The New Substantive Due Process

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After the Supreme Court overruled Roe v. Wade*, commentators made much about the possible demise of substantive due process—the idea that the Constitution safeguards certain substantive liberties that are not specifically or explicitly spelled out in the Constitution. Judges and scholars are debating which substantive due process decisions are next on the chopping block and whether the entire domain of substantive due process is in jeopardy. But a curious thing happened as the Court scaled back and openly questioned the traditional individual-rights line of substantive due process: Rather than eliminating it entirely, the Court seems to have transposed it elsewhere.*

While the Court is restricting the contours of traditional substantive due process, in other areas of law, it has adopted doctrines and legal analyses that resemble it. In cases on presidential removal and Congress's use of non-Article III courts, the Court has reoriented doctrines to inquire into whether particular arrangements are consistent with concepts of liberty that are not explicit in the constitutional text and are articulated at high levels of generality with remarkably little precision. The Court is reshaping the institutions of the administrative state based on this freewheeling jurisprudence that centers the Justices' conceptions of liberty.

This Article examines what it coins the new substantive due process—the reemergence of a jurisprudence focused on broad, incompletely defined conceptions of liberty that examine whether laws are consistent with the Justices' political, theoretical accounts of liberty. The Court's emphasis on a notion of liberty that is trained on the administrative state sounds in an anti-establishment, populist register that purports to speak for the people who are supposedly being disadvantaged by elite, unelected, and undemocratic bureaucrats. But the new substantive due process is plagued by its own antidemocratic features and riddled with doublespeak concerning liberty: It empowers some parts of government, specifically the presidency, as it restrains others, all in the name of liberty. It also rests on a highly contestable presumption that government regulation is, by and large, hostile to liberty. This Article highlights the similarities between the old and new substantive due process to better understand what is happening in these changing areas of law (presidential removal and non-Article III courts) and where they might go next. It also attempts to explain the Court's newfound comfort with some kinds of substantive due process but not others.

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Introduction

When the Supreme Court overruled *Roe v. Wade*[1] in *Dobbs v. Jackson Women's Health Organization*,[2] the Justices in dissent warned that other substantive due process rights were in jeopardy.[3] The dissenters wrote that "no one should be confident that this majority is done with its work" and pointed "to other settled freedoms involving bodily integrity, familial relationships, and procreation."[4] Scholars and commentators similarly wondered whether and when the Supreme Court might chip away at other substantive due process rights.[5]

1. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

2. 142 S. Ct. 2228 (2022).

3. *Id.* at 2319 (joint dissent).

4. *Id.* The dissenters specifically pointed to the right to use contraception and the right to same-sex intimacy and marriage as examples of other rights that might be in jeopardy. *Id.* (citing Griswold v. Connecticut, 381 U.S. 479 (1965); then citing Eisenstadt v. Baird, 405 U.S. 438 (1972); then citing Lawrence v. Texas, 539 U.S. 558 (2003); and then citing Obergefell v. Hodges, 576 U.S. 644 (2015)).

5. *E.g.*, Ian Millhiser, *The End of* Roe v. Wade*, Explained*, VOX (June 24, 2022, 12:50 PM), https://www.vox.com/2022/6/24/23181720/supreme-court-dobbs-jackson-womens-health-samuel-alito-roe-wade-abortion-marriage-contraception [https://perma.cc/P3L8-EWCV]; Tierney Sneed, *Supreme Court's Decision on Abortion Could Open the Door to Overturn Same-Sex Marriage, Contraception and Other Major Rulings*, CNN (June 24, 2022, 1:39 PM),

Substantive due process refers to the idea that the Constitution safeguards certain substantive, in addition to procedural, rights—rights that cannot be restricted absent constitutional amendment (or a Supreme Court decision overruling them).[6] Substantive due process decisions largely prohibit the government from doing certain things, such as criminalizing contraception or intimate relationships between adults.[7] Procedural due process decisions, by contrast, require the government to adopt certain procedures before acting.[8]

Judges, scholars, and commentators raised questions about the future of other substantive due process rights in part because the Court's decision in *Dobbs* evinced considerable hostility to the basic project of substantive due process. The Court said, for example, that "[s]ubstantive due process has at times been a treacherous field for this Court."[9] It opined that the entire "theory . . . that the Fourteenth Amendment's Due Process Clause provides substantive, as well as procedural, protections for 'liberty' . . . has long been controversial."[10] And Justice Thomas wrote separately in *Dobbs* to reiterate his view that the Court should jettison all of substantive due process.[11]

Despite indications that substantive due process in general may be at risk, the substance of substantive due process has not disappeared. If anything, it seems to have been relocated to other areas of law at the same time that it has been restricted in its traditional domain. The Court has adopted doctrinal tests that bear a striking similarity to substantive due process in two different areas of law—one regarding the President's power to remove executive officials and the other concerning adjudications by non-

https://www.cnn.com/2022/06/24/politics/abortion-ruling-gay-rights-contraceptives/index.html [https://perma.cc/B9NB-549L]; Kenji Yoshino, *Is the Right to Same-Sex Marriage Next?*, N.Y. TIMES (June 30, 2022), https://www.nytimes.com/2022/06/30/opinion/same-sex-marriage-supreme-court.html [https://perma.cc/DYT4-3FHS]; Jazmine Ulloa & Stephanie Lai, *Jim Obergefell and L.G.B.T.Q. Groups Warn that Abortion Ruling Could Impact Other Rights*, N.Y. TIMES (Dec. 9, 2022), https://www.nytimes.com/2022/06/24/us/jim-obergefell-same-sex-marriage-rights-roe.html [https://perma.cc/EX6Z-MAPK]; Mark Joseph Stern, *The Supreme Court's Next Target Is Marriage Equality. It Won't Be the Last.*, SLATE (June 24, 2022, 1:41 PM), https://slate.com/news-and-politics/2022/06/supreme-court-dobbs-roe-wade-obergefell-marriage-equality.html [https://perma.cc/96W5-W6B8]; Leah Litman & Steve Vladeck, *The Biggest Lie Conservative Defenders of Alito's Leaked Opinion Are Telling*, SLATE (May 5, 2022, 5:31 PM), https://slate.com/news-and-politics/2022/05/conservatives-lying-impact-samuel-alito-leaked-draft-opinion-roe.html [https://perma.cc/V9VT-97H8].

6. Washington v. Glucksberg, 521 US. 702, 719–20 (1997).

7. *E.g.*, *Griswold*, 381 U.S. at 485–86.

8. *See* Matthews v. Eldridge, 424 U.S. 319, 344 (1976) ("[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases . . . .").

9. *Dobbs*, 142 S. Ct. at 2247 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion)).

10. *Id.* at 2235.

11. *Id.* at 2302 (Thomas, J., concurring).

Article III tribunals. (Non-Article III tribunals are courts that are created by Congress and staffed by judges who do not enjoy life tenure or salary guarantees.[12])

In both areas of law, presidential removal and non-Article III courts, the Court has changed the doctrines such that they resemble traditional substantive due process in important respects. The Court has reoriented both areas of law around general conceptions of liberty so that the Court now assesses whether certain removal restrictions or particular adjudications before non-Article III tribunals are better or worse for liberty than removal restrictions or non-Article III adjudications the Court has previously upheld. In one of the Court's recent removal cases, the dissenting opinion described the Court as "slid[ing] to a different question": whether certain executive officers were "more capable of exercising power, and so of endangering liberty."[13] One Court of Appeals analyzed a removal restriction based on the litigant's "freestanding liberty" claim and one then-judge (and now Justice) wrote an opinion with its analysis centered on "liberty."[14] In the Court's most recent case regarding non-Article III courts, *SEC v. Jarkesy*,[15] several Justices who ended up invalidating Congress's selection of a non-Article III tribunal had demanded to know, during the oral argument, how the non-Article III tribunal affected "individual liberty."[16] The Justices in dissent wrote this about the majority's new approach to non-Article III courts: "By giving respondents a jury trial, even one that the Constitution does not require, the majority may think that it is protecting liberty."[17] They recognized the majority was repurposing substantive due process in another venue.

There are additional parallels between these areas of law and the older iterations of substantive due process. The new cases on removal and the Seventh Amendment adopt broad, not carefully or specifically defined, conceptions of liberty. The Court has not, in either the separation of powers context or the Seventh Amendment cases, offered a "careful description" of

12. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 345 (7th ed. 2015).

13. Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2243 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

14. PHH Corp. v. CFPB, 881 F.3d 75, 108 (D.C. Cir. 2018) (en banc); *id.* at 184 (Kavanaugh, J., dissenting).

15. 144 S. Ct. 2117 (2024).

16. Transcript of Oral Argument at 28–29, *Jarkesy*, 144 S. Ct. 2117 (No. 22-859) [hereinafter *Jarkesy* Oral Argument Transcript] ("Well, what about individual liberty? . . . [Y]our individual liberty, it would seem, is even more or at least equally affected when the government is coming after you than another private party." (Kavanaugh, J.)); *id.* at 49–50 ("Isn't the theory of the Seventh Amendment that people in this country should have protection against having their liberty or property taken away by officials who are answerable to a powerful executive, that the jury should be set up as a buffer . . . in that situation?" (Alito, J.)).

17. *Jarkesy*, 144 S. Ct. 2117 at 2175 (Sotomayor, J., dissenting).

the liberty interest that is supposedly relevant to these cases, even though the majority in *Dobbs* insisted that, in the traditional substantive due process cases, courts adopt a narrow and careful description of any asserted liberty interest before assessing it.[18] The Court applied the *Dobbs* methodology in a recent decision that narrowly interpreted the marriage right such that people with non-citizen spouses may not be able to live with their spouses in their home country.[19] There, the Court started with "a 'careful description of the asserted fundamental liberty interest'" and then asked whether that liberty interest is deeply rooted in the country's history and traditions.[20]

The Court's approach to presidential removal and non-Article III courts opens up the Court to the criticism that, in the absence of a careful definition of the relevant liberty interest, it may revert to judicial policymaking and impose the Justices' own accounts of liberty onto constitutional law.[21] The Court has warned that in substantive due process matters, there is a risk that "the liberty protected by the Due Process Clause [will] be subtly transformed into the policy preferences of the Members of th[e] Court."[22] It has pointed to "the natural human tendency to confuse what [the Fourteenth Amendment] protects with [the Justices'] own ardent views about the liberty that Americans should enjoy."[23] Academics have similarly observed that substantive due process "uses highly contestable ideas about political theory to invalidate" legislative enactments[24] and draws "on political theory, in the absence of constitutional text."[25] Interwoven with these fears of judicial policymaking is an accusation that substantive due process is antidemocratic

18. *See* Dobbs v. Jackson's Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (employing the legal standard formulated in *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

19. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1821–22 (2024).

20. *Id.* at 1822 (quoting *Glucksberg*, 521 U.S. at 720–21); *see also Dobbs*, 142 S. Ct. at 2246 (requiring that a right be "deeply rooted in [our] history and tradition" (quoting *Glucksberg*, 521 U.S. at 721)). The dissenters in *Muñoz*, pointing to *Dobbs*, once again warned that the Court's new approach to substantive due process "'undermine[s]' . . . other entrenched substantive due process rights such as 'the right to marry,' 'the right to reside with relatives,' and 'the right to make decisions about the education of one's children.'" *Muñoz*, 144 S. Ct. at 1828–29 (Sotomayor, J., dissenting) (quoting *Dobbs*, 142 S. Ct. at 2257–58).

21. *See* Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 95 n.440 (2003) (identifying that "the chronic suspicion that plagues substantive due process doctrine derives not from the doctrine's lack of connection to the text or to the design of the Constitution, but instead from the fact that these connections are operationalized in vague and indeterminate ways").

22. *Dobbs*, 142 S. Ct. at 2247–48 (quoting *Glucksberg*, 521 U.S. at 720).

23. *Id.* at 2247.

24. Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 167 (1992).

25. Jefferson B. Fordham, *The People and the Court*, 70 YALE L.J. 481, 485 (1961) (book review).

because "in our democratic republic," decisions "should rest with the people acting through their elected representatives," rather than judges.[26]

By trading on vague and poorly defined conceptions of liberty, the new removal and Seventh Amendment cases have led the Justices to reason in the register of contestable political theory about the nature of liberty and the proper role of government. The cases lean heavily on the idea that government regulation is mostly at odds with liberty when regulation can enhance liberty in important respects. Perhaps because the cases are trafficking in loose political theory, they occasionally engage in doublespeak on liberty. Sometimes they acknowledge that liberty requires empowering the government, including parts of the executive branch, whereas other times they insist that liberty requires disempowering the government, including parts of the executive branch.

The new substantive due process also mimics the old in its latent populism, meaning its emphasis on securing the interests of the people as against the elite (here, the federal bureaucracy). Traditional substantive due process cases maintained they were protecting the people's interests from perceived government overreach. The new substantive due process also purports to safeguard the people's liberties from the perceived excesses of government, specifically the administrative agencies run by unelected bureaucrats. In these respects and others, the current Court has uncritically adopted various aspects of the traditional substantive due process cases.

The new substantive due process cases have branched out from the old in some respects, including their attempts to co-opt the democracy critique of the old, traditional substantive due process cases. In the traditional individual-rights substantive due process cases, the dissenting opinions accused the Court of trammeling the people's will because the people's will was reflected in the legislatures that enacted the laws the Court struck down. In the new substantive due process cases, the Justices in the majority insist they are safeguarding democracy by limiting the powers of administrative institutions, which they depict as being run by unelected bureaucrats who are supposedly not responsive to the people's will. But here too, the Court's political claims to democratic pedigree are contestable. Agencies may be run by unelected officials not directly accountable to the people via elections, but so too is the Court imposing these rules. And the Court is prioritizing its own views and its own understandings of liberty over the legislature's, which obviously has a good claim to represent the people's will.

Rather than jettisoning substantive due process entirely, then, the Court seems to have moved substantive due process inquiries to other areas—areas of law this Article labels the new substantive due process. The Court is now using a substantive due process-like inquiry, which focuses on general

26. Obergefell v. Hodges, 576 U.S. 644, 688 (2015) (Roberts, C.J., dissenting).

notions of liberty and contestable political theory about liberty, to reshape the institutions of the administrative state and to preserve the liberty of the people from what it perceives as the excesses of government.

This Article makes two primary contributions. First, it offers a novel synthesis of two changing areas of law—the law governing when Congress may restrict the President's ability to remove executive officials and the law governing when Congress may assign the adjudication of certain claims to non-Article III tribunals—as well as an account of where these areas of law may go next.[27] Second, this Article shows how the Court has not entirely jettisoned or abandoned substantive due process, but rather moved the doctrinal substance and apparatus of substantive due process to other areas. This Article identifies how the Court's new jurisprudence on removal and non-Article III courts is similar to the prototypical substantive due process case because of the Court's unabashed focus on liberty. It is not just that the Court is relying on especially non-textualist or -originalist interpretive approaches in these cases. It is that the Court has refashioned broad swaths of law around the very concept it was uncomfortable with in the individual-rights line of substantive due process: generally defined conceptions of liberty.

This Article proceeds in four parts. Part I lays out the concept and doctrinal area of substantive due process and unenumerated rights, the idea that the Constitution protects some rights that are not specifically or explicitly spelled out in the constitutional text. It also surveys the primary critiques leveled at substantive due process and unenumerated rights. Part II reveals how the Court has restructured the doctrines governing presidential removal and Congress's use of non-Article III tribunals to revolve around judicial assessments about whether certain arrangements are better or worse for liberty. A close analysis of the Court's decisions, as well as the oral arguments and briefing in the cases, underscores how the Justices have embraced doctrinal approaches that turn on the Justices' accounts of liberty, which are defined at a high level of generality, if they are even defined at all. Part III unpacks the connections between the new substantive due process cases and the old, and explains how the new substantive due process reverts to many of the supposedly problematic aspects of the old. Part III also offers some possible explanations for the emergence of a new substantive due

27. The Justices who dissented on the recent Seventh Amendment case involving non-Article III courts warned of "the chaos today's majority would unleash" on the "more than 200 statutes" that potentially implicate the Court's new approach to the separation of powers. SEC v. Jarkesy, 144 S. Ct. 2117, 2155 (2024) (Sotomayor, J., dissenting); *see also id.* at 2173–74 (warning of "momentous consequences" from the Court's new approach to the Seventh Amendment, which "means that the constitutionality of hundreds of statutes may now be in peril"). For (some) potential distinctions, *see infra* subpart III(A).

process. This Article then concludes by offering some thoughts about where the new substantive due process might go next.

I. Substantive Due Process and Unenumerated Rights

This Part explains the concept of substantive due process[28] before surveying the various academic and judicial critiques of substantive due process.[29]

A. Definitions

Substantive due process represents the idea that the Due Process Clauses of the Fifth and Fourteenth Amendments safeguard certain substantive rights that the government cannot restrict with what would otherwise be constitutionally adequate procedures.[30] In that respect, substantive due process differs from procedural due process.[31] With a procedural due process claim, the deficiency is that the government has failed to afford some process (such as notice, a hearing, or a reasoned explanation) in order to justify a deprivation.[32] By contrast, a substantive due process claim identifies a constitutional problem even after a trial comports with the procedural requirements in the Constitution.[33] A substantive due process decision would say that a law cannot restrict the teaching of foreign languages in schools;[34] a procedural due process decision would say that it could do so, provided any convictions were secured in accordance with certain procedures.[35]

Substantive due process, while formally referring to a doctrine concerning the Due Process Clauses, is sometimes a moniker for the broader concept of unenumerated rights—the idea that there are rights protected by

28. *See infra* subpart I(A).

29. *See infra* subpart I(B).

30. Substantive due process was not always used to describe such cases. *See, e.g.*, Note, *Constitutionality of Judicial Decisions in Their Substantive Law Aspect Under the Due Process Clause*, 28 COLUM. L. REV. 619, 619 (1928) ("[L]ack of substantive due process has been presented almost exclusively through legislative enactments.").

31. *E.g.*, Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 844–48 (2003). For arguments on how they are related—for example, that substantive due process requires a particular kind of procedure (constitutional amendment) to justify an infringement—see Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253, 259–61 (2016).

32. Goldberg v. Kelly, 397 U.S. 254, 266–71 (1970); Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

33. Washington v. Glucksberg, 521 U.S. 702, 719 (1997) (citing Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

34. *E.g.*, Meyer v. Nebraska, 262 U.S. 390, 403 (1923).

35. *See, e.g.*, *Mathews*, 424 U.S. at 333–35 (considering the sufficiency of the procedures that lead to a deprivation of liberty); Hamdi v. Rumsfeld, 542 U.S. 507, 528–35 (2004) (plurality opinion) (same).

the Constitution even though they are not explicitly or specifically mentioned in the constitutional text.

The written Constitution has some indications that there is a set of not-explicitly-spelled-out substantive rights that are protected from government interference. The Privileges or Immunities Clause of the Fourteenth Amendment, for example, provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."[36] That language suggests some set of privileges or immunities that cannot be abridged by any state.[37] The Ninth Amendment specifies that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[38] That language implies there are certain rights not explicitly or specifically mentioned in the Constitution.[39] And the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the federal and state governments, respectively, from depriving people of "life, liberty, or property, without due process of law."[40] The reference to liberty might refer to some set of rights that are not explicitly mentioned in the Constitution.[41]

As a matter of constitutional doctrine, the Court came to formally house unenumerated rights within the Due Process Clauses.[42] This is in part because of some historical contingencies. The Court narrowly read the Privileges or Immunities Clause of the Fourteenth Amendment on the heels of the Civil War when the Court was increasingly hostile to Reconstruction.[43] The decision, *The Slaughter-House Cases*,[44] effectively eliminated the clause as a textual hook for unenumerated rights because it concluded the provision

36. U.S. CONST. amend. XIV, § 1. Some scholarship has suggested the Privileges or Immunities Clause contains a kind of nondiscrimination principle. *E.g.*, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387–88 (1992).

37. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 806 (2010) (Thomas, J., concurring in part and concurring in the judgment) (adopting this view).

38. U.S. CONST. amend. IX.

39. *E.g.*, Griswold v. Connecticut, 381 U.S. 479, 486–92 (1965) (Goldberg, J., concurring) (endorsing this view). It does not necessarily follow that such rights would be judicially enforceable. Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 505, 508 (2011).

40. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

41. *E.g.*, Obergefell v. Hodges, 576 U.S. 644, 663–64 (2015).

42. *E.g.*, *id.*

43. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78–79 (1872); *see* Maeve Glass, *Killing Precedent: The* Slaughter-House *Constitution*, 123 COLUM. L. REV. 1135, 1136–40 (2023) (arguing that the Court's narrow interpretation of the Reconstruction Amendments failed to properly consider the history of enslaved people in America). Other decisions that were part of this trend include *The Civil Rights Cases*, 109 U.S. 3, 11–12 (1883).

44. 83 U.S. (16 Wall.) 36 (1872).

protected only those rights that "owe their existence to the Federal government, its National character."[45]

The hydraulics of textualism meant that after the Court gutted the Privileges or Immunities Clause, a seemingly natural home for unenumerated rights, unenumerated rights popped up somewhere else: the Due Process Clause. When *Lawrence v. Texas*[46] invalidated a statute prohibiting consensual sexual intimacy between adults of the same sex, the Court announced that it had "resolved" the case by determining that the "petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment."[47] The Court redescribed several earlier decisions, including *Pierce v. Society of Sisters*,[48] *Meyer v. Nebraska*,[49] and *Griswold v. Connecticut*[50] in similar terms—that is, as cases that had identified certain constitutionally protected liberty interests under the Due Process Clause.[51] As *Obergefell v. Hodges*[52] summarized, "The fundamental liberties protected by [the Due Process Clause] . . . extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[53] Finally, when *Dobbs v. Jackson Women's Health Organization* examined whether to overrule *Roe v. Wade*, it asked "whether the right at issue in this case is rooted in our Nation's history and tradition and whether

45. *Id.* at 79. Justice Thomas has "reject[ed]" *The Slaughterhouse Cases*' "understanding" of the privileges and immunities clause as he concluded the clause contained substantive elements. McDonald v. City of Chicago, 561 U.S. 742, 852–53 (2010) (Thomas, J., concurring in part and concurring in the judgment). His analysis of whether a right was a privilege or immunity protected by the Fourteenth Amendment was not meaningfully distinguishable from the Court's analysis about whether the right was protected by the Due Process Clause. Both opinions analyzed similar historical sources to assess how foundational and fundamental the asserted right was. *Id.* at 767–80 (majority opinion); *id.* at 838–51 (Thomas, J., concurring). In explaining why the Second Amendment "applies to the States through the Fourteenth Amendment's" Privileges or Immunities Clause, moreover, Justice Thomas indicated that he "agree[d] with [the majority's] description of the right" as "'fundamental' to the American 'scheme of ordered liberty' . . . and 'deeply rooted in this Nation's history and tradition,'" which was the legal standard the plurality used to conclude the right was secured via the Due Process Clause. *Id.* at 806 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). The privileges or immunities analysis therefore does not appear to escape many of the purported analytical problems with the Due Process Clause inquiry—the text doesn't specify with particularity which rights are protected, and judges will thus consult whatever other constitutional modalities they would use when interpreting the Due Process Clause.

46. 539 U.S. 558 (2003).

47. *Id.* at 564, 578.

48. 268 U.S. 510 (1925).

49. 262 U.S. 390 (1923).

50. 381 U.S. 479 (1965).

51. *Lawrence*, 539 U.S. at 564–65.

52. 576 U.S. 644 (2015).

53. *Id.* at 663.

it is an essential component of what we have described as 'ordered liberty'" such that it was one of the liberties protected under the Due Process Clause.[54]

B. Common Criticisms

The doctrine of substantive due process and the related concept of unenumerated rights have been subject to a fair amount of criticism, though the nature of these criticisms have changed over time.[55] This subpart provides an overview of different criticisms and identifies a common thread among them. Some criticisms are rooted in constitutional text and textualism, others in history and originalism, and still others in structural considerations and institutional choice. Whatever the precise critique, however, a throughline among them is the fear that recognizing judicially enforced unenumerated rights, wherever they are housed, permits judicial policymaking and allows judges to impose their own ideological or partisan preferences on the rest of the country under the auspices of (constitutional) law. Part of this concern sounds in democracy—the disjunction of unelected judges imposing their policy preferences over those of the people and the people's elected representatives.

One of the most famous critiques of substantive due process is that it is textually incoherent.[56] John Hart Ely launched the incoherence critique by likening substantive due process to something as contradictory as "green pastel redness."[57] Justice Scalia picked up on this, arguing that the Due Process Clause "guarantees only process" and that "[t]o say otherwise is to abandon textualism."[58] Jamal Greene, however, labeled the idea that substantive due process is a contradiction in terms as a constitutional meme and showed how the doctrine does not offend the constitutional text.[59] Greene maintained that substantive due process claimants were arguing they were deprived of liberty pursuant to a process of law (often legislation) that was not the process due to them. Rather, "in light of the significance of the

54. 142 S. Ct. 2228, 2244 (2022). For critiques of *Dobbs*'s method of analyzing liberty claims under the Due Process Clause, see Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 843–57 (2023), and Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEXAS L. REV. 1127, 1161–69 (2023).

55. *See, e.g.*, Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 734–56 (2024) (outlining developments in arguments against substantive due process).

56. *E.g.*, John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 494–95 (1997).

57. JOHN HART ELY, DEMOCRACY AND DISTRUST 18 (1980). For a cataloguing of subsequent echoes of this claim, see Greene, *supra* note 31, at 258.

58. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 24–25 (Amy Gutmann ed., 1997).

59. *See generally* Greene, *supra* note 31.

deprived interest," "[a] more rigorous legal process" was required—namely, a federal constitutional amendment or Supreme Court decision finding that the state had a sufficiently important reason for the liberty deprivation and had tailored the deprivation of liberty to that reason.[60]

Other critiques of substantive due process reflect different modalities of constitutional interpretation.[61] One is that substantive due process lacks an historical foundation.[62] Another sounds more in structural considerations, namely, the idea that unenumerated rights jurisprudence forecloses democratic choices.[63] Here, the argument is that judges are deciding questions that the Constitution allocates to the people and democratic processes, which as a general matter are preferable to judicial ones. Some of these arguments trade on structural principles that favor democratic deliberation rather than judicial decisionmaking.[64] Along these lines, Justice Breyer has, in dissent, invoked *Lochner v. New York*,[65] the decision invalidating New York's minimum wage and maximum hour law, as emblematic of the problematic practice of "substituting judicial for democratic decisionmaking."[66] *Dobbs* echoed a similar theme, warning that substantive due process "has sometimes led the Court to usurp authority that

60. *Id.* at 259; *see also id.* at 260–61 (explaining connections between substantive and procedural due process).

61. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7, 93 (1982) (identifying six different modalities of constitutional interpretation—historical, textual, doctrinal, prudential, structural, and ethical).

62. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1677–79 (2012); *see* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 415 (2010) (agreeing with respect to the Fifth Amendment, but not the Fourteenth Amendment).

63. *See, e.g.*, Doe v. Bolton, 410 U.S. 179, 221 n.*, 222 (1973) (White, J., dissenting) (criticizing *Roe* on the ground that it eliminated the ability of "the people and the legislatures of the 50 States . . . to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand"); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 185 (reasoning that "the political process" was "open and fair" and resulted in "uneasy but reasonable responses to . . . troublesome questions"). This argument seems to have been a more recent intervention in the substantive due process debates, at least with respect to *Roe v. Wade*, 410 U.S. 113 (1973), in particular. *See* Murray & Shaw, *supra* note 55, at 734–39 ("[I]n the immediate aftermath of *Roe*, Justice White was largely alone in voicing concern that the *Roe* Court had usurped an issue best left to the legislatures and to the people.").

64. *See* Walton H. Hamilton & George D. Braden, *The Special Competence of the Supreme Court*, 50 YALE L.J. 1319, 1354 (1941) ("[Substantive due process theories do] not prove that the matters at issue lie within the distinctive competence of a bench habituated to the law.").

65. 198 U.S. 45 (1905).

66. Sorrell v. IMS Health Inc., 564 U.S. 552, 603 (2011) (Breyer, J., dissenting).

the Constitution entrusts to the people's elected representatives."[67] The Court pointed to *Lochner* as an example of "freewheeling judicial policymaking."[68]

While these are different critiques of substantive due process, many of them are paired with the claim that substantive due process and unenumerated rights empower judges too much and lack meaningful safeguards against judicial policymaking. For example, Justice Scalia, in arguing that the doctrine of substantive due process "abandon[s] textualism," explained why that was bad by adding that substantive due process "render[s] democratically adopted texts mere springboards for judicial lawmaking."[69] Robert Bork, who invoked both textualism and originalism to criticize substantive due process, similarly believed that unenumerated rights requires judges to make rudderless value judgments that inevitably draw upon their own values and policy preferences.[70] John Hart Ely likewise accused the Court in *Roe* of "second-guessing legislative balances."[71] Also writing about *Roe*, Richard Epstein quipped, "Anyone can quote Holmes in *Lochner v. New York*. But not everyone can apply the Holmes doctrine when his views are not embodied in the legislation under review."[72] Finally, in *Dobbs*, the Court emphasized that in substantive due process matters, it "must . . . exercise the utmost care . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."[73] As Robert Post summarized, "[T]he chronic suspicion that plagues substantive due process doctrine derives not from the doctrine's lack of connection to the text or to the design of the Constitution, but instead from the fact that these connections are operationalized in vague and indeterminate ways."[74]

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67. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247 (2022).

68. *Id.* at 2248. There are also other critiques of substantive due process. John Hart Ely famously wrote that one substantive due process decision, *Roe v. Wade*, "is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973).

69. Scalia, *supra* note 58, at 24–25.

70. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9–11 (1971).

71. Ely, *supra* note 68, at 926.

72. Epstein, *supra* note 63, at 168 (footnote omitted); *see also id.* at 175–76 ("In the case of the Supreme Court, only principled grounds for decision stand between it and the charge of arbitrary decision based upon its naked political preferences.").

73. *Dobbs*, 142 S. Ct. at 2247–48 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

74. Post, *supra* note 21, at 95 n.440; *see also* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 42 (1972) ("[D]ue process carries a repulsive connotation of value-laden intervention . . . ."); Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (acknowledging that "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended").

The idea that substantive due process unduly empowers judges is often associated with the Court's discredited decision in *Lochner v. New York*, which invalidated New York's maximum hour and minimum wage law for bakers.[75] Academics have pressed more precise critiques of the decision than loose accusations of judicial policymaking,[76] but in the broader constitutional discourse, the decision in *Lochner* is associated with judicial policymaking—when *Lochner* is invoked and used as an insult, that is often its connotation.[77] Both dissents in *Griswold v. Connecticut*, the case invalidating a contraceptive restriction, invoked *Lochner* to accuse the majority of "subjective" decisionmaking.[78] The dissents in *Obergefell v. Hodges* accused the majority of judicial policymaking by referring to *Lochner*. The Chief Justice's dissent argued that "the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York*."[79] The dissent accused the majority of "confus[ing] [the Justices'] own preferences with the requirements of the law."[80]

Both the majorities and dissents in the traditional substantive due process cases purport to be speaking for the people and protecting their interests. The *Lochner* Court had (albeit implausibly) maintained that it was preserving the people's liberty to negotiate with employers while the dissenters argued the decision trampled on the people's will, as expressed

75. Lochner v. New York, 198 U.S. 45, 64–65 (1905).

76. *See, e.g.*, Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 874–75 (1987) (arguing that *Lochner*'s error was to view government inaction and existing distributions of wealth and entitlements as constitutionally protected entitlements and baselines); Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241, 1244–45 (2020) ("Contemporary free speech law is instead *Lochner*-like in how it conceives of the liberty it protects."). As Jamal Greene has written, "[T]he consensus over *Lochner*'s wrongness obscures deep disagreement over *why* it is wrong." JAMAL GREENE, HOW RIGHTS WENT WRONG 43 (2021); *see also* David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 374 (2003) ("The striking thing about the disapproval of *Lochner*, though, is that there is no consensus on why it is wrong.").

77. *See, e.g.*, Sunstein, *supra* note 76, at 874 ("The received wisdom is that *Lochner* was wrong because it involved 'judicial activism . . . .'"); Ely, *supra* note 68, at 943 ("But at least crying 'Wolf!' doesn't influence the wolves; crying 'Lochner!' may."); Lakier, *supra* note 76, at 1242–43 (noting that "[w]hat critics usually mean when they argue that contemporary free speech law revives *Lochner* is that, by extending constitutional protection to commercial advertising, to corporate speech, and to other kinds of profit-oriented expression," "it grants judges too much power to second-guess the economic policy decisions of democratically elected legislatures"). In that respect, this aspect of the critique is another "meme" within constitutional law—"an idea, a cluster of information, so deeply embedded that it is often stated without further proof or elaboration and resists counterargument." Greene, *supra* note 31, at 256–57.

78. Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting); *id.* at 528 (Stewart, J., dissenting).

79. Obergefell v. Hodges, 576 U.S. 644, 694 (2015) (Roberts, C.J., dissenting).

80. *Id.* at 686–87.

through the actions of the legislature that represented them.[81] Similarly, in *Griswold*, the majority maintained that it was safeguarding the people's liberty from over-encroachment by the government while the dissenters argued the Court was imposing its will ahead of the legislature, which represented the people.[82] All of the opinions claimed to be vindicating the will of the polity and championing the interests of the people.

Related to the fear of judicial policymaking is the idea that substantive due process and unenumerated rights require judges to engage in a kind of political theory that is amorphous and not especially suited to judicial resolution. Justice Holmes channeled this idea in his *Lochner* dissent when he said "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[83] Many substantive due process cases opine on the necessary components of liberty, such as autonomy, and the general relationship between government and individuals that is necessary for liberty.[84] Academics have observed that "[c]onstitutional doctrine relating to government regulation has always been susceptible to changes in prevailing economic and political theory."[85] They have argued that substantive due

81. Lochner v. New York, 198 U.S. 45, 52–53 (1905) ("The employé may desire to earn the extra money . . . ."); *id.* at 75–76 (Holmes, J., dissenting) ("I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion . . . .").

82. *Griswold*, 381 U.S. at 485–86 ("The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. . . . We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."); *id.* at 522 (Black, J., dissenting) ("That formula, based on subjective considerations of 'natural justice,' is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights.").

83. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

84. *See, e.g.*, Rochin v. California, 342 U.S. 165, 172 (1952) (observing that "[i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, [and] the forcible extraction of his stomach's contents" was "conduct that shocks the conscience" and was "bound to offend even hardened sensibilities," constituting "methods too close to the rack and the screw to permit of constitutional differentiation"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion) (stressing that matters "involving the most intimate and personal choices a person may make in a lifetime" are "central to personal dignity and autonomy, [and] central to the liberty protected by the Fourteenth Amendment," and that "the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State"), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Lawrence v. Texas, 539 U.S. 558, 567 (2003) (acknowledging "that adults may choose to enter upon [a same-sex] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons," and affirming that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring" to conclude that "[t]he liberty protected by the Constitution allows homosexual persons the right to make this choice").

85. Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 COLUM. L. REV. 2213, 2213–14 (1996); *see also*

process, in particular, "uses highly contestable ideas about political theory to invalidate" legislative enactments.[86] Contemporary critics of some early substantive due process decisions maintained that the Court "had drawn on political theory, in the absence of constitutional text, to find limitations" on government.[87] And judicial critics of substantive due process have inveighed against "immers[ing] the federal courts in a hopeless project of weighing questions of political theory."[88]

It is helpful to see some of these critiques in action before assessing if they are applicable to the new substantive due process. In *Obergefell*, Chief Justice Roberts' dissent maintained that "the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society," a line of reasoning he contended is "indefensible as a matter of constitutional law."[89] Justice Scalia's dissent in *Obergefell* also criticized "the Court's claimed power to create 'liberties' that the Constitution and its Amendments neglect to mention."[90] He observed, "[t]his practice of constitutional revision" is "always accompanied (as it [was in the Majority opinion]) by extravagant praise of liberty."[91] The dissents in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[92] reasoned in similar registers.[93] Chief Justice Rehnquist's dissent accused the *Casey* plurality, which established the undue burden standard to guide whether the substantive due process abortion right was unconstitutionally infringed, of setting a "standard" that "will do nothing to prevent 'judges from roaming at large in the constitutional field' guided only by their personal views."[94] Justice Scalia's opinion insisted that "[a] State's choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a 'liberty' in the absolute sense."[95] He charged the Majority with using a "mode of constitutional adjudication that relies" on "nothing but philosophical

Book Note, *Reconstructing Constitutional Interpretation*, 107 HARV. L. REV. 937, 937 (1994) (reviewing DAVID A. J. RICHARDS, CONSCIENCE AND THE CONSTITUTION (1993)) (observing that an author's construction of unenumerated rights "brings abolitionist political theory and history to bear on interpretation of the Reconstruction Amendments").

86. Sunstein, *supra* note 24, at 167.

87. Fordham, *supra* note 25, at 485–86.

88. Holder v. Hall, 512 U.S. 874, 892 (1994) (Thomas, J., concurring in the judgment).

89. Obergefell v. Hodges, 576 U.S. 644, 694 (2015) (Roberts, C.J., dissenting).

90. *Id.* at 713–14 (Scalia, J., dissenting).

91. *Id.* at 714.

92. 505 U.S. 833 (1992).

93. *Id.* at 965 (Rehnquist, C.J., concurring in part and dissenting in part), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); *id.* at 981 (Scalia, J., concurring in part and dissenting in part).

94. *Id.* at 965 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (Harlan, J., concurring in the judgment)).

95. *Id.* at 980 (Scalia, J., concurring in part and dissenting in part).

predilection and moral intuition" in determining "[a]ll manner of 'liberties' . . . enforceable by this Court."[96] He further accused the Court "of making *value judgments*" inappropriate for the judicial role in defining "the 'liberties' protected by the Constitution."[97]

In *Washington v. Glucksberg*,[98] the Court purported to address the concern that substantive due process and unenumerated rights lend themselves to judicial policymaking.[99] It did so by offering what it described as a "restrained methodology" for identifying unenumerated rights.[100] *Glucksberg* directed courts to adopt a "careful description" of the asserted liberty interest and ask whether the asserted liberty was "deeply rooted in this Nation's history and tradition."[101] The Court maintained that this method prevented "the liberty protected" from being "subtly transformed into the policy preferences of the Members of th[e] Court," and "rein[ed] in the subjective elements that are necessarily present in due process judicial review."[102] *Glucksberg* reflects an intuition that broad, expansive definitions of liberty (rather than more careful descriptions) are a vehicle for unprincipled judicial decisionmaking that lends itself to judicial policymaking.[103] Later, in *McDonald v. City of Chicago*,[104] Justice Scalia emphasized this concern, criticizing decisions "defining" liberty in terms of "a number of capacious, hazily defined categories."[105] Along these lines, both judicial and scholarly analyses, critiques, and defenses of substantive due process have centered around the doctrine's conception of liberty and the challenges inherent in defining liberty.[106]

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96. *Id.* at 1000.

97. *Id.* at 1000–01.

98. 521 U.S. 702 (1997).

99. *Id.* at 720.

100. *Id.* at 720–21.

101. *Id.* at 720–21 (first quoting Reno v. Flores, 507 U.S. 292, 302 (1993); and then quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

102. *Id.* at 720, 722.

103. *See, e.g.*, Thomas A. Bird, *Challenging the Levels of Generality Problem: How* Obergefell v. Hodges *Created a New Methodology for Defining Rights*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 579, 584 (2016) ("With such a broadly construed definition of liberty, it is unsurprising that Justice Harlan's approach to substantive due process was similarly expansive, if somewhat nebulous.").

104. 561 U.S. 742 (2010).

105. *Id.* at 797 (Scalia, J., concurring).

106. *See, e.g.*, Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) ("The selection of a level of generality necessarily involves value choices."); Chapman & McConnell, *supra* note 62, at 1735–37, 1780–82 ("Due process is . . . the individual right to deprivation of life, liberty, or property upon adjudication by a court according to generally applicable laws."); Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 TEXAS L. REV. 275, 277–81, 295–98 (2014) ("[M]odern substantive due process depends on a coherent, robust, and thoroughly modern account of liberty . . . .").

As a result of these misgivings with substantive due process, the current Court's conception of substantive due process seems to be primarily focused on enumerated rights rather than unenumerated ones. Thus, in *McDonald v. City of Chicago*, the Court, in an opinion by Justice Alito, relied on substantive due process to incorporate the Second Amendment to apply to the states.[107] Justice Thomas's concurrence called the plurality to task for incorporating the Second Amendment through the Due Process Clause, specifically its substantive element; he would have relied on the Privileges or Immunities clause to do so.[108] But the Court seems fine with substantive due process in the limited context of enumerated rights and liberties.

And, it turns out, it is fine with a substantive due process model of unenumerated liberties in other contexts besides the traditional, individual-rights line of substantive due process cases.

II. Reemergence of a Jurisprudence of Unenumerated Liberties

This Part documents the emergence of a liberty-focused jurisprudence in the Court's cases governing removal and the use of non-Article III tribunals. These doctrinal areas have come to resemble the traditional, individual-rights line of substantive due process cases in important respects, including their orientation around notions of liberty that are not explicitly defined in the constitutional text. Now, doctrines governing removal and non-Article III courts analyze constitutional issues in terms of whether a given governmental arrangement negatively affects particular judicial conceptions of liberty. The two different areas use different mechanisms to justify a focus on liberty.

In one instance, the Court seems to boil down structural inferences about separated powers to a single, core purpose, which the Court insists is the preservation of liberty. This Article describes this method as "structural reasoning squared." Structural inference refers to

> a form of constitutional extrapolation that seeks to derive rights and principles from an array of sources, including the interactions among, and the spirit behind, constitutional provisions, the basic presuppositions that gave life to those provisions, and the overarching themes that can be gleaned from the architecture of the founding document as a whole.[109]

The Court's removal jurisprudence amounts to structural reasoning squared because it relies on not one, but two extrapolations and inferences: The first

107. *McDonald*, 561 U.S. at 758–59 (plurality opinion); *id.* at 767 (majority opinion).

108. *Id.* at 805–06 (Thomas, J., concurring in part and concurring in the judgment).

109. Laurence H. Tribe, *The Supreme Court, 1998 Term—Comment:*, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 110 n.3 (1999).

is that the Court infers from the Constitution that there is a principle of separated powers, and the second is that the aim or design of that structural principle of separated powers is to secure liberty. Then, at a third step in the analysis, the Court creates specific doctrine based on that principle.

In the other area of law, non-Article III courts, the Court does something similar with a constitutional amendment—abstracting from the purpose of the amendment to generate doctrine. The Court starts with the text of the amendment and then infers that the animating sentiment of the amendment is to protect liberty. And, like the removal cases, the next step in the analysis is to create specific doctrine based on that hazy idea.

A. Structural Reasoning Squared—Removal

The path of the Supreme Court's removal jurisprudence has wound its way toward a focus on "liberty." In the past, the Court zeroed in on the extent to which a removal restriction unduly burdened the President's authority. Now, the Court examines whether restrictions on the President's removal authority are inconsistent with liberty even though that word is not used in any pertinent constitutional provisions. Rather, the Court seems to reason based on a general notion of liberty that is unmoored from the constitutional text and is not even defined with any particularity. The Court's account of liberty in the new substantive due process sounds in the same register as traditional substantive due process decisions. Here, the Court purports to be safeguarding the people from perceived government overreach in the form of the administrative state, including the institutions that are run by people who are not elected and that (according to the Court) may prioritize bureaucrats' preferences over the will of the people.

Constitutional challenges to the President's authority to remove executive officers are rooted in Article II of the Constitution, as well as separation of powers principles inferred from the structure of the Constitution or embedded in its backdrop or design. Some articulations of removal challenges proceed on the theory that Article II of the Constitution, by vesting the executive power in the President, implies that only the President may exercise the executive power.[110] And so, the idea goes, the President must have adequate control over subordinate officers who exercise executive power in order to ensure that such officers are exercising that power consistent with how the President would do so.[111] Giving the President authority to remove executive officers is thought to ensure that the executive power remains with the President.[112] A similar logic informs the Court's

110. *E.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484, 492 (2010).

111. *Id.*

112. *See id.* at 483 ("Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary.").

gestures toward the Take Care Clause, which imposes a duty on the President to take care that the laws be faithfully executed.[113] Here too, the notion is that, because the President must superintend the execution of the law in order to take care that it be faithfully executed, the President must have a degree of control over executive officers who execute the law, and the power to remove subordinate officers provides the requisite amount of control.[114]

Though related to the preceding theories, the Court's removal jurisprudence has increasingly invoked more general notions of the separation of powers, rather than a distinct provision in the Constitution. Thus, in *Seila Law LLC v. CFPB*,[115] the Court framed its conclusion as: "[T]he structure of the CFPB violates the separation of powers."[116] The Court acknowledged there is no "separation of powers clause" in the Constitution, but maintained that some principle of separated powers was "evident from the Constitution's vesting of certain powers in certain bodies," including "Article II's vesting of the 'executive Power' in the President."[117] Untethering removal questions from particular provisions in the Constitution is part of what has enabled the Court's turn toward liberty.[118]

The shift in the Court's removal jurisprudence happened as the Court gradually moved away from the legal standard articulated in *Morrison v. Olson*.[119] Before *Morrison*, the Court's removal jurisprudence had relied, in part, on assessing the nature of the power being exercised by the relevant official and administrative agency.[120] If an agency possessed quasi-legislative or quasi-judicial powers, then restricting the President's authority to remove agency officials posed fewer constitutional problems than if the officer exercised executive power.[121] *Morrison*, however, upheld a removal restriction on an officer who was concededly exercising purely executive authority: a special counsel with investigative and prosecutorial powers.[122] *Morrison* synthesized the Court's previous removal cases into a single test that examined whether a removal restriction "interfere[d] with the President's exercise of the 'executive power' and his constitutionally

113. *Id.* at 483–84, 493.

114. *Id.*

115. 140 S. Ct. 2183 (2020).

116. *Id.* at 2192.

117. *Id.* at 2205 (quoting *Free Enter. Fund*, 561 U.S. at 483).

118. *Cf.* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1943 (2011) [hereinafter *Ordinary Interpretation*] ("Resting as it does upon a freestanding separation of powers principle, [a functionalist] approach tends to privilege general constitutional purpose over specific textual detail." (footnote omitted)).

119. 487 U.S. 654 (1988); *id.* at 688–93.

120. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935) (characterizing the FTC's power as "quasi-legislative[]" and "quasi-judicial[]").

121. *E.g.*, *id.* at 631–32; Wiener v. United States, 357 U.S. 349, 351–52 (1958).

122. *Morrison*, 487 U.S. at 689, 696–97.

appointed duty to 'take care that the laws be faithfully executed.'"[123] *Morrison* framed the question as whether a removal restriction "violates the principle of separation of powers by unduly interfering with the role of the Executive Branch."[124]

The Court effectively relied on the substance of this legal test in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[125] Though the Court did not acknowledge *Morrison* as the governing standard, the Court seemingly relied on the extent of the President's control over an officer as the dividing line between permissible and impermissible removal restrictions, and as the way of distinguishing other cases involving removal restrictions.[126] *Free Enterprise Fund* involved a so-called "double" layer of removal restrictions: The case was litigated under the assumption that members of the Securities and Exchange Commission (SEC) were removable only for cause by the President, and federal law made members of the Public Company Accounting Oversight Board (PCAOB) removable only for cause by the SEC.[127] In other words, there were two layers of removal restrictions between the PCAOB officers and the President.

Free Enterprise Fund used the two layers of removal restrictions to place the case outside the scope of the Court's previous removal decisions, particularly *Humphrey's Executor v. United States*.[128] In *Humphrey's Executor*, the Court upheld statutory restrictions on the President's ability to remove members of the Federal Trade Commission (FTC).[129] *Free Enterprise Fund* maintained that whereas a single layer of removal restrictions between the President and executive officers allowed the President to retain sufficient control over the officers, two layers of removal restrictions did not provide the President with sufficient control.[130] In other words, the Court analyzed the extent to which the removal restrictions interfered with the President's control, i.e., the *Morrison* standard. As *Free Enterprise Fund* explained, "[t]he added layer of tenure protection makes a difference" with respect to "the nature of the President's review" of executive officers' actions.[131] The Court continued, "[t]his novel structure

123. *Id.* at 689–90.

124. *Id.* at 693.

125. 561 U.S. 477 (2010).

126. *Id.* at 495–97, 513–14.

127. *See id.* at 486–87 (noting that the parties agreed that SEC Commissioners could be removed only for cause).

128. 295 U.S. 602 (1935).

129. *Id.* at 631–32.

130. *Free Enter. Fund*, 561 U.S. at 495 ("In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President—or a subordinate he could remove at will—who decided whether the officer's conduct merited removal under the good-cause standard.").

131. *Id.* at 495–96.

. . . transforms" the Board's "independence" because "[t]he President is stripped of the power [the Court's] precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired."[132] "[T]he second layer of tenure protection does compromise the President's ability to remove a Board member the Commission wants to retain" because "[w]ith the second layer in place, the Commission can shield its decision from Presidential review by finding that good cause is absent."[133] As this reasoning suggests, what mattered in *Free Enterprise Fund* was the degree of presidential control. That determined whether removal restrictions were constitutional.

The focus changed, however, when challenges to the Consumer Financial Protection Bureau's (CFPB) structure made their way through the courts. Congress structured the CFPB to be headed by a single officer who was removable by the President only for cause—i.e., there was only one layer of removal restriction between the relevant officer and the President.[134] That made the CFPB's structure similar to the structure of the agency the Court had deemed constitutional in *Humphrey's Executor*. The CFPB was different than the agency at issue in *Humphrey's Executor*, however, in that the CFPB was led by a single director whereas the FTC was led by multiple commissioners.[135] But that difference did not affect the degree of Presidential control over the officers.[136] If anything, the distinction might have cut the other way such that Presidents enjoyed greater control over the single-Director-led CFPB than over the multimember-commission-led FTC. As Justice Kagan observed during the oral argument in *Seila Law*, "a multi-member commission . . . is . . . much more difficult to influence."[137] "[I]f a President can get one person on the phone, that's a lot easier than if he has to worry about seven people who are all doing their own thing."[138]

132. *Id.* at 496.

133. *Id.* at 497 n.4.

134. PHH Corp. v. CFPB, 839 F.3d 1, 6, 8 (D.C. Cir. 2016).

135. Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2194 (2020).

136. *See* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1421 n.89 (2017) ("[T]he President may have more power over agencies headed by a single person, rather than a multimember commission.").

137. Transcript of Oral Argument at 30, *Seila L.*, 140 S. Ct. 2183 (No. 19-7) [hereinafter *Seila Law* Oral Argument Transcript].

138. *Id.* This was echoed in her dissent. *See Seila L.*, 140 S. Ct. at 2225 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) ("[T]he distinction doing most of the majority's work . . . does not respond to the constitutional values at stake. . . . [T]he constitutional concern is, if anything, ameliorated when the agency has a single head."); *id.* at 2242 ("[A] multimember commission may be harder to control than an individual director for a host of reasons unrelated to its plural character."); *id.* at 2243 ("A multimember structure reduces accountability to the President because it's harder for him to oversee, to influence—or to remove, if necessary—a group of five or more commissioners than a single director.").

Faced with a distinction that did not seem to matter under the governing legal test, the Court, in *Seila Law*, shifted gears. Instead of focusing on whether the distinctive features of the CFPB interfered more with the President's control over the CFPB Director, the Court proceeded to examine whether the distinctive features of the CFPB were more or less of a threat to liberty than the design of other agencies.[139] After establishing that the CFPB's structure was relatively new and differed from the structure of other agencies, the Court examined whether the CFPB's structure was "[]compatible with our constitutional structure."[140] The Court opened its analysis with the observation that "structural protections" such as separation of powers "were critical to preserving liberty" and that the Constitution's "solution to governmental power and its perils was simple: divide it."[141] The Court then analyzed how the CFPB's structure departed from this method of safeguarding liberty. "The CFPB's single-Director structure . . . vest[s] significant governmental power in the hands of a single individual," the Court explained.[142] And the Court framed the resulting problem in terms of liberty: "With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans."[143]

As Justice Kagan surmised in her dissent, "[b]ecause [the Court] has no answer" for why a removal restriction on a single Director interferes with the President's authority more than removal restrictions on a multimember commission, "the majority slides to a different question."[144] The new question was, she explained, "[I]s a single-head or a multi-head agency more capable of exercising power, and so of endangering liberty?"[145] And, she continued, "[t]he majority says a single head is the greater threat" to liberty "because he may wield power '*unilaterally*' and 'with no colleagues to persuade.'"[146] She made these same observations during the oral argument in *Seila Law*. Speaking to the lawyers challenging the removal restriction, Justice Kagan remarked: "So what strikes me about a lot of these arguments in the brief and here, you're saying, you know, this is the better way to

139. *Id.* at 2202 (majority opinion).

140. *Id.*

141. *Id.* (quoting Bowsher v. Synar, 478 U.S. 714, 730 (1986)). The Court's only removal case post *Seila Law* similarly framed separation of powers in terms of liberty: "As we have explained on many prior occasions, the separation of powers is designed to preserve the liberty of all the people." Collins v. Yellen, 141 S. Ct. 1761, 1780 (2021). That case struck down the removal restrictions applicable to the Federal Housing Finance Agency. *Id.* at 1787.

142. *Seila L.*, 140 S. Ct. at 2203.

143. *Id.* at 2204.

144. *Id.* at 2243 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

145. *Id.*

146. *Id.* (quoting *id.* at 2203–04 (majority opinion)).

promote liberty, to protect liberty."[147] At various points during the argument, some of the advocates leaned into this framing of their claim. Explaining why courts do not "leave [the structure of agencies] just to the [political branches]," the advocate for the petitioner insisted that "the purpose of separation of powers is . . . to protect the liberty of the people."[148]

The structure and focus of the Court's decision in *Seila Law* mirrored the arguments in the briefing. The brief for the entity challenging the CFPB's structure first covered the purported novelty of the CFPB's structure before proceeding to argue that the CFPB's purportedly novel structure "poses a unique threat to individual liberty."[149] All of that happened before the brief even touched on the extent of the President's control over the CFPB.[150] During the argument, the advocate challenging the CFPB's structure distinguished other agencies on the ground that the structure of those agencies "poses no threat to individual liberty."[151] "We believe that multi-member commissions pose a much lower threat to individual liberty . . . ."[152]

Then-Judge Kavanaugh's dissenting opinion in *PHH Corp. v. CFPB*,[153] a pre-*Seila Law* challenge to the CFPB, was even more explicit and heavy-handed with its focus on liberty.[154] PHH's challenge had similarly been framed in terms of what the en banc majority on the U.S. Court of Appeals for the D.C. Circuit described as a "freestanding liberty" claim.[155] Then-Judge Kavanaugh's dissenting opinion similarly announced that the challenge to the CFPB was "a case about executive power and individual liberty."[156] The dissent went on a lengthy exegesis about how the CFPB, with its single Director structure, was a greater threat to liberty than agencies structured with multimember commissions. "To mitigate the risk to individual liberty, the independent agencies historically have been headed by *multiple* commissioners or board members," then-Judge Kavanaugh wrote, which "reduces the risk of arbitrary decisionmaking and abuse of power, and

147. *Seila Law* Oral Argument Transcript, *supra* note 137, at 32–33.

148. *Id.* at 34.

149. Brief for the Petitioner at 3, *Seila L.*, 140 S. Ct. 2183 (No. 19-7).

150. *Id.*

151. *Seila Law* Oral Argument Transcript, *supra* note 137, at 9–10.

152. *Id.* at 20. The Solicitor General, supporting the lawyer arguing that the CFPB's structure was unconstitutional, reasoned similarly. *Id.* at 31.

153. 881 F.3d 75 (D.C. Cir. 2018) (en banc).

154. *See id.* at 164 (Kavanaugh, J., dissenting) ("This is a case about executive power and individual liberty.").

155. *Id.* at 105 (majority opinion) ("Moving beyond precedent and practice, PHH and its amici ask us to compare single-headed and group-led agencies' relative contributions to 'liberty.' The CFPB, headed by an individual Director, is constitutionally invalid, they say, because it diminishes the President's firing authority without substituting a different, ostensibly liberty-protecting mechanism—collective leadership.").

156. *Id.* at 164 (Kavanaugh, J., dissenting).

helps protect individual liberty."[157] After the dissent's survey of history, the next section was captioned as "LIBERTY" and focused explicitly on how the agency's structure "threatens individual liberty more than the traditional multimember structure does."[158] The dissent depicted that as a basis to strike down the removal restrictions on a single director, but not removal restrictions on multimember commissions.[159] Only after that analysis did the dissent touch on presidential authority and control.[160]

* * *

This Article refers to the method in the Court's removal cases as structural reasoning squared. It does so, in part, in order to distinguish what happened in *Seila Law* from the dynamics that other scholars have observed in the Court's separation of powers and federalism cases. John Manning and Laurence Tribe focused on the parallels and tensions between the Court's interpretive methodology in federalism or separation of powers cases and the Court's interpretive methodology in other cases—individual-rights matters (in the case of Tribe) or statutory interpretation decisions (in the case of Manning).

Tribe argued that Republican-appointed Justices in 1990s-era federalism cases were "employing the very method of constitutional interpretation that those Justices routinely dismiss as little more than a vehicle for indulging the judge's subjective preferences when it is employed in the service of individual rights"—"structural inference."[161] Tribe accordingly urged the Court to announce, "much as Richard Nixon once did of Keynes, 'We are *all* structuralists now.'"[162]

Manning's work on the Court's federalism and separation of powers decisions similarly focused on the interpretive methodology the Court used in those cases. Manning argued that many of the Court's decisions reflected a strong version of purposivism that the Court had rejected in cases involving

157. *Id.* at 165.

158. *Id.* at 183.

159. *Id.* at 183–84.

160. *Id.* at 188.

161. Tribe, *supra* note 109109, at 139, 159. One such example was *Printz v. United States*, 521 U.S. 898 (1997), which invalidated a Brady Act provision after conceding "there is no constitutional text speaking to [the] precise question" before the Court. *Id.* at 905. The Court reasoned similarly in state sovereign immunity decisions, acknowledging that "[a]lthough the text of the [Eleventh] Amendment" may not specifically prohibit such suits, the Court "ha[s] understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991)).

162. Tribe, *supra* note 109, at 172.

statutory interpretation.[163] In the constitutional cases, Manning argued, the Court relied on a handful of specific provisions in the Constitution about either federalism or the separation of powers in order to abstract more general principles about federalism or the separation of powers.[164] The Court "identifies numerous discrete provisions that, in particular ways, . . . preserve a measure of state autonomy"[165] or create a "strict separation" between the different branches of the federal government.[166] Then, he maintained, the Court, "[t]aking all those provisions together, . . . ascribes to the document as a whole a *general purpose*."[167] And the Court relied on general, abstract notions of federalism or the separation of powers to generate specific constitutional rules about federalism and the separation of powers (including about states' immunity from suit, or the President's power to remove certain executive officers).[168] Manning, in other words, described classic structural reasoning, inferences deduced from specific provisions that yield a general principle about constitutional structure, i.e., federalism and the separation of powers, and the purported purpose or design behind the constitutional system.[169]

As these summaries suggest, Manning and Tribe focused on the interpretive methodology the Court used in federalism and separation of powers cases—either structural inference or purposivism—and how that methodology differed from the Court's interpretive methodology in other matters.[170]

What makes the more recent removal cases different is that there is one additional structural inference at work (hence the label structural reasoning squared). From specific constitutional provisions, the Court arrives at a principle of structure—a principle of separated powers whereby the President

163. John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2052–57 (2009) [hereinafter Manning, *Generality*]; Manning, *Ordinary Interpretation*, *supra* note 118, at 1978; John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 4–8 (2014) [hereinafter Manning, *Foreword*].

164. Manning, *Generality*, *supra* note 163, at 2006.

165. *Id.*

166. Manning, *Ordinary Interpretation*, *supra* note 118, at 1944.

167. Manning, *Generality*, *supra* note 163, at 2006.

168. Similarly, Cass Sunstein and Adrian Vermeule argued that some of the Court's administrative law cases were "largely a product of very contemporary values and fears," making "its use by judges and Justices . . . methodologically of a piece with presentist decisions as *Roe v. Wade*, *Obergefell v. Hodges*, and (arguably) *District of Columbia v. Heller*." Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 44 (footnotes omitted).

169. *See* Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98, 103–04 (2009) (evaluating the consequences of Manning's arguments).

170. Manning, *Generality*, *supra* note 163, at 2006; Manning, *Ordinary Interpretation*, *supra* note 118, at 1944; Tribe, *supra* note 109, at 140; *see also* Manning, *Foreword*, *supra* note 163, at 4–8 (elaborating on the contexts in which the Court uses different interpretive methods).

needs to retain control over executive officials because all executive power is vested in the President. That is the kind of freestanding, structural interpretation that Manning and Tribe described. But then, in the more recent cases, the Court abstracts this structural inference one step further: From the inferred principle of separated powers, the Court then infers that the purpose of this structural principle *is to protect liberty*. Then, the Court proceeds to craft specific constitutional rules based on the Court's assessment of what best protects liberty. So the Court first infers a principle derived from the structure of the Constitution—that there is a strict separation of powers. It then infers that the animating purpose of that structural principle is the preservation of liberty. And it uses that principle—that the Constitution is concerned with protecting liberty—to derive specific rules that purportedly protect liberty (at least in the Justices' eyes). That is why it is structural reasoning squared; there is an additional structural inference in play.

So it is not just that the Court is relying on less textualist or originalist interpretive approaches in these cases—i.e., structural inference or purposivism. It is that the Court has refashioned broad swaths of law around the very concept it was uncomfortable with in the context of substantive due process: generally defined conceptions of liberty.

B. Purposive Rights-Based Analysis—The Seventh Amendment and Non-Article III Courts

Like the Court's removal cases, Seventh Amendment doctrine has pivoted to focus on liberty and away from the concern the Court identified in the previous Seventh Amendment cases—namely, the identity of the parties and whether suits were between a private entity and the government or between two private parties. This subpart identifies how the doctrine evolved, and the mechanism through which it has done so, which is a style of purposive reasoning about the scope of constitutional rights. As the previous subpart explained, it is not just that the Court is relying on purposivism; it is that the Court is doing so to generate a doctrine oriented around broad, hazy conceptions of liberty.

By way of background, non-Article III courts refer to courts that are created by Congress and that are staffed by judges who do not enjoy the protections of Article III: life tenure and salary guarantees.[171] The constitutional problem with non-Article III courts arises because Article III of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[172] It further spells out that the judges on those courts "shall hold their Offices during good

171. FALLON ET AL., *supra* note 12, at 345.

172. U.S. CONST. art. III, § 1.

Behaviour" and "receive for their Services[] a Compensation, which shall not be diminished" during their tenure.[173] Therefore, the reasoning goes, by vesting "the judicial Power of the United States" in courts that are not staffed with judges who enjoy tenure and salary protections, Congress may violate Article III by creating (at least some) non-Article III courts.[174]

The doctrine concerning non-Article III courts has followed a somewhat circuitous path. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[175] the Supreme Court invalidated a provision of the 1978 Bankruptcy Act that authorized bankruptcy judges (who lack the tenure and salary protections of Article III) to hear a state-law contract claim filed by the debtor against an entity that was not otherwise part of the bankruptcy proceeding.[176] But that case did not produce a majority opinion commanding five votes to explain why that was so. The six Justices who concluded the provision was unconstitutional agreed that Congress had the constitutional authority to assign cases involving "public rights" to non-Article III courts but differed in how they defined that category.[177] A four-Justice plurality defined "public rights" as only "matters arising between the Government and others."[178] Whereas "public rights . . . arise 'between the government and others,'" those four Justices believed, "private rights," which may not be assigned to non-Article III tribunals, concern "the liability of one individual to another."[179] Two Justices concurred only in the judgment to say that "whatever" the "extent" of the "'public rights' doctrine," they were satisfied that the state-law contract claim against the non-party "cannot be so sustained."[180]

After *Northern Pipeline*, the Court upheld two congressional assignments to non-Article III courts even though the assignments allowed non-Article III courts to hear claims between private parties.[181] In *Thomas v.*

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173. *Id.*

174. *See* Stern v. Marshall, 564 U.S. 462, 482 (2011) (quoting U.S. CONST. art. III, § 1) ("Although we conclude that § 157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie's counterclaim, Article III of the Constitution does not.").

175. 458 U.S. 50 (1982).

176. *Id.* at 56–57, 87 (plurality opinion); *id.* at 91–92 (Rehnquist, J., concurring in the judgment).

177. *Id.* at 67–68 (plurality opinion); *id.* at 90–91 (Rehnquist, J., concurring in the judgment).

178. *Id.* at 69 (plurality opinion) (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 458 (1929)). Before *Jarkesy*, this was thought to be sufficient to assign a claim to a non-Article III tribunal. *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2157–58 (2024) (Sotomayor, J., dissenting) (explaining that, pre-*Jarkesy*, "public rights always [could] be assigned outside of Article III").

179. *Northern Pipeline*, 458 U.S. at 69–70 (plurality opinion) (first quoting *Bakelite Corp.*, 279 U.S. at 458; and then quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)).

180. *Id.* at 90–91 (Rehnquist, J., concurring in the judgment).

181. *Cf. Jarkesy*, 144 S. Ct. at 2158 (Sotomayor, J., dissenting) ("The majority says that aspects of the public-rights doctrine have been confusing. That might be true for cases involving wholly private disputes, but not for cases where the Government is a party." (citation omitted)).

Union Carbide Agricultural Products Co.,[182] the Court upheld the assignment of a claim for reimbursement by one private entity against another under the Federal Insecticide, Fungicide, and Rodenticide Act.[183] Federal law required pesticide manufacturers to submit research data to the Environmental Protection Agency (EPA) in order to obtain the EPA's approval of the pesticide; later-in-time pesticide manufacturers could rely on the previously submitted research data to obtain approval.[184] But if later-in-time manufacturers relied on data previously submitted, federal law provided that the later-in-time manufacturer had to compensate the pesticide manufacturer that had previously submitted the data and directed any disputes over reimbursement and compensation to a non-Article III tribunal.[185] The Court upheld that scheme and in doing so, rejected "doctrinaire reliance on formal categories" including "the identity of the parties alone" or the "public rights/private rights" distinction.[186] Instead, the Court pointed to the fact that the right was created by a federal statute, "represent[ed] a pragmatic solution to the difficult problem of spreading [certain] costs," and did "not preclude review of the arbitration proceeding by an Article III court."[187] "Given the nature of the right at issue and the concerns motivating the Legislature," the Court concluded, this arrangement did not "threaten[] the independent role of the Judiciary in our constitutional scheme."[188]

Using similar reasoning, *Commodity Futures Trading Commission v. Schor*[189] upheld the assignment of a state-law contract claim between private entities to the Commodity Futures Trading Commission (CFTC).[190] Under federal commodities law, customers could sue their commodity futures brokers in proceedings before the CFTC for violations of federal commodities law.[191] These federal-law claims often alleged that customers' debit balances were the result of brokers' unlawful actions. Brokers would then respond by filing a counter-claim for breach of contract to recover the debit balance.[192] In upholding the assignment of the contract claim to the CFTC, the Court, once again, "declined to adopt formalistic and unbending rules" and instead "weighed a number of factors, none of which has been

182. 473 U.S. 568 (1985).
183. *Id.* at 571.
184. *Id.*
185. *Id.* at 571–74.
186. *Id.* at 585–87.
187. *Id.* at 590, 592.
188. *Id.* at 590.
189. 478 U.S. 833 (1986).
190. *Id.* at 851–57.
191. *Id.* at 843.
192. *Id.*

deemed determinative," including "the origins and importance of the right to be adjudicated."[193] On that factor specifically, the Court noted that where "private rights," rather than "public rights," are involved, the "danger of encroaching on the judicial powers" is greater.[194] Although the state-law contract claim was a private right in the sense that it was a suit between two private individuals arising under state law, the Court upheld the assignment of the claim to a non-Article III court.[195]

More recently, *Stern v. Marshall*[196] invalidated the assignment of certain claims to bankruptcy courts. There, the claims were counter-claims by debtors against creditors.[197] In *Stern* itself, a creditor filed a defamation claim against a debtor who had filed for bankruptcy, and the debtor filed a counter-claim against the creditor for tortious interference with a gift (in that case, the debtor's inclusion in a will).[198] *Stern* purported to synthesize the Court's case law regarding "'public right[s]' that can be decided outside the Judicial Branch."[199] The Court said that "the reach of the public rights exception" extended to "those [matters] arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.'"[200] But, the Court continued, the "public rights exception" was not "limit[ed]" to "actions involving the Government as a party"; it also included "cases in which the claim at issue derive[d] from a federal regulatory scheme," i.e., cases like *Union Carbide*, or cases "in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority," i.e., cases like *Schor*.[201] The public rights category did not include state-law counterclaims of the kind in *Stern*, and therefore, the non-Article III bankruptcy courts could not resolve the claim.[202] Justice Scalia concurred to say that "a matter of public rights . . . must at a minimum arise between the government and others."[203]

193. *Id.* at 851, 853–54.

194. *Id.* at 853–54 (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 589 (1985)).

195. *Id.*

196. 564 U.S. 462 (2011).

197. *Id.* at 468–69.

198. *Id.* at 470.

199. *Id.* at 488.

200. *Id.* at 489 (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)).

201. *Id.* at 490–91.

202. *Id.* at 493–94. The Court later held in *Wellness International Network, LTD v. Sharif*, 575 U.S. 665 (2015), that *Stern* claims can be heard by non-Article III bankruptcy courts if both parties consent to the adjudication there and a court performs a *Schor*-like analysis. *Id.* at 669, 678–79 (2015).

203. *Stern*, 564 U.S. at 503 (Scalia, J., concurring) (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 65 (1989) (Scalia, J., concurrning in part and concurring in the judgment)).

The (potential) Article III issue with non-Article III courts is intertwined with another (potential) constitutional issue about the Seventh Amendment. The Seventh Amendment provides, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[204] Non-Article III courts do not have juries and therefore the adjudication of claims in non-Article III courts potentially raises Seventh Amendment issues, in addition to questions under Article III.[205] Because these two issues are so related, however, the Court had previously said, "This Court's precedents establish that, when Congress properly assigns a matter to adjudication in a non-Article III tribunal, 'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.'"[206] Confirming the degree of interchangeability between the Article III and Seventh Amendment issues, the Court in *Stern v. Marshall* cited its previous decision in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*[207] to explain the bounds of Congress's authority to assign claims to non-Article III courts without violating Article III.[208] *Atlas Roofing*, however, had resolved a Seventh Amendment challenge to non-Article III courts: Congress's assignment of claims under the Occupational Safety and Health Act (OSH Act) to the Occupational Safety and Health Administration (OSHA).[209] And *Atlas Roofing*, in resolving that Seventh Amendment issue, freely cited and relied on cases that addressed Article III challenges to non-Article III courts. *Atlas Roofing* specifically relied on the "public rights" category from the Article III cases to explain why the Seventh Amendment did not prohibit adjudicating OSH Act claims before OSHA adjudicators rather than a jury—because such claims were "public rights" as

204. U.S. CONST. amend. VII.

205. There could be Article III issues with a congressional assignment to non-Article III courts even if there are no Seventh Amendment issues, perhaps including cases where parties seek equitable relief. But there should not be Seventh Amendment issues if Article III is satisfied. Oil States Energy Servs. v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1379 (2018) (quoting *Granfinanciera*, 492 U.S. at 53–54); *see also id.* ("[O]ur rejection of Oil States' Article III challenge also resolves its Seventh Amendment challenge.").

206. *Id.* (quoting *Granfinanciera*, 492 U.S. at 53–54); *see also* SEC v. Jarkesy, 144 S. Ct. 2117, 2157–58 (2024) (Sotomayor, J., dissenting) (noting that Seventh Amendment claims in non-Article III courts are settled by whether the court can hear the case under Article III); William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1571 (2020) ("The Article III analysis should be conducted first, on its own. And then . . . if the non-Article III adjudication is permissible, the Seventh Amendment should be ignored.").

207. 430 U.S. 442 (1977).

208. *Stern*, 564 U.S. at 489–90, 493.

209. 430 U.S. at 444–45, 461 ("The issue in these cases is whether, consistent with the Seventh Amendment, Congress may create a new cause of action in the Government for civil penalties enforceable in an administrative agency where there is no jury trial.").

that category was defined in the Court's jurisprudence on Article III.[210] And in the Court's most recent case on non-Article III courts, *SEC v. Jarkesy*, it framed the Seventh Amendment analysis in terms of "whether the 'public rights' exception to Article III jurisdiction applies."[211]

Jarkesy reoriented the Court's case law, and it relied on the Seventh Amendment to do so.[212] Rather than focusing on whether a claim concerned a private right or public right (specifically, whether a claim arose between private individuals or between an individual and the government), *Jarkesy* restructured the Seventh Amendment analysis to hinge, in part, on whether certain arrangements pose particular risks to liberty.[213] Using this new analysis, *Jarkesy* invalidated the SEC's ability to bring civil enforcement suits seeking civil penalties for violations of the fraud provisions of federal securities law before the SEC's own adjudicatory system, a non-Article III court.[214] The Court concluded these proceedings violated the Seventh Amendment right to trial by jury.

The Court structured its Seventh Amendment analysis as a two-step inquiry. The "threshold issue is whether [an] action implicates the Seventh Amendment," and the "next" inquiry is "whether the 'public rights' exception to Article III jurisdiction applies."[215] More intriguingly, the Court explained both steps of the analysis in terms of liberty. With respect to the "threshold" step, the Court wrote that "'any seeming curtailment of the right' has always been and 'should be scrutinized with the utmost care'" because "Americans condemned Parliament for 'subvert[ing] the rights and liberties of the colonists'" when adjudications happened in juryless courts.[216] And with respect to the second step, the Court invoked Alexander Hamilton quoting Montesquieu for the proposition that "there is no liberty if the power of judging be not separated from the legislative and executive powers."[217] It was "[o]n that basis," the Court explained, that the Court had previously held "that matters concerning private rights may not be removed from Article III

210. *Id.* at 452 (citing Crowell v. Benson, 285 U.S. 22, 50 (1932) and explicating the "public rights" category); *id.* at 456–57 (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.), 272, 284 (1856)).

211. 144 S. Ct. at 2127.

212. *Id.* at 2131–35, 2139.

213. *See id.* at 2135, 2138–39 (holding that the individual right to a jury trial may displace legislation that "concentrate[s] the roles of prosecutor, judge, and jury in the hands of the Executive Branch").

214. *Id.* at 2139.

215. *Id.* at 2127.

216. *Id.* at 2128 (first quoting Dimick v. Schiedt, 293 U.S. 474, 486 (1935); and then quoting RESOLUTIONS OF THE STAMP ACT CONGRESS (1765), *reprinted in* SOURCES OF OUR LIBERTIES 270, 271 (Richard L. Perry & John C. Cooper eds., 1959)).

217. *Id.* at 2131–32 (quoting THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

courts."[218] (As the next Part explains, the Court's doctrinal analysis turned on the remedy sought and the extent of the analogy between the federal securities claim and common law claims, but those doctrinal tools were in service of legal standards the Court explained in terms of liberty.[219])

The reorientation of Seventh Amendment doctrine around legal standards that seek to determine whether particular arrangements threaten liberty marked a shift in the law governing the assignment of claims to non-Article III tribunals. Previously, the doctrine relied in significant respects on the nature of the claim at issue in a case, and specifically whether the claim arose between the government and a private party or between private individuals. The Court had not previously invalidated the assignment of a claim between private individuals and the Government to non-Article III tribunals.[220] Rather, the Court's cases that had vacillated back and forth between different legal tests all concerned private rights—claims between private parties.[221]

The separate writings in *Jarkesy* understood the majority to be developing Seventh Amendment doctrine based on the Court's understanding of what arrangements threatened liberty. The closing of Justice Sotomayor's dissent, for example, observed: "By giving respondents a jury trial, even one that the Constitution does not require, the majority may think that it is protecting liberty."[222] Justice Gorsuch's concurrence emphasized the overlap between the Seventh Amendment, Article III, and the Due Process Clause protections for liberty (among other things).[223] The closing passages of the concurrence observed that "[p]eople like Mr. Jarkesy may be unpopular," which "is why the Constitution built 'high walls and clear distinctions' to safeguard individual liberty."[224] It is moments like this where the Court seems to veer away from its conventional practices of interpretation to channel background beliefs that sound in political theory but are hazy to say the least.[225]

The oral arguments in *Jarkesy* were even more explicit about how the Justices in the *Jarkesy* majority interpreted the scope of the Seventh Amendment based on their understandings of liberty and their assessments

218. *Id.*

219. *See infra* section III(A)(2).

220. *Jarkesy*, 144 S. Ct. at 2159–64 (Sotomayor, J., dissenting); *id.* at 2155 ("Today, for the very first time, this Court holds that Congress violated the Constitution by authorizing a federal agency to adjudicate a statutory right that inheres in the Government in its sovereign capacity, also known as a public right.").

221. *Id.* at 2158–59.

222. *Id.* at 2175.

223. *Id.* at 2140 (Gorsuch, J., concurring).

224. *Id.* at 2154 (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995)).

225. That makes it almost risible that they are simultaneously congratulating themselves on supplying clear distinctions to guide the law.

about whether certain arrangements threatened liberty. The federal government lawyer defending Congress's assignment of claims to the SEC said, "We're asking, are we concerned about Congress taking away the judiciary's power? And that's not—that is a concern when you have disputes between private parties . . . ."[226] Justice Kavanaugh, who joined the majority in *Jarkesy*, responded, "Well, what about individual liberty? . . . [Y]our individual liberty, it would seem, is even more or at least equally affected when the government is coming after you than another private party."[227] That exchange signifies how the Justices' new focus on liberty led them to reorient the doctrine away from a focus on whether a suit was between the government and private entities. Other moments revealed the same. In one particularly illuminating exchange, Justice Alito directed the lawyer for the federal government to "go back to" the question "that Justice Kavanaugh asked."[228] He told the government lawyer, "[Y]ou have arguments based on precedent. You have your—your textual argument . . . ."[229] But, Justice Alito continued,

> I just want you to talk about the theory of the Seventh Amendment. Isn't the theory of the Seventh Amendment that people in this country should have protection against having their liberty or property taken away by officials who are answerable to a powerful executive, that the jury should be set up as a buffer . . . in that situation?[230]

This exchange once again underscores how at least some of the Justices' apparent focus on liberty was seemingly more important to their resolution of the case than precedent or text.

The briefing that argued the SEC adjudication violated the Seventh Amendment also focused on liberty. The challengers' brief explained the existence of the jury-trial right in terms of liberty.[231] It used its focus on liberty to explain why the identity of the parties should not determine whether the public rights exception applied. The briefing maintained that "whether a claim involves a 'private' or 'public' right" does not rest on "the identity of the government as plaintiff."[232] Rather, "[i]n its most benign and defensible form, the public rights doctrine allows" non-Article III adjudications "because they . . . usually do not involve deprivations of life, liberty, or

226. *Jarkesy* Oral Argument Transcript, *supra* note 16, at 29.

227. *Id.*

228. *Id.* at 49.

229. *Id.*

230. *Id.* at 49–50.

231. Brief for Respondents at 19, *Jarkesy*, 144 S. Ct. 2117 (22-859) ("The friends and adversaries of the [Constitution] . . . concur at least in the value they set upon the trial by jury: [but while] the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government." (quoting THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

232. *Id.* at 31.

property."[233] Amicus briefing argued that the administrative body, which "wields vast legislative, executive, and judicial power, pos[es] a grave threat to core private rights and individual liberty" to explain why the adjudication scheme was unconstitutional.[234]

* * *

The Court's jurisprudence regarding non-Article III courts resembles the structural-reasoning squared approach used in the removal cases in its focus on liberty. But the mechanism the Court used to refocus the doctrine on liberty differs. In the removal context, to arrive at a jurisprudence of liberty, the Court relied on what were effectively two structural inferences (one about the strict separation of powers and the executive power residing in the Presidency, and the other about how the separation of powers safeguards liberty). The Court then used the idea that the Constitution safeguards liberty to generate specific rules about the lawfulness of removal restrictions based on whether the restrictions negatively affect the Justices' conception of liberty. In the non-Article III context, by contrast, the Court is relying on a kind of purposive analysis of the Seventh Amendment. That is, the Court ascribes to the Seventh Amendment a purpose: that the right secured by the Seventh Amendment is about the protection of liberty. It then relies on that purpose (the protection of liberty) to ascertain the scope of the

233. *Id.* (quoting Baude, *supra* note 206, at 1536).

234. Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Respondents at 3, *Jarkesy*, 144 S. Ct. 2117 (22-859); *see also* Brief of Amicus Curiae The Competitive Enterprise Institute in Support of Respondents at 1, *Jarkesy*, 144 S. Ct. 2117 (22-859) ("English common law protected people's property and liberty by requiring a local jury to approve of any punishment or compensation for unlawful action."); Brief for Amicus Curiae Pioneer Public Interest Law Center in Support of Respondents at 6, *Jarkesy*, 144 S. Ct. 2117 (22-859) ("[Administrative adjudications] are available only when a suit involves public rights and privileges, and not when the vested liberty and property rights of private citizens are at stake."); Brief Amicus Curiae of the New Civil Liberties Alliance in Support of the Respondents at 14–15, *Jarkesy*, 144 S. Ct. 2117 (22-859) ("NCLA urges this Court to abandon its notion of 'public rights' and, instead, speak about matters within the judicial power, or involving life, liberty, or property."); Brief of Amici Curiae State of West Virginia and 17 Other States in Support of Respondents at 26, *Jarkesy*, 144 S. Ct. 2117 (22-859) ("In sum, agency administration is permissible when it involves a privilege like a public benefit that does not deprive life, liberty, or property."); Brief of the Cato Institute as Amicus Curiae in Support of Respondents at 11, *Jarkesy*, 144 S. Ct. 2117 (22-859) ("The Seventh Amendment ensures that when the government threatens the private rights of citizens—their lives, liberty, or property—it is accountable to a jury whenever an Englishman would have had one under British common law."); Brief of Constitutional Originalists Edwin Meese III, Steven G. Calabresi, and Garry S. Lawson as Amici Curiae in Support of Respondents at 4 n.3, *Jarkesy*, 144 S. Ct. 2117 (22-859) ("Even if parties elect not to have a jury, they are still entitled to have facts initially found by an Article III judge rather than by an executive official if the government is seeking to deprive them of life, liberty, or property."); Brief of Amici Curiae the Chamber of Commerce of the United States, the National Federation of Independent Small Business Legal Center, Inc., and Business Roundtable in Support of Respondents at 14, *Jarkesy*, 144 S. Ct. 2117 (22-859) (noting that several states conditioned ratifying the Constitution on the right to trial by jury).

right protected by the Seventh Amendment—i.e., a purposive, rights-based analysis.

III. Assessment

This Part unpacks the similarities between the earlier substantive due process cases and the recent removal and Seventh Amendment cases that are now oriented around liberty. Subpart III(A) focuses on three similarities: how both new and old substantive due process cases are trained on notions of liberty that are not explicitly spelled out with any particularity; how both sets of cases gesture toward populist ideas about protecting the people's prerogatives from (elitist) government overreach; and how the reasoning in the new substantive due process cases traffics in contestable political theory about the nature of government. Subpart III(B) then discusses some ways of reconciling the two lines of cases. It critically assesses how the new substantive due process cases have attempted to cut off the democracy critique of the old substantive due process cases by invoking democratic misgivings about the administrative state. It also offers some tentative explanations for the emergence of a new substantive due process.

A. The New and Old Substantive Due Process

One similarity between the new substantive due process and the old is that, as the previous Part showed, the Court has reoriented two doctrinal areas around loosely defined notions of liberty that the Court has not even attempted to define with any specificity. In both the removal context and the non-Article III context, the Court examines whether a given arrangement is better or worse for "liberty" than arrangements that the Court has previously upheld. The doctrinal changes in these areas of law refocused them on notions of liberty that are not spelled out in the constitutional text and are therefore susceptible to one of the core criticisms leveled at substantive due process—namely, that it lends itself to judicial policymaking, as judges may transpose their own views onto vaguely defined conceptions of liberty, though not necessarily consciously or intentionally.[235]

The cases embodying this mode of analysis do not attempt to define the "liberty" that is safeguarded by structural separation of powers or the Seventh Amendment with much particularity. The Court is not doing the type of unenumerated rights, substantive due process analysis that the Court announced in *Glucksberg* and then insisted was required in *Dobbs v. Jackson Women's Health Organization* and, more recently, in *Department of State v.*

235. *Cf.* Richard Primus, Response, *The Functions of Ethical Originalism*, 88 TEXAS L. REV.: SEE ALSO 79, 79 (2010) ("Despite the common claim that originalism constrains decisionmaking, people who disagree about constitutional issues tend to enact their disagreement in the realm of original meaning, as well as in the other realms of constitutional argument.").

Muñoz.[236] It is not adopting a careful description of the liberty interest that may be safeguarded by the constitutional provisions concerning removal and non-Article III courts; it is not really offering much of a definition at all beyond asserting that the preservation of liberty is the relevant guidepost. So it's possible to quote from Justice Scalia in *McDonald* to say the new substantive due process "includes a number of capacious, hazily defined categories."[237]

A second similarity is that the new substantive due process reflects the latent populist streak of the old individual-rights line of cases that purported to speak on behalf of the people against the overbearing elites in government. *Lochner* had insisted (again, albeit somewhat implausibly) that it was preserving the people's liberty to negotiate with their employers: It spoke of "the right of the individual to labor for such time as he may choose" and the employee who "may desire to earn the extra money, which would arise from his working more than the prescribed time."[238] *Griswold* likewise emphasized that it was protecting the people's prerogatives from over-encroachment by the state. The majority emphasized the right to "[t]he association of people" and the entitlement of the "intimate relation of husband and wife" to a "zone of privacy" from the state.[239] Justice Goldberg's concurrence labeled privacy "a personal right 'retained by the people' within the meaning of the Ninth Amendment."[240]

The new substantive due process cases also gesture toward the idea that the Court is protecting the people's liberties from government overreach. Referring to the Seventh Amendment jury-trial right, *Jarkesy* insisted "every encroachment upon it has been watched with great jealousy."[241] The Court invoked Alexander Hamilton's quotation of Montesquieu in the Federalist Papers: "[T]here is no liberty if the power of judging be not separated from the legislative and executive powers."[242] *Seila Law* is similarly replete with populist-like claims about protecting the people's prerogatives from overbearing elites. There, the Court observed that the CFPB Director, as a

236. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242, 2246 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)); Dep't of State v. Muñoz, 144 S. Ct. 1812, 1822 (2024) (applying the *Glucksberg* analysis to define the asserted right as "the right to *reside with* [a] *noncitizen spouse in the United States*," which "includes the right to have [a] noncitizen [spouse] enter (and remain in) the United States").

237. McDonald v. City of Chicago, 561 U.S. 742, 797 (2010) (Scalia, J., concurring).

238. Lochner v. New York, 198 U.S. 45, 52–54 (1905).

239. Griswold v. Connecticut, 381 U.S. 479, 482, 484 (1965).

240. *Id.* at 499 (Goldberg, J., concurring).

241. SEC v. Jarkesy, 144 S. Ct. 2117, 2128 (2024) (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830)).

242. *Id.* at 2131 (quoting THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

single officer, "may dictate and enforce policy for a vital segment of the economy affecting millions of Americans."[243]

These similarities give rise to other connections as well. The new substantive due process relies on the kind of contestable political theory, rooted in conceptions of liberty and the nature of government, that supposedly plagued the old substantive due process cases. On some level, it's not surprising that the political theory undergirding the new substantive due process would be contestable since political theory often involves debates about the nature and role of government.[244] But the political theory in play in the new substantive due process is so poorly defined and manipulable it has resulted in judicial doublespeak. As the following sections explain, sometimes the Justices insist that liberty requires restraining government while at other times they insist that liberty requires empowering government. Sometimes the Justices even insist that liberty requires restraining government in cases where they empower other parts of government. The political theory is so hazy and poorly worked out that at times it seems to embody little more than the Justices' personal philosophies and preferences. The decisions wander away from familiar practices of interpretation and tap into blurry and oversimplified background beliefs on political theory.

1. Seila Law*: Structural Reasoning Squared*.—The Court's decision in *Seila Law LLC v. CFPB* reoriented the Court's removal jurisprudence around liberty. In the final section of the Court's analysis, it explained that "[t]he question" was "whether to extend" its precedents upholding various removal restrictions "to the 'new situation' before [it], namely an independent agency led by a single Director and vested with significant executive power."[245] The Court "decline[d] to do so" by invoking "constitutional structure" in addition to history.[246]

The considerations the Court described as "constitutional structure" sound in political theory. First, the Court insisted that the Framers' "solution to governmental power and its perils was simple: divide it."[247] There are several premises built into this claim. One is the idea that the Constitution sought to restrain power as a means of securing liberty, a second is a theoretical claim that liberty requires restrained government, and another is

243. Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2204 (2020).

244. *See* Christopher S. Havasy, Joshua C. Macey & Brian Richardson, *Against Political Theory in Constitutional Interpretation*, 76 VAND. L. REV. 899, 903 (2023) ("Enlightenment political theorists themselves engaged in a vigorous debate about how to distribute government power, and the most self-aware of them saw their collective rumination to be a hall of mirrors.").

245. *Seila L.*, 140 S. Ct. at 2201 (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010)).

246. *Id.*

247. *Id.* at 2202.

that dividing or separating power was the preferred method for restraining government. All three claims are, at a minimum, oversimplified. The reality is that the Constitution reflects various compromises between competing values rather than a singular notion that constitutional liberty requires less government. Constitutional law balances that view against many others, including the idea that an active, efficacious government is sometimes necessary for liberty.[248]

Take the Court's insistence that the Constitution secured liberty by limiting government authority (here, by restricting how Congress could structure administrative agencies).[249] There are competing historical and structural inferences that could be drawn in an opposite direction. From a historical perspective, while it is true the Constitution sought to restrain government in some respects, including through specific prohibitions, it also sought to empower government in others. Historical work by Michael Klarman and Richard Primus, among others, has documented ways in which the Framers sought to consolidate power to ensure a more effective system of government.[250] It is also uncontroversial that the Constitution was

248. *See* Havasy et al., *supra* note 244, at 904 ("The Framers therefore rejected and revised their Enlightenment progenitors and instead invented a system they felt would more effectively check legislative and executive power while supporting effective government.").

249. The Court, or at least the Republican appointees on the Court, have sounded this theme before. *See, e.g.*, Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1934 (2019) ("It is sometimes said that the bigger the government, the smaller the individual."). The Court also insisted that the Framers viewed legislative power "as a special threat to individual liberty" whereas they "thought it necessary to secure the authority of the Executive." *Seila L.*, 140 S. Ct. at 2203. Here too, there is something to say in defense of the Court's claim—it's undoubtedly true that some Framers were concerned about legislative excesses. But it doesn't follow that they were uniformly unconcerned with the excesses of the Executive and sought to empower the Executive Branch in all respects. For one thing, the Framers were coming off an experience with a King they felt exercised too much arbitrary power. *See, e.g.*, Trump v. United States, 144 S. Ct. 2312, 2358–59 (2024) (Sotomayor, J., dissenting) (noting that strong Presidential immunity is inconsistent with the Framers' focus on preventing executive excess). And there is considerable historical evidence that they did not empower the executive branch much beyond allowing Presidents to carry out the laws of Congress. *See, e.g.*, Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1271 (2020) ("For the founders, 'the executive power' meant the power to execute the law. Nothing more. And nothing less."); Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1173–74 (2019) ("[T]he first sentence of Article II . . . vests the executive power, not the royal prerogative.").

250. *See generally* MICHAEL J. KLARMAN, THE FRAMERS' COUP (2016) (explaining the Framers' decision to strengthen the federal government and insulate it from public control); Richard Primus, *Reframing Article I, Section 8*, 89 FORDHAM L. REV. 2003 (2021) (explaining the enumeration of congressional powers as empowerment rather than limitation); David S. Schwartz, Jonathan Gienapp, John Mikhail & Richard Primus, *Foreword: The Federalist Constitution*, 89 FORDHAM L. REV. 1669 (2021) (describing the initial Federalist concepts meant to justify expansive governmental authority); Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014) (arguing that federalism and the Constitution do not require congressional power to be limited under the auspices of enumeration rather than external or process constraints).

designed in part to remedy the fact that the Articles of Confederation did not sufficiently empower the central government.[251]

There are also structural inferences that cut against the idea that the Constitution has a myopic focus on restraining government. As John Manning has written, the Necessary and Proper Clause's broad grant of authority to Congress, which includes the congressional power to carry into effect powers that are vested in other branches of government, belies overly simplistic claims about a limited federal government or a strict separation of powers.[252] The various provisions in the Constitution that delegate overlapping powers to different branches of the federal government do the same.[253] Madison observed in Federalist No. 47 that "the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other" in the British Constitution of which Montesquieu wrote, and insisted that Montesquieu was concerned only with situations "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department."[254] As Madison summarized in Federalist No. 48, "the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other."[255] Recently, Joshua Macey and Brian Richardson have argued there is historical support for the idea that "[t]he Constitution's separation of powers . . . substantive content is modest: the separation of powers is breached only where a branch's actions would allow it to tyrannize or to dominate another."[256]

In light of these competing historical and structural inferences, it is difficult to draw particular, well-defined rules from the general idea that the Constitution sought to restrain power. The Constitution also sought to empower government, and discerning when, exactly, the Constitution restrains versus empowers government can't be easily resolved with reference to general principles defined at a high level of abstraction.[257]

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251. GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET, PAMELA S. KARLAN, AZIZ Z. HUQ & LEAH LITMAN, CONSTITUTIONAL LAW 2–5 (9th ed. 2023); FALLON ET AL., *supra* note 12, at 2–3.

252. *See, e.g.*, Manning, *Generality*, *supra* note 163, at 2056 (assessing the extent of power granted to Congress by the Necessary and Proper Clause); Manning, *Ordinary Interpretation*, *supra* note 118, at 1986–88 (discussing the tension created by the broad language of the Necessary and Proper Clause); Manning, *Foreword*, *supra* note 163, at 60–67 (arguing that the Necessary and Proper Clause grants Congress "rulemaking authority" over other governmental branches).

253. Manning, *Ordinary Interpretation*, *supra* note 118, at 1978–85.

254. THE FEDERALIST NO. 47, at 302–03 (James Madison) (Clinton Rossiter ed., 1961).

255. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

256. Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 TEXAS L. REV. 89, 96 (2022).

257. This is not to indict structural reasoning per se, but instead might suggest that this particular pocket of structural reasoning does not lend itself to judicially enforceable rules rather

Constitutional law reflects an effort to balance competing considerations, including the need for constraints on power with the need for effective, efficient, and expeditious power.

Indeed, the Court's own opinion in *Seila Law* is somewhat inconsistent with respect to whether the Constitution sought to restrain or empower government actors. The opinion contains lengthy exegeses on how the Framers "thought it necessary to secure the authority of the Executive."[258] The executive branch is part of the federal government, so the Court seems to concede that the Constitution occasionally sought to empower the federal government, or at least parts of the federal government, in some respects. And that is the effect of the Court's decision in *Seila Law*: Even as it limits congressional authority to structure the federal bureaucracy, it augments presidential authority by giving the President a removal power that supposedly allows the President to better control the work of agencies.

Putting aside the contestable historical and structural bases for the claim that the Constitution sought to restrain government, *Seila Law*'s reasoning also rests on ideas that sound in political theory, including the notion that restraining government is essential to liberty.[259] The Justices in *Seila Law* have explicitly made this claim elsewhere. In an interview with *The Atlantic*, Justice Gorsuch said that "law has exploded" and "threaten[s]" freedom.[260] He wrote a dissent, signed by both Chief Justice Roberts and Justice Thomas, that insisted "the framers . . . believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty."[261] In 2019, Justice Kavanaugh wrote a majority opinion for all of the then-five Republican appointees that concluded with, "It is sometimes said that the bigger the government, the smaller the individual."[262]

than consideration in Congress. *See* Metzger, *supra* note 169, at 103–05 (highlighting the pitfalls of judges using a structural reasoning-based approach to constitutional interpretation to derive judicially enforceable limits).

258. Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2203 (2020).

259. Similar ideas have been historically expressed. *See, e.g.*, JEREMY BENTHAM, THE THEORY OF LEGISLATION 48 (C.K. Ogden ed., Richard Hildreth trans., Harcourt, Brace & Co. 1931) (1802) (compiled, edited, and translated into French by Etienne Dumont) ("Every law is an evil, for every law is an infraction of liberty."); *see also*, THOMAS HOBBES, LEVIATHAN 155 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651) ("[L]yberties . . . depend on the Silence of the Law. In cases where the Soveraign has prescribed no rule, there the Subject hath the Liberty to do, or forbeare, according to his own discretion.").

260. Rebecca J. Rosen, *The Law as Justice Gorsuch Sees It*, ATLANTIC (Aug. 5, 2024), https://www.theatlantic.com/ideas/archive/2024/08/interview-justice-neil-gorsuch-over-ruled/679342/ [https://perma.cc/NVB5-PHLM].

261. Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

262. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1934 (2019).

But as Don Herzog has explained, "Laws and other rules can *expand* our freedom."[263] They may do so in part by establishing "constitutive rules," which "generate new options," such as where laws tell people how to write wills in ways that are binding—those rules make it possible to accomplish certain goals.[264] Restrictive rules can also improve liberty; Herzog listed as examples rules governing driving, vehicle safety, and gun control, which expand freedom by reducing the chances of catastrophes and fatalities.[265] Senator Elizabeth Warren put it this way: "Done right[,] strong[,] fair regulations protect the freedom of every American. How free would you be if companies were allowed to lie to you about their businesses in order to trick you into investing [your] life savings in their stock?"[266] Or "if no one had to wash their hands before they handled your hamburger," or if "companies could pass off little white pills as antibiotics"?[267]

So sometimes empowering government can secure liberty, including in the cases where the Court has insisted that government and laws only do the opposite. For example, the agency at issue in *Seila Law*, the CFPB, occasionally issues regulations designed to prohibit business practices that mislead consumers. Those regulations restrict liberty in the sense that they prohibit certain business practices. But the regulations also bolster liberty by ensuring consumers are not misled into obtaining financial loans that ensnare them in abusive debt practices, which helps to secure consumers' economic liberty. The regulations open up the possibility that consumers will have more freedom to purchase other goods or services. Or take the case of *National Federation of Independent Businesses v. Sebelius*,[268] the challenge to the Affordable Care Act (ACA). The ACA contained, among many other provisions, guaranteed-issue and community-rating requirements that obligated insurance carriers to sell health insurance to anyone (without regard to whether they had a preexisting condition) and to sell the insurance at a price that did not depend on whether someone had a preexisting condition.[269] Those requirements limited the liberty of insurance carriers by prohibiting

263. DON HERZOG, *More Laws Less Freedom*, *in* A LITTLE BOOK OF POLITICAL MISTAKES (2020), https://little-book-of-political-mistakes.pubpub.org/pub/l8t49l2w/release/1 [https://perma.cc/R7DK-23UB]. As Herzog summarized, "laws can tell you how to do things," "create options," and "make others possible"—even when laws forbid some things. *Id.*

264. *Id.*

265. *Id.* For additional explanation on how some criminal laws involve liberty–liberty tradeoffs and plausibly enhance liberty in some respects, see Leah M. Litman, *The Myth of the Great Writ*, 100 TEXAS L. REV. 219, 251 (2021).

266. Pedro Nicolaci da Costa, *Elizabeth Warren Says There's a Dirty Little Secret Behind the Republicans' Push for Broad Deregulation*, BUS. INSIDER (June 6, 2018, 11:34 AM), https://www.businessinsider.com/elizabeth-warren-says-deregulation-boosts-profits-at-consumers-expense-2018-6 [https://perma.cc/35EK-Q6DC].

267. *Id.*

268. 567 U.S. 519 (2012).

269. 42 U.S.C. §§ 300gg, 300gg–1, 300gg–3, 300gg–4.

certain business practices. But there is also a plausible argument that they improved the liberty of others: the people who could now obtain health insurance and thus health care. The law secured their physical liberty by facilitating their access to health care, and their economic liberty by preventing debilitating medical debt.[270]

This isn't to say any of these regulations are, on net, better or worse for liberty. It is merely to point out that *Seila Law* seems to rest on an overly simplistic political theory about liberty by assuming that government regulation is necessarily liberty detracting. In Justice Scalia's words (describing the old substantive due process), the majority's analysis "consist[ed] primarily of making *value judgments*."[271] And in any case (also according to Justice Scalia), the "choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a 'liberty' in the absolute sense."[272]

The idea that empowering the government and enabling regulation are essential to liberty is not alien to American political thought. Government officials and political theorists have long argued that the absence of laws (which can enable private power such as market and economic power) can pose a threat to individual liberty.[273] The political theorist John Rawls explained democratic theory in terms of people's "first interest in

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270. The Solicitor General, in defending the ACA, mentioned this during the oral argument in discussing the ACA's Medicaid expansion:

> There is an important connection, a profound connection between th[e] problem [of deficient health-care provisions] and liberty. And I do think it's important that we not lose sight of that. That in this population of Medicaid eligible people who will receive health care that they cannot now afford under this Medicaid expansion, there will be millions of people with chronic conditions like diabetes and heart disease, and as a result of the health care that they will get, they will be unshackled from the disabilities that those diseases put on them and have the opportunity to enjoy the blessings of liberty.

Transcript of Oral Argument at 82, *Sebelius*, 567 U.S. 519 (No. 11–393).

271. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1000 (Scalia, J., concurring in the judgment in part and dissenting in part), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

272. *Id.* at 980.

273. *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 478 (1923) (discussing the potential hindrances on individual freedom that would flow from either the presence or absence of governmental constraints); CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 16 (2004) (explaining that Roosevelt's second bill of rights speech "marked the utter collapse of the (ludicrous) idea that freedom comes from an absence of government"). For more historical and originalist analyses, see generally DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014); JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION (2022); and Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445 (2016).

government," which he defined as "just and effective legislation."[274] Even before the COVID-19 pandemic hit, a majority of Americans said the government should do *more* to solve problems.[275] These views reflect the idea that an active and efficacious government may sometimes be necessary to secure liberty just as restraining government may sometimes be.[276] The Court in *Seila Law* insisted that liberty means insulating market and economic power from the government when the constitutional settlement probably does not reflect *only* that view.[277]

Because the Court, in *Seila Law*, trained its focus on the idea that restraining the government is essential to protecting the people, it overlooked how empowering the government may protect the people and their prerogatives. That omission undermines the populist frame for the new substantive due process decisions. The cases imagine the Justices to be speaking on behalf of the downtrodden masses and protecting the people from the excesses of government when government and regulation will sometimes protect people's prerogatives. Indeed, the libertarian-like populism reflected in the new substantive due process cases is at odds with accounts of populism that are associated with wanting government to give people things, including various government benefits as well as freedom from abusive or fraudulent business practices.

Seila Law relied on another idea that sounded in political theory—that the solution to excessive government power was to divide power rather than concentrate it. Here too, there is at least something to be said for the Court's assertion; as *Seila Law* explained, if government action requires the consent of multiple parties, presumably that is harder to obtain than the consent of one person.[278] But once again, there is also something to be said for an opposing view, since consolidating power in one individual may produce another, different constraint. Consider *Seila Law*'s description of the Presidency. In *Seila Law*, the Court justified a presumptive requirement that

274. JOHN RAWLS, A THEORY OF JUSTICE, 227 (original ed. 1971); *see also* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 400–01 (2019) ("We should . . . revive a strain of thinking that connects the legitimacy of the administrative state to its ability to satisfy public aspirations . . . .").

275. PEW RSCH. CTR., IN A POLITICALLY POLARIZED ERA, SHARP DIVIDES IN BOTH PARTISAN COALITIONS 24 (2019), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2019/12/PP_2019.12.17_Political-Values_FINAL.pdf [https://perma.cc/8TRP-CZD6].

276. *See*, *e.g.*, Lakier, *supra* note 76, at 1243–48 (arguing that some regulations of speech may promote liberty); Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2120–21 (2018) (arguing that some regulation of speech may promote expressive equality).

277. *See* Sunstein & Vermeule, *supra* note 168, at 82–83 (identifying the view that many of the architects of the modern administrative law viewed regulation as a boon to liberty); FRANK BOURGIN, THE GREAT CHALLENGE: THE MYTH OF LAISSEZ-FAIRE IN THE EARLY REPUBLIC 54–56 (1989) (noting the Framers' preference for a powerful executive).

278. Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2203 (2020).

Presidents be able to remove executive officials on the ground that "the President's political accountability is enhanced by the solitary nature of the Executive Branch."[279] Here, the Court seems to be saying that single-person offices are more accountable than multimember offices, perhaps because single-person offices are easier to celebrate or criticize for their decisions. The increased accountability of single-person offices might lead some officials who occupy these offices to hesitate before taking action, because they know they will be blamed should anything go wrong. Again, this is not to say that single-person offices are more restrained than multimember ones. It is merely to point out that there are arguments on both sides. Additionally, single-person offices, which consolidate different powers in one person, may be burdened by resource constraints and time limitations that do not plague multimember offices. Offices led by a single individual have to run everything through a single individual who has a limited number of hours in a day, whereas multimember offices may be able to get more done by dividing responsibilities.

The claim that the President's accountability is enhanced by the solitary nature of the Executive Branch is also in some tension with the Court's efforts to differentiate the CFPB Director from the heads of multimember commissions. Recall that *Seila Law* impliedly suggested that Presidents might have less control over single-director agencies than multimember commissions. As Justice Kagan pointed out in dissent and during the oral argument, that was far from clear.[280] In some respects, the majority in *Seila Law* acknowledges this with respect to the Presidency. The majority asserted that "the Framers made the President the most democratic and politically accountable official in Government" and pointed to the fact that "the President's political accountability is enhanced by the solitary nature of the Executive Branch."[281] If single-person offices are "more accountable" than multimember offices, then a single director should be more accountable to the president than a multimember commission.[282] The new substantive due

279. *Id.* at 2203.

280. *See supra* notes 137–138 and accompanying text.

281. *Seila L.*, 140 S. Ct. at 2203.

282. The Court also insisted that the CFPB's single-Director structure was a unique affront to liberty, reasoning, "With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans." *Id.* at 2204. This claim, like the first one surveyed, involves the same two premises: one, that the threat to liberty comes from regulation or executive action, and the other, that the way to minimize that threat is to divide power rather than consolidate it. *See supra* text accompanying notes 259–282. *Seila Law* has other contestable claims sounding in political theory, including the idea that "the Framers made the President the most democratic and politically accountable official in Government." *Seila L.*, 140 S. Ct. at 2203. That is contestable in part because of the Electoral College. *See generally* Katherine Shaw, *"A Mystifying and Distorting Factor": The Electoral College and American Democracy*, 120 MICH. L. REV. 1285 (2022) (arguing primarily

process is not precise or careful enough to offer a well-thought-out view of accountability. In a single opinion, the Justices state that ensuring accountability is easier when an office is led by a single individual while they also imply that preserving accountability is harder when an office is led by a single individual. Perhaps both can be true given the context or particulars, but again the Court does not even try to hammer out exactly what accountability demands and when.

2. Jarkesy*: Purposive Rights-Based Analysis*.—The Seventh Amendment's turn toward liberty is less obviously steeped in loose political theory than the Court's removal cases. But there is still some political theory in both the *Jarkesy* majority opinion and Justice Gorsuch's concurrence.

The majority opinion in *Jarkesy* gestures toward concerns about executive abuse and tyranny. The closing of the opinion, for example, underscores "the right to be tried by a jury of his peers *before a neutral adjudicator*."[283] And it describes, with both concern and disdain, the prospect that Congress could "concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch."[284] These concerns are heightened, Justice Kavanaugh insisted during oral argument, "when the government is coming after you [rather] than [if] another private party" were to do so.[285]

For this reason, Justice Sotomayor's dissenting opinion in *Jarkesy* characterized the majority in this way: "By giving respondents a jury trial, even one that the Constitution does not require, the majority may think that it is protecting liberty."[286] In other words, the *Jarkesy* majority identified a Seventh Amendment violation in part because they felt that a jury would enhance people's liberty in cases involving the government. This calls to mind Chief Justice Roberts's dissent in *Obergefell*, which maintained that the majority in *Obergefell* had concluded the "fundamental right to marry" applies to same-sex couples "because" the majority believed "it will be good for [same-sex couples] and for society."[287]

In defending the Court's newly expansive conception of the Seventh Amendment jury trial right, Justice Gorsuch wrote more about the political

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that the Electoral College is dangerous to democratic principles). The President is not directly elected based on a national popular vote; for that reason, candidates who lost the national popular vote may become President, and they have. *Id.* at 1285–86. In part for that reason, it is difficult to argue the President is the most democratic and politically accountable official, at least relative to, say, individual members in the House of Representatives. In the absence of gerrymandered districts, individual congressional representatives have a claim to being at least as democratic and politically accountable as a President who is elected via the Electoral College.

283. SEC v. Jarkesy, 144 S. Ct. 2117, 2139 (2024) (emphasis added).

284. *Id.*

285. *Jarkesy* Oral Argument Transcript, *supra* note 16, at 29.

286. *Jarkesy*, 144 S. Ct. at 2175 (Sotomayor, J., dissenting).

287. Obergefell v. Hodges, 576 U.S. 644, 694 (2015) (Roberts, C.J., dissenting).

function of juries. Drawing from historical sources, Justice Gorsuch insisted that "[t]he participation of ordinary Americans" on juries "serves" the "function" of checking judges.[288] Justice Gorsuch added that the constitutional decisionmakers who chose to expand jury-trial rights beyond criminal cases were concerned about judges who were "always ready to protect the officers of government against the weak and helpless citizen."[289] He seemed to be positioning juries as political checks against government power, an account that reflects a plausible theory of the role of juries.[290]

Both the majority and Justice Gorsuch's implicit views of liberty harken back to *Seila Law*'s insistence on a *negative* vision of liberty—liberty *from* government regulation.[291] As the previous section explained, that vision is, at a minimum, oversimplified since there are reasonable accounts of how governance, law, and regulations sometimes enhance liberty. In the specific context of civil juries that seems plausible: Civil jury verdicts will not result in physical imprisonment, and it will not always be clear which way liberty cuts.[292] A jury verdict for a defendant may be liberty enhancing in some respects—it allows civil defendants to do things without incurring penalties. But in other respects, it might not be. Consider the facts of *Jarkesy*, which involve allegations that a business fraudulently misled investors. Does penalizing instances of fraud restrict liberty (because of the effects on the business)? Or does it enhance liberty (because of the effects on investors who are no longer fleeced)? There are plausible liberty interests secured by regulating such behavior: the economic liberty of consumers and investors. Regulations curtailing fraud expand consumers' options and open up possibilities for them. And that may be true in a fair number of scenarios where the government seeks to regulate in the public interest or to benefit large swaths of the population.[293]

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288. *Jarkesy*, 144 S. Ct. at 2144 (Gorsuch, J., concurring) (citing Letter from the Federal Farmer (Jan. 18, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 320 (Herbert J. Storing ed., 1981)).

289. *Id.* (quoting *Essay of a Democratic Federalist*, PA. HERALD, Oct. 17, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 61 (Herbert J. Storing ed., 1981)).

290. *See, e.g.*, Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 251, 273–74 (2019) (explaining this argument about the role of juries before also explaining why juries may not actually perform this role in the current system).

291. *See* text accompanying notes 247–264.

292. There are also questions about which way it would cut in some criminal cases. *See, e.g.*, Litman, *supra* note 265, at 251–55 (noting the role of habeas corpus as a tool for courts to rein in legislative overreach, but with varying implications for liberty).

293. *See, e.g.*, Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981, 1985 (1998) (describing the economic benefits of regulations protecting healthcare and the environment); Lisa Heinzerling & Frank Ackerman, *Law and Economics for a Warming World*, 1 HARV. L. & POL'Y REV. 331, 339–40, 356 (2007) ("The Court *sees* consequences when the government directly causes them, but dismisses them . . . when the government allows them to

The Court's decision in *Jarkesy* may undermine those liberty interests. By requiring agencies to proceed in federal court, rather than before agency adjudicators (in some ill-defined set of cases), *Jarkesy* may have jeopardized some agencies' ability to enforce federal laws at all. Congress has not authorized all agencies to proceed in both federal court and before agency adjudicators. Unlike the laws governing the SEC, Congress has authorized some agencies to enforce certain federal provisions only before agency adjudicators.[294] By (possibly) impeding agencies' ability to effectuate and enforce measures that may be liberty enhancing, *Jarkesy* may involve a more complex liberty calculus than the Court's loose political theory suggests. Even by requiring agencies that are authorized to proceed in both federal court and before agency adjudicators to proceed only in federal court, *Jarkesy* may raise the costs and obstacles to bringing enforcement actions. That may lead agency officials to decline to enforce federal law in smaller cases (which nonetheless involve liberty interests of some individuals), or in more debatable cases (which again may also involve liberty interests).

Jarkesy insists that liberty exists only when the executive branch is restrained, and that the real threat to liberty is consolidated executive power rather than ineffective executive power.[295] As the previous section explained, the reality is more complicated. Constitutional law safeguards against the risk of executive abuse and overreach. But it also reflects additional goals that are at odds with restraining the executive, such as promoting welfare and protecting liberty from abuses resulting from private market ordering.[296] In Alexander Hamilton's words, "A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory,

happen even when it is within its power to prevent them."); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1937–38 (2017) (arguing that there is "no basis in law" for the Court's distrust of agency regulation that fails to "consider costs before deciding to regulate" or that deals with "question[s] of large economic and political significance").

294. *See, e.g.*, 16 U.S.C. § 823b(c) (Federal Energy Regulatory Commission); 21 U.S.C. § 335b (Department of Health and Human Services); 29 U.S.C. § 666(j) (Occupational Safety and Health Review Commission); 30 U.S.C. §§ 820(a)–(b) (Federal Mine Safety and Health Review Commission).

295. The extent to which the agency adjudicators are agents of the executive branch may also be overstated. Another issue in *Jarkesy* was the constitutionality of the provisions that limited the ability to remove administrative law judges (ALJs) for political reasons; the officials could only be removed for cause (rather than at will) by members of the SEC, who themselves could only be removed for cause (rather than at will) by the President. 5 U.S.C. § 556(b); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 486–87 (2010). The two layers of removal protections insulate ALJs from political influence. Additionally, SEC ALJs are protected by provisions of the Merit Systems Protection Board. 5 U.S.C. § 7521(a). So unless and until the Court jettisons some of the mechanisms for insulating ALJs from executive control, the idea that adjudication before SEC ALJs is a consolidation of power in the executive branch seems a bit overstated. *See* Butz v. Economou, 438 U.S. 478, 513 (1978) (describing "the role of the modern federal hearing examiner or administrative law judge" as "functionally comparable" to that of a judge); *see also* 5 U.S.C. § 3105 (authorizing appointment of ALJs).

296. *See* text accompanying notes 247–264.

must be, in practice, a bad government."[297] Sometimes, avoiding bad execution will require empowering executive action.[298] Writing about the Court's cases on the Administrative Procedure Act, Cass Sunstein and Adrian Vermeule pointedly observed that "[c]onstraints have costs," and that some constraints "might even endanger liberty, however it is understood."[299] Yet the Court insists on taking a view of liberty that "is inherently limited and one-sided, a reflection of a subset of the relevant concerns."[300]

Once again, *Jarkesy* itself is illustrative. An energetic executive that enforces anti-fraud provisions of federal securities law will enhance the economic liberty of potential fraud victims; by ensuring their money isn't wrongfully taken in a scheme, it expands the set of options available to them. They may be able to afford college or a home or a vacation or earlier retirement that they otherwise could not. And there are reasons to think that agency adjudicators would be better at resolving these claims than juries in federal courts such that agency adjudication would be better for that aspect of liberty. For one thing, agencies have a deep knowledge and familiarity with the subject matter; complex markets and particular forms of securities may not be the bailiwicks of the average jury or judge.[301] Agencies are also bound by reasoned decisionmaking requirements that obligate an agency to explain its findings, which may promote rational decisionmaking.[302] And the precedents that agencies produce may provide guidance to regulated entities and a more stable body of law.[303] If proceeding in federal courts before juries hamstrings the enforcement of anti-fraud provisions, the liberty of both regulated entities and their victims could be negatively affected.

So here, as in *Seila Law*, the populist frame for the new substantive due process matters is more complicated than the Court's caricatured version that imagines the Court is protecting the people and their prerogatives from the overbearing elites within the administrative state. The Court's own decisions

297. THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

298. *See* text accompanying notes 245–264.

299. Sunstein & Vermeule, *supra* note 168, at 86.

300. *Id.* at 45; *see also id.* at 49, 82–83 (discussing different understandings of liberty that may be implicated by the presence or absence of executive authority, as well as competing constitutional considerations aside from liberty and preventing executive overreach).

301. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2413 (2019) (plurality opinion) ("If you are a judge, you probably have no idea what the FDA's rule means . . . ."); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 90 (abr. student ed. 1965) ("[T]he concept of expertise on which the administrative agency rests is not consistent with the use by it of a jury as fact finder.").

302. 5 U.S.C. §§ 701–706; FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021).

303. *See* Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 222 (2016) ("[A]n '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005))); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (explaining that an agency must "display awareness that it *is* changing position" and "show that there are good reasons for the new policy").

are made by a group of elite government decisionmakers: the Justices themselves. And the elites on the Court are limiting the extent to which government can give people what they want and what they need, which is somewhat at odds with populism.

These implications probably will not be limited to the SEC. Other agencies have authority to impose civil fines for claims that have *some* similarity to common law matters, which is why *Jarkesy* said federal securities claims must proceed in federal court with the option of a jury.[304] The EPA has the authority to seek civil fines for various kinds of pollution,[305] and claims challenging pollution have some similarities to public nuisance suits.[306] Already, after *Jarkesy*, the EPA is allowing defendants in enforcement proceedings to have federal juries conduct the factfinding.[307] The CFPB can impose civil penalties when regulated entities engage in "unfair" practices, such as where an entity takes "unreasonable" advantage of consumers.[308] Common law claims used to govern reasonable rates.[309]

There is some additional contestable theory buried in *Jarkesy*, including Justice Gorsuch's suggestion that juries are liberty enhancing because they are inclined to restrict excessive or abusive exercises of government power. There is an extensive body of literature about whether public opinion would in fact restrain the reach of laws, particularly criminal laws. It's not entirely clear which way the evidence goes, including whether the people who make up juries have more or less punitive views than the views embodied in harsh penal laws.[310] Indeed, around the time the Court decided *Jarkesy*, the Court decided a Sixth Amendment case about the reach of the jury-trial right in criminal cases. In that case, *Erlinger v. United States*,[311] Justice Jackson penned a lengthy dissent that suggested judicial factfinding may sometimes be more favorable and lenient to defendants than alternative sentencing schemes that restrict judicial-factfinding, which would make judicial factfinding liberty enhancing under Justice Gorsuch's and the *Jarkesy*

304. SEC v. Jarkesy, 144 S. Ct. 2117, 2127–28 (2024).

305. *See* 33 U.S.C. § 1319(d) (allowing civil fines for violations of various sections of federal environmental law).

306. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 415 (2011) (concluding the Clean Air Act and EPA action displace some public nuisance claims); City of Milwaukee v. Illinois, 451 U.S. 304, 307–08, 332 (1981) (holding the same for the Clean Water Act).

307. *E.g.*, Complaint at 7, United States v. Legacy Builders/Devs. Corp., No. 24 Civ. 6367 (S.D.N.Y. Aug. 22, 2024).

308. 12 U.S.C. §§ 5563, 5531(a), (d).

309. *See* Atchison, Topeka & Santa Fe R.R. Co. v. Denver & New Orleans R.R. Co., 110 U. S. 667, 674, 680–83 (1884) (using common law to resolve a rate dispute); Scofield v. Lake Shore & M.S. Ry. Co., 3 N.E. 907, 929 (Ohio 1885) (same).

310. *See, e.g.*, John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 773 (2020) ("But the [very lenient] Bronx jury is famous because it is exceptional . . . .").

311. 144 S. Ct. 1840 (2024).

majority's view of liberty.[312] While Justice Jackson's dissent focused on factfinding by Article III judges, it's not clear there would be a meaningful difference between Article III and non-Article III judges in this respect; at a minimum, the Court in *Jarkesy* did not offer evidence that there was any such difference, at least beyond the Court's invocations of hazy political theory.[313]

Justice Gorsuch's *Jarkesy* concurrence also drew on some political theory about the role of the judiciary in a system of separated powers. He argued that "the peculiar province of the judiciary" was "to safeguard life, liberty, and property," and therefore, "due process often meant *judicial* process."[314] Here too, it is plausible to claim that judges and courts are especially well suited to protect life, liberty, and property. But there is also considerable evidence to the contrary.[315] Scholarship has suggested judges and courts may be unlikely to vary much from the views of their contemporaries in the executive branch or the legislature with respect to protecting individual, minority rights from government overreach.[316]

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This subpart has identified three meaningful similarities between the new substantive due process and the old. Both trade on contestable and amorphous definitions of liberty; in doing so, both draw from rather loose and contestable political theory; and they both reflect some oversimplified gestures toward populism.

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312. *Id.* at 1880–83 (Jackson, J., dissenting).

313. The relevant materials, for example, try to draw out comparisons between the views of "the people" and "the elites" (meaning government officials as a singular category). *See, e.g.*, Rappaport, *supra* note 310, at 759–63 (arguing that "democratizers" are hypocritical in their approach to the general public, limiting the extent to which we can infer that public opinion would make criminal law less punitive).

314. SEC v. Jarkesy, 144 S. Ct. 2117, 2145 (2024) (Gorsuch, J., concurring) (quoting 1 GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. note D at 358 (Philadelphia, William Young Birch & Abraham Small 1803)).

315. *See, e.g.*, Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1516–19 (2010) (arguing that the Justices' close relationships with academics and journalists affect their holdings). Even if the claim were that courts are responsive to public opinion, that too would not necessarily differentiate them from other institutions. *Cf.* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 245, 255–58, 261–64, 269, 273, 370 (2009) (noting public backlash to the Warren Court); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA, at xii–xiii, 2–3, 59, 89–90, 169 (2006) ("[O]n the rare occasions when courts have acted unilaterally—trying to impose a constitutional vision that a majority of the country rejects—they have tended to provoke backlashes that often undermine the very causes the judges are attempting to advance.").

316. *See, e.g.*, Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6 (1996) ("My claim is only that the Court's capacity to protect minority rights is more limited than most justices or scholars allow.").

B. Explanations

This subpart considers several possible explanations for the emergence of a new substantive due process. It rejects the suggestion that the new substantive due process is less contestable or more determinate than the old. It also rejects the Court's effort to pitch the new substantive due process as more democratic than the old. The displacement of substantive due process probably reflects the reality that certain forms of reasoning are inevitable in constitutional law and may be particularly attractive in times of consolidated political control over the courts.

1. History and Determinacy

One might think that the new substantive due process is more defensible than the old if the new substantive due process were somehow more determinate and less rooted in contestable political theory. As the previous Part suggested, however, the new substantive due process, like the old, draws on contestable notions of liberty and political theory, and it would be difficult to maintain or even assess whether one context is somehow less contestable than the other.

To some, the new substantive due process cases may seem more determinate to the extent the new substantive due process cases are better rooted in history or originalism. It would be difficult to definitively compare the originalist bona fides of the three different areas of law, and that is not the goal of this Article. But there are reasons to be skeptical of the notion that the new substantive due process is more determinate because it is better rooted in history. For one thing, numerous scholars and Supreme Court Justices have presented persuasive evidence that there was no original determination that the executive power required the President to be able to remove other executive officers.[317] In the Seventh Amendment context, there are early cases that suggest all manner of public rights may be assigned to non-Article III courts; in *Jarkesy*, the Court attempted to cabin some of these cases by mistakenly describing one case from the early 1900s, *Crowell v. Benson*,[318] as a case about public lands.[319] There have also been originalist defenses of substantive due process and the existence of unenumerated rights more generally.[320]

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317. Manning, *Ordinary Interpretation*, *supra* note 118, at 1965–66, 2030–31; Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 361, 385 (1927).

318. 285 U.S. 22 (1932).

319. *Jarkesy*, 144 S. Ct. at 2133. *Crowell* concerned the award of workers compensation under federal law for workers on the navigable waters of the United States. 285 U.S. at 37.

320. *E.g.*, PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 9–10 (1997); Williams, *supra* note 62, at 415, 454. On unenumerated rights—which Justice

Even if the newer substantive due process cases were more rooted in history and originalism than the old, it does not necessarily follow that the new substantive due process would be more determinate. That is for two reasons. One is the general determinacy issues with respect to originalism and historical analysis, including whether originalism and historical analysis are more or less likely to yield clear answers than other modes of analysis, such as reliance on judicial precedent.[321] Asking lower courts in particular to sift through archives and historical materials raises various administrability issues that could undermine the determinacy originalism might in theory provide.[322]

There are further determinacy issues with the new substantive due process cases because of its treatment of prior case law. In both areas of law—removal and non-Article III courts—the Court effectively limited the precedential force of the Court's previous decisions on removal and non-Article III courts.[323] The Court said that it would not extend those precedents further, thereby limiting litigants' and courts' ability to reason from those decisions using traditional doctrinal analysis and common law reasoning. The Court's artificial limitations on previous cases inject some indeterminacy into constitutional analysis precisely because the limitations on and distinctions with those cases are artificial.[324] For example, *Seila Law* had to supply the removal analysis with a new distinction—whether a removal restriction is better or worse for liberty or consolidations of power—because the distinction that had animated the Court's previous cases, the extent of presidential control over an officer, would have meant upholding the removal restriction in *Seila Law*.[325]

Jarkesy's treatment of precedent suffered from similar flaws. The primary case *Jarkesy* had to distinguish was *Atlas Roofing*, which upheld

Thomas locates in the Privileges or Immunities Clause—more generally, see *McDonald v. City of Chicago*, 561 U.S. 742, 854 (2010) (Thomas, J., concurring in part and concurring in the judgment).

321. *See, e.g.*, Richard Primus, *supra* note 235, at 79–81 (arguing that originalism is not more of a constraint on judges than other interpretive methodologies); Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 213–16 (2008) ("Nor is it clear that a jurisprudence that used originalist reasoning as one method among several—say, alongside text and precedent—would always yield less discretionary decisionmaking than a jurisprudence that consulted text and precedent but not original meanings.").

322. *See* Litman, *supra* note 136, at 1482–87 ("Walling off existing precedent results in considerable transition costs . . . ."); United States v. Rahimi, 144 S. Ct. 1889, 1927 (2024) (Jackson, J. concurring) ("It isn't just that *Bruen*'s history-and-tradition test is burdensome (though that is no small thing to courts with heavier caseloads and fewer resources than we have).").

323. For examples of where the Court has done this elsewhere, see Litman, *supra* note 136, at 1485 and Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. 865, 868–69 (2019).

324. *See* Litman, *supra* note 136, at 1481–87 (outlining the administrability problems and arbitrariness created by antinovelty norms).

325. *See supra* text accompanying notes 119–124.

Congress's assignment of claims under the OSH Act to agency adjudications within OSHA.[326] *Atlas Roofing* reasoned that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency."[327] *Atlas Roofing* explained that OSH Act claims were "a new cause of action" and created "remedies therefor[] unknown to the common law."[328] *Jarkesy* did something quite different. Rather than relying on the fact that Congress had created new statutory rights that generated cases between the government and a private party and established a new cause of action (for violations of federal securities law), *Jarkesy* emphasized the nature of the penalties in the case, civil penalties, to explain why the claims implicated the Seventh Amendment. *Jarkesy* suggested that "remedy is all but dispositive."[329] But civil penalties were also at issue in *Atlas Roofing*,[330] and perhaps for that reason, *Jarkesy* introduced an additional distinction into the Seventh Amendment analysis, specifically, "[t]he close relationship between the causes of action in this case and common law fraud."[331] That reasoning, however, had to reframe and effectively jettison the reasoning from *Atlas Roofing*, which had emphasized that the federal claims under the OSH Act were "new" causes of action and "new statutory 'public rights.'"[332] The same was true of the federal securities claims at issue in *Jarkesy*—federal securities claims were not entirely coextensive with state common law fraud claims; federal securities law had expanded the rights and protections available under state common law fraud claims.[333] There was certainly a relationship between the federal and common law claims, but as *Atlas Roofing* had explained, "[w]e cannot conclude that the [Seventh] Amendment render[s] Congress powerless[]when it conclud[es] that remedies available in courts of law [are] inadequate to cope with a problem within Congress's power to regulate."[334]

The *Jarkesy* standard invites an analysis of the proximity and similarity between common law and statutory claims, which will probably turn on tricky questions of degree. For example, how close were the federal claims

326. Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 449, 461 (1977); *see* SEC v. Jarkesy, 144 S. Ct. 2117, 2136–37 (2024) ("The principal case on which the SEC and the dissent rely is *Atlas Roofing* . . . .").

327. 430 U.S. at 455.

328. *Id.* at 461.

329. 144 S. Ct. at 2129. The remedy, *Jarkesy* noted, varied according "to the perceived need to punish the defendant rather than to restore the victim." *Id.*

330. 430 U.S. at 444, 446.

331. 144 S. Ct. at 2130.

332. 430 U.S. at 445, 450, 455, 459–61.

333. *See* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 162 (2008) ("Section 10(b) does not incorporate common-law fraud into federal law."); SEC v. Cap. Gains Rsch. Bureau, Inc., 375 U.S. 180, 194 (1963) (explaining that "doctrines of fraud and deceit which developed around transactions involving land and other tangible items of wealth are ill-suited to the sale of such intangibles as advice and securities").

334. 430 U.S. at 460.

at issue in *Jarkesy* to common law fraud, at least relative to how close the federal claims at issue in *Atlas Roofing* were to common law claims like negligence? *Jarkesy* insisted that the OSH Act claims in *Atlas Roofing* "br[ought] no common law soil with them" and "resembled a detailed building code."[335] The former claim seems somewhat exaggerated—under the common law, employees could bring negligence claims against their employers in some cases where employers maintained unsafe working conditions that caused harm to employees.[336] So there was *some* common law soil in claims between employers and employees about unsafe workplace conditions. The OSH Act also requires employers to "furnish . . . employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to . . . employees."[337] The title of that section is "[d]uties," a word that borrows from common law torts.[338] Moreover, the "detailed building code" *Jarkesy* referred to were OSH Act regulations, not the federal statute.[339] There are some SEC regulations that are also quite detailed,[340] and the OSH Act contains general directives that sound like negligence claims, including in the aforementioned duties section.

2. Democracy

The new substantive due process cases have subtly and implicitly attempted to distinguish themselves from the old by co-opting the democracy critique of substantive due process. The old substantive due process cases had joined issue, in part, over how to protect the people's prerogatives. The majorities in cases like *Lochner* and *Griswold* had maintained they were protecting the people's liberties by warding off government overreach; the dissents had countered that the people's prerogatives were best protected by the legislature, and that the Court, by invalidating legislative enactments, was undermining the people's prerogative to govern themselves.[341] The dissents in *Obergefell* and *Lawrence* did something similar: While the majorities depicted the Court as securing the people's prerogatives and liberties, the

335. *Jarkesy*, 144 S. Ct. at 2137.

336. *See Atlas Roofing*, 430 U.S. at 445 (noting that "existing state statutory and common-law remedies for actual injury and death remain unaffected").

337. Occupational Safety and Health Act of 1970 § 5(a)(1), 29 U.S.C. § 654(a)(1).

338. *Id.*

339. 144 S. Ct. at 2137.

340. *See, e.g.*, 17 C.F.R. pt. 204 (Rules Relating to Debt Collection); 17 C.F.R. pt. 230 (General Rules and Regulations, Securities Act of 1933); 17 C.F.R. pt. 240 (General Rules and Regulations, Securities Exchange Act of 1934).

341. *See supra* notes 81–84 and accompanying text.

dissents chided the Court for writing off the views that were adopted by legislatures that represented the people's will.[342]

The new substantive due process cases have, with some awkwardness, attempted to ward off the critique that substantive due process is antidemocratic by co-opting it. The Justices who are refashioning the institutions of the administrative state sometimes purport to be doing so in the name of democracy. That is, not only do they claim to be protecting the people's prerogatives and liberties, they also purport to be preserving democracy. For the most part, the Justices have tried to do this by critiquing the administrative state as antidemocratic, which allows them to insist they are attacking elements of government that are antidemocratic.[343] In the new substantive due process cases, liberty sounds in both populist-like and democracy-oriented registers.

In the removal cases, for example, the Republican Justices have characterized agencies that are insulated from presidential removal as instances where the people are "being ruled by functionaries" and "experts."[344] According to the Court, that contravenes the constitutional design, which was "adopted to enable the people to govern themselves, through their elected leaders," and it "heightens the concern that" government "may slip from the Executive's control, and thus from that of the people."[345] These themes appear in myriad other administrative law cases as well.[346] Justice Gorsuch has warned about "government by bureaucracy

342. *See* Obergefell v. Hodges, 576 U.S. 644, 686–87 (2015) (Roberts, C.J., dissenting) ("The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition."); *id.* at 687 (accusing the majority of "[s]tealing this issue from the people"); *id.* at 688 (proclaiming "this dissent is about . . . whether, in our democratic republic, th[e] decision should rest with the people acting through their elected representatives"); Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) (identifying "the benefits of leaving regulation of this matter to the people rather than to the courts").

343. *See* Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3 (2017) ("[T]hey have attacked the modern administrative state as a threat to liberty and democracy . . . .").

344. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010).

345. *Id*; *see also* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2204 (2020) (quoting *Free Enter. Fund*, 561 U.S. at 499).

346. *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 91 (2015) (Thomas, J., concurring in the judgment) ("We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure."). They also appear in the corresponding political movement. *See, e.g.*, STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE 3 (2021) ("In Trump's America, the Deep State came to stand for cadres of administrators operating throughout the executive branch who put their own interests and ideology ahead of the preferences of the nation's 'chief' executive."); Jonathan Allen, *Awaiting Possible Indictment, Trump Rallies in Waco and Vows to 'Destroy the Deep State,'* NBC NEWS (Mar. 25, 2023, 10:00 PM), https://www

supplanting government by the people."[347] He has tried to sound an alarm about "a regime administered by a ruling class of largely unaccountable 'ministers.'"[348] He has characterized administrative governance as "enabl[ing] intrusions into the private lives and freedoms of Americans by bare edict."[349] Justice Alito, joined by Justices Thomas, Gorsuch, and Barrett, insisted that today, "most federal law" is made through "rules issued by unelected administrators."[350] And Justice Scalia, joined by Justice Thomas, had similarly maintained: "Too many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress."[351]

Ultimately, however, the new substantive due process seems no less antidemocratic than the old. Even though the Court pitches these cases as courts versus the administrative state, the cases are still about courts versus legislatures, specifically Congress.[352] It was Congress that established the removal restrictions in *Seila Law*, and it was Congress that established the system for adjudicating federal securities claims in *Jarkesy*. So the new substantive due process cases still prioritize federal judges' accounts of liberty over those of democratically elected representatives.

Even if the new substantive due process cases came down to courts versus agencies, moreover, it's far from clear that courts would have the democratic upper hand. There is a vast literature documenting and defending

.nbcnews.com/politics/awaiting-possible-indictment-trump-rallies-waco-rcna75684 [https://perma.cc/EEU3-CG4R] (quoting then-former President Trump's warning that "[e]ither the deep state destroys America or we destroy the deep state").

347. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (quoting Antonin Scalia, *A Note on the Benzene Case*, REGUL., July/Aug. 1980, at 25, 27).

348. West Virginia v. EPA, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (quoting THE FEDERALIST NO. 11, at 85 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

349. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring).

350. Biden v. Missouri, 142 S. Ct. 647, 659 (2022) (Alito, J., dissenting).

351. EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 525 (2014) (Scalia, J., dissenting); *see also* Rapanos v. United States, 547 U.S. 715, 721 (2006) (plurality opinion) (characterizing the U.S. Army Corps of Engineers as "exercis[ing] the discretion of an enlightened despot").

352. *See* Anya Bernstein & Cristina Rodríguez, *Working with Statutes*, 103 TEXAS L. REV. (forthcoming Apr. 2025) (manuscript at 47), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4906895 [https://perma.cc/59ML-VPXW] (highlighting the tension between courts and Congress by arguing that forcing Congress to constantly legislate is unduly burdensome); Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2226 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (characterizing the majority as "second-guessing the political branches").

administrative agencies' democratic bona fides.[353] Recently, Cristina Rodríguez and Anya Bernstein have argued that democracy depends on a kind of accountability that is reflected in how agencies work today—namely, "government actors . . . justify[ing] their positions," "consider[ing] multiple perspectives in their decision-making," and "serv[ing] as sites for the contestations, negotiations, and provisional outcomes that characterize any successful democracy."[354] Based on interviews with agency officials, Rodríguez and Bernstein have argued that agencies are "a central way our system of government addresses dead-hand problems, balancing continuity and change and ameliorating naturally occurring intertemporal tensions."[355] So it's not clear that Congress is acting undemocratically by empowering agencies.

3. Inevitability and Political Homogeneity

Another possible explanation for the emergence of the new substantive due process is that the kind of analysis embodied in both the new and old substantive due process cases is inevitable in constitutional law.[356] The new and old substantive due process involve analysis that does not turn on the interpretation of specific words in the constitutional text, and that instead sounds in ideas and reasoning resembling political theory. Such analysis may sometimes be inevitable in constitutional cases in part because of the nature of constitutional law—the Constitution is a relatively short document compared to the myriad questions about governance that will arise over time.[357] Constitutional law also concerns the nature of government and the politics of governance. In that space, legal analysis will inevitably sound in a register that calls to mind some political theory, whether the theory concerns the role of government vis-à-vis individuals, the proper balance and allocation of power between different branches of government, the proper balance of power between different levels of government (the federal government and the states), or other considerations, including conceptions of liberty. All of those are potentially relevant to legal analysis. But they also

353. *See generally, e.g.*, Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023) (arguing that the major questions doctrine can obscure antidemocratic decisions by the Court); Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1 (2022) (suggesting that administrative law is consonant with an agonistic view of democracy); Bernadette Meyler, *The Majoritarian Difficulty*, 132 YALE L.J.F. 290 (2022) (noting that Walters' agonistic view of democracy requires upsetting the dominant notion of majoritarian democracy).

354. Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1604–05 (2023).

355. Bernstein & Rodríguez, *supra* note 352 (manuscript at 7).

356. *Cf.* Metzger, *supra* note 169, at 101–05 (documenting instances).

357. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget, that it is *a constitution* we are expounding.").

sound in political theory, which will generate some constitutional analysis that is less than textual and sometimes contestable.[358]

That reality suggests the dissonance between the new and old substantive due process may not be sensibly resolved by simply insisting the Court abandon the former because it criticizes the latter. A more realistic response is that a Court that is willing to shoot for the liberty moon in cases like *Jarkesy* and *Seila Law* should not be in the business of radiating contempt for the old substantive due process, individual-rights line of cases.

That being said, there is reason to demand that the new substantive due process be substantially more cabined and humble than cases such as *Jarkesy* and *Seila Law*. As this section and the preceding section have explained, there are plausible accounts of liberty that cut against the cases' myopic insistence that liberty requires the absence of government regulation, and there is evidence that undermines any grand claim that the Constitution has a single-minded focus on securing liberty by restraining the government. The two cases are not even on the same page as to the latter: *Jarkesy* disempowers the executive branch, while *Seila Law* empowers the executive branch, or at least part of it (the Presidency)—all in the name of liberty.[359] That is almost doublespeak in the way it conceives of liberty in relation to the people, since it admits that a strong executive can both enhance and infringe liberty depending on the context.[360] To be sure, the conservative legal movement has often coupled a belief in expansive presidential power with a desire to weaken the administrative agencies housed within the executive branch.[361] But that seems to underscore how the new substantive due process tracks personal preferences and political philosophies.

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358. *See, e.g.*, Leah M. Litman, *"Hey Stephen,"* 120 MICH. L. REV. 1109, 1114–15 (2022) (explaining that decisions interpreting the Constitution may implicate different "plausible values" or "reasonably weigh[] the values differently").

359. *Cf.* Metzger, *supra* note 343, at 37 (noting that while "those fearing unaccountable power often advocate greater presidential control" over agencies, "from an aggrandized power perspective, such a response may simply worsen the problem").

360. The Court, in *Seila Law*, also conveyed an enthusiasm for and an expectation that agencies would change policies based on presidential administrations even though the Court expressed considerable hostility to the same in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). *See* Daniel T. Deacon & Leah M. Litman, *Two Takes on Administrative Change from the Roberts Court*, 62 HARV. J. ON LEGISL. ONLINE 1, 2 (2024) ("[W]hereas in the removal cases, the Court views itself as ensuring that a President holds broad influence over an agency's policy positions, *Loper Bright* restricts the degree to which agencies can adapt based on the views of the President."); *id.* at 8 ("*Seila Law* thus stands in sharp contrast to *Loper Bright*.").

361. *See* Charlie Savage, *Legal Conservatives' Long Game: Amp Up Presidential Power but Kneecap Federal Agencies*, N.Y. TIMES (July 4, 2024), https://www.nytimes.com/2024/07/04/us/politics/conservative-legal-movement-supreme-court.html [https://perma.cc/D9C4-JPMX] ("In the eyes of the conservative legal movement, presidential power is good while that of regulatory agencies—even though they are housed in the executive branch—is bad.").

The reality is there are a wide range of institutional arrangements concerning the allocation of power between the executive branch and the courts, agency adjudications and federal court adjudications, presidential power and officer independence, and congressional design and presidential power; and many of those arrangements represent plausible accounts for how best to advance liberty. Most of the arrangements will probably involve some liberty–liberty tradeoffs. All of that counsels in favor of courts proceeding with caution in the new substantive due process space when invoking blurry, ill-defined, and over-simplified accounts of liberty that seemingly run in opposite directions than the account of liberty that was selected by the democratically elected branches of government.[362] It may even suggest that courts are not the proper venue in which freestanding liberty claims concerning the allocation of power between Congress and the executive branch, or the executive branch and courts, should be resolved—at least outside of truly extreme cases and outlandish arrangements.

Another explanation for the emergence of the new substantive due process cases is that this particular method of constitutional analysis will be both more common and more aggressive in eras of political and ideological homogeneity in judicial decisionmaking bodies.[363] When one political or partisan group controls the Supreme Court, the possibility of courts engaging with a little political theory and looking beyond precise constitutional text may be less concerning to the group that controls the Court. People with similar partisan affiliations and political views will share similar conceptions of liberty; those views about liberty will not seem as unmoored, or as off the wall, as the views of people who have different partisan affiliations and political views.[364] For that reason, the members of a group that control an institution like the Supreme Court may feel comfortable engaging in that kind of analysis when there is ideological consensus and cohesion (at least on certain high-salience matters), compared to times when the Justices' views are more heterodox. The Justices in the ideological majority may be less concerned about where the analysis will go because they think it is more likely to generate results that resonate with them. Now that the Supreme Court has a supermajority of Republican-appointed Justices, members of that group engage in more freewheeling constitutional analysis.

362. *Cf.* Metzger, *supra* note 169, at 99, 105–07 (advocating the same in federalism cases).

363. Sunstein & Vermeule, *supra* note 168, at 86 (likening some analogues to "free-form constitutional law, ultimately based on the judges' own policy preferences, and Dworkin's conception of law as integrity, which attempts to fit the existing legal matters but also to justify them by casting them in what seems (to the interpreters) to be the best or most appealing light" (citation omitted)).

364. Litman, "*Hey Stephen*," *supra* note 358, at 1113–17; LEAH LITMAN, LAWLESS, chapter 5 (2024).

There is considerable evidence that Republican-appointed Justices and judges were selected for particular views on liberty and political theory. With respect to the current Supreme Court and the current Republican Party, there has been a clear emphasis on how laws, regulations, and administrative agencies are a threat to liberty and how courts are a proper venue for addressing that perceived threat. The Justices and judges were selected for a set of political–legal views that are a core part of the Republican Party. One of those views is the idea that the Constitution has nothing to say about laws restricting abortion and reproductive health care but does have something to say about how the government goes after entities accused of securities fraud. Another is a hazy sense that liberty is negatively affected by the presence of government, laws, and regulations, rather than their absence (at least outside of women's reproductive health care and other social policies). This idea has been a part of Republican politics since at least the 1980s. When Ronald Reagan accepted the Republican presidential nomination in 1980, his speech included a claim that "a tiny minority opposed to economic growth . . . finds friendly ears in regulatory agencies."[365] In his 1989 farewell address, he signed off with the claim that "Man is not free unless government is limited."[366] In 2023, Republican presidential candidate Vivek Ramaswamy announced: "The only war that I will declare as U.S. president will be the war on the federal administrative state."[367] That same year, Republican Speaker of the House Mike Johnson declared the "administrative state . . . is out of control."[368] And the 1980 platform of the Republican Party promised the "appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life,"[369] while the 2016 platform read:

> Only a Republican president will appoint judges who respect the rule of law . . . including the inalienable right to life and the laws of nature

365. Ronald Reagan, Address Accepting the Presidential Nomination at the Republican National Convention in Detroit (July 17, 1980), https://www.presidency.ucsb.edu/documents/address-accepting-the-presidential-nomination-the-republican-national-convention-detroit [https://perma.cc/3KD7-QX2Z].

366. salim000001, *Ronald Reagan Speech: "Man Is Not Free Unless Government Is Limited*," YOUTUBE (Oct. 13, 2013), https://www.youtube.com/watch?v=dC3x7fvUGwo [https://perma.cc/6YDG-3RSA].

367. Robin Bravender & Timothy Cama, *Debate Takeaways: GOP Bashes "Deep State," Climate Law*, E&E NEWS (Aug. 24, 2023, 1:46 PM), https://www.eenews.net/articles/debate-takeaways-gop-bashes-deep-state-climate-law/ [https://perma.cc/FZ8E-F9G8].

368. Brianna Herlihy, "*Death by a Thousand Cuts": Louisiana Republican Blasts Economic Damage from "Administrative" State*, FOX NEWS (May 24, 2023, 4:13 PM), https://www.foxnews.com/politics/death-by-thousand-cuts-louisiana-republican-blasts-economic-damage-administrative-state [https://perma.cc/S2V5-6554].

369. *Republican Party Platform of 1980*, AM. PRESIDENCY PROJECT (July 15, 1980), https://www.presidency.ucsb.edu/documents/republican-party-platform-1980 [https://perma.cc/92LC-PP98].

> and nature's God, as did the late Justice Antonin Scalia. . . . Only such appointments will enable courts to begin to reverse the long line of activist decisions—including *Roe*, *Obergefell*, and the Obamacare cases . . . .[370]

There has been extensive reporting about how the Republican Party selected judges who believe both that liberty is threatened by the administrative state and that judges must do something about that perceived threat.[371] Trump's then-White House counsel said,

> What you're seeing is the president nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus . . . . There is a coherent plan here, where the judicial selection and the deregulatory effort are really the flip side of the same coin.[372]

Senator Mitch McConnell told *The New York Times* that "[d]ismantling the administrative state . . . has been the motivating force" for nearly every "Federalist Society-type lawyer."[373] Selecting judges with that as an emphasis will ensure some consistency among the group that is pursuing this new doctrinal path.

The old substantive due process was not the chosen vehicle to advance that agenda, though there may yet be some opportunities for it to reemerge. *BMW of North America v. Gore*[374] insisted the Due Process Clause said something about the permissible multiplier between compensatory and punitive damages.[375] More recently, in *Moore v. United States*,[376] some Justices who are openly hostile to the classic individual-rights substantive due process line of cases invoked the substantive component of due process as a constitutional limit on the government's ability to attribute income

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370. REPUBLICAN NAT'L COMM., REPUBLICAN PLATFORM 2016, at 10 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf [].

371. *E.g.*, Savage, *supra* note 361; Jeremy W. Peters, *Trump's New Judicial Litmus Test: Shrinking "the Administrative State,"* N.Y. TIMES (Mar. 26, 2018), https://www.nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html [https://perma.cc/2HZP-4EK5].

372. David Weigel, *Conservatives Battle the Left, Without a Clear Foe*, WASH. POST (Feb. 22, 2018, 7:45 PM), https://www.washingtonpost.com/powerpost/conservatives-battle-the-left-without-a-clear-foe/2018/02/22/6fb14ae4-180d-11e8-92c9-376b4fe57ff7_story.html [https://perma.cc/EJJ2-4VP9].

373. Carl Hulse, *Architects of the Trump Supreme Court See Culmination of Conservative Push*, N.Y. TIMES (July 3, 2024), https://www.nytimes.com/2024/07/03/us/politics/trump-supreme-court-conservative-push.html [https://perma.cc/CHJ4-38FA].

374. 517 U.S. 559 (1996).

375. *Id.* at 568 ("Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."); *id.* at 598–99 (Scalia, J., dissenting) ("I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against 'unfairness' . . . .").

376. 144 S. Ct. 1680 (2024).

earned by one entity to another for tax purposes. *Moore* rejected a Sixteenth Amendment challenge to the mandatory repatriation tax that imposed a pass-through tax on undistributed income of American-controlled foreign corporations to American shareholders.[377] The majority opinion dropped a footnote to say the federal government "acknowledge[d] that there are due process limits on attribution to ensure that the attribution is not arbitrary" but noted the taxpayers had not raised such a challenge.[378] A concurrence by Justice Barrett, joined by Justice Alito, noted that the attribution question, which sounds in substantive due process, "would present a different case" for other taxes, such as "a tax on shareholders of a widely held or domestic corporation."[379] At oral argument, Justice Alito confirmed with Solicitor General Prelogar that the government's position was that "limits on Congress's ability to attribute income that was realized by one taxpayer to another taxpayer" is a "question of substantive due process."[380]

Still, there may be some discomfort with using the old, traditional substantive due process as the basis for the new substantive due process cases that rely on hazy, contestable conceptions of liberty to refashion the institutions of the administrative state. That may be because the political–ideological group engaging in the new substantive due process had used critiques of the old substantive due process as a basis to undercut *Roe* and challenge other decisions.[381] The hydraulics of constitutional law then pushed the new substantive due process trained on the administrative state elsewhere.

Conclusion

The Supreme Court has seemingly transposed aspects of substantive due process onto other areas of law. Now, in both presidential removal matters and cases involving Congress's assignment of claims to non-Article III tribunals, the Court has fashioned doctrines to analyze statutes in terms of whether they cohere with the Justices' generalized conceptions of liberty. Thus far, the new substantive due process has relied on contestable notions of liberty and political theory to reshape the institutions of the administrative state.

What might it do next?

One possibility is that the new substantive due process remains where it is—in removal and non-Article III courts matters concerning the

377. *Id.* at 1685.

378. *Id.* at 1691 n.4.

379. *Id.* at 1700 (Barrett, J., concurring in the judgment).

380. Transcript of Oral Argument at 67, *Moore*, 144 S. Ct. 1680 (No. 22-800).

381. *See* Siegel, *supra* note 54, at 1149–52 (detailing the Reagan administration's post-*Roe* judicial strategy).

administrative state. Another possibility is that it will expand to other areas of law governing the administrative state, and a third possibility is that it will creep into other areas of law that go beyond administrative agencies.

This Conclusion explores all three possibilities with reference to the political movement that is associated with the rise of these legal doctrines. Political movements have the potential to shape judge-made law, perhaps especially so when that law is framed in terms of general notions of liberty; political movements may provide more specific guidance and talking points about their understanding of liberty.[382] Indeed, the political movement associated with the new substantive due process has already signaled where it may be trying to push the law next. That movement, which propounds the excesses of the administrative state and its purported threats to liberty, has taken over the federal executive branch and the United States Senate. There may, accordingly, be attempts to refashion the administrative state from within the executive branch, including through new judicial appointments. And the judges and Justices who have already been appointed by that movement may also be emboldened to themselves do more vis-à-vis the administrative state. Even if the new substantive due process is limited to removal and non-Article III court matters, it could do some additional work in those areas.

As for removal restrictions, there are several entities that could be affected by the Court's freewheeling, liberty-based separation of powers jurisprudence: independent agencies, writ large; administrative law judges; and the civil service more broadly.

A liberty-centric removal jurisprudence could threaten the continued vitality of independent agencies—agencies whose heads are insulated in some respects from removal by the President. Some of the signals that this may be a next frontier come from Project 2025, the policy plans laid out for the next Republican administration by the Heritage Foundation and at least 100 other Republican-affiliated organizations.[383] The Department of Justice

382. *See, e.g.*, Reva B. Siegel, *Introduction: The Constitutional Law and Politics of Reproductive Rights*, 118 YALE L.J. 1312, 1312–13 (2009) ("[L]aw does not shape public opinion; instead, public opinion shapes law."); Reva B. Siegel, *How Conflict Entrenched the Right to Privacy*, 124 YALE L.J.F. 316, 316, 319–21 (2015) ("[T]he Constitution's meaning is shaped by conflict as well as by consent."); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 201–02 (2008) ("[I]t is judicial interpretation of the Constitution that is responsive to popular constitutionalism."); Siegel, *supra* note 54, at 1148–49, 1153–54 (arguing that originalism was developed as a method for attacking *Roe*); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1323–25, 1332 (2006) ("Social movement conflict, enabled and constrained by constitutional culture, can create new forms of constitutional understanding . . . .").

383. *Policy Agenda*, PROJECT 2025 PRESIDENTIAL TRANSITION PROJECT, https://www.project2025.org/policy/ [https://perma.cc/4N4S-GYSU]; *About Project 2025*, PROJECT 2025

section of Project 2025's Policy Agenda (*Mandate for Leadership: The Conservative Promise*) calls for DOJ to ask the Court to overrule *Humphrey's Executor v. United States*, the early judicial decision upholding removal restrictions on agency heads.[384] Two Justices, Thomas and Gorsuch, have already signed an opinion indicating they would overrule *Humphrey's Executor*.[385] And as a judge on the U.S. Court of Appeals for the D.C. Circuit, then-Judge Kavanaugh wrote that "independent agencies collectively constitute, in effect, a headless fourth branch of the U.S. Government."[386] The same writing declared there is "a strong argument . . . that independent agencies violate Article II."[387]

The interconnected political and legal movements have challenged independent agencies, including the Federal Reserve Board, which historically has enjoyed considerable independence.[388] The Republican candidate for President in 2024, Donald Trump, repeatedly challenged the norms of independence governing the Fed, such as when he asserted that "the president should have at least [a] say" concerning the Federal Reserve Board's interest-rate decisions.[389] During the first Trump administration, he publicly lobbied the Board's chair over interest rates.[390] He could do more still during the second Trump administration. Doctrinally, the U.S. Court of Appeals for the Fifth Circuit invalidated the funding structure of the CFPB with a theory that raised questions about the constitutionality of the Federal

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PRESIDENTIAL TRANSITION PROJECT, https://www.project2025.org/about/about-project-2025/ [https://perma.cc/VLM7-GLV3].

384. Gene Hamilton, *Department of Justice*, *in* MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 545, 560 (Paul Dans & Steven Groves eds., 2023), https://static.project2025.org/2025_MandateForLeadership_CHAPTER-17.pdf [https://perma.cc/28EF-RLD7] [hereinafter PROJECT 2025 POLICY AGENDA].

385. Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2211–12 (2020) (Thomas, J., concurring in part and dissenting in part).

386. PHH Corp. v. CFPB, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

387. *Id.* at 179 n.7.

388. *See* Sam Sutton, *Trump Says Presidents Have the Right to Influence Fed Policy*, POLITICO (Aug. 8, 2024, 5:19 PM), https://www.politico.com/news/2024/08/08/trump-fed-powell-bank-2024-elections-00173299 [https://perma.cc/S7XQ-6UGM] (describing President Trump's efforts to break the historical norm of Fed independence); Marco Quiroz-Gutierrez, *Donald Trump Thinks He Should Influence Fed Rates—Here's What History and the Law Say*, FORTUNE (Aug. 11, 2024, 4:22 PM), https://fortune.com/2024/08/11/donald-trump-interest-rates-fed-independence-jerome-powell-richard-nixon/ [https://perma.cc/NH7P-H8S6] (same).

389. Geoff Bennett, Diane Lincoln Estes & Azhar Merchant, *How Trump's Wish for More Federal Reserve Control Could Impact Economy if He's Reelected*, PBS NEWS (Aug. 13, 2024, 6:30 PM), https://www.pbs.org/newshour/show/how-trumps-wish-for-more-federal-reserve-control-could-impact-economy-if-hes-reelected [https://perma.cc/4Z7R-V4HG].

390. Sutton, *supra* note 388.

Reserve Board's structure.[391] Although the Supreme Court ultimately rejected the theory, a Court of Appeals and two Justices embraced it.[392]

The Court's new removal jurisprudence could also affect administrative law judges (ALJs), the relatively independent adjudicators housed within administrative agencies. Some ALJs are protected from removal by the President through at least two layers of removal restrictions—ALJs can be removed, only for cause, by agency heads who may themselves be removable only for cause by the President.[393] In some cases, the Merit Systems Protection Board, another agency, must make a finding about whether there is cause to remove an ALJ.[394] In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court invalidated a dual layer of removal restrictions on the PCAOB officers, but specifically reserved the question of whether its holding extended to ALJs.[395] In *Jarkesy* the U.S. Court of Appeals for the Fifth Circuit invalidated the dual layer of removal restrictions on SEC ALJs.[396] While the Supreme Court did not reach that issue,[397] with the Fifth Circuit's decision in *Jarkesy* still out there, the issue may be headed back to the Court soon. And the Court has already signaled that it has some concern with insulating ALJs from presidential control: In *United States v. Arthrex, Inc.*,[398] the Court refashioned the structure of patent law after concluding the judges on the Patent Trademark Appeals Board were not sufficiently subject to presidential control.[399]

The corresponding political movement has also been broadly skeptical of the independence of the federal civil service, of which ALJs are a part. At the end of the first Trump administration, President Trump issued Executive Order 13957, which reclassified a number of career civil servants within administrative agencies. The Executive Order (EO) established "an exception to the competitive hiring rules and examinations for career positions" for officials "who discharge significant duties and exercise

391. Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB, 51 F.4th 616, 635 (5th Cir. 2022), *rev'd*, 144 S. Ct. 1474 (2024). For implications for the Federal Reserve Board, see Transcript of Oral Argument at 4, 14, 74–76, *Cmty. Fin. Servs. Ass'n of Am.*, 144 S. Ct. 1474 (No. 22-448).

392. *Cmty. Fin. Servs. Ass'n of Am.*, 144 S. Ct. at 1480; *id.* at 1493 (Alito, J., dissenting).

393. *See supra* note 295 (discussing ALJs and *Free Enterprise Fund*).

394. *E.g.*, 5 U.S.C. § 7521(a).

395. 561 U.S. 477, 484–87 (2010); *id.* at 507 n.10 ("For similar reasons, our holding also does not address that subset of independent agency employees who serve as administrative law judges.").

396. Jarkesy v. SEC, 34 F.4th 446, 463 (5th Cir. 2022), *aff'd*, 144 S. Ct. 2117 (2024).

397. *Jarkesy*, 144 S. Ct. at 2127–28 ("Since the answer to the jury trial question resolves this case, we do not reach the nondelegation or removal issues.").

398. 141 S. Ct. 1970 (2021).

399. *Id.* at 1985–88. For relevant scholarship on the structure of these agencies, see generally Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141 (2019) and Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1 (2023).

significant discretion in formulating and implementing executive branch policy and programs."[400] In other words, the EO increased the number of individuals who are political appointees subject to greater presidential control and influence. Invalidating the removal restrictions applicable to ALJs would do the same. Project 2025 calls for a "reinstate[ment]" of EO 13957, which was rescinded by the administration of President Joe Biden.[401]

Political signals suggest this movement for greater presidential control over the federal administrative apparatus extends beyond ALJs and to the civil service more broadly, which is the third place the Court's new liberty-focused removal jurisprudence may yet go. As Kate Shaw has written, "Over the course of his term in office, President Trump grew increasingly willing to challenge nonpartisanship values directly," including those governing the civil service.[402] Before he was the Republican candidate for Vice President in 2024, JD Vance called for the replacement of "every civil servant" with political loyalists—recommending in a podcast that Trump "fire every single midlevel bureaucrat, every civil servant in the administrative state" and "replace them with our people."[403] They may experiment with some version of that plan over the next four years.

There are also some clues about the future of non-Article III courts. Project 2025 called for the elimination of essentially all administrative adjudications within the SEC, the agency at issue in *Jarkesy*.[404] The proposal seemed to call for the end of equitable remedies before the SEC, which would likely require converting and repurposing the *Jarkesy* Seventh Amendment analysis into an Article III-based jurisprudence. Project 2025 also called for limits on the CFPB's system for administrative adjudications; one of its proposals is to "[r]equire that respondents in administrative actions be allowed to elect whether an adjudication occurs in an administrative law court or an ordinary Article III federal court."[405]

Another possibility is that the new substantive due process remains generally trained on the administrative state but moves beyond the specific areas of law (removal and non-Article III courts) where it has thus far appeared. For example, the Court could wield a liberty-focused account of the separation of powers to rework the law governing appointments and

400. Exec. Order No. 13957, 85 Fed. Reg. 67631 (Oct. 26, 2020).

401. Donald Devine, Dennis Dean Kirk & Paul Dans, *Central Personnel Agencies: Managing the Bureaucracy*, *in* PROJECT 2025 POLICY AGENDA, *supra* note 384, at 69, 80–81.

402. Katherine Shaw, *Partisanship Creep*, 118 NW. U. L. REV. 1563, 1568 (2024).

403. James Pogue, *Inside the New Right, Where Peter Thiel Is Placing His Biggest Bets*, VANITY FAIR (Apr. 20, 2022), https://www.vanityfair.com/news/2022/04/inside-the-new-right-where-peter-thiel-is-placing-his-biggest-bets [https://perma.cc/M8U6-2F2M].

404. David R. Burton, *Securities and Exchange Commission and Related Agencies*, *in* PROJECT 2025 POLICY AGENDA, *supra* note 384, at 829, 833.

405. Robert Bowes, *Consumer Financial Protection Bureau*, *in* PROJECT 2025 POLICY AGENDA, *supra* note 384, at 837, 839.

expand the definition of who constitutes an officer.[406] Employees of the federal government are not subject to the constitutional rules governing the appointment of officers, which means Congress has more latitude to structure how employees may be appointed (perhaps through competitive hiring procedures and not by a President or agency head).[407] In *Lucia v. SEC*,[408] both Justices Thomas and Gorsuch urged the Court to adopt a broad definition of officers to "encompass[] all federal civil officials 'with responsibility for an ongoing statutory duty.'"[409] The principal academic proponent of such a theory, Jennifer Mascott, has conceded that the theory would "require a significant portion of civil service employees to undergo Article II officer appointment," though she also suggested it would not necessarily completely destroy the civil service structure.[410]

It is also possible the Court will resurrect a nondelegation doctrine. Five of the six Republican appointees on the Court have signaled an openness to reviving the nondelegation doctrine, which would limit Congress's ability to give agencies the authority to adopt regulations pursuant to a general standard, at least outside of some hazily defined exceptions.[411] Justice Gorsuch even defended a renewed nondelegation doctrine in terms of "liberty."[412] In *Jarkesy*, the U.S. Court of Appeals for the Fifth Circuit invalidated the SEC's enforcement scheme on the basis of the nondelegation doctrine.[413] After the Supreme Court did not reach the nondelegation issue in that case, the Fifth Circuit invalidated another federal regulatory program on nondelegation grounds.[414]

The Court might generate other doctrinal innovations to refashion the administrative state in the name of liberty. There are many indications of a general anti-administrativist bent in Republican politics as well as in the judicial doctrine generated by Republican appointees. (Anti-administrativism is Gillian Metzger's term for "strong rhetorical

406. *See supra* text accompanying notes 384–387.

407. *See* U.S. CONST. art. II, § 2, cl. 2 ("Congress may by Law vest the Appointment of . . . inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."); Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam) (holding "that any appointee exercising significant authority pursuant to the laws of the United States" must "be appointed in [a] manner" satisfying Article II, § 2, clause 2).

408. 138 S. Ct. 2044 (2018).

409. *Id.* at 2056 (Thomas, J., concurring) (quoting NLRB v. SW Gen., Inc., 137 S. Ct. 929, 946 (2017) (Thomas, J. concurring)).

410. Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 546, (2018).

411. Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting); *id.* at 2130–31 (Alito, J., concurring in the judgment); Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Justice Kavanaugh respecting the denial of certiorari).

412. *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

413. Jarkesy v. SEC, 34 F.4th 446, 462–63 (5th Cir. 2022).

414. Consumers' Rsch. v. FCC, 109 F.4th 743, 779 (5th Cir. 2024) (en banc).

condemnation of administrative government" in both electoral politics and judicial doctrine.[415]) Steve Bannon, President Trump's chief strategist for the first several months of his first administration, said that "deconstruction of the administrative state" was one of the administration's key priorities.[416] More recently, Project 2025 called for the CFPB to be abolished.[417] It also took aim at the Federal Reserve Board, urging "free banking" and that "the federal role in money" be "abolish[ed] . . . altogether."[418] The foreword to Project 2025 championed Bannon's vision by proclaiming that one of its four "consensus recommendations" is to "[d]ismantle the administrative state."[419] The incoming Trump administration may pursue this agenda in new frontiers, and the Republican appointees on the Supreme Court may be receptive to it.

A third possibility is that the Court may revert to a jurisprudence that revolves around general concepts of liberty in other areas of law that do not concern the administrative state. One area of law that is in flux is the Second Amendment. In a pair of recently decided cases, the Court used seemingly different methods to determine whether gun regulations were consistent with the Second Amendment. In the 2022 decision *New York State Rifle & Pistol Association, Inc. v. Bruen*,[420] the Court declared that gun regulations are constitutional only if they fall within the "Nation's historical tradition of firearm regulation."[421] In explaining that legal standard, the Court said that regulations addressing "a general societal problem" that has long existed must have "distinctly similar historical regulation[s]."[422] The Court then rejected the state's proffered analogues on the ground that there were too few of them,[423] and they were too dissimilar to the challenged law.[424] Then, two years later in *United States v. Rahimi*,[425] the Court upheld a federal law while

415. Metzger, *supra* note 343, at 4.

416. Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for "Deconstruction of the Administrative State,"* WASH. POST (Feb. 23, 2017, 9:28 PM), 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/3TQS-ZFQH].

417. Bowes, *supra* note 405, at 839.

418. Paul Winfree, *Federal Reserve*, *in* PROJECT 2025 POLICY AGENDA, *supra* note 384, at 731, 736.

419. Kevin D. Roberts, *Foreword* to PROJECT 2025 POLICY AGENDA, *supra* note 384, at 1, 3 (Foreword: A Promise to America).

420. 142 S. Ct. 2111 (2022).

421. *Id.* at 2126.

422. *Id.* at 2131.

423. *Id.* at 2142 ("[W]e doubt that *three* colonial regulations could suffice to show a tradition . . . .").

424. *Id.* ("[E]ven looking at these laws on their own terms, we are not convinced that they regulated public carry akin to the New York law before us.").

425. 144 S. Ct. 1889 (2024).

purporting to apply the *Bruen* framework.[426] But there, the Court insisted that *Bruen* was "not meant to suggest a law trapped in amber," and that modern regulations need not be "identical" to "founding era regimes"; instead they need only "comport with the principles underlying the Second Amendment."[427]

Rahimi generated five separate writings from Justices in the majority who sought to explain how *Bruen* and *Rahimi* were reconcilable and how the *Bruen* methodology applied, at least in cases like *Rahimi*.[428] Attempting to provide some guidance, the majority opinion said only that "[u]nlike the regulation struck down in *Bruen*," the law in *Rahimi* "does not broadly restrict arms use by the public generally."[429] As lower courts begin to grapple with how to reconcile *Bruen* and *Rahimi*,[430] it may be that the Court will try to harmonize Second Amendment jurisprudence by reorienting it around liberty as well.

Wherever the new substantive due process goes, it is striking that the Court, which has recently been explicitly contemptuous of the classic individual-rights line of substantive due process cases, has fashioned multiple bodies of law around blurry, incomplete, and contestable notions of liberty that are rooted in equally blurry, contestable, and oversimplified political theory. Even if the new substantive due process remains where it has been used to date, it has the potential to meaningfully refashion the institutions of the administrative state. The only question is by how much.

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426. *Id.* at 1902.

427. *Id.* at 1897–98, 1901; *see also id.* at 1905 (Sotomayor, J., concurring) ("The dissent reaches a different conclusion by applying the strictest possible interpretation of *Bruen*.").

428. *Id.* at 1903 (Sotomayor, J., concurring); *id.* at 1907 (Gorsuch, J., concurring); *id.* at 1910 (Kavanaugh, J., concurring); *id.* at 1924 (Barrett, J., concurring); *id.* at 1926 (Jackson, J., concurring).

429. *Id.* at 1901 (majority opinion).

430. *Cf. id.* ("Unlike the regulation struck down in *Bruen*, Section 922(g)(8) does not broadly restrict arms use by the public generally."). Justice Jackson noted:

> [T]he unresolved questions hardly end there. Who is protected by the Second Amendment, from a historical perspective? To what conduct does the Second Amendment's plain text apply? To what historical era (or eras) should courts look to divine a historical tradition of gun regulation? How many analogues add up to a tradition? Must there be evidence that those analogues were enforced or subject to judicial scrutiny? How much support can nonstatutory sources lend? I could go on—as others have.

Id. at 1929 (Jackson, J., concurring); *cf.* Bianchi v. Brown, 111 F.4th 438, 474 (4th Cir. 2024) (en banc) (Diaz, C.J., concurring) ("[T]he Supreme Court's recent attempt to decipher the *Bruen* standard in *United States v. Rahimi* . . . offered little instruction or clarity about how to answer these persistent (and often, dispositive) questions."); United States v. Jackson, 110 F.4th 1120, 1122 (8th Cir. 2024) ("*Rahimi* does not change our conclusion . . . .").