued in \textit{Seila Law LLC v. Consumer Financial Protection Bureau}\textsuperscript{31} that the President, because they are “the most


\textsuperscript{28} \textit{Steven Klein, The Work of Politics: Making a Democratic Welfare State 172 (2020). See also Bernardo Zacka, When the State Meets the Street: Public Service and Moral Agency 23 (2017) (observing that “street-level bureaucrat[s]” . . . belong to both the ‘Left hand’ of the state, the one that delivers social services, and to the ‘Right hand,’ [of the state,] which enforces order and economic discipline”).

\textsuperscript{29} Christopher J. Walker, \textit{Inside Agency Statutory Interpretation}, 67 Stan. L. Rev. 999, 1001–02 (2015); Wiseman & Wright, supra note 25.

\textsuperscript{30} Posner & Vermeule, supra note 6, at 12–15; \textit{Carl Schmitt, Legality and Legitimacy} 13 (Jeffrey Seitzer ed., trans., Duke Univ. Press 2004) (1932) (“[T]he newly created financial bureaucracy[] found the possibility of a new basis in the plebiscitary legitimacy of the German President elected by the entire German people.”) (citation omitted); K. Sabeel Rahman, \textit{Reconstructing the Administrative State in an Era of Economic and Democratic Crisis}, 131 Harv. L. Rev. 1671, 1673 (2018) (reviewing \textit{Jon D. Michaels, Constitutional Coup: Privatization’s Threat to the American Republic} (2017)).

\textsuperscript{31} 140 S. Ct. 2183 (2020).
democratic and politically accountable official in Government” and the only representative “elected by the entire Nation,” deserves the power to single-handedly shape administrative policy and personnel.\textsuperscript{32} The implication is that the President, unlike an agency official removable for cause, instantiates popular sovereignty because he speaks for, and at the behest of, the entire electorate. Yet the equation of presidential decision-making with popular rule carries the stench of Schmittian politics.\textsuperscript{33} It presumes that a president can identify not only what the people want, but also that there is a people (comprised of hundreds of millions of distinct individuals) that can want something. It therefore contemplates that administration might be governed according to the dictates of a Caesarist leader purporting to speak with the unified voice of the sovereign people.\textsuperscript{34} Of course, the prospect of a largely unbound executive officer claiming a popular mandate should alarm any that followed the Trump Administration’s treatment of refugees, civil protestors, polluters, and political cronies.

Admittedly, if administrative decision-making power is not subject to any kind of popular control, we risk the parade of bureaucratic horribles painted by theorists from Weber to Foucault to Habermas.\textsuperscript{35} Concerns about “technocracy, the relentless conquest of instrumental rationality, and roads to future serfdom and despotism”\textsuperscript{36} are not delusional. But there is more than one way to incorporate popular participation into administration. As legal scholars Blake Emerson,\textsuperscript{37} Sabeel Rahman,\textsuperscript{38} Mark Seidenfeld,\textsuperscript{39} and Glen

\textsuperscript{32} Id. at 2203.


\textsuperscript{34} ERNESTO LA CLAU, ON POPULIST REASON 159–60 (2005) is probably the most influential contemporary statement of this Schmittian notion. See also Andrew Arato, How We Got Here? Transition Failures, Their Causes and the Populist Interest in the Constitution, 45 PHIL. & SOC. CRITICISM 1106, 1108 (2019) (discussing the rise of populist politics).


\textsuperscript{36} WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 233 (2022).

\textsuperscript{37} BLAKE EMERSON, THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY (2019).

\textsuperscript{38} K. SABEEL RAHMAN & HOLLIE RUSSON GILMAN, CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS (2019); K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION (2017).

\textsuperscript{39} Seidenfeld, supra note 9, at 1529.
Staszewski\textsuperscript{40} show, administrative agencies can, and often do, incorporate popular input into their decision-making. Agencies do not only serve as platforms for democratic participation. They also, as political theorist Stephen Klein argues, motivate public debate, and therefore permit ordinary citizens to change policymaking agendas.\textsuperscript{41}

As laudable as these recent efforts are, they share a problem with the transmission belt model: they do not confront and address the mediating institutions of the state. The United States government does not operate as one gargantuan, universal town hall. No matter how open policymaking is to public debate and feedback, there will be some official, somewhere, who must make decisions and some citizen, somewhere, who was excluded or uninvolved in the process. No matter how often citizens elect representatives, those representatives will make choices that are not traceable to their constituents’ preferences. Because the decision-making of individual officials fades behind the colorful pictures painted by deliberative, presidential, and electoral theories, none of them fully explain: (1) “how groups that are diffuse and unorganized are supposed to assert themselves;”;\textsuperscript{42} (2) the obligations and standards of judgment that officials must adopt when confronted with public feedback; and (3) what officials must do if and when they are confronted not with public consensus, but with apathy, conflict, and confusion. For example, even if agencies take up the advice given by deliberative theories by providing a public platform for decision-making, there is always the risk that officials might be captured by industry actors, cater to well organized and powerful partial interests, or simply respond best to the loudest voices—including their own preferences.\textsuperscript{43}

What is more, if those officials can claim legitimacy via electoral mandate, as might an official nominated by and serving at the president’s pleasure, it is not clear whether they ought to account for direct public feedback at all. If they do not explain how the popular will—whether determined by aggregation, election, deliberation, or otherwise—is to be translated into policy by officials, it is all too easy for a self-appointed demagogue or technocrat to claim a monopoly on such translation.

As I argue in this Article, there is a way to model the democratic legitimacy of administration without the normative and empirical blunders of the transmission belt model. There is also a way to do it that speaks to the inevitable gap that opens between ruler and ruled, notwithstanding our best efforts to build popular participation into agency decision-making. Namely, it is a theory that recognizes that agencies and their officials are themselves political representatives of the public. They act and decide on our behalf just

\textsuperscript{40} Glen Staszewski, Political Reasons, Deliberative Democracy, and Administrative Law, 97 IOWA L. REV. 849, 886–87 (2012).
\textsuperscript{41} KLEIN, supra note 28, at 93 (citing Weber).
\textsuperscript{42} HEATH, supra note 23, at 74.
\textsuperscript{43} Stewart, supra note 6, at 1764; Daniel E. Walters, The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State, 132 YALE L.J. 1, 39–40 (2022).
like a member of Congress or president act and decide on our behalf. It is also a theory that insists that representation can plausibly be called democratic, notwithstanding the separation between ruler and ruled, if some mechanism exists that ensures that citizens are present in the game of collective decision-making in a meaningful and equal way. It is also a theory that does not just account for pluralism and political conflict. It *embraces* it. Citizens’ social, economic, and ideological differences inspire humility in lawmakers because they cannot ever plausibly claim to speak with the voice of the whole people. Conflict inspires participation by citizens because they can always claim that their voices were improperly disregarded in the last round of collective decision-making. They can make this claim because it is theoretically impossible for a representative to speak for everyone. If everyone’s views are fully articulated in the political process, such would indicate presence, not representation. Finally, representation also presumes a division of labor that ensures that government does what its citizens expect it to do: make and implement well-informed decisions on the citizenry’s behalf, with citizens’ input, and for citizens’ benefit.

In the following sections, my case for treating administration as a form of democratic representation proceeds as follows. I first demonstrate that the transmission belt model relies upon a conception of popular sovereignty that takes literally several fictions: first, that the people have an identifiable “will;” second, that this will can be identified by Congress in the law; and third, this will can be applied regularly and without controversy by administrators as they interpret and execute that law. As a result, critics of administration may grant congressional lawmaking more democratic credentials than it deserves. While Congress certainly captures social, economic, and political diversity better than a single president might, it is still a body comprised of fewer than one thousand individuals. I will also show that some deliberative and civic republican models inadvertently reproduce some of the problems associated with the transmission belt model. I then argue that it is instead better to analyze lawmaking legitimacy using a theory that, unlike the transmission belt model, does not rely upon scaffolding built by three-hundred-year-old political theorists with pecuniary interests in both slavery and colonization. 44 It instead uses our best

---

44 The common reference to Locke in the service of nondelegation is, at the very least, ironic. Locke himself, as secretary to Earl Shaftesbury, was heavily involved with the Carolina colony, which received a government charter that delegated to it the power to govern large colonial territories and resources. VICKI HSUEH, HYBRID CONSTITUTIONS: CHALLENGING LEGACIES OF LAW, PRIVILEGE, AND CULTURE IN COLONIAL AMERICA 55–56 (2010). See, e.g., Brad Hinshelwood, The Carolinian Context of John Locke’s Theory of Slavery, 41 POL. THEORY 562, 564 (2013). In any event, Locke’s primary interlocutor in writing this text was Sir Robert Filmer and his primary aim was to challenge the theocratic legitimacy of monarchs, not to allocate powers amongst popularly elected government officials. As a result, it is most likely that this oft-cited passage was meant to dissuade a body of elected representatives, like Parliament, from transferring their power into the hands of James II—not to say anything about whether postal roads are best planned by administrators nominated by a President and approved by Congress, or Congress itself. This is evident not the least because it is the topic of Locke’s *First Treatise*. 
current understanding of the aims that democracy seeks and the institutions through which it can seek them. Namely, it is a theory of democratic representation. After a brief survey of the various models offered by this theory, I will make the case that the oft-maligned trustee model can serve as an apt yardstick by which to assess the democratic credentials of the administrative state. I will also show that it can incorporate the insights of agonistic democracy, recently articulated by law professor Daniel Walters: that democratic legitimacy is served best by recognizing that our leaders cannot and should not try to present their decisions as the outcome of consent and consensus.\footnote{Walters, supra note 43, at 48–49.} The Article concludes with some thoughts about how a trustee model informs doctrinal issues touching on legislative delegation and the presidential appointment power.

I. DISASSEMBLING THE TRANSMISSION BELT MODEL

Lawyers and political theorists generally imagine administration as a machine whose only directive is to carry out the will of a sovereign authority.\footnote{HEATH, supra note 23, at 17–18.} Although superficially appealing, it relies upon a problematic organ-body conception of popular sovereignty: that there is a “people” with a “will” that is captured in the congressional statutes granting authority to agencies. The model posits that elected political representatives’ statutory control over agencies lends them democratic legitimacy because “agency policy decisions . . . will presumably reflect the will of the people and achieve the consent of the governed.”\footnote{Staszewski, supra note 40, at 856 (citation omitted). See also, e.g., Evan J. Criddle, Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking, 88 TEX. L. REV. 441, 450 (2010) (describing three different models of popular representation); Indus. Union Dep’t v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (describing the functions that the nondelegation doctrine serves).} This hierarchical conception of legitimate authority is an upshot of democratic legal positivism. If natural law, natural liberties, or some other transcendental standard is not to govern, then polities are left only with the commands of their (popular) sovereign.\footnote{KLEIN, supra note 28, at 93.}

The idea that the popular will is transmitted from démos to agency requires acceptance of a cascading series of fictions. First, that a people has a will; second, that Congress reproduces this will; third, that Congress accurately transcribes this will into statutes; and, fourth, that agency policymakers straightforwardly apply this will. Making these fictions work requires logical gymnastics. For example, Congress—a collective body of diverse human beings—has no “intent,” at least as it may be understood as some kind of psychological state unique to human persons.\footnote{See, e.g., Andrew D. Martin, Congressional Decision Making and the Separation of Powers, 95 AM. POL. SCI. REV. 361, 376 (2001) (arguing that individual members of Congress modify their votes according to strategic concerns that incorporate the influence of United States Supreme Court and

See, e.g., CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* 59 (2011) (describing the relationship between group members as “one of ‘supervenience’” and arguing “that the group’s attitudes cannot generally be determined by the attitudes of its members in a ‘proposition-wide’ way, only in a ‘holistic’ one”); Carol Rovane, *Group Agency and Individualism*, 79 ERKENN 1663, 1664–65 (2014) (critiquing and expanding on the List & Pettit theory of supervenience).

See, e.g., JOHN NEVILLE FIGGIS, *CHURCHES IN THE MODERN STATE* 64 (1913) (suggesting that corporate personality “is inherent in the nature of . . . society”); 3 FREDERICK WILLIAM MAITLAND, *Moral Personality and Legal Personality, in THE COLLECTED PAPERS OF FREDERICK WILLIAM MAITLAND* 304, 305 (H.A.L. Fisher ed., 1911) (“Besides men or ‘natural persons,’ law knows persons of another kind. In particular it knows the corporation, and for a multitude of purposes it treats the corporation very much as it treats the man.”); John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 656 (1926) (analyzing the theory of corporate personhood); William W. Bratton Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471 (1989) (describing the conceptualization of a firm’s identity); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 201 (describing the concept of a corporation as an entity, but also as an “artificial creation of state law”).

E.g., “original public meaning,” purposivism, textualism, and constitutional avoidance, among others.

Deacon and Litman argue, however, that the newest variety of the MQD is not a method of statutory interpretation, but instead a Constitutional limitation on agency power. Deacon & Litman, supra note 17, at 1016.

Emerson, supra note 16, at 2044.

technocrats that merely “fill in the details” according to a statute’s “intelligible principle[s].”\(^56\)

Legal scholars are generally familiar with the doctrinal tools used to attribute an intent to Congress when it passes laws.\(^57\) They are also familiar with the fiction of agencies’ role as statutory transcribers: administrators routinely make value-laden policy choices that cannot be directly identified within statutory text.\(^58\) They may be less familiar, however, with the fiction used to ascribe an intent to the people themselves. Many take it for granted, as constitutional theorist A.V. Dicey did, that representation would “produce coincidence between the wishes of the sovereign and the wishes of the subjects.”\(^59\) For them, it is a matter of common sense: legislative primacy derives from legislators’ unique connection to the popular sovereign.\(^60\) “The people” and “Congress” are interchangeable when it comes to claiming popular legitimacy. The problem is that this kind of theoretical substitution comes with some intractable empirical and normative challenges.

First, the empirical issues. As Daniel Walters has recently pointed out, legal scholars sometimes characterize democratic popular sovereignty under pluralist or deliberative (or civic republican) models.\(^61\) Each, in its own way, contemplates that the people can function effectively as a principal that can direct a governmental agent.\(^62\) But it is incredible that a country of hundreds

\(^{56}\) The “intelligible principle” standard is a less stringent version of the nondelegation doctrine: Congress may not delegate unless it provides the agency with an intelligible principle to guide its policymaking. See Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 474–75 (2001); Mistretta v. United States, 488 U.S. 361, 372 (1989). Arguably, the same logic applies to courts who should, at least if they are performing their duties well, mechanically apply statutory law by calling balls and strikes. See Glen Staszewski, Statutory Interpretation as Contestatory Democracy, 55 WM. & MARY L. REV. 221, 223 (2013); Jane S. Schacter, Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation, 108 HARV. L. REV. 593, 594 (1995). The assumption that apolitical, neutral technocrats could successfully make objective decisions in “the public interest” while insulated from partisanship, stems from the Progressive movement. MERRILL, supra note 55, at 27.

\(^{57}\) See, e.g., Mark Seidenfeld, Chevron’s Foundation, 86 NOTRE DAME L. REV. 273, 278 (2011) (discussing problems with assuming congressional “intent” to delegate policymaking power to agencies); supra note 51 (citing substantive and interpretive canons of construction that, at best, only indirectly measure congressional intent via the manifestation of intentions of individual representatives).

\(^{58}\) E.g., Emerson, supra note 16, at 2022, 2074 (describing how administrative agencies use value-oriented judgment when interpreting statutes); RICHARDSON, supra note 27, at 116 (critiquing the instrumentalist view of agency action); Bowsher v. Synar, 478 U.S. 714, 749 (1986) (Stevens, J., concurring) (“[G]overnmental power cannot always be readily characterized” as legislative, executive, or judicial; rather, a governmental power, “like a chameleon, will often take on the aspect of the office to which it is assigned.”); MERRILL, supra note 55, at 25–27. See generally JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT (2018); KLEIN, supra note 28.


\(^{60}\) See also, e.g., Bryan Garsten, Representative Government and Popular Sovereignty, in POLITICAL REPRESENTATION 90, 90 (Ian Shapiro, Susan C. Stokes, Elisabeth Jean Wood & Alexander Kirschner eds., 2009) (“[M]ost of the political science literature simply presumes that the purpose of representative government is to be an instrument of the popular will.”).


\(^{62}\) Id. at 39. See also, e.g., MÓNICA BRITO VIEIRA & DAVID RUNCIMAN, REPRESENTATION 95–96 (2008) (discussing the use and limitations of the principal-agent framework).
of millions could agree to anything, and certainly not so much that they can act as a unitary macro-subject.  

For example, the pluralist model suggests that voters’ distinct preferences might be aggregated through interest groups who then, after negotiation and compromise, yield coherent policy outcomes that incorporate everyone’s views in a fairhanded way. As a result, the output of the political process can fairly be called the “popular will.”

However, political scientists have confirmed time and again that citizens do not have clear, identifiable policy preferences that are capable of aggregation into a coherent collective purpose. Many cast ballots based on party identification alone. For most, the only way to effectively contribute to politics, given their lack of expertise and resources, is to make a small money donation to those who can claim the requisite expertise and resources. Further, citizens remain necessarily ignorant (or apathetic) of most policy proposals and their consequences. They instead rely entirely upon the judgment of lawmakers. Nowhere is this clearer than when Congress considers policy that lobbyists and staff scribe in backroom offices. The vote, moreover, is a ham-handed tool for conveying information about voter preferences. Politicians routinely cite the “mandates” conferred by elections to pursue policy agendas that were not, in fact, on the ballot.

---


65 See LIST & PETIT, supra note 50, for a discussion of how an intent might be attributed to a group if all group members provide inputs that help determine—at least to some extent—the collective intention.


68 Jennifer Rubenstein, Small Money Donating as Democratic Politics, 20 PERSPS. ON POL. 965, 972 (2022) ("[F]or ordinary people without specialized training, sometimes the best (or even only) way to support scientific, artistic, and legal forms of political action, especially on emergent issues, is to send money.").


70 PITKIN, supra note 63, at 215. See generally SCHUMPERTE, supra note 63.

71 MASHAW, supra note 58, at 170.

72 E.g., HEATH, supra note 23, at 64.

any event, both the President and Congress can claim these electoral mandates. Yet both often disagree on policy, and whose views should take precedence is not obvious. If collective decision-making reflects certain values, then, it is not clear that those values reflect voters’ choices. Instead, they may better reflect the predilections of the powerful. Hannah Pitkin, in her seminal work on political representation, noted that “a constituency is not a single unit with a ready-made will or opinion on every topic; a representative cannot simply reflect what is not there to be reflected.” As a result, pluralist theories of democracy that propose calculating coherent policy by netting out voters’ clearly defined but competing preferences fail to capture how representative democracy actually functions.

The problem compounds when it is acknowledged that citizens do not enter politics with clearly defined preferences. Instead, they come to have preferences only after political entrepreneurs successfully engage their attention. Voters commonly form opinions and beliefs about policy only because representatives and activists have won them over. Incorporating empirical research showing that citizens’ preferences are rarely stable outside the context of electoral politics, political theorists and political scientists find that representatives help create, through an educational process, the very constituencies and voter demands they are supposed to represent. For example, representatives will distinguish a group, paint it in a certain light, and then make claims on its behalf. Group members will then either accept or reject those claims based upon their own views and in light of competing messages from other representatives in an ongoing practice of judgment-formation. For instance, a voter who has spent her entire life in the country will form an opinion about “failing urban public schools” not because of her personal experience, but because debates amongst policy entrepreneurs have influenced her. Given that voter preferences are constructed by those with an interest in shaping public policy, it is not clear that lawmaking reflects the popular will and not the will of, for example, canny elites and clever manipulators.

To be sure, deliberative democrats might encourage the political construction of voter preferences. For them, the point of democracy is not to
aggregate voters’ pre-political values, but to gain consensus by changing voters’ minds after reasoned deliberation.\textsuperscript{82} As a result, it is possible under deliberative democratic theories that the \textit{demos} can still act as a collective subject that could give direction to governmental officials.\textsuperscript{83} But even conceding that political preferences are an endogenous outcome of the political process, not its starting point, states are too diverse and too disaggregated to achieve collectivized reason and consensus—and certainly not in the fine detail contained in legislation.\textsuperscript{84} Despite the most ideal speech situations, intractable conflicts will emerge.\textsuperscript{85} Everyone might agree that there should be freedom of speech. But because the “inherently formal and indeterminate nature” of principles like freedom, there will be many reasonable but inconsistent elaborations.\textsuperscript{86} The public may never find a unanimous general will, no matter how constrained and qualified its public reasoning or how universal and general its aspirations.\textsuperscript{87} Nor is this difficulty something that can be satisfactorily resolved by incorporating even more democracy into the decision-making process. Even if administrative rulemaking provides additional platforms for citizen participation, the problem will persist because diversity and differences will always exist. As Daniel Walters describes, “[i]t is unrealistic to assume that disagreement over policy could be substantially ameliorated through administrative processes or through accountability to elected officials, such that it would be coherent to speak of a ‘general will’ embodied in administrative action.”\textsuperscript{88} A general will is, rather, an “ontological impossibility.”\textsuperscript{89} There is no way to deliberate ourselves out of our intransigent positions on vaccine-or-test mandates and eviction moratoria, no matter how many public comments that the Occupational Safety and Health Administration (OSHA) solicits.\textsuperscript{90}


\textsuperscript{83} Walters, \textit{supra} note 43, at 9–10 (“[C]ivic republicans and deliberative democratic theorists assert that certain features of the administrative process—including notice-and-comment rulemaking and agencies’ duty to provide reasons for their decisions—foster deliberation that, ideally, results in agreement (or, at least, in less disagreement).”) (citing Seidenfeld, \textit{supra} note 9, at 1529 and Staszewski, \textit{supra} note 40, at 886–87).


\textsuperscript{85} Walters, \textit{supra} note 43, at 10.

\textsuperscript{86} Cordelli, \textit{supra} note 27, at 57.

\textsuperscript{87} E.g., Schmitt, \textit{supra} note 30, at 7; Franz Neumann, \textit{The Concept of Political Freedom, in The Democratic and The Authoritarian State} 160, 171, 190 (Herbert Marcuse ed., 1957) (1953) (Neumann is worth citing because he engaged contemporaneously with Schmitt’s work); Habermas, \textit{supra} note 82, at 10; Schumpeter, \textit{supra} note 63, at 251.

\textsuperscript{88} Walters, \textit{supra} note 43, at 10.

\textsuperscript{89} Id. at 53.

\textsuperscript{90} Id. at 10–12.
Pluralist and deliberative accounts of democracy, therefore, fail as an empirical matter. The principal-agent transmission belt model of popular sovereignty is, as political theorists Brito Vieira and Runciman\(^\text{91}\) put it, plainly inadequate to describe what is going on. Voters do not behave in a way that make them plausible principals.\(^\text{92}\)

These empirical issues lead directly to some serious normative concerns. If anyone claims to have identified an intention that is shared by all (or even a numerical majority), no matter how much it is massaged and manipulated by deliberation, one is not terribly likely to conclude that we have achieved social harmony. Rather, it is more likely that something nefarious is afoot. “The abstract idea,” notes political theorist Bryan Garsten, “of a sovereign people tend[s] to become concrete in the form of demagogues claiming to rule in the name of the people.”\(^\text{93}\) Attempts to establish mimetic identity between representative and the represented is not the realization of democracy. It is instead, argues historian F.R. Ankersmit, an invitation to tyranny.\(^\text{94}\) Blinding ourselves to the conceptual gap between ruler and ruled tends to foreclose public contestation, efface social difference, and give politicians an excuse to engage in a “relentless and unchecked pursuit of their particular vision of the good.”\(^\text{95}\) As Anya Bernstein and Glen Staszewski note in a recent work exploring the institutional implications of populism, the idea of the people as a unified whole with an undifferentiated will enables exclusionary identity politics while lending leaders the ability to claim legitimacy by fiat.\(^\text{96}\) The fiction of popular sovereignty, if taken literally, therefore puts us “in the business of electing dictators who can rule by decree while hiding behind ‘the will of the people.’”\(^\text{97}\) The idea that the people and its will can be truthfully mirrored is simply a lie. “[L]ike all such political lies, it [can] be maintained not only at the cost of truth but of blood

---

\(^{91}\) Brito Vieira & Runciman, supra note 62, at 138.

\(^{92}\) One response is to conclude that most lawmaking lacks democratic legitimacy. Rousseau argued that laws should be simple, general, and obvious. Many conservative jurists would agree. This outcome is not, however, straightforwardly democratic. Jackson, supra note 1, at 793. Where the state does not rule, powerful private actors will rule instead. Brian Butler & Anne Barnhill, SNAP Exclusions and the Role of Citizen Participation in Policy-Making, 38 Soc. Phil. & Pol’y 266, 286–87 (2021). Further, if laws are vague and general, unelected judges will inevitably fill in the regulatory blanks. Daniel R. Ernst, Tocqueville’s Nightmare: The Administrative State Emerges in America 13 (2014); Novak, supra note 36, at 233. Moreover, legal complexity is a result of democratic demands for market intervention. Klein, supra note 28, at 95; Emerson, supra note 37, at 17–18; Norberto Bobbio, The Future of Democracy 60 (Richard Bellamy ed., Roger Griffin trans., 1987) (1984). In any event, it’s notable that Rousseau himself leaned heavily on expert government ministers that, like a travel agent, were to present proposed legislation to the sovereign for approval. Nadia Urbinati, Continuity and Rupture: The Power of Judgment in Democratic Representation, 12 Constellations 194, 207 (2005).

\(^{93}\) Garsten, supra note 60, at 99. See also, e.g., Margaret Canovan, The People 24–29 (2005).

\(^{94}\) See generally Nadia Urbinati, Me the People: How Populism Transforms Democracy (2019).

\(^{95}\) F.R. Ankersmit, Aesthetic Politics: Political Philosophy Beyond Fact and Value 104 (1996).

\(^{96}\) Mashaw, supra note 58, at 11.

\(^{97}\) Anya Bernstein & Glen Staszewski, Judicial Populism, 106 Minn. L. Rev. 283, 284 (2021).

\(^{97}\) Mashaw, supra note 58, at 11.
as well.” There is a reason, after all, that Carl Schmitt—who identified the people with their leader—was so closely associated with the Nazi regime. In a democracy, collective decision-making should not be a question of identifying some non-existent popular “will” after preferences are aggregated, netted, reformed, and revised under either pluralistic or deliberative procedures. Nor should it be reduced to the dictates of a demagogue purporting to speak with the unified voice of the sovereign people. Neither should it be up to a technocrat purporting to identify policies to which all rational people might agree. Instead, it is a question of developing transparent and accessible collective decision-making procedures that ensure that all citizens can understand themselves as equal participants in, if not identifiable authors of, their collective ordering.

In the words of Danielle Allen, political theorist, power should be “depersonalized”: not attributable to anyone in particular, but attributable to the immanent operation of the procedural accoutrements of constitutional representative democracy. As a result, whatever it is that Congress is doing, it does not, and should not even pretend to, translate the will of the sovereign people into law. Much contemporary political theory scholarship accordingly assigns Congress a different function altogether. While these theories vary widely, each deploys some model of democratic representation that preserves a space for legislators’ independent thinking and decision-making. For some, Congress should help resolve political conflict under decision-making procedures that give all citizens equal respect and concern. For others, it should serve as a deliberative, and deliberately counter-majoritarian, body capable of

---

98 Brito Vieira & Runciman, supra note 62, at 43.
100 For further discussion of how false proclamations of political consensus can lead to violence, see, e.g., Walters, supra note 43, at 50 (citing Chantal Mouffe, Agonistics: Thinking the World Politically 8 (2013)).
101 Laclau, supra note 34, at 159–60 (describing the inherent problems of trying to represent the beliefs of others validly) See also, e.g., Arato, supra note 34 (explaining populism, its deficits, its comparison to new democracies, and how to address relative concerns).
103 Danielle Allen, President Trump Sings One Vision of America. Let Me Sing Another, WASH. POST (Feb. 5, 2020, 1:05 PM), https://www.washingtonpost.com/opinions/2020/02/05/president-trump-sings-one-vision-america-let-me-sing-another/. Thanks to Mark Seidenfeld for recommending this valuable source.
104 Bellamy, supra note 84, at 4; Waldron, supra note 84.
identifying objective truths about what is in the general interest—usually in a way favorable to counterrevolutionary factions.

Given these issues, requiring an administrative agency to merely “fill in the details” of its statutory mandate is not necessarily democratic. No matter how much of the agency’s discretion is constrained by carefully crafted legal codes, citizens will still experience the statute not as their own will, but instead a rule imposed upon them. Claiming otherwise is itself undemocratic because it forecloses contestation: citizens cannot complain because the agency is diligently carrying out their own orders. Since they have willed the ends, they have willed the means. Conversely, recognizing that Congress does not speak with the “voice of the people” opens space for citizens’ objection and participation.

II. DEMOCRATIC POLITICAL REPRESENTATIVE AND ADMINISTRATION

Given the problematic suppositions of the transmission belt model of administrative legitimacy, a new model is necessary. In the remainder of this Article, I argue that a theory of democratic representation can serve as this model, just as it does for legislative decision-making. Under a theory of representation, we can call administration democratic without apology. Though it may “seem[] to have a democracy problem,” perhaps it doesn’t—or at least, not a problem that it does not also share with the other branches of government. Specifically, I suggest that it is worth revitalizing the trustee model of political representation. The next Part, after providing a rough definition of democratic political representation and several different models within it, offers a few pro tanto justifications for this move.

A. The Democratic Political Representation: A Survey

A democratic system of representative government is an institutional framework “for realizing the democratic ideal of giving kratos to the [dēmos], power to the people.” Yet it recognizes that giving power to the people does not require that all citizens directly participate by, for example, directly consenting to the laws that bind them. Unmediated rule, one that transcribes the “will of the people” into the legal code, would indicate

---

105 See Pitkin, supra note 63, at 195 (discussing Burke and The Federalist authors’ views on congressional involvement and balancing popular interest); Staszewski, supra note 59, at 398. Chief Justice Roberts adopts this version in Seila Law, LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020) (citing THE FEDERALIST NO. 70 (Alexander Hamilton)).


107 Richardson, supra note 27, at 116.

108 Mathews, supra note 3, at 606.

presence, not representation.110 Representation can therefore avoid the normative and empirical pitfalls of the transmission belt model.111 As Bryan Garsten explains, “[t]he impossibility of fully and completely representing the people’s will . . . is therefore integral to the concept of representation itself.”112 Accordingly, many models of representation reject the transmission belt theory’s folkish notion that representatives take exogenous citizen preferences as the “bedrock for social choice” in a linear, bottom-up process that transmits those preferences into law.113 Such a system could do without representation altogether if an alternative preference-aggregation mechanism were to become available.114 Moreover, although democratic representation does not promise rule through the will of the people, it can promise that decisions will be the result of actions taken in the name of all rather than by an identifiable actor imposing her personal judgments on everyone else. Though it does not require citizens to knowingly consent to the laws that bind them, it does require that their presence is known and felt during the decision-making process.

To be clear, theories of democratic representation do not purport to present an inferior, watered-down version of democracy adopted only because direct democracy is impossible, impracticable or undesirable.116 “[T]he opposite of representation,” argues political theorist David Plotke, “is not participation. The opposite of representation is exclusion.”117 Representation identifies where and when citizens can be included in collective decision-making, notwithstanding their disagreements and their apathy. And it does so in a way that (1) maintains citizens’ normative priority118 and (2) ensures they have an equal and meaningful role to play. Representative systems are assessed according to how well they allow morally equal human beings to be involved in political decision-making—a fundamental norm that theorists Nadia Urbinati and Mark Warren call “democratic autonomy.”119 Stated more prosaically, citizens are to be equal players in a game that produces decisions that bind them. Representation vindicates democratic autonomy by allowing the otherwise absent citizens

110 PITKIN, supra note 63, at 170; Garsten, supra note 60, at 105.
111 Disch, supra note 64, at 101.
112 Garsten, supra note 60, at 105.
113 Disch, supra note 64, at 101 (quoting BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS’ POLICY PREFERENCES 354 (1992)).
114 For example, universal online referenda.
115 CORDELLI, supra note 27, at 11, 67.
116 Urbinati, supra note 92, at 196; PITKIN, supra note 63, at 191; THE FEDERALIST NO. 52 (Alexander Hamilton or James Madison); Jane Mansbridge, Rethinking Representation, 97 AM. POL. SCI. REV. 515 (2003); David Plotke, Representation is Democracy, 4 CONSTELLATIONS 19 (1997).
118 PITKIN, supra note 63, at 117 (explaining what one represents [e.g., the citizen] must guide one’s actions). Paul B. Miller, Fiduciary Representation, in FIDUCIARY GOVERNMENT 36 (Evan J. Criddle, Evan Fox-Decent, Andrew S. Gold, Sung Kim & Paul B. Miller eds., 2018); identifies this idea as an “other-regarding” principle that should guide decision-making and action.
to be present in some sense: for example, to have their interests considered, their preferences anticipated, their authorization solicited, and their ex-post judgments registered. Brito Vieira and Runciman, both political theorists and respected scholars of representative theory, explain that citizens can be present in lawmaking if they are able to object to what is being done in their name and for their benefit by, _inter alia_, filing lawsuits that challenge government policy or supporting a radical political movement. Another way, as emphasized by Jed Mathews, is through elections that (1) give citizens a chance to fire their leaders and (2) motivate potential leaders to compete for support by appealing to citizens’ interests and preferences, among other things. In turn, democratic autonomy, or presence, ensures that citizens maintain normative priority. Procedures like elections and citizen lawsuits help ensure that it is citizens and their concerns, their interests, their dignity to which political leaders attend.

But representation does not pretend that the outcome of collective decision-making involves the transposition of collective intent from voter to representative. Nor does it pretend that conflicts can be seamlessly woven together through compromise and consensus. To be sure, representation is consistent with some aspects of deliberative democracy because it accommodates and even expects public debate as representatives offer competing values to voters. It does not, however, require social and political unity—either as a result or a precondition of democratic politics. Representatives, as mediators that represent a particular conception of the people and their interests, cannot speak for the whole. They can only speak for a part. We can expect others to object and offer competing values and visions. Furthermore, because political representation facilitates the articulation and advocacy of necessarily partial interests, it can help ensure that any collective decisions undertaken by representatives always remain contingent and provisional. It is therefore a theory of democratic politics that accommodates what Daniel Walters calls democratic agonism.

---

120 Brito Vieira & Runciman, _supra_ note 62. See also Anthony Michael Bertelli, _Democracy Administered: How Public Administration Shapes Representative Government_ 13 (2021). See generally Dahl, _supra_ note 73. For a similar account, see Walters, _supra_ note 43, at 47 (discussing that democratic values are best instantiated when citizens have an opportunity to resist political settlement).

121 Mathews, _supra_ note 3, at 636–37 (citing Schumpeter).

122 Uribnati & Warren, _supra_ note 119, at 401–402; Mansbridge, _supra_ note 116, at 520 (specifically incorporating deliberative norms into a theory of anticipatory representation).

123 For example, Carl Schmitt’s theory of democracy presumes a cultural, social, and political homogeneity. Only then does the string of identities between citizen and leader hold water. Schmitt, _supra_ note 99.

124 Plotke, _supra_ note 116, at 22.


127 Walters, _supra_ note 43, at 49.
give everyone a chance to rule and be ruled in turn. According to political theorist Nancy Rosenblum, it is parties and partisanship, both made possible by political representation, that protect polities from the tyrannical holism presented by utopian theories of the common good.\(^{128}\) Promoting party politics within representative systems protects pluralism and prevents the kind of “durable” political settlement that is “undesirable and even dangerous.”\(^{129}\) Moreover, with opposition as their aim,\(^{130}\) representatives can always propose different solutions to public problems.

Finally, although representation accommodates participatory politics, it cannot be reduced to universal participation. Citizens might select party candidates for office via open primaries, but those candidates are still representatives that act on behalf of others. Proposed policy changes subject to public referenda are nevertheless the product of work done by a relative few on behalf of many others.\(^{131}\) A majority vote means that the majority is acting on behalf of not just itself, but also the minority. Plebiscites are the result of campaigns designed and organized by a subset of the population.

Indeed, in politics, representation exists everywhere—not just in connection with elected office. The unelected leaders of social movements and citizen petitions,\(^{132}\) formally organized public interest or charity organizations, political action committees, and interest group lobbies\(^{133}\) all act as representatives. Attorneys that bring blockbuster, politically consequential cases before the United States Supreme Court likewise represent interests beyond those of their immediate clients.\(^{134}\) Even participatory town halls involve representation. Invariably, some

---

\(^{128}\) Rosenblum, supra note 126, at 25–164.

\(^{129}\) Walters, supra note 43, at 47.


\(^{131}\) See, e.g., Amanda Taub & Max Fisher, Why Referendums Aren’t as Democratic as They Seem, N.Y. TIMES (Oct. 4, 2016), https://www.nytimes.com/2016/10/05/world/americas/colombia-brexit-referendum-farc-cameron-santos.html (explaining that voters rely on elite narratives which often serve as a tool for leaders to seek acclamation rather than meaningful consent); Julie Carr Smyth & Ali Swenson, Abortion Messaging Rolls Debate Over Ohio Ballot Initiative. Backers Said it Wasn’t About That, ASSOCIATED PRESS (July 24, 2023, 11:51 AM), https://apnews.com/article/abortion-ohio-referendum-election-2023-7ea656d35adce9dfb8d9a9bf8c69d60 (identifying the various political representatives and interest groups engaging in a referendum campaign related to abortion rights in Ohio).


\(^{134}\) For example, the case Dobbs v. Jackson Women’s Health Organization, 142 S. Ct. 2228 (2022), was a heavily political and politicized case drawing over 140 amici briefs. See Ellena Erskine, We Read All the Amicus Briefs in Dobbs So You Don’t Have To, SCOTUSBLOG (Nov. 30, 2021, 5:24 PM), https://www.scotusblog.com/2021/11/we-read-all-the-amicus-briefs-in-dobbs-so-you-dont-have-to/.
spokesperson will articulate a viewpoint on behalf of others while other individuals remain silent.\textsuperscript{135} According to Thucydides, such was the case even in participatory Ancient Athens; “[t]he democracy existed in name, but in fact the first citizen ruled.”\textsuperscript{136} Pericles’ oration was compelling enough that the people gave him the lead.\textsuperscript{137} He acted and spoke on their behalf while most remained silent.\textsuperscript{138} Representation likewise arises when decision-making bodies use committees and subcommittees to divide their decision-making labor.

Although only a handful are summarized below, there is a multitude of different types of democratic political representation, and a representative democratic polity will typically exhibit all of them.\textsuperscript{139} While all models of democratic representation describe how a government might achieve democratic autonomy for its citizens, they do so in significantly different ways. Indeed, in a healthy representative democracy, many different forms of representation should overlap and flourish because each provides a unique way for citizens to achieve presence and normative priority in collective decision-making.\textsuperscript{140} As explained below, each model also suffers from weaknesses that can be mitigated through the implementation or integration of other models. Some of these models involve elections but, importantly, some do not. Many of them are dyadic, describing a relationship between two parties: the constituent and the representative. Dyadic models are sometimes characterized in terms of a commanding principal and her obedient agent.\textsuperscript{141} Sometimes they emphasize informed advocacy over the advancement of opinions and preferences.\textsuperscript{142}

Importantly, because each model is vulnerable to arguments about the imperfection of the representation that they provide, they encourage public contestation.\textsuperscript{143} The paradox of representation,\textsuperscript{144} the simultaneous presence and absence of citizens in lawmaking, gives every citizen standing to pass

\textsuperscript{135} Urbinati, supra note 125, at 768; Plotke, supra note 116, at 26.
\textsuperscript{136} Urbinati, supra note 125, at 768.
\textsuperscript{137} Id. See also Nadia Urbinati, Republicanism: Democratic or Popular?, 20 GOOD SOC’Y 157, 162 (2011) (“Athens could not function without an aristocracy of speakers[,]”).
\textsuperscript{138} Urbinati, supra note 125, at 762 (“A minority came to dominate the field of politics and the majority of citizens never trod the speakers’ platform.”) (citation omitted).
\textsuperscript{139} Mansbridge, supra note 116, at 515; BRIOTO VIEIRA & RUNCIMAN, supra note 62, at x–xii.
\textsuperscript{140} Mansbridge, supra note 116, at 515; BRIOTO VIEIRA & RUNCIMAN, supra note 62, at x–xii.
\textsuperscript{141} Urbinati & Warren, supra note 119, at 389; BRIOTO VIEIRA & RUNCIMAN, supra note 62, at 68, 69 fig.3.1.
\textsuperscript{142} BRIOTO VIEIRA & RUNCIMAN, supra note 62, at 71; BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 132–60 (1997).
\textsuperscript{143} Urbinati & Warren, supra note 119, at 402 (“[W]e should understand electoral representation as having an elective affinity with deliberative politics because it structures ongoing processes of action and reaction between institutions and society, between mistrust and legitimacy, and between sanctioned will and censuring judgment from below.”).
\textsuperscript{144} See BRIOTO VIEIRA & RUNCIMAN, supra note 62, at xi (explaining that representation involves a “paradox of simultaneous presence and absence”).
judgment on what is being done in their name and on their behalf. Representation “allows certain questions to remain open, or at least to be answered in different ways, depending on what is required, and by whom.” This kind of openness “is central to the competitive, reflexive and fluid nature of any democratic polity . . . .”

First, the compliance or mandate model of representation mirrors the transmission-belt model addressed above. It suggests that representatives should reflect, in a relatively unmediated manner, constituents’ instructions or expressed desires. Here, the representative is an agent following the direction of her constituent principals who can sanction deviations through elections. The citizen is made present because the representative must attend to their preference, on pain of unemployment and loss of power. It generally presumes that the preferences of the constituent-principal are sufficiently settled and stable to effectively direct representative-agent action. Though a substantial amount of empirical political science scholarship relies on this model, it has both empirical and normative drawbacks because it presumes that there is a collective intention that exists to be represented. While this may be the case in specialized interest group organizations, it is certainly not the case for jurisdictions drawn according to simple geography. The compliance model, for example, gives the presidency a Schmittian gloss by encouraging the effacement of difference and diversity in the name of a silent majority.

Second, a retrospective model holds that representatives will anticipate what voters may want and feel in the future. When exercising their franchise, voters will punish their representatives, not just for disobeying the mandate described in the compliance model, but also for any results deemed objectionable with the benefit of hindsight. This model helps explain minimalist theories that, like Joseph Schumpeter’s, define democracy as a political system where citizens may rid themselves of their

---

146 Brito Vieira & Runciman, supra note 62, at xii.
147 Id.
148 Mansbridge, supra note 116, at 516.
149 See Brito Vieira & Runciman, supra note 62, at xi (“[R]epresentation should be understood as a concept.”).
150 Id. at 516–17.
151 Id. at 517.
153 Brito Vieira & Runciman, supra note 62, at 117.
154 Mansbridge, supra note 116, at 516 (“[This model] comes closer than any other model to an ideal in which the simple imprint of the voter’s will is transmitted through institutions to an equal exertion of power on the final policy.”).
155 Id. at 517.
156 Id. at 516–17.
157 Id.
underperforming leaders.\textsuperscript{158} Representation performed under this model can serve the purposes of nondomination,\textsuperscript{159} at least if voters are able to successfully identify which representatives are responsible for any failed policies. It also neither requires that citizens adopt fully formed preferences,\textsuperscript{160} nor does it expect sustained voter participation. Rather, it merely suggests that voters will indicate their approval or disapproval of representatives’ past performance by deciding whether to reelect an incumbent.\textsuperscript{161} A weakness of the model, however, is that it fails to provide leaders with much guidance when they determine the substantive content of the policies they will implement.\textsuperscript{162} An electoral thumbs-up or thumbs-down, even if interpolated through the opposing policy positions of political parties, does not reveal very much about what voters like and why they like it. Instead, representatives are more like oligopolistic entrepreneurs who are relatively free to exercise discretion in their decision-making as they try to both anticipate the needs of future voters and sell them on the desirability of the policies they produce.\textsuperscript{163}

Third, descriptive representation holds, roughly, that “someone like me will pursue my interests.”\textsuperscript{164} The representative is motivated by personal reasons that she shares with her constituents, not by the possibility of electoral sanction or instruction. As a result, descriptive representation proves useful in circumstances where formal accountability measures, like voting, are difficult to implement. Citizens are made present not because they help select and sanction their representatives, but because someone like them is making decisions that they also might make if they were in a place to decide. For example, we might describe the 2023 United States Supreme Court as more representative than the 1923 Court because its members include people of color and those who identify as female.\textsuperscript{165} As a result, the Court’s decisions may better reflect the values of a diverse citizenry. This

\textsuperscript{158} \textit{Josef A. Schumpeter, Capitalism, Socialism & Democracy} 272 (2003). For a discussion in relation to administration, see Walters, supra note 43, at 31; Mathews, supra note 3, at 609–10. This kind of democracy is also referred to as “elite” democracy or “leadership democracy.” Walters, supra note 43, at 31 & n.143.

\textsuperscript{159} Walters, supra note 43, at 32.

\textsuperscript{160} In Walters’ apt language, it “simplifies the math problem of aggregating the preferences of citizens.” Id. at 32.

\textsuperscript{161} Mansbridge, supra note 116, at 516.

\textsuperscript{162} Walters, supra note 43, at 34.

\textsuperscript{163} Mansbridge, supra note 116, at 518.


\textsuperscript{165} See, e.g., Melissa S. Williams, \textit{Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation} 52–53 (1998) (“The political representation of marginalized groups can serve our interest in ameliorating structural inequality [adverse to democratic equality] by creating legislatures more capable of generating policies that do not reproduce systemic bias against marginalized groups.” This will, \textit{inter alia}, help prevent “a refusal to cooperate from those who are most injured by [structural inequality].”). For Williams, an important function of representative democracy is to address and mediate social conflict. \textit{Id}.
model, however, has some drawbacks. It risks essentialism,\(^{166}\) obscuring the fact that interests can be endogenous to the political process rather than derived from empirical characteristics like race, class, religious affiliation, and gender identification. Finally, any decision-making body that perfectly resembled the people would simply reproduce the people itself and, therefore, not be representation at all. Accordingly, some judgment must be exercised as to which people, which characteristics, and which interests merit representation. Like anything else in a plural, multiracial democracy, these judgments are contestable. Should a representative who identifies as female take intersectional concerns into account? How should she address abortion, given split opinions within her female-identifying constituency?

Fourth, the gyroscopic model posits that voters authorize particular representatives that can be trusted, without oversight or sanction, to pursue principles and interests that the voters find attractive.\(^ {167}\) These representatives “act like gyroscopes, rotating on their own axes, maintaining a certain direction, pursuing certain built-in . . . goals.”\(^ {168}\) Gyroscopic representation captures voters’ support for those representatives who are understood as honestly doing “the right thing.” Gyroscopic representatives can also be skilled advocates who are trusted to deploy their expertise, experience, and passion in the service of policies they endorse. This kind of representation, like descriptive representation, is also useful when formal accountability mechanisms are infeasible.\(^ {169}\) So long as they are being candid about their motivations, gyroscopic representatives can be trusted to act in a certain way because those motivations are internal and not dependent upon outside pressure.\(^ {170}\) As a result, they are not expected to act like agents to their constituent principals.\(^ {171}\) To illustrate: middle and working-class voters throughout the country who are concerned about commercial exploitation might find representation in Massachusetts Senator Elizabeth Warren, a banking and financial law expert with credible commitments to middle and working-class financial interests nationwide.\(^ {172}\) Similarly, Progressive supporters of business regulation may be relatively confident that Commissioner Lina Khan of the Federal Trade Commission (FTC) will represent the interests of consumers and workers, notwithstanding her

\(^{166}\) Id. at 28; Hayward, supra note 164, at 115.

\(^{167}\) Mansbridge, supra note 116, at 520.

\(^{168}\) Id.

\(^{169}\) See James D. Fearon, Electoral Accountability and the Control of Politicians: Selecting Good Types Versus Sanctioning Poor Performance, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 55, 56 (Adam Przeworski, Susan C. Stokes & Bernard Manin eds., 1999) (“[E]lectoral accountability is not necessary[].”)

\(^{170}\) Mansbridge, supra note 116, at 520.

\(^{171}\) Id. at 521.

immunity from electoral accountability.\textsuperscript{173} The risks of this type of representation include (1) short-shifting commercial interests, and (2) pleasing only a radical base of supporters.\textsuperscript{174} Gyroscopic representatives therefore may serve democratic autonomy best if conflicting interests already enjoy adequate representation elsewhere.

More recently, constructivist accounts of representation\textsuperscript{175} jettison the idea that voters come to politics with ready-made preferences and interests. Instead, their views—even their sense of group identity\textsuperscript{176}—are the result of successful appeals and counter-appeals made by representatives.\textsuperscript{177} Emphasizing the tutelary aspect of democratic discourse,\textsuperscript{178} a representative’s claim to represent a constituency is considered successful if their constituency signals their approval with a vote, a campaign contribution, or otherwise expresses their support or takes up the representative’s appeal. In other words, voters do not think much about very much until a representative convinces them to care and to consider what ought to be done.\textsuperscript{179} Even highly educated voters may not naturally have strong opinions about topics such as fossil fuel emissions unless and until a public figure first educates and persuades them. Laudably, constructivist theories do not rely on organ-body sovereignty or the existence of a people with exogenous preferences that a democracy should translate into law.\textsuperscript{180} The people and its preferences are, under the theory, \textit{constructed} things.\textsuperscript{181} Thus, constructivist theories of representation are congenial to theories of deliberative democracy: both expect that voters’ preferences are shaped by

\begin{itemize}
  \item \textsuperscript{173} See Dara Kerr, \textit{Lina Khan is Taking Swings at Big Tech as FTC Chair, and Changing How it Does Business}, \textit{NAT’L PUBL. RADIO} (Mar. 9, 2023, 8:30 AM), https://www.npr.org/2023/03/07/1161315523/ftc-tech-(discussing Khan’s priorities and achievements as FTC Chair).
  \item \textsuperscript{174} Mansbridge, \textit{supra} note 116, at 522 (comparing the gyroscopic model to a Burkean trustee model, whereby the trustee, unlike the gyroscope, is “concerned with interests rather than mere preferences and with the interests of the entire nation rather than the district”).
  \item \textsuperscript{175} See generally Saward, \textit{supra} note 77, at 298–99; Andrew Rehfeld, \textit{Towards a General Theory of Political Representation}, 68 J. POL. 1, 2 (2006); Disch, \textit{supra} note 66, at 6; Disch, \textit{supra} note 81.
  \item \textsuperscript{176} Disch, \textit{supra} note 81, at 490–91.
  \item \textsuperscript{178} See, e.g., Disch, \textit{supra} note 66, at 5–9 (relying on Laclau and Mouffe’s insights about the symbolic construction of the “people”).
  \item \textsuperscript{179} Disch, \textit{supra} note 81, at 491 (explaining that constructivism is critiqued because, \textit{inter alia}, it reduces voters to passive recipients of representative claims, “seem[ing] to invert the traditional principal-agent relationship”).
  \item \textsuperscript{180} Iris Marion Young, \textit{Deferring Group Representation, in ETHNICITY AND GROUP RIGHTS} 349, 358–59, 561 (Ian Shapiro & Will Kymlicka eds., 1997); Disch, \textit{supra} note 81, at 489 (noting the represented constituency does not exist independently of its representation); Jackson, \textit{supra} note 1, at 806; Pitkin, \textit{supra} note 63, at 221; Saward, \textit{supra} note 77, at 299–300; Urbiniati, \textit{supra} note 92, at 197 (citing Emmanuel-Joseph Sieyès, who held that the “sovereign nation was politically mute outside the electoral booth and [that] its will [is] inexpressible without and outside the representative assembly”).
  \item \textsuperscript{181} Disch, \textit{supra} note 66, at 5.
the political process. Moreover, all models of representation imply some amount of interest construction as, for example, representatives predict how voters might respond to policies and craft their public appeals to secure citizens’ support. But constructivist theories may lead, as a seminal paper by political theorist Lisa Disch argues, to a normative dead-end. Either they are too relativist, or they are too rationalist. They provide no way to distinguish successful manipulation from ordinary representation without also relying on standards of judgment that are perfectionist—namely, whether a voter’s decision to take up the representative’s claim is rationally correct or made only after fulfilling certain deliberative desiderata. The heavy burdens of careful judgment laid upon citizens, moreover, grate against the division of labor contemplated by representative democracy: representatives are supposed to work for the people, not vice versa.

B. Representation’s Relevance to Administrative Legitimacy

There are several reasons to suggest that a theory of democratic representation may help answer the question of administrative legitimacy. First, administrators are part of a state conceived as separate from citizens, and the work they do is on behalf of those citizens. “This is,” as public policy scholar Anthony Bertelli puts it, “representation.” Political representation is a division of labor between citizen and public official, one that accommodates a citizen’s expectation that an “intelligent, civic-minded state official [will] take care of problems that arise.” In contrast to scholars that wring their hands over whether and to what extent policymaking is the result of finely tuned procedures capable of implementing universal citizen participation, representation accounts for a public that “is mercifully unaware of picayune debates over administrative procedure.” Many models of representation do not require citizens’ understanding and prior approval for everything an administrative official does in their name. The gyroscopic and descriptive models discussed above, for instance, contemplate the very opposite. Representation instead requires something less demanding but nonetheless of utmost importance: that citizens play

---


183 Disch, *supra* note 81, at 493.


186 Heath, *supra* note 23, at 76. See also Zacka, *supra* note 28, at 29 (observing that most bureaucrats are well intentioned); Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* 75–86 (Arthur Goldhammer trans., 2011) (observing that the institutions the public considers impartial and objective are thought of most favorably); Nicholas Bagley, *The Procedure Fetish*, 118 Mich. L. Rev. 345, 377–79 (2019) (discussing agencies’ legal and sociological legitimacy).

187 Bagley, *supra* note 186, at 381.
some kind of role in its practice and that their dignity and welfare is prioritized by their representatives. As John Dewey observed in *Liberalism and Social Action*, “there is nothing inherent [in the forms of representative government],” which already divides the labor of governing, “that forbids their supplementation by political agencies that represent definite economic social interests[.]

Second, in undertaking its work on behalf of the public, administration invariably finds itself addressing political questions. Agency decisions involve both “facts and value commitments, both ends and means”—all of which are “inextricably intertwined in political life.” To the extent that theories of democratic representation can answer to the legitimacy of any value-laden political decision, then, it should likely prove relevant to those answered by administrative bodies. And if they can, then there is no longer any need to pretend that administration ought merely to “fill in” technical details of legislative enactments. Both agency regulation and implementing statutes are equally products of representation.

Indeed, except for some mandate/congruence variants, theories of democratic representation avoid the transmission belt theory’s organ-body sovereignty problem. As a result, a theory of representation can suggest something meaningful about the legitimacy of administrative action beyond whether it carries out the orders of a congressional (or presidential) principal who itself is imagined following the orders of “the people.” It rejects the “formalist vestiges of prerogative, sovereignty, and even lordship.” As it sidesteps these cascading series of fictions, it asks instead whether decision-making institutions foster democratic autonomy; whether citizens have some presence in decision-making; and whether it is their welfare, interests, and rights that are prioritized, however we might understand them.

As a result, rather than imagining democracy as a hierarchy, with a sovereign at its apex issuing commands to inferior officers and administrators, representation encourages institutional creativity. Political representation acknowledges that the norms that liberal constitutional democracy is supposed to instantiate—democratic autonomy—do not imply any particular kind of collective decision-making procedure at all. The yardstick is not to “transcribe the will of the people” by having them, literally, transcribe their will into the Code of Federal Regulations (and pretending that they can manage this transcription successfully). It is instead

---

190 NOVAK, *supra* note 36, at 220.
191 Paul Miller attributes this institutional flexibility to the capacious generalizability to the theory of representation created by Thomas Hobbes. Miller, *supra* note 118, at 43–45.
to create “procedures that allow us to understand ourselves as contributing equally to policymaking” and “procedures that encourage officials to prioritize the citizen.” To illustrate this kind of creativity, we can say that a running back contributes to the outcome of a football game even if he scores no touchdowns and even if his team loses. We can likewise say that a voter contributes to policy by voting for a losing candidate with identifiable policy preferences. The game is played and resolved differently simply because she played it. Basketball games, volleyball games, and baseball games, despite their different rules, all give team members a role that ensures that they contribute to the outcome. Representation, similarly, permits and encourages experimentation in the design of collective decision-making procedures. Decision-making institutions can mix-and-match gyroscopic, descriptive, congruence, and other models, play around with constituency boundaries, experiment with size, quorum requirements, and voting rules, among other things to establish effective representation.

C. Agencies Not as Platforms for Representative Politics, but as Political Representatives Themselves

Given the flexibility it lends to the design of governing institutions, democratic representation’s normative requirements allow for the possibility that administrative action is legitimate even if there is no clear statutory “will” to implement, no public consensus to execute, and even if the next administration does its level best to undo it. Of course, the application of representative theory to administration has been tried before.\footnote{Pluralist models of administrative policymaking were first inspired by Richard B. Stewart’s seminal article, *The Reformation of American Administrative Law* (1975). Stewart, supra note 6. For review, discussion, and critique of pluralist models, see, e.g., Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RSCH. & THEORY 103 (2006) (explaining formal participation and its impact on government policy outputs); Miriam Seifer, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300 (2016) (describing interest group participation and its effect on governance); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005) (providing insight into how the notice-and-comment process affects regulatory policy); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2265 (2001) (describing meaningful participation and its effect on political administration).} Namely, scholars have suggested that agencies can provide a platform for representative politics.\footnote{Kagan, supra note 192, at 2265 (discussing the goal of this model was to “replic[ate] the process of interest group representation and bargaining thought responsible for legislation”).} Richard B. Stewart’s interest representation model of administrative law\footnote{Stewart, supra note 6, at 1790–93.} seeks, for example, to replicate at the agency level the pluralist politics of a representative legislature.

As outlined above, pluralist theories are perhaps too sanguine about the possibility of netting out a popular mandate from a diverse citizenry. Furthermore, opening agencies to the direct input of interests carries several additional antidemocratic implications. First, it risks reproducing and
exacerbating the very same inequalities in capacity and incentives that corrupt representative lawmaking in the legislature. Those citizens well-positioned to influence elected representatives are just as—if not more so—well-positioned to influence regulators. As Daniel Walters notes, “well-heeled organizations dominate the process and wield substantial influence” while the marginalized are either “underrepresented or entirely unrepresented.” The subsidization of massive notice-and-comment campaigns, sometimes characterized by fraud and manipulation, may be the result. This tendency is all the more alarming within agencies established precisely to empower those who are not already well-positioned to influence the ordinary political process. The Consumer Financial Protection Bureau (CFPB) should, if its purposes vindicate the name given it by Congress, consider the experiences, interests, and preferences of ordinary consumers. It should not cater to financial elites that already enjoy influence with elected lawmakers.

Second, it effaces the institutional mediation of public input. Not everyone provides comments to agency rules. Unlike ordinary politics, there is no universal franchise to ensure all affected will be accounted for. Furthermore, there is no rule that describes the duties of those purporting to represent the interests of others. A lobbying firm might submit a letter during notice-and-comment that purports to speak on behalf of an entire industry. There is also reason to think, as Daniel Walters notes, that the use of interest group advisory committees during “negotiated rulemaking” are not only unrepresentative, but also staffed with the goal of marshalling political support for exogenous concerns. Whether it does so in good faith is an open question. As a result, the theory fails to guide the agency official who is unsure that public comments are, indeed, representative of the public.

Finally, it says little of the duties of the agency official who is to decide whether and to what extent it ought to take such comments to heart.

197 Walters, supra note 43, at 38–39, 39 n.188.
198 Id. at 36–37.
199 See 12 U.S.C. § 5511(a) (explaining that the agency must ensure that “markets for consumer financial products and services are fair, transparent, and competitive”); 12 U.S.C. § 5536(a)(1)(B) (policing unfair, deceptive, or abusive acts or practices by certain participants in the consumer-finance sector).
200 See Rehfeld, supra note 175, at 1–2. See generally Mónica Brito Vieira, Representing Silence in Politics, 114 AM. POL. SCI. REV. 976 (2020) (discussing the problematic implications that focusing on voice has in democratic representation).
201 Seifter, supra note 192, at 1313, 1317, 1334–35.
especially if there is conflict. It gives them little guidance as to whether and
to what extent the official should trust her own judgment over those of
interested parties. Rather, it seems to presume that the aggregation of public
comment will yield some identifiable equilibrium that incorporates
everyone’s interests equally—an equilibrium that the official can and should
adopt as her own judgment. In this sense, they replicate the problems
associated with deliberative and procedural theories of administrative
legitimacy.

These critiques are devastating. Building public participation into
agency decision-making, in other words, does not eliminate agency
decision-making discretion. It seems that the solution to democratic
deficiencies is not always more direct democracy. Rather than jettison the
intuition that representation can provide traction into the question of
administrative legitimacy, however, it is useful to think of agencies
themselves as representatives. Given the autonomy that officials will enjoy
in their decision-making, notwithstanding the “proceduralist fetish” of the
interest representation model, they are not and cannot be mere platforms for
additional representative politics. Moreover, given intractable social and
economic diversity, agencies cannot and should not pretend to articulate
universal consensus. Agencies can, however, act like good representatives
themselves.

III. ADMINISTRATION AS TRUSTEE REPRESENTATION

If we consider whether agencies themselves can function well as
political representatives, several models come to mind. In particular, those
that do not require electoral accountability may not only describe how
agencies actually function, but also provide normative criteria to assess their
legitimacy. A gyroscopic model, for example, can describe the duties of an
agency tasked to act on behalf of specific interests. An agency dedicated to
protecting the environment can be staffed by scientists and other experts
dedicated to environmental protection. Citizens with interests in
environmental protection are thereby made present in decision-making not
because they elected agency officials, but because agency officials can be
trusted to act in their interests. Whether representation is successful under
this model depends upon: (1) the agency officers’ level of commitment; (2)
the extent to which they articulate interests and preferences found amongst
the citizenry; and (3) whether staffing procedures and incentives are
adequate to select for the appropriate officers. Democratic autonomy,
moreover, also requires equal representation. Therefore, because
environmental interests often conflict with business interests, a separate
agency dedicated to business might be staffed by its own gyroscopic
representatives. What should happen when these two agencies butt heads,

however, is unclear. During such conflict, there is a role for other representatives, like Congress or the President, to arbitrate.

In this Article, I suggest that another model of representation may be suitable for evaluating the role of administrative agencies in constitutional democracy: the trustee model. Unlike many recent theories of fiduciary government, a trustee model of democratic representation is explicitly political. As explained below, it does not pretend to offer finite answers to contestable questions of value. While inspired by juridical models of trusteeship, it need not, like private fiduciary law, be enforced only by judges applying legal standards. Instead, its democratic bona fides are established when other representatives—the press, a politician, an interest group, for example—can offer rival claims to speak in the beneficiary’s interest. It is but one of many kinds of representation that lend polity legitimacy through democratic autonomy.

204 For an argument that inter-agency conflict can be productive, see Daniel A. Farber & Anne Joseph O’Connell, Agencies as Adversaries, 105 CALIF. L. REV. 1375 (2017).


206 For a discussion of the conceptual overlap between public and private representation through a fiduciary model, see Miller, supra note 118, at 23–24.


208 BRITO VIEIRA & RUNCMAN, supra note 62, at 74–79 (describing how juridical conceptions of property-based trusteeship were adapted and changed to serve political functions and that the use of legal trusteeship “must be a metaphor”).

209 Id. at 79 (explaining that rival representative claims can give the beneficiary’s interest a “separate presence [which] should never be confused with an objective presence—the claims will always be in competition with each other. How they are settled is the stuff of politics itself”).
A. Defining the Political Model of Trustee Representation

Before making a case for its suitability, a definition is necessary. The trustee model, unlike the dyadic models described above, has a tripartite structure. A principal (party one) authorizes a trustee (party two) who acts for a beneficiary (party three):

This model enables the representation of persons (both natural and fictitious) who are unable to speak and act for themselves. For example, trustees represent minor children, those with severe mental disabilities, and corporations. Here, the beneficiary, otherwise absent from decision-making, is made present through an obligation, perhaps inspired by private law concepts, on the part of the trustee to act in the beneficiary’s best interests. Meanwhile, although the authorizing party has some capacity to set the terms and scope of the trustee’s authority, it retains no day-to-day control over it. Instead, the trustee enjoys significant decision-making autonomy.

210 Miller, supra note 118, at 25. Trusteeship was supervised by the Court of Chancery, which could impose equitable (fiduciary) remedies whose character, because they are so context sensitive and so dependent on the idiosyncratic judgment of the trustee, cannot be reduced to blanket legal rules. This fiduciary language has also been used to characterize the duties of public officials. According to Bray and Miller, for example, there is “a recognizable tradition that runs from Plato and Aristotle through Cicero to Locke and Hume . . . that public officials are, in certain respects, like fiduciaries. Public officials should exhibit the other-regarding virtues that an idealized Roman guardian and English trustee were called to exhibit.” Samuel L. Bray & Paul B. Miller, Against Fiduciary Constitutionalism, 106 VA. L. REV. 1479, 1492 (2020). Locke, according to Brito Vieira and Runciman, argued that representatives were “entrusted” to care for the people’s welfare. Brito Vieira & Runciman, supra note 62, at 31, 96–97. The Federalist depends on the “‘virtue’ of the representatives, precisely so that they shouldn’t be liable to capture by partial interests.” Id. at 40. Similarly, the Take Care Clause charges the President to “take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3. Weber’s “ethic of responsibility,” which distinguishes the charismatic leader from a Schmittian thug, also illustrates the idea. See also Pitkin, supra note 63, at 127–29 (discussing Maitland’s argument that the concept of trust had become widely used and passed into the political realm in English thought). See generally, Criddle et al., supra note 207.

To be sure, many associate trustee representation with the noxious paternalism of Edmund Burke\textsuperscript{213} and \textit{Federalist 10}.\textsuperscript{214} It inspires visions of a Platonic guardian babysitting an ignorant populace that cannot be trusted to take care of itself. Unlike these visions, however, there is reason to believe that trustee representation remains compatible with democratic government. As will be explained below, trustee representation has certain features that should be attractive to those committed to constitutional democracy. Indeed, some models of deliberative and representative democracy cannot do without it.\textsuperscript{215} With some modification, moreover, it is possible to build public contestation not only into the ascription of the trustee’s authority, but also into its determinations about: (1) the identity of the beneficiary it serves and (2) what its best interests are. In particular, if another representative can offer a competing claim to speak in the beneficiary’s interest, the trustee model opens up space for democratic debate.\textsuperscript{216} These moves help ensure democratic autonomy and the citizens’ normative priority, notwithstanding its association with the “good king” problem. The model, moreover, accommodates the constructivist and Hobbesian notion that there are no “people” prior to politics.\textsuperscript{217} Like an infant child, the “people” cannot speak and act. Instead, if it is to have any political presence at all, the trustee must act and speak for it. If we are able to talk about the common good at all, it is only because it is articulated first by someone acting like a trustee claiming to speak for our common interests. But, unlike juristic theories of fiduciary government, the trustee model of democratic representation does not fail because a distinct beneficiary with a distinct, identifiable interest may not be found.\textsuperscript{218} Nor does it fail because there is no commonly accepted understanding of the public good that can be policed by courts.\textsuperscript{219} Instead, it recognizes and embraces the fact that these questions motor democratic debate itself.

B. \textit{The Anatomy of the Trustee Representative: Discretion and Constraint}

Some elaboration of the trustee model’s various elements will demonstrate its attractiveness. First, under this model, the trustee representative enjoys decision-making autonomy.\textsuperscript{220} This is not a “mandate” model whereby the trustee is an agent bound, subject to sanction, to follow the dictates of its constituent principals. Nor is it bound to follow the orders

\textsuperscript{213} \textsc{pitkin supra} note 63, at 169.
\textsuperscript{214} \textsc{the federalist no. 10} (James Madison).
\textsuperscript{215} See Miller, \textit{supra} note 191, at 29 (“[H]owever else one might characterize it, [representation] is inherently fiduciary.”); \textsc{brito vieira \& runciman, supra} note 62, at xi (“[T]rust is an issue in all forms of representation.”).
\textsuperscript{216} \textsc{brito vieira \& runciman, supra} note 62, at 77–79.
\textsuperscript{217} Id. at 26.
\textsuperscript{218} Criddle et al., \textit{supra} note 207, at 6.
\textsuperscript{219} Id.
\textsuperscript{220} \textsc{emmanuel joseph sieyes, political writings 13} (Michael Sonenscher ed., trans., 2003) (1863); \textsc{brito vieira \& runciman, supra} note 62, at 74–75.
of the authorizing party past the moment of authorization, when the scope
of its duties is set out.\textsuperscript{221} Instead, the model holds that it is legitimate for a
trustee to make its own decisions.

Despite this autonomy, the trustee does not operate without any
constraints whatsoever. On the contrary, it is bound to decide in the best
interests of the beneficiary.\textsuperscript{222} To be sure, what is in a beneficiary’s best
interests is usually subject to contestation. When the beneficiary is the
population of a country, such contestation is both inevitable and commonly
heated. It is no more likely that we can agree on the public’s best interests
than we can agree on vaccine mandates, immigration policies, and the scope
of the Second Amendment. And unlike a mandate-based principal-agent
model of representation, there is no way to determine whose objections to
the trustee’s decisions will prove decisive.\textsuperscript{223} The trustee’s beneficiary,
unlike a citizen-principal, lacks the capacity to do so.\textsuperscript{224}

Despite the stubborn indeterminacy of the model, it is nevertheless
possible to draw certain meaningful, though minimal, substantive
constraints on what might qualify as a beneficiary’s best interests. These
constraints arise logically from the fact that the trustee, in order to qualify as
a trustee in a trustee relationship, must be other-regarding and not self-
regarding.\textsuperscript{225} To be other-regarding (and not self-regarding) requires what
courts of equity have described as duties of loyalty, care, and good faith.
First, the trustee cannot act in its own self-interest. Whatever “best interests”
means it is certainly not a trustee’s selfish preferences. A trustee cannot, for
example, steal trust resources for its own personal use. Second, a trustee
cannot act in such a way that no one could ever believe that it acts in the
beneficiary’s best interests. A trustee cannot murder a beneficiary for its own
pleasure or benefit. Third, it must in good faith (with subjective honesty)
believe that the actions it takes are in the beneficiary’s interests. Thus,
a trustee cannot overpay itself from trust resources and, all the while knowing
it is overpaid, nevertheless insist it is acting loyally. Nor can it unthinkingly
invest all of the trust resources in cryptocurrency without any research or
other reason to believe the investment will bear fruit. Whatever good faith
means, it is certainly not intentional or reckless disregard of the beneficiary’s
interests.\textsuperscript{226}

\textsuperscript{221} Here, the trustee model approximates Hobbes’ notion that the “author” (the represented) comes
to “own” the acts of the representative that are performed in the author’s name. See BRITO VIEIRA &
RUNCIMAN, supra note 62, at 25.

\textsuperscript{222} This is why even the Hobbesian sovereign might be understood to be bound—it acts not for
itself, but for the state, and thus is “not his own man.” PITKIN, supra note 63, at 4.

\textsuperscript{223} BRITO VIEIRA & RUNCIMAN, supra note 62, at 77.

\textsuperscript{224} Id. at 77–78.

\textsuperscript{225} Id. at 74.

\textsuperscript{226} These restraints are parsed in terms of private law as the fiduciary duties of loyalty, diligence,
good faith, and waste. See in re Walt Disney Co. Derivative Litig., 906 A.2d 27 (2006) for an explanation
of how recklessness might violate the duty of loyalty. See also Miller, supra note 118, at 42.
These minimalist standards of loyalty, good faith, and diligence are not immaterial. The public’s discovery of the Emoluments Clause\textsuperscript{227} of the United States Constitution during the Trump Presidency is one example. Some government officials murder citizens for selfish gain.\textsuperscript{228} Further, a government cannot hope to maintain legitimacy if it undertakes ill-considered actions that have no hope of achieving its ends. Burning more and more fossil fuel will not stop catastrophic global warming any more than dousing crops with Gatorade\textsuperscript{229} will alleviate an agricultural drought. Further, because other models of representation do not enforce these standards, they often fail to provide an answer to what is, according to Bernard Williams, the first question of politics: security.\textsuperscript{230} The trustee model’s minimal but meaningful substantive rationality requirements arguably impose on representatives a duty to establish safety and civil peace. Wherever the public’s best interests lie, they certainly do not lie in the death of millions of citizens as the result of violence, famine, and disease. Meanwhile, it is not obvious that citizens will know which actions might successfully stifle the outbreak of a deadly virus or defend against armed invasion. Mandate models of representation nevertheless suggest that leaders follow voters’ myopic preferences regarding such matters. In contrast, a trustee model lets experts be experts. This is not to argue that experts always ought to be trusted, nor that they remain insulated from critique. Expert trustees’ claiming to act in the public interest should face and respond to the crucible of citizen objections. But a trustee does not need to apologize for “following the science.” It is, in fact, its duty as a trustee to do so responsibly.\textsuperscript{231}

The trustee can be held accountable to these duties through an examination of the procedures it uses in its decision-making, for instance: time spent in consideration; the reliability and extent of the factual data considered; the credentials of any advisors that have been consulted; the veracity of its public statements; and the responses it provides to objections. A reviewer might also police for the kinds of conflicts-of-interest that indicate a lack of good faith commitment to the beneficiary’s interest. To be sure, such reviews can be more or less invasive of the trustee’s autonomy. For example, Delaware courts will respect a corporate board’s business judgment (used here as metaphor for a trustee representative’s policy-

\textsuperscript{227} U.S. CONST. art. I, § 9.
\textsuperscript{229} IDIOCRACY (Twentieth Century Studios 2006).
\textsuperscript{230} BERNARD WILLIAMS, IN THE BEGINNING WAS THE DEED: REALISM AND MORALISM IN POLITICAL ARGUMENT 3 (Geoffrey Hawthorn ed., 2005) (“[T]he ‘first’ political question is posed in Hobbesian terms as the securing of order, protection, safety, trust, and the conditions of cooperation.”).
\textsuperscript{231} See MASHAW, supra note 58, at 60.
making discretion) unless its decision-making procedures are reckless or tainted by a conflict of interest. On the other hand, courts deem administrative decisions “arbitrary and capricious” after taking a “hard look” at the time spent, the authorities consulted, or the responses given to public comments. At least to a certain extent, these procedural methods of review can avoid lending the reviewing body the final say into where best interests lie. Courts do not, however, provide the only possible oversight mechanism. Elections, for example, can help citizens revoke the authorization of those who fail to fulfill the minimum requirements—a form of “negative democracy.” Administrative ombudsmen and special prosecutors, especially those with some specialization in relevant subjects, can also provide accountability through publicly transparent audits and enforcement actions. Regardless, to the extent that any oversight bodies apply their own policymaking discretion, they must answer for their democratic legitimacy. They too should be made to act like good democratic representatives.

C. Embracing the Disquieting Nature of Trustee Anatomy

Substantive constraints aside, the autonomy that the model ascribes to the trustee is discomforting. It requires us to place our fates into the hands of a guardian who may make decisions that we might not only dislike but also prove dangerous. Perhaps this discomfort is not only something we must live with, but also something that we should embrace. It captures something ineffable about the nature of collective rulemaking in a pluralistic society that is best addressed head-on. Furthermore, a trustee’s autonomy brings several benefits.


233 E.g., In re Oracle Corp. Derivative Litig., 824 A.2d 917, 936–37 (Del. Ch. 2003); In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 753 (Del. Ch. 2005); Stone v. Ritter, 911 A.2d 362 (Del. 2006); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985). There is an interesting conceptual overlap between corporation law’s “business judgment” and administrative law’s “policy” and “discretion,” as both are black-boxed by the courts as an area of reviewable prerogative by legally authorized decision-makers.

234 MASHAW, supra note 58, at 43. These arbitrariness constraints are inferred through judicial caselaw, imposed as a general constitutional constraint on lawmaking, and mandated by the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

235 The application of any procedural standard will, of course, invariably reward specific conceptions of what a good decision must look like or entail. To ameliorate this problem, reviewers might confine their assessment to a consideration of whether the decision was the result of a procedure that no one, under any circumstance, would use if they were acting in good faith and with diligence. A similar standard of review is used by courts which, being self-consciously ignorant of business, nevertheless must review the decisions taken by corporate boards of directors.

As an initial matter, citizens’ distaste for and disapproval of an official’s decision is, of course, nothing new to democratic politics. Just because former Speaker of the House Nancy Pelosi is elected does not mean every Democrat likes her choices—let alone every voter. Nor is discovering, with the benefit of hindsight, that an official made a poor decision. No robust theory of democracy requires that citizens always agree with the rules that bind them. It likewise does not require that the rules are always correct. Indeed, this feature of democracy is implicit in any system of government that enshrines rights into a constitution that is invulnerable to regular lawmaking. If the point of democracy is unanimous consensus, then there would be no reason to protect certain liberties from the possibility that a consensus would undermine them. Instead, democratic autonomy requires that citizens participate equally in a process that produces these rules. They can do so, by, for example, helping to elect a trustee or those who will authorize a trustee. They can participate by contributing to public debates about what the public interest requires. They can also do so by filing lawsuits against trustees who act beyond the scope of their mandates.

Moreover, a trustee’s autonomy provides a solution for a problem presented by a lack of consensus amongst the represented. Under the model, it does not matter that citizens, both present and future, cannot form preferences regarding (and agree about) the actions that the representative should take. If citizens are apathetic, the trustee representative does not, like a mandate representative dependent upon voter preferences, lose its authority to act. It only matters that the trustee uses its decision-making autonomy to pursue citizens’ best interests (however understood) loyally, diligently, and in good faith. To illustrate, citizens may not think very much about international currency policies, but this does not mean a central banker should not intervene to prevent a disruptive devaluation. Even if citizens are bitterly divided on vaccination mandates, a trustee nevertheless has the authority to intervene productively to mitigate a pandemic. The trustee model therefore enables governance when other models may yield only inaction, conflict, and gridlock. And because government inaction maintains the status quo of regulatory policies, there is no reason to believe that it is more democratic than bitterly contested action or action flying under the radar of citizens’ vigilant attention.

Second, this discomfort reminds us that no one can and should claim any kind of universal popular mandate. The conspicuous tripartite distinction that the trustee model draws between the authorizer, the trustee, and the

---


beneficiary prevents representatives from successfully claiming to speak with the voice of the people. Unlike other models, which might forgive any action taken by lawmakers so long as they garner electoral support, receive acclamation, or seem identical to their constituents, a trustee model prevents a ruler from claiming an identity with the ruled. On the contrary, it emphasizes the non-identity between the ruling trustee, the authorizing authority, and the governed beneficiary. Former presidents Ronald Reagan and Richard Nixon could have claimed to speak on behalf of the American people much more successfully than can a court-appointed conservator claim to speak for Britney Spears239 or Dr. Anthony Fauci can claim to speak for public health. Jerome Powell, Chairman of the Federal Reserve Board, cannot wield the kind of power and influence that accompanies an electoral mandate. “This is what is best for the people,” from the lips of a trustee, does not call forth the same populist politics as does “this is what we, the people, want” from the lips of a nationally elected politician. As a result, a trustee model invites healthy skepticism, contestation, and objection. In turn, it also undermines any attempt to force clouture on policy-making debates because the trustee cannot credibly claim to articulate any kind of popular consensus.240 Because the trustee is neither authorizer nor beneficiary, they are always an interloper worthy of suspicion and pushback.

Third, this discomfort brings attention to a problem introduced by all models of political representation. It therefore challenges us to address it directly rather than camouflage it with various fictions. Namely, all models of representation require that a representative exercise autonomy as she constructs and interprets what constituents want, will want, or should want.241 For example, the tutelary aspect of constructivist models,242 whereby representatives mobilize voters’ politically endogenous interests into existence, requires that a representative think and judge independently of the electorate. Likewise, descriptive models of representation require the construction of constituent interests. Descriptive representatives must decide which aspects of their group merit attention and which ones to screen out. They must come up with some understanding about how people “like them” would behave under the circumstances, extrapolate their findings, and apply them to the complex circumstances of politics. Gyroscopic representatives

240 BRITO VIEIRA & RUNCIMAN, supra note 62, at 79. See also Walters, supra note 43, at 64 (discussing the importance of leaving policy debates open to public contestation—a feature denied by procedural and deliberative models).
241 BRITO VIEIRA & RUNCIMAN, supra note 62, at xi.
242 Rehfeld, supra note 175, at 13–17. See also BRITO VIEIRA & RUNCIMAN, supra note 62, at 101 (describing that the political trustee representation mimics constructivist accounts: groups “rely on their representatives . . . [to] interpret the group’s interest, and in so doing put forth a claim to be representing it. This claim, by its very interpretative nature, is open to be challenged by rival claims of different representatives . . . ”).
are explicitly meant to independently exercise their judgment in the service of a specific cause.\textsuperscript{243} Even mandate models must build in room for a representative’s independent judgment. Representatives face votes only every few years, and those votes contain very little information about voters’ preferences on particular policy issues—even if a constituency could form a coherent unified preference.\textsuperscript{244} And then they must weigh the opportunity cost of asserting these preferences over other preferences, accommodate the power of competing representatives, and weigh the costs associated with negotiation and compromise. Each requires judgment and discretion. Yet, unlike the trustee model, none of these theories of representation provide much guidance when it comes to assessing how well the representative exercises it. Instead, we must either weigh a representative’s decisions against an outside perfectionist theory of good government or accept that the next election cycle is the only judgment available. A trustee model, however, provides a yardstick that allows us to assess how this discretion is exercised. It at least demands that the representative decides loyally, diligently, and in subjective good faith. Representative independence from the electorate can, finally, make them more successful advocates.\textsuperscript{245} More successful advocates, in turn, give those that they represent more presence in decision-making. An attorney presenting a case on behalf of a client, for example, is expected to use both subject matter expertise and procedural experience to secure outcomes that are superior to those that the client might achieve on their own. Though the client always has the power to approve or disapprove major decisions—like whether to settle, and for how much—it is expected not only that the attorney give informed advice, but also that this advice clarifies and simplifies the client’s choices. As Dewey quipped, “[t]he man who wears the shoe knows best that it pinches and where it pinches, even if the expert shoemaker is the best judge of how the trouble is to be remedied.”\textsuperscript{246} Likewise, an advocate within a legislative body, exercising independent judgment and expertise, can press the interests and preferences of her constituency more effectively.

\textsuperscript{243} Mansbridge, supra note 116, at 522 (“[T]he voter often expects the representative . . . to act with considerable discretion . . . . This expectation opens the door to creative deliberation and negotiation at the legislative level. Compromises, changes of heart, and even the recasting of fundamental interests are all normatively permitted.”).

\textsuperscript{244} Hayward, supra note 164, at 118.

\textsuperscript{245} Here, I have in mind Nadia Urbiniati’s conception of representation as advocacy, which combines a strong commitment to cause and an independent capacity for judgment. This requires not “existential identification” between representative and represented, but instead “an identity of ideals and projects.” Urbiniati, supra note 125, at 773–77. See also RAHMAN & GILMAN, supra note 38, at 146 (discussing the Consumer Financial Protection Bureau as a “proxy advocate”).

\textsuperscript{246} DEWEY, supra note 188 at 154. Dewey’s argument mirrors Burke, who contended that “the most poor, illiterate, and uninformed creatures upon earth are the judges of a practical oppression. It is a matter of feeling . . . . But for the real cause, or the appropriate remedy, they ought never to be called into council.” Letter from Edmund Burke, to Sir Hercules Langrishe (1792) (emphasis in original); PITKIN, supra note 63, at 184. See also DEWEY, supra note 188, at 20–21 (arguing that Bentham’s consequentialism was at least latently democratic because it focused on individual-level consequences in an egalitarian way).
than they can themselves and, as a result, give them more presence within lawmaking than they otherwise might enjoy.

D. The Public and Its Highly Debatable and Constructed Interest

As mentioned above, under the trustee model, the representative is bound to act in the best interests of its beneficiary. In the context of political representation, this beneficiary is often the public at large. In considering the public interest, the trustee representative can make present that which is absent: the people. To be sure, the notion of the “public” and its “interest” are fictions. What is in the public interest cannot be determined by reference to some common value shared by all. Raucous debates will arise over who, exactly, is included in this “public” and what, exactly, its best “interests” are. Often, politics is motored by our irreconcilable differences about what the public interest entails. As Brito Vieira and Runciman put it, “the functioning of representative democracy depends upon politicians being able to offer competing visions of the people to the people.”

“[P]eople want action from their government,” notes Daniel Walters, “but disagree vehemently about what that action should be.” Further, because they cantilever between objectivity and subjectivity, interests—including public ones—require construction. Citizens will have their own ideas about their own interests and how they are best served. Entrepreneurial representatives competing for offices and policy influence will try to sell them on rival visions. As a result, we cannot and indeed should not state in advance what these interests are. There are, nevertheless, reasons to find this feature of trustee representation appealing.

First, the trustee representative’s cognitive orientation towards the public reduces the likelihood that lawmaking will reflect the partial preferences of some at the expense of others. Decisions have a weaker claim to be in the public interest if they reflect concern for only a small portion of the population or the personal idiosyncrasies of the representative. In other words, the fictional notion of the public interest is a principle of inclusion rather than exclusion. Private parks have gate-checks and ticket booths; public parks are open to all comers. As legal historian William Novak argues, the growth of government institutions geared toward the public welfare and the common good came hand-in-hand with the notion of

---

247 Brito Vieira & Runciman, supra note 62, at 76.
248 Id. at 77.
249 Id. at 141 (emphasis in original). See also Chantal Mouffe, The Democratic Paradox 4–5 (2009) (discussing the paradox between maintaining popular sovereignty and protecting one’s liberty).
250 Walters, supra note 43, at 46.
251 Pitkin, supra note 63, at 156–61; Mansbridge, supra note 116, at 519–20 (explaining that interests are not susceptible to certain resolution and are “essentially contested”).
252 Cordelli, supra note 27, at 104; Mashaw, supra note 58, at 57; Pitkin, supra note 63, at 117–18; Miller, supra note 118, at 23 (stating that “fiduciary representation entails at minimum manifest responsiveness to the other-regarding purposes”).
universal national citizenship that ascribed equal rights to all.\textsuperscript{253} Admittedly, American political discourse often presents the public and the individual as analytical opposites and forces the individual and the community to engage in a zero-sum game. As many Progressives recognized, however, the notion of the public is only possible if each member of a community is counted along with the rest.\textsuperscript{254} The notion of “public” is individualist at least insofar as it ensures that the fate of each individual is included in, not excluded from, its determination. Consequently, the trustee serving the public can make present a greater swath of the population than a mandate representative who openly serves partial interests.

Indeed, trustee representation may be the only way by which marginalized communities might find any presence at all within collective decision-making. When political resources are stacked in a lopsided manner, when many are so overburdened by the demands of ordinary life that they cannot speak for themselves, only a trustee with an inclusive, other-regarding cognitive orientation can speak for them.\textsuperscript{255} At the very least, enforcing a commitment to the public interest forbids highly-resourced private parties from hijacking the collective decision-making process to serve their own ends.\textsuperscript{256} A representative charged to protect the public interest can serve, in the words of Franklin Delano Roosevelt, as a “Tribune of the People”\textsuperscript{257} that acts as a counterweight against those, like some commercial interests, already well positioned to influence policy.

Finally, the notion that the trustee should serve the public interest, as opposed to public opinion, steers the trustee away from making reckless or negligent decisions based on misleading considerations. Though its substantive content may be “essentially contested,”\textsuperscript{258} the idea of the interest, as opposed to subjective preference, at least forces a trustee to ask the right kinds of questions: ones that permit the trustee to make an educated guess about what members of the public might want, given adequate information,

\bibliography{\textsuperscript{253}NOVAK, supra note 36, at 58.\
\textsuperscript{254}See, e.g., DEWEY, supra note 188 (arguing—philosophically—about the progression of liberalism to public control); NOVAK, supra note 36, at 72, 143 (providing a historical examination of progressive state-building that cashed out individual rights through public regulation).\
\textsuperscript{255}ACKERMAN, supra note 109, at 24; Brito Vieira & Runciman, supra note 62, at 163. This argument reflects federalists’ counterintuitive point that limiting the type and number of individuals who might serve as representatives (here, that such representatives act as good faith, loyal, and diligent fiduciaries of the public) could expand the means by which the people could be represented as a whole. See id. at 40. It also resonates with Burke’s idea of “virtual” representation, whereby representatives act on behalf of the disenfranchised.\
\textsuperscript{256}MASHAW, supra note 58, at 53.\
education, and time for reflection. As a result, it encourages the trustee to dig deeper than opinion polls and off-the-cuff public comments. It encourages the trustee to engage in a process of mutual communication, education, and influence that characterizes the kind of healthy representative system that takes seriously the citizen’s role in shaping the laws that bind her.

E. Deliberative Rationality vs. the Public Interest

The notion of “the public” in the public interest, the idea of a mass of human beings existing together, attends to the ways individual experience affects, and is affected by, broader social and economic conditions. It therefore calls to mind human interdependence and, as a result, suggests the kind of reflexivity and generality endorsed by social contract theories from Kant to Habermas. The idea of “interest” in the public interest encourages the use of the same kind of informed advocacy, judgment, and cognitive orientation attributed to trustees. As a result, citizens are encouraged not to pursue naked self-interest or follow ill-informed intuitions. Instead, they are to change their minds because of the unforced force of the better argument. They must imagine, for example, what others’ interests might be and how a proposed rule might impact those interests. And they are encouraged to endorse decisions that, given deliberation’s generality and reflexivity requirements, articulate some notion of the public good and fulfil the criteria of deliberative rationality. As Daniel Walters puts it, such deliberative processes were viewed “as opportunities for citizens and agencies to learn from deliberative engagement and adopt regulatory and social policies that could withstand the test of reason and support the common good.”

Despite the resonance, however, the idea of the public interest should not be confused with deliberative reason. First, deliberative reason, unlike the idea of public interest, has difficulty accommodating the fact that different deliberative bodies, staffed with a different set of people, may come

---

259 See Mansbridge, supra note 116, at 519–20 (noting that while questions regarding voters’ interests are not purely objective, they are the correct questions to ask).
262 BRITO VIEIRA & RUNCIMAN, supra note 62, at 133.
263 HABERMAS, supra note 261, at 134.
264 The generality requirement holds, roughly, that no decisions should be made that are not applicable to all. The reflexivity requirement holds, roughly, that any decisions that one person would not accept for themself should not be imposed upon others. By deploying generality and reflexivity, deliberative democrats can make a case for individual rights. For example, if I do not want X’s religion imposed on me, then I cannot impose my religion on X.
265 Walters, supra note 43, at 27.
up with different decisions.\textsuperscript{266} It also has trouble accommodating the idea that conceptions of the common good might be democratically valid even if they fail to comport with deliberation’s ostensibly universal and neutral rationality requirements.\textsuperscript{267} In contrast, the idea of the public interest is open to interpretation and encourages humility regarding its substantive content. Questions about who the people are and where their interests lie, as mentioned earlier, activate democratic debate. Deliberative models, in contrast, too often seek to end it.\textsuperscript{268}

Deliberative democratic theory, moreover, does not usually acknowledge the fact that it is also often a theory of representation. As a result, it misses the important normative implications of institutional mediation. It blinds itself to the gap that exists between ruler and ruled. For example, some legal scholars promote the use of civil juries whose deliberations might inform agency decision-making.\textsuperscript{269} These bodies, whose members are supposed to be representative of the public at large, are set to the task of deliberating and deciding what actions will be taken not for themselves, but for the entire populace. Likewise, theories that champion the use of deliberative mini-publics seem to take for granted that those mini-publics will produce unobjectionable decisions that others would reproduce if they undertook the same decision-making procedures.\textsuperscript{270} The implication is that the fact of representation is not normatively interesting enough to merit theoretical elaboration.

Of course, many deliberative theorists do not usually wring their hands over the representation inherent in their models because they emphasize well-reasoned, reflexive, and general procedures over the realities of actual citizen participation. It is okay, in other words, that some are excluded so long as the points they might have made enter the conversation.\textsuperscript{271} The objective, after all, is not to count each voter one-by-one; it is instead to create public deliberation.\textsuperscript{272} As political theorist Jane Mansbridge explains, “the ideal is the absence of coercive power.”\textsuperscript{273} It is not to spread coercive power equally throughout the public by instituting a universal franchise, for

\textsuperscript{266} Cf. Seyla Benhabib, Democratic Iterations: The Local, the National, and the Global, in ANOTHER COSMOPOLITANISM 50–55 (Robert Post ed., 2006). However, these theories of deliberative democracy account for large-scale cultural differences, not small-scale differences in policy preferences driven by, for example, the particular historical experiences of individuals. In other words, they do not address Americans’ inability to come to any kind of consensus when it comes to immigration and vaccination policies.

\textsuperscript{267} See, e.g., KATRINA FORRESTER, IN THE SHADOW OF JUSTICE: POSTWAR LIBERALISM AND THE REMAKING OF POLITICAL PHILOSOPHY (2019) (discussing the cultural and historical particularity of ostensibly neutral and universal conceptions of democratic deliberation).

\textsuperscript{268} Walters, supra note 43, at 34.

\textsuperscript{269} Seidenfeld, supra note 9, at 1520–25.

\textsuperscript{270} See BRITO VIEIRA & RUNCI MAN, supra note 62, at 133.

\textsuperscript{271} According to Mansbridge, deliberation is judged successful not by universal participation, but according to different criteria: “[N]onmanipulation, illuminating interests, and facilitating retrospectively approvable transformation.” Mansbridge, supra note 116, at 519.

\textsuperscript{272} Walters, supra note 43, at 37.

\textsuperscript{273} Mansbridge, supra note 116, at 519.
instance. As a result, “influence can legitimately be highly unequal.” But a deliberative body’s decisions are still taken on behalf of others—others who might have changed the discussion had they the opportunity to participate meaningfully. This tendency to exclude both citizens and their viewpoints is illustrated by some deliberative scholars’ endorsement of cost-benefit analysis (CBA). By counseling agencies to make decisions that maximize benefits and minimize costs, CBA loosely approximates deliberation’s generality and reflexivity requirements. Namely, it is reflexive because it approximates whether and when citizens might endorse a proposed policy: those who will benefit will support it; those who will suffer costs will object. It is general because each citizen’s costs and benefits are considered neutrally. Of course, CBA is anything but uncontroversial. Its blindness to marginalized communities is well-documented.

A trustee model, unlike a deliberative theory, acknowledges the gap between ruler and ruled. It recognizes that a representative will invariably make decisions to which others may (and likely will) object, no matter how well-reasoned their arguments and how well-justified their decisions. The trustee’s notion of the public interest cannot be the only acceptable definition because the trustee’s notion of the public interest is not proffered directly by the people themselves. Nor is it produced by some process of deliberative reasoning that ostensibly yields the same output no matter which citizens provide the input. It is instead merely the informed, good faith opinion of a trustee. And unlike deliberative reason, the idea of the public interest invites objection and contestation. It summons competing trustee representatives who can offer different conceptions of the public interest. As a result, it is perhaps better to think of deliberative bodies as trustee representatives themselves. While they may act with the appropriate cognitive orientation and with loyalty and good faith, they cannot and should not provide the last word in policymaking.

274 Id.
275 For example, Rawls’ idea of public reason emphasizes substantive outcomes (collective decisions that do not embrace “comprehensive” theories of the good life) instead of specifying participatory procedures. JOHN RAWLS, POLITICAL LIBERALISM 36–37 (1993).
F. Democratic Authority and Trustee Authorization

It is important to make clear what authorization purports to do—and what it does not. Drawing from Hobbes, authority is conferred by an author, the person who has the right to act.279 Within the context of trustee representation, this authorizer is recognized as having legitimate power to appoint a trustee to care for the interests of a beneficiary. It also is recognized as having the legitimate power to define the scope of a trustee’s duties: to determine what is *ultra vires* and thus not an act of representation.280 Sometimes this legitimacy arises from a pre-existing normative relationship between the authorizer and beneficiary.281 For example, a parent might authorize a teacher to instruct a child in science and math. But unlike a principal-agent model, this relationship is not identity. There is good reason to treat authorizers as distinct moral agents whose interests may diverge from those of the beneficiary.282 Despite the close and meaningful relationship between parent and child, the parent’s authority does not render a teacher trustee her mere agent. The duty of the teacher is to act on behalf of the child, a person with her own unique interests, while remaining within the scope of their authority. In fact, to fulfill its duties, a trustee might occasionally find itself acting against the authorizer’s express wishes. A parent might want a teacher to discipline the child with painful physical punishment. The teacher, duty bound to act in the child’s best interests, might, and likely should, refuse.

Within the context of democratic politics, the right to authorize a trustee representative is usually attributed to “the people.”283 As Hobbes pointed out, however, “the people” do not exist prior to their representation; there is only the multitude.284 Thus, his elaborate scheme of political legitimacy required the concurrent appointment of a representative and the creation of the people through that representative.285 Another possibility is that individual voters, each of whom have a claim to be part of “the people,” jointly authorize representatives via election.286 Voters authorize members of Congress, as trustee representatives, to decide collectively on the laws that best serve the people-as-beneficiary. Notably, this model recognizes that

282 Id. at 78.
283 Pettit, *supra* note 109, at 61. See also Wurman, *supra* note 5, at 1518 (citing Locke’s *Two Treatises*).
the people-as-beneficiary may have interests that conflict with the opinions of the people-that-voted. As a result, Congress might, for example, provide for the interests of those who cannot or did not vote, who are not yet born, or who voted for losing candidates. Trustee representation also occurs when Congress authorizes an agency to regulate the economy on behalf of the public. Congress can serve as an authorizer because it has an important normative relationship with “the people.” Namely, it is elected by voters who can claim to be part of “the people” and is empowered by the Constitution to make laws “necessary and proper” for carrying out tasks like the regulation of interstate commerce. But just like a congressional trustee representative, an agency trustee representative is free to decide that the notion of the public’s best interest is not always the notion advanced by congressional representatives.

The fictiveness of “the people,” furthermore, makes space for various trustees’ rival claims to represent the interests of the people-as-beneficiaries. It is therefore congenial to a constitution that separates powers. Particular subsets of the population elect members of Congress. Another distinct subset elects the President. Each has unique authority to represent the people-as-beneficiaries, whose interests cannot be reduced to those of their (distinct) authorizers. Finally, because the authorizer is “the people,” and because “the people” is instantiated differently during different times, places, and contexts, any authorization given cannot remain fixed. The “people” that elect a Congress at time one is not the “people” that elect a Congress at time two. Given the nonidentity of the electorate over time, it is harder to argue—pace Hobbes (and certain conceptions of trusteeship under private law)—that a trustee retains its authority irrevocably. It therefore provides space for authorizers to change their minds about where and with whom they should place their trust.

Of course, the boundaries of a trustee’s authority are often unclear. A teacher charged by a parent to teach science but avoid religion might hesitate over whether the subject of evolution is within the scope of her authority. Congress may be authorized under the Constitution to regulate interstate commerce but hesitate over whether its authority includes firearm regulations that protect victims of domestic violence. Similarly, the precise scope of an administrative agency’s authority is commonly indeterminate. Indeed, as Justice Kagan pointed out in Gundy, an inquiry into the scope of an agency’s authorization “always begins (and often almost ends) with statutory interpretation.” It is not immediately obvious, for

288 See United States v. Lopez, 514 U.S. 549 (1995) (holding that possession of a gun in a school zone is not an economic activity that has a substantial effect on interstate commerce).
289 Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (pointing out that whether a statute provides a sufficiently “intelligible principle” is a matter of statutory interpretation). Gundy also states that “the answer requires construing the challenged statute to figure out what task it delegates and what
example, that a health department is authorized to impose an eviction moratorium to prevent the spread of disease. At this point, one observation should be clear. Given the autonomy ascribed to the trustee, it should not simply take an authorizer’s interpretation at face value. The trustee’s loyalty and duty are owed to the beneficiary, not the authorizer. The authorizer may have interests that conflict with those of the beneficiary. The authorizer may be acting in bad faith, on bad information, or with bad, selfish motives. What is best for an authorizing voter might not be what is best for the people, and the scope of the authorization should be treated accordingly.

IV. TRUSTEE REPRESENTATION AND ADMINISTRATIVE LEGITIMACY

If it is true that the trustee model of democratic representation lends legitimacy to political decision-making by helping to establish democratic autonomy, there is reason to believe that many administrative agencies might already enjoy an independent source of such legitimacy. First, many agencies’ statutory mandates to regulate in the public interest replicate the trustee model’s cognitive orientation and therefore promote democratic autonomy. Second, administration cannot help but exercise decision-making autonomy. No voter, no elected representative, and no court has the capacity to review and consent to each and every one of their decisions. A trustee model of representation can provide normative checks on this activity in a manner that lends democratic credentials to agency decisions. There is reason to believe that agencies already adopt many of these safeguards. What is more, one especially appealing feature of trustee representation is that it can provide representation for those otherwise shut out of the collective decision-making process.

A. Administrative Practice as Public Trusteeship

The idea of administration as a public trust often aligns with historical administrative practice. First, public, political, and legal authorities recognize and enforce its normative standards. Second, administration is commonly afforded the same kind of decision-making autonomy entrusted to a trustee. Finally, the tripartite distinction between authorizer, trustee, and beneficiary more accurately describes administrative practice than does a binary principal-agent model.


See ROSANVALLON, supra note 10 (detailing arguments supporting the idea of administration as a representative trustee emerging during crises in democratic representation); ROSANVALLON, supra note 186, at 91 (characterizing independent agencies as, inter alia, an institutional manifestation of the empty place of power in democratic politics).
1. Shared Normative Standards

Congress, the courts, and statutory authorities incorporate and endorse the normative standards woven through the concept of public trust: the public interest and the fiduciary duties of the trustee. “We have,” noted Justice Kagan in Gundy, “approved [congressional] delegations to various agencies to regulate in the public interest.”291 For example, the statutory charge of the Interstate Commerce Commission, established in 1887, was to “protect[] and promot[e] the public interest” by establishing “reasonable and just” and non-discriminatory railway rates.292 United States caselaw condoned this charge when it, relying on 17th century English legal treatises293 permitted government regulation of businesses “affected with a public interest.”294 Congress accordingly makes use of the notion of the public interest when authorizing agency behavior, often with the Supreme Court’s approval. Today, argues administrative law scholar Jerry L. Mashaw, “[a]dmnistrators must surely give ‘public regarding’ reasons” for their decisions, reasons that “[call] on some understandable vision of the public welfare or public purposes.”295 As political philosopher Joseph Heath observes, “there is little disagreement that the civil servant should be committed to serving ‘the public interest,’ or ‘the general good.’”296 Indeed, the development of public administration within the United States developed concurrently with social sciences that articulated and began quantifying the concept of the public welfare.297 Progressive advocate Herbert Croly thus maintained that democracy “must be defined not by who rules but by who the government is ruling for.”298 In other words, a democracy cannot be a democracy unless its institutions accept and implement some notion of the public good.299

---

291 Gundy, 139 S. Ct. at 2129 (internal quotation marks omitted). See also Miller, supra note 118, at 21.
292 NOVAK, supra note 36, at 136.
293 Lord Chief-Justice Matthew Hale, De Portibus Maris, in COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 46–113 (Francis Hardgrave ed., 1787).
294 Munn v. Illinois, 94 U.S. 113, 126 (1876).
295 MASHAW, supra note 58, at 158.
296 HEATH, supra note 23, at 48 (discussing a change in the conception of administration from public power (enacting the sovereign will) to public service). See also NOVAK, supra note 36, at 225 (documenting the rise of the public service state).
297 NOVAK, supra note 36, at 226–27, 258.
298 POSTELL, supra note 2, at 172 (discussing the impact that Croly had on progressive democracy in the United States).
299 Italian political theorist Norberto Bobbio was likewise able to argue that “[a]ll states which have become more democratic have simultaneously become more bureaucratic.” BOBBIO, supra note 92, at 38. Similarly, Jürgen Habermas noted that administration, given popular demand for social and economic protections, is “not just [a] functionally necessary supplement[] to the system of rights but implications already contained in rights.” HABERMAS, supra note 261, at 134 (emphasis in original). The upshot is this: “If democratic movements tend to increase political complexity, we should not identify democracy with simplicity or directness per se—even if [participatory democratic] movements rightly say that democratic reform will make politics more directly accessible for [citizens].” Plotke, supra note 116, at 24.
Agencies are not charged just with pursuing the public’s best interest. They are also charged with upholding equitable standards often associated with trusteeship. In 1798, as perhaps its first attempt to authorize domestic coercive administration, Congress authorized a board of federal tax commissioners “as shall appear to be just and equitable.”\footnote{Parrillo, supra note 16, at 1304.} In 1914, well before the passage of the Administrative Procedure Act (APA), Congress charged the FTC with a duty akin to the duty of care: to base its findings on substantial evidence.\footnote{The Federal Tort Claims Act (FTCA) states that agency’s finding of fact would be conclusive if supported by substantial evidence. 28 U.S.C. §§ 2671–2680. See also Universal Camera Corp. v. Nat’l Lab. Rel. Bd., 340 U.S. 474, 474–96 (1951) (applying the APA’s substantial evidence rule).} While Congress would not weigh in with a final answer to questions of fact, they might at least ensure that the agency gives answers only after the exercise of diligence and care. Even the United States Constitution tasks the President with fiduciary duties: to “take Care that the Laws be faithfully executed,”\footnote{U.S. CONST. art. II, § 3. See generally Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, Faithful Execution and Article II, 132 HARV. L. REV. 2111 (2019) (discussing Article II of the Constitution).} without specifying either a measurable standard or body to whom he must answer. Of course, courts, when they review agency action, impose, or enforce, fiduciary-adjacent standards of care when they determine whether agencies’ decisions pass an arbitrary-and-capricious review.\footnote{See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414 (1971) (analyzing administrative action under the APA’s arbitrary and capricious standard of review); MERRILL, supra note 55, at 51 (discussing arbitrary and capricious review).} Namely, they require “agency action [to] bear the indicia of . . . expert process and judgment” using generally accepted epistemological methods.\footnote{Kagan, supra note 192, at 2270 (internal quotation marks omitted).} At least one circuit court demanded from agency officials a trustee’s inclusive cognitive orientation: they cannot approach proposed rules with “an unalterably closed mind,”\footnote{Ass’n of Nat’l Advertisers v. Fed. Trade Comm’n, 627 F.2d 1151, 1175 (D.C. Cir. 1979) (Leventhal, J., concurring).} but must instead consider whether public feedback, technical understanding, and scientific research counsel a different decision.

2. \textit{Trustee Autonomy}

Second, and unlike the transmission belt model, the trustee model of representation can easily accommodate administration’s inescapable decision-making autonomy. The agency’s autonomy is already baked in; it need not be effaced by, for example, bootstrapping agency decision-making to the President’s democratic legitimacy.\footnote{See, e.g., POSNER & VERMEULE, supra note 6, at 12–15; CARL SCHMITT, LEGALITY AND LEGITIMACY 13 (J.P. Seitzer ed. & trans., Duke Univ. Press 2004) (1932) (“[T]he newly created financial
engage in the kind of analytical gymnastics required to argue that substantive agency decisions merely “fill up the details” of otherwise comprehensive legislation. There is likewise no need to engage in the pretense that elected officials can hold agencies accountable despite their “sprawling, parochial, [and] competitive” structure riddled with overlapping and conflicting delegations. Instead, it can incorporate the ineluctable tendency for democratic government to become more complex as citizens demand more from their government. “Democratic successes,” notes political theorist David Plotke, “expand the number of voices in conversations about what to do and thereby make decisions more complicated.” Agencies, if understood as trustee representatives, can accommodate democracy’s inevitable complexity. Given their autonomy, agencies can wield their discretion to meet new challenges and demands as they arise. Agency autonomy, especially when augmented with expertise, may be the only mechanism that allows officials to meaningfully respond to the claims citizens make on them.

Setting aside the issue of whether Congress is permitted to delegate decision-making power to agencies, logic demands they have it. First, the inherent ambiguity of agencies’ statutory mandates will require interpretation and elaboration. As political theorist Richard Bellamy notes, no amount of rule-tightening or definitional glossaries will ever “remove all ambiguity” from the law. Legal interpretations are commonly controversial and, even when the law’s meaning is clear, how it ought to

bureaucracy[] found the possibility of a new basis in the plebiscitary legitimacy of the German President elected by the entire German people.”); K. Sabeel Rahman, Reconstructing the Administrative State in an Era of Economic and Democratic Crisis, 131 HARV. L. REV. 1671, 1673 (2018) (reviewing Jonas D. Michiels, Constitutional Coup: Privatization’s Threat to the American Republic (2017)). These scholars, endorsing separation-of-powers formalism, encourage the consolidation of agency decision-making under the office of the President. Professor Walters characterizes this move as an attempt to “make the American administrative state more like the prototypical Weberian bureaucracy: organized, subordinate, comprehensively rational, and internally without conflict.” Walters, supra note 43, at 42.

308 Wayman v. Southard, 23 U.S. 1, 43 (1825).
309 Walters, supra note 43, at 41–42.
310 BOBBIO, supra note 92, at 60; HABERMAS, supra note 261, at 134; Plotke, supra note 116, at 24.
311 Plotke, supra note 116, at 24.
312 This characterization of legitimate agency action—that it can take the initiative on policymaking subject to oversight by Congress—is discussed by Merrill, who calls it the “last word” conception of legislative supremacy: while an agency can act without “clear” statutory authorization, Congress gets the “last word” by overriding otherwise legally binding agency policy. MERRILL, supra note 55, at 20–22.
play out in particular circumstances may remain murky. Meanwhile, appeals to legislative intent will not eliminate the ambiguity. For example, determining legislative intent, which requires imputing intent to a collective agent, is also a matter of interpretation—one that involves linguistic ambiguities or problems of systemic coherence. And when law is indeterminate or under-determinate, agencies will inevitably exercise discretion that makes tradeoffs among competing values. A statutory instruction to test pharmaceuticals for safety and effectiveness does not actually tell administrators about how much risk should be traded off for marginal increases in efficacy. When administration applies the law, it therefore operates in the “circumstances of politics,” CBA analysis notwithstanding.

Second, given the expertise and experience required to make policy, administrators will better understand relevant issues. They therefore enjoy an independent source of political influence among other policymakers that is orthogonal to the power lent to leaders with popular mandates. Greater popular participation cannot entirely mitigate this source of autonomy. Citizens, lawmakers, and even lawyers rarely know what regulations cover, let alone how to assess and judge them. Legislators’ capacity and incentive for oversight is likewise limited, constrained to episodic formal investigations and debates “focus[ed] on scandal rather than routine policymaking.”

Even politically appointed agency officers have an incomplete understanding of their charge. Meanwhile, agency officials’ expertise, connections to well-organized stakeholders, and reputation for

---

314 Bellamy, supra note 84, at 54–55.
315 Id. at 55.

The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

23 U.S. 1, 42–43 (1825). But this, however, concedes that there will be details to fill, that it could be conceived as “legislative” and that Congress could have filled them itself, had it wanted.
318 Bellamy, supra note 84, at 66.
319 Heath, supra note 23, at 13, 47.
320 Mashaw, supra note 58, at 87.
effectiveness lends them political clout. They leverage it by shaping the legislative process itself as they propose bills and amendments. The civil service, notes Heath, “is often the source of highly effective policy entrepreneurship.” Ordinary citizens will certainly balk at such “deep state” sausage-making. But there may be no way around this particular principle-agency problem. We can only hope that our trustees are indeed trustworthy.

Finally, decision-making discretion is also desirable. Agencies are sometimes tasked by their authorizers to work against the interests of powerful private parties. To construct and articulate the needs of citizens that are not well positioned to influence the political process themselves agencies require some distance from political appointees who may give preferential treatment to their most well-resourced supporters. Furthermore, allowing well-resourced citizens and their lobbyists to permeate a trustee’s autonomy, especially in “our ‘new Gilded Age’ of pervasive conflict and extreme inequality,” may only aggravate existing misrepresentation. It is also useful when a mechanical application of rules works against the public interest. Even street-level bureaucrats will better serve the public if they can exercise some discretion to bend general, all-things-considered rules that fail to capture citizens’ unique circumstances.


322 Id. at 12.
323 Id. at 11, 59.
324 Id. at 47. See also NOVAK, supra note 36, at 209 (noting that early FTC investigations “led to significant subsequent legislation and administrative regulation as in the passage of the Packers and Stockyards Act of 1921, the establishment of the Federal Oil Conservation Board in 1924, and the Robinson-Patman Act in 1936”). Kessler shows the role played by administrators in forming policy on civil liberties and the First Amendment as they struggled over the problem of the conscientious objectors. Jeremy K. Kessler, The Administrative Origins of Modern Civil Liberties Law, 114 COLUM. L. REV. 1083, 1160 (2014).
326 For example, the Equal Opportunity Commission (EEOC), the Consumer Financial Protection Bureau (CFPB), and the Securities and Exchange Commission (SEC) each protect employee and consumer interests against those of resource-rich employers and financial institutions. See generally U.S. EQUAL OPPORTUNITY COMM’N, https://www.eeoc.gov (last visited Aug. 28, 2023); CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/ (last visited Aug. 28, 2023); U.S. SEC. EXCH. COMM’N (Nov. 22, 2016), https://www.sec.gov/about.
328 See, e.g., ERNST, supra note 92, at 12 (discussing Ernst Freund’s fear that administrators would be captured by partisan interests and his hope that a Bismarckian professionalism could be incorporated into U.S. administration); LOWI, supra note 133 (offering not interest group pluralism, but juridical democracy, as a model for administration).
329 Walters, supra note 43, at 41 (emphasis added).
330 ZACKA, supra note 28, at 37; HEATH, supra note 23, at 259; BELLAMY, supra note 84, at 59.
3. A More Accurate Tripartite Model

Finally, the trustee model’s tripartite structure better describes administrative practice than the transmission belt theory’s bilateral scheme. Agencies are often considered by courts, the public, and administrators themselves not as agents bound to the ongoing instruction of Congressional principals. Rather, agencies receive their authorization from decision-making procedures (i.e., via legislation331) undertaken by bodies that are distinct from the beneficiaries (the public) that they serve. The Department of Justice, for example, is not the President’s personal law firm;332 the United States Army is not his personal security force333 the United States Federal Reserve System does not take marching orders from Congress,334 and the job of the CDC is not to take care of the health of voters existing in 1946, when it was established, but to the public as it exists today.335

Other features of administrative law likewise show that the tripartite trustee model better describes agencies than the bilateral, principal-agent model of the transmission belt theory. First, agency policymaking is not, in fact, subject to legislative veto.336 Without the veto, it is harder to argue that the relationship between administration and Congress is bilateral, it is merely a principal directing its agent. Similarly, it is unlawful for Congress to staff administrative offices with either Congressmembers themselves or those of their choosing.337 Under a principal-agent model, permitting the principal to interfere with the agent is not only expected, but also desirable—at least insofar as it prevents the agent from straying too far from its mandate.338 In a recent work, Novak argues that Congress granted this

331 CORDELLI, supra note 27, at 99.
332 Organization, Mission and Functions Manual: Overview, U.S. DEP’T OF JUST. (July 1, 2022), https://www.justice.gov/jmd/organization-mission-and-functions-manual-overview (“The mission of the Department of Justice (DOJ) is to uphold the rule of law, to keep our country safe, and to protect civil rights. . . . [O]ur employees adhere to the highest standards of ethical behavior, mindful that, as public servants, we must work to earn the trust of, and inspire confidence in, the public we serve.”).
335 About CDC, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 31, 2022), https://www.cdc.gov/about/ (“[T]he CDC is the nation’s leading science-based, data-driven, service organization that protects the public’s health. For more than 70 years, we’ve put science into action to help children stay healthy so they can grow and learn; to help families, businesses, and communities fight disease and stay strong; and to protect the public’s health.”).
338 A counterargument is that such actions are wrongful, not because they fail to hew to a trustee model, but because they violate the Bicameralism and Presentment Clauses of the United States
autonomy because agencies worked within institutions designed to evade capture by private, special, or pecuniary interests.\footnote{339}

The trustee model of democratic representation therefore describes the administrative state and our understanding of its role in governance fairly well. More modestly, it, at the very least, describes what is going on better than the bilateral transmission belt model. As explained below, given this correspondence, it also provides a reason to credit administration with democratic legitimacy.

\section*{B. \textit{The Public Interest and Agencies’ Inclusive Cognitive Orientation}}

As noted above, the notion of the public and its interest promotes an inclusive cognitive orientation among policymakers that is congenial to democratic autonomy. In fact, it is this orientation that made independent administrative agencies so attractive to the Progressive movement. By the late nineteenth century, “virtually every group affected by the railroads favored government regulation in one form or another.”\footnote{340} Believing that political decision-making too often followed the preferences of big business “plutocrats,” Progressives accordingly suggested the use of independent commissions charged with acting in the “public interest” precisely because they could give voice to the countless many that remained voiceless.\footnote{341} For example, the Interstate Commerce Commission—established by overwhelming majorities in Congress\footnote{342}—would consider the impact of railroad monopoly rates on disempowered Midwest farmers. To justify this ratemaking, they characterized railroads as \textit{public} utilities.\footnote{343} To illustrate further, those who were formally enslaved and shut out of electoral politics found presence in the Freedman’s Bureau of the Reconstruction Era.\footnote{344}

There is no reason, however, to pigeonhole administrators as Platonic guardians. Citizens and their representatives (both elected and unelected) enjoy many opportunities to intervene in intra-agency determinations about Constitution. But this begs the question: if the principal is not Congress, who is? To answer that it is Congress acting with the President according to specified procedures is to concede that the principal is simply representative democracy in action. An agency can very well be a part of that action. U.S. \textit{CONST.} art. I, § 7, cl. 2; \textit{id.} art. I, § 3, cl. 4.\footnote{345} NOVAK, supra note 36, at 221.\footnote{346} Robert L. Rabin, \textit{Federal Regulation in Historical Perspective}, 38 \textit{STAN. L. REV.} 1189, 1199 (1986) (describing the Granger movement in particular).\footnote{347} See, e.g., NOVAK supra note 36, at 235–39 (documenting the rise of independent commissions); EMERSON, supra note 37, at 65 (noting that progressivism “emphasizes an ongoing, constitutive relationship between administrative agencies and the people at large”); MASHAW, supra note 58, at 166 (“The Progressive’s basic claim was that . . . independent and expert administration was actually a move toward greater democratic responsiveness.”); Wilson, supra note 11, at 199–200 (discussing the rise of the “science of administration”).\footnote{348} Rabin, supra note 340, at 1206.\footnote{349} NOVAK, supra note 36, at 134.\footnote{350} EMERSON, supra note 37, at 64.
the nature of its public and its interest. As Klein, Emerson, Rahman and Gilman persuasively demonstrate, the very fact of administration opens space for democratic debate. There is a reason why, whenever the public is presented with an image of itself and its good, politics emerge. Who is included in “We, the people” helps determine the content of the people’s interests. In turn, the notion of the public interest helps determine who ought to be included in “We, the people.” The logic of the public and its good thus inspires controversy. Because agencies’ interpretations of the public good provide an image of the people and their interests that they may reflect upon, it creates occasions for politics. The voracious public debate over national COVID-19 policies—what steps to take, whose interests to protect, and what the public welfare requires—aptly demonstrates the logic.

Contemporary laws, like the APA, sometimes allow these public debates to permeate administrative policymaking. They not only require administrators to solicit public comment for their proposed rules, but also to provide responses. They require agencies to expose their reasoning process to the public as early as possible to facilitate dialogue and make room for objections. Further, the justifications provided by agencies must be public-regarding, based on claims that incorporate some understandable vision of the public welfare or public purposes.

Moreover, separating the roles of authorizer, trustee, and beneficiary does not just fit contemporary practice. It has, as noted above, some attractive normative features. It permits agencies to consider the future and long-term interests that are effaced by models that account only for the motivations and interests of the representative and represented. As a result, it allows agencies like the Environmental Protection Agency (EPA) to engage in the kind of long-term planning that eludes short-term election cycles. It also enables agencies to consider the interests of those whose views are excluded from the sectional politics of Congress or those who cannot speak for themselves because they are poorly organized or poorly resourced. For instance, political theorist Sam Bagg observes that

---

345 KLEIN, supra note 28, at 128.
346 EMERSON, supra note 37, at 65.
347 RAHMAN & GILMAN, supra note 38, at 13–16, 41–42.
348 BRITO VIEIRA & RUNCIMAN, supra note 62, at 139.
350 MASHAW, supra note 58, at 40.
351 Id. at 51–52. See also Nat. Res. Def. Council v. Herrington, 768 F.2d 1355, 1433 (D.C. Cir. 1985) (holding the agency’s determination was arbitrary and capricious because it failed to sufficiently explain it).
352 MASHAW, supra note 58, at 158.
353 See supra Part IV.
354 HEATH, supra note 23, at 24–27. Political Theorist Jennifer Rubenstein enlists a trustee model
agencies can serve as counter-powers against interests that are already adequately (or more than adequately) represented.\textsuperscript{355} It likewise permits agencies to pursue interests that cannot be advanced by a beneficiary itself, no matter how well-resourced: the protection of the environment, children, and so on.

The separation, moreover, reminds us that those that are doing the ruling—the agency—are not the same as either those being ruled or those who have the ultimate right to rule. Hewing to the trustee model can immunize agencies from charges of Schmittian politics.\textsuperscript{356} By drawing attention to the various levels of institutional mediation between “the people” and the leader,\textsuperscript{357} it prevents the kind of identification that empowers populist demagogues who would otherwise demand the right to steer government as they see fit. It therefore encourages administrators to be a bit humble about where their authority lies and what it permits. It also encourages productive suspicion on the part of citizens, who may accordingly contest what is done by agencies in the name of the public good.

C. Constraining Administrative Autonomy

As explained above, agency decision-making discretion is unavoidable. But because it is often unaccountable, it carries risks. Citizens cannot object to what is being done in their name and on their behalf without cost. In fact, given the expertise, time, and experience required to both understand and judge agencies’ decisions, they likely cannot do so at all. As a result, a transmission belt, congruence theory of representation cannot provide a meaningful accountability mechanism. Voters cannot effectively sanction, consent to, or mandate what they do not understand. This is true even if administrative policymaking procedures are made more permeable to popular input. It is true, furthermore, even if the power to set policymaking agendas is dispersed.\textsuperscript{358}

Given this inevitability, some political theories of agency legitimacy conscript perfectionist liberal values in their efforts to constrain administrative policymaking discretion. For example, Joseph Heath argues that administrative agencies should hew to freestanding liberal principles of value neutrality, equality, liberty, and efficiency.\textsuperscript{359} Chiara Cordelli\textsuperscript{360} and

\begin{itemize}
  \item\textsuperscript{356} \textit{SCHMITT}, supra note 99, at 25–32.
  \item\textsuperscript{357} See, e.g., \textit{URBINATI}, supra note 93, at 2–4 (discussing the importance of institutional mediations in preventing dangerous populist politics).
  \item\textsuperscript{358} Daniel Walters recommends these procedural changes in order to better institutionalize agonistic democratic politics. \textit{Walters}, supra note 43, at 64–66.
  \item\textsuperscript{359} \textit{HEATH}, supra note 23, at 146–48.
  \item\textsuperscript{360} \textit{CORDELLI}, supra note 27, at 62–63.
\end{itemize}
Pierre Rosanvallon\textsuperscript{361} charge agencies with discovering an objective general or “omnilateral will” that can be applied regularly and without much controversy. Similarly, Jerry L. Mashaw endorses the use of reason as an independent source of political legitimacy.\textsuperscript{362} While attractive, these theories are convincing insofar as one is willing to accept their objective criteria of legitimacy. Not everyone, however, is a liberal perfectionist or a Kantian rationalist. Furthermore, they invite judicial overreach. If the applicable source of authority is an outside, objective liberal norm and not the agency itself, courts may feel free to police agency decisions \textit{de novo}. When justice is evaluated from some Archimedean mountaintop, we can be fairly certain that judges will set up shop there and displace democratic alternatives.\textsuperscript{363}

Alternatively, the trustee model provides normative benchmarks for administrators that both demand normative humility and incorporate democratic feedback. In fact, trustee representation may be the only feasible way to give the public any consequential presence at all in administrative decision-making.

1. \textit{Epistemic and Procedural Constraints}

First, the trustee model provides meaningful, if limited, substantive constraints on administrative discretion. As discussed above, a trustee’s duty of loyalty, care, and good faith sets forth minimal procedural and epistemic standards.\textsuperscript{364} Administrative officers, for example, cannot be reckless in their conclusions nor act through blatant self-interest.\textsuperscript{365} A CDC official cannot in good faith claim to address a contagious disease without any supporting research or investigation—they should base decisions on facts, not fairy tales.\textsuperscript{366} A campaign finance official cannot draft regulations that favor her

\textsuperscript{361} Rosanvallon, supra note 186, at 75, 129 (outlining the legitimacy lent by impartiality and reflexivity (social generality)).

\textsuperscript{362} Mashaw, supra note 58, at 4–5.


\textsuperscript{364} See supra Part IV.C.

\textsuperscript{365} See Miller, supra note 191, at 42.

\textsuperscript{366} Mashaw, supra note 58, at 60.
preferred candidate alone. Whatever the public interest is, it is not choosing personal political favorites.367

In many respects, extant law already respects these constraints. The APA requires, for instance, an agency to support its decisions with “substantial evidence.”368 Courts award agencies if their consideration is thorough and their reasoning is valid by deferring to their interpretations of their own implementing statutes—even under strict standards of review.369 Courts correspondingly punish agencies if their decisions are not based on the public good, but on self-interested incentives. For example, in Bow v. Georgetown University Hospital, the Court refused to defer to an agency’s interpretation of its implementing statute because it was most likely a post-hoc rationalization formulated during the course of litigation.370

In addition, a trustee model can side-step many of the anxieties associated with administrative technocracy and expertocracy.371 As Blake Emerson and William Novak have demonstrated, Progressive scholars converged sharply on the possibility that agencies’ neutral technical competence could foreclose any objection to agency decision-making based upon their lack of democratic credentials.372 Some, like Frank Goodnow and James Landis, insisted it could.373 Others, including John Dewey, W.E.B. Du Bois, and Mary Follett, insisted that agencies be rescued from democratic exile through the use of participatory practices.374 A trustee model permits both. It recognizes and even requires administrators to use their expertise in subjective good faith and with diligence. It allows administrators to be curators of factual truth, even if factual truth will always present with an Arendtian slipperiness.375 But it also recognizes that an agency, because it is

367 Professor Kathryn A. Watts gives another hypothetical: then-President Obama might direct the Department of Health and Human Services (HHS) to rescind a Bush-era rule permitting medical facilities receiving federal funding to refuse to provide abortion services not based upon a good faith belief that it is in the public interest, but instead “to reward various pro-choice organizations for their endorsement of him during his campaign.” Kathryn A. Watts, Proposing a Place for Politics in Arbitrary and Capricious Review, 119 YALE L.J. 2, 9 (2009).
369 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); United States v. Mead, 533 U.S. 218, 228 (2001) (holding that agency interpretations of implementing statutes will earn judicial deference if based on “the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position”); cf. Nat’l Lab. Rel’n Bd. v. Hearst Pub., 322 U.S. 111, 131 (1944) (holding that agency interpretation is binding if it has “warrant in the record”—a more deferential standard than that found in Skidmore).
370 488 U.S. 204, 212 (1988). See also Auer v. Robbins, 519 U.S. 452, 461–62 (1997) (holding that deference is appropriate in an amicus brief submitted by the agency when the agency is not a litigant).
372 Emerson, supra note 37, at 62–65; Novak, supra note 36, at 1–2; Walters, supra note 43, at 19–20; Seidenfeld, supra note 9, at 1518.
373 JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 75 (1938); Kagan, supra note 192, at 2261–62; Frank Goodnow, Politics and Administration: A Study in Government 120 (1900).
merely a trustee representative and not the curator of the general will, cannot and should not be permitted to depoliticize issues that fall within its bailiwick. The decisions it makes are and should be contestable and open to the very sort of public intervention as outlined in the APA’s rulemaking requirements and, perhaps, even some amount of presidential influence.

2. Democratic Presence and Normative Humility

Relatedly, the trustee model incorporates the idea of public interest without making any commitment to its precise content. It accepts that citizens (and their other representatives) may object to, and should have the means to object to, the agency’s own interpretation. In this respect, the cognitive orientation required by the trustee model resembles theories of administrative legitimacy that, like Mark Seidenfeld’s canonical work, lean on deliberative norms and public participation. For example, some require that those that interpret and apply the law take everyone into account and give meaningful weight to their different points of view. Others, like Jerry L. Mashaw, take on a more Rawlsian gloss by emphasizing the public quality of reasoning rather than direct citizen participation. They require administrators give public-regarding reasons for their actions, that is, “reasons calling on some understandable vision of the public welfare or purposes” and reasoned responses to public objections. Deliberative democrats offer their own positive twist: such reasons must be those that all citizens might (or do) accept.

These theories, like a trustee theory, give presence to the represented by openly acknowledging and addressing their interests and preferences in a general and reflexive way. At least as presented in this Article, however, the trustee model differs in that it is less sanguine about the possibility that administrators land on some rationally correct or consensus-based response. A trustee’s claim to authority is always provisional; it can always be revoked. An agency official is no Judge Hercules. Moreover, its claim to act on behalf of a fictitious “public” and its interests is inherently indeterminate and thus subject to contestation. An administrator, therefore, can and should consult and consider the interests of individuals and the public in a way that a judge cannot. As Bagg recommends, agencies can also encourage public contestation by implementing mechanisms beyond

377 Seidenfeld, supra note 9, at 1569–70.
378 BELLAMY, supra note 84, at 73–74.
379 MASHAW, supra note 58, at 11.
380 Id. at 158; 5 U.S.C. § 553(c) (identifying the notice and comment rulemaking procedures, which requires that administrators consider comments and provide an explanation of the basis and purpose of the final rule adopted).
381 Staszewski, supra note 40, at 886.
382 RONALD DWORKIN, LAW’S EMPIRE 239 (1986).
383 BELLAMY, supra note 84, at 78.
those provided in their notice-and-comment obligations. These might include, for example, appointing diverse (gyroscopic or descriptive) representatives to their internal decision-making bodies, or opening up agenda-setting decisions to public feedback.

Finally, the idea of the public interest can accommodate, and indeed even welcome, the inevitable infiltration of so-called “political reasons” in agency decision-making processes. Citizens often presume that administrators have “pre-existing views” about not only “scientific [and] technical facts,” but also the “policies and purposes embodied in the relevant legislation.” Unlike courts, the trustee model does not dance around the permissibility of these “political” considerations. Undoubtedly, citizens hold honest but inconsistent understandings of the public and its interest. Electoral campaigns broadcast and ballyhoo sharply distinguished, competing policy options. An agency trustee is free to choose amongst them, so long as she otherwise fulfills her duties in good faith with diligence and loyalty. If an official believes, based upon careful examination, that a decision both serves the public interest and comports with the scope of her statutory authorization, she may make it despite vociferous objection. A trustee’s decisions are both values-based and technocratic. If citizens object to those values, a healthy representative system should give them an opportunity to authorize a different trustee or change the scope of the trustee’s authorization. A trustee model will expect, for instance, administrative flip-flopping on abortion access, immigration, and other contentious issues that motor our deep political disagreements.

D. The Guardians of Democratic Autonomy

Finally, administrative agencies, if understood as representative trustees, can enhance the state’s democratic legitimacy by protecting citizens’ democratic autonomy. Agency autonomy can, in the words of Jon

384 Bagg, supra note 355, at 236–42 (recommending the institutionalization of oppositional expertise, citizen oversight juries, and building leverage points for popular mobilization).
385 Walters, supra note 43, at 64.
387 Mashaw, supra note 58, at 149.
D. Michaels, provide another “administrative separation of powers” that functions when the more typical separation fails to curb abuses of power. For example, if a single party achieves control of the other branches of government, an autonomous agency beholden to the public interest can provide representation for those left out. Consider a scenario in which a single party captures the executive, the legislature, and the courts. It then seeks to change election rules in its favor. An independent election commission with reviewing authority could protect the democratic autonomy of those supporting the minority party. Unlike a transmission belt model, which links popular sovereignty to elected representatives, a trustee model can provide arguments that the election commission clearly serves democratic values.

There are also less alarming examples where a trustee can intervene productively in collective decisions distorted by the unequal distribution of political power. A powerful industry might successfully lobby enough legislators to block regulation that would hurt its bottom line yet protect many from significant harm. This intervention might violate democratic autonomy because it ascribes an equal amount of political power to a privileged few. An independent agency, on the other hand, might write regulations that attend to the interests illegitimately silenced by the legislative process. Proponents of New Deal agencies promoted them, according to Blake Emerson, precisely because they could protect people who, given the complexity and inequality intrinsic to the modern economy, could not protect themselves. Their predictions bore fruit. When the FTC was first established, for example, it received twenty-seven thousand requests for action, including thirteen thousand complaints, from people whose legal rights were inadequately protected by extant institutions. Federal commissions proved to be the “poor man’s court” they were designed to be. “[G]iven the constant inequality generating pressures of the capitalist economy,” notes political theorist Kevin Olson, administration may be “required to maintain the conditions under which the sovereignty of citizens can be fairly and accurately translated into law.” Indeed, they have often been at the forefront of recognizing and asserting rights under the

---

389 Jon D. Michaels, Constitutional Coup: Privatization’s Threat to the American Republic 69 (2017). See also Heath, supra note 23, at 21 (observing that the permanent civil services is the “real constitutional check” on Parliament).
391 Emerson, supra note 37, at 226–29 (citing John Dickinson, Administrative Justice and the Supremacy of Law in the United States 13 (1927)).
392 Novak, supra note 36, at 207–09.
393 Id. at 137 (citing Robert La Follette).
There is a reason: agencies are better placed than either the Court or Congress to adapt constitutional rights to changing technologies, cultures, contexts, business practices, and perhaps even social values.

**E. Some Circumspect Democratic Amendments to the Trustee Model of Administration**

There is reason to conclude that administration will benefit from any democratic legitimacy provided under a trustee model of representation. As discussed, however, there are several features of trustee representation that, without modification, may prove worrisome. For starters, any opinion about who counts as part of the “public” and what its interests are will be subject to vociferous debate. What is in the “public interest” is a constructed product of politics, not a precondition that establishes the need for politics. Moreover, if we just take the trustee’s word for it, we risk the “good king” problem. Permanently appointing even the very best guardian can hardly be considered democratic. Authorization of the representative is also a sticking point. If the sovereign authority is popular, and if we eschew a notion of organ-body sovereignty, any claim to possess popular authority will face certain contestation. Also subject to debate is the scope of the authorization given. Citizens routinely debate, for example, whether it is proper for a president to implement his policy agenda through executive orders.

What a theory of democratic representation should provide is not certain answers to these dangling, obstinate questions. It should provide instead a way for each citizen to play an equal part in the formulation of their ever-changing answers. Within a trustee model of democratic representation, there are at least four moments that can accommodate more citizen presence in the trustee’s decision-making. First, institutions can better facilitate competing interpretations of the public and its interest when the trustee undertakes decision-making. Second, citizens might provide testimony regarding their own interests in the expectation that these interests are relevant to the determination of the public interest. Trustees can be encouraged to solicit and study this testimony. Third, citizens might contribute regularly to the authorization of trustee representatives through, for example, regular elections. They might also offer their own competing

---


396 Ross II, supra note 395, at 523.

397 BRITO VIEIRA & RUNCIMAN, supra note 62, at 138; KLEIN, supra note 28, at 113; Garsten, supra note 60, at 91.

398 HEATH, supra note 23, at 28.

399 BRITO VIEIRA & RUNCIMAN, supra note 62, at 10.
thoughts on the contours of the trustee’s authority. Finally, any misrepresentation caused by trustee representatives favoring certain partial interests over others might be mitigated by developing counter-representative institutions.

Many of these moments identify where and when agency representation can better promote democratic autonomy. It must be noted, however, that building more citizen presence within trustee representation does not and should not boil down to adding more direct citizen participation whenever and wherever possible. Democratic representation is not participatory democracy. And this is not only okay, but also something to endorse. As argued in Section IV.A.2 supra, it is difficult to ensure that participation does not skew towards the well-resourced at the expense of those marginalized from the system. It is also irresponsible to presume that any particular snapshot of public opinion that representatives derive from such participation faithfully represents the “will of the people.” Instead, considered use of other models of representation will be more productive. What is more, representatives will require autonomy to pursue their functions without battling the headwinds of those determined to throw them off course. Governance is about more than deciding what to do. It is actually doing what is decided.

1. Representation in High-Level Agency Appointments

First, citizen presence can be expanded during a trustee’s public interest determinations through further representation. A decision-making body authorized to make decisions in the public interest, like high-level agency appointments, might be staffed by gyroscopic or descriptive representatives that provide presence to those previously ignored by the trustee’s decision-making process. For example, a central bank tasked with stabilizing prices and increasing employment might include experts drawn from labor, finance, consumer, homeowner, student borrower, and other interest groups amongst its board of governors. It might also recruit members from marginalized communities or those sensitive to such communities’ concerns. Given the inevitable distributional conflicts amongst such groups, it may be unlikely—pace proponents of negotiated rulemaking—that they will come to a consensus on monetary policy. But if the chairman is forced to respond to their concerns or solicit a majority of their support, such a scheme will increase citizen presence in the trustee’s public interest determinations. At present, the Board of Governors of the United States Federal Reserve System consists of seven individuals nominated by the President and confirmed by the United States Senate. Each has a background in either academia or the institutional banking community prior to their government service.400 The Board also has an advisory council comprised of

twelve representatives of the banking industry. As a result, there is reason to believe that the tradeoffs it makes between, for example, employment and price stability, liquidity and systemic safety, market innovation and consumer security, fail to consider competing notions of the public interest. The interests of countless citizens are locked out from the decision-making process. To ameliorate possible misrepresentation, agencies might deploy federal advisory committees under the Federal Advisory Committee Act to ensure that underrepresented perspectives are addressed.


Second, since the public interest is an inclusive rather than an exclusive concept, it is related at least indirectly to individual citizens’ interests. The nation and its parts, as Hannah Pitkin once observed, do not confront each other like two hostile nations—they are related to one another, even if one is not reducible to the other. To be sure, Madison once characterized personal, partial interest as equivalent to destructive faction. Our more modern moral skepticism, however, provides no easy means to identify and screen out partial interests from the public variety. Deliberative democrats and pluralists therefore have good reason to promote public participation in the notice-and-comment process.

Nevertheless, as explained above, turning notice-and-comment rulemaking into a national town hall meeting can replicate and exacerbate extant inequalities in political resources. It also suggests that public consensus presents a realistic option. But agencies need not use the notice-and-comment process as an input mechanism for preference aggregation or public reason. It might instead use it to discover whether its proposed rules might pervert the public interest. As Madison himself argued, partisans can camouflage their private interests as public goods. An interest put forth as public might really be a disguised version of powerful private preferences. To reveal any obscured elite favoritism, citizens might articulate for themselves their own interests and show how they clash with others’ favored policies. Duly educated, the trustee representative is better able to make its public interest determinations in good faith.

403 See Feinstein, supra note 196, at 3.
404 I am not arguing that the public good supervenes upon individual private interest without remainder. I am making the more modest point that whatever the public interest is, individual experiences are relevant to its determination. For a discussion, see Pitkin, supra note 63, at 217–23.
405 Pitkin, supra note 63, at 217.
406 THE FEDERALIST NO. 10 (James Madison).
407 Id.
408 Id.
But we need not stop at notice-and-comment rulemaking. The public good is epistemically related to individual, personal experience. Even Edmund Burke, who otherwise insisted on the decision-making autonomy of representatives, acknowledged that citizens’ personal “feelings” (pain, harm, etc.) ought to be transmitted to government so that diagnoses and cures might be provided. The implication is that the public interest is logically connected to the experience of the public’s individual members. If many are in pain, it is less likely that government is serving the public well. Accordingly, agencies might take more seriously citizen petitions to re-open settled rules, particularly from underrepresented communities. The trustee’s duties of good faith and diligence might be expanded, furthermore, to include a duty to investigate, survey, interview, and otherwise find out what individual citizens deal with as they set their decision-making agendas or flesh out the substantive content of their proposed rulemaking. They can be proactive rather than reactive. They can “find and amplify dissenting perspectives” from parts of the public that are too often shut out from policymaking. They need not work solely with the voluntary input of well-resourced interest groups. Nor need they accept without question the stability offered by “ossifi[ed]” rules that judicial review makes difficult to reopen. Daniel Walters recommends, for instance, that administrators routinely revisit and reexamine extant rules. Trustees might also regularly send their staff out with clipboards to knock on doors. For example, the Federal Communications Commission might put boots on the ground in densely populated but impoverished communities to determine how best to secure universal internet service for citizens. The Administrative Conference of the United States (ACUS), for example, recommends

---

409 Pitkin, supra note 63, at 184.
411 The Biden Administration recently took steps in this direction when OIRA released new guidance that outlines changes that would make it easier for members of the public to voice their views in the regulatory process. Sam Berger, Making Voices Heard in the Regulatory Process, WHITE HOUSE (July 19, 2023), https://www.whitehouse.gov/omb/briefing-room/2023/07/19/making-voices-heard-in-the-regulatory-process/ (citing Memorandum from Richard L. Revesz, Administrator for the Office of Information and Regulatory Affairs, for the Heads of Executive Departments and Agencies (July 19, 2023)).
412 Walters, supra note 43, at 77.
413 Id. at 63.
415 Walters, supra note 43, at 70.
outreach programs that actively solicit input from underrepresented groups at the early stages of rulemaking.\textsuperscript{416}

3. The Authorization Process

In the context of administration, citizens play an indirect, intermediated role in agency authorization. They vote in elections that determine the holders of legislative and executive offices. These officers (1) nominate and confirm high-level appointees; (2) pass statutes that authorize the agency and set the scope of its authorization; and (3) pass statutes, like the Pendleton Civil Service Act\textsuperscript{417} and the APA\textsuperscript{418} which further specify the duties of agency officials. To increase citizen presence in agency authorization, then, it appears necessary to increase citizen presence in federal elections and during federal lawmaking generally. While a diagnosis of the frailties\textsuperscript{419} of our institutions of electoral representation is beyond the scope of this Article, I will nevertheless gesture at a few reforms that may be relevant to agency authorization. Most of these recommendations do not, notably, require direct citizen participation. Instead, they encourage the use of representative mechanisms that ameliorate underrepresentation in the authorization process.

First, the President, when determining who to nominate for high-level positions, might be encouraged (or required) to solicit suggestions from those currently serving underrepresented communities in policymaking institutions. The United States Senate, when advising the President during the nomination process under Article II § 2, might demand such solicitation before taking a confirmation vote. For example, community policing, Innocence Project, and Black Lives Matter advocates might present their own short lists for those who should be considered for high level Department of Justice positions. Second, confirmation hearings might include more participation by non-electoral representatives, particularly from underrepresented communities. Nominees, for example, might be required to answer not just the questions of Congressional committee members, but also those offered by non-congressional representatives. When the Senate determines whether to confirm the President’s nominee for Commissioner of Food and Drugs, who leads the Food and Drug Administration, it might allow questions from groups like Black Health and The Center for Black Health and Equity, which advocate for equitable health treatments and


\textsuperscript{418} Administrative Procedure Act, 5 U.S.C. § 551 et seq.

\textsuperscript{419} Such frailties include, for example, partisan gerrymandering, state-level voter suppression laws, distortions in campaign finance exacerbated by Citizens United v. FEC, and public misinformation campaigns. 558 U.S. 310, 363–64, 412 (2010).
outcomes. Knowing that such questions will be incoming, the President might be incentivized to nominate individuals with more inclusive notions of the public interest. Third, lower-level agency officials with decision-making authority might be drawn from communities directly or urgently affected by the agency’s rulemaking and adjudication. Recall that authorization presumes some pre-existing normative relationship between the authorizer and beneficiary. The democratic intuition can identify one such relationship: those who are ruled (the beneficiary) should shape the rules that bind them (the authorizer). As a result, an agency like the Disability Rights Section of the Department of Justice might recruit attorneys that have already successfully represented both the disabled and the business sectors responsible for implementing accessibility reforms. Relatedly, we might affirm and expand our commitment to civil service exams because they militate against spoil systems that permit a powerful few to appoint those who will rule over the many. Such exams might also require officers to evidence knowledge and understanding about how agency actions might impact affected communities.

4. Counter-Representation and Political Equality

Finally, if agencies themselves are representatives, a question immediately emerges—whether agencies misrepresent the public because they, collectively, tend to exclude or marginalize parts of the démos. As a result, it is worth asking whether administrative agencies, taken together, not only (1) fairly represent all the interests implicated in policymaking and (2) provide space for new and conflicting interests to emerge. Democratic autonomy requires not just that citizens have presence in decision-making, but also that this presence is distributed equally. To this end, the creation of the CFPB is a laudable development, at least to the extent that it presses interests otherwise given short shrift in agencies already tasked with financial regulation. Similarly laudable is the FTC’s recent turn to protect individual contractors, unskilled laborers, and consumers against corporate interests by, for example, examining the capacious use of non-compete agreements and commercial surveillance against citizens not already well-placed to advocate on their own behalf. In any case, implementing a

---


422 See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376; 12 U.S.C. § 5511(a) (stating the CFPB is charged with “implement[ing] and enforce[ing]” a large body of consumer protection laws to ensure that “markets for consumer financial products and services are fair, transparent, and competitive”).


standard of judicial review that disciplines agency action but does very little to discipline agency inaction is itself unrepresentative. It favors those powerful private actors that benefit from deregulation while disfavoring those who need government the most. Revisiting whether and when judicial review is applied may therefore go some way towards increasing citizen presence in agency decision-making. Similarly, agencies tasked with representing disadvantaged communities might be permitted to discount notice-and-comment contributions from more powerful constituents with adverse, conflicting interests. Arbitrary and capricious review, for example, might be modified to permit the EPA to emphasize the concerns of environmental activists representing the general public over the concerns of the fossil fuel industry—an industry already well represented elsewhere.

V. THE UPSHOT FOR LEGAL DOCTRINE: QUESTIONS OF AGENCY DELEGATION, ARBITRARY AND CAPRICIOUS REVIEW, AND PRESIDENTIAL APPOINTMENTS

The trustee model of democratic representation gives good reasons to believe that the administrative state is a legitimate part of democratic governance. It facilitates democratic autonomy by giving citizens presence in collective decisions that, by their nature, escape direct participation. To be sure, as a representative institution, the administrative state is imperfect. But so too are the other institutions of American democracy. The appropriate response, though, is not to eliminate our deficient institutions. It is to commit to improve them. The trustee model can help show us how. As discussed above, some amendments can help agencies better serve democratic autonomy than they already do.

A trustee model, furthermore, can provide some insight into the puzzle presented at the beginning of this Article: whether and to what extent Congress may delegate lawmaking authority to agencies. Namely, because it emphasizes agency autonomy and does not double-down on the fictions of the transmission belt model, it provides some theoretical support for accepting agency interpretations of their own implementing statutes. It also gives reason to reject the major questions and nondelegation doctrines. Relatedly, it provides some guidance to courts undertaking an arbitrary and capricious review of agency decision-making. Finally, it provides an

---

425 Walters, supra note 238 at 513–14.
426 See, e.g., Massachusetts v. Env’t Prot. Agency, 549 U.S. 497, 505 (2007) (“Calling global warming ‘the most pressing environmental challenge of our time,’ a group of States, local governments, and private organizations alleged . . . that the Environmental Protection Agency (EPA) has abdicated its responsibility under the Clean Air Act to regulate [greenhouse gas] emissions . . . .”); Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: From Politics to Expertise, 2007 SUP. CT. REV. 51, 51–52, 63–64 (2007) (observing that the EPA must determine whether greenhouse gas emissions contribute to climate change before declining to regulate them, as presumably desired by industry favored by the Bush Administration).
alternative to the Supreme Court’s recent fashioning of presidential removal jurisprudence.

A. Nondelegation

As an initial matter, the decision-making constraints specified by the trustee model might rescue delegations that might otherwise fail a judicial “intelligible principle” test.427 When Congress fails to articulate “any policy or standard,” as it did in *A.L.A. Schechter Poultry Corp. v. United States*428 and *Panama Refining Co. v. Ryan*,429 they can steer agencies away from the abuse of their public trust. In *A.L.A. Schechter*, for example, the “competition code written by a group of (possibly self-serving) New York poultry butchers”430 could be struck down not based on nondelegation, but on the basis that it violated the norms of public trusteeship by serving partial interests. In other words, the regulation was self-interested and therefore a violation of the trustee’s duty to act in the public interest. This standard might even be used to salvage ostensibly unlawfully capacious legislative delegations just as implied-in-law contractual terms can rehabilitate contracts containing the sort of illusory promises that yield failures of consideration or mutual assent.431 For example, Justice Gorsuch warned, in his *Gundy* dissent, of the unjust arbitrariness of a mandate that affords the Attorney General discretion to force sex offenders to register, or not to register, “as he pleases.”432 The concern raised in Justice Gorsuch’s dissent implies that the duties associated with trusteeship would circumscribe this apparently unfettered and objectionable discretion.

In any event, because the trustee model lends agencies their own freestanding democratic legitimacy, it takes the wind out of the sails of the nondelegation doctrine. It contemplates citizen presence beyond the electoral authorization of congressional representatives and presidential appointments. Similarly, the trustee model gives reason to doubt the MQD. If it is true that agency decision-making enjoys freestanding legitimacy, not one bootstrapped to elected officials, then there is no reason to think that only Congress or the President may make major policy. To be sure, agency officials cannot rely on the legitimizing force of direct electoral

---

430 Gundy v. United States, 139 S. Ct 2116, 2137 (2019) (Gorsuch, J., dissenting) (discussing *Schechter*).
431 Wood v. Lucy, Lady Duff Gordon, 118 N.E. 214, 214–15 (N.Y. 1917) (Of course, Judge Cardozo, as a United States Supreme Court Justice, would later write the *A.L.A. Schechter* opinion). Notably, contracts that grant discretion to one party to exercise their judgment in performing their contractual obligations always include an implied-in-law term of good faith and fair dealing—a fiduciary concept that is apt and often applied by courts in any agency context, including the trustee context addressed here.
432 *Gundy*, 139 S. Ct. at 2132 (Gorsuch, J., dissenting).
authorization. But citizen presence is likewise mediated when it comes to congressional decision-making. Any electoral authorization that involves a multi-district collective decision-making body, like Congress, is indirect: voters vote for their local representative, not the body as such. Only after the deliberations, log-rolling, and strategic calculations of its members, each stratified through congressional procedures and the possibility of presidential veto, will representatives (or their staffs) draft a bill and take a vote. Indeed, many find the rupture between constituency and representative attractive: it shields legislative outcomes from the “violent passions” of immediate citizen preference. Regardless, it can compensate for any legitimacy gap opened by their lack of direct electoral authorization, particularly if administration undertakes the reforms described above. Democratic autonomy can be vindicated by, for example, incorporating citizen feedback into public interest determinations during rulemaking. Agencies can staff their internal decision-making bodies with gyroscopic or descriptive representatives. Agencies can speak for, and act on behalf of, the interests of marginalized communities shut out of congressional lawmaking. To the extent that agencies are already required to do these things suggests that they may, at least occasionally, facilitate democratic autonomy better than Congress itself.

B. Interpretation of Agencies’ Organic Statutes

The MQD, of course, is about more than the legitimacy of collective rulemaking outside bicameralism and presentment. It also involves what Congress intended, or might/must/should have intended, when it ascribed policymaking power to administrative agencies via ambiguous statutes. Under a trustee model, the question of congressional delegation is instead a question of authorization. Further, the trustee model suggests that there is little reason to conclude that innovative administrative policy that responds to circumstances unanticipated by statutory language is prima facie illegitimate. Under the model, an agency is not, in fact, an agent of Congress in the traditional sense. Given its decision-making autonomy, it is not expected to wait upon further orders from a commanding principal. Instead, as trustees, agencies are bound to act on behalf of the public and in its interest. Consequently, the agency must orient itself not towards what its


authorizer might have intended in any particular situation but instead, towards the best interests of its beneficiary. Rather than extrapolating hypothetical congressional intentions from archives and old transcripts, the trustee model instead asks: (1) whether the agency is authorized to undertake the action; and (2) whether the agency in good faith took that action in the public interest, subject to the constraints set forth above.

The question of authorization is resolved, under contemporary practice, by legislation—the organic statutes that create agencies and the statutes that constrain or define their authority. This authorization procedure, as mentioned above, respects the idea that authority derives from the people in two ways. First, by incorporating democratic presence indirectly via the election of lawmakers and second, by virtue of the public debates that may shape the statute’s substantive content. The output of legislation, in other words, is the product of process that vindicates democratic autonomy. As a result, when there is a question about the scope of an agency’s authority, the answer is a question of statutory interpretation.

As noted below, however, statutory text is often insufficiently determinate to permit uncontroversial applications. Courts will therefore reach to various canons of statutory interpretation when clarifying the scope of authority granted to administrative agencies. Divining the meaning of a statute using history and purpose is, however, hazardous business. To be sure, scholars and jurists that examine congressional intent regularly discover not consensus, but instead, only frustrating deadlock. Interpreting statutes according to the intent of Congress involves historical investigations skewed by the reviewer’s own biases and values. Courts

436 Justice Kagan, in Gundy v. United States, 139 S. Ct 2116, 2126 (2019), recently laid out the rule for statutory interpretation when determining the scope of authority granted to administration: “[R]easonable statutory interpretation must account for both the specific context in which . . . language is used and the broader context of the statute as a whole . . . beyond context and structure, the Court often looks to ‘history [and] purpose’ to divine the meaning of language.” (quoting Maracich v. Spears, 570 U.S. 48, 76 (2013) and citing Nat’l Broad. Co. v. United States, 319 U.S. 190, 214, 216 (1943)). Deacon and Litman argue that the “new” major questions doctrine is not a doctrine of statutory interpretation, but a substantive canon forbidding congressional delegation for certain issues. Deacon & Litman, supra note 17, at 1040–41.

437 See infra notes 444–446 and accompanying text.

438 See, e.g., West Virginia, 142 S. Ct. at 2631 (Kagan, J., dissenting) (critiquing the Court for ignoring “normal rules of statutory interpretation” including linguistic canons and legislative history) (citing Jama v. Immigr. & Customs Enf’t, 543 U.S. 335, 341 (2005)); Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (holding words in a statute must be read in context and with a view to their place in the overall statutory scheme, with common sense as to the manner in which Congress is likely to delegate); MERRILL, supra note 55, at 75 (explaining that the Chevron court meant for Chevron “step one” to include interpreting the implementing statute according to the relevant text and legislative history).


440 Courts certainly, whether an issue is sufficiently “major” is so indeterminate that judges will necessarily import controversial value judgments into their reasoning. Deacon & Litman, supra note 17, at 1012–13.
lack expertise in historiography and partisans tend to cherry-pick auspicious portions of the congressional record for their own purposes.\textsuperscript{441} Such is hardly a stable foundation on which to determine the authority of consequential government institutions.\textsuperscript{442}

The trustee model provides further reason to untether agency authority from congressional intent. If the people have no intentions that might be codified, Congress certainly cannot transcribe it into agencies’ organic statutes.\textsuperscript{443} Under the transmission belt model, the only reason to credit Congressional intentions with the power of law is because Congress is sovereign, and Congress is sovereign only because it faithfully reproduces the intentions of a fictional popular sovereign. If the transmission belt model is false, though, courts have less reason to weigh Congress’s intent heavily when interpreting agencies’ implementing statutes. Instead, it creates a space for the use of other interpretive methods. The treacherous exercise of gleaning legislative intentions from the historical record might be side-stepped.

Accordingly, the trustee model is superficially textualist—at least insofar as it distances itself from the judicial examination of congressional intent and legislative history.\textsuperscript{444} But the text is not always so clear, and interpretation may require “amending statutes outside the legislative process reserved for the people’s representatives.”\textsuperscript{445} The trustee model suggests one way to bring democratic presence to the interpretation of agencies’ authorizing statutes. Namely, the agency can interpret its own authorizing statute with loyalty, care, and good faith as it does its best to act in the best interests of the people. This, of course, is something close to the Chevron doctrine.\textsuperscript{446} Under Chevron, an agency must make rules in accordance with any “unambiguously expressed intent of Congress”\textsuperscript{447} contained in the statutes that an agency is charged with administering. But if the authorization within that statute is silent or ambiguous, an agency is free to make reasonable interpretations (or “permissible constructions”) of the

\textsuperscript{441} One example of the conscription of cherry-picked testimony is found when comparing Ilan Wurman, Nondelegation at the Founding, 130 YALE L.J. 1490 (2020), and Julian Davis Mortenson & Nicholas Bagley, Delegation at the Founding, 121 COLUM. L. REV. 277 (2021).

\textsuperscript{442} The impossibility of identifying a coherent congressional intent is illustrated sharply by the ICC Act of 1887, described by Rabin as internally incoherent and piecemeal. Robert L. Rabin, Federal Regulation in Historical Perspective, 38 STAN. L. REV. 1189, 1207 (1986).

\textsuperscript{443} The question of congressional intent is, in any event, usually an epistemic one that requires identifying the institution most likely to find an accurate answer: a court, or the agency itself. The answer is likely to be the agency because, inter alia, agencies are often involved in drafting the statutes that govern them.

\textsuperscript{444} See, e.g., Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731, 1738 (2020) (“This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President.”).

\textsuperscript{445} Id.


\textsuperscript{447} Id.
scope of its authorization. Thus, a teacher authorized by a parent to teach science to a child should teach science: geology, biology, chemistry, and the like. The teacher should not teach comparative literature. But if the scope of their authority is unclear, the teacher enjoys some autonomy to determine their scope in a manner that serves the interests of the beneficiary so long as they do so with care, loyalty, and good faith. As previously mentioned, a teacher might not know whether “science” includes a unit on evolution, given its controversial status under certain religious doctrines. But as a trustee, they would be free to determine either way, so long as they make their decision after fulfilling the required constraints of loyalty, care, and good faith. Note, however, that this two-step process has very little to do with what Congress intended (or must have intended) when it drafted the ambiguous statutory provisions. Nor does it have anything directly to do with the trustee’s “institutional competence.” The trustee’s power is not legitimate solely because she can make objectively better decisions than can the parent. Its legitimacy is not based upon technocratic expertise. Instead, this two-step test has everything to do with an agency fulfilling its duties as a public trustee.

This approach is more appealing than delegating to courts the duty of statutory interpretation, especially if the purpose of interpretation is, au fond, to limit arbitrary decision-making while preserving the democratic legitimacy of the law. Agencies are better placed to interpret statutes in a manner that (1) serves the public good in a way that (2) recognizes the interests of many. Courts, of course, prioritize the interests of litigants sub judice and can deploy no expertise in determining their decision’s social knock-on effects. Furthermore, given public involvement not only in their authorization procedures, but also at least occasionally in their public interest determinations, agency policymaking makes the people present in ways that courts cannot.

Nor is there always a compelling reason to wait for Congress to elaborate upon the meaning of an ambiguous statute. First, when a court forces an agency to wait for further congressional orders, it often swaps the agency’s interpretation for its own by holding that what is clear to the agency is not, in fact, clear to the court. Second, Congress’s own authority is not sui generis, but relies instead upon its own capacity to vindicate democratic autonomy. And, as explained above, it has no monopolistic claim to speak on behalf of the people. Administration likewise carries its own democratic credentials. Finally, agency inaction may be the least democratic action.

448 Id. at 843, 866.
449 Id. at 864.
450 Emerson, supra note 16, at 2022. See generally NOVAK, supra note 36.
451 MASHAW, supra note 58, at 70.
452 Mortenson & Bagley, supra note 441, at 283–84.
available because it preserves a status quo that many citizens might find untenable.\textsuperscript{453}

Those worried about agencies’ democratic legitimacy when they promulgate rules under their authority should not look first to the courts. Instead, agencies can improve democratic autonomy by expanding upon the APA’s notice and comment rulemaking standards\textsuperscript{454} to make them more inclusive and representative.\textsuperscript{455} As trustees, they can educate and solicit feedback from their beneficiaries, i.e., the communities affected by their regulations—just as they once did under formal, adjudication, like in Interstate Commerce Commission ratemaking.\textsuperscript{456} Courts might then award these democratizing decisions by giving more deference to determinations reliant upon such inclusive procedures. To illustrate: when an agency considers whether the public interest requires generation-shifting regulations for power plants, it must answer a mixed question of value and fact.\textsuperscript{457} The agency must decide in the people’s interests by weighing costs and benefits, each informed by empirical and scientific data. A court could give the agency’s final determination more or less deference depending upon (1) the amount and diversity (representativeness) of democratic feedback considered and addressed; (2) the weight, reliability, and persuasiveness of the evidence it relied upon; and (3) whether certain partial interests were overrepresented or otherwise skewed its public interest determination.\textsuperscript{458}

\textsuperscript{453} See Stewart, supra note 6, at 1736 (observing that under this framework a stranger would not be permitted to thwart agency action, even if it violated a governing statute, because it would “stifle creative compromise with the dead hand of past legislatures. Given the heavy demands on legislatures and their limited capacities, one cannot expect that statutes will be constantly amended to reflect changing conditions and new constellations of interests. The abstract concern for vindicating the bare words of statutes seems too attenuated a justification for disturbing mutually satisfactory arrangements struck by all of the relevant public and private interests.”).

\textsuperscript{454} Examples of such expansions include the National Environmental Policy Act (additional procedures for rules affecting the environment) and the Regulatory Flexibility Act (for small business).

\textsuperscript{455} At present, they apply only to formal rulemaking under § 553. They can be expanded (1) to cover more types of agency decision-making and (2) to intentionally incorporate a broader, more diverse array of voices by mandating representative input from constituencies impacted by the action, for example. See, e.g., Bagg, supra note 355, at 239–40. For a thoughtful discussion of the impact of citizen participation in agency action, see Mark Seidenfeld & Janna Satz Nugent, “The Friendship of the People”: Citizen Participation in Environmental Enforcement, 73 GEO. WASH. L. REV. 269 (2005).


\textsuperscript{457} See, e.g., O’Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 507–08 (1951) (deferring to the agency’s interpretation of statute, although a mixed question of value and fact, given its expertise and experience); Nat’l Lab. Rel. Bd. v. Hearst Publ’ns Inc., 322 U.S. 111, 130–31 (1944) (“Hence in reviewing the Board’s ultimate conclusions, it is not the court’s function to substitute its own inferences of fact for the Board’s, when the latter have support in the record.”).

\textsuperscript{458} For examples of sliding-scale deference given by courts depending upon the persuasiveness of the agency’s reasoning, see Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) and Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000). Of course, there is a trade-off here. The more a court is permitted to evaluate an agency’s procedures, the more likely it is that the Court will substitute its own value judgments for those of the agency—even if it can camouflage those judgments as an evaluation of procedure. See, for example, the transmogrification of Overton Park’s “hard look” review under the arbitrary and capricious standard of review into a standard of substantive reasonability. Nat’l Lime Ass’n v. Env’t Prot. Agency, 627 F.2d 416, 453 (D.C. Cir. 1980); Motor Vehicle Mfrs. Assn. v. State Farm
C. Judicial Review of Agency Action

Despite the significant autonomy given to the agency under a trustee model, its discretion is not utterly unconstrained. It must still act in loyalty, care, and good faith as it serves the interests of its public beneficiary. Accordingly, there is space for judicial review of agency action beyond the textual interpretation of their authorizing statutes. As it happens, much extant legal doctrine addressing the scope of judicial review overlaps with what a trustee model would recommend.

For example, the APA allows a reviewing court to examine an agency’s factual findings and discretionary decision-making to determine whether they are “arbitrary, capricious [or] an abuse of discretion.” Courts will accordingly determine whether the agency examined relevant data and “within the bounds of reasoned decisionmaking,” made “a rational connection between the facts found and the choice made,” and did not act “counter to the evidence before the agency.” These legal standards resemble what one would expect of a trustee making decisions with care and diligence. A trustee should not draw factual conclusions recklessly. They should rely upon generally acceptable epistemological methods. A trustee model, however, might, like Justice Breyer in Department of Commerce v. New York suggests, give more credit to the factual assumptions and predictions of career experts over those of political appointees with no special background in the subject matter.

Furthermore, the trustee model might accept as satisfactory an explanation that directly incorporates political values. Americans, after all, disagree in good faith about the values their government should endorse. Indeed, a trustee model might counsel agencies, when exercising their decision-making discretion, to staff their decision-making bodies and offices with gyroscopic or descriptive representatives to increase the diversity of values ventilated during decision-making. It also suggests that the record


Id. at 2585 (Breyer, J., concurring in part).

Id. at 2592.

Id. at 2594.

Here, I distinguish political “values” from political “reasons” because, although the boundary is sometimes unclear, the latter may serve strategic purposes related to an individual politician’s reelection prospects and thus may be less likely to serve the public beneficiary’s interest. Meaning it may be self-regarding and not other-regarding. For excellent discussions of the benefits of making space for political values in agency decision-making, see Kathryn A. Watts, Proposing a Place for Politics in Arbitrary and Capricious Review, 119 YALE L.J. 2 (2009); Staszewski, supra note 40.

For scholarship exploring the possibility of interest group representation in rulemaking, see generally, e.g., Cass R. Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29 (1985); Stewart, supra note 6, at 1742–43.
upon which agencies make their decisions ought to incorporate data addressing all citizens whom the decision might impact.\textsuperscript{466} Of course, under extant caselaw, even courts skeptical of political influence “may not set aside an agency’s policymaking decision solely because it might have been influenced by political considerations or prompted by [a presidential administration’s] priorities.”\textsuperscript{467} A trustee model, however, would place such policy reasons on firmer doctrinal footing. Nevertheless, both doctrine and the trustee model suggest that those policy reasons cannot override a trustee’s duty to make informed decisions guided by research. The data upon which the policy decision cannot be “contrived” or massaged to support a foregone conclusion.\textsuperscript{468} The conclusion, no matter how politically controversial, should be held in good faith and not upon gut instinct. A trustee model might push even a bit further. It counsels a court to consider whether decisions were self-interested in some way. It might ask questions like: was there any quid pro quo involved? Was the policy a direct result of a request made by an important campaign donor? Does a relevant agency official benefit personally from the decision?

While the standards of judicial review under the trustee model are largely similar to existing doctrine, the trustee model gives different reasons for it. The former goes to the fulfillment of duties. The latter goes to the necessity of providing “genuine justifications for important decisions” that can be “scrutinized by courts and the interested public.”\textsuperscript{469} The former queries whether the trustee is acting in the best interest of the public. The latter attempts to facilitate substantive judicial review. The trustee model, furthermore, suggests that a realignment of evidentiary burdens might be appropriate. It suggests that only if a party can show that the agency violated its duties of loyalty, care, and good faith should the court be allowed to revisit the substance of the agency’s decision.\textsuperscript{470} Opponents of agency action

\textsuperscript{466} Perhaps through an expansion or revision of the Negotiated Rulemaking Act, 5 U.S.C. §§ 561–570 (permitting an advisory group of important constituency interests to form a consensus on a proposed rule in lieu of normal rulemaking procedures). For a critical analysis, see Mark Seidenfeld, \textit{Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation}, 41 WM. & MARY L. REV. 411, 446–51 (2000).


\textsuperscript{468} Id. at 2576.

\textsuperscript{469} Id. at 2575–76.

\textsuperscript{470} This is intentionally a restatement of the business judgment rule under state corporate law doctrine. Both corporate law and constitutional law already share a genealogy and a history. See, e.g., David Ciepley, \textit{Is the U.S. Government a Corporation? The Corporate Origins of Modern Constitutionalism}, 111 AM. POL. SCI. REV. 418, 418–19 (2017). I draw these standards of review from, e.g., Gagliardi v. Trifoods Int’l Inc., 683 A.2d 1049 (Del. Ch. 1996); Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985) (articulating the duty of care and the business judgment rule presumption); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954, 958 (Del. 1985) (applying intermediate scrutiny); and Valeant Pharms. Int’l v. Jerney, 921 A.2d 732, 745–46 (Del. Ch. 2007) (describing highest scrutiny—the board must show the transaction is substantially fair). For a fiduciary take on constitutional law, see, e.g., GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING
might be required to demonstrate, for instance, that the agency relied on questionable methods, failed to take the requisite time and effort to make an informed decision, were engaged in self-interested transactions, or neglected to consider significant impacts on constituents. In turn, a higher standard of judicial review, like the one offered by *Skidmore v. Swift & Co.* might be appropriate if there is reason to suspect the independence or diligence of agency decision-making. A court would then uphold the decision based upon the agency’s “power to persuade.”

D. Presidential Accountability

The trustee model, finally, provides a new way to look at the presidential removal power. As argued above, the trustee model is comfortable with policy and political values shaping agency decision-making. Further, if democratic autonomy is to mean anything, the elections that yield the appointment of trustee agents should mean something too. Presidents seated after a national election should therefore enjoy the power to nominate agency heads that will pursue policies—even controversial ones—that they believe in good faith to be in the public interest. The trustee model, however, is altogether uncomfortable with permitting the President to set policy simply upon his say-so. Notwithstanding the President’s unique position as the sole official elected “by the entire Nation,” theories of democratic representation do not lend him any monopoly on articulating what exactly it is that the sovereign people want. An agency decision is not made democratically legitimate simply because a President can fire their officials at will. Nor is it legitimate, as a transmission model might suggest, because they gave specific marching orders to the Office of Information and Regulatory Affairs (OIRA) or some other centralized body with influence over all agency policymaking. Agency policymaking likewise does not gain democratic legitimacy simply because the President may threaten to fire officials unless they make the decisions he prefers. Additionally, because trustee representatives are meant to act in the public interest, electoral incentives might distort their decision-making. They might cater towards

---

471. 323 U.S. 134, 140 (1944).
473. See supra notes 33–34 and accompanying text.
partial, partisan interests solely to advance their careers and not because they are carrying out their authorized mandate in good faith. As a result, the trustee model recommends a few changes to removal jurisprudence.

First, some agencies are authorized to represent interests that are at odds with the President’s agenda. For example, even though then-President Bush endorsed deregulatory policies, the duties of the EPA under the Clean Air Act nonetheless include protecting the public health and welfare from hazardous air pollutants. In this instance, if the agency can only fulfill its duties through regulation, it should regulate—withstanding any countervailing pressure from the White House. In any event, the President, like the EPA, has a duty to faithfully execute the laws. The EPA, as a trustee, should refrain from following faithless orders. Moreover, if it is likely that a president might be regularly tempted to staff an agency with personnel hostile to the agency’s mission, the trustee model would support a decision to make appointments immune from presidential control. For example, if Congress suspects that a president might be tempted to tap the alumni of major investment banking firms to head the CFPB, it perhaps ought to make its directors removable only for cause.

Second, with regard to lower-level agency appointments, very little reason exists to afford the President direct removal power. The spoils system, in fact, incentivizes trustees to disregard their duties of care, loyalty, and good faith. It motivates civil servants to act in their own self-interest, not that of the public. Accordingly, the trustee model provides additional support for Congress’s power, under Morrison v. Olson and United States v. Perkins, to provide job protections for inferior officers with narrowly defined duties. Unlike Morrison and Perkins, though, the trustee model would not confine such protections only to those officers whose mandates are so limited that they pose no threat to executive policymaking power. The reason to curtail executive control is instead the need to ensure agency officials have sufficient autonomy to act in the public interest.

Finally, recall that the trustee model suggests that an agency’s public interest determinations will achieve more democratic autonomy if representatives from relevant interest groups can first articulate their concerns. Of course, it is not impossible for a presidency to incorporate this kind of representation. White House and Cabinet staff can, and likely ought to, include diverse viewpoints. The Biden Administration achieved historic,

---

481 116 U.S. 483, 484–85 (1886).
482 Morrison, 487 U.S. at 691.
if imperfect, diversity in its appointments. The White House might also use its authority to direct agencies to improve the representativeness of their decision-making procedures by actively soliciting the input of marginalized communities. Recently, it issued guidance, through OIRA, to do just this. But it may be better to institutionalize representation through permanent or semi-permanent agency appointments. For example, members of the National Labor Relations Board are appointed to staggered five-year terms to help ensure that the views of both Democratic and Republican parties are present. The five Commissioners of the FTC are likewise appointed to staggered terms, with no more than three from the same political party. Under the trustee model, however, the reason to protect these appointments from Executive control is not because their mandates are quasi-judicial or quasi-legislative and therefore no threat to executive power. The reason is to protect citizens’ democratic autonomy by ensuring that administrative decision-making incorporates representative views in its public interest determinations.

CONCLUSION: THE IMPORTANCE OF MAKING A POSITIVE CASE FOR THE ADMINISTRATIVE STATE

It is unlikely that courts hostile to administrative policymaking will take the public trust held by administrators seriously. Instead, the full impact of the courts’ turns to the nondelegation and major questions doctrines will continue to unfold. It is nonetheless worthwhile to consider whether advocates of the administrative state have made the strongest case possible for its legitimacy. All too often, their arguments in favor of agency policymaking autonomy stand on either inherently contestable historical credentials or inherently defeasible instrumental rationales. Some scholars debate whether and to what extent founding-era politicians embraced Congressional delegations to agencies. Others insist that contemporary political institutions, which must govern a complex society, simply would

---

488 Parrillo, supra note 16; Emerson, supra note 16; Mortenson & Bagley, supra note 441; Wurman, supra note 5.
not work without their expertise and discretion. Each line of argument is open to easy attack. There will always be historical sources that support an anti-administration argument, those who insist that complex contemporary governance is itself illegitimate precisely because it requires unlawful administration, and those who argue that the private sector may more easily and efficiently achieve the same goals sought by administration.

As political theorist Bernardo Zacka challenges, if the gap between real and ideal is so very large, it may be because we are not working with the right ideal. If agencies’ legitimacy cannot be supported by the transmission belt model, perhaps we ought to start using another. Presuming that the Constitution is a political document that guides citizens as they arrange their collective life together, there is no reason we cannot. What the text of the Constitution does, at least in part, is constitute a representative democracy. As I have argued, there is every reason to expect that administration will fit comfortably amongst the other branches of our representative government. It may even be helpful to model the relationship between Congress and administration as parts of a unified procedure that houses the collective process of lawmaking. This relationship is not hierarchical, but horizontal, as different institutions interact with each other in ongoing conversation while they each vindicate, in different ways, the norm of democratic autonomy. As explained by Blake Emerson, this is a vision shared by Progressives like John Dewey, Woodrow Wilson, and Frank Goodnow: “an administrative state in which political values would be fleshed out in dialogue between administrators, elected representatives, and the public at large.” In any event, there is a case to be made that government cannot be legitimate without administration. Government and governance are never disconnected. To give citizens the right to participate in collective lawmaking, while denying them the means to implement those

489 E.g., Gundy v. United States, 139 S. Ct. 2121, 2130 (2019) (citing Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)) (“It is wisdom and humility alike that this Court has always upheld such ‘necessities of government.’”); Gundy v. United States, 139 S. Ct. at 2130 (“[I]f SORNA’s delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs.”).


491 U.S. CONST. arts. I, II. For arguments establishing the United States as a representative democracy see, e.g., THE FEDERALIST NO. 14 (James Madison) (“[I]n a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents.”); THE FEDERALIST NO. 35 (Alexander Hamilton) (discussing the effective representation of interests and arguing that “[t]he man who understands those principles [of political economy] best will be least likely to resort to oppressive expedients, or sacrifice any particular class of citizens to the procurement of revenue”); THE FEDERALIST NO. 37 (James Madison) (“The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those [e]ntrusted with it should be kept in independence on the people.”); THE FEDERALIST 68 (Alexander Hamilton) (“It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided.”).

492 CORDELLI, supra note 27, at 199 (making a similar argument).

493 Emerson, supra note 16, at 2061.
laws, is either a fool’s errand or a paternalistic usurpation of power. Even arch-democrat Jean-Jacques Rousseau made space in his utopian democratic dream for policy-making and policy-executing ministers. Further, because constitutional liberal democracy demands not a simplistic model of popular sovereignty, but instead institutions that give citizens a role to play in creating the laws that bind them, there is no good reason to call administration undemocratic. It has plenty of democratic credentials. It is time to start defending administration based upon principled necessity, not with diffident excuses.

494 Cf. Postell, supra note 2, at 169–70 (arguing that progressivism might not have had a coherent philosophy because of its embrace of both administration and institutions of direct democracy).
495 Rousseau, supra note 26, at 49 (“The public force therefore needs an agent of its own to bind it together and set it to work under the direction of the general will, to serve as a means of communication between the State and the Sovereign, and to do for the collective person more or less what the union of soul and body does for man.”).