

The Majoritarian Difficulty

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ABSTRACT. The Supreme Court has rooted recent attacks on the administrative state in its asserted effort to increase democratic accountability, or accountability to elected officials, whether the President or Congress. Daniel E. Walters’s Article, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, posits a different democratic justification for the administrative state, one celebrating rather than dismissing political conflict. Walters does not, however, demonstrate how that vision is compatible with the version of democracy that the U.S. Constitution itself puts forth. This Response fills that gap, highlighting the ways in which the Constitution celebrates aspects of democracy that do not fit neatly within the model of majoritarian elections. Focusing in particular on the jury system, the protections for petition and assembly, and the references to the general welfare, this Response opens space for nonelectoral democratic defenses of the administrative state, including agonism.

INTRODUCTION

Recently, the administrative state has been lambasted as undemocratic and even unconstitutional by a number of politicians, jurists, and scholars, particularly those who identify as originalists.¹ While it may be easy to make claims

1. See, e.g., Jerry L. Mashaw, *Is Administrative Law at War with Itself?*, 29 N.Y.U. ENV’T L.J. 421, 434 (2021) (contending that the kind of presidentialism largely consistent with recent Supreme Court decisions in administrative law “appeals to electoral or aggregate democracy and locates democratic legitimacy in the Office of the President”); Akram Faizer & Stewart Harris, *Administrative Law Symposium Debate*, 8 BELMONT L. REV. 427, 434 (2021) (discussing Steve Bannon’s attacks on the administrative state); Gillian E. Metzger, *The Supreme Court, 2016 Term – Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 42–46 (2017) (discussing constitutional and originalist critiques of the administrative state); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014) (arguing that the Executive’s exercise of the power to bind individuals through administrative law is unconstitutional); Caryn Devins, Roger Koppl, Stuart Kauffman & Teppo Felin, *Against Design*, 47 ARIZ. ST. L.J. 609, 664 (2015) (“The administrative state also poses challenges to democratic rule, as unelected ‘experts’ exercise increasing control over interpretation and implementation of statutes and

about what is not democratic, it is harder to establish what is democratic in the contemporary United States and whether or not the concept of democracy is constitutionally rooted. As Martin Loughlin has argued in his critique of modern constitutionalism, the United States and other constitutional polities are moving toward viewing “the constitution created by an exercise of democratic will” as itself “determin[ing] the very meaning of democracy within that regime.”² Adrian Vermeule has similarly contended that originalists – in his view, ineffectually – attempt to insulate their understanding of constitutional values from extraconstitutional sources.³ To the extent that the predominantly originalist Supreme Court Justices derive constitutional values from the Constitution itself, they would need to ground their assessment of the democratic credentials of the administrative state on a constitutional vision of democracy. Therefore, efforts to defend administrative law that neglect how the Constitution itself constructs democracy do not respond directly to the core of the contemporary critique of the administrative state as undemocratic.

Daniel E. Walters convincingly argues that agonistic democracy can bolster the democratic credentials of the administrative state in his Article, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*. Drawing on the work of political theorist Chantal Mouffe and others, Walters explains that “agonism . . . rejects the unifying assumption of conventional democratic theory that conflict can or should be extinguished in the lawmaking process”; instead, he contends, a democracy gains legitimacy precisely because of “the opportunity to resist settlement when it fails to represent the entire *dêmos*.”⁴ For Walters, agonism – by emphasizing the important role conflict can play in a democracy – better fits the contemporary moment of extreme social conflict and polarization than competing theories such as pluralist, civic-republican, and minimalist accounts.

Walters suggests we need a new theory of why the administrative state is legitimate: not only are existing accounts flawed because they attempt to settle

may only be held indirectly accountable to the electorate via presidential elections.”); *see also infra* notes 10–25 and accompanying text (elaborating on Supreme Court Justices’ recent democratic arguments against the administrative state).

2. MARTIN LOUGHLIN, *AGAINST CONSTITUTIONALISM* 6 (2022).
3. ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* 16 (2022) (“[O]riginalism is . . . an illusion; it proves impossible to avoid interpretation that rests on controversial normative judgments at the point of application, especially in hard cases. The consequence is that even putatively originalist decisions of the Supreme Court turn out to be richly interpretive, richly Dworkinian. They are shot through with implicit and explicit justification in light of claims about political morality – including . . . deference to other institutions based on political role morality.”).
4. Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 *YALE L.J.* 1, 47 (2022).

rather than sustain disagreement, but they also have failed to bolster the administrative state against the view that many aspects of its political independence are not constitutionally authorized. As Walters recognizes, “a major trend in administrative law over the past few decades has been a move toward rendering more administrative decisions subject to direct lines of accountability to elected officials.”⁵

This critique of the administrative state, at least as implemented by the Supreme Court, is rooted partly in constitutional theory claiming to effectuate the original meaning of the text and Founding Era practice. Several ideas have been used to reduce the independence of the administrative state, including the unitary-executive theory and the nondelegation doctrine; both of these claim originalist support.⁶

Lurking within these doctrinal developments is a particular vision of democracy that has captured those critiquing the administrative state as undemocratic. As Walters writes, “The Court’s accountability-based logic [in the administrative context] . . . is essentially a minimalist democratic theory that says that national presidential elections are sufficient to legitimate the administrative state.”⁷ Under this account, competitive (majoritarian) elections are the principal sine qua non for rendering the administrative state legitimate. As a result, the electoral norm (i.e., majoritarian democracy) overshadows other values often taken to justify the administrative state, such as expertise or fairness.⁸

5. *Id.* at 33.

6. For discussions of the role of originalism in unitary-executive theory, see, for example, Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, and Future*, 2020 SUP. CT. REV. 83, 88–99, which discusses the relative merits of originalist and non-originalist justifications for the unitary executive; Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 325 (2016), which states, “With few exceptions, proponents of a hard unitary executive defend their reading of the Constitution on purportedly originalist grounds.”; and SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 1–11* (2015). For treatments of originalist rationales for nondelegation, see, for example, Julian Davis Mortensen & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 288–89 (2021), which highlights the appeal to originalism in the Supreme Court’s nondelegation decisions; and Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021), which defends the nondelegation doctrine on originalist grounds.

7. Walters, *supra* note 4, at 80 (footnote omitted). For a broader account of a minimalist democracy based on competitive elections underlying the administrative state, see Jud Matthews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 609–12 (2016).

8. For an early defense of the administrative state based on expertise, see JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 45–46 (1938). Lisa Schultz Bressman has demonstrated the tension between a majoritarian accountability justification for the administrative state and the goal of achieving nonarbitrary decisions. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462–63 (2003). Kevin M. Stack has similarly fleshed out the conflict between presidential control of the administrative

In an era in which originalism dominates the Court's methodology, the agonistic account can succeed in sustaining the administrative state only if it comports with the Constitution's original meaning. But if majoritarian elections were the exclusive mechanism that the Framers envisioned for enshrining democracy in the Constitution, an agonistic justification for bolstering the democratic credentials of the administrative state would be incorrect under an originalist view. Walters's Article does not answer originalists' critique of the administrative state; it likewise does not address the argument, originalist or otherwise, that the relevant account of democracy must derive from the Constitution itself. This Response helps fill that void by beginning to survey the multiple forms of democracy beyond electoral processes that the Constitution incorporates. In doing so, it reconstructs a broader vision of the understanding of democracy internal to the Constitution than contemporary originalists have espoused.

In earlier work, I have argued that agonism in constitutional interpretation is consistent with and perhaps even required by the diversity of original constitutional meanings and the Framers' acknowledgement of that diversity.⁹ This Response further contends that originalists have been wrongly captured by a vision equating electoral majoritarianism with democracy. Instead, I maintain, the Constitution opens up other democratic visions, largely through clauses that have been relatively neglected by jurists and scholars. Unseating the exclusivity of majoritarian elections within constitutional conceptions of democracy is a prerequisite to embracing other democratic theories of the administrative state, including the agonistic one that Walters so persuasively puts forward. Contemporary critics of the administrative state provide an account of democracy that not only would lead today to undesirable results, such as the evisceration of the administrative state, but also does not accurately describe the Founding Era vision of democracy that these critics purport to uphold.

Part I treats the several ways in which originalists have taken aim at the administrative state based on an exclusively electoral view of democracy. I argue that the Constitution itself embeds other possible versions of democracy, one of which – democracy by lot, or sortition – I examine in Part II. Part III then turns to the mechanisms the Constitution provides for giving the people a democratic voice outside of the electoral process, both individually and collectively. Finally, Part IV looks to the Constitution's invocation of "the general welfare" as a guiding principle for democracy that would unseat an exclusively majoritarian vision. Taken together, these aspects of the Constitution suggest a more capacious original vision of democracy than one captured by majoritarian elections alone. In doing so, they clear the way for Walters's agonistic justification of the

state and its ability to promote the rule of law. Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1997 (2015).

9. Bernadette Meyler, *Accepting Contested Meanings*, 82 FORDHAM L. REV. 803, 818 (2013).

administrative state. Furthermore, some constitutional features particularly support the kind of agonistic account that Walters has furnished.

I. ORIGINALIST AND ORIGINAL UNDERSTANDINGS OF DEMOCRACY

In the late twentieth century, Justices on the U.S. Supreme Court began to accuse the Court itself of being undemocratic. As Justice Scalia famously said, “While the present Court sits, a major, undemocratic restructuring of our national institutions and mores is constantly in progress.”¹⁰ Accusations against the administrative state soon followed. Justice Thomas, for example, referred to the administrative rulemaking process as “inherently undemocratic and unaccountable.”¹¹ Through critiques like this, Scalia and Thomas took up the problem Alexander Bickel had diagnosed as the “countermajoritarian difficulty” and discovered it widely across the unelected officers of the federal government.¹²

Several recent cases exemplify how the Supreme Court has restrained aspects of the administrative state in the name of democratic control, whether provided by Congress or the President. The Supreme Court’s decision in *West Virginia v. Environmental Protection Agency (EPA)* offers an apt example of the former. In that case, the Court relied on the recently minted “major questions doctrine” to strike down the EPA’s effort to implement the Clean Air Act in a way that would reduce the use of coal-powered plants to generate electricity.¹³

Justice Gorsuch’s concurrence (joined by Justice Alito) elaborates upon the major questions doctrine and relies implicitly on a theory of exclusively electoral democracy. Gorsuch defines the “major questions doctrine” as follows: “[A]dministrative agencies must be able to point to ‘clear congressional authorization’ when they claim to make decisions of vast ‘economic and political

10. *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 710 (1996) (Scalia, J., dissenting).

11. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1929 n.13 (2020) (Thomas, J., concurring in part).

12. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962). Bickel’s work sparked a wealth of commentary and critique too vast to catalogue completely here. For some examples, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361 (2008); Matt Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759 (1997); and Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997).

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

significance.”¹⁴ He then sets out a typology of instances in which the major questions doctrine would likely apply. First on the list is “when an agency claims the power to resolve a matter of great ‘political significance’”;¹⁵ in explaining this set of cases, Gorsuch worries that an agency might “‘work [a]round’ the legislative process to resolve for itself a question of great political significance.”¹⁶

The desire to tether agencies to the electoral process lies in the background of this statement but becomes more explicit in Justice Gorsuch’s conclusion. There, he writes that “the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people’s representatives.”¹⁷ Thus, although it is partly rooted in a structural separation-of-powers framework, the major questions doctrine also aims to tie the administrative state more closely to the work of elected legislatures.¹⁸

On the presidential side, much ink has already been spilled to justify the President’s unitary control of the administrative state through the unitary-executive doctrine. As Steven G. Calabresi wrote almost thirty years ago, “[T]he President is unique in our constitutional system as being the only official who is accountable to a national voting electorate and no one else. . . . [T]his constitutes the President’s unique claim to legitimacy.”¹⁹

In recent cases involving presidential control over the administrative state through appointment and removal, some Justices have explicitly emphasized the democratic basis for the unitary executive. Justice Gorsuch similarly concurred in *United States v. Arthrex*, which invalidated under the Appointments Clause the unreviewable authority of administrative patent judges.²⁰ There, he wrote:

14. *Id.* at 2616 (Gorsuch, J., concurring) (quoting *id.* at 2609 (majority opinion)).

15. *Id.* at 2620 (quoting Nat’l Fed’n of Indep. Bus. (NFIB) v. OSHA, 142 S. Ct. 661, 665 (2022)).

16. *Id.* at 2621 (quoting *NFIB*, 142 S. Ct. at 668 (Gorsuch, J., concurring)).

17. *Id.* at 2626.

18. Others have also noted that the major questions doctrine is rooted partly in an account of democracy. See Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2025 (2018) (“The broader normative justification for the major questions doctrine is to reinforce democratic legitimacy. The doctrine presumes that democracy will be enhanced if administrative agencies do not make important value choices.”); see also Justin Walker, *The Kavanaugh Court and the Schecter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 926 (2020) (arguing that the decisions of many conservative Justices on the current Court are motivated by principles of democratic accountability).

19. Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 59 (1995); see also Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1092-94 (2013) (discussing in detail the arguments for and objections against presidential administration from a democratic-accountability perspective).

20. 141 S. Ct. 1970, 1985 (2021).

“Without presidential responsibility there can be no democratic accountability for executive action.”²¹

Chief Justice Roberts employed similar rhetoric in *Seila Law LLC v. Consumer Financial Protection Bureau*, where the Court struck down the for-cause restriction on the President’s power to remove the director of the Consumer Financial Protection Bureau.²² Writing for the majority, he explained:

To justify and check [the extensive authority of the President] – unique in our constitutional structure – the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President’s political accountability is enhanced by the solitary nature of the Executive Branch, which provides “a single object for the jealousy and watchfulness of the people.” The President “cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,” because Article II “makes a single President responsible for the actions of the Executive Branch.”²³

This insistence that the President is “the most democratic and politically accountable official in Government” underlies most claims for broad presidential power over the administrative state.

Juxtaposing the Court’s statements about the requisite legislative authorization for administrative action with the presidential roots of administrative authority suggests a tension between anchoring the democratic credentials of administration to Congress versus the President. Blake Emerson has recently unpacked the conflict, writing that “the conservative Justices invoke democracy in one of two ways, without acknowledging that a fair accounting of democratic impacts requires consideration of both”; in the removal context, they rely on presidential elections, and in the area of nondelegation, they invoke congressional authorization.²⁴ What is significant about both lines of cases, however, is that they treat the electoral process as the only relevant form of democratic participation.

Strikingly, the Justices who have promulgated these views in their extrajudicial writings as well as in their opinions are also some of those most strongly

21. *Id.* at 1988 (Gorsuch, J., concurring).

22. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020).

23. *Id.* at 2203 (2020) (emphasis omitted) (first quoting THE FEDERALIST NO. 70, at 430 (Alexander Hamilton) (Clinton Rossiter ed., 1961); and then quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496-97 (2015)).

24. Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court’s Political Theory*, 73 HASTINGS L.J. 371, 413 (2022).

identified with originalist constitutional interpretation, including Justices Scalia, Thomas, and Gorsuch. Yet many scholars have critiqued the U.S. Constitution precisely because the Framers did not design it as democratic enough from a majoritarian perspective; for example, they constitutionalized the Electoral College, which allows a President who did not win the popular vote to take office.²⁵ Even apart from many Framers' endorsement of republicanism over democracy, the Founding Era understanding of democracy demonstrates that democracy was not associated exclusively – or perhaps even primarily – with majoritarian elections.

Indeed, a number of constitutional provisions – many of which the originalist tradition has neglected – furnish indicia of other Founding Era conceptions of democracy. Such provisions include the references to the “general welfare” in the Preamble and Article I, Section 8;²⁶ the notoriously disregarded Republican Guarantee Clause;²⁷ the power to petition for redress of grievances articulated in the First Amendment;²⁸ the “forgotten” right to assemble;²⁹ the reservation of power to the people as well as the states in the Tenth Amendment with its

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25. See, e.g., Pamela S. Karlan, *The New Counter-majoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2325, 2334-44 (2021) (explaining how the U.S. electoral system itself enables “a shrinking white, conservative, exurban numerical minority to exert substantial control over the national government and its policies”); Ryan D. Doerfler & Samuel Moyn, Opinion, *The Constitution Is Broken and Should Not Be Reclaimed*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html> [https://perma.cc/XJ85-C9K6] (“Starting with a text that is famously undemocratic, progressives are forced to navigate hard-wired features, like the Electoral College and the Senate, designed as impediments to redistributive change.”). The fact that the electoral process has become decreasingly majoritarian in unsettling ways would itself undermine some of the Justices’ democratic critiques of the administrative state. This Response does not, however, take up the majoritarianism of the electoral process (or lack thereof) and instead focuses on the nonelectoral paths for democracy that the Constitution suggests.
26. See generally James T. Kloppenberg, *To Promote the General Welfare: Why Madison Matters*, 2019 SUP. CT. REV. 355 (arguing that James Madison understood the Constitution as a democratic means to advance the common good).
27. U.S. CONST., art. IV, § 4; see also *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 209 (2012) (Sotomayor, J., concurring in part) (referring to the nonjusticiability of the Republican Guarantee Clause).
28. See generally DANIEL CARPENTER, *DEMOCRACY BY PETITION: POPULAR POLITICS IN TRANSFORMATION, 1790-1870* (2021) (arguing that petitioning has had an essential but forgotten role in American democracy); Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538 (2018) (arguing that much of the administrative state grew from the formal petition process).
29. See generally JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012) (arguing that freedom of assembly has been forgotten even though it played a central role in many social movements).

attendant support for popular constitutionalism;³⁰ and the specification of jury trial in the Sixth and Seventh Amendments.³¹ Taken together, these provisions indicate the breadth of Founding Era notions of democracy and the error of confining an originalist account to majoritarian elections.

The remainder of this Response examines some of the most significant versions of democracy that these clauses suggest and how they could modify an account of the administrative state based in a predominantly electoral vision. Some of the clauses, such as the Sixth and Seventh Amendment jury-trial rights, gesture toward incorporating the ancient democratic mechanism of selection by lot or sortition into the constitutional and administrative scheme. Other clauses, such as the First Amendment's Petition and Assembly Clauses, show the importance of amplifying voices excluded from or minimized within the electoral process. Finally, the references to the "general welfare" indicate that government should not be concerned only with those interests that have won in the electoral process but should instead take a broader view of the public interest.

These clauses and the views of democracy they support do not precisely dictate applications to the contemporary administrative state but instead make possible a sphere of democratic justifications that would harmonize with the original meanings of the Constitution.

II. AN ALTERNATIVE TO ELECTION

While democracy today is often seen as synonymous with majoritarian elections, that was not always the case. Another form of democracy, practiced in ancient Athens and elsewhere, entailed selecting officials by lot, or sortition.³² Although the U.S. Constitution never explicitly mentions this procedure, it was not foreign to the Founders, who arguably incorporated it into our constitutional scheme through the jury. Sortition represents a significant democratic alternative to the mechanism of election, and systems that rely on sortition tend to emphasize different aspects of democracy than those implementing majoritarianism.

Early in U.S. history, various politicians exalted the virtues of sortition and attempted to incorporate the procedure more explicitly into the Constitution. Dissatisfied with the party system, an 1849 memorialist proposed a radical

30. See generally Elizabeth Anne Reese, *Or to the People: Popular Sovereignty and the Power to Choose a Government*, 39 CARDOZO L. REV. 2051 (2018) (arguing that courts have neglected the Tenth Amendment as a constraint on state action infringing on popular sovereignty).

31. For an argument that the democratic aspects of the jury are constitutionally guaranteed, see, for example, AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 94-95 (1998) [hereinafter AMAR, *THE BILL OF RIGHTS*]; and Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1189 (1991).

32. See *infra* notes 39-41 and accompanying text.

change to the Twelfth Amendment—selecting the President by lot from the current senators.³³ Selection by lot, the memorialist argued, would ensure that the President would not be beholden to any special interests supporting his election. He would be a “public officer . . . without any motive or obligation to be otherwise than the chief magistrate of the Union.”³⁴

While no evidence suggests that this proposal received serious attention at the time, it was not simply the fanciful musing of an eccentric. Forty years earlier, Senator James Hillhouse of Connecticut had argued for the same approach as part of a suite of reforms designed to alter the nature and power of the presidency.³⁵ And reaching further back to the drafting of the Constitution itself, James Wilson had proposed that a small group of senators who picked a “golden ball” out of a set of balls equal to the number composing the legislative body be charged with electing the President.³⁶ Although Gouverneur Morris and others objected to this method, they mostly complained that the legislature would still have control over the appointment of the Executive.³⁷ Indeed, the day after Wilson’s proposal was tabled, never to be revived, Morris indicated that he approved of lottery even if not the other aspects of Wilson’s scheme: “[H]e could not but favor the idea of Mr. Wilson, of introducing a mixture of lot. It will diminish, if not destroy both cabal & dependence.”³⁸

33. JOHN W. KING, MEMORIAL TO THE STATE LEGISLATURES OF THE UNITED STATES 6 (Cincinnati, Morgan & Overend 1849).

34. *Id.* at 8.

35. JAMES HILLHOUSE, PROPOSITIONS FOR AMENDING THE CONSTITUTION OF THE UNITED STATES 10, 30 (New Haven, Oliver Steele & Co., 2d ed. 1808); see also 1 JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2010, at 235–37 (3d ed. 2010) (describing Senator James Hillhouse’s proposal). While Hillhouse first made his proposal in 1808, he published it in 1830. John Adams critiqued Hillhouse’s initial suggestions, opining that selecting the President by lot from among the Senators would reduce him to a “Doge of Venice.” John Adams, Review of James Hillhouse, Propositions (Apr. 12, 1808), <https://founders.archives.gov/documents/Adams/99-02-02-5237> [<https://perma.cc/X3CE-WEFV>]. James Madison also expressed some trepidations about the published proposal in a letter to Hillhouse even as he acknowledged “the evils incident” to the existing structure of the presidency. Letter from James Madison to James Hillhouse (May 17, 1830), <https://founders.archives.gov/documents/Madison/99-02-02-2045> [<https://perma.cc/U7DS-QKTY>].

36. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 99 (Max Farrand ed., 1911) [hereinafter RECORDS]; 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 360–61 (Jonathan Elliot ed., 1845) [hereinafter DEBATES].

37. DEBATES, *supra* note 36, at 361–62.

38. RECORDS, *supra* note 36, at 113. The Articles of Confederation actually incorporated selection by lot in an elaborate procedure for appointing members of the Continental Congress who would be responsible for adjudicating disputes between the states. See ARTICLES OF CONFEDERATION of 1781, art. IX, para. 2; see also Lochlan F. Shelfer, *Intergovernmental Federalism Disputes*, 50 GA. L. REV. 831, 871–76 (2018) (discussing the resolution of interstate disputes under

Recently, some political theorists have delved further into the history and normative underpinnings of selection by lot, including its uses in ancient Athens as well as in the Florentine republic; a few have even advocated its revival today.³⁹ In doing so, they have emphasized other normative virtues of the practice. In particular, selection by lot could permit an equal distribution of the “probability of achieving power” and “could promote equality in the distribution of offices.”⁴⁰ Various societies throughout history also valued it for its capacity to inhibit factions and its ability to disrupt aristocracy and oligarchy.⁴¹

As Bernard Manin has shown, the members of the Founding generation in the United States should have been aware of lotteries as an alternative to election.⁴² Many of the political thinkers on whom they relied, including Montesquieu, not only discussed lotteries but also deemed them important components

the Articles). A similar procedure was included in the Committee of Detail’s draft of the U.S. Constitution, but it was abandoned in favor of judicial resolution of these disputes. See 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 265-66 (Merrill Jensen ed., 1976) (presenting article 9, section 2 of the draft of the Committee of Detail); Shelfer, *supra*, at 876-84.

39. See, e.g., HÉLÈNE LANDEMORE, *OPEN DEMOCRACY: REINVENTING POPULAR RULE FOR THE TWENTY-FIRST CENTURY* (2020) (advocating for lottocracy as one alternative to contemporary electoral practices); JAN-WERNER MÜLLER, *DEMOCRACY RULES* 47-49, 86-89, 156-58 (2021) (describing historical and contemporary uses of selection by lot and discussing its merits over election); John Gastil & Erik Olin Wright, *Legislature by Lot: Envisioning Sortition Within a Bicameral System*, in *LEGISLATURE BY LOT: TRANSFORMATIVE DESIGNS FOR DELIBERATIVE GOVERNANCE* 3 (John Gastil & Erik Olin Wright eds., 2019) (proposing and evaluating a bicameral legislature in which one chamber is selected through sortition); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 *YALE L.J.* 148, 181-92 (2019) (suggesting that Supreme Court Justices should be rotated by lottery selection from the federal courts of appeals); DAVID VAN REYBROUCK, *AGAINST ELECTIONS: THE CASE FOR DEMOCRACY* 106-15, 138-62 (Liz Waters trans., 2016) (recounting sortition’s revival during the late nineteenth century and proposing a democracy run through “multi-body sortition”); Alexander A. Guerrero, *Against Elections: The Lottocratic Alternative*, 42 *PHIL. & PUB. AFFS.* 135 (2014) (explaining the advantages of lottocracy, such as preventing corruption, producing more descriptively representative officials, and better respecting the ideals of equality); JOHN P. MCCORMICK, *MACHIAVELLIAN DEMOCRACY* 183-84 (2011) (outlining a lottocratic component for a new political system); JACQUES RANCIÈRE, *HATRED OF DEMOCRACY* 33-49 (Steve Corcoran trans., 2009) (explaining why ruling by chance as it occurs through selection by lot is a crucial component of democracy); BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* 8-93 (1997) (detailing the systems that historically employed at least a partial political lottery and explaining their normative attractions).
40. MANIN, *supra* note 39, at 39, 67.
41. *Id.* at 51, 59 (explaining that ancient Italian societies adopted selection by lot to reduce factionalism and entrenchment of oligarchical power); MÜLLER, *supra* note 39, at 51.
42. MANIN, *supra* note 39, at 80 (“In the debates that shaped the United States Constitution, for instance, James Wilson suggested having the President of the United States chosen by a college of electors, who were themselves drawn by lot from among the members of Congress.”).

of a democratic system.⁴³ Indeed, Thomas Paine treats the selection of an executive by lot several times in his book *Common Sense*.⁴⁴ When speculating about how the first king was anointed, Paine presents the options of lottery, election, and usurpation.⁴⁵ Furthermore, he recommended combining lottery with election in choosing the president of the Congress of the new polity. Under this method, a particular colony would “be taken from the whole thirteen colonies by lot, after which . . . the whole Congress [would] choose (by ballot) a president from out of the delegates of that province.”⁴⁶

Given the extensive history of selection by lot and its presence in eighteenth-century political thought, it is somewhat mysterious that the Framers did not more thoroughly contemplate this alternative to election, whether for the presidency or for other offices. Manin suggests that social-contract theory dominated among the members of the Founding generation and, to them, appeared superior to selection by lot.⁴⁷ As he contends, social-contract theory insists upon the consent of the governed and the idea that “what obligates all must have been consented to by all.”⁴⁸ At the time, election may have appeared to furnish a more visible demonstration of consent than a lottery system despite the obvious exclusions of enslaved and Native peoples and women from the electorate. But many scholars have pointed out that social-contract theory rests on a fiction of original consent by the people.⁴⁹ The pervasive exclusions from and distortions of the electoral process, not only historically but also today, suggest that consent remains fictional. Considering these deficiencies of the electoral system, selection by lot may have new appeal.

43. *Id.* at 70-74.

44. THOMAS PAINE, *Common Sense*, in POLITICAL WRITINGS 27 (Bruce Kuklick ed., 1997).

45. *Id.* at 13.

46. *Id.* at 27.

47. MANIN, *supra* note 39, at 83-86 (discussing the then-popular notion that political power must be derived through direct consent).

48. *Id.* at 86. Recent work has emphasized how important a social-contractarian approach was to members of the Founding generation. See, e.g., Jonathan Gienapp, *In Search of Nationhood at the Founding*, 89 FORDHAM L. REV. 1783, 1797 (2021) (“This form of nationalist thinking, which assumed that a national social contract had been forged through the act of independence, emerged swiftly and potently at the Constitutional Convention.”); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 268 (2017) (“The intellectual foundation of Founding Era constitutionalism was social-contract theory.”).

49. See, e.g., MICHAEL ZUCKERT, LAUNCHING LIBERALISM: ON LOCKEAN POLITICAL PHILOSOPHY 230-31 (2002) (explaining first, that the Declaration of Independence relies on social-contract theory but that social-contract theory itself is “in important senses a self-conscious fiction that presents moral and rational truths about politics but not the literal truth about history,” and second, that “the morally binding quality [of governmental authority] is expressed in the notion of a social contract, that is, of consent to authority for the sake of securing rights”).

In any case, despite the lack of explicit deliberation about the selection of governmental officials by lot in the drafting and ratification of the Constitution, the document does enshrine one mechanism for the allocation of political actors at least partly by chance: the jury system. Article III as well as the Fifth, Sixth, and Seventh Amendments constitutionalize the grand and petit juries.⁵⁰ At the time of the Founding, some states – including New Hampshire, South Carolina, Georgia, Massachusetts, and Connecticut – did, in fact, draw jurors by lot from “a panel previously selected by ‘some impartial means.’”⁵¹ Furthermore, jury selection prompted deliberation about democratic practices. Thomas Jefferson, in particular, wrote several letters on the selection of juries by lot or by election; he even drafted a legislative proposal that combined the two methods.⁵² Several decades ago, in a student note, Akhil Reed Amar advocated choosing legislators by lottery and drew an analogy to the jury system.⁵³ There, he suggested that the general historical practice had been to allow “local selectmen . . . to handpick jurors of exemplary moderation and wisdom,” and he located relatively recent twentieth-century roots for the selection of jurors by lot.⁵⁴ Subsequent scholarship, however, has demonstrated that this historical account is inaccurate; the roots of jury selection by lot are even deeper. These recent findings, even as they undercut Amar’s historical analysis, only bolster his normative argument for increasing the use of sortition in a manner consistent with our constitutional scheme. Many have observed that the jury was designed not solely for the benefit of the criminal defendant or civil processes but also to ensure broad democratic

50. U.S. CONST. art. III; *id.* amends. V, VI, VII.

51. Brent Tarter & Wythe Holt, *The Apparent Political Selection of Federal Grand Juries in Virginia, 1789-1809*, 49 AM. J. LEG. HIST. 257, 261 (2007); *see also* 4 WILLIAM NELSON, *THE COMMON LAW IN COLONIAL AMERICA: LAW AND THE CONSTITUTION ON THE EVE OF INDEPENDENCE, 1735-1776*, at 24 (2018) (“Jury panels in Massachusetts were selected by the clerk of court’s sending to each town in the county a writ of venire facias directing the town to select by lot a specific number of inhabitants for jury duty.”).

52. *See* Letter from Thomas Jefferson to James Madison (Oct. 26, 1798), https://www.loc.gov/resource/mtj1.021_0759_0759?st=pdf [<https://perma.cc/756T-RAHN>]; Letter from Thomas Jefferson to John Taylor (Nov. 26, 1798), https://www.loc.gov/resource/mtj1.021_0788_0790?st=pdf [<https://perma.cc/EK9F-6RSH>]; Petition from Thomas Jefferson to the General Assembly of Virginia (Nov. 2 or 3, 1798), <https://founders.archives.gov/documents/Jefferson/01-30-02-0387> [<https://perma.cc/C5L5-6SZC>]; *see also* ARTHUR SCHERR, *THOMAS JEFFERSON’S IMAGE OF NEW ENGLAND* 35 (2016) (“Jefferson appraised [New England’s] custom of directly electing jurors as eminently suitable for his states emulation.”).

53. Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283 (1984).

54. *Id.* at 1287.

participation.⁵⁵ Since juries were constituted partly by chance from among the members of the polity at least in certain jurisdictions, their incorporation into the U.S. Constitution brought with it another, nonelectoral model of democracy.

Procedures for selecting groups by lot along the lines of the jury could be introduced into the administrative state as well. Lawmakers worldwide have undertaken significant efforts to incorporate citizen deliberation into administrative decision-making, measures that resonate with one aspect of the jury system.⁵⁶ Less attention has been devoted, however, to the possibility of selecting bodies within the administrative state through random processes along the lines of the contemporary jury. I have argued elsewhere that the Office of the Pardon Attorney should be reformed to integrate a lay element like a pardon jury to revitalize and democratize federal pardoning.⁵⁷ Other areas of the administrative state could similarly incorporate lay participation.⁵⁸

Incorporating lay participation could also soften concerns about clandestine value judgments underlying agency work. While many aspects of administrative rulemaking rely on technical expertise, technical details can obscure normative judgments.⁵⁹ For example, the decision about whether to prioritize current

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55. See, e.g., AMAR, *THE BILL OF RIGHTS*, supra note 31, at 94-96; ALBERT W. DZUR, *PUNISHMENT, PARTICIPATORY DEMOCRACY, AND THE JURY* 63-83 (2012); LANDEMORE, supra note 39, at 90 (2022).
56. See, e.g., Avery White & Michael Neblo, *Capturing the Public: Beyond Technocracy & Populism in the U.S. Administrative State*, 150 *DAEDALUS* 172, 181 (2021) (“Techniques such as citizen assemblies, participatory budgeting, deliberative town halls, policy juries, and deliberative polling have been employed around the world in a variety of political contexts.”).
57. See Bernadette Meyler, *Transforming the Theater of Pardoning*, 33 *FED. SENT’G REP.* 293, 295 (2021); Bernadette Meyler, *Democratizing the Executive* 6 (Feb. 17, 2013) (unpublished manuscript), https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1159&context=schmooze_papers [<https://perma.cc/6EAE-9R8F>].
58. For a recent discussion of possibilities within federal agencies, see Administrative Conference of the United States, *ACUS Forum on Enhancing Public Input in Agency Rulemaking*, *YOUTUBE* (Dec. 1, 2021), <https://youtu.be/XiEYS-wG7Go> [<https://perma.cc/25J5-9HE6>]. Several scholars have also proposed integrating lotteries into the administrative state. See, e.g., Samuel Bagg, *Fighting Power with Power: The Administrative State as a Weapon Against Concentrated Private Power*, 38 *SOC. PHIL. & POL’Y* 220, 238-40 (2021) (proposing the use of “citizen oversight juries” that would screen administrative decisions for signs of capture); David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 *GEO. WASH. L. REV.* 1458, 1494-1503 (2013) (advocating the use of “administrative juries” or “citizen panels” in agency decision-making); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 *ADMIN. L. REV.* 411, 491-92 (2005) (suggesting using surveys with participants drawn through random sampling to inform the regulatory process).
59. See, e.g., DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE* 17 (2010) (“[B]oth risk assessment and cost-benefit analysis – two essential methodologies offered in support of the claim that public policy making can be reduced to empirical technique – reveal a need for the political community to maintain a skeptical distance from its tools of understanding and evaluation.

economic and social values over the small risk of future catastrophic occurrences like flooding, earthquake, or nuclear war is a normative one.⁶⁰ Likewise, the decision about whether to pardon a particular person may rest not only on an assessment of their guilt or innocence or demonstrated reform but also on a normative judgment about the law under which they were convicted. Walters suggests as much throughout *The Administrative Agon*, arguing that an agonistic model would allow agencies to “make decisions without having to dress them in ostensibly neutral—but in fact value-tinged—reasons for courts to accept them as rational.”⁶¹ If we involved randomly selected citizen-decision-makers in administrative processes, those of us scattered throughout society could better express our voices on matters of urgent public concern. Selection by lot would also tangibly bring into administrative deliberation the kinds of conflictual voices that Walters’s model of agonistic administration highlights.

III. MULTIPLYING VOICES

Among the many virtues of Walters’s agonistic account of the administrative state is its claim to amplify dissenting voices and perspectives.⁶² A reading of the First Amendment that emphasizes all of its clauses similarly illustrates the democratic imperative of bringing minoritarian perspectives into the political process.

Freedom of expression is an essential component of democracy.⁶³ After all, the First Amendment of the U.S. Constitution insists that “Congress shall make no law . . . abridging the freedom of speech.”⁶⁴ And the Supreme Court has extensively reinforced both individuals’ and corporations’ rights to freedom of

In the absence of this distance, questions concerning how the community should behave in the face of uncertain but potentially irreversible threats become obscured by technical assumptions and assessments that do not merit the degree of deference afforded to them.” (footnote omitted)).

60. See *id.* at 87–88. See generally WILLIAM MACASKILL, *WHAT WE OWE THE FUTURE* (2022) (discussing the normative questions raised for policy making by the interests of future generations).

61. Walters, *supra* note 4, at 65–66 (footnote omitted).

62. *Id.* at 70, 77 (explaining that agonism, unlike other accounts, seeks to “search out and voice latent dissenting perspectives” and “amplify[] marginalized voices”).

63. See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (arguing that democracy entails freedom of speech); see also STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY* (2008) (considering the linkage between free speech and democracy in historical context).

64. U.S. CONST. amend. I.

speech under the First Amendment in recent years.⁶⁵ Yet freedom of speech cannot be separated from the freedoms that immediately follow in the text of the First Amendment—“the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁶⁶ These provisions also emphasize how people can make their voices heard, both individually and collectively. But as scholars have demonstrated, these clauses have been neglected relative to free speech.⁶⁷ This neglect has detrimentally affected our conception of our constitutional democracy. It has led to an individualistic notion of freedom of speech as opposed to a vision of collective civic group self-definition; it has also encouraged us to leave the formulation of new ideas about our polity to organized political parties rather than allowing emergent political formations to affect our core conceptions.⁶⁸

As John D. Inazu has demonstrated in *The Forgotten Freedom of Assembly*, the Supreme Court neglected the right of assembly in favor of speech on the one hand and association on the other.⁶⁹ The result, in Inazu’s view, was to “weaken[] group autonomy by suppressing dissent, depoliticizing action, and constraining expression.”⁷⁰ Under this description of the historical trajectory, the Supreme Court restricted the collective development of alternative political perspectives by focusing on a libertarian conception of speech.

Daniel Carpenter’s *Democracy by Petition* makes a similar argument about the Petitions Clause. He claims that the focus on elections has obscured the way in which the Constitution protects emergent voices of the people through enshrining a constitutional right to petition. According to Carpenter:

Absent a quotidian technology linking citizens to their government . . . a democracy founded on elections alone remains an impoverished regime and a dangerous form of rule. No democracy can flourish without institutions that encourage and embed the voices of its people directly and regularly—not just at the time of election—in government and its

65. Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389 (2017) (elaborating on the more and less favored claims within the Supreme Court’s speech jurisprudence); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016) (examining the deregulatory agenda of the Supreme Court’s recent First Amendment jurisprudence).

66. U.S. CONST. amend. I.

67. See *infra* notes 69–72 and accompanying text.

68. See *infra* notes 69–80 and accompanying text.

69. INAZU, *supra* note 29, at 7.

70. *Id.* at 10.

operations In North America, petitioning provided this institutional technology⁷¹

Carpenter demonstrates the ways in which petitioning functioned as a crucial mechanism for those without a substantial voice in the electoral process to make their visions heard. Instead of highlighting legislative majorities, “[p]etition democracy offered another model of aggregation, where numerical minorities could still make a case for quantitative relevance.”⁷²

Maggie (McKinley) Blackhawk has more specifically argued that the Petitions Clause as well as the colonial and U.S. history of petitioning provide a constitutional basis for the administrative state, affirming petitions’ role in supplementing majoritarian processes.⁷³ As she writes, “[T]he petition process provided a mechanism of representation for individuals and minorities not represented by the majoritarian mechanism of the vote. Even the unenfranchised could petition: women, free African Americans, Native Americans, the foreign born, and children turned to the petition process to participate in lawmaking.”⁷⁴ For this reason, she says, petitioning calls into question the model of electoral accountability that the Court has advanced in the nondelegation arena because petitioning “served as a complement to the purely majoritarian mechanism of the vote.”⁷⁵

Neglect of these informal mechanisms for expressing collective voice shows up not only in the disappearance of petition from constitutional consideration but also in the very methodology that the Supreme Court employs to determine the history of popular will. Justice Alito’s opinion for the Court in *Dobbs v. Jackson*

71. CARPENTER, *supra* note 28, at 22.

72. *Id.* at 479. Judith Butler makes a similar point about the importance of mass assembly for “precariously” situated individuals. See generally JUDITH BUTLER, NOTES TOWARD A PERFORMATIVE THEORY OF ASSEMBLY (2015) (arguing that mass assembly can be seen as a provisional version of popular sovereignty). Jill Lepore’s effort to assemble unratified constitutional amendments represents a complementary attempt to give voice to constituencies that were neglected within the ordinary electoral process. See Donna Hunter, *Jill Lepore: Making Amends*, MCCOY FAM. CTR. FOR ETHICS IN SOC’Y AT STAN. (May 25, 2022), <https://ethicsinsociety.stanford.edu/news/jill-lepore-making-amends> [https://perma.cc/UE8F-EHF9].

73. McKinley, *supra* note 28. For other analyses of historical petitions and their role in the development of the modern state, see MICHELE LANDIS DAUBER, THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE (2013); and Kristin Collins, “Petitions Without Number”: Widows’ Petitions and the Early Nineteenth-Century Origins of Public Marriage-Based Entitlements, 31 LAW & HIST. REV. 1 (2013).

74. McKinley, *supra* note 28, at 1547.

75. *Id.* at 1618.

*Women's Health*⁷⁶ overturning *Roe v. Wade*⁷⁷ relied substantially on nineteenth-century state statutes criminalizing abortion.⁷⁸ He adduced these statutes as evidence that a liberty interest comprehensive enough to protect a woman's right to choose an abortion was not "deeply rooted" in American history.⁷⁹ But, as Jill Lepore and others have observed, women generally were not able to vote on these state statutes, all of which were passed before the Nineteenth Amendment was ratified and many of which also preceded women's rights to vote in state elections.⁸⁰ Methodologically, the Court's focus on the results of the legislative process as a way to define the scope of other constitutional rights occludes the parts of the Constitution that think differently about democracy – and that value the petitions of those not fully enfranchised.

Envisioning a democracy responsive to petition rather than exclusively legislative majorities (as Blackhawk most prominently has done⁸¹) could alleviate concerns about a democracy deficit in the administrative state. Such a democracy could avoid eviscerating administrative independence in favor of legislative control along the lines that the current Supreme Court has suggested;⁸² instead, this version of democracy would encourage a porousness of administrative agencies and responsiveness to the input of those whose voices are otherwise neglected within the legislative process. This step would be consistent with Walters's vision of agonistic democracy as "reserv[ing] a place for the excluded and wronged" and "fram[ing] their resistance and insistence on inclusion as an act of democratic politics."⁸³

76. 142 S. Ct. 2228 (2022).

77. 410 U.S. 113 (1973).

78. *Dobbs*, 142 S. Ct. at 2236.

79. *Id.* at 2235.

80. Jill Lepore, *Of Course the Constitution Has Nothing to Say About Abortion*, NEW YORKER (May 4, 2022), <https://www.newyorker.com/news/daily-comment/why-there-are-no-women-in-the-constitution> [<https://perma.cc/U65P-8M3M>] ("Alito, shocked – shocked – to discover so little in the law books of the eighteen-sixties guaranteeing a right to abortion, has missed the point: hardly anything in the law books of the eighteen-sixties guaranteed women anything."); U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

81. See, e.g., McKinley, *supra* note 28, at 1601-05; Maggie Blackhawk, *Lobbying and the Petition Clause*, 68 STAN L. REV. 1131 (2016).

82. See *supra* notes 13-18 and accompanying text.

83. Walters, *supra* note 4, at 76.

IV. IN SERVICE OF THE GENERAL WELFARE

The Preamble to the Constitution articulates “promot[ing] the general Welfare” as one of the purposes of the document.⁸⁴ Article I echoes the phrase when it grants Congress the power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”⁸⁵ The Supreme Court, however, has declined to adjudicate the Preamble and has barely assessed the meaning of Congress’s power to spend in service of the general welfare.⁸⁶ The concept of the general welfare resonates with the idea of the common good, which Walters describes as “[t]he central goal of almost all classical democratic theories.”⁸⁷ He also sees it as the animating principle behind two of the most prominent twentieth-century democratic justifications for the administrative state – the pluralist and republican versions.⁸⁸

Like selection by lot and participation by petition, governing for the general welfare undercuts the primacy of majoritarian elections. Conceptually, we might imagine the general welfare diverging not only from special interests but also from the will of legislative majorities. The general welfare seems to designate a broader and more comprehensive good than that derived from partisan politics. Taking the general welfare as a constitutional framing principle suggests emphasizing the people as a whole within the democratic process instead of simply the majority. Focusing on the general welfare has implications for how rights might be conditioned or limited. It may also reanimate the reasons for rotation in office, which would allow each position holder to envision themselves as if they were on the other side and perhaps thereby better implement the general rather than party or individual welfare.

Several scholars approaching constitutional history and interpretation from divergent intellectual and political perspectives have recently given more weight

84. U.S. CONST. pmb.

85. *Id.* art. I, § 8.

86. *See, e.g.,* *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (“The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of ‘the general welfare.’ In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress.” (citations omitted)).

87. Walters, *supra* note 4, at 21.

88. *See id.* (explaining that for pluralists, what mattered for implementing the common good “was that policy outcomes matched the result of fair competition among the concerned interests in a marketplace for influence”); *id.* at 25 (explaining that republican theorists place “a greater emphasis on a common good that does not reside in the aggregation of the actual preferences of citizens, as it does with pluralist theories, but rather in some ideal notion of the common good”).

to the Constitution's specification of the general welfare as a guiding principle. For example, historian James Kloppenberg has contended that "[t]he purpose of government, at least from the perspective of Adams, Wilson, and Madison, was to advance the common good, or, in the words of the Preamble to the Constitution, to 'promote the general Welfare.'"⁸⁹ For Madison, the general welfare could best be ascertained through deliberation.⁹⁰ Legal scholars have similarly begun to address the general welfare as a guiding constitutional principle. Adrian Vermeule has relied partly on this textual hook in articulating a new theory of "common good constitutionalism," and Jud Campbell has emphasized the significance of the general welfare in his discussions of natural rights.⁹¹

For each of these thinkers, the Constitution's invocation of the general welfare indicates that rights should be interpreted against a backdrop of the common good.⁹² This approach would rule out extreme libertarianism. The comments of Brutus, one of the Anti-Federalists, on the Suspension Clause provides an early example of constitutional construction that prioritizes the general welfare. In several writings, Brutus expressed the view that the common good furnishes the goal of governmental action.⁹³ He interpreted the Suspension Clause in this light, writing that "[t]his clause limits the power of the legislature to deprive a citizen of the right of habeas corpus, to particular cases viz. those of rebellion and invasion; the reason is plain, because in no other cases can this power

89. Kloppenberg, *supra* note 26, at 356.

90. *Id.* at 363.

91. VERMEULE, *supra* note 3, at 39, 62; Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 86-87 (2017). Although Adrian Vermeule connects the classical tradition of the common good with the general welfare, he emphasizes that he does "not advocate a revival of the classical law *because* it is the original understanding." Vermeule, *supra* note 3, at 2.

92. Campbell, *supra* note 91, at 87 ("Individual liberty mattered, of course, and the Framers indeed wanted to insulate politics from the whims of capricious majorities. But the overriding goal of their efforts was to improve representation, not lessen it, and to ensure that the general welfare was the government's paramount concern. The Founding-Era idea of 'natural rights' thus called for judicial deference to legislative judgments, and it favored *broader* governmental power just as much as limits to that power. In short, natural rights called for good government, not necessarily less government."); VERMEULE, *supra* note 3, at 57 ("[W]e would go very wrong to suppose that the natural rights strand of the tradition supported anything like the sort of robust judicial review and scrutiny of legislation we see in the modern caselaw. That is a kind of anachronism, originated after the Civil War by property rights libertarians. Instead the natural rights tradition itself recognized broad scope for public authorities to make reasonable determinations as necessary to balance and reconcile competing natural rights or to override them for the general welfare.").

93. See Brutus No. II (Nov. 1, 1787), in 2 THE COMPLETE ANTI-FEDERALIST 372, 373 (Herbert J. Storing ed., 1981) ("The common good, therefore, is the end of civil government.").

be exercised for the general good.”⁹⁴ Here, Brutus construes the Constitution’s limitation on governmental power not as a further protection for an individual right of habeas corpus but rather as a means of ensuring that the government’s reasons for acting pertain to the common good.

The priority that the Constitution places on the general welfare also recalls some of the virtues of the older model of sortition democracy. As discussed above and as Manin has argued, election imports a form of aristocracy into the polity.⁹⁵ It therefore introduces a division between those who are exalted into elective office and those left behind, one inimical to officials’ considering the general good rather than their class interests. Whereas lotteries like those used in the Florentine republic and elsewhere can dissipate the effect of factions,⁹⁶ elections can enhance the power of factions and lead representatives to prioritize the interests of their own group over the general welfare. Giving more weight to the general welfare as part of the Constitution’s vision of democracy thus simultaneously calls into question the dominance of the majoritarian, electoral model.

To be sure, the Constitution’s support for the general welfare might, on first blush, appear incompatible with agonistic democracy. Indeed, Walters critiques the democratic theories he finds to be the most concerned with the common good—pluralism and republicanism—as sharing an “implicit baseline assumption: that the purpose of democratic institutions is to reduce or ameliorate political conflict over government policy.”⁹⁷ As Walters indicates in his discussion of civic-republican rationales for administration, the most influential of these rationales has tended to “equate” the good—or the general welfare—“with the government action that citizens would want if they had to come to a consensus through real or imagined deliberation about the good.”⁹⁸ Walters demonstrates that the effort to cash out the general welfare has resulted in cost-benefit analysis to “do things that increase net social benefits after considering any social costs”; cost-benefit analysis “is sometimes presented as the only universalizable notion of the common good.”⁹⁹ Although a perspective based in the general welfare can and has been used to justify administrative decision-making democratically, it cannot on its own suffice as the basis for an agonistic model.

94. Brutus No. IX (Jan. 17, 1788), in *THE COMPLETE ANTI-FEDERALIST*, *supra* note 93, at 408, 409.

95. See *supra* note 41 and accompanying text; MANIN, *supra* note 39, at 70-74, 78-79, 145-49.

96. MANIN, *supra* note 39, at 56.

97. Walters, *supra* note 4, at 34.

98. *Id.* at 26.

99. *Id.* at 27.

CONCLUSION

In *The Administrative Agon*, Walters illuminates the stakes of the alleged democracy deficit in the administrative state and suggests that an agonistic conception of democracy can revive the democratic legitimacy of administrative law. However, an agonistic conception of democracy cannot take root until the dominant majoritarian view of democracy is unseated. And the majoritarian view will not be unseated in today's originalist era until originalist research presents alternatives to majoritarianism. As I have begun to show here, the majoritarian vision is a foreshortened shadow of the broader and more multiform vision of democracy embedded in the Constitution. By neglecting many relevant constitutional clauses and narrowing our contemporary ideas about democracy, we have allowed a cropped image of majoritarian democracy to capture us. We should instead explore the broader canvas of democracy that the Constitution reveals. By displacing congressional and presidential supremacy through majoritarian elections, we can create more space to reconcile administration with democracy.

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