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VINDICATING PUBLIC RIGHTS

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Formalist jurists are constructing a new kind of administrative law. In this emerging regime of private prerogative, "private rights" of property and contract receive heightened protection against administrative interference. These rights get special treatment in the form of novel constitutional rules against the delegation of policymaking and adjudicatory authority to agencies, as well as restrictive principles of statutory interpretation. Private prerogative treats economic entitlements as sacrosanct, and therefore grants their holders discretionary control over other people. Administrative power is treated as a generally threatening and often arbitrary imposition that often risks and never protects constitutional rights.

This Article offers a better alternative. It argues for an administrative law of public liberty that is more firmly grounded in the legal materials and more responsive to the requirements of popular sovereignty. Understood as the law of public liberty, administrative law is not primarily about the restraint of governmental power to protect vested economic interests. Rather, administrative law affirmatively protects "public rights"—entitlements held by the body politic that are requisite to republican self-government. These include the people's rights to health, safety, and equality. Such rights routinely and pervasively impinge upon property and contract. While historically anchored in monarchical sovereignty and made actionable in the common law of nuisance, public rights today are anchored in popular sovereignty, recognized by federal statutory law, and implemented by federal regulatory agencies. Agencies are competent to protect these shared political interests where private initiative and ordinary litigation cannot.

Public liberty departs from conventional understandings of administrative law today. Instead of treating agency action as a discretionary exercise of legislative and executive will, public liberty recognizes governmental obligations to protect the essential interests of the polity. This shift has implications for the constitutionally permissible powers of agencies, including their authority to adjudicate or otherwise burden property and contract rights. American public law has traditionally recognized agencies' power to adjudicate these matters where public rights to health, safety, and equality so require. Agency adjudication, on this account, is not justified merely by expertise but by a right of collective self-defense in the face of grave social risks and overweening private power. Furthermore, the argument shows that the courts may not arbitrarily privilege private over public rights with clear statement rules, such as the major questions doctrine, that narrowly constrict legislative and administrative power. In a context of deep jurisprudential hostility to the administrative state, the concept of public rights is essential to the construction of a legal grammar in which citizens and officials can articulate the state's regulatory duties.

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INTRODUCTION

The distinction between "public" and "private," once pushed to the margins of jurisprudence,[1] is now at the center of administrative law. In *Securities & Exchange Commission (SEC) v. Jarkesy*,[2] the Supreme Court held that Congress had violated the Constitution by authorizing the SEC to impose civil penalties for securities fraud in its own administrative tribunals. The Court reasoned that such "matters concerning private rights" had to be adjudicated through jury trial.[3] Despite several long-standing precedents

[1] *E.g.*, Nebbia v. New York, 291 U.S. 502, 536 (1934) ("[T]here is no closed class or category of businesses affected with a public interest[.]"); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 8–13 (1927) (describing legal history of the distinction between "public law" and "private law" and arguing that, in fact, private property involves the exercise of public, or "sovereign" powers); see also Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471–2 (1923) (describing how private property rights authorize coercion by non-governmental parties that is akin to governmental control).

[2] SEC v. Jarkesy, 144 S. Ct. 2117 (2024).

[3] *Id.* at 2132.

admitting administrative authority over such matters,[4] the Court now appears to have laid down a rule against agency adjudication of rights it deems "private." "Public rights," by contrast, remain within the province of administration.[5] After *Jarkesy*, a wide array of administrative adjudications are at risk: agencies such as the Environmental Protection Agency (EPA),[6] the Centers for Medicare and Medicaid Services,[7] the Food and Drug Administration,[8] and many others[9] exercise powers similar to those the Court struck down.

The case is the outcome of long-running developments in conservative legal thought.[10] Supreme Court opinions and formalist scholarship increasingly rely on the distinction between "public" and "private" to argue for limitations on the independent powers of federal regulatory agencies over property rights and contractual relations.[11] The deepening fault line between

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4 *See* Crowell v. Benson, 285 U.S. 22, 50–52 (1932) (holding that an administrative agency may adjudicate "private right[s]" concerning employment relations with only deferential judicial review); Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 450 (1977) (holding that agency may adjudicate civil penalties for statutory violations); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 857 (1986) (holding that agency may adjudicate state-law counterclaims between private parties if implicated in federal regulatory scheme).

5 144 S. Ct. at 2131–2133.

6 42 U.S.C. § 7413(d) (providing that the Administrator of the Environmental Protection Agency may impose administrative penalties up to $25,000 per day of violation of applicable implementation plans); and 40 C.F.R. pt. 22 (describing EPA procedures for imposition of civil penalties).

7 42 C.F.R. pt. 402 (describing provisions for imposition for civil money penalties in administrative proceedings to enforce Medicare and Medicaid rules and regulations).

8 21 C.F.R. pt. 17 (describing Food & Drug Administration procedures for administrative imposition of civil penalties).

9 *E.g.,* 29 U.S.C. § 659 (Occupational Safety and Health Review Commission) 42 U.S.C. § 6303(d) (Department of Energy and Federal Trade Commission); 14 C.F.R. §§ 13.16, 13.18 (Federal Aviation Administration); 15 U.S.C. § 5408(b)(1) (Department of Commerce); 11 C.F.R. § 111 (Federal Elections Commission). How broad the threat is depends on whether the Court treats the imposition of monetary penalties as dispositive and what it takes "common law" or "traditional legal claims" to mean. 144 S. Ct. at 2128, 2136.

10 *See, e.g.*, Axon Enterprises, Inc. v. Fed. Trade Comm'n, 598 U.S. 175, 196 (2023) (Thomas, J., concurring) ("I have grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end.")

11 *E.g.*, Seila Law v. CFPB, 591 U.S. 197, 219, 221-222 (2020) (holding the structure of the Consumer Financial Protection Bureau unconstitutional in part because it "has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses," whereas other agencies with similar structures do not "bind private parties at all" or "bring enforcement actions against private parties"). *See infra* Part I.A for other cases and discussion. The scholarship on private and public rights is vast. *See also* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Model of Administrative Law*, 111 COLUM. L. REV. 939, 972–8 (2011); William Baude,

public and private is an old one, reminiscent of the *Lochner* Era and the classical legal thought of the late nineteenth and early twentieth century.[12] The Court in *Jarkesy* has revived the *laissez-faire* ideology of that era, condemning the SEC's actions to "regulate transactions between private individuals interacting in a pre-existing market."[13] But the current trend is not merely to revive once moribund conceptions of a "private" realm that "pre-exists" the state. Rather, formalist jurists have refashioned the distinction between "public" and "private" into a novel tool to constrict the regulatory powers of government. New rules of constitutional and statutory interpretation make it more costly and presumptively suspect—but not categorically barred—for Congress and the administrative agencies it creates to burden rights of property and contract.

Call this new formulation *private prerogative*. The emerging body of law suggests that, where private rights of property and contract are at issue, administrative powers are strictly limited and subject to searching judicial review.[14] Congress has a freer hand regarding "public rights," such as those involving government-granted privileges, beneficence, or largesse.[15] The

Adjudication Outside Article III, 133 HARV. L. REV. 1511, 1541–2 (2020); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 565–93 (2007) [hereinafter Nelson, *Adjudication*]; Caleb Nelson, *Vested Rights, Franchises, and the Separation of Powers*, 169 U. PA. L. REV. 1429 (2021); Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L. J. 1015, 1020–36 (2006) [hereinafter Woolhandler, *Public Rights, Private Rights*]; Ann Woolhandler, *Public Rights and Taxation: A Brief Response to Professor Parrillo*, 84 U. PITT. L. REV. 1 (2023) [hereinafter Woolhander, *Private Rights and Taxation*]; Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 772, 787 (1986); John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 148–9 (2019); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L. J. 1490, 1555 (2021); Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy, Kisor, *and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 178–81 (2019); Laura Ferguson, *Revisiting the Public Rights Doctrine: Justice Thomas's Application of Originalism to Administrative Law*, 84 GEO. WASH. L. REV. 1315, 1324–28 (2016).

12 *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 47–65 (1998); DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LIBERAL THOUGHT 242–64 (2006).

13 144 S. Ct. at 2136.

14 *See infra* Part I.A.

15 *See* Baude, *supra* note 11, at 1541 (describing a "longstanding principle of Anglo-American law" that article III adjudication is not required when "the government is simply deciding whether to bestow a benefit or privilege, or if the government is grappling only with the scope of a public right"); Nelson, *Adjudication*, *supra* note 11, at 566–68 (describing similar categories of "'public rights'[,]" such as proprietary rights of the government and servitudes held by the public, and distinguishing these from private rights to life, liberty, and property). *See also* John Harrison, *Executive Discretion in Administering the Government's Resources and the Delegation Problem*, in THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 232, 233–4 (Peter J. Wallison & John Yoo eds., 2022). Notably, Harrison argues for a more expansive

result is a significant constriction of the powers of government to coerce economic actors by way of administrative action. But such a loss in public power does not necessarily mean that power, writ large, wanes. Instead, private parties with dominant economic positions enjoy greater coercive capacity over those employees, patients, tenants, and consumers who depend on the controlling party's property for their survival and wellbeing.[16] Private modes of authority then replace those that are democratically authorized; property holders seize sovereignty from the people.

For formalist jurists such as William Baude, protecting private rights against administrative authority provides a "map back to civilization" from the wilderness of twentieth-century public law.[17] In this telling, legal reasoning in the Founding Era and the nineteenth century cleanly separated public from private rights, and gave the highest judicial protection to the latter, thus protecting a sphere of individual liberty from governmental incursion. Legal historians such as William J. Novak,[18] Gregory Ablavsky,[19] K-Sue Park,[20] and Nicholas R. Parrillo[21] have raised significant doubts about the historical credentials of this theory of private prerogative. Nonetheless, it is playing and likely will continue to play a central role in the political

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conception of public right than other formalist scholars, as he characterizes communication and environmental regulation as a licensing scheme over government-owned resources. *Id*. at 249–50, 260–61. Such an approach would nonetheless presumably exclude other mainstays of administrative regulation, such as regulation of the workplace or unfair or deceptive practices in the marketplace.

16 Cohen, *supra* note 1, at 12 ("If . . . somebody else wants to use the food, the house, the land, or the plow which the laws calls mine, he has to get my consent. To the extent that these things are necessary to the life of my neighbor, the laws thus confers on me a power, limited but real, to make him do what I want.").

17 Baude, *supra* note 11, at 1513.

18 *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA 7–12 (1996) (challenging the myth that nineteenth century law separated a private realm of individual freedom from governmental interference).

19 *See generally* Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277 (2022) (arguing that formalist scholarship on public rights has ignored the history of administrative adjudication of private land claims).

20 *See generally* K-Sue Park, *Property and Sovereignty in America: A History of Title Registries & Jurisdictional Power*, 133 YALE L. J. 1487 (2024) (arguing that property in the colonial period and nineteenth century was an instrument of sovereign power, rather than a private realm insulated from it).

21 *See* 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, 1302 (explaining how, in implementing the direct tax of 1798, Congress delegated discretionary rulemaking power over matters implicating core private rights, *i.e.* taxation of real estate.).

project to "deconstruct[]the administrative state."[22] Regulatory agencies that protect health, safety, and welfare regularly straddle the boundary of public and private. They deploy rules, regulations, and orders to place constraints on how private property is used. A serious effort to categorically separate public from private would therefore dismember much of the administrative state.

This Article critiques the law of private prerogative and offers a contrary account of administrative law—one that finds substantial support in the legal materials and is more consistent with the principle of popular sovereignty recognized by the Constitution.[23] Whereas private prerogative guards authority relations based on property and contract against governmental interference, *public liberty* protects the people's shared interests in health, safety, and equality against substantial risks and injuries. Public liberty is an umbrella term for the public rights of the sovereign people, which are grounded in the requirements of republican self-government. These rights do not operate in a separate sphere from property and contract. Instead, they routinely and pervasively regulate, modulate, and even constitute economic relations.[24] Public rights sweep broadly to include rights to clean air and water, to safe and open ways, to just and reasonable terms of access to public utilities, and to the creation and maintenance of egalitarian social conditions. Because public rights are *rights*, rather than merely powers, governmental actors have a *duty* rather than a purely discretionary choice to protect them.[25] Legislative and executive officials hold their legal powers in trust and are obliged to exercise them so as to safeguard the sovereign people's interests.[26]

Public liberty links the constitutional structures of the administrative state with substantive concerns long recognized at common law.[27] Administrative

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[22] Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State,'* WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html [https://perma.cc/Q7C2-5WDW].

[23] U.S. CONST. pmbl.

[24] On the administrative construction of markets and price, see, e.g., William Boyd, *Ways of Pricing and the Challenge of U.S. Energy Law*, 105 MINN. L. REV. 739 (2020).

[25] *See* JOSEPH FISHKIN & WILLIAM N. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY, 4, 21, 73–8, 252–53 (2022) (describing a constitutional tradition of congressional duties to legislate).

[26] *See generally* Katharine Jackson, *Administration as Democratic Trustee Representation*, 29 L. THEORY 314 (2024) (arguing for a fiduciary model of administrative legitimacy).

[27] On the common law foundations of regulatory power in the context of antitrust, see Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 1 (2021).

agencies address the same sorts of collective interests as does the law of public nuisance.[28] The argument here draws from scholars of tort law and public health, such as Leslie Kendrick,[29] David Dana,[30] and Lindsay Wiley,[31] a reinvigorated conception of nuisance as an attractive legal framework to grasp and redress population-level harms. It then deploys this conception of nuisance to reinterpret the purposes and structures of the administrative state. Tort law traditionally has spoken in the language of duties and wrongs, not merely of risk and regulation.[32] Administrative law, by contrast, usually has spoken in the language of positive statutory enactment and the case law that interprets it. Constitutional principles then enter in as negative, procedural constraints on the exercise of governmental power. Little is said about the affirmative constitutional reasons why administrative power should—even must—be put into action. This Article stands administrative law back on its ethical footing, showing that it is concerned not merely with bridling the exercise of power but with enabling government to secure the political community against substantial risks to its wellbeing and integrity. Administrative law translates and elevates the basic normative logic of common law nuisance into our modern "republic of statutes," where legislators and executives, as well as citizens and civil servants, jointly articulate the requirements of self-government.[33]

The foundation of both public nuisance and administrative law is the sovereign's legal right to the health and safety of the realm. Under the Constitution of the United States, the sovereign is "We the people," not some

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[28] Thomas W. Merrill, *Is Public Nuisance A Tort?*, 4 J. TORT L. 35, 36 (2011) ("administrative agencies . . . have been created to enforce public rights"). *See infra* Part II.B.

[29] Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L. J. 702 (2023).

[30] David A. Dana, *Public Nuisance Law When Politics Fails*, 83 OHIO ST. L. J. 61 (2022).

[31] Lindsay F. Wiley, *Rethinking the New Public Health*, 69 WASH. & LEE L. REV. 207 (2012).

[32] *See, e.g.*, Douglas K. Kysar, *The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism*, 9 EUR. J. RISK REGUL. 48, 50 (2018) (describing tort law's "core mission of providing a forum for the airing of grievances and the redress of wrongs" as well as "ancillary benefits" of "problem articulation, norm amplification, and intergovernmental signalling"); JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 3–42 (2020) (offering a theory of tort law as concerned with the redress of interpersonal wrongs). *But see* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (offering an economic theory of negligence); *see generally* Catherine M. Sharkey, *Modern Tort Law: Preventing Harms, Not Recognizing Wrongs*, 134 HARV. L. REV. 1423 (2021) (critiquing Goldberg and Zipursky's view from a similar economic perspective). It is beyond the scope of this article to address perennial debates about the moral versus economic purposes of tort law. The narrower point, to be explored in Part II.C, is that public nuisance law has a normative logic that is irreducible to efficiency. This logic helps to explain the purposes of administrative agencies.

[33] *See* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 7–75 (2010).

King or his parliament.[34] Democratic sovereignty introduces principles of equal political freedom into the framework of public rights, above and beyond the physical well-being of the population. The departments of the federal government have the power and the obligation to remove obstructions and abate hazards that impede the nation's shared civic life.

This study of the constitutional and common law sources of regulatory authority unearths a long-forgotten justification for administrative adjudication: a collective right of self-defense in the face of serious risks to fundamental political interests. In nineteenth-century cases permitting administrative adjudication of matters burdening private property,[35] courts drew an analogy between the summary, private abatement of a common nuisance and administrative adjudication of matters involving taxation and public health. Infringements on these public rights registered as risks to the political community on the whole rather than just to any one of its constituent members. Such rights remain vulnerable today because individuals have diffuse interests in them, and because it is often costly or impossible to protect them by way of civil litigation. Congress thus creates agencies with powers to bring enforcement actions, to adjudicate claims, and to make regulations.[36] Legislators often design administrative procedures to be more summary in form, more in tune with social facts, and more politically responsive than judicial proceedings. While administrative procedure remains constrained by due process requirements, such as notice and a hearing, it is nonetheless calculated to privilege common interests over and above the vested interests of individuals in the maintenance of their social status.

The conception of public liberty and administrative power advanced here does not simply affirm the administrative state as it existed between the New Deal and the Reagan Revolution, pining for a bygone era of regulatory glory.

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[34] U.S. CONST. pmbl. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 167–99 (1991) (describing the Federalists' theory of popular sovereignty, which separated the sovereign from the institutions of government).

[35] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1856) (holding that the U.S. Treasury could seize property of a customs collector in satisfaction of a debt without judicial process); Metropolitan Bd. of Health v. Heister, 37 N.Y. 661, 672 (1868) (holding that the authority of New York City's Metropolitan Board of Health is "not judicial in its character" but instead "falls more properly under the head of an administrative duty").

[36] *See* U.S. ATT'Y GEN.'S COMM. ON ADMIN. PROC., FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 13 (1941) [hereinafter FINAL REPORT, U.S. ATT'S GEN.'S] (describing the need to supplement common law causes of action through administrative enforcement).

Scholars such as Joy Milligan,[37] Bijal Shah,[38] Sophia Z. Lee,[39] Christopher S. Havasy,[40] and others[41] have recently identified ways in which administrative agencies at times entrench racial, class, and other forms of social subordination. Agencies may carry out the discriminatory agendas of their political principals, pay greater heed to the input of well-resourced parties, or else sacrifice the interests of vulnerable constituencies to the dictates of "efficiency" and the preservation of often meager bureaucratic budgets. Public liberty, by contrast, would center administrative law's concern with matters of collective justice above and beyond aggregate economic welfare. It reconstructs from key examples of administrative history, such as the Freedmen's Bureau Acts and the National Labor Relations Act, a conception of regulatory power that aims to achieve conditions of political freedom *in and through* market regulation.[42] With this history in view, we might reinterpret and reform administrative procedures

[37] *See generally* Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847 (2018) (analyzing the stagnant administrative enforcement of desegregation under *Brown v. Board of Education* by the federal Office of Education during the late 1950s and early 1960s).

[38] *See* Bijal Shah, *Administrative Subordination*, 91 U. CHI. L. REV. 1, 10 (2024) (analyzing the ways "that agencies engage in behavior, in the implementation and enforcement of regulatory law, that subordinates the interests of vulnerable and marginalized people to institutional priorities").

[39] *See* Sophia Z. Lee, *Racial Justice and the Administrative Procedure Act*, 97 CHI. KENT. 161, 167, 188 (2022) (discussing how generally "[a]dministration and administrative law . . . has been integral to sustaining White supremacy and thwarting racial justice[,]" including through statutory exceptions to adjudicative and rulemaking mandates).

[40] *See* Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. 749, 820–21 (2023) (discussing how the "flattening of participation causes the structure of notice-and-comment rulemaking to violate relational fairness" and contributes to the "inequalities of access between affected parties" where only well-resourced organizations and individuals can participate in the process without undue burdens).

[41] *See, e.g.*, Evan Bernick, *Movement Administrative Procedure*, 98 NOTRE DAME L. REV. 2177, 2215 (2023) (challenging the view that the Administrative Procedure Act of 1946 represented "an ideologically neutral compromise between pro- and anti-New Dealers" and instead arguing that the APA "was conceived during liberal retreat from early New Deal efforts to fundamentally reshape the socioeconomic order" and "has been judicially implemented in ways that are broadly consistent with its origins"); Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1242–43 (2021) (arguing against *Chevron* deference in immigration adjudication and instead advocating for more administrative rulemaking in immigration policies); Kathryn E. Kovacs, *Introduction to Symposium on Racism in Administrative Law*, YALE J. REGUL.: NOTICE & COMMENT (July 13, 2020) (introducing a Symposium with 31 contributors); *see generally* Ming Hsu Chen, *Citizenship Denied: Implications of the Naturalization Backlog for Noncitizens in the Military*, 97 DENV. U. L. REV. 669 (2020).

[42] *See infra* Part II.E. On the social preconditions of republican liberty, see generally GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION (2017); K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION (2016); and FISHKIN & FORBATH, *supra* note 25.

so that they redress a fundamental problem administrative law set out to tackle during the New Deal: "the absence of equal economic power."[43]

The judiciary's recent attacks on the administrative state threaten the survival of a public realm long left in disrepair.[44] In the wake of forty-some years of neoliberal law and policy, regulatory institutions have been hollowed out and privatized.[45] We are in a period that John Dewey once described as an "eclipse of the public," in which the polity lacks the intellectual and institutional resources to grapple with and address shared social problems.[46] Legal conservatism does not bear all the blame for this state of affairs. Broader trends in legal discourse and political economy have siloed legally protected interests into issues of individual autonomy, on the one hand, and social efficiency, on the other, sidelining the paramount value of collective freedom.[47] The Roberts Court has taken up this discretionary conception of governmental power, while redescribing individual autonomy as a question of propertied, rather than bodily or dignitary, freedom. The result is a new era of private authority, in which economically powerful actors increasingly dictate the conditions of law and life for others.

While this Article uncovers serious flaws in the theory of private prerogative, it would be overly optimistic to expect the Roberts Court to change course and embrace public liberty. Instead, the aim is to recover a long-disused but still vital discourse by which citizens and officials can comprehend the corresponding rights of the people and the obligations of the administrative state. Those tools will help us identify the risks and remedy the wrongs posed by the jurisprudence of private prerogative.

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43 JAMES LANDIS, THE ADMINISTRATIVE PROCESS 36 (1938).

44 *See* BONNIE HONIG, PUBLIC THINGS: DEMOCRACY IN DISREPAIR 1–36 (2017) (describing the importance of an objective, durable "infrastructure" or "holding environment" for democratic life, and how privatization and other neoliberal trends undermine this infrastructure).

45 *See* JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 79–118 (2017) (describing and criticizing, on democratic-constitutional grounds, the privatization of welfare state functions); CHIARA CORDELLI, THE PRIVATIZED STATE 1–84 (2020) (offering a normative argument against privatization of certain governmental functions, including those of the welfare state); Bridget C.E. Dooling & Rachel Augustine Potter, *Rulemaking By Contract*, 74 ADMIN. L. REV. 703, 709–12 (2022) (summarizing concerns about contracting out government services, such as inadequate oversight capacity, accountability, and ethical standards); *see generally* Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405 (1996)

46 JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 110–42 (Swallow Press 1954) (1927).

47 Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1794–1817 (2020); *see also* Jodi L. Short, *In Search of the Public Interest*, 40 YALE J. REGUL. 101 (2023) (describing how the "public interest" tends to be identified with economic efficiency in regulatory decisionmaking).

The argument proceeds in three parts. Part I describes the new ideology of private prerogative at work at the Supreme Court and in conservative legal thought. It then situates this development in the historical trajectory of public law since the early twentieth century. Part II recovers a contrary understanding of public liberty from the law of popular sovereignty, public nuisance, public utility, and agency adjudication. It argues that administrative law is grounded in the substantive rights of the popular sovereign to healthy, safe, and egalitarian terms of political association. Part III explains the implications of this theory for legal doctrine and constitutional politics. It argues that administrative law flows from the legislative duty to vindicate public rights, that these rights preclude the Court's anti-administrative principles of statutory interpretation,[48] and that administrative adjudication is sometimes needed as a form of collective self-help.

I. PRIVATE PREROGATIVE

This Part examines the Roberts Court's increasing reliance on the distinction between public and private rights to constrain regulatory power. I call the Court's approach "private prerogative" because it reallocates discretionary, coercive authority to people outside of government who hold economic rights. Section A examines how private prerogative operates within recent cases in administrative law and formalist and originalist scholarship. Section B then places this development in the context of longer-running trends in public law. The Court's emerging approach synthesizes three elements: first, a discretionary conception of Congress' economic-regulatory power that emerged from the Court's reception of the New Deal; second, a formalist conception of separate public and private spheres; and third, a substantive prioritization of property and contract rights over governmental authority. The result is a legal and political theory that treats regulatory action as suspect when these economic interests are burdened.

A. In Administrative Law

The Roberts Court relies on the distinction between private and public to curtail the powers and the independence of federal regulatory agencies. A set of constitutional and statutory rules cut more deeply against administrative power when rights of property or contract are at issue than

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[48] On "anti-administrativism," *see* Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 4 (2017).

when the government disposes of its own resources. A robust strand of formalist scholarship underpins this effort to limit administrative power to the distribution of government largesse, and to prevent it from impinging upon a sacred domain of economic rights, whose protection is reserved to the Article III courts. The distinction between public and private is not altogether stable in this jurisprudence, however. As the Court has acknowledged, the distinction has never been "definitively explained"[49] and has "not been entirely consistent."[50] Nonetheless, resort to this binary does real doctrinal work in paring back the powers of and deference owed to administrative agencies, while increasing the authority of powerful economic actors.

While the public versus private distinction has long played a role in cases on bankruptcy[51] as well as in intellectual property adjudication,[52] it has now returned to general administrative law.[53] In *Jarkesy*,[54] the Court held that Congress had unconstitutionally authorized the Securities and Exchange Commission (SEC) to impose civil penalties in its administrative tribunals. Affirming the Fifth Circuit below,[55] Chief Justice Roberts reasoned that it was impermissible for the agency to adjudicate "matters concerning private rights," such as fraud, in its own tribunals, without an Article III jury trial.[56] The case follows on originalist scholarship arguing for a formalist and expansive understanding of judicial power, according to which the Article III courts alone, and not administrative courts, may deprive persons of property.[57] This approach would likely render at least some other agency adjudication provisions unconstitutional—at least those, like the SEC's adjudications, which allow the agency to impose civil penalties on private

49 Oil States Energy Servs., L.L.C. v. Greene's Energy Grp., 584 U.S. 325, 334 (2018) (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982)).

50 *Oil States*, 584 U.S. at 334 (quoting Stern v. Marshall, 564 U.S. 462, 488 (2011)).

51 *See, e.g.*, 458 U.S. at 69; Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 55 (1989); *Stern*, 564 U.S. at 488.

52 *See generally Oil States*, 584 U.S. 325; B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138 (2015).

53 Several cases in the 70s and 80s revived the distinction, but not in a way that restricted administrative power. *See* 430 U.S. at 451 (relying on distinction to uphold agency's authority to issue civil penalties against a Seventh Amendment challenge); 478 U.S. at 854 (upholding authority of CFTC to adjudicate state-law counterclaims, despite the fact that these were "private rights"); Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568, 585–86 (1985) (rejecting "private rights" challenge to Environmental Protection Agency pesticide registration and compensation scheme). The longer line of cases on administrative adjudication and public rights in discussed in Part II.E.

54 144 S. Ct. at 2117.

55 Jarkesy v. SEC, 34 F.4th 446, 453–59 (5th Cir. 2022).

56 144 S. Ct. at 2131–2139.

57 Nelson, *Adjudication*, *supra* note 11, at 566–68; Baude, *supra* note 11, at 1540–48.

parties for past conduct of the same general sort as that originally proscribed at common law.[58]

The prior term, Justice Thomas had already intimated that the Court might take a firm stand against legislative and administrative encroachment on private rights. In *Axon Enterprise v. Federal Trade Commission (FTC)*,[59] the Court held that federal district courts had jurisdiction to entertain certain constitutional challenges against the adjudicatory structures of the FTC and the SEC. In his concurrence, Thomas' underscored his "grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end."[60] Citing to his own opinions and the scholarship of Caleb Nelson and Jennifer Mascott,[61] he argued for exclusive Article III jurisdiction over the adjudication of private rights. While agencies could adjudicate "public rights and privileges" that "belong to the people at large" and are "created purely for reasons of public policy," only Article III courts could adjudicate the "unalienable" and "absolute" "private rights" to "life liberty and property," which are rooted in a "Lockean state of nature."[62] Roberts would sound a similar note in *Jarkesy* when he explained that "[t]he object of this SEC action is to regulate transactions between private individuals interacting in a pre-existing market."[63] Thomas' "Lockean state of nature"[64] becomes Roberts' "pre-existing market."[65] Then, Thomas' unalienable, natural rights become Roberts' common law: "This is a common law suit in all but name. And such suits typically must be adjudicated in Article III courts."[66]

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58 Nelson and Baude's historical evidence has recently come under sharp criticism. Gregory Ablavsky argues that administrative agencies in the nineteenth century, such as the Land Department, routinely adjudicated private property rights. Ablavsky, *supra* note 19, at 287. Moreover, it is far from clear that the evidence Nelson and Baude marshal is relevant to original public meaning. The cases they cite on the distinction between public and private right stem not from the late eighteenth century, when the Constitution was written and enacted, but rather from the 1820s onward. Nelson, *Adjudication*, *supra* note 11, at 566–68; Baude, *supra* note 11, at 1540–48. The argument then rests either on mid-nineteenth-century traditionalism or on a normative commitment to prioritizing rights of property relative to the regulatory claims of the people as a whole.

59 *Axon*, 598 U.S. at 175.

60 *Id.* at 196.

61 *Id.* at 197–98 (citing Jennifer Mascott, *Constitutionally Conforming Agency Adjudication*, 2 LOYOLA U. CHI. J. REGUL. COMPLIANCE 22, 45 (2017)); *id.* (quoting Nelson, *Adjudication in the Political Branches*, *supra* note 11, at 569)

62 *Id.* at 198–199 (internal quotations and citations to other opinions by Justice Thomas omitted).

63 144 S. Ct. at 2136.

64 *Axon*, 598 U.S. at 199.

65 144 S. Ct. at 2136.

66 *Id.*

Note how, for Thomas and Roberts, a set of individual, pre-political rights are given categorical priority relative to the discretionary policymaking powers of the federal government. This is the ideology of private prerogative in the wild: public policy is strictly subordinate to the rights of private property holders in legal as well as moral status. While Thomas' conception of the divide between public and private rights pay heed to the interests in "life" and "liberty" as well as "property," the cases in which this theory has bite against administrative power usually concern economic regulation—such as the adjudicatory functions of the SEC or FTC—rather than matters involving physical liberty, human dignity, or preservation of life.[67] Thomas, for instance, has suggested that due process may not apply *at all* to immigration removal proceedings.[68] Removal hearings certainly involve "liberty"[69] in the ordinary sense of the freedom to remain at large within the United States. In addition, as Adam B. Box and Cristina Rodríguez have noted, the "coercive techniques" often involved in deportation, such as detention, plainly infringe on "personal liberty."[70] But Thomas has suggested that the right of non-citizens to remain in the United States is not a matter of "liberty" in the sense that the Fifth Amendment's Due Process Clause protects. Rather, it is solely a matter of "privilege," where "vested" personal and property interests are not at stake.[71]

Other cases outside of the adjudication context deploy the public/private divide invoked by Thomas's concurrence in *Axon* and Roberts' opinion for the Court in *Jarkesy* to curtail agencies' economic-regulatory powers. However, the results have been uneven. In *Seila Law v. Consumer Finance Protection Bureau (CFPB)*, the Court ruled that the structure of the CFPB was unconstitutional.[72] The CFPB is an independent regulatory agency with powers to issue regulations, adjudicate cases, and bring enforcement actions concerning consumer financial products. The Court held that Congress had

67 An interesting partial exception is Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 595 U.S. 109 (2022), invalidating the vaccine-and-testing mandate, which is discussed below.

68 Sessions v. Dimaya, 584 U.S. 148, 210–216 (2018) (Thomas, J., dissenting) (arguing that the original understanding of due process did not apply to removal proceedings).

69 *Liberty*, OXFORD ENGLISH DICTIONARY (2010), https://www.oed.com/dictionary/liberty_n1?tab=meaning_and_use#39406776 [https://perma.cc/QW5G-JYUR] (defining "liberty" as "Freedom to do a specified thing; permission, leave" and "Unrestricted use of or access to a specified thing; free run of a place.") (last visited Sept. 7, 2023).

70 ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 81 (2020).

71 *Sessions*, 584 U.S. at 212–215. For an argument against this conclusion, see Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1805–7 (2023).

72 591 U.S. at 197.

infringed on the President's executive power by giving the agency a single Director, whom the President could only remove for good cause. To reach this conclusion, the Court had to distinguish several other historical and contemporary precedents for identical agency structures. These included the Social Security Board (SSB), which adjudicates social security claims; the Office of Special Counsel (OSC), which enforces ethics rules governing federal employees; and the Federal Housing Finance Agency (FHFA), which regulates federal mortgage financing entities Fannie Mae and Freddie Mac. To explain why none of these agencies set a historical precedent for the leadership structure of the CFPB, the Court explained that the SSB "lacks the authority to bring enforcement actions against private parties,"[73] the OSC "does not bind private parties at all,"[74] and FHFA "regulates primarily Government-sponsored enterprises, not purely private actors."[75] Unlike CFPB, which intervened directly into private property and contractual relations, the other agencies focused exclusively or primarily on benefits and liabilities originating in the federal government.

This distinction did not hold up for very long, though. The next year, in *Collins v. Yellen*,[76] the Court ruled that the FHFA's structure was also unconstitutional for the same reason as CFPB's. Now deemphasizing the private versus public distinction, it said that "the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head."[77] Once the public/private distinction had done the crucial work in *Seila Law* of dismissing relevant historical precedents, the Court appeared to lose interest in it.

A similarly problematic public/private divide arose again as the Court developed its new version of the "major questions doctrine," which requires express authority from Congress if an agency is to exercise a power of "vast economic and political significance."[78] In *Alabama Association of Realtors v.*

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[73] *Id.* at 222.

[74] *Id*. at 221.

[75] *Id.* at 222.

[76] Collins v. Yellen, 594 U.S. 220 (2021).

[77] *Id.* at 1784.

[78] W. Virginia v. Env't Prot. Agency, 597 U.S. 697, 732 (2022) (first quote); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021)(internal citations and quotations omitted) (second quote). On the current, expansive iteration of the major questions doctrine, see Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022). On the old one, see generally Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019 (2018).

Department of Health and Human Services (HHS),[79] the Court invalidated the Centers for Disease Control and Prevention's (CDC) moratorium on residential evictions under broad emergency authority to prevent the spread of contagious disease.[80] The "sheer scope of the CDC's claimed authority" made it suspect, in part because the moratorium "intrudes" into the "landlord-tenant relationship" and thus would "alter . . . the power of the [federal] Government over private property."[81] The Court announced an emerging clear statement rule against government action burdening private property rights.[82]

Likewise, in *National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration (from hereafter NFIB v. DOL)*,[83] the Court held that the Occupational Safety and Health Administration (OSHA) lacked authority to impose a vaccine-or-testing mandate on all employers holding contracts with 100 or more employees. Though Congress had granted OSHA authority to issue emergency regulations to protect workers against "occupational safety hazards," the Court concluded that OSHA's mandate was unlawful because it was a "significant encroachment into the lives—and health—of a vast number of employees" that the statute did not expressly authorize.[84] Justice Gorsuch explained in concurrence that the ruling sought to avoid "intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives."[85]

Whereas *Alabama Realtors* focused narrowly on property and contract interests implicated by the administrative action, the vaccine case gestures at, without articulating, a wider set of personal liberty interests. To distinguish the OSHA mandate from prior measures the agency had taken, the Court emphasized that a vaccine "cannot be undone at the end of the workday."[86] The implication seemed to be that the government was stretching beyond

[79] Ala. Ass'n of Realtors v. Dep't of Health and Human Services, 594 U.S. 758, 758 (2021).

[80] *See* 42 U.S.C. § 264 ("The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases[.]").

[81] *Alabama Realtors*, 594 U.S. at 764.

[82] A rule it invoked again in Sackett v. EPA, 598 U.S. 651 (2023), to restrict EPA's power to regulate wetlands. *Id.* at 679 ("[T]his Court require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.") (internal quotations omitted).

[83] *Nat'l Fed'n*, 595 U.S. 109 (2022).

[84] *Id.* at 665.

[85] *Id.* at 669.

[86] *Id.* at 665 (internal quotations omitted).

workplace regulation and into a private sphere of bodily integrity or personal conscience.[87]

Contrast these two cases with *Biden v. Missouri*,[88] in which the Court upheld a regulation of the Department of Health and Human Services (HHS) requiring hospitals participating in Medicare or Medicaid to vaccinate their employees. The statutory language at issue was not any broader or more explicit than that at issue in the other COVID controversies. But the Court noted that "healthcare facilities that *wish to participate* in Medicare and Medicaid have always been obligated to satisfy a host of conditions that address the safe and effective provision of healthcare."[89] Whereas OSHA's vaccine-and-testing mandate and the CDC's eviction moratorium unilaterally intruded upon otherwise private rights of property, contract, and (perhaps) person, HHS's regulation only imposed a condition on those private entities that willingly availed themselves of a government benefit.

As in the official removal context, the public/private divide has not reliably held up with regards to the major questions cases. In *Biden v. Nebraska*,[90] the Court invalidated the Department of Education's student debt forgiveness program. This debt relief program is more readily conceived as a grant of government largesse than an invasion of a private right, as it is not clear that any private property rights were invaded by the government's decision to forgive public debt. Nonetheless, the Court relied on major-questions precedent to conclude that the Secretary's authority to "waive" any

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87 This is a surprising line of argument given the Court's roughly contemporaneous decision in *Dobbs v. Jackson Women's Health*, eliminating the constitutional right to abortion and limiting substantive due process to historically entrenched rights that are part of a "scheme of ordered liberty." Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 216 (2022). There is no historically entrenched right against even mandatory vaccination. *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905). Elsewhere in *Dobbs*, the Court had made clear which private rights it prized. The Court's *stare decisis* analysis dismissed women's reliance on abortion rights as enabling them to "participate equally in the economic and social life of the Nation[.]" 597 U.S. at 221. The rights that truly mattered for reliance purposes were "property and contract rights." *Id*. at 220. This holding significantly narrowed the Court's prior approach to *stare decisis.* Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845, 1847 (2023). *Dobbs*' focus on private rights has a normative impulse similar to the Court's administrative law decisions. Collective interests in equal economic and social participation, of the sort at issue both in reproductive health and public health more broadly, are dismissed as "generalized assertions about the national psyche," whereas common law rights of property and contract deserve the judiciary's utmost care. 597 U.S. at 288, *quoting* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 957 (1992) (Rehnquist, J., concurring in part), *overruled by Dobbs*.

88 Biden v. Missouri, 595 U.S. 87 (2022).

89 *Id*. at 94 (emphasis added).

90 Biden v. Nebraska, 143 S. Ct. 2355 (2023).

provision of the student loan program did not encompass the authority to forgive $430 billion in student loans.[91] Similar to *Collins v. Yellen*,[92] discussed above, the Court rejected the government's contention that the case ought to be treated differently than other major questions cases because it did not burden "individual rights."[93] But even though the Court rejected this distinction, the concept of private rights persisted in this case in a different form. The Court had to identify a property-type interest held by one of the challengers in order to establish Article III standing. In an apparent expansion of existing doctrine, it concluded that a non-profit government corporation that would suffer economic loss from loan forgiveness was an arm of the state of Missouri.[94] Insofar as Missouri, through this corporation, had property interests that would be burdened by the student loan program, it had standing to challenge its legality.

Formalist and originalist scholars have also relied on the distinction between private and public rights to strengthen and specify constitutional limits on Congress' regulatory authority—in particular, the nondelegation doctrine. This doctrine provides that Congress may not delegate its legislative powers to the executive branch without providing an "intelligible principle" to govern its discretion.[95] The Court has only invalidated a federal statute on this ground three times, all during the New Deal.[96] But Justice Gorsuch and others on the Court are keen to revive it.[97] According to Gorsuch, "as long as Congress makes the policy decisions when regulating *private* conduct, it may authorize another branch to 'fill up the details.'"[98] Thus, if a delegation involved only government property or internal governmental affairs, it would presumably not be subject to a stringent non-delegation test. Aditya Bamzai and Michael McConnell have attempted to build out this distinction by arguing that at least some previous nondelegation cases involved not restrictions on private property but rather public rights

91 *Id.* at 495–508.

92 *Collins*, 594 U.S. 220.

93 *See* 143 S. Ct. at 2374 ("In the Government's view, 'there are fewer reasons to be concerned' in cases involving benefits, which do not impose 'profound burdens' on individual rights[.]").

94 *Id.* at 490–91.

95 J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).

96 Panama Refin. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Co., 298 U.S. 238, 311–12 (1936).

97 Dep't of Transp. v. Ass'n of Am. R.R.s, 575 U.S. 43, 76–8 (2015) (Thomas, J., concurring); Gundy v. United States, 588 U.S. 128, 157–59 (2019) (Gorsuch, J., dissenting).

98 588 U.S. at 157 (Gorsuch, J., dissenting) (emphasis added).

such as the use of public lands.[99] John Harrison as well as Ilan Wurman also argue that looser delegation rules govern the disposition of public property.[100] Ann Woolhandler has similarly relied on this distinction to argue that early examples of delegation recovered by Nicholas Parrillo do not count because they involved taxation, which would have been classified as a "public right."[101] Woolhandler and Nelson have also invoked the distinction to affirm constitutional limitations on private standing to challenge governmental conduct as well as limitations on legislative or administrative retroactivity.[102]

There is therefore a substantial body of case law and scholarship among originalist and formalist jurists that relies, often inconsistently, on a distinction between private rights associated with property and contract and public rights associated with discretionary government benefits. Where only public rights are at issue, administrative powers sometimes enjoy a wider ambit than where private rights are also implicated. Property holders are not immune from administrative interference, but rather enjoy a robust set of procedural and substantive protections that the beneficiaries of statutory law lack. The Court will more strictly scrutinize and delimit the powers of agencies where they impinge on such private economic rights, may reduce such agencies' independence from presidential control, and may deprive them of authority to issue binding orders. By contrast, in areas that involve government-granted privileges, the Court is, at times, willing to give agencies a wider birth.[103] The public/private right distinction limits government intervention in the marketplace while giving government a freer hand regarding public resources.

This approach does not necessarily decrease legal coercion, but instead shifts discretion from state to non-state actors, creating a set of private prerogatives. Note that the cases discussed above, in which private prerogative has operated to constrict federal regulatory power, generally concern agencies that regulate private businesses. As legal realists like Morris

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99 Bamzai, *supra* note 11, at 178–81; MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 334 (2020).

100 Harrison, *supra* note 15, at 233–34; Wurman, *supra* note 11, at 1555.

101 *See generally* Woolhandler, *Public Rights and Taxation*, *supra* note 11 (distinguishing the historical example of the direct tax of 1798 on this basis).

102 Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004); Woolhandler, *Public Rights, Private Rights*, *supra* note 11, at 1015 (2006).

103 The Court nonetheless remains willing to enforce some rights with regards to spending statutes, over Thomas' protestations. *See* Health and Hosp. Corp. of Marion Cty. v. Talevski, 599 U.S. 166, 172 (2023) (confirming existence of a private right of action to enforce provisions of the Federal Nursing Home Reform Act).

R. Cohen and Robert Hale observed, property rights can take on the attributes of sovereignty, empowering their holders to coerce people who need the enclosed resources.[104] Here is Cohen: "If . . . somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent. To the extent that these things are necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want."[105] Property is not always a matter of negative liberty, but, at least sometimes, also confers a power on the owner to compel others who need what is owned. Regulation can diminish that coercive power if it requires the owner to use their property so as not to unduly burden those who need it. As the Court today strips the legislature of its agency-constituting authority, it reallocates sovereignty to those with dominant economic positions.

To illustrate Cohen's point, consider, again, *NFIB v. DOL*,[106] where the Court struck down OSHA's vaccine-or-testing mandate. Though the mandate was only legally binding on *employers*, the Court treated it as binding on *employees*, describing it as an "encroachment" on their "lives" and "health."[107] That sleight of hand had a certain legal-realist logic. Employers often hold coercive power over their employees, who depend on their employment for food and housing and may face significant costs in finding other employment.[108] Regulations binding on many employers will therefore also often have a practically binding effect on their employees. The Court thus traded on the coercive character of the employment relationship to emphasize the liberty burdens on employees of a mandate that only legally bound employers.

The Court's own analysis would seem to imply that, once the Court pares back OSHA's authority to regulate the workplace, the worker does not necessarily suffer diminished coercion, but may instead suffer coercion at the hands of the employer rather than the government. For example, without the OSHA mandate or similar state or local mandates, an employee who, for all

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[104] Cohen, *supra* note 1, at 12–13; Hale, *supra* note 1, at 471–2 (1923). *See also* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 71–107 (1998) (discussing Hale and his legal influence).

[105] Cohen, *supra* note 1, at 12.

[106] NFIB v. DOL, 595 U.S. 109.

[107] *Id.* at 117.

[108] See Noah Zatz's contribution in Luke Herrine et al., *Eight Reactions to NFIB v. Department of Labor*, LPE BLOG (Jan. 26, 2022), https://lpeproject.org/blog/seven-reactions-to-nfib-v-department-of-labor/ [https://perma.cc/XF86-CNVG] ("Taking employer domination seriously would mean acknowledging that . . . workers have no meaningful freedom to protect their own and their community's health if they are forced to work in an unsafe setting").

intents and purposes, had to continue at their current job at the height of the Pandemic would still be burdened by the health risks (or enjoy the health benefits) of that employer's *private* policies, such as those that forbid, allow, or require masking.[109]

Private prerogative thus grants discretionary power to dominant economic actors, as the judiciary increases the costs of the administrative regulation of property and contract. It amplifies certain economic methods of coercion and control, such as in the employment relationship, because it reduces the discretionary, political authority of the government to intervene in those relationships. The same can be said of the residential tenant who, after *Alabama Realtors*,[110] loses the benefit of an eviction moratorium that kept them off the streets. Discretion in such cases shifts from a governmental actor to the economically superior private party.

The "private" sphere, of course, can be as much of a bureaucratic menace as government, relying on organizational hierarchies to reduce the cost of information and control over resources and personnel.[111] As Elizabeth Anderson has argued, "private government" in the workplace often excludes employees from a say in the conditions in which they labor.[112] The law has long recognized some degree of "managerial prerogative" in these units of unelected government that insulates them from the collective bargaining process, even in the few remaining workplaces that are unionized.[113] More recent cases involving regulatory takings[114] and preemption[115] show extraordinary solicitude for property interests while reducing the space in which state and federal labor regulation can maneuver. First Amendment

[109] *Cf.* Wei Lyu & George L. Wehby, *Community Use of Face Masks and COVID-19: Evidence From a Natural Experiment of State Mandates in the U.S.*, HEALTH AFFS. 1419 (2020) (providing evidence of the health benefits of masking mandates).

[110] *Alabama Realtors*, 594 U.S. at 758.

[111] *See, e.g.*, DAVID GRAEBER, THE UTOPIA OF RULES: ON TECHNOLOGY, STUPIDITY, AND THE SECRET JOYS OF BUREAUCRACY 17–35 (2015) (describing fusion of bureaucratic power in public and private spheres); *see* KENNETH J. ARROW, THE LIMITS OF ORGANIZATION 63 (1974) (describing how organizational hierarchies address information costs in private as well as public contexts); *see also* MAX WEBER, 1 ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 221 (Guenther Roth & Claus Wittich eds., 1968) (describing private bureaucracies).

[112] ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 44–45 (2017).

[113] Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1389 (1982).

[114] *E.g.*, Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021). *See* Don Rhodes, *Constitutionalizing Property's Priority Over Farm Worker Organizing: The Threat of Cedar Point*, LPE PROJECT (Jan. 14, 2021), https://lpeproject.org/blog/constitutionalizing-propertys-priority-over-farm-worker-organizing-the-threat-of-cedar-points/ [https://perma.cc/KMA9-3K9A] (describing the conflict between an expansive concept of private property and the exercise of labor rights in this case).

[115] Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 598 U.S. 771 (2023).

jurisprudence likewise places increasingly intense constitutional scrutiny on financial disclosure regulations.[116]

The new administrative law supplements these developments with broader interpretive rules that put a thumb on the scale of capital and business owners' and employers' prerogatives over their employees and customers. A new rule against the regulation of "private property" without express statutory authorization has now crystallized.[117] If the federal Executive wishes to condition, limit, enjoin, or penalize the prerogatives of private executives, it will have to overcome interpretive presumptions against the exercise of governmental authority in those spaces.

There is reason to doubt that this line of jurisprudence will be coherent or stable over time. As noted, the Court is willing to renege on the public/private distinction when it no longer serves to distinguish inconvenient precedent. Already, both the Court and formalist scholars have emphasized that the distribution of government benefits may be just as "coercive" as the imposition of binding regulations or penalties.[118] It is nonetheless likely that the relation between public and private will become a key axis of legal controversy and political struggle in the years to come. Private prerogative need not be consistently applied to operate as a mode of legal and political argument that limits administrative power. It trades on a powerful myth of a realm of life that is free from coercion to underwrite the expansion of authorities rooted in economic power. Legal Realists worked hard to dispel that myth.[119] But their handiwork has broken down with time. The next section traces that development.

B. After the Twentieth-century Synthesis

The previous section showed how the distinction between public and private operates in recent administrative law cases to scale back agencies' authority to regulate economic interests. This section places this new era of private prerogative in the context of American legal development, identifying the links and breaks between what came before and the Court's current approach. The conservative jurists' new political theory departs from what Jedediah Purdy, David Singh Grewal, Amy Kapczynski, and K. Sabeel

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116 Robert Post, *Compelled Commercial Speech*, 117 W.VA. L. REV. 867, 868 (2015).

117 *Sackett*, 598 U.S. at 655.

118 *Collins*, 594 U.S. 220; Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 580 (2012). *See generally* PHILIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM (2021) (criticizing the use of federal spending to coerce state and private conduct).

119 *See* FRIED, *supra* note 104, at 1–28.

Rahman call the "twentieth-century synthesis," in which the economic realm is governed by principles of efficiency, whereas constitutional law protects an increasingly narrow domain of personal and political (rather than economic) rights.[120] The Roberts Court today follows the post-New Deal Court in treating economic-regulatory law as a purely discretionary exercise of congressional power, with some categories of individual rights earning heightened protection against governmental interference. But it has departed from this approach by giving property and contract heightened protections they did not enjoy under the prior order.

The laissez-faire period of jurisprudence associated with *Lochner v. New York* treated "private business" as enjoying constitutional protection against the government's regulatory powers.[121] This classical liberal model of political economy separated the private sphere, understood as the realm of market exchange, from the state, understood as a sphere of political equality that ought not to interfere with social and economic life.[122] The actual workings of regulatory and constitutional law during this period were far more complex and significant than this simple picture suggests. There was in fact pervasive public health and public utility regulation at the turn of the twentieth century, and even the *Lochner* Court upheld many state regulatory statutes against constitutional challenge.[123] Nonetheless, the Court placed significant barriers in the way of government regulation of employment and commercial relationships, "pricking out a line" between individual rights and the pervasive police powers of the states.[124] The Court also sharply distinguished between government infringement on vested property rights, which could not be deprived without due process, and mere deprivation of

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[120] Britton-Purdy et al., *supra* note 47, at 1794–1817.

[121] Lochner v. New York, 198 U.S. 45, 64 (1905), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[122] Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); JOHN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 46–52 (2004).

[123] Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez Faire Constitutionalism*, 3 L. & HIST. REV. 293, 327–8 (1985); Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294 (1913); Victoria Nourse, *A Tale of Two* Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental* Rights, 97 CALIF. L. REV. 751, 761–74 (2009).

[124] Adkins v. Childs. Hosp. of the D.C., 216 U.S 525, 562 (Taft, J., dissenting). *See generally* Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. Rev. 1489 (1998) (reconstructing the normative logic of *Lochner* Era jurisprudence).

discretionary government privileges, which enjoyed no such protection.[125] The line between the public "state" and the private "civil society" was therefore firmly etched, if not coherently applied, in public law.[126]

Progressive jurists and political theorists spent a generation attempting to uproot the divide between public government and private market.[127] They treated the distinction as "transcendental nonsense" that obscured the ideologies and objectives underlying judicial decision-making.[128] In the New Deal's wake, the Court obliged by opening up a broad, almost unlimited space for the states' exercise of police power and the federal government's Commerce Clause powers.[129] But the Court largely shied away from adopting an affirmative understanding of the legitimating purposes behind the regulatory state.[130] Constitutional law eschewed a long-standing tradition of legal and political argument, recently recovered by Joseph Fishkin and William Forbath, that conceived the elected branches as under a constitutional duty to regulate society in the interests of equality.[131] The Legal Realist critique made this form of political constitutionalism unavailable, unattractive, or at least irrelevant. While questions of political morality might matter in the framing of legislation, the judiciary had to step back from its attachment to natural law and instead permit legislated public opinion to work its will.

In the post-New Deal constitutional order, Congress might go as far as it liked in terms of economic and social regulation, so long as it did not infringe

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125 *See* Stephen A. Siegel, *Understanding the* Lochner *Era: Lesson from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 203 (1984); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1440–42 (1968); McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220 (1892).

126 *See* Frances Olson, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1501–08 (1983) (describing this divide and its complex relation to the market/family divide in laissez-faire ideology).

127 *See, e.g.*, DEWEY, *supra* note 46, at 15 ("[T]he line between private and public is to be drawn on the basis of the extent and scope of the consequences of acts which are so important as to need control, whether by imposition or promotion"); *see also* FRIED, *supra* note 104, at 1–107 (discussing legal-realist critiques of formalist conceptions of private property).

128 *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 817–8 (1935).

129 *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (holding that Congress can regulate any activity that has a substantial economic effect on interstate commerce); *see* Williamson v. Lee Optical of Okla., 348 U.S. 483, 487 (1955) (finding that "it is for the [state] legislature, not the courts, to balance the advantages and disadvantages" of state laws governing businesses); *see also* Nebbia v. New York, 291 U.S. 502 (1934) (upholding New York state regulation of the price of milk).

130 *But see* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (describing employee collective bargaining as a "fundamental right"), discussed in Part II.E.

131 FISHKIN & FORBATH, *supra* note 25, at 4.

on personal liberties.[132] Considerations of efficiency and justice, as well as raw interest-group bargaining, would govern the choice of administrative command-and-control mechanisms versus the delegation of property rights and contractual choice to private actors.[133] In the 1960s and 70s, the scope of protected rights expanded, including the property-in-welfare rights protected by *Goldberg v. Kelly*[134] and the rights to safe workplaces and environmental protection recognized by federal regulatory legislation.[135] As these rights were tethered to statutory provisions, however, their constitutional status was uncertain at best.[136] The Reagan Revolution then decisively enhanced the prominence of efficiency over justice concerns regarding regulation and limited the reach of constitutional equality and dignity norms.[137] The resulting "twentieth-century synthesis" sought to cleanly separate the economic sphere from the political.[138]

The administrative state was always a fly in the ointment of this synthesis, however. Regulatory agencies routinely straddled the boundary of politics and the economy. While economic cost-benefit analysis took on an outsized role in administrative policymaking during and after Reagan, at the same time, and by the same mechanisms, presidential power came to predominate over the independent judgment of expert administrators.[139] The executive orders on regulatory review issued by Reagan and Clinton simultaneously enhanced the role of efficiency analysis and enhanced political control over

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132 JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 58–67 (2021).

133 *Cf.* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 24–28, 68–9 (1970) (describing justice and efficiency as two goals of accident law and analyzing the choice between state and market mechanisms to achieve these goals).

134 Goldberg v. Kelly, 397 U.S. 254 (1970).

135 ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY 154–60 (2022).

136 *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134, 153–4 (1974) ("[W]here the [statutory] grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet.").

137 BERMAN, *supra* note 135, 201–16.

138 Britton-Purdy et al., *supra* note 47, at 1795–1801.

139 *See* Ashraf Ahmed, Lev Menan & Noah Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2153–59 (2024) (describing how cost-benefit analysis in the Reagan Administration was conceived and practiced as an instrument of presidential control); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277–80 (2001) (discussing Reagan's strategies to influence agencies).

the administrative state.[140] It remains difficult today to disentangle political ideology and economistic thinking in regulatory policymaking.[141]

Administrative law, therefore, has long defied and continues to defy the separation of political and economic, of public and private, because it has deployed state authority in order to regulate the disposition of private property.[142] As Jerry Mashaw observed in the early Reagan years, the "rights" recognized in administrative due process and in occupational, environmental, and traffic safety were hybrids of individual entitlements and "statist" policy agendas.[143] They gave individuals standing, hearing rights, and causes of action to enforce and, in a sense, administer public programs. Across the neoliberal period, the administrative state has crisscrossed the boundary of public and private, proving the distinction's malleability with each regulation and adjudication that grants a benefit to or imposes a binding obligation on a "private" party.

The private/public distinction the Roberts Court has fastened upon therefore provides a cut point along which to dissect the administrative institutions that connect state and civil society, politics and economy. To the extent administrative agencies are constrained from regulating private economic rights, they lose their central institutional identity—the capacity to take binding rulemaking or adjudicatory actions on persons outside the government. The new law of private prerogative does not go quite so far as a categorical ban on such public interventions into the private sphere, however. It rather reintroduces the *Lochner* Era's conception of public and private to overlay and constrict the post-New Deal Court's discretionary conception of regulatory power. Today's Justices do not recognize

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140 Exec. Order 12,291, 3 C.F.R. 127 (1981); Exec. Order No. 12,866, 3 C.F.R. 638 (1993). *See* Ahmed et al., *supra* note 139, at 2153–59, 2201-2210 (describing the dominant role of efficiency analysis in presidential administration through these executive orders and surrounding White House policy).

141 *Compare* Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV'T L. REV. 325 (2014) (describing the regulatory review process at the Office of Information and Regulatory Affairs (OIRA), a former EPA official depicts a politicized, conflictual, and deleterious process), *with* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1843 (2013) (former Administrator of OIRA describing the same period as involving a largely "technical" and desirable process of information gathering, coordination, and cost-benefit analysis).

142 *See* G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT §§ 230–45, §§ 287–97 (Allen W. Wood ed., H.B. Nisbet trans., 1991) (describing the regulatory power as existing within civil society as well as within the constitutional state); *see also* Blake Emerson, *The Democratic Reconstruction of the Hegelian State in American Progressive Political Thought*, 77 REV. POL. 545, 564–8 (2015) (describing how American Progressive theorists of administration adapted Hegel's distinction between "state" and "civil society" to the American context).

143 Jerry L. Mashaw, *"Rights" in the Federal Administrative State*, 92 YALE L.J. 1129, 1165–73 (1983).

constitutional rights that point in favor of environmental, safety, or bargaining obligations on market actors. Rights only enter the picture as negative restraints against governmental conduct. To this extent, the Court is consistent with its immediate forebears. The break appears in the content of those rights. Whereas the Warren Court fastened around a set of political and privacy rights, arguably grounded in a substantive notion of individual autonomy,[144] the Roberts Court is giving renewed vigor to property and contract rights as the normative core of the "private" realm.

The late Justice Scalia laid the rudiments for this approach. His jurisprudence imposed new constitutional limitations on Congress' ability to authorize citizen suits, requiring some kind of private "injury" to a property-type interest in order to get access to the courts to challenge administrative action or inaction.[145] Gone was any notion that a party might sue merely to vindicate a public interest.[146] Administrative burdens on property, by contrast, could easily be challenged by aggrieved property owners.[147] The twenty-first century cases described in section A show this solicitude for the economic interests of property owners migrating into merits discussions concerning whether or not administrative action is lawful.

The resulting formalist jurisprudence is transparent in its substantive underpinnings. The Court routinely exhibits explicit concern for the protection of a sacrosanct "private" sphere of property and contract. In *Jarkesy*, the SEC's adjudications were constitutionally infirm in part because they "regulate transactions between private individuals in a pre-existing market."[148] The old *laissez-faire* notion of the pre-political marketplace has returned with gusto. The difference from *Lochner*, however, is that the Court does not directly constitutionalize these economic rights. Instead, it refashions administrative law norms to provide indirect support and subsidy to private power. *Jarkesy*, for instance, did not hold that Congress may not in any way regulate securities fraud, but only that it may not do so by empowering an administrative agency to adjudicate civil penalties for such fraud. Rules concerning official removal, statutory interpretation, and agency adjudication

144 GREENE, HOW RIGHTS WENT WRONG, *supra* note 132, 69–93. *See generally* JAMES E. FLEMING, CONSTRUCTING BASIC LIBERTIES: A DEFENSE OF SUBSTANTIVE DUE PROCESS (2022) (offering an account of substantive due process based on individual autonomy or self-rule).

145 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

146 Federal Commc'ns Comm'n v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940).

147 *See, e.g.*, Babbit v. Sweet Home Chapter of Comtys. for a Great Oregon, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting) (bemoaning the plight of the "simplest farmer who finds his land conscripted to national zoological use").

148 144 S. Ct. at 2136.

thus substantially increase the cost of regulating private property, by limiting the tools and scope of delegation available to Congress and the agencies it creates. Private economic rights act not as categorical bars but instead as vague values that cast shade on the exercise of administrative power.

The argument that follows will not probe further the proper boundaries and content of "private" rights. No doubt, it is an urgent task to understand the shifting legal meaning of personal and economic liberties.[149] The question of what individual liberty requires deserves further attention as the Court shifts from prior emphasis on privacy and political equality towards property, as well as religion and armed self-defense. My project here, however, is to turn away from this contested private realm and towards its public foil.

At the same time as private prerogative undermines federal regulatory power, it throws into relief a set of normative and political values that the Court and public law scholarship more broadly have given short shrift. The next Part will show how the public rights that the Court misconstrues provide a principled foundation for the exercise of administrative power. Reconstructing public rights will therefore provide concepts for understanding the moral and political significance of private prerogative's restrictions on government agencies and outline a path to respond to those incursions.

II. PUBLIC LIBERTY

This Part reconstructs a conception of public liberty from legal history and political theory that runs contrary to the Court's current approach and that of associated scholarship. Whereas formalist jurists today treat private and public as distinct realms, and privilege the protection of property and contract against regulatory interference, the relevant legal materials support a contrary interpretation that affirmatively legitimates federal administrative power. According to the legal tradition and constitutional theory of public liberty I recover here, the sovereign people hold certain rights that secure their basic interests. At common law, these included rights to health and safety. They have expanded, in the context of republican government, to include equality principles that are requisite to collective self-government. Such public rights can and routinely have infringed upon private property and contract. They are not a narrow and categorically distinct domain of

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[149] A task I have pursued elsewhere. See Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 389–92 (2022).

discretionary congressional spending and other non-binding action. No, public rights spread across an indefinite range of social activity. They provide a substantive foundation for (and obligation upon) the administrative state in the present.

Section A outlines the general contours of the normative theory of public rights that I reconstruct from the legal materials that follow. Sections B through E then develop this conception in detail through the bodies of law in which it has been recognized. Beginning with constitutional law, Section B describes the subject of public right, which is the sovereign people. Public rights are the rights the sovereign holds, which are core to its political existence. The legislature and executive enjoy primacy over the courts with respect to the enforcement of these rights. Section C describes the sovereign's rights against unreasonable interference with public health and safety. These rights arose in public nuisance law, which provides a common law foundation for federal regulatory action. Section D then describes the positive right of the sovereign to the use of essential private property on just and reasonable terms. These rights have been recognized in public utility law, which spawned the case law for judicial review of agency action and judicial deference to agency fact-finding and legal interpretation. Section E, finally, describes how the domain of public right has expanded—from taxation and public health to social equality—in and through methods of administrative adjudication.

A. As a Normative Theory of Regulation

A public right is an entitlement held in common by the people that secures their sovereign political interests. These interests include the health and safety of the population, the availability of essential resources and shared spaces on just and reasonable terms, and the establishment and maintenance of an egalitarian society. Whereas private rights are grounded in interests in individual independence, public rights are grounded in the joint autonomy of citizens as political consociates. Administrative agencies are functionally suited, and may even be required, to vindicate these collective interests, where individual initiative and private rights of action are insufficient.

While public rights can partially be understood in economic terms, they are more fundamentally a subject matter of politics and political morality.[150]

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150 *See* LESLIE GREEN, THE AUTHORITY OF THE STATE 127–30, 206–09 (1988) (describing the economic conception of public goods and arguing that the common nature of some such goods,

Economists understand "public goods" as non-excludable and non-rivalrous resources, such as national defense or clean air.[151] Such goods are strong candidates for government ownership or regulation because they cannot efficiently be allocated through a system of private property. But this economic conception only partially grasps what public rights are all about. In many if not all cases, the determination of whether something is a public good is a matter of political and moral value-judgment—*should* this good be one to which people have open access and which is widely or indefinitely available—rather than a physical characteristic of good itself. For instance, theorists of public goods will often list police or security as public goods.[152] But policing and national security certainly can be exclusive and rivalrous, as subgroups may be purposefully or structurally excluded from protection and subjected to state violence.[153] Likewise, safe, breathable air is geographically excludable and rivalrous under the right conditions and sufficient (or insufficient) political will.[154] If such goods are public, it is because the legal and political order constructs and manages institutional relations and natural fact so as to make them inclusive and abundant. The question then becomes, not what is public in its natural properties, but what ought to be public given its moral and political value?

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like friendship or citizenship, cannot be accounted for in instrumental, economic, but rather in intrinsic, moral terms).

151 MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 14 (1965) (defining public goods as goods that, if provided to one member of a group, "cannot feasibly be withheld from others in that group"); *see Public Goods*, STANFORD ENCYC. PHIL., https://plato.stanford.edu/entries/public-goods/ [https://perma.cc/6HDC-8R5Q] (July 21, 2021) (listing security and clean air as public goods); *see also* Thomas W. Merrill, *Private Property and Public Rights*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 75, 95–99 (Kenneth Ayotte & Henry E. Smith eds., 2011) (arguing that the public rights doctrine should be defined by economic problems such as public goods and natural monopoly, and that lawmakers and policymakers should select a regime that solves this problem at lowest cost to private rights).

152 OLSON, *supra* note 151, at 14.

153 *See, e.g.*, HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 265–292 (describing the problem of "stateless" peoples in interwar Europe who had been denationalized and thus deprived of physical security and the rights of citizenship by nationalist governments); *see* Monica C. Bell, *Located Institutions: Neighborhood Frames, Residential Preferences, and the Case of Policing*, 125 AM. J. SOC. 917, 943–8 (2020) (qualitative study showing that some residents frame policing as an "exclusionary amenity" while others frame policing itself as a "public nuisance"); *see also* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2055, 2057 (2017) (describing how criminal-procedural rules governing police conduct subject poor people of color "to the brute force of the state while exclud[ing] [them] from its protection").

154 *See*, *e.g.*, Simone C. Gray, Sharon E. Edward & Marie Lynn Miranda, *Race, Socioeconomic Status, and Air Pollution Exposure in North Carolina*, 126 ENV'T STUD. 152, 155 (2015) (finding correlation between the socioeconomic and racial makeup of a census tract, on the one hand, and the level of particulate matter and ozone in the tract, on the other).

It is this second, normative sense of "the public" that the legal tradition rests on. Public rights are rights held by the sovereign that secures her—or their—basic political interests. These rights have long been recognized in Anglo-American law and legal discourse, but they have more universal purchase in the history of political thought.[155] They are composed of individual and collective interests that are essential to the flourishing of the political community. For instance, a population that is paralyzed by widespread and preventable disease cannot function properly as a democratic polity. Many of its members, stricken by preventable illness or paralyzed by fear, will be unable to participate meaningfully in the difficult and taxing projects of self-government.[156]

Health and safety, in this literal sense, are only the most basic kinds of public entitlement.[157] Broader threats to economic and social security may also injure the public's capacity for political agency.[158] Social structures that subordinate individuals and groups, so as to undermine their equal social standing, may undermine the people's capacity for democratic agency.[159]

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[155] The Kantian tradition, in particular, has a well-developed concept of public right as the set of laws that implements citizens' common will to maintain their equal freedom. IMMANUEL KANT, THE METAPHYSICS OF MORALS 97 (Lara Denis ed., Mary Gregor trans., 2017) (describing "public right" as "the right of a state," where the state is "the whole of individuals . . . which are all united through their common interest in being in a rightful condition"). Within this tradition, there are narrower and broader interpretations of what public right ultimately requires. *Compare* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 182–299 (2009) (describing various traditional liberal constitutional rights, as well as exercises of police power that further "freedom, understood as independence of another person's choice") *with* BARBARA HERMAN, THE MORAL HABITAT 100–203 (2021) (describing a broader and dynamic set of public rights and duties, including recognition of a right to housing and care support, that are necessary to instantiate citizens' equal freedom). Conceptualizing sovereign powers as rights is not unique to the Kantian tradition. *See, e.g.*, DANIEL LEE, THE RIGHT OF SOVEREIGNTY: JEAN BODIN ON THE SOVEREIGN STATE AND THE RIGHT OF NATIONS (2021) (describing Bodin's theory of sovereignty as a set of fundamental rights defining the condition of statehood); *see also* DANA VILLA, PUBLIC FREEDOM 27–107 (2008) (describing Arendt, Tocqueville, and Hegel's related conceptions of public freedom).

[156] *See* Barry C. Burden, Jason M. Fletcher, Pamela Herd, Donald P. Moynihan & Bradley M. Jones, *How Different Forms of Health Matter to Political Participation*, 79 J. POL. 166, 166–67 (2020) (describing how "voting is strongly affected by cognitive functioning, general health functioning, and physical functioning.").

[157] *See* CORDELLI, *supra* note 45, at 213 (describing how public health concerns might broaden, by way of "democratic deliberation" to include interests concerning "social relationships" and "[p]reventing community division").

[158] ESKRIDGE & FEREJOHN, *supra* note 33, at 90–99 (describing a liberal-republican conception of "security" that underlies the New Deal welfare state).

[159] *See*, *e.g.*, Patrick Emmenegger, Paul Marx & Dominik Schraff, *Off to a Bad Start: Unemployment and Political Interest During Early Adulthood*, 89 J. POL. 315, 316 (2017) (finding a relationship between

The point here is not to substantiate any particular social-scientific claim linking a matter of health or equality to democratic governance. Rather, the normative argument is that the public has rights against any conduct, practice, or structure that in fact poses a substantial risk to its integrity as a democratic agent.

The theory of popular sovereignty separates the ruling sovereign—the people—from the government that acts in their name.[160] The government, therefore, is merely the agent or trustee of the sovereign,[161] and is obligated to see to it that sovereign rights are respected. As the ultimate legitimate authority within its jurisdiction, the sovereign is entitled to those goods, conditions, and states of affairs that are requisite to the preservation and maintenance of such authority. A democratic sovereign, in particular, will have a right to preserve conditions of civic equality among its members.[162] The government that acts in the people's name, then, has a duty to protect such rights.

Borrowing from the work of Barbara Herman, Lawrence Sager, and Seana Valentine Shiffrin,[163] I describe the government's obligations toward

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unemployment and political participation among young voters but not at an older age); *see* Henry E. Brady, Sidney Verba & Kay Lehman Schlozman, *Beyond SES: A Resource Model of Political Participation*, 89 AM. POL. SCI. REV. 271, 285 (1995) (offering a model to explain differing rates of participation based on employment and resources such as schooling and involvement in religious institutions); Frederick Solt, *Economic Inequality and Democratic Political Engagement*, 52 AM. J. POL. SCI. 48 (2008) (finding that "economic inequality powerfully depresses political interest, discussion in politics, and participation in elections among all but the most affluent"); RAHMAN, *supra* note 42, at 83–6 (criticizing the "structural domination" inherent within the free market system); Niko Kolodny, *Being Under the Power of Others*, *in* REPUBLICANISM AND THE FUTURE OF DEMOCRACY 94, 94–5 (YIFTAH ELAZAR & GENEVIEVE ROUSSELIERE eds., 2019) (stressing the importance of "relations of social equality" in a "democratic state").

160 For an account of the intellectual history of the distinction between "sovereign" and "government," from Bodin through the U.S. Constitution, see RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY (2016). Relying on the concept of popular sovereignty does not require adoption of a metaphysical, organic personality that stands within or behind the state. For a critique of such a theory in the context of administrative law, see Katharine Jackson, *The Public Trust: Administrative Legitimacy and Democratic Lawmaking*, 56 CONN. L. REV. 1 (2023). It rather requires that we ascribe legal personality to the group of citizens which the Constitution recognizes as its co-authors. On democratic citizenship as "co-authorship," see SEANA VALENTINE SHIFFRIN, DEMOCRATIC LAW 22–4 (2021).

161 *See generally* Katharine Jackson, *All the Sovereign's Agents: The Constitutional Credentials of Administration*, 30 WM. & MARY BILL OF RTS. L. J. 777 (2022).

162 Such public rights do not deny or exclude moral or legal obligations of government towards non-citizens, which are a matter of cosmopolitan right as well as treaty obligation. *See, e.g.*, SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS (2012).

163 *See generally* Barbara Herman, *Being Helped and Being Grateful: Imperfect Duties, The Ethics of Possession, and the Unity of Morality*, 109 J. PHIL. 391 (2012); HERMAN, *supra* note 155, at 123–63; Lawrence

the people as "imperfect duties," which correspond to the people's collective rights. An imperfect moral duty, such as beneficence, is one that does not command or prescribe specific, mandatory conduct, but rather has normative weight for practical deliberation. Performance of the government's public duties involves the exercise of discretion and judgment to determine the relationship among the people's multiple interests and the sacrifices that one kind of service may impose upon other relevant concerns. This discretionary quality does not contradict their obligatory character. While political and legal officials may and must exercise judgment in delineating and protecting common rights, they may not ignore these obligations altogether or fail to act reasonably to safeguard them.

The law of public nuisance has recognized a broad and indefinite range of collective interests concerning health, safety, and morality.[164] In a democratic-constitutional system, however, public rights are not limited to common law categories of any particular historical vintage. They rather evolve in response to the shifting self-understandings of the people in their collective capacity. Precisely because public rights are subject to political construction, the elected branches have primacy in the definition and the expansion of public rights in new domains.[165] Congress and the Executive Branch have special institutional competence to determine what the people's present shared needs and values are.[166] Their electoral connections enable them to render democratic judgments. And their capacities for legislative and administrative fact-finding enable them to determine the natural and social circumstances relevant to executing those judgments.

Sager, *Imperfect Duties—The Dark Matter of The Constitutional Universe,* Herbert Morris Lecture in Law and Philosophy, UCLA School of Law (Jan. 28, 2022) (on file with author); Seana Valentine Shiffrin, *Democratic Representation as Duty Delegation*, 2022 PROC. OF THE AM. PHIL. ASS'N 90.

164 *See infra* Part II.C.

165 *See* Helvering v. Davis, 301 U.S. 619, 640–41 (1937) (Cardozo, J.) (upholding the Social Security Act against constitutional challenge):

> The line must . . . be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event . . . . The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times. The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided.

166 *See infra* Part II.B.

Congress has thus recognized public rights in the collection of revenue, the protection of the interests of dominated classes, collective bargaining, safe and healthy workplaces and streets, clean air and water, and much more. Administrative agencies established by Congress often implement such public rights. Sometimes, Congress *must* resort to administrative methods of rulemaking, adjudication, and enforcement where ordinary methods would prove inadequate to protect core sovereign interests.[167] Agencies can be proactive and act more swiftly than the Legislature or the courts to secure essential political interests in which each person may have too small a stake to pursue civil litigation. And they can adjudicate the mass of small-value cases that are likely to arise where rights are general rather than individualized in nature. Administrative action can and frequently does impinge on relations of property and contract to protect the collective rights identified by legislation. The formalist effort to separate public from private rights has therefore fundamentally misconceived this tradition of legal thought and practice.

B. Based on the People's Sovereign Rights

To understand the legal structure of public rights, consider first the subject who holds them: "We the People."[168] Because public rights are held in common by the people, and are not the private preserve of a sovereign monarch, they are not limited to a state of social and physical wellbeing that increases the King's power and riches and secures his domain. Rather, they include collective exercises of political agency in and through the people's representative institutions. The domain of public liberty tracks the development of the state, from the growth of its territorial jurisdiction and fiscal powers in the late Middle Ages through its contemporary regulatory and welfare functions. Administrative agencies that protect these political rights serve as the popular "sovereign's agents."[169]

One of the earliest authorities on English common law, the thirteenth-century treatise *Bracton*, borrowed from Roman civil law to distinguish "public" from "private" right.[170] Whereas "[p]rivate right is that, which pertains principally to the interests of individuals," public right "is what

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167 *See infra* Part II.E.

168 U.S. CONST. pmbl.

169 *See* Jackson, *supra* note 161, at 810–15 (arguing that agencies can serve as democratic-representative bodies).

170 1 HENRY DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 21 (Travers Twiss ed., 1878).

regards the state of the body politic."[171] In English medieval political thought, the "body politic" was one of the "[t]he King's Two Bodies."[172] This legal fiction permitted the continuity of government and perpetuation of sovereignty in the "body politic" of an immortal King or Queen, despite the natural death of any particular sovereign. In the reign of Elizabeth I, the court at Sergeant's Inn described the body politic as "consisting of Policy and Government, and constituted for the Direction of the People, and the Management of the public weal."[173] Public right was therefore the law concerning general policies that would guide and benefit the people. It was distinct from the will of the prince and rather consisted in objective qualities of good governance.[174]

The core of public right in medieval and early modern law lay in the defense of the realm, administration of justice, as well as the taxation that made these viable.[175] The royal fisc was the paradigmatic public right,[176] as taxing funded war-making.[177] The maintenance of "peace" also extended into the interior, however. "The King's Peace" provided the foothold for the jurisdiction of the King's courts to resolve private disputes when the King traveled the country.[178] The open highways and waterways subject to public nuisance law were the arteries through which centralized governmental authority flowed. Management of the waters was core to the exercise of sovereign power, in ways complementary to common law rights to navigable waters. Perhaps the most important early example of an administrative commission in England, the Court of Sewers, was created by statute in 1532 with immense powers over persons and property to the ends of preventing floods, draining swamps and marshes, and promoting economic development and public health.[179]

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171 *Id.*

172 ERNST KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY 9 (1957).

173 *Id.* at 7.

174 The distinction between official will and institutional purpose retains vitality today in American public law. As Daphna Renan has shown, the law of presidential power continuously trades on the distinction between the office of the presidency and the personal will of any particular president. *See generally* Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119 (2020).

175 Gaines Post, *The Theory of Public Law and the State in the Thirteenth Century*, 6 SEMINAR (JURIST) 42, 46 (1948).

176 KANTOROWICZ, *supra* note 172, at 180.

177 CHARLES TILLY, COERCION, CAPITAL AND EUROPEAN STATES 84–87 (1990).

178 David Feldman, *The King's Peace, The Royal Prerogative, and Public Order*, 47 CAMBRIDGE L. J. 101, 106–07 (1988); *see also* Frederick Pollock, *The King's Peace*, 1 L. Q. REV. 37, 41–42 (1885).

179 SIDNEY WEBB AND BEATRICE WEBB, ENGLISH LOCAL GOVERNMENT: STATUTORY AUTHORITIES FOR SPECIAL PURPOSES 20–30 (1922).

The notion of public right stood in an ambivalent relationship to monarchical authority in the development of the English state. The King's will made the law, but the King was also authorized by and subject to law.[180] At least since *Bracton*, English constitutional law occasionally recognized that the King's lawmaking power could be "bridled" by his counselors.[181] The constitutional struggles in the seventeenth century shifted lawmaking authority from the King as a solitary actor to the Parliament, acting in the King's name.[182] Eighteenth-century parliamentary government tied public law not to monarchical will but rather to a "bourgeois public sphere" in which constituents could debate matters of policy and principle in coffee houses, newspapers, and a republic of letters.[183] Within this constitutional tradition, the public was alienated from itself. As Blackstone observed in the context of remedies for public nuisance, "the public" referred to what was "common to all the king's subjects," but this commonality remained personated in and protected by "the king in his public capacity of supreme governor, and *pater familias* of the kingdom."[184]

The American Revolution jettisoned monarchical sovereignty and took up English constitutionalism's radical tradition, which emphasized not only private but "publick liberty."[185] Public liberty concerned not property or contract but rather a collective power of deliberation, choice, and constraint on government.[186] As Hannah Arendt observed in her study of American revolutionary thought, the "new bodies politic" formed in colonial societies established the foundation for "a political realm that enjoyed power and was entitled to claim rights without possessing or claiming sovereignty."[187] The government could not lay a claim to sovereign power, which rested in the people alone. America's distinctive brand of "public freedom" meant the

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180 KANTOROWICZ, *supra* note 172, at 148–51.

181 BRACTON, *supra* note 170, at 269.

182 F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 281–311 (1920) (describing the shift to parliamentary sovereignty after the Glorious Revolution).

183 JÜRGEN HABERMAS, STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE 51–66 (Thomas Burger trans., 1989).

184 WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 220, §290 (William Carey Jones ed., 1916) (1765-69).

185 JOHN TRENCHARD & THOMAS GORDON, 1 CATO'S LETTERS OR ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 110, 422 (Ronald Hamowy ed., 1995) (1720-23).

186 *Cf.* ANNELIEN DE DIJN, FREEDOM: AN UNRULY HISTORY 1–2 (2020) (introducing the shift in the Western intellectual tradition from defining liberty in terms of democratic self-governance to limitations on government).

187 HANNAH ARENDT, ON REVOLUTION 159 (Penguin Books ed., 2006) (1963).

joint exercise of power in a "man-made public space . . . where freedom appears and becomes visible to all."[188]

The Framers designed the Constitution as such a space. In *Federalist 51*, James Madison wrote that in constitutional governments, "the constant aim is to divide and arrange the several offices in such a manner . . . that the private interest of every individual may be a sentinel over the public rights."[189] The government had to be structured so as to advance the common or general interest rather than the narrow interests of individuals. The "public rights," were the collective interests of the people. The Constitution would not merely secure individual rights but rather mark out an open and common setting in which citizens could contest, articulate, and advance shared interests.[190] In his *Lectures on Law*, James Wilson hoped that the scheme of checks and balances would not result in inaction or paralysis. Rather, "there is necessity for movement in human affairs; and these powers are forced to move, though still to move in concert" along "the true line of publick liberty and happiness."[191]

Public liberty in this context did not refer to a fixed basket of entitlements but rather the ongoing, collaborative, and contested project of self-governance. It was a "grammar of political conflict" and development, not of legal stasis.[192] Defining specific public rights was both a matter of constitutional structure generally, but also, more specifically, the preserve of the elected departments of government. They would build on and expand the historical foundations of sovereignty through the exercise of legislative and executive power. In a nod to the ancient subject-matters public rights, the Constitution in one and the same clause assigned Congress the power to

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188 *Id*. at 115. Tocqueville in his study of Jacksonian democracy likewise emphasized that American self-government succeeded in alloying social equality with "political freedom," by "multiplying infinitely the occasions for citizens to act together and to make them feel every day that they depend on one another." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 486–7 (Harvey C. Mansfield & Delba Winthrop eds., 2000) (1835). There is significant tension between Tocqueville and Arendt's conception of self-government and the modern bureaucratic state, which American legal development has addressed through legal and political controls. On legal controls as a response to Tocqueville's "nightmare" of democratic despotism, see DANIEL ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940, 1–8 (2014). On political controls, especially public participation, as a response to Arendt and Tocqueville's worries, *see* BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 4–6 (2019).

189 THE FEDERALIST NO. 51 (James Madison).

190 ACKERMAN, *supra* note 34, at 6.

191 JAMES WILSON, *Lectures on Law*, *in* 1 THE WORKS OF JAMES WILSON 300 (Robert Green McCloskey ed., 1967) (1790-91).

192 *See* MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 156 (2010).

"lay and collect Taxes" and to provide for the "common Defence and general Welfare."[193] Legislative primacy in matters of general welfare flowed not only from republican ideals of the rule of law but from the concrete institutional configuration of Congress, which was designed to reflect diverse interests and viewpoints of the polity.[194]

The executive played a crucial, though secondary, role in the maintenance of the body politic. As Hamilton observed in *Federalist 72*, "[t]he administration of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive, or judiciary; but in its most usual, and perhaps its most precise signification it is limited to executive details, and falls peculiarly within the province of the executive department."[195] Legislation would specify the general contours of the body politic with particular authorities, structures, and facilities. The Executive would articulate the rights thus staked out. The tertiary role of the courts in this scheme was to ensure, in justiciable "cases" or "controversies," that the laws were within the bounds of the Constitution and that public and private conduct fell within the bounds of law.[196]

Taking seriously the notion of a "public" holding "rights" may seem out of place in our contemporary legal and political culture. We are generally accustomed today to treat rights as purely individual and the public as either a mere aggregation of individual interests or else as an empty space in which individuals can transact and dispute with one another.[197] But there is value in taking our Constitution at its word, and considering the notion of "We the people" as a collective legal subject capable of holding rights. Such a collective conception of legal authority enables citizens to make claims on government by virtue, not just of the harms or benefits experienced by particular actors, but also of the political life we jointly inhabit and

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[193] U.S. CONST. art. I, § 8, cl. 8. For a broad interpretation of Congress' powers under the clause, see David S. Schwartz, *Recovering the Lost General Welfare Clause*, 63 WM. & MARY L. REV. 857 (2022).

[194] *See* THE FEDERALIST NO. 70 (Alexander Hamilton) ("The differences of opinion, and the jarrings of parties in [the legislative] department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection.")

[195] THE FEDERALIST NO. 72 (Alexander Hamilton).

[196] THE FEDERALIST NO. 78 (Alexander Hamilton).

[197] *See, e.g.*, Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON IN POLITICS 3, 3–11 (James Bohman & William Rehg eds., 1997) (identifying the limits of social-choice theories of democracy and introducing the alternative of politics as "an open and public activity").

construct.[198] Across our legal and political history, the public has pressed for negative rights against direct interference with its health and safety, as well as positive rights to the use of private property that is essential to its wellbeing. These entitlements are described in the next sections.

C. Against Unreasonable Interference with Health and Safety

This section describes the rights of the public against interference with its health and safety. It recovers the substantive, common law foundations for administrative law. These foundations provide grounds for Congress to enact regulatory legislation.

A public nuisance is "an unreasonable interference with a right common to the general public."[199] Such common or "public" rights include rights against "significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience[.]"[200] The concept of public nuisance is an old one. In medieval and early modern common law, public nuisances were regulatory offenses prosecuted in local criminal and administrative courts, and later by the attorney general before the central courts in London.[201] While criminal in origin, by the late sixteenth century, private parties could bring an action on their own behalf as well if they suffered special damages.[202] Private parties could also seek an injunction with the permission of and on behalf of the attorney general in the Court of Chancery.[203] Such limitations on civil suits for public nuisance owed to the common character of the relevant rights and wrongs. As Blackstone put it, "the damage being common to *all* the king's subjects, no

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[198] *See* DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 65 (2010) (arguing for the centrality of "collective identity and responsibility" and "collective agency" in environmental and governmental decisionmaking.).

[199] RESTATEMENT (SECOND) OF TORTS § 821B (1965).

[200] *Id*.

[201] *See generally* J.R. Spencer, *Public Nuisance: A Critical Examination*, 48 CAMBRIDGE L. J. 55 (1989) (describing the historical development of public nuisance).

[202] *See* William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1005–6 (1966) (explaining how public nuisance became a private action).

[203] *Id*. at 1006; *see also* BLACKSTONE, *supra* note 184, at 219 n.3 ("Courts of chancery exercise jurisdiction as to common or public and private nuisances, by restraining persons from setting them up, by inhibiting their continuance, or compelling their abatement"); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA, 297–99, §§921–23 (14 ed., 1918) (1836) (describing the jurisdiction of the courts of equity over public nuisances, the availability of injunctive relief, with the purpose to "restrain and prevent such nuisances" where common-law remedies of ex post abatement and punishment were inadequate).

one can assign his particular portion of it," unless the damage they suffered was "extraordinary."[204]

Importantly, for the purposes of the discussion that follows in Part II.E and III, public nuisance traditionally may be remedied without judicial process. A private party could abate a public nuisance peculiarly affecting them on their own initiative, without judicial assistance, if the threat were immediate.[205] In nineteenth-century state and federal constitutional law, some governmental authorities could also abate public nuisances summarily.[206] In other words, judicial adjudication was—and remains—not necessary to accomplish the lawful end of preventing substantial injury to common rights. This principle provides a long-forgotten foundation for administrative adjudication of matters impacting private property rights, to be explored in Part II.E. Collective self-help, by way of administrative action, may be necessary to secure common interests where the ordinary course of law is too slow and cumbersome.

Nuisance law was a key aspect of the state's police powers in the United States in the nineteenth century. As William J. Novak's pathbreaking study documents, states and localities pervasively regulated the use of private property to protect public health, safety, and morals.[207] In this period, the American state was not "weak."; rather, it was localized, and moored to

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204 BLACKSTONE, *supra* note 184, at 220, §§290–91.

205 *E.g.*, Brown v. Perkins, 78 Mass. 89, 94 (1858) ("[I]f a public or private nuisance so imperils a man's life, limbs, health, happiness, liberty or property, or so obstructs him in the exercise and enjoyment of his undoubted legal rights, that it is not safe and reasonable for him to invoke the process of the law to abate the nuisance, he may, on the principles of self[-]defence, so far remove and abate the nuisance as to relieve himself from immediate peril and his legal rights from dangerous obstructions, and the law will excuse or justify him so far in abating the nuisance."). For other examples and discussion, see Prosser, *supra* note 202, at 1006 n.89.

206 *E.g.*, Metropolitan Bd. of Health v. Heister, 37 N.Y. 661, 670 (1868) ("from the earliest organization of the government, the absolute control over persons and property, so far as the public health was concerned, was vested in boards or officers, who exercised a summary jurisdiction over the subject, and who were not bound to wait the slow course of the law"); *see* People ex rel. Copcutt v. Bd. of Health of City of Yonkers, 140 N.Y. 1, 6 (N.Y. 1893) ("Boards of health and other like boards act summarily, and it has not been usual anywhere to require them to give a hearing to any person before they can exercise their jurisdiction for the public welfare."); *see also* Lawton v. Steele, 152 U.S. 133, 136 (1894) ([T[he 'police power' is . . . universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance.").

207 WILLIAM J. NOVAK, THE PEOPLE'S WELFARE, *supra* note 18, at 44–45, 60–70 (1996) (describing the use of nuisance law as a regulatory tool to improve the general welfare of citizens in the nineteenth century).

judicial common law, rather than federal legislative and administrative law, as it came to be in the late-nineteenth and twentieth century.[208]

The modern state federalized and administered these public rights against common nuisances. As Thomas Merrill observes, "administrative agencies . . . have been created to enforce public rights."[209] Core areas of administrative law address the same or similar risks as public nuisance.[210] The clearest contemporary examples are the Clean Air and Clean Water Acts administered by the EPA.[211] These statutes set out extensive regulatory schemes to protect public health against air and water pollution. The Court has explicitly recognized that such laws address the same rights and wrongs as the common law of public nuisance. When several states sued power companies for causing "substantial and unreasonable interference with public rights" by contributing to climate change, the Court ruled that the Clean Air Act had "displaced" their federal public nuisance claims.[212]

While preemption here operated to limit the scope of common law claims, it at the same time relied upon the normative overlap between common law nuisance and administrative regulation. It was only because the Clean Air Act was grounded in a common right to public health that it

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[208] William J. Novak, *The Myth of the "Weak" American State*, 113 AM. HIST. REV. 752 (2008).

[209] Merrill, *supra* note 28, at 36.

[210] *See* David A. Dana, *Public Nuisance Law When Politics Fails*, 83 OHIO ST. L. J. 61, 71 (2022) ("What arguably unites the categories of public nuisance cases is that they all do the work of what a well-functioning administrative state should do."); *see also* Harrison, *supra* note 15, at 260–61 (describing EPA regulation as a matter of public right). Public nuisance remains a vital area of practice today, particularly for state attorney generals in attempting to abate harm from cigarettes, guns, climate change, lead paint, and opiates. *See, e.g.*, Jonathan Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. REV. 1827, 1829 (2007) (arguing that "nuisance litigation could form of a reasonable basis for climate change regulation"); Rachel Rothschild, Note, *State Nuisance Law and the Climate Change Challenge to Federalism*, 27 N.Y.U. ENV'T L. J. 412, 416 (2019) (arguing that there is "legal precedent for allowing state nuisance suits concerning transboundary pollution," there is "no basis for removing" state nuisance suits to federal court, and "courts should not find federal law preempts [state] nuisance lawsuits."); Press Release, Office of the Attorney General of California, Attorney General Bonta Announces Lawsuit Against Oil and Gas Companies for Misleading Public About Climate Change (Sept. 16, 2023), https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-lawsuit-against-oil-and-gas-companies [https://perma.cc/C6WB-SK4Z] (citing a public nuisance claim regarding climate change); *See generally* Kendrick, *supra* note 29 (exploring and responding to the traditionalist, formalist, and institutionalist objections to public nuisance as it applies to opioid litigation) It is beyond the scope of this article to address the important questions of institutional competence and constitutional theory that underlie the proper extent of public nuisance as a civil cause of action. Instead, my aim is to identify public nuisance as a general, substantive, common law foundation for what many if not most federal regulatory agencies are authorized and, ultimately, obliged to do.

[211] 42 U.S.C. § 7401 et seq. (Clean Air Act); 33 U.S.C. §1251 et seq. (Clean Water Act).

[212] Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011).

could displace a common-law cause of action as to the same. Such cases impliedly recognize Congress' power, under the Commerce Clause, to abate public nuisances and protect public rights where they exist in the wide streams of interstate commerce. As Section II.E will show, other key statutes and cases on agencies' adjudicatory powers rely on nuisance concepts, such as "obstruction" of commerce and "abatement" of health and safety hazards, to justify and delineate the scope of administrative power.

While the EPA is perhaps the most obvious example of an agency with authority to protect public rights against common nuisance, many other regulatory agencies may be conceived in analogous terms. The National Highway Traffic and Safety Administration aims to protect public safety on the roadways.[213] The Centers for Disease Control and Prevention has authority to stop the spread of contagious disease.[214] The nuisance frame is pliable and can expand further to encompass non-physical forms of "safety."[215] The CFPB has the responsibility, for instance, to prevent financial acts and practices that cause "substantial injury to consumers."[216] Such agencies have the authority to vindicate general and shared legal rights against substantial and material but not necessarily physical harms to indefinite numbers of persons.

The close affinity between the tort of public nuisance and many federal regulatory statutes discloses administrative law's implicit normative grammar. Agencies must regulate not *merely* because Congress authorizes them to regulate. They must regulate because Congress has directed them to protect public rights in specific domains.

The concept of public right in nuisance law relies, of course, on the idea that some rights are "public" rather than "private" in nature. Ancient categories of public rights, such as rights against infection by contagious

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213 *See* 49 U.S.C. § 30101 (describing congressional purpose to "reduce traffic accidents and deaths and injuries resulting from traffic accidents"); 49 U.S.C. § 105 (d) (authorizing Secretary of Transportation to rely on National Highway Traffic Safety Administration to carry out that purpose).

214 *See* 42 U.S.C. § 264 (authorizing the Surgeon General "to make and enforce such regulations . . . to prevent the . . . spread of communicable diseases" from foreign countries into the U.S. or between states); *see also* 42 C.F.R. § 70.2 (authorizing the Centers for Disease Control and Prevention to take reasonably necessary measures to stop the spread of diseases).

215 *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 3–7 (2008) (analogizing the physical safety risks of consumer products to the economic risks of financial products).

216 12 U.S.C. §5531(c)(1)(A).

diseases,[217] involved conditions, activity, or conduct that impact an indefinite number of people in similar ways. In Wiley's epidemiological terms, such harms are afflicted on "the population" as a whole, as well as the individuals who compose it.[218] While public rights are often connected to those of individuals, the law of public nuisance indicates that such rights are different from the mere aggregation of individual interests. Rather, they are best understood as shared rights held in common by the people to enjoy and maintain "valuable associations among people."[219] A society with open and safe thoroughfares, fresh air, and potable water is an object of public right not merely because of intrinsic physical or economic properties of these goods, nor merely to preserve the personal interests of individuals, but, more fundamentally, because these conditions are essential to the political association's very being. They help to make up "the fabric of social existence."[220] We generally do not use the streets alone, contract a contagious disease on our own, or suffer from noxious chemicals that strike only our person and not any others. Public rights thus emerge from and safeguard our sociality.

Rights against common nuisances are distinctive in that they often benefit from administrative enforcement, as well as, if not entirely in substitution of, private enforcement. Any one private party may have difficulty suing to protect the common right, and their own harm may not justify the cost. But the overall harm across society may be so great that administrative prevention and deterrence are necessary. As John Dickinson observed in his landmark 1927 treatise, *Administrative Justice and the Supremacy of Law in the United States*:

> Such . . . are the relations between individuals to-day that, if one person fails to make timely insistence on his rights, the result may often be damaging to others; as where an immediate neighbor fails to enforce the removal of a *disease-breeding nuisance on abutting property*. There must be some agency to initiate action on behalf of the public in such cases, based on wider information than private individuals generally have, and the action taken must be more summary in form than a proceeding at law. What is needed is not

[217] Spencer, *supra* note 201, at 66, *citing* Baines v. Baker (1752) Amb. 158, 27 E.R. 105, sub nom. Anon. 3 Atk. 751, 26 E.R. 1230 (smallpox).

[218] Wiley, *supra* note 31, at 213.

[219] GREEN, *supra* note 150, at 208.

[220] HERMAN, *supra* note 155, at 148.

> so much an adjudication of disputed rights as a seasonable order telling someone what to do in time to avoid committing injury.[221]

When James Landis explained the necessity of "the administrative process" in his 1938 Storrs Lectures, he did so in similar terms.[222] Any particular labor law violation or instance of securities fraud might count for little monetarily or in terms of the dignitary interests of particular parties harmed. But when these instances become systemic or structural, they pose "a serious social threat."[223] Proactive and relatively summary administrative adjudication would provide an essential means of vindicating the public interest in peaceful and just social conditions, above and beyond the welfare and entitlements of immediately aggrieved but often under-resourced parties.[224]

Section E examines methods of administrative adjudication in more detail. But before we turn to those questions of constitutional structure and administrative procedure, we need to consider another substantive object of public right: reasonable access to private property providing essential services.

D. To the Use of Essential Private Property

The previous sections mapped out a set of negative rights and constitutional functions associated with popular-sovereign power in the United States. This section describes a set of positive rights to the public use of private property on just and reasonable terms. Whereas the nuisance concept was the backbone of what Novak calls the "well-regulated society"[225] of the early- to mid-nineteenth century, "the modern American administrative and regulatory state" that first emerged in the late nineteenth century "was built directly upon the legal foundation laid by the expanding conception of the essentially public services."[226] Today, progressive legal scholars have again relied on public utility concepts to provide a normative

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[221] JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 13 (1927) (emphasis added); on Dickinson's immense influence, *see* Merrill, *supra* note 11, at 972–79 (describing the lasting impact of Dickinson's *Administrative Justice and the Supremacy of Law in the United States* on the field of administrative law).

[222] LANDIS, *supra* note 43, at 36.

[223] *Id*.

[224] *See* FINAL REPORT, U.S. ATT'S GEN.'S, *supra* note 36, at 13 (describing the need to supplement common law causes of action through administrative enforcement).

[225] WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 141 (2022).

[226] *Id*. at 108.

and practical foundation for financial, internet, and energy regulation.[227] Placing public utility into the broader concept of "public right" strengthens and extends such arguments. Public utilities are businesses that the people are *entitled* to regulate and use, that have corresponding *duties* to behave justly and reasonably toward consumers. This collective entitlement justifies judicial deference to legislative and administrative decisions, which are more closely tied than judicial adjudications to the people and the social circumstances that compose the body politic.

In *Munn v. Illinois*,[228] the Supreme Court held that states could subject private property "affected with a public interest" to reasonable rate regulations.[229] Businesses holding a "virtual monopoly" over important goods and services were found to be "clothed with a public right."[230] This public utility concept came to underlie and set the agenda and boundaries of early American administrative law.[231] The case can be hard to decipher to the modern ear because it does not seem problematic today that a state might impose regulations on a private business as an ordinary exercise of its police powers, or that the federal government might do so under the Commerce Clause. However, this current (and increasingly contested) state of affairs is the hard-won result of a constitutional struggle running from Reconstruction through the New Deal.[232]

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[227] *See, e.g.*, K. Sabeel Rahman, *Infrastructural Regulation and the New Utilities*, 35 YALE J. REG. 911 (2018) (examining the legal tradition of public utility regulation to adapt a public utility framework for regulating modern infrastructure); William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614 (2014) (looking to early twentieth-century concepts of public utility to gain insights for dealing with the challenges of decarbonization); GANESH SITARAMAN & ANNE L. ALSTOTT, THE PUBLIC OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY 62–63 (2019) (explaining how public utility regulation works and how a public utility compares to a public option); MORGAN RICKS, GANESH SITARAMAN, SHELLY WELTON, & LEV MENAND, NETWORKS, PLATFORMS, AND UTILITIES: LAW AND POLICY (2022) (examining the legal regulation of a wide range of public utilities); Saule Omarova, *The "Franchise" View of the Corporation: Purpose, Personality, and Public Policy*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 201, 211 (Elizabeth Pollman & Robert P. Thompson eds., 2011) (describing banks as "public utilities" which perform "essential public functions," and arguing that "the sovereign public, acting through its central bank and fiscal authorities, is the ultimate creator of this critical public resources [currency and credit] that private banks are licensed to dispense, for a profit").

[228] Munn v. Illinois, 94 U.S. 113 (1876).

[229] *Id*. at 126.

[230] *Id*. at 128.

[231] NOVAK, *supra* note 228, at 122 ("Public utility law incubated . . . a modern concept of administration.").

[232] *See* Joshua Macey & Brian Richardson, The Public Utility Constitution 12 (Sept. 7, 2023) (unpublished article) (on file with author) ("The victory of the pro-regulatory understanding of *Munn*

Munn's notion of public rights, like that in the law of nuisance, grounds administrative regulation in the common interests of the political community. The legal question in the case was whether Illinois had deprived the owners of grain elevators of their property without due process by legislatively setting rates for their use. In concluding that it had not, Chief Justice Waite first relied on the fundamental powers of the "body politic," in which "the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."[233] Where private property was "used in a manner to make it of public consequence, and affect the community at large[,]" the body politic had the right to regulate the way in which such property was used.[234] Though a person could generally dispose of their property as they pleased as long as they did not injure others, "if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose . . . he must, as an equivalent, perform the duty attached to it on reasonable terms."[235] Due process requirements were therefore informed and delimited by the corresponding "right" of the public and "duty" of private property holders.

Like the concept of public nuisance, the concept of public utility justified the regulation of private property in terms of its substantial, general consequences for the political community. The examples Waite draws from English law concern spaces also at issue in nuisance, such as streets, inns, and navigable waters. But whereas nuisance was a tort developed and administered primarily by the judiciary, Waite's grounding of public utility in the rights of the body politic gave a primary role to the legislature rather than the judiciary. Waite rejected the contention that, as to compensation for the public use of property, "what is reasonable is a judicial and not a legislative question."[236] Rather, he said, "it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances."[237] Where matters concerned the public generally, the legislature, which represented its collective interests, had the primary responsibility to determine the reasonableness of rates.

v. Illinois, which occurred nearly sixty years after *Munn* was decided, provided the doctrinal foundation for legislative authority to regulate big business, to delegate regulatory authority to agencies and commissions, and to direct adjudication outside of Article III Courts.").

233 94 U.S. at 124.

234 *Id.* at 126.

235 *Id.* at 127–28.

236 *Id.* at 133.

237 *Id.*

This aspect of *Munn* set up a structural-constitutional conflict that continues to bedevil administrative law to this day. Populist and Progressive reformers relied on *Munn* to establish public utility commissions at the state level to curtail the powers of railroads and secure fair rates for agricultural shippers.[238] At the same time, the increasing grip of *laissez-faire* ideology in the judiciary in the ensuing decades restricted the powers of state legislatures and their administrative agencies. In *Smyth v. Ames*,[239] the Court held that the question of whether railway rates established by a state railway commission "were so unreasonably low as to deprive the carrier of its property . . . without due process of law, cannot be so conclusively determined by the legislature of the State . . . that the matter may not become the subject of judicial inquiry."[240] The Court thus wrested from legislatures, and the agencies they created, the authority it had acknowledged in *Munn* to establish the "reasonableness" of public utility rates.[241]

But *Smyth* was not the end of the matter. Congress relied on its Commerce Clause authority to create its own railway utility commission in 1887, the Inter-state Commerce Commission.[242] This milestone of Progressive statecraft initially met with fierce resistance from the Court, which declined to defer to its determinations as to whether shipping rates were "reasonable and just."[243] The Court, however, proved unable to resist an increasingly powerful Progressive movement, which aimed to counter economic domination by large industrial concerns through the expansion of legislative and administrative authority.[244] Congress in 1906 passed the Hepburn Act, which made the Commission's orders self-executing unless "suspended or set aside by a court of competent jurisdiction."[245] While the statute did not establish a standard of review, the Court sensed the political

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238 *See* ELIZABETH SANDERS, ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877–1917, at 179–216 (1999).

239 Smyth v. Ames, 169 U.S. 466 (1898).

240 *Id.* at 526.

241 *See, e.g.*, Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418, 457 (1890) (holding unconstitutional a state statute giving a regulatory commission final authority over the reasonableness of rates, on the grounds that it "deprives the company of its right to a judicial investigation, by due process of law, under forms and with machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy.").

242 STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 139–150 (1982).

243 Interstate Com. Comm'n v. Alabama Midland Ry. Co., 168 U.S. 144, 162 (1897).

244 *See* SKOWRONEK, *supra* note 242, at 248–59 (describing conflict between the federal courts and Congress over the authority of the Inter-state Commerce Commission, culminating in passage of the Hepburn Act.

245 Hepburn Act, H.R. 12987, 59th Cong. § 4 (1906).

winds and retreated from its position of *de novo* review of the Commission's findings. Instead, in a series of cases, it adopted an "appellate review model."[246] The Court would review questions of constitutional and statutory law *de novo*, but would defer to the Commission's factual findings so long as it did not act "arbitrarily," "contrary to evidence," or in a manifestly "unreasonable" manner.[247] Even as to "mixed questions of law and fact," the court would "not examine the facts further than to determine whether there was substantial evidence to sustain the order."[248]

These phrases have become hallmarks of judicial review of administrative action from the 1900s to the present day. They originate in an era when the Court retreated from its aggressive posture of review in the face of Congress' assertion of jurisdiction over the public's right to the just and reasonable use of private property. Administrative law thus rests on an inference from substantive social rights to constitutional structure and process. The existence of a public right to the use of private property subjected such property to governmental control without ordinary judicial process. Because public rights were collective in nature, concerning the community as a whole, their recognition lay primarily in the hands of the legislature. The legislative decision to delegate the specifics of regulation to administrative agencies reflected the Progressives' judgment that the complex social, scientific, and political questions at issue in the regulation of private property required a "tribunal appointed by law and informed by experience."[249] The judiciary retained a role in the regulatory scheme, but only in the posture of deferential appellate review. Public rights were primarily the province of legislative authority and administrative judgment.

Administrative organizations are institutionally suited to the defense of collective rights because the practical entailments of such imperfect rights are highly fact- and context-dependent. Agencies answer questions such as: whether various commercial practices are "unfair methods of competition,"[250] whether a financial disclosure is "necessary or appropriate

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[246] Merrill, *supra* note 11, at 953–64.

[247] Interstate Com. Comm'n v. Union Pac. R.R., 222 U.S. 541, 547 (1912). *See also* Interstate Com. Comm'n v. Illinois Cent. R. Co., 215 U.S. 452, 470 (1910) (reviewing courts may not, "under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised."). For the authoritative account of these and other cases in the wake of the Hepburn Act, see DICKINSON, *supra* note 221, at 160–61.

[248] 222 U.S. at 547–48.

[249] 206 U.S. at 454.

[250] Federal Trade Commission Act, 15 U.S.C. § 45.

in the public interest,"[251] and whether an air quality standard is "requisite to protect the public health" within an "adequate margin of safety."[252] The answers to such questions depends both on general normative judgments about what kinds of social conditions constitute the contemporary public as well as factual judgments about what concrete steps will help to achieve and maintain those conditions. The enforceable requirements of public right cannot simply be deduced from clear principle but must be induced from evidence of specific practices and relations as necessary or else injurious to the people in the present.

The earliest American administrative law scholars recognized that administration was uniquely suited to this analysis of common interests and the complex, aggregated conditions in which they were at issue. In the words of Bruce Wyman, administrative law was "the science of common action," in which organized governmental units would collect information and reach policy decisions based on elaborate divisions of labor and delegations of authority.[253] Frank Goodnow likewise observed that "administration and administrative law have to do . . . with the actual operation of political life."[254] While the legislature would specify democratic will, social, scientific, and political judgment would be necessary to put its abstract intentions into institutionalized action.

The organizational imperatives of administrative law were grounded in its substantive agenda. Dickinson's influential treatise on administrative law recognized that the Court's focus on "individual right" had to be complemented by the more communitarian focus of administration: "The introduction of administrative justice . . . is one of the ways in which the newer philosophy of social solidarity has been making its interests felt. It marks a recognition of the fact that in the determination of the rights of individuals . . . the interests of the community ought to be consulted."[255] The shared, intricate interests in matters of health, safety, and economic regulation required administrative processes capable of broad, synthetic, and flexible political judgment. The discretion, however, was not unbounded.

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[251] 15 U.S.C. § 78j(a)(1).

[252] 42 U.S.C § 7409(b).

[253] BRUCE WYMAN, THE PRINCIPLE OF THE ADMINISTRATIVE LAW CONCERNING THE RELATIONS OF PUBLIC OFFICERS 15 (1903).

[254] FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 5 (1905).

[255] DICKINSON, *supra* note 221, at 30.

"Social solidarity" and the "interests of the community" imposed obligations upon both the government and upon private parties.[256]

Over the years, the structural residue of administrative discretion has remained, but without this substantive foundation. In part, this had to do with the indefinite expansion of the public utility idea to cover practically any domain life.[257] If, as Justice Holmes suggested, "the Legislature may forbid or restrict any business when it has sufficient force of public opinion behind it,"[258] it added nothing to say that the public interest was at issue in a particular case. This development nonetheless obscured the specific constitutional values that underlie the delegation of authority to agencies. As William Boyd observes, public utility regulation was and remains a "common, collective enterprise directed at the social control of business."[259] K. Sabeel Rahman accordingly describes public utility regulation as creating "new systems of democratic governance," which "enable the accountability and contestation of concentrated economic power."[260]

The concept of public rights, of which public utility is but one expression, gives this collective project its proper weight as an entitlement, rather than as mere policy or utility. The people, by right, may exercise reasonable controls over private property that has become, in some respect, essential to their civic life. To borrow a phrase from Justice Harlan's dissent in the *Civil Rights Cases*, "the public have rights in respect of such places, which may be vindicated by the law."[261] Indeed, as Rebecca J. Scott has shown, African Americans in the Reconstruction period took up the language of "public rights" to express their legal interest in access to public utilities such as common carriers.[262] Conventional public utilities such as power, transportation, and telecommunications form the core of a broader practice of social control governing other businesses, such as financial service providers or social media platforms, whose very importance gives them substantial power to shape and constrain the values and projects of the body politic. The purpose of such control is not only to redress the economic

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[256] *Id.*

[257] *See* Nebbia v. New York, 291 U.S. 502 (1934) (holding that New York could regulate the price of milk in the public interest).

[258] Tyson & Bro. v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting).

[259] Boyd, *supra* note 230, at 1650.

[260] Rahman, *supra* note 230, at 920.

[261] Civil Rights Cases, 109 U.S. 3, 42 (1883), quoted in NOVAK, *supra* note 225, at 142.

[262] *See generally* Rebecca J. Scott, *Discerning a Dignitary Offense: The Concept of Equal "Public Rights" During Reconstruction*, 38 L. & HIST. REV. 519 (2020) (discussing how civil rights activists used the concept of "public rights" to claim equal access to public services in Reconstruction-era Louisiana).

inefficiencies endemic to monopolies, but rather to ensure that businesses central to political life operate in a manner consistent with republican principles. The next section will examine the relationship between republican principles and economic regulation, with specific references to the structure and permissible scope of administrative adjudication.

E. By Way of Administrative Procedure

This section examines the historically evolving scope of public liberty as visible in the statutes and case law on administrative adjudication. The discussion refutes the formalist view that agencies traditionally could only adjudicate public rights but not private rights. Rather, the history of administrative adjudication shows agencies' public-rights adjudications routinely intervening in matters of private property and contract. As the people's sovereign interests have historically expanded, and with them the state's administrative capacity, the sphere of administrative adjudication has grown from matters involving taxation and land to civic equality, industrial democracy, and workplace safety. Legislators have turned to administrative procedures not only to address the subject matter of nuisance law or of public utility, but also to address issues of republican self-government and democratic equality.

The Constitution assigns judicial power to the Supreme Court and inferior courts established by Congress[263] and provides that no person can be deprived of life, liberty, or property without due process of law.[264] However, these requirements have never meant that Article III courts are the only federal institutions capable of adjudicating civil cases or that due process is equivalent to judicial process. In the landmark case *Murray's Lessee v. Hoboken Land & Improvement Company*, the Supreme Court held that there are matters, such as those implicating revenue, "involving public rights . . . which congress may or may not bring within the cognizance of the courts of the United States."[265] To date, scholars have not recognized that the Court here used a similar conception of "public rights" to those we have seen in the context of sovereignty, nuisance, and public utility to justify resort to administrative process. *Murray's Lessee* stands for the proposition that, where the issue is one of fundamental sovereign interests, and where the judiciary is incapable of vindicating those interests through ordinary process, the

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263 U.S. CONST. art. III, § 1.
264 U.S. CONST. amend. V.
265 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1855).

people may have to resort to other, administrative methods of resolving the relevant disputes.

Murray's Lessee involved a property dispute concerning land previously owned by a customs official, Swartwout, who had embezzled vast sums from the federal coffers.[266] The Treasury issued a "distress warrant" against Swartwout's property.[267] The Supreme Court held that the warrant, issued without judicial process, had lawfully effected a transfer of title from Swartwout to the United States.[268] Relying on roughly analogous English and state-level tax precedent, as well as the "imperative necessity" of tax collection, the Court held that in such matters concerning "public rights," Congress had the power to assign adjudicative authority to the executive rather than the judicial branch.[269]

Formalist scholars who argue for a narrow conception of public rights struggle to make sense of *Murray's Lessee*.[270] It clearly involves administrative deprivation of property without ordinary judicial process, which runs counter to their theory that agencies may not adjudicate matters concerning private rights. Caleb Nelson thus treats the case as a "deviation[ ] from the traditional framework" that was "quite limited," and might be explained by the peculiar status of tax adjudication.[271] But to dismiss the case as an "oddity" understates its historical and political significance.[272] Tax administration was a core function of the English state in the eighteenth century and of the American states in the eighteenth and nineteenth century.[273] The administration of the excise tax in England in the eighteenth

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[266] JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 217–18 (2012).

[267] 59 U.S. at 274.

[268] *Id.* at 274, 285.

[269] *Id.* at 282.

[270] Baude, *supra* note 11, at 1551–53; Nelson, *Adjudication*, *supra* note 11, at 586–90. Baude suggests that the case might be explained by the "temporary" nature of the deprivation of property, since the relevant statute provided for a right of judicial review. Baude, *supra* note 11, at 1551. But the opinion does not hold or imply that judicial review was constitutionally mandatory. Rather, it treats statutory provision of a right to seek review as "waiv[ing] a privilege which belongs to the government," namely its sovereign immunity. 59 U.S. at 284. Moreover, if an extrajudicial deprivation of property is permissible so long as it is brief, then it is unclear whether and which current administrative adjudication schemes would fall short of that requirement. Judicial review of administrative action affecting private rights is presumptively available. *See* LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320–76 (1965). *See, e.g.*, 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[271] Nelson, *Adjudication*, *supra* note 11, at 589–80.

[272] *See* Baude, *supra* note 11, at 1551 (describing the case as an "oddity").

[273] MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT 162–74.

century relied on extrajudicial, bureaucratic structures, with only limited access to judicial review, in order to fund the nation's military expenditures.[274] Following this state-building project, the early federal government in the United States developed fiscal and military capacities first and foremost.[275] The first Congress enacted legislation governing tax collection and the administrative appeal structures within the Treasury Department.[276] The customs houses were a prime site for the early development of administrative power.[277]

To call *Murray's Lessee* a "limited" "deviation[ ]" from the "traditional framework," then, is to misread *central* subjects of nineteenth-century federal authority as *exceptional*.[278] The case is better understood as permitting administrative adjudication of property rights where summary process was, as the Court put it, an "imperative necessity" to vindicate core sovereign rights, such as the collective right to sound maintenance of the fisc and the security interests it underwrote.[279]

This interpretation of *Murray's Lessee* is consistent with the meaning of public rights in nuisance law, where a claim of collective interest would routinely infringe upon private rights. Indeed, the decision makes the connection explicit. Justice Curtis analogized the "summary extra-judicial remedies" Congress had authorized in the case at hand to "the abatement of a public nuisance" by a "private person."[280] Just as a private party might remedy "public wrong" without resorting to judicial process, "the recovery of public dues by a summary process of distress, issued by some public officer authorized by law, is an instance of redress, of a particular kind of public wrong, by the act of the public through its authorized agents."[281] The law of distress was a right of self-help at common law to take chattel without legal process from one who failed to pay rent, a tax, or a fine for committing a public nuisance.[282] As shown in Part II.B, public nuisance also recognized a right of self-help by private persons put at imminent risk by the common

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274 JOHN BREWER, THE SINEWS OF POWER: WAR, MONEY, AND THE ENGLISH STATE, 1688–1783, at 101–14 (1989).

275 EDLING, *supra* note 273, at 4–12.

276 MASHAW, *supra* note 266, at 34–38.

277 GAUTHAM RAO, NATIONAL DUTIES: CUSTOMS HOUSES AND THE MAKING OF THE AMERICAN STATE 1–18, 53–102 (2016).

278 Nelson, *Adjudication*, *supra* note 11, at 586, 589–90.

279 59 U.S. at 282. *See* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 64 (1985) (describing Justice Curtis's "functional" analysis of the "interests of the state").

280 59 U.S. at 283.

281 *Id.*

282 JAMES BRADBY, THE LAW OF DISTRESSES 2, 174, 186–95 (1808).

danger. The Supreme Court now explicitly analogized summary distress process to summary abatement of a public nuisance.[283] Both were permissible when it came to serious threats to the sovereign people, should they take the form of raiding the fisc or allowing a disease or fire to race through a town.[284] In either case, waiting for judicial resolution of the matter might fall well short of protecting collective political interests.[285]

Similar concerns motivated Congress to establish administrative courts during Reconstruction under the auspices of the Bureau of Refugees, Freedmen, and Abandoned Lands. The situation in the Southern states in the wake of the war posed acute threats to sovereign political interests, such as the physical safety, civic equality, and health of the population,[286] particularly of the freed people. To address the intermingled political, social, and economic crises, Congress provided that "where the ordinary course of

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283 As other state court judgments would later do. *See, e.g.*, Weimer v. Bunbury, 30 Mich. 201, 211–12 (1874) (analogizing distress process to collect tax revenue to summary abatement of public nuisance); and State v. Sponaugle, 45 W. Va. 415, 430 (1898) (same).

284 The Supreme Court would later affirm that the government's summary abatement of a public nuisance would not violate due process, so long as the property destroyed or confiscated was of small value, such as diseased cattle or a house in the path of a fire. Lawton v. Steele, 152 U.S. 133, 140 (1894). For discussion of this and other cases, see FRANK GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 356–66 (1906).

285 This reliance on public nuisance principles and procedures to justify administrative adjudication was not anomalous. In its 1868 decision in Metro. Bd. of Health v. Heister, 37 N.Y. 661 (1868), the New York Court Appeals rejected constitutional challenges to the Metropolitan Board of Health for the same reason. The adjudicatory powers of the Board did not violate due process or the right to a jury trial because "any individual or body may abate a nuisance, provided he commits no breach of the peace." *Id*. at 669. Looking back to state precedents as far back as 1784, the Court observed that, "from the earliest organization of the government, the absolute control over persons and property, so far as the public health was concerned, was vested in boards or officers, who exercised a summary jurisdiction over the subject, and who were not bound to wait the slow course of the law, and . . . juries had never been used in this class of cases." *Id*. at 670. As John Fabian Witt suggest in his discussion of this case, the decision and the dissenting opinion were reminiscent of today's debates around combined functions and summary procedures of administrative agencies. JOHN FABIAN WITT, AMERICAN CONTAGIONS: EPIDEMICS AND THE LAW FROM SMALLPOX TO COVID-19, at 24–25 (2020). The link is not altogether surprising once we identify the deep connections between public nuisance and administrative law. Judicial common law around due process, jury trial, and the separation of powers justified administrative power in relation to public nuisance. Both private self-help and administrative adjudication might be necessary to address threats to the body politic's vital functions. Both the unlawful taking of public moneys and the creation risks to public health deprived the body politic of its rights.

286 *See* GREGORY P. DOWNS, AFTER APPOMATTOX: MILITARY RECONSTRUCTION AND THE ENDS OF WAR 158–210 (2015) (describing threats to the physical safety of the freedmen and loyalist whites in the Southern States in the War's aftermath, and the connection between physical safety and civil and political rights); *see also* 1 FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861–1867, 6–7 (Steven Hahn et al. eds., 2008) (describing public health crises in the Reconstruction South and administrative measures to mitigate it).

judicial proceedings has been interrupted by the rebellion[,]" the Bureau would exercise "military jurisdiction over all cases and questions concerning the free enjoyment of such immunities and rights" as "the right to make and enforce contracts," to dispose of property, to enjoy "full and equal benefit of all laws and proceedings concerning personal liberty," and to bear arms.[287] Freedmen's Bureau courts adjudicated property and contract disputes as well as minor criminal offenses.[288]

Congress conceived these courts not only as guaranteeing the economic and personal rights of African Americans in the South but also as securing the sovereign rights of the United States and meeting its political duties toward the freedmen.[289] The Bureau's purpose was to "aid [freedmen] in making the freedom conferred by the proclamation of the commander-in-chief . . . and by constitutional amendment, available to them and beneficial to the republic."[290] In a context of deep social inequality, violence, and dysfunctional government in the wake of slavery and war, administrative adjudication provided freed people with a forum in which to assert their rights. As W.E.B. Du Bois observed in his path-breaking research in *Black Reconstruction in America*:

> [t]he judicial work of the Bureau consisted in protecting the Negro from violence and outrage, from serfdom, and in defending his right to hold property and enforce his contracts. It was to see that Negroes had fair trials and that their testimony was received, and their family relations respected.[291]

Du Bois here recognized Bureau adjudication as an instrument of, rather than departure from, due process. Administrative courts provided "the

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287 Freedmen's Bureau Act, ch. 200, 14 Stat. 173, 176–77 (1866).

288 *See* James Oakes, *A Failure of Vision: The Collapse of the Freedmen's Bureau Courts*, 25 CIVIL WAR HIST. 66 (1979) (discussing the failure of the Freedmen's Bureau Courts); *see also* Karen M. Tani, *Administrative Constitutionalism at the "Borders of Belonging": Drawing on History to Expand the Archive and Change the Lens*, 167 U. PA. L. REV. 1603 (2019) (analyzing the Freedmen's Bureau Courts as examples of administrative proceedings).

289 *See* JOHN FABIAN WITT, LINCOLN'S CODE: THE AMERICAN LAWS OF WAR 307 (2012) (explaining the "grasp of war" theory that Congress relied on to justify the Freedmen's Bureau: "a 'conquering party' . . . could . . . 'hold the other in the grasp of war until it has secured whatever it has a *right* to acquire,'" and "'the authority which destroyed Slavery' was now 'competent to the kindred *duty*' of guaranteeing the rights of the freedmen.") (emphasis added). Notably Lincoln's Emancipation Proclamation, justified the order not only as a matter of "military necessity" but also as "an act of justice," revealing that matters of right, and not only expediency, were at issue. Proclamation No. 95, President Abraham Lincoln's Emancipation Proclamation, NAT'L ARCHIVES (Jan. 1, 1863). On the relation of justice and necessity in the Proclamation, see WITT, LINCOLN'S CODE, at 197–219.

290 Freedmen's Bureau Act, *supra* note 287, at 174.

291 W.E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION IN AMERICA 226 (1935).

Negro some standing at law" and "imparted a conception—inadequate and distorted as it may have been—of his civil rights as a freeman."[292] Resort to agency proceedings, rather than state courts, was constitutionally necessary not only to protect due process principles, but also because "present abandonment of the freedmen meant their practical reenslavement."[293]

The civic equality of emancipated people was both a matter of their private liberty, insofar as it concerned their personal independence from the control of others, and also a matter of collective concern, insofar as it was necessary to the integrity of the body politic that they have the capacity to exercise their rights of self-government.[294] Even prior to the statutory authorization of administrative courts in 1866, the Bureau's informal adjudications served as a forum for freed persons not only to make contractual claims sounding in private right but also to secure safety from violence and to assert their political rights.[295] Freedmen's petitions to the Bureau concerning matters of property and contract were not categorically distinct from, but instead deeply interwoven with, their republican demands of equal standing and membership within the sovereign people.[296]

The operation of public rights in practice has not necessarily accomplished emancipatory aims, however. The Freedmen's Bureau itself has been criticized for its paternalistic attitude toward African Americans and

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292 *Id.* at 227.

293 W. E. B. Du Bois, *The Freedmen's Bureau,* ATLANTIC (Mar. 1901), https://www.theatlantic.com/magazine/archive/1901/03/the-freedmens-bureau/308772/ [https://perma.cc/J6T3-UL8T].

294 *See* NOVAK, *supra* note 225, at 58 ("The reconstruction Congress inaugurated a revolution in what W. E. B. Du Bois called 'abolition democracy,' fundamentally altering prevailing American configurations of the intimate relationships between public power, private right, and the equal protection of the laws."); *see also* Daniel Backman, Note, *"A Vast Labor Bureau": The Freedmen's Bureau and the Administration of Countervailing Black Labor Power*, 40 YALE J. REGUL. 837, 842 (2023) (describing the Freedmen's Bureau as having "challenged the boundaries between the public and private, the economic and political, and the racial and economic[.]").

295 *See* HAHN ET AL., FREEDOM, *supra* note 286, at 181–82 (2008) (describing Bureau adjudications and their role in promoting freedmen's agency).

296 *E.g.*, Northern Teacher to the Freedmen's Bureau Commissioner, in *id*., at 699, communicated the adopted resolutions of freedpeople in Halls Hill, Virginia to form a committee for requesting aid from the Freedmen's Bureau to obtain housing:

> We feel it to be very important that we obtain Homes—owning our shelters, *and the ground*, that we may raise fruit trees, concerning which our children can say—*These are ours*; also: that we may regularly and perseveringly educate our children . . . so that we may be an established and growing people, and be respected, and recognized by all loyal people, as welcome and efficient citizens of these United States—which is now *our* Country—made emphatically so by the blood of our brethren shed to save our Country.

its coercive efforts to bring them within the bounds of the contract system.[297] Likewise, federal administrative courts have long treated Indians as federal wards on the theory that the federal government acts as a benevolent trustee of native peoples.[298] Immigration provides another prominent example in which the courts and Congress have historically justified due process limitations in the language of public right.[299] In such contexts, the invocation of public rights has operated to undermine human dignity as well as other forms of collective self-determination. The norms and institutions of public right are thus capable of a particular kind of abuse: they assert fundamental collective interests that threaten to fully displace or else minimize other relevant concerns.

That real risk of abuse is only heightened, however, if the realms of public and private right are treated in traditionally formalist terms as categorically distinct. If due process only applies where the government aims to deprive someone of narrow classes of common-law rights, then any other matter—such as immigration deportation proceedings or the receipt of government benefits—falls entirely outside the constitutional requirements of fairness.[300] The theory of public liberty advanced here imports no such binary conception of procedural justice. Once we recognize that public and private rights are each implicated in most, if not all, governmental action, the question becomes how to do justice to these different dimensions of right within particular institutional settings.[301]

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[297] *E.g.*, Tani, *supra* note 288, at 1613–14.

[298] *See e.g.*, Maggie Blackhawk, *Federal Indian Law as a Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1825, 1829–38 (2019) (noting the "'trust relationship' between the United States and Nation Nations" and then detailing the use of the inherent or plenary powers doctrine to buttress the institutionalization of American colonialism over Natives); *see also* Lauren van Schilfgaarde, *Restorative Justice as Regenerative Tribal Jurisdiction*, 112 CALIF. L. REV. 103, 115–17 (2024) (describing the assimilationist role of administrative courts at the Bureau of Indian Affairs in the late nineteenth and early twentieth century).

[299] *E.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("The exclusion of aliens is a fundamental act of sovereignty."); *see* United States v. Ju Toy, 198 U.S. 253, 263 (1905) (holding that a decision to deny entry "may be intrusted to an executive officer and that his decision is due process of law[.]") (internal citations omitted); *see also* 8 U.S.C. § 1229a(b)(4)(A) (according a "privilege" of representation in deportation proceedings). For further discussions on this point, *see generally* Ingrid V. Eagly, Gideon's *Migration*, 122 YALE L.J. 2283, 2285 (2013) *and* COX & RODRÍGUEZ, *supra* note 70, at 61–62.

[300] *E.g.*, *Sessions*, 584 U.S. 148, 210 (2018) (Thomas, J., dissenting) (suggesting that original understanding of due process would not have covered removal proceedings).

[301] Louis Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720, 725–26 (1946) ("Private and public interests are, both in a substantive and in a procedural sense, aspects of the totality of the legal order.").

Administrative law has addressed this problem by way of notice and hearing rights in administrative proceedings. The issue arose prominently in the context of workers' compensation claims, which displaced the private law regime governing workplace injuries.[302] In rejecting a constitutional challenge to a federal compensation scheme in *Crowell v. Benson*,[303] the Court held that Congress did not trespass on Article III by giving an administrative commission the power to make factual findings regarding compensation disputes. The Court approved these substantial powers even though the commission exercised jurisdiction over the "private right" of interpersonal liabilities arising under the employment relationship.[304] So long as the commission's orders remained subject to deferential judicial review, and so long as the commission respected basic due process requirements of notice and a hearing, Congress was free to empower the agency to adjudicate the case in the first instance.

Crowell paved the way for expansive administrative regulation of private employment in the National Labor Relations Act (Wagner Act). The Act recognized employees' right to collective bargaining and empowered the National Labor Relations Board (NLRB) to adjudicate and enforce these rights.[305] The Wagner Act sought to protect "actual liberty of contract" against the weight of employers' bargaining power.[306] In upholding the Act in *NLRB v. Jones and Laughlin Steel Corp.*,[307] Chief Justice Hughes read the statute as a "safeguard" for the "fundamental right" of "employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer."[308]

In a Progressive inversion of *Lochner*, Hughes saw the Act not as creating but rather as vindicating a prior substantive right relating to the conditions of work. Unlike *Lochner*'s "private" right to "liberty of contract," grounded in the interest in individual autonomy, the character of the right Hughes

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302 Nelson, *Adjudication*, *supra* note 11, at 598 (discussing administrative, as opposed to judicial, determinations of workers' compensation awards). WITT, *supra* note 122, at 126–86 (describing the rise of workmen's compensation in the early twentieth century and judicial reaction against it based on a classical-liberal model of private rights).

303 285 U.S. 22.

304 *Id.* at 50.

305 An Act To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes, Pub. L. 74–198, §§3, 7, 49 Stat. 449, 451, 452 (1935).

306 29 U.S.C. § 151.

307 *Jones & Laughlin Steel Corp.*, 301 U.S. at 33.

308 *Id.*

recognized here was "public," which is to say, collective and political.[309] It concerned a set of collaborative political interests in "self organization" and "mutual protection" rather than the coordinative procedures of private ordering.

The power to vindicate these fundamental rights lay in the Commerce Clause's concern with the prevention of nuisances within the streams of interstate commerce. Congress aimed to "eliminate the causes of certain substantial obstructions to the free flow of commerce."[310] The characterization of the wrong against the public as an "obstruction" to commerce traded in the language of public nuisance. "[T]he refusal by some employers to accept the procedure of collective bargaining" had operated like a ditch across a highway or a low bridge across a river, preventing goods from flowing across state lines and into the streams of interstate commerce.[311]

Just as the Act and Hughes inverted *Lochner*'s liberty of contract into a Progressive right to collective bargaining, so too did this nuisance language reappropriate a legally conservative conception of labor strikes as interferences with sovereign power.[312] In the 1895 case *In re Debs*,[313] the Court had upheld an injunction of the Pullman strike, without statutory authority, on the grounds that the strike constituted a "nuisance," which has "always been held subject to abatement at the instance of the government"[314] under the Commerce Clause. The Wagner Act implicitly traded on, but reversed, the ideological valence of that holding in describing the Act as necessary to remove the "obstruction" which industrial conflict had placed into the stream of commerce.[315]

As the Act recognized a fundamental, political right in collective bargaining, it constructed the public nuisance authority of the Commerce

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309 *See* Diana S. Reddy, *After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions*, 132 YALE L.J. 1391, 1413–14 (2023) (describing the Court's decision in *Jones & Laughlin Steel* which ruled that collective action was a fundamental right for workers).

310 29 U.S.C. § 151.

311 *Id.*; *see also* Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518, 582–83 (1851) ("Congress may forbid the erection of any structure in a navigable stream, which it deems an obstruction to commerce, and may declare it a nuisance, and direct it to be removed.").

312 *See* William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1154 (1989) (describing late-nineteenth-century justifications for judicial injunctions of labor strikes as responses to "bodies of men presuming to act as self-constituted sovereigns").

313 *In re Debs*, 158 U.S. 564 (1895).

314 *Id.* at 587.

315 Jones & Laughlin Steel Corp., 301 U.S. at 42 ("Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife.").

Clause to encompass not merely economic but also interrelated civic injuries.[316] The theory of "industrial democracy" operative in the Wagner Act connected interests in workplace governance to the sovereign's political interests in self-government and the egalitarian social conditions that underlay it.[317] The domain of public right now expanded from highways and common carriers to the privately owned factory where the nation's economic life was then anchored.

Reliance on the NLRB to fulfill this purpose accomplished several objectives. First, it would provide a forum to adjudicate labor rights outside of an ideologically hostile federal judiciary.[318] Second, and relatedly, empowering the Board to make fact and policy judgments that were to some extent binding on the courts would facilitate the uniform development of law, beyond common law confines.[319] Like so many other aspects of the New Deal, the Wagner Act relied on administrative power to reconfigure private order in terms of the collective interests recognized by Congress.[320] These new public-legal regimes did not jettison the language of private right. Agencies had authority to rework common law terms such as "employee" into public rights that were sensitive to the overall distribution of risk and of power in the economic and social order.[321]

The move from common law to statutory employment relations freed up space for administrative action. *Jones & Laughlin*[322] thus rejected not only a Commerce Clause challenge to federal regulation of private employment but also a Seventh Amendment challenge to the NLRB's adjudicatory powers: "[t]he instant case is not a suit at common law or in the nature of such a suit.

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316 *See* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 285 (1978) (discussing the broader political implications of the redistribution of bargaining power contemplated by the Wagner Act).

317 *See, e.g.*, Ruth Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV., 556, 560–64 (1945) (citing examples from legislative history of the relationship between "political" and "industrial democracy"). *See* Klare, *supra* note 316, at 284–90 (discussing the concept of industrial democracy as an embedded and elusive legislative purpose of the Wagner Act); *see also* CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960, at 101 (1985) (highlighting that the Wagner Act "made collective bargaining a matter of public concern, conducted by institutions with statutorily defined rights and responsibilities within a framework shaped by state agencies.").

318 PETER H. IRONS, THE NEW DEAL LAWYERS 229 (1982) (noting "hostility of district court judges").

319 *Id.* at 228 (noting significance of "the administrative finality of the Board's proceedings").

320 *See* KAREN ORREN, BELATED FEUDALISM: LABOR, LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES 118–90 (1992) (describing how statutory and administrative law came to supplant common-law ordering).

321 NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944); *see also* FINAL REPORT, U.S. ATT'S GEN.'S, *supra* note 36, at 13.

322 *Jones & Laughlin Steel Corp.*, 301 U.S. at 1.

The proceeding is one unknown to the common law. It is a statutory proceeding."[323] Rather than identifying the affinities between public nuisance and the collective rights at issue in labor law, this aspect of the opinion severed regulatory law from its common law roots. The Court then went on to rely on this positivistic conception of statutory public rights in subsequent cases to deny private rights of action to enforce its provisions.[324] At the same time, it lost sight of the fundamental right to collective bargaining the *Jones & Laughlin* Court had recognized.

Turning to the administrative process did not mean relying on purely summary process or the abandonment of rule-of-law values. In the wake of the Supreme Court's invalidation of the National Industrial Recovery Act, lawyers in the Roosevelt Administration crafted the Wagner Act with significant procedural protections.[325] The Administrative Procedure Act of 1946 followed suit with significant procedural requirements within any formal adjudication.[326] The vast expansion of public right over private power compensated for the risk of governmental arbitrariness by way of due process.

Congress subsequently extended federal authority into the employment relationship further, including in the Civil Rights Act of 1964[327] and the Occupational Safety and Health Act of 1970.[328] The latter empowered the Occupational Safety and Health Review Commission to approve penalties for employers found to be in violation of the Act.[329] Like the Wagner Act, this statute borrowed the language of nuisance—"abatement"—as a remedy for workplace health and safety violation.[330] The Act at once trades on the common-law discourse of nuisance but applies it in a context—the employment relationship—where nuisance would not have traditionally sounded. This further expansion of public right from streets and waters to workplaces was motivated by protests from organized labor over workplace health and safety, and drew inspiration from the contemporaneous success of movements for environmental regulation, highway and traffic safety, and

[323] *Id.* at 48–49.
[324] Amalgamated Util. Workers v. Consol. Edison Co., 309 U.S. 261, 269 (1940).
[325] IRONS, *supra* note 318, at 228.
[326] 5 U.S.C. §§ 554–557.
[327] 42 U.S.C. § 2000d *et seq*.
[328] 29 U.S.C. § 651 *et seq*.
[329] 29 U.S.C. § 666. For a description of the OSHA enforcement process, including administrative inspections and penalties, see GREGORY A. HUBER, THE CRAFT OF BUREAUCRATIC NEUTRALITY 55–56 (2007).
[330] 29 U.S.C. § 659.

other nuisance-like regulatory statutes.[331] The OSH Act, like the Wagner Act, relied heavily on administrative enforcement and adjudication.[332] Relying on *Jones & Laughlin*, the Court rejected another Seventh Amendment challenge to this scheme on the ground that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible."[333]

The language of "public right" has thus persisted in the context of the constitutionality of administrative adjudication. But the substantive underpinning of the concept has been lost. The twentieth-century synthesis described in Part I.B emptied out "public right" of its substantive commitment to health, safety, and equality, leaving only the formal husk of statutory authority. As this Part has shown, however, what makes a right public is not merely the fact that Congress enacts it. Rather, in a system of popular sovereignty, public rights are rights held by the people to create and maintain a civic condition that is consistent with their self-rule. Congress plays an essential role in defining those conditions, as it is the primary spokesperson for the people's collective legal interests. But the fact of statutory enactment is not the only source of administrative adjudication's normative weight. More significant are the fundamental sovereign interests such legislation protects. Statutes like the Wagner Act and the Occupational Safety and Health Act, as well as Title VII of the Civil Rights Act, protect collective interests in the maintenance of just workplace conditions. The administrative agencies Congress has created should be measured by the yardstick of those interests. They ought not to be barred from intervention based on an imperious conception of private right. As this part has shown, rights of property and contract can traditionally claim no categorical immunity from administrative adjudication.

III. SAVING PUBLIC RIGHTS IN THE PRESENT

This Part draws out the contemporary implications of the history and theory of public liberty offered in Part II. The core insight is that administrative regulation is not merely a matter of policymaking discretion.

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331 CHARLES NOBLE, LIBERALISM AT WORK: THE RISE AND FALL OF OSHA 66–98 (1986); JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 4 (1990).

332 NOBLE, *supra* note 333, at 95 (noting that OSHA "[e]mpowered the secretary of labor and the agency to which the secretary delegates responsibility . . . to set and enforce standards governing the conditions of work of all employers except federal, state, and local government agencies.").

333 430 U.S. at 443–56.

It is also a question of rights and duties of a public nature. Governmental institutions have an obligation to vindicate the people's collective interests in health, safety, and equality. Section A explains the legislative duties that correspond to the public's right, and argues that administrative law is sometimes required to vindicate important, vulnerable, and diffuse collective rights. Section B applies this approach to administrative adjudication at the SEC.

A. Through Obligatory Administrative Law

An influential book by Philip Hamburger, *Is Administrative Law Unlawful?*,[334] answers its titular question in the affirmative. Hamburger tries to make the case that administrative agencies' power to issue binding orders or regulations contravenes basic constitutional principles concerning the allocation and separation of legislative, executive, and judicial power.[335] Conservative jurists routinely rely on this broadside against administration in recent cases on the delegation of rulemaking and adjudicatory power to agencies.[336] Scholars have objected to Hamburger's assessment, explaining why constitutional law permits the delegation of rulemaking and adjudicatory powers to agencies.[337]

The theory of public rights goes further: such administrative powers are sometimes constitutionally required.[338] Where sovereign rights such as

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334 *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

335 *Id*. at 31–82.

336 *E.g.*, W. Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (citing Hamburger in articulating nondelegation principles); Dep't of Transp. v. Ass'n of Am. Railroads, 575 U.S. 43, 71 (2015) (Thomas, J., concurring) (same); Gundy v. United States, 139 S. Ct. 2116, 2140 (2019) (Gorsuch, J., dissenting) (same); 34 F.4th, at 460 (same); Cochran v. U.S. Sec. & Exch. Comm'n, 20 F.4th 194, 215 (5th Cir. 2021) (Oldham, J., concurring), *cert. granted sub nom.* Sec. & Exch. Comm'n v. Cochran, 142 S. Ct. 2707 (2022) (relying on Hamburger to link the Securities and Exchange Act of 1934 to Woodrow Wilson and "German historicism").

337 *E.g.*, Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 TEX. L. REV. 89, 100–03, 154–7 (2020) (offering a theory of the separation of powers that generally rejects the nondelegation doctrine). *See generally* Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015)(reviewing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014)); Paul P. Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight*, (Oxford Legal Stud. Rsch. Paper No. 44/2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802784 [https://perma.cc/FVV6-RRGQ].

338 *Cf.* Metzger, *supra* note 48, at 87–92 (2017) (arguing that the administrative state is "constitutionally obligatory" due to legislative delegation, the president's duty to take care that the laws are faithfully executed, and general constitutional values of legal and political accountability). My argument goes further and grounds administrator power on a duty to legislate to protect the public in the first place.

health, safety, or equality are at issue, legislative specification of primary modes of conduct, and judicial methods of applying law to fact, may be insufficient to protect these core political interests. Problems may be too complex and varying for a fixed legislative solution, and the civil process may unduly privilege the vested rights of private parties and the social status quo to the irreparable harm of the public rights asserted. Resort to administrative adjudication and rulemaking may be necessary to gather relevant information, to resolve numerous small-value cases efficiently, and to remedy power imbalances between social groups. This is not to say that administrative processes as currently constituted effectively achieve these objectives; current processes are often inefficient, unequal, and may reinscribe the interests of the stronger.[339] Rather, the point is to recover the forgotten obligation of legislators and administrators to protect public rights such as equality by way of appropriate process.[340]

The notion of a duty to legislate is currently rather foreign to U.S. public law. But it was not always so. As Joseph Fishkin and William Forbath have shown, legislators combatting various forms of social domination in the Jacksonian years, Reconstruction, and the New Deal have understood themselves as under a constitutional obligation to act.[341] William N. Eskridge, Jr. and John R. Ferejohn likewise describe "affirmative obligations" on the legislature to protect the security and welfare of the people.[342] The theory of public liberty advanced here aligns with these arguments with regards to collective rights to administrative regulation, in particular. The Constitution's vesting of legislative powers concerning the "general welfare,"[343] and "commerce,"[344] and "all other powers vested by this Constitution in the Government"[345] ought not to be understood as merely discretionary grants. Rather, these clauses give the national Legislature the requisite means to fulfil the government's prior duty to safeguard citizens' collective interests in self-government.

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339 Havasy, *supra* note 40, at 820 (noting that notice-and-comment rulemaking "creates inequalities of access between affected parties"). *See also* Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2007–16 (2012) (describing how agency adjudication at times undermines equality and access to justice).

340 LANDIS, *supra* note 43, at 36 (referring to "the absence of equal economic power" as a justification for resort the administrative process); *see also* DICKINSON, *supra* note 224, at 13, 30 (aligning agency adjudication with an interest in social solidarity).

341 FISHKIN & FORBATH, *supra* note 25, at 74–88, 116–26, 251–89.

342 ESKRIDGE & FEREJOHN, *supra* note 33, at 43.

343 U.S. Const. art. I, § 8, cl. 1.

344 U.S. Const. art. I, § 8, cl. 3.

345 U.S. Const. art. I, § 8, cl. 18.

That obligation is likely to go unmet if the Court bars or hampers legislatively created agencies from regulating or adjudicating matters involving property and contract. For instance, as Part I described, the Court's major questions cases on public health and environmental regulation frequently rely on private-law values such as "property" to justify clear statement rules against agencies deciding matters of "vast economic or political significance."[346] This major questions doctrine may have some plausibility if "rights" only exist *against* governmental action, whereas government has only a purely discretionary power to act or not to act. If the government might as well regulate as not, and regulating burdens constitutionally protected property or liberty interests, then the courts may have some reason to tip the scales in favor of inaction. But this approach fails to respect sovereign rights of health, safety, and equality that underlie and justify the exercise of legislative and executive power. Once we understand that the people have shared entitlements to those social conditions requisite to self-rule, a generic presumption against regulatory action cannot be justified. At a minimum, the rights of the public to regulatory protection do not have an intrinsically lesser weight than those of private persons against arbitrary interference.

Public nuisance, which grew out of the sovereign rights of the crown, establishes a common-law baseline for the contemporary content of public rights. But the Constitution's shift to a system of popular sovereignty authorizes and obliges Congress and the President to articulate public rights by way of legislation. In our statutory republic, the legislature must thwart substantial risks to the physical well-being of the population as well as whatever other social goods and relations are necessary for the collective project of self-governance.[347] Legislation establishing health and safety agencies, such as the EPA[348] or OSHA,[349] have further articulated a common right against practices and patterns of economic life that threaten the health of the population. Once we understand these regulatory schemes as concerned with public rights, the whole moral valence of administrative

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346 *E.g.*, *Alabama Realtors*, 594 U.S. at 764 ("We expect Congress to speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance.'"). *See also Sackett*, 598 U.S. at 679 ("[T]his Court 'require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.'" (quoting U.S. Forest Serv. v. Cowpasture River Preservation Ass'n, 590 U.S. 604 (2020).

347 ESKRIDGE & FEREJOHN, *supra* note 33, at 43–48.

348 42 U.S.C. § 7401 *et seq*.

349 29 U.S.C. § 651 *et seq*.

regulation shifts. We are not merely trying to correct market failures in this domain of law. We are also trying to remedy and prevent wrongs to the people as a collective moral agent.

This conception of regulatory power shifts attention from both individuated rights and social efficiency, on the one hand, towards matters of systemic harm, on the other. The concept of "structural injustice," developed by Iris Marion Young, refers to situations where no particular person has necessarily wronged another, but larger institutional and social patterns nonetheless constitute an injury.[350] Public rights are violated by, and sometimes win legislative and administrative remedies against, structural injustice. Part of what makes unfair labor practices, unsafe work conditions, environmental harm, and disparate racial and gender impacts wrong is that they injure the people's common right to social circumstances of health, safety, and equality. The Equal Employment Opportunity Commission, for instance, has historically taken the lead in understanding racial discrimination not only as an invidious act but also "as a condition of pervasive exclusion."[351] When agencies regulate such risks, they attack social patterns and practices that make it impossible for people to recognize one another as coequal members of a common political body.

The structural concern for equal standing is not isolated to traditional civil rights laws but also implicates core health and safety concerns.[352] For instance, "environmental justice" programs at the EPA examine how environmental harm falls disproportionately on marginalized communities.[353] Scholars have also urged agencies to take equality and anti-

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[350] IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 41 (1990). *See also* RAHMAN, *supra* note 40, at 85. For discussion of this problem in the context of algorithmic decisionmaking, see Benjamin Eidelson, *Patterned Inequality, Compounding Injustice, and Algorithmic Prediction*, 1 AM. J.L. & EQUAL. 252, 262 (2021).

[351] VERNON M. BRIGGS, JR. ET AL., 1 "THEY HAVE THE POWER—WE HAVE THE PEOPLE": THE STATUS OF EQUAL EMPLOYMENT OPPORTUNITY IN HOUSTON, TEXAS, 1970 (1970). *See* Griggs v. Duke Power, 401 U.S. 424, 433–34 (1971) (deferring to Commission's interpretation of Title VII in establishing disparate impact liability).

[352] *See* Lindsay F. Wiley, *From Patient Rights to Health Justice: Securing the Public's Interest in Affordable, High-Quality Health Care*, 37 CARDOZO L. REV. 833, 879 (2016) (noting the health and safety concerns through the lens of patient rights, health justice, and communitarian perspectives).

[353] *See* Paul Mohai, David Pellow & J. Timmons Roberts, *Environmental Justice*, 34 ANN. REV. ENV'T. RES. 405, 407 (2009) (describing an equal protection right to health and safety regulations); *see also* *Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice [https://perma.cc/6637-3BW8] (last visited Oct. 14, 2024) ("'Environmental justice' means the just treatment and meaningful involvement of all people regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment[.]").

subordination norms more seriously in crafting rules and adjudicatory orders.[354] The concept of public liberty, and the public rights that compose it, provide a juridical framework in which to articulate these interests at the trans-substantive level where administrative law operates.[355] Administrative agencies over time might develop regulations, guidance, and adjudicatory common law that provide enhanced substantive and procedural protection for the republican value of civic equality.

Public liberty also provides a framework for understanding the legal wrongs and harms involved in maladministration and executive under-enforcement. As David L. Noll,[356] and Jody Freeman and Sharon Jacobs,[357] have recognized, presidential administrations sometimes take steps to dismantle regulatory programs or to forestall agencies from carrying out their statutory missions. These steps violate the president's duty to take care that the laws be faithfully executed. But that structural concern overlays a deeper substantive interest in the ultimate objects of regulation. Because statutes aren't themselves discretionary, but rather vindicate basic political interests in collective wellbeing, "administrative sabotage"[358] does not merely pose a problem for a thin notion of legal compliance but also for the underlying concerns of health, welfare, and equality. For example, the Trump Administration's purposeful steps to undermine the EPA continue to sap the agency's capacity in the present.[359] To the extent that those steps create a substantial risk to public health, they constitute wrongs against the public. Government officials are under a legal duty to prevent and to remedy such breaches of public trust.

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354 *E.g.,* Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 652, 711–26 (2021) (arguing that the National Labor Relations Board should reform labor law doctrine to vindicating the Wagner Act's "equal bargaining power purpose"); Shah, *supra* note 36, at 11, 57–89 (identifying the problem of "administrative subordination" and "harm to minorities" within administrative proceedings and offering reforms to address these problems); Matthew B. Lawrence, *Subordination and the Separation of Powers*, 131 YALE L.J. 78, 88 (2021) (calling for "anti-subordination" to be taken into account in separation-of-powers analysis).

355 In this respect, the theory of public liberty provides a complement to Matthew B. Lawrence's argument for consideration of "antisubordination" values in the separation of powers. Lawrence, *supra* note 354, at 86. Part of why this move is difficult today is that both liberty and equality interests tend to be conceived in individualist terms. By comprehending freedom and equality as matters of collective concern, public rights provide a promising foundation for consideration of *structural* equality concerns in the separation of powers.

356 David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753, 762–63 (2022).

357 Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 591–622 (2021).

358 Noll, *supra* note 356, at 821.

359 Lisa Friedman, *Depleted Under Trump, a 'Traumatized' E.P.A. Struggles With Its Mission*, N.Y. TIMES (Jan. 25, 2023), https://www.nytimes.com/2023/01/23/climate/environmental-protection-agency-epa-funding.html [https://perma.cc/68JU-CPPY].

B. Adjudication of Private Rights

Beyond this conceptual reorientation of administrative law from constraint to affirmative obligation, the theory of public liberty helps to resolve the constitutional questions surrounding administrative adjudication. Recall the case with which this article began: *SEC v. Jarkesy.*[360] There, the Court held that Congress had violated the Seventh Amendment right to a jury trial by permitting the SEC to issue civil penalties through administrative adjudication. To reach that conclusion, the Court claimed that SEC's imposition of civil penalties for securities fraud was a "'matter[] of private rather than public right.'"[361] Therefore, the Court concluded that "Congress may not withdraw it from judicial cognizance."[362]

The theory developed in Part II shows what's wrong with this claim: public and private claims are each routinely present within administrative action, whenever an agency burdens a right of property, contract, or person.[363] Administrative law is replete with examples—some dating back to the nineteenth century—of agencies adjudicating competing public and private claims. The quintessentially "public right" to adjudicate issues involving the public fisc, recognized in *Murray's Lessee*, involves the lawful boundaries between the sovereign's property and those of private parties.[364] Nuisance law and public utility law have long recognized the power of non-judicial, administrative bodies to adjudicate the rights of private parties. It therefore fundamentally distorts our legal tradition to assert that there is some private "sphere" where the public, as represented by the agency, cannot intrude. Public interests in collective health and safety routinely conflict and intertwine with private claims of autonomy across the full spectrum of social and political relations. Labeling some claims "private" therefore provides no discriminating principle for cabining the bounds of administrative discretion. If there are any limits to what agencies may adjudicate, the conceptually valid distinction between public and private cannot furnish it.

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360 144 S. Ct. at 2117.

361 *Id.* at 2136 (quoting Granfinanciera, 492 U.S. at 56).

362 *Id*. (quoting *Stern*, 564 U.S. at 484, quoting *Murray's Lessee*, 59 U.S. 284) (internal citations omitted).

363 The question of whether the Seventh Amendment jury trial right covers various administrative adjudications is arguably distinct from the Article III questions concerning "public" and "private" right. For discussion of that issue, see Richard Lorren Jolly, *The Administrative State's Jury Problem*, 98 WASH. L. REV. 1187 (2023).

364 *See supra* Part II.E.

The formalist bifurcation of public and private is especially unappealing in the context of the SEC adjudications at issue in *Jarkesy*. The Court suggested that there was a "close relationship between federal securities fraud and common law fraud[,]"[365] rendering the former subject to the Seventh Amendment jury trial right for "'suit[s] at common law.'"[366] But, as the Court grudgingly acknowledged, the two are not identical.[367] Moreover, the normative significance of fraud under the securities laws is quite different than common-law fraud claims. As Samuel W. Buell has written, securities fraud under federal statutes and SEC regulations encompasses both a narrower understanding that is most firmly rooted in "core" common law fraud, involving intentional deceit, as well as a broader one that sounds in negligence.[368] That latter understanding is not merely about protecting particular individuals from wrongful conduct. Rather, it addresses a collective interest in routinized, legally guaranteed soundness of the financial marketplace.[369]

Passed in the wake of the 1929 market crash, the securities laws responded to voters' "sense of helpless frustration . . . in the face of continued financial fraud and irresponsibility" and sought "concrete remedies to be applied over the entire field of finance."[370] As President Roosevelt stated to Congress in 1933, "the public in the past has sustained severe losses through practices neither ethical nor honest on the part of many persons and corporations selling securities."[371] The conception of fraud that emerged from a nationwide financial collapse was not geared merely toward the particular bad apple but rather to systemic abuse, and the need to create a reliable avenue for investment, which could be harmed by careless or reckless as well as willful misconduct. The Dodd-Frank Act of 2010,[372] which expanded SEC's power to issue civil penalties in administrative proceedings, likewise came on the heels of a market crash and addressed itself to the problem of systemic risk.[373] SEC adjudications therefore aim to vindicate

365 144 S. Ct. at 2131.

366 U.S. CONST. amend. VII.

367 144 S. Ct. at 2131

368 Samuel W. Buell, *What is Securities Fraud?*, 61 DUKE L. J. 511, 515, 528–29, 568–71 (2011). I am grateful to Andrew Verstein for the reference.

369 *Id.* at 568–69. Buell argues that the confusion between these two understandings of fraud is problematic for securities law—an argument that is beyond the scope of this paper.

370 RALPH F. DE BEDTS, THE NEW DEAL'S SEC: THE FORMATIVE YEARS 29 (1964).

371 *Id.* at 33.

372 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010).

373 Jarkesy v. SEC, 803 F.3d 9, 12 (D.C. Cir. 2015) (describing legislative history of Dodd Frank).

public rights in fair and transparent markets, which the sovereign people are entitled to by virtue of their shared economic fates. Like threats to physical health and safety protected by public nuisance law, securities regulation protects the public's financial "safety" against risky conduct.[374]

Think of SEC adjudication, then, in analogy to summary abatement of a public nuisance. In *Murray's Lessee*,[375] the Court invoked this analogy to justify extrajudicial methods to collect on a debt to the government. Where the core interests of the public—fiscal integrity, bodily health, market soundness—would be put at risk by reliance on trial procedures alone, Congress might empower the executive to act summarily, though the official could be called to judicial account subsequently for any unlawful conduct.[376] Contemporary administrative law follows a similar structure: administrative adjudication initially disposes of complaints with less than judicial process but meeting due process minima of notice and a hearing.[377] Provision of notice and a hearing ensures that administrative action is duly responsive to the factual record, constrained within the bounds of law, and attentive to the dignity of the affected party.[378] The comparatively streamlined procedures at the same time decrease the cost of enforcement and increase the cost of harmful social conduct, relative to a system that would require civil suit. But because such relatively summary procedures may pose a risk to individual autonomy interests, administrative adjudication today is usually followed, not only by internal administrative appeals, but also by the opportunity to appeal the agency decision to an Article III court.[379]

The justification for administrative structures of this kind in *Murray's Lessee* was "imperative necessity."[380] That justification has withstood the test of time. As the SEC's first chairman and legislative drafter, James Landis, put it in his landmark work *The Administrative Process*, "the absence of equal economic power" in areas such as "the relationship between investor and management" required administrative methods of adjudication "not so much because of the grave social import of the particular injury but because

[374] Indeed, the proponents of Dodd-Frank regulations drew an analogy to product safety regulations to justify the creation of a financial regulatory commission. Bar-Gill & Warren, *supra* note 215, at 3–7.

[375] 59 U.S. at 285.

[376] *Id.* at 283 (describing availability of judicial review). The Court did not hold that judicial review is constitutionally mandatory. *Id.* at 283–84.

[377] *E.g.*, 5 U.S.C. §§ 554–56.

[378] *See* MASHAW, DUE PROCESS, *supra* note 279, at 172–253.

[379] JAFFE, *supra* note 270, at 320.

[380] *Id.* at 282.

the atmosphere and conditions created by an accumulation of such unredressed claims is of itself as serious social threat."[381] Private parties may lack the resources or information to press their claims in ordinary court. The civil process may enable the well-resourced party to avoid liability simply by imposing costs and delay in pretrial proceedings. The accelerated form of the administrative process reduces the legal power of the civil defendant, and therefore helps to remedy the inequality of social power between particular parties, and the attendant market risks they generate. If properly tailored and exercised, administrative processes may reduce routine but relatively low-value risks to market soundness, which, if left unredressed, could devastate economic and social life. Administrative process, then, is a form of collective self-defense.

CONCLUSION

Administrative regulation and adjudication ought not to be conceived as purely discretionary exercises of policymaking power that must be bridled to protect the rights of private parties. Rather, administrative law is the law of public liberty. The people are entitled to healthy, safe, and equal conditions that enable republican self-government. The new theory of private prerogative that is emerging from the Roberts Court ignores these affirmative constitutional values. It instead enthrones economic rights of property and contract above the claims of the people to regulate the conditions of their political life. The Court has sought to categorically demarcate a private realm that enjoys heightened protection from governmental interference while leaving social welfare open to purely discretionary choice.

This conclusion is not supported by our legal traditions. As this Article has shown, American public law has all along recognized the significance of public liberty and has permitted administrative bodies to regulate the use and disposition of private party to preserve the fundamental interests of the political community. As we navigate through an era of profound legal change, ideological fragmentation, and heightened constitutional conflict, public liberty provides us with the means to articulate the government's regulatory obligations, and to name and right the wrongs that officials and private parties afflict on our shared political existence.

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[381] LANDIS, *supra* note 43, at 36.