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Illiberalism and Administrative Government

Jeremy K. Kessler
Columbia Law School, jkessler@law.columbia.edu

CHAPTER 3

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Driven by the perception that liberal democracy is in a state of crisis across the developed world, political and legal commentators have taken to contrasting two alternatives: "illiberal democracy" (or populism) and "undemocratic liberalism" (or technocracy).[1] According to the logic of this antinomy, once an erstwhile liberal-democratic nation-state becomes too populist, it is on the path toward illiberal democracy; once it becomes too technocratic, it is on the path toward undemocratic liberalism.[2]

While the meanings of liberalism and democracy are historically and conceptually fraught, the contemporary discourse of liberal democratic crisis assumes a few minimal definitions. Within this discourse, liberalism means something like "the protection of the rights of minorities and individuals, guarantees of citizens' liberty, and the subjection of the government to the constraints imposed by the rule of law."[3] And democracy means something like "the combination of popular sovereignty and majority rule."[4] Given the size of the population of nearly all modern nation-states, that combination is thought to require a representative mechanism: comparatively free, fair, and competitive elections, in which the people choose representatives to govern their common life.

It is not the goal of this essay to quibble with the above definitions, or to call into question the utility of heuristic frameworks such as illiberal democracy versus undemocratic liberalism and populism versus technocracy. I assume that both the definitions and the frameworks reference—however imprecisely—a real world of institutions, ideas, and social movements that exist—however complexly—beyond the confines of scholarly debate.

The goal of the essay is rather to ask where administration or administrative government fits within the contemporary discourse of liberal democratic crisis. If two constitutive features of liberal democratic nation-states are

liberalism and democracy, administration is a third feature that has been integral to those states' development and persistence over time, as well as to their present predicament.

What is administration, or administrative government? It is government not by legislatures, courts, or elected members of the executive branch (such as presidents and prime ministers), but by administrators who are subject to the supervision of all the other branches of government, while not being fully identified with any of them. Whether selected by meritocratic procedures or appointed by elected officials, these administrators work within "agencies" or "departments" or "commissions." There, their task is to implement in detail the broad national policies approved by the people's elected representatives in the legislative and executive branches.

History demonstrates that where liberal democratic nation-states have emerged from the shocks of industrialization and globalization, so too has administrative government.[5] This fact is not surprising given that to govern any sufficiently large, populous territory—particularly under conditions of industrialization and globalization—is to govern administratively. The very generality of this point, however, has given rise to considerable anxiety within liberal democratic nation-states, as administrative government is every bit as much a feature of illiberal and undemocratic regimes as liberal and democratic ones. Throughout the first two-thirds of the twentieth century, the effort to distinguish the administrative governments of liberal-democratic nation-states from those of their fascist and communist rivals was a major preoccupation of American and European lawyers and politicians.[6]

Where does the ineluctability of administrative government fit within the contemporary discourse of liberal democratic crisis? At first, this question would seem to have an easy answer: rule by administration—rule by electorally unaccountable bureaucrats—is technocracy, or undemocratic liberalism. The answer is not so simple for at least two reasons. First, because many of the staunchest defenders of administrative government in the liberal democratic world view administration as a vital organ of *democracy* itself.[7] If administrative government is vital to democratic legitimacy, to channeling and achieving the ends of the people themselves, then to align administration on the side of undemocratic liberalism is nonsensical. The second reason why a simple conflation of administrative government with technocracy, or undemocratic liberalism, is unworkable is that many of the staunchest critics of administrative government in the liberal democratic world see it as a mortal threat to *liberalism*—to individual and minority rights, to the liberty of citizens, and to the rule of law.[8]

Administrative government, then, seems to be both too democratic and too illiberal to perform the functions of undemocratic liberalism. Perhaps administrative government is then more sensibly identified with illiberal democracy, or populism? Hardly. Populists in general disdain administrative decision-making as a technocratic domination of the public sphere, terminally undemocratic yet also often too liberal in its circumscription of valid administrative ends.[9]

Given that administrative government satisfies neither technocrats nor populists, one might be tempted to argue instead that such government is most at home within the liberal-democratic nation-state itself. From this perspective, the persistence of administration would be a sign of liberal democratic stability, rather than liberal democratic crisis. And yet, as discussed above, all industrial and post-industrial nation-states, not just liberal-democratic ones, have featured administrative government. Just as importantly, all industrial and post-industrial liberal-democratic nation-states have experienced recurrent crises concerning the threat that administrative government poses to liberal and democratic governance.[10] Administrative government lives everywhere but is never truly at home. Within liberal democratic nation states in particular, administrative government appears as both a vital organ and a potentially malignant mass of cells.

Current debates among scholars and practitioners of American administrative law exemplify the puzzling role that administrative government plays within the broader discourse of liberal democratic crisis.[11] Previously confined to seminar rooms, law reviews, and the occasional federal court, these debates about the legitimacy of administrative government have achieved a new prominence thanks to the political polarization of the executive and legislative branches during the Obama presidency, the rise to power of Donald Trump and his early, anti-administrative supporters, such as Steve Bannon, and twenty years of unprecedented Republican success in appointing judges skeptical of administrative government to the federal courts.

Some might find it surprising that scholars and practitioners of administrative law spend any time at all debating the legitimacy of administration. If administration exists, and there are laws that govern its functioning, then practitioners and scholars of that law presumably have their hands full. To understand why debates about administrative legitimacy nonetheless persist within the precincts of administrative law, it helps to say a few words about the historical function of administrative law, as distinct from the historical function of public administration as such.

Administrative law, at least as it has developed since the late nineteenth century in the Anglo-American world, purports to submit administration—understood to be tendentially illiberal and tendentially undemocratic—to liberal and democratic norms. Center-left or "progressive" defenders of the American administrative state claim that it still performs this function, and admirably. They emphasize the forms of supervision and control to which federal administrators are subject by the executive, legislative, and judicial branches of government, as well as the forms of "internal administrative law" that administrators themselves produce, internal processes that preserve individual rights and other rule-of-law values.[12] Right-leaning critics claim that administrative law no longer works to check the illiberal and undemocratic tendencies of the administrative state and call for the restoration of a prior, more liberal, and democratic order.[13] Some heterodox theorists—Adrian Vermeule in particular—take a different tack, arguing that administrative law has largely worked to develop and legitimate necessarily illiberal modes of government that liberalism and democracy themselves turned out to require.[14]

In a striking passage at the opening of his recent book *Law's Abnegation*, Vermeule writes:

> Although in earlier eras law claimed (rightly or not) to represent the overarching impartial power that resolved and reconciled local conflicts over the activities of government, the long arc of the law has bent steadily toward deference—a freely chosen deference to the administrative state. Law has abnegated its authority, relegating itself to the margins of governmental arrangements. Although there is still a sense in which law is constitutive of the administrative state, that is so only in a thin sense—the way a picture frame can be constitutive of the picture yet otherwise unimportant, compared to the rich content at the center.[15]

While Vermeule celebrates the abnegation of law, many on both the left and right see in the developments that Vermeule describes the dread spread of illiberalism through the formerly liberal democratic nation-states of the transatlantic world. In his avocational writings on public affairs, Vermeule has not sought to assuage anxious liberals.[16] Rather, he hails the promise of administratively driven social reforms, reforms that are denounced as illiberal by prominent legal commentators in the United States, Europe, and elsewhere. However heterodox, Vermeule's open celebration of the administrative achievement of controversial social goods represents the true challenge of illiberalism that progressive administrative law scholars are at pains to overcome.

This challenge is made all the more difficult by the fact that progressives also reject the traditional checks on the illiberal tendencies of administrative government: more invasive judicial review of administrative decision-making; and the imposition of more painstaking decision-making procedures that replicate the adversarial, deliberative, and transparent qualities of decision-making in the courtroom and the legislative chamber.[17] These checks—which taken together could be called, somewhat tendentiously, the legalization of the administrative process—is the one preferred by conservative critics of American administrative government.[18]

The progressive response to both the conservatives and the Vermeullians is that American administrative government is plenty lawlike already. Contra Vermeule, no abnegation has occurred, and therefore, contra the conservatives, no new rounds of legalistic reform are necessary. If anything, progressives continue to insist that administrative government suffers from too many legalistic fetters, and they argue that more of these fetters could be removed without any risk to the liberalism of the administrative process.[19]

The progressive response is unavailing, for at least two interrelated reasons. First, the internal administrative law that progressives hail as a substitute for quasi-judicial and quasi-legislative procedures may well be adequate from the perspective of justice (or scientific rationality, or other commendable values), but it is not adequate from the perspective of *liberalism*, commonly understood.[20] Second, the parallel attempt by progressives to demonstrate that administrative government is adequately democratic undermines their account of the adequacy of its liberalism. This is because the democratic features of administration (such as presidential and legislative supervision, and public participation) regularly put pressure on administration's more liberal features (such as regularity, neutrality, rights protection, etc.).[21] This dynamic leads to continual efforts by administrative apologists to explain how democratic inputs do not, in fact, violate administrative government's more lawlike features. These efforts are frustrated by the fact that democracy and liberalism exist in considerable tension with one another. If administrative government works at all, it works by exacerbating this tension, not by resolving it.

To see how, it is useful to introduce three relatively technical questions that structure the current debate between progressive defenders and conservative critics of American administrative government.

First, to what extent should Congress be able to delegate to administrative government the task of shaping federal law, rather than shaping such law itself through the normal (and exceedingly cumbersome) legislative

process? Since the New Deal, courts have proven exceedingly reluctant to second-guess Congress's decision to delegate law-making power to administrators. Progressives are more than happy to preserve this status quo, while some conservative judges, politicians, and scholars have called for its revision. One such revision would require that every administrative rule that significantly impacts the economy be approved by majorities of both the House and Senate before going into effect.[22]

Second, what degree of deference should judges extend to administrative decision-makers? Common answers range from declining to review administrative decisions at all to making an independent judgment about the quality of the evidence, procedures, and legal reasoning on which administrative decision makers relied.

Third, what degree of procedural protection should private parties receive when they are regulated by a given administrative agency? The answer here is always multifaceted, but conservative critics tend to prefer procedures that either (1) resemble those used in a court of law, when administrators apply preexisting rules to the past conduct of individual parties; or (2) that allow for extensive, public deliberation and multiple rounds of testimony from interested parties, when administrators craft general rules that will apply prospectively to all similarly situated parties. Progressives, on the other hand, contend that such quasi-judicial and quasi-legislative procedures are often too cumbersome, too skeptical of administrative expertise, and too prone to manipulation by wealthy corporations and lobbyists.

In giving their own answers to the three foregoing questions (concerning the proper extent of congressional delegation, judicial supervision, and procedural protection), progressive scholars have developed a theory of administrative government that emphasizes its peculiar mix of democratic and liberal bona fides. This theory begins with a highly plausible historical and pragmatic answer to the first question: the delegation of power to make legally binding decisions from Congress to administrative agencies is a centuries-old practice that also happens to be unavoidable in a populous, industrial, or post-industrial nation-state.[23] Having assumed this much, progressive theorists then endeavor to show why administrative government can be trusted to wield its delegated power in a reliably democratic and liberal manner. According to progressive theory, the primary democratic check on administrative government is presidential supervision, supplemented from below by bouts of public participation in administrative decision-making.[24]

The primary liberal check, meanwhile, is internal administrative law—a body of administratively generated rules, customs, and practices that

structure how administrators behave, and render that behavior more rather than less consistent, fair, and protective of individual rights.[25] Some of these rules, customs, and practices are intentionally created and relatively formal. Others are emergent felicities. All are the product of cooperation and competition between administrators within a given agency, administrators across agencies, and administrators and the White House. In one recent, synoptic account, Gillian Metzger and Kevin Stack define internal administrative law as the law, or lawlike system, produced by all the "policies, procedures, practices, [and] oversight mechanisms" that are "internal" to the executive branch, rather than imposed upon it by Congress and, especially, the courts.[26] So defined, internal administrative law has always existed. Yet, as Metzger and Stack go on to argue, the phenomenon appears to be of growing importance to both practitioners and scholars of administrative government:

> More and more, presidents and executive branch officials rely on internal issuances and internal administration to achieve policy goals and govern effectively. . . . To give just a few examples: interagency arrangements are important parts of recent environmental and financial regulation and national security initiatives; guidance and enforcement policy play an increasingly central role in education and employment contexts; and administrative oversight, negotiated agreements, and funding protocols have significantly affected the shape of contemporary federalism. Equally, if not more, significant is the growing number of issuances from centralized entities like the Office of Management and Budget (OMB) and its Office of Information and Regulatory Affairs (OIRA), governing everything from regulatory promulgation and analysis to agency use of guidance, budgeting, enforcement policy, and peer review.
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> Administrative law scholarship has also gone internal. Agency design and coordination, centralized White House control, the civil service and internal separation of powers, internal supervision, the role of agency guidance—these are just some of the topics now receiving sustained scholarly analysis.[27]

What explains this growth in the volume and significance of internal administrative law? Most scholars who have studied the phenomenon point to a mix of political, regulatory, and jurisprudential developments. At the political level, Metzger and Stack are not alone in emphasizing "political polarization and partisan gridlock" within the legislature.[28] At the regulatory level, a set of interrelated changes to the form and focus of administrative government have each tended to spur agencies' production of internal administrative law: growth in the perceived complexity and uncertainty of commercial, environmental, and technological problems; a shift away from command-and-control-style regulation and toward greater

cooperation between federal agencies, private corporations, and state governments; and, finally, a tendency to "securitize" various regulatory challenges, that is, to treat those challenges from the point of view of emergency management and national security.[29] Finally, at the jurisprudential level, internal administrative law can be understood as a strategic response to the federal courts' increasing willingness to second-guess more tractable kinds of administrative decision-making, such as procedurally intensive administrative rule making and administrative adjudication. The result of this strategic play—less formal, less transparent, and less legally legible forms of administrative law-making—was certainly not intended by already-skeptical judges, and it does not satisfy their doubts about the lawfulness of the administrative process. But internal administrative law does make administrative decision-making somewhat more difficult to attack directly in the courts.

These explanations for the growth of internal administrative law could, of course, be used to question its liberal pedigree. Why should administrators seeking to work around partisan gridlock, to exert mastery over complex social and natural problems, or to mitigate judicial interference, be trusted to regulate themselves in a manner consistent with the regularity, neutrality, and respect for individual rights that one associates with liberal governance? One answer to this question occasionally suggested by progressives is that democratic checks—such as presidential control and public participation—can help to push back against illiberal deformations of internal administrative law. But this answer makes sense only if we assume that the politicians and publics who influence the administrative state themselves favor liberal outcomes. That is not an assumption that progressives are willing to make consistently over time and across fields of regulation.[30] A different sociological assumption has proven more appealing to progressives seeking to establish internal administrative law's liberal bona fides. This assumption is that the same professional discipline and technical expertise that enable administrators to forge the rules, customs, and practices of internal administrative law also imbue that law with a reliably liberal cast. Whether a given administrator's expertise lies in the natural sciences, the social sciences, medicine, or law, the social experience of professionalization itself, as well as the overarching commitment to lawful action in the public interest that inclines administrators of every stripe to be particularly deferential to the legal experts within their ranks, helps to ensure that internal administrative law satisfies norms of regularity, neutrality, and respect for individual rights.[31] Undergirded by this

sociological assumption of a particular kind of professional—and therefore liberal—administrative class, the concept of internal administrative law is crucial to rebutting both conservative critics of administrative government (who claim that administration as it currently exists in the United States traduces the rule of law) and administrative government's heterodox defenders (who affirm and applaud its illiberalism).

The resulting picture of an administrative state in democratic and liberal equilibrium, shored up by presidentialism and public participation on the one hand, and professionalism and internal administrative law on the other, provides reliably progressive answers to the second two questions raised above. Those questions concern the optimal degree of judicial review of administrative decision-making, and the optimal degree of procedural constraint that Congress and the courts should impose on administrative decision-making. The answers favor judicial refusal to review a range of administrative decisions relating to resource allocation and enforcement policy; judicial deference to administrative fact-finding and administrators' interpretations of the statutes that they are tasked with implementing; and judicial and legislative restraint when it comes to imposing decision-making procedures more onerous than those that administrators themselves have determined are most efficient and fair.

But it is reasonable to reject the progressive picture of an administrative state in democratic and liberal equilibrium, and thus also to be skeptical of progressive answers to more technical questions concerning the administrative state's relationship to Congress, the judiciary, and the people whom it regulates. There are two fundamental problems with the progressive picture. The first is that the putative sources of democratic and liberal legitimation of administrative decision-making—presidentialism, public participation, professionalism, and internal administrative law—are unreliably democratic and unreliably liberal. The second is that these sources, to the extent that each does provide some modicum of democratic or liberal legitimation, undermine one another.

There already exist important and troubling critiques of the democratic bona fides of presidentialism and public participation.[32] I will not rehearse them at length. The fundamental point of these critiques is that neither presidential pressure nor pressure from those private parties subject to a given regulatory scheme satisfy our intuitive sense of what it would mean for a national polity to govern itself, however representatively. While such pressures can and do influence administrative decision-making, they cannot supply the quality of deliberation or represent the diversity of interests that

a functioning legislature would. That being said, the United States does not have a functioning legislature. In light of this fact, the democratic argument for administrative government is the strongest one available to progressives (as well as to other, more heterodox defenders of administration, such as Adrian Vermeule and his sometimes co-author, Eric Posner).

The progressive defense is weakest at two other points: its claim that professionalism and internal administrative law provide an adequate substitute for more traditional judicial and legislative means of protecting liberal values such as regularity, neutrality, and respect for individual rights; and its assumption that the putatively democratic sources of administrative legitimation—presidentialism and public participation—do not undermine whatever liberal legitimation might be supplied by professionalism and internal administrative law.

Administrative law's flight from judicial control is a perilous road for progressives to travel. The striking symmetry—at times identity—between progressive defenses of the administrative state and those offered by openly illiberal theorists calls not so much for pause as for reorientation. How did progressives get themselves into this mess, and where are they trying to go? Viewing the courts as the chief obstacle to progressive governance is an old theme, and contemporary progressives trace their preferred countermeasures to a well-pedigreed source: the New Deal.[33] But what they miss in resuscitating New Deal–era arguments for presidentialism and professionalism is that these arguments depended on a sociological analysis of the courts as the representatives not of a particular party but of a particular class.[34] From this perspective, presidential and professional control of the administrative state was a second-best or third-best solution, one that would only be successful in advancing progressive reforms to the extent that the president and the professionals could be sufficiently autonomous from the class fractions that the judiciary represented—the large capitalists and the upper echelons of corporate management.

New Deal reformers were quite explicit about the potential for, and the desirability of, class differentiation across the federal government. Their optimism can be attributed in large part to certain contingencies of the period, relating to the social composition of the federal bureaucracy and the Democratic Party. New Deal agencies were largely staffed by an aspiring middle class with close ties to urban immigrant communities and rural backwaters. While some administrators, particularly some of the lawyers, enjoyed elite educations, many did not, and most came to Washington in part because they were excluded, for socioeconomic reasons, from the

traditional pathways of elite professional development in the private sector.[35] As such, the New Deal's administrative class reflected the increasingly multiethnic and working-class base of the New Deal–era Democratic Party. This party's base, in turn, exerted a disciplining effect on its political representatives, the president in particular.

The role of the Democratic Party's social base in shaping New Deal racial policy—often for the worse, given the power of white Southerners within the Democratic coalition—has recently received great attention.[36] But the influence of large, economically marginalized social blocs also helped to insulate New Deal governance from corporate capture. So too did divisions within the corporate sector itself, as the leading labor-intensive and capital-intensive firms vied against one another for control over industrial and trade policy.[37] Whether the resulting New Deal state was conducive to liberal democracy remains a fair question. But its departures from liberal democratic norms could be understood, and defended, as the price to be paid for establishing countervailing socioeconomic power within the executive branch.

Today the situation is quite different. Rising inequality, declining social mobility, and the consolidation of an alliance between the most productive and powerful firms, an increasingly self-reproducing professional class, and the Democratic Party itself—all these trends make it difficult for contemporary progressives to offer a hopeful compromise between liberalism, democracy, and countervailing economic power.[38] Today, there is less room than ever between the social composition of the judiciary and the upper echelons of the administrative state, and less connection than ever between the upper echelons of the administrative state and the median private-sector worker. Nor has the contemporary Democratic Party's social base proven capable of imposing working-class priorities on the administrative state in times of Democratic control. Given these dynamics, an administrative state whose legality rests on external presidential control and internal professional control risks sacrificing liberal ideals for no greater cause than the entrenchment of the prerogatives of those firms and professionals associated with high-productivity sectors of the economy. Perhaps that entrenchment is far preferable to the social chaos on offer from the party of Trump and the courts under its sway. But under present conditions, the progressive vision of administrative legality departs not only from liberal ideals, but also from the sort of economic democracy imagined by New Deal reformers.

While many aspects of this story are distinctly American, the peculiar status of administrative government, as both a deviation from liberal democracy and a frustration to illiberal democrats and undemocratic liberals, has become a global phenomenon. Over the course of the twentieth century,

the struggle to maintain, defend, and spread liberal democratic capitalism required the construction of ever more powerful administrative states. Administrative government thus became liberal democracy's eerie double, a necessary supplement that also functions like a funhouse mirror: reflecting and attempting to resolve the fundamental tension between liberalism and democracy even as it distorts the meaning of those concepts.

At the dawn of the twenty-first century, a group of French sociologists explained this mirror-like relationship between administrative government and liberal democracy in terms of a fateful "double delegation": the delegation from citizens to political representatives, and from laypersons to technical experts.[39] Each delegation alienates from members of mass society their capacity to learn, to deliberate, and to decide. The combination and iteration of the two delegations constitute what is now recognizable as administrative government. In administrative government, political representatives act as a proxy for democratic decision-making, and technical experts act as a proxy for liberal decision-making. While direct public participation in the administrative process, and the development by experts of self-binding rules, customs, and practices, can enrich the thin forms of democracy and liberalism that survive the double delegation, they do not alter the fundamental alienation of power from citizens and laypersons that administrative government entails. Nor do they resolve the persistent tension between even the thinnest forms of democracy and liberalism, as conflicts between political and technical delegates continually call into question the legitimacy, rationality, and fairness of administrative decision-making.

In this context, illiberal democracy and undemocratic liberalism are most usefully understood as expressions of the desire to overcome the alienations that constitute administrative government, and to resolve the internal conflicts among political representatives and technical experts that come to preoccupy it. Meanwhile, actually existing liberal democratic societies are so dependent on administrative government that they cannot help but become identified with it, their ideals compromised by it. The crisis of liberal democracy, then, is a function of liberal democratic success. For populous, capitalist nation-states, the condition of that success was the adoption of administrative government. While administrative government need be neither fully illiberal nor fully antidemocratic, its very effort to embody liberal and democratic values tends to distort those values, and to accentuate their contradictions. To the extent that defenders of administrative government ask us to accept unconvincing and ineffective proxies for liberalism and democracy as the things themselves, they feed the desire for less alienating and contradictory—if often more unjust—alternatives.

Notes

1. For a useful overview, see Shari Berman, "The Pipe Dream of Undemocratic Liberalism," *Journal of Democracy* 28 (July 2017): 29. The term "illiberal democracy" is generally attributed to Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Affairs* 76 (November–December 1997): 22. For other recent discussions, see Nadia Urbinati, *Me the People: How Populism Transforms Democracy* (Cambridge, MA: Harvard University Press, 2019); Yascha Mounk, *The People v. Democracy* (Cambridge, MA: Harvard University Press, 2018); Cas Mudde and Cristóbal Rovira Kaltwasser, eds., *Populism in Europe and the Americas: Threat or Corrective for Democracy?* (Cambridge: Cambridge University Press, 2012); Christopher Bickerton and Carlo Invernizzi Accetti, "Populism and Technocracy: Opposites or Complements?," *Critical Review of International Social and Political Philosophy* 20 (2017): 186; Jan-Werner Mueller, "Protecting Popular Self-Government from the People," *Annual Review of Political Science* 19 (2016): 249; Elliott Norton, "Illiberal Democrats versus Undemocratic Liberals: The Struggle over the Future of Thailand's Fragile Democracy," *Asian Journal of Political Science* 20 (April 2012): 46; and Camilla Vergara, "Systemic Corruption: Constitutional Ideas for an Anti-Oligarchic Republic" (Ph.D. diss., Columbia University, 2019). Note that Berman's association of technocracy with undemocratic *liberalism* is itself contingent, bound up with the political and legal culture of the contemporary capitalist West. It is logically possible to imagine, and historically easy to identify, illiberal technocracies.

2. See, e.g., Berman, "The Pipe Dream of Undemocratic Liberalism," 37. ("Technocracy and populism are evil political twins, each feeding off and intensifying the other. The first seeks to limit democracy to save liberalism, while the second seeks to limit liberalism to save democracy.") Berman notes correctly that populism has traditionally set itself against oligarchy, rule by the elite or the few, rather than technocracy. In contemporary liberal democracies, however, oligarchy has few *explicit* defenders. It is rule by experts—judges, central bankers, public health officials, and other professional decision makers who are assumed to be apolitical—that is offered as a legitimate alternative to rule by the masses. Populists, in turn, have tended to direct their ire at technocratic means of solving social problems. See generally Bickerton and Invernizzi Accetto, "Populism and Technocracy," 8–10.

3. Norton, "Illiberal Democrats versus Undemocratic Liberals," 64.

4. Cas Mudde and Cristóbal Rovira Kaltwasser, "Populism and (Liberal) Democracy: A Framework for Analysis," in Mudde and Kaltwasser, *Populism in Europe and the Americas*, 1, 10.

5. See generally Susan Rose-Ackerman, ed., *Comparative Administrative Law* (Northampton, MA: Edwin Elgar, 2010). For the even deeper roots of administrative government, see, e.g., Jerry Mashaw, *Creating the Administrative Constitution* (New Haven, CT: Yale University Press, 2012).

6. For a brief historical overview, see Jeremy K. Kessler, "A War for Liberty: On the Law of Conscientious Objection," in *The Cambridge History of the Second World War*, vol. 3, ed. Michael Geyer and Adam Tooze (Cambridge: Cambridge University Press, 2015), 447.

7. See, e.g., Peter L. Lindseth, *Power and Legitimacy* (Oxford: Oxford University Press, 2010); Jerry Mashaw, *Reasoned Administration and Democratic Legitimacy* (Cambridge: Cambridge University Press, 2018); Pierre Rosanvallon, *Democratic Legitimacy* (Princeton, NJ: Princeton University Press, 2008); William Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (Baltimore: Johns Hopkins University Press, 2004); Samuel Moyn, "On Human Rights and Majority Politics: Felix Frankfurter's Democratic Theory," *Vanderbilt Journal of Transnational Law* 52 (2019): 1135; Eric Posner and Adrian Vermeule, "Tyrannophobia," in *Comparative Constitutional Design*, ed. Tom Ginsburg (2012), 317.

8. See, e.g., Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge, MA: Harvard University Press, 2010); Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2016); Matthias Ruffert, ed., *The Transformation of Administrative Law in Europe* (Oxford: Oxford University Press, 2007); Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (London: Verso Books, 2015); Paul Dragos Alicia, "Public Administration and the Classical Liberal Perspective: Criticism, Clarifications, and Reconstruction," *Administration & Society* 49 (2017): 530; Michael C. Behrent, "Foucault and France's Liberal Moment," in *In Search of the Liberal Moment* (London: Palgrave Macmillan, 2016), ed. Stephen W. Sawyer and Iain Stewart, 155, 162–164; Steven G. Calabresi and Gary Lawson, "The Depravity of the 1930s and the Modern Administrative State," *Notre Dame Law Review* 94 (2018): 821 (2018); and Gwendal Châton, "Taking Anti-totalitarianism Seriously: The Emergence of the Aronian Circle in the 1970s," in Sawyer and Stewart, *In Search of the Liberal Moment*, 17.

9. See generally Margaret Canovan, *Populism* (Toronto: Junction Books,1981); Ernesto Laclau, *On Populist Reason* (London: Verso Books, 2005); Vergara, "Systemic Corruption."

10. See, e.g., James O. Freedman, *Crisis and Legitimacy* (Cambridge: Cambridge University Press, 1978); William Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge, MA: MIT Press, 1994); Peter L. Lindseth, "Reconciling with the Past: John Willis and the Question of Judicial Review in Inter-War and Post-War England," *University of Toronto Law Journal* 55 (2005): 657; Peter L. Lindseth, "The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s," *Yale Law Journal* 113 (2004): 1341; and Michael Taggart, "From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century," *University of Toronto Law Journal* 55 (2005): 575.

11. See generally Jeremy K. Kessler, "The Struggle for Administrative Legitimacy," *Harvard Law Review* 29 (2016): 718; Gillian Metzger, "Foreword: 1930s Redux: The Administrative State Under Siege," *Harvard Law Review* 131 (2017): 1.

12. See, e.g., Daniel Ernst, *Tocqueville's Nightmare: The Administrative Emerges in America* (Oxford: Oxford University Press, 2014); Mashaw, *Creating the Administrative Constitution*; Nicholas Parrillo, ed., *Administrative Law from the Inside Out* (Cambridge: Cambridge University Press, 2017); Daniel A. Farber and Anne Joseph O'Connell, "Agencies as Adversaries," *California. Law Review* 105 (2017); Abbe Gluck, Anne Joseph O'Connell, and Rosa Po, "Unorthodox Lawmaking, Unorthodox Rulemaking," *Columbia Law Review* 115 (2015): 1789; Neal Kumar Katyal, "Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within," *Yale Law Journal* 115 (2006): 2314; Elizabeth Magill and Adrian Vermeule, "Allocating Power within Agencies," *Yale Law Journal* 120 (2011): 1032; Metzger, "1930s Redux"; Gillian E. Metzger and Kevin M. Stack, "Internal Administrative Law," *Michigan Law Review* 115 (2017): 1239; Jon D. Michaels, "Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers," *New York University Law* 91 (2016): 227; Trevor W. Morrison, "Constitutional Alarmism," *Harvard Law Review* 124 (2011): 1688; Noah Rosenblum, "The Antifascist Roots of Presidential Administration," *Columbia Law Review* 122 (2022); Edward P. Rubin, "The Myth of Accountability and the Anti-Administrative Impulse," *Michigan Law Review* 103 (2005): 2073; Cass Sunstein and Adrian Vermeule, "Libertarian Administrative Law," *University of Chicago Law Review* 82 (2015): 393.

13. See, e.g., Hamburger, *Is Administrative Law Unlawful?*; Lawson and Calabresi, "The Depravity of the 1930s and the Modern Administrative State."

14. See, e.g., Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press, 2010); Adrian Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Cambridge, MA: Harvard University Press, 2016).

15. Vermeule, *Law's Abnegation*, 1.

16. See, e.g., Adrian Vermeule, "Integration from Within," *American Affairs* 2 (Spring 2018), https://americanaffairsjournal.org/2018/02/integration-from-within/.

17. See generally Ernst, *Tocqueville's Nightmare*; Joanna Grisinger, *The Unwieldy American State: Administrative Politics since the New Deal* (Cambridge: Cambridge University Press, 2012); Jeremy K. Kessler, "New Look Constitutionalism," *University of Pennsylvania Law Review* 167 (2019): 1749.

18. See, e.g., Calabresi and Lawson, "The Depravity of the 1930s and the Modern Administrative State."

19. See, e.g., Nicholas Bagley, "The Procedure Fetish," *Michigan Law Review* 118 (2019): 345.

20. Self-regulation by a mix of political appointees and career civil servants within administrative agencies is not the same as review of those agencies by an independent judiciary; such self-regulation does not serve the same values, or produce the same outcomes, as judicial review. Nor does internal self-regulation, however leavened with public participation by interested private parties, serve the same values and produce the same outcomes as the passage of general and prospective rules by majority vote of a body of elected representatives. Administrative self-regulation is a different mode of governance than the liberal mode of governance. See, e.g., Anders Esmark, "Limits to Liberal Government: An Alternative History of Governmentality," *Administration & Society* 50 (2018): 240; Cynthia R. Farina, "The Consent of the Governed: Against Simple Rules for a Complex World," *Chicago-Kent Law Review* 72 (1997): 987.

21. For an illuminating discussion of the problem in the context of presidential supervision, see Daphna Renan, "The President's Two Bodies," *Columbia Law Review* 120 (2020): 1178–84. See also Daphna Renan, "Presidential Norms and Article II," *Harvard Law Review* 131 (2018), 2278. ("[L]inking the legitimacy of the administrative state to democratic accountability through the President, in turn, reinforced norms of presidential control over agency policymaking. And those norms over time contributed to a less stable and more ideologically polarized policymaking apparatus inside the executive branch.")

22. Compare Metzger, "1930s Redux," 87–90, with Calabresi and Lawson, "The Depravity of the 1930s and the Modern Administrative State," 855–56.

23. See generally Mashaw, *Creating the Administrative Constitution*; Maggie Blackhawk, "Petitioning and the Making of the Administrative State," *Yale Law Journal* 127 (2018): 1538; Gillian E. Metzger, "The Constitutional Duty to Supervise," *Yale Law Journal* 124 (2015): 1837; 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," *Yale Law Journal* 130 (2021): 1288; Keith E. Whittington and Jason Iuliano, "The Myth of the Nondelegation Doctrine," *University of Pennsylvania Law Review* 165 (2017): 379.

24. For the classic statement, see Elena Kagan, "Presidential Administration," *Harvard Law Review* 114 (2001): 2245.

25. For the classic statement, see Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven, CT: Yale University Press, 1983). For a contemporary account, see Metzger and Stack, "Internal Administrative Law." Concepts related to, and often by encompassed by, internal administrative law are "internal checks and balances" and "internal separation of powers."

26. Metzger and Stack, "Internal Administrative Law," 1244.

27. Metzger and Stack, 1241–43.

28. Metzger and Stack, 1242.

29. See, e.g., Metzger, "The Constitutional Duty to Supervise," 1849–58.

30. Indeed, if the assumption was generalizable, there would be far less need for internal administrative law as a liberalizing force within the administrative state.

31. A similar argument was made by future Supreme Court Justice Felix Frankfurter in his seminal article "The Task of Administrative Law," *University of Pennsylvania Law Review* 75 (1927): 614. For further discussion of the relationship between professionalism and internal administrative law, see Jeremy K. Kessler and Charles Sabel, "The Uncertain Future of Administrative Law," *Daedalus* (2021): 188–207. For more on the influence of lawyers on both liberalism and administration, see Robert W. Gordon, "Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920," in *Professions and Professional Ideologies in America*, ed. Gerald L. Geison (Chapel Hill: University of North Carolina Press, 1983), 95; and Terrence C. Halliday and Lucien Karpik, "Politics Matter: A Comparative Theory of Lawyers in the Making of Political Liberalism," in *Lawyers and the Rise of Western Political Liberalism* (Oxford: Clarendon Press, 1997), 20–34.

32. See, e.g., Peter M. Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy* (Chicago: University of Chicago Press, 2009); Farina, "The Consent of the Governed"; Samuel Issacharoff, "Democracy's Deficits," *University of Chicago Law Review* 85 (2018): 485; Jerry L. Mashaw and David Berke, "Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience," *Yale Journal of Regulation* 35 (2018): 549; Jide Nzelibe, "The Fable of the Nationalist President and the Parochial Congress," *UCLA Law Review* 3 (2006): 1217; Wendy E. Wagner, "Administrative Law, Filter Failure, and Information Capture," *Duke Law Journal* 59 (2010): 1321; Note, "Civic Republican Administrative Theory: Bureaucrats as Deliberative Democrats," *Harvard Law Review* 103 (1994): 1401.

33. See, e.g., Metzger, "1930s Redux"; Rosenblum, "Antifascist Roots of Presidential Administration."

34. See generally Robert H. Jackson, *The Struggle against Judicial Supremacy: A Study of Crisis in American Power Politics* (New York: Knopf, 1941); Edward A. Purcell Jr., *Brandeis and the Progressive Constitution* (New Haven, CT: Yale University Press, 2000). For further discussion, see Kessler, "The Struggle for Administrative Legitimacy."

35. See generally Peter H. Irons, *The New Deal Lawyers* (Princeton, NJ: Princeton University Press, 1982); Ronen Shamir, *Managing Legal Uncertainty: Elite Lawyers in the New Deal* (Durham, NC: Duke University Press, 1992).

36. See, e.g., Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York: Norton, 2013).

37. See Thomas Ferguson, *Golden Rule: The Investment Theory of Party Competition and the Logic of Money-Driven Political Systems* (Chicago: University of Chicago Press, 1995), 113–240.

38. See, e.g., Catherine Liu, *Virtue Hoarders* (Minneapolis: University of Minnesota Press, 2021); Michael Lind, *The New Class War* (New York: Penguin Random House, 2020); Daniel Markovits, *The Meritocracy Trap* (New York: Penguin Random House, 2019).

39. Michel Callon, Pierre Lascoumes, and Yannick Barthe, *Acting in an Uncertain World: An Essay on Technical Democracy* (Cambridge, MA: MIT Press, 2009). While delegation is an age-old tool of governance, the combination of political and technical delegation along with its normalization as the preferred solution to every social problem are distinctive to industrial and post-industrial liberal and state capitalist societies.