



TOWARD A REALIST DEFENSE OF THE CIVIL SERVICE

Noah A. Rosenblum[†]

Champions of administrative independence are on the defensive. The American legal academy has long been preoccupied with debates about the foundations of the administrative state.¹ But the worry no longer seems merely academic.² In the last few years, federal courts have undermined long-settled principles of administrative autonomy,³ and Presidents have asserted new, far-reaching powers over government personnel.⁴ Career civil servants are demonized on Capitol Hill, while Republican candidates for high office promise to dismantle the “Deep State.”⁵ The Heritage Foundation’s

[†] Associate Professor of Law, New York University School of Law. This article emerged from the great “Workshop on the Past, Present, and Future of the Personnel of the State” held at Princeton University in April 2024. Thanks to Kim Lane Scheppelle, Jane Manners, and the rest of the organizers and participants. Special thanks to Cary Coglianese for encouraging me to put these reflections in print. The article benefitted from the exceptional research and editing assistance of Nick Hardiman, Sam Burdyl, and the student editors of *The Regulatory Review*.

¹ See, e.g., Gillian E. Metzger, *The Supreme Court: 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 141 (2017) (describing debates about administrative history and development).

² See, e.g., Philip Rucker and 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 [perma: <https://perma.cc/876D-XRN9>] (demonstrating the debate moving into the public sphere).

³ See, e.g., *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020) (discussing how the structure of Consumer Financial Protection Bureau, with a single director who could only be removed from office “for cause,” violated separation of powers); *Collins v. Yellen*, 141 S. Ct. 1761 (2021) (holding that the restrictions on the President’s authority to remove the director of the Federal Housing Finance Agency violated separation of powers).

⁴ See *Constitutionality of the Commissioner of Social Security’s Tenure Protection*, 45 Op. O.L.C., slip op. at 10 (July 8, 2021), <https://www.justice.gov/olc/file/1410736/download> [perma: <https://perma.cc/6ZQN-9H5H>] (arguing the President may remove the Commissioner of Social Security at will notwithstanding the statutory limitation on removal in 42 U.S.C. § 902(a)(3)).

⁵ See Russell Berman, *The Open Plot to Dismantle the Federal Government*, THE ATLANTIC (Sept. 24, 2023), <https://www.theatlantic.com/politics/archive/2023/09/trump-desantis-republicans-dismantle-deep-state/675378/> [perma: <https://perma.cc/S8RD-S79S>]; see also STEPHEN SKOWRONEK JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE (2021).

Project 2025, which calls on the next Republican President to “[t]ak[e] the Reins of Government,” humble the bureaucracy, and reinstitute Schedule F, suggests that such attacks are not going away.⁶

Defenders of the civil service are flummoxed about how to respond. They talk about the benefits of expertise and the value of political independence.⁷ But not all the bureaucracy draws on specialized experts. And even ardent civil servants recognize the importance of some degree of political responsiveness, at least for some parts of the government.⁸

As a result, defenses of the administrative state are often theoretical, working from the premises of administrative state skeptics to reconcile bureaucracy with democracy.⁹ An independent civil service, the argument goes, is legitimate because it helps translate the will of the people into action. It should be insulated from overweening presidential interference because it is a creature of statutory law, which, pursuant to Article I, Section 8 of the U.S. Constitution, can specify the reach and form of the President’s administrative powers.¹⁰ If federal staffing is not now perfect—and how could it be?—it can be reformed, through careful tweaks to merit selection, retention, the operation of the Merit Systems Protection Board, and so on, rather than wholesale reclassification.¹¹ The right kind of bureaucracy, properly fitted into a regime of separated powers without being undermined by the courts or dominated by the President, can

⁶ PROJECT 2025, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 19 (Jan. 31, 2023), https://static.project2025.org/2025_MandateForLeadership_FULLL.pdf.

⁷ See, e.g., Heidi Kitrosser, *A Government That Benefits from Expertise: Unitary Executive Theory and the Government’s Knowledge Producers*, 72 SYRACUSE L. REV. 1473 (2022) (arguing for independence from political control for agency employees whose work regularly entails fact-finding, reporting, or analysis); Brian D. Feinstein, *Legitimizing Agencies*, 91 U. CHI. L. REV. 919 (2024) (analyzing ordinary citizens’ perceptions of agency legitimacy and arguing that these perceptions suggest that an independent and technocratic civil service is worth defending).

⁸ See Cristina M. Rodríguez, *Regime Change*, 135 HARV. L. REV. 1 (2021) (arguing for the importance of government responsiveness to changes in the presidency).

⁹ See, e.g., JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT (2018) (arguing that the administrative state can be more respectful of rights and equal citizenship and truer to democratic values than lawmaking by either courts or legislatures); Blake Emerson, *The Existential Challenge to the Administrative State*, 113 GEO. L.J. (forthcoming 2024) (arguing that the administrative state can serve democratic-constitutional values, such as the protection of the body politic against harm, the preservation of value pluralism, and the impartial application of law); Daniel Hemel, *Major Questions Avoidance and Anti-Avoidance*, 98 S. CAL L. REV. (forthcoming) (discussing theoretical defenses of the administrative state).

¹⁰ See PETER M. SHANE, DEMOCRACY’S CHIEF EXECUTIVE: INTERPRETING THE CONSTITUTION AND DEFINING THE FUTURE OF THE PRESIDENCY (2022) (explaining legal architecture of place of president in the administrative state).

¹¹ See PARTNERSHIP FOR PUBLIC SERVICE, PARTNERSHIP FOR PUBLIC SERVICE STATEMENT ON OPM MERIT SYSTEM RULE (2024) (seeking to safeguard the civil service from partisan interference by clarifying longstanding merit system principles related to hiring and removing career federal employees).

make democracy work better, whatever political leaders' partisan projects may be.¹²

On this tack, Americans take bureaucrats and good government to be theoretically synonymous. The civil service is supposed to be independent of politics, and so our support for it should be too. By writing its independence into law, we can protect it from improper interference. Doing so will help bring our existing government into line with the theoretically best democratic government, allowing practice to line up with theory.

This defense is not exactly wrong. But it is built on a series of mistaken choices. It works from an apolitical, doctrinal, and idealized understanding of the administrative state. In fact, as a historical matter, administrative independence was never apolitical, but was itself a political project.¹³ Its instantiation owes as much to institutions and culture as to legal doctrine. And its functional appeal comes not from its coherence with democratic theory but its practical superiority to other forms of staffing, including the spoils system, which it replaced.

Advocates should learn from these lessons. They should examine their choice to defend administration on apolitical, doctrinal, and idealistic grounds. Instead, they should choose differently: In lieu of the fantasy that administration could be removed from electoral politics, they should accept the electoral dimension of administration; in place of thinking about administration through the formalist lens of doctrine, they should approach it through the functionalist lens of institutional analysis; and instead of puzzling through the place of an ideal-typical administration in an idealized government, they should consider its place in our government—and the government itself—concretely and realistically.

To choose differently would promote a new, pragmatic defense of the administrative state and of administrative independence. We should not romanticize bureaucracy as the best system designed by elites and shored up by law to realize the abstract promise of government. Rather, we should defend it as it is: a useful, practical, worst-except-all-the-others-that-have-been-tried way of actually doing popular sovereignty.

¹² See Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104 (2021) (advocating that the President move from “presidential administration” (use of unilateral executive action to advance the policy priorities) to “civic administration” (diffusing authority away from the office of the President in ways that empower the federal bureaucracy, state, local, and tribal officials, and civil society)); Peter M. Shane, *Concerted Civic Action*, 92 FORDHAM L. REV. 551 (2023) (criticizing the “unitary executive theory” and proposing that courts resolve the Constitution’s ambiguities concerning separation of powers in ways that advance checks and balances and enhance Congress’s capacities to structure, regulate, and oversee the exercise of executive power).

¹³ See *infra* notes 15–33 and accompanying text.

THE POLITICS OF INDEPENDENCE ARE NOT INDEPENDENT FROM POLITICS

The civil service's independence from politics is often considered to be one of its principal virtues.¹⁴ This was not always so. In the past, American government positions were primarily patronage appointments. Political parties rewarded their supporters with plum federal posts. Would-be government servants launched their careers by volunteering in partisan elections; if their party won, it would reward them with a job.¹⁵

The result was massive waste and inefficiency.¹⁶ Many roles were filled by incompetent cronies. Some drew a salary without ever going to work. Those who showed up were often not good at their jobs. This was not surprising, since fitness for the role was not a criterion for selection. They had been picked because they were party hacks. Indeed, this was the main qualification for a career in government at the time; government employees regularly remitted a percentage of their salary back to their political party.¹⁷ This led to disciplined and highly functional party organizations, but made for terrible government.

This regime also led to corruption. The financial scandals of the late 19th century remain legendary: Tammany Hall,¹⁸ the Whiskey Ring,¹⁹ Jay Gould,²⁰ and Black Friday.²¹ Fraud was such a byword of the era that the politician George Washington Plunkitt famously distinguished between distinct kinds of graft.²² In that era, to dream of a corruption-free

¹⁴ See, e.g., U.S. Agency for Int'l. Dev., *Political Neutrality in Civil Service* (May 2021), https://pdf.usaid.gov/pdf_docs/PA00Z6WP.pdf [perma: <https://perma.cc/E6TX-K4KR>] ("For the maintenance of the merit-based, professional and effective civil service, it is essential to ensure its independence from political processes."); 5 C.F.R. pts. 210, 212, 213, 302, 432, 451, and 752 (2024) ("Career civil servants have a level of institutional experience, subject matter expertise, and technical knowledge that incoming political appointees have found to be useful and may lack themselves. Such civil servants' ability to offer their objective analyses and educated views when carrying out their duties, without fear of reprisal or loss of employment, contribute to the reasoned consideration of policy options and thus the successful functioning of incoming administrations and our democracy. These rights and abilities must continue to be protected and preserved.").

¹⁵ Olle Folke, Shigeo Hirano & James M. Snyder Jr., *Patronage and Elections in U.S. States*, 105 AM. POL. SCI. REV. 567 (2011) ("Before the 1950s, U.S. political appointments were primarily to help the incumbent party win elections as 'spoils' patronage.").

¹⁶ See RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 211–238 (2015).

¹⁷ See Folke, Hirano & Snyder, *supra* note 15.

¹⁸ TERRY GOLWAY, *MACHINE MADE: TAMMANY HALL AND THE CREATION OF MODERN AMERICAN POLITICS* (2014).

¹⁹ Timothy Rives, *Grant, Babcock, and the Whiskey Ring*, NATIONAL ARCHIVES (2000), <https://www.archives.gov/publications/prologue/2000/fall/whiskey-ring-1> [perma: <https://perma.cc/4CCT-4C9H>].

²⁰ GREG STEINMETZ, *AMERICAN RASCAL: HOW JAY GOULD BUILT WALL STREET'S BIGGEST FORTUNE* (2022).

²¹ KENNETH D. ACKERMAN, *THE GOLD RING: JIM FISK, JAY GOULD, AND BLACK FRIDAY, 1869* (1988).

²² WILLIAM L. RIORDON, *PLUNKITT OF TAMMANY HALL: A SERIES OF VERY PLAIN TALKS ON VERY PRACTICAL POLITICS* (1905) (distinguishing "honest" and "dishonest" graft).

government was hopelessly naïve; the best anyone could hope for was “honest” theft.

To remedy the situation, reformers championed a non-partisan, professional civil service.²³ The assassination of President James Garfield by a disappointed office seeker led to the Pendleton Act of 1883, which sketched the basic architecture for the system we still have.²⁴ The law defined a new kind of government officer—a civil servant—who would be hired and promoted on the basis of merit, not partisan connection, and who would work independently of political interference.

Over time, presidential administrations and legislators reclassified the vast majority of the federal government’s employees as civil servants.²⁵ Where once each change in party control of government led to the turnover of tens of thousands of employees, today all but about 4,000 of the federal government’s two million or so civilian employees are members of the protected bureaucracy.²⁶

The new system succeeded. Of course, turnover remains, and not just at the top: Some civil servants may prefer to leave government employment rather than work for a disfavored political party.²⁷ And the civil service may have some partisan leanings: There is evidence suggesting that the average civil servant is more liberal than the average American voter,²⁸ although there is also evidence suggesting that civil servants are more moderate than elected politicians, on both the left and right.²⁹ In any case, the civil

²³ See JESSE TARBERT, *WHEN GOOD GOVERNMENT MEANT BIG GOVERNMENT: THE QUEST TO EXPAND FEDERAL POWER, 1913–1933* (2022) (detailing reformers’ efforts to transform the federal government’s ineffectual executive branch into a modern organization with the capacity to solve national problems).

²⁴ *Pendleton Act (1883)*, NATIONAL ARCHIVES (last visited June 24, 2024), <https://www.archives.gov/milestone-documents/pendleton-act#:~:text=Approved%20on%20January%2016%2C%201883,Act%20in%20January%20of%201883>.

²⁵ See STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920* (1982).

²⁶ See U.S. OFF. OF PERS. MGMT., *FEDERAL CIVILIAN EMPLOYMENT* (2017), <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/federal-civilian-employment/> (about 1.9 million civilian employees as of 2017); Alexander Bolton, John M. de Figueiredo, & David E. Lewis, *Elections, Ideology, and Turnover in the US Federal Government*, 31 J. PUB. ADMIN. RSCH. & THEORY 451 (2021) (finding substantial stability in the civil service in response to changes in administration).

²⁷ See Bolton, de Figueiredo, & Lewis, *supra* note 26 (noting “pockets of responsiveness to political factors” among parts of the career civil service).

²⁸ *Civil Servants Often Work for Administrations They Disagree with Politically. How Does This Affect Their Job Performance?*, NW. U. KELLOGG SCH. OF MGMT. (Jun. 1, 2021), <https://insight.kellogg.northwestern.edu/article/civil-servants-political-ideology> (finding that Democrats were overrepresented in nearly every federal department compared with Republicans—especially in senior positions—and that Democrats made up about half of all federal bureaucrats, while Republicans wavered between a third and a quarter).

²⁹ See Brian D. Feinstein & Abby K. Wood, *Divided Agencies*, 95 S. CAL. L. REV. 731 (2022) (comparing civil servant ideology to that of elected officials).

service's own self-image remains non-partisan and independent from politics.³⁰

Yet, as this brief historical excursus suggests, the civil service's independence from politics does not mean that the civil service is or ever was apolitical. Just the opposite: The construction of an independent civil service was an intensely political project. An independent civil service happened because it was electorally appealing. Americans elected civil service reformers because of their frustration with the waste, inefficiency, and corruption of the spoils system. They wanted independence.³¹ And the civil service entrenched itself through its achievements. In place of constant turnover and partisan favoritism, the federal bureaucracy delivered efficient government, which helped secure its place.

This political appeal remains strong even today. Despite its inefficiencies, no one—not even the Heritage Foundation with its Project 2025 report—thinks government worked better in the era of the spoils system.³² No drivers want bridges inspected by political operatives instead of engineers; no banks want the Federal Reserve to make decisions on the monetary supply at the behest of a politician; no claimants want to go before an agency adjudicator who is biased against them. Administrative competence remains politically attractive.³³

REALITY OVER DOCTRINE

Embracing the politics of the civil service is to throw in with experience instead of reason. The civil service was not won by appealing to theory or high-minded ideals. It was achieved through partisan political contest. It solved problems that people wanted solved. Defenders of the administrative state should embrace such realism more broadly.

Consider, in this respect, the current conversation about independent agencies. Recent Supreme Court decisions have suggested that executive

³⁰ See Matthew Stoss, *Civil Servants: 'The Guardians of Process,'* NAT'L CONF. OF STATE LEGISLATURES (June 14, 2023), <https://www.ncsl.org/state-legislatures-news/details/civil-servants-the-guardians-of-process> (detailing independent self-image of civil servants).

³¹ See JOHN D. BUENKER & JOSEPH BUENKER, EDS., *ENCYCLOPEDIA OF THE GILDED AGE AND PROGRESSIVE ERA* (2005); TARBERT, *supra* note 23.

³² See PROJECT 2025, *supra* note 6.

³³ See Feinstein, *supra* note 7; cf. Robert L. Glicksman & Richard E. Levy, *Restoring ALJ Independence*, 105 MINN. L. REV. 39 (2020) (emphasizing the necessity of independence); CHRISTOPHER J. WALKER, MELISSA WASSERMAN & MATTHEW LEE WIENER, *PRECEDENTIAL DECISION MAKING IN AGENCY ADJUDICATION* (Dec. 6, 2022) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/document/precedential-decision-making-agency-adjudication-final-report>; see also Richard J. Pierce, Jr., *Does the Constitution Require the Agency to Use Biased Judges?*, REGUL. REV. (Oct. 2, 2023), <https://www.theregreview.org/2023/10/02/pierce-does-the-constitution-require-agencies-to-use-biased-judges/> [perma: <https://perma.cc/B3A9-NDZ3>]; CARY COGLIANESE, *ACHIEVING REGULATORY EXCELLENCE* (2016); ELIZABETH FISHER & SIDNEY A. SHAPIRO, *ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW* (2020).

branch agents must be more or less directly under the thumb of the President.³⁴ The potentially nefarious consequences of this are obvious: It could lead to Presidents ordering enforcement actions against political rivals, regulatory commissions sanctioning firms on presidential say-so, and government funding redirected to partisan cronies, among other undesirable actions.

In response to these dangers, defenders of good government have championed technical, legal fixes. So, to protect the independence of agency adjudicators, they call for special appointment and removal procedures that might pass constitutional muster while denying the President an opportunity to meddle.³⁵ To safeguard the integrity of agency decisions, they push for new laws explicitly empowering agency statutory interpretation.³⁶ To protect the civil service, they have masterminded new Office of Management and Budget regulations institutionalizing bureaucratic autonomy.³⁷ And so on. Although the specific methods vary, the goal is the same: to use law to shore up the independence of the administrative state.

There is something puzzling about this approach, though. As we know from experience, doctrines of legal independence are not enough to guarantee actual independence. On the flipside, some agencies that act independently do not enjoy formal doctrinal independence at all.

Start with independent agencies. Despite their name, scholars have long recognized that not all independent agencies are equally independent.³⁸ Independence is, perhaps, better conceptualized as a spectrum, with different factors contributing, in different contexts, to different degrees of independence.³⁹ Simple removal protections or senatorial involvement in appointment is not enough to guarantee independence. Some independent agencies, such as the Federal Trade Commission and the National Labor

³⁴ See *United States v. Arthrex, Inc.*, 594 U.S. 1, 20 (2021) (emphasizing the unitary executive theory); Noah A. Rosenblum & Ricks Hills, *Presidential Administration After Arthrex* (draft manuscript) (on file with author) (discussing the status of administrative agencies in a unitary executive world).

³⁵ See Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797 (2013) (describing measures to prevent presidential interference inside agency decision-making).

³⁶ See Emerson, *supra* note 9, at 59; see also, e.g., Press Release, Elizabeth Warren, Warren Leads Senate Response to End of Chevron Doctrine (Jul. 23, 2024), <https://www.warren.senate.gov/newsroom/press-releases/warren-leads-senate-response-to-end-of-chevron-doctrine> [perma: <https://perma.cc/J5QL-4BSC>].

³⁷ U.S. OFF. OF PERS. MGMT., RELEASE: OPM ISSUES FINAL RULE TO REINFORCE AND CLARIFY PROTECTIONS FOR NONPARTISAN CAREER CIVIL SERVICE (2024), <https://www.opm.gov/news/releases/2024/04/release-opm-issues-final-rule-to-reinforce-and-clarify-protections-for-nonpartisan-career-civil-service/> [perma: <https://perma.cc/T47W-CGKW>].

³⁸ Kirti Datla & Richard L. Revesz, *The False Dichotomy of Agency Independence*, REGUL. REV. (May 5, 2014), <https://www.theregreview.org/2014/05/05-datla-revesz-agency-independence/> [perma: <https://perma.cc/7NBA-GSC4>].

³⁹ Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013); see also Cary Coglianese, *The Semi-Autonomous Administrative State* 44 UNIV. OF DAYTON L. REV. 319 (2019).

Relations Board, seem awfully responsive to the White House, despite having unremovable heads appointed with senatorial confirmation.⁴⁰

Meanwhile, some putatively executive agencies can display a remarkable degree of independence. Scholars have spilled much ink, for example, about U.S. Immigration and Customs Enforcement, whose powerful union and distinctive culture have made it difficult for the President to control.⁴¹

Most executive branch agencies pursue their work in relative isolation from the White House. From the Department of Agriculture's extension service⁴² to the Department of Defense's procurement process,⁴³ most of the administrative state operates autonomously, even the parts of it that do not enjoy legal indicia of independence.

This is not surprising. The administrative state consists of many different bureaucratic institutions. And such institutions follow their own logics regardless of the formal law. Bureaucratic sociology, organizational psychology, and institutional politics often do more to create and protect autonomy than "parchment barriers."⁴⁴

This situation is why, despite tremendous presidential administrative power today, civil service independence persists. The President already enjoys the power to reclassify most federal employees,⁴⁵ to fire most agency heads,⁴⁶ and to appoint thousands of high-ranking government officers.⁴⁷ Yet the administrative headache of reclassification and the political costs of removal effectively constrain most Presidents' relationships with most of the bureaucracy. Meanwhile, to my knowledge, no President has ever filled all the positions that the Plum Book says he has the authority to staff. Nineteenth-century Presidents found the stress of

⁴⁰ Ganesh Sitaraman & Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 ADMIN. L. REV. 719 (2019); see also Todd Phillips, *Commission Chairs*, 40 YALE J. REG. 277 (2023) (examining agency deference to the White House).

⁴¹ See *New Data Analysis Reveals ICE's Enforcement Activities Contradicted Biden Administration's Prioritization Guidelines*, AMERICAN IMMIGRATION COUNCIL (June 28, 2023), <https://www.americanimmigrationcouncil.org/news/data-reveals-ice-enforcement-activities-and-deviations-from-priorities> (noting that enforcement actions against immigrants who did not meet the agency's priorities under the Biden Administration accounted for approximately one-third of all ICE enforcement activities).

⁴² U.S. DEPARTMENT OF AGRICULTURE, EXTENSION (last visited Jun. 24, 2024), <https://www.nifa.usda.gov/about-nifa/how-we-work/extension>.

⁴³ Cong. Rsch. Serv., *Defense Primer: Procurement* (May 7, 2024), <https://sgp.fas.org/crs/natsec/IF10599.pdf>.

⁴⁴ Cf. Daryl Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2011).

⁴⁵ Pub. L. No. 95-454, 92 Stat. 1111.

⁴⁶ See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020); *Collins v. Yellen*, 594 U.S. 220 (2021).

⁴⁷ David E. Lewis, *Political Appointees to the Federal Bureaucracy*, U. CHI. CTR. FOR EFFECTIVE GOV'T (Feb. 20, 2024), <https://effectivegov.uchicago.edu/primers/political-appointees-to-the-federal-bureaucracy>.

filling offices an overwhelming burden; twenty-first century Presidents are not much better off.⁴⁸

Champions of agency independence, then, should put less trust in law and more in bureaucratic logic. To protect agencies from presidential meddling, they might be better off inculcating cultures of autonomy and whistleblowing, building institutions to enable politically efficacious leaking, and raising the costs of improper presidential action. Law might have a role to play here. By creating new legal procedures for reclassification, for example, defenders of the administrative state could make it more time-consuming for the President to undermine agency independence through legally sanctioned channels and so easier to expose presidential aggrandizement. But the work of maintaining agency independence is not accomplished by doctrine alone.⁴⁹

REAL GOVERNMENT DOES NOT LOOK LIKE IDEAL THEORY

This penchant for formal law over institutional analysis may be a specific example of a broader pathology: a tendency to approach American public law through the lens of ideal theory rather than examining concrete reality.

Debate about the administrative state today can feel like a political theory seminar. Scholars, judges, and publicists talk about the relationship between government institutions in their ideal-typical form. When they go on about the virtues of separation of powers, or how to apportion different governance responsibilities between different branches and departments, they rarely consider the existing federal state. They mean something like the theoretical state, the imagined state.

Recent discussions of the so-called major questions doctrine illustrate the problem. The doctrine's defenders often ground their arguments in abstract considerations of government structure:⁵⁰ Agencies do not enjoy

⁴⁸ See Andrea Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-in-Chief: Myers and the Progressive Presidency*, 123 COLUM. L. REV. 2153 (2023) (arguing that *Myers v. United States*, 272 U.S. 52 (1926) did not explicate a preexisting tradition of presidential power but instead invented one on developmental, not originalist, grounds).

⁴⁹ See Emerson, *supra* note 9.

⁵⁰ See, e.g., *West Virginia v. Env'tl. Prot. Agency*, 597 U.S. 697 (2022); *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin.*, 595 U.S. 109 (2022) (Gorsuch, J., concurring); Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 227, 232 (2023) (arguing that critiques of the major questions doctrine are overstated); Michael D. Ramsey, *An Originalist Defense of the Major Questions Doctrine* (C. Boyden Gray Center for the Study of the Administrative State Research Paper No. 23-35, San Diego Legal Studies Paper No. 23-048, Jan. 8, 2024) (pointing to historical practice as a basis to legitimize clear-statement rules); Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909 (2024) (arguing that the major questions doctrine can be understood as a linguistic canon and therefore consistent with textualism); Ilya Somin, *A Textualist Defense of the Major Questions Doctrine*, THE VOLOKH CONSPIRACY (Mar. 1, 2023), <https://reason.com/volokh/2023/03/01/a-textualist-defense-of-the-major-questions-doctrine/>; Thomas Koenig & Ben Pontz, *The Roberts Court's Functionalist Turn in Administrative Law*, 46 HARV. J.L. & PUB. POL'Y 221 (2022) (arguing that the major questions doctrine represents the integration of a balance-of-powers

inherent democratic legitimacy, they say, but get it from the President, who is elected by the people; or the agencies receive democratic legitimacy by implementing laws passed by Congress, which embodies the democratic will. Congress (and not agencies) must make policy decisions, since it is the job of the legislature to make policy, and Congress is the American legislature. Courts need to ensure that agencies do not overstep their role, lest democracy be undermined. The major questions doctrine is just one way that courts do this: The doctrine protects the fundamental structure of the federal state by ensuring that, on the most consequential issues, Congress makes policy and agencies do not usurp democratic authority.

Whatever this argument's appeal, it is striking for its abstraction. It is completely disconnected from extant political institutions. You do not have to be a radical to observe that Congress is not obviously a democratic legislature; certainly it does not embody democratic will. The actually existing Congress is a decidedly minoritarian institution.⁵¹ The Senate is structured so that well less than half of American voters elect a majority of Senators, and in any case the filibuster prevents legislation from advancing without supermajority support. The House of Representatives introduces its own anti-democratic distortions, privileging less dense settlements over cities, even though the United States has been a majority-urban country for a century now.⁵²

Moreover, the way Congress operates undercuts simplistic arguments drawn from political theory. Today, representatives are not primarily legislators. They are political celebrities who operate in a media environment that rewards various forms of performance. Most representatives play no role in formulating policy at all.⁵³ Real legislation is crafted in negotiations between staff from the offices of the congressional leadership, representatives from the White House, and various outside stakeholders. Such "unorthodox lawmaking" has been the rule in Washington for many decades already; it is just how the institution operates.⁵⁴ Taking this account of Congress seriously gives the lie to facile claims that the civil service is somehow trenching on Congress's democratic authority.

Institutional realism should lead to a different assessment of the role of courts as well. They may be present themselves as policing the boundaries of America's public law. But the realities of their interventions are doctrine-

approach into the Roberts Court's more formalist, separation-of-powers historical focus); Randolph J. May & Andrew K. Magloughlin, *NFIB v. OSHA: A Unified Separation of Powers Doctrine and Chevron's No Show*, 74 S.C. L. Rev. 265 (2022) (suggesting that *NFIB* heralds a revitalized, more coherent separation of powers doctrine).

⁵¹ Cf. Cary Coglianese & Gabriel Scheffler, *What Congress's Repeal Efforts Can Teach Us About Regulatory Reform*, 3 ADMIN. L. REV. ACCORD 43 (2017).

⁵² Aaron O'Neill, *Urbanization in the United States*, STATISTA (May 22, 2024), <https://www.statista.com/statistics/269967/urbanization-in-the-united-states/>.

⁵³ See Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465 (2023).

⁵⁴ See BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* (1st ed. 1997).

independent. Judges disfavor certain regulatory agencies, such as the Environmental Protection Agency,⁵⁵ the Consumer Financial Protection Bureau,⁵⁶ and the Securities and Exchange Commission.⁵⁷ These disfavored agencies face aggressive scrutiny by politically hostile judges who were selected for the bench for their ideological commitment to the conservative legal movement. Allied impact litigation firms, staffed with those judges' former clerks, seek out sympathetic plaintiffs and forum-shop cases with the explicit aim of deconstructing the administrative state.⁵⁸ Those actors have shown themselves willing to overturn well-established precedent in many areas of the law in pursuit of their political aims.⁵⁹ There is no reason to contend that they will approach the civil service or new laws meant to shore it up any differently.

This counsels against abstract or idealistic defenses of administrative independence. The threat to administration is not rooted in ideas or theoretical problems. It comes from biased institutions, animated by political concerns. To defend the administrative state, administrators need to meet those institutions and politics head on.

CONCLUSION: TOWARD A NEW DEFENSE OF THE ADMINISTRATIVE STATE

Consider three dichotomies: political vs. apolitical; institutions vs. doctrine; realism vs. idealism. Defenders of the administrative state tend to gravitate toward the second term of each pair. They defend the administrative state as apolitical; they seek to protect its independence through law; and they do so in pursuit of an ideal theory of democratic government. But we might do better to embrace these pairs' first terms. As a historical matter, agency independence is a product of politics. What administrative independence we have is a function more of institutional design than legal doctrine. And the reasons to champion the administrative state and to be critical of efforts to erode it owe much to realistic understandings of our government and public law.

⁵⁵ *West Virginia v. Env'tl. Prot. Agency*, 597 U.S. 697 (2022).

⁵⁶ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020).

⁵⁷ *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446, 450 (5th Cir. 2022), *aff'd* 144 S. Ct. 2117 (2024).

⁵⁸ *See, e.g.*, ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008); AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2019); STEPHEN VLADECK, *THE SHADOW DOCKET* (2023); Andy Kroll, *We Don't Talk About Leonard: The Man Behind the Right's Supreme Court Supermajority*, *PROPUBLICA* (Oct. 11, 2023), <https://www.propublica.org/article/we-dont-talk-about-leonard-leo-supreme-court-supermajority>.

⁵⁹ *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism and Some Pathways for Resistance*, 101 *TEX. L. REV.* 1127 (2023); Kate Redburn, *The Equal Right to Exclude: Compelled Expressive Commercial Conduct and the Road to 303 Creative v. Elenis*, 112 *CALIF. L. REV.* (forthcoming 2024).

What would it mean to take a more political, institutional, and frankly realist approach to defending administration? At a minimum, it would mean resisting the allure of abstract argument and thinking about the concrete effects of proposed reforms. More generally, it might mean making the political case for administration and its connection to a government that appeals.⁶⁰ It could mean thinking about the features of institutional design that protect administrative independence where we should have it, and what role law plays, if any, in safeguarding agency autonomy.⁶¹ And it should give us confidence to push back on arguments that are rooted in stylized characterizations of the federal state.

It can also lead to concrete proposals for reform and action. Defenders of the administrative state should highlight the threat that the loss of independence for agency adjudicators poses to specific plaintiffs in specific contexts. They might encourage politicians to campaign on their commitment to independence and to enshrine that independence through operative rules, regulations, and principles of agency staffing. They can identify the problems with a return to the spoils system and explain how broadbrush solutions will tend to make the pathologies they are designed to address worse, not better.

The administrative state is not a tyrannical imposition on regulated parties, however much libertarians may whine. It is simply government. Those who seek to mystify and abstract it have ulterior motives. Defenders of the administrative state need not join issue on their terms. We should see it clearly, concretely, and unromantically—and think about it as it actually is in comparison with actual possible alternatives.

⁶⁰ Aaron L. Nielson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication*, 103 TEX. L. REV. (forthcoming 2025).

⁶¹ Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1 (2022).