



## Rights, Regulations, and the Modern Administrative State

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**[00:00:00] Melody Rowell:** Welcome to live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the center in person and online. I'm Melody Rowell, the center's podcast producer. The Supreme Court is debating the constitutional scope of the administrative state more vigorously than at any time since the new deal. Cases before the court deal with a range of issues from the environmental protection agencies, regulation of carbon emissions to the federal government's vaccine mandates.

**[00:00:36]** On today's episode, we'll look at the past, present and future of the administrative state with three guests. Lisa Heinzerling is the Justice William J. Brennan Jr. Professor of Law at the Georgetown University Law Center. Ilan Wurman is an associate professor at the Sandra Day O'Connor College of Law at Arizona State University and author of *The Second Founding: An Introduction to the Fourteenth Amendment*. And William J. Novak is the Charles F. and Edith J. Clyne Professor of Law at the University of Michigan School of Law and author of *New Democracy: The Creation of the Modern American State*. Lana Ulrich senior director of content at the National Constitution Center moderates. This conversation was streamed live on May 10th, 2022. Here's Lana to get the conversation started.

**[00:01:27] Lana Ulrich:** Welcome friends to the National Constitution Center and to today's America's Town Hall program. I'm Lana Ulrich, senior director of content at the center, and I'll be the moderator for today's discussion. So thank you so much for joining us, Lisa Heinzerling, Ilan Wurman and Bill Novak. So Bill, I thought I would start with you and ask you about your new book, *New Democracy*. In your book you write that between the period of 1866 and 1932, which was between the civil war and the new deal that the American system of governance was fundamentally transformed with momentous implications for modern American and social life. And that the 19th century to traditions of local self-government and associative citizenship were replaced by a modern approach to positive state craft, social legislation, economic regulation, and public administration that is still with us today.

**[00:02:21]** And you also note that the last such formative transformation of American public life was in the late 18th century and was dubbed by Historian Gordon Wood as the "Creation of the American Republic." And that this later turn of the century revolution, uh, was best characterized as the creation of the modern American state. Can you tell us more about this period? Why did you choose to write about it and why was it, uh, the period that led to the creation of the modern American state?

**[00:02:47] William J. Novak:** Sure. Uh, great to be with you, Lana, and great to be with distinguished colleagues, uh, on the panel and at the National Constitution Center. I think this is great work, um, uh, you're all doing. Um, so, so *New Democracy: The Creation of the Modern American State* is a kind of sequel to my first book, which was called *People's Welfare: Law and Regulation in Nineteenth-Century America*. And it's really part of a kind of larger, uh, project. I'm now currently, uh, working in the eight.

**[00:03:10]** I'm trying to retrain myself as an 18th century historian to go back and look at the American founding and all with a goal of trying to chart historically this long and deep history of regulation, administration, legislation, and public governance, public law governance in the United States. Uh, that goes right back to the earlier Republic and sort of writing history of that tradition, uh, and, and suggesting how robust that tradition was before the new deal. Because I think we have a lot of myths that we carry around, historical myths, uh, about American constitutional history that suggests, oh, it's the new deal. It's Franklin Roosevelt, where we finally get an active regulatory administrative state in the United States.

**[00:03:53]** And before that, the US was a land of laissez faire and private initiative and self-reliance and rugged individualism property and contract. And, uh, my work, I hope, uh, but life's work will, will, will try to challenge, um, these kind of fictions and myths and show that once you start looking for it, once you scratch meet the surface of some of our kind of, uh, national, uh, mythology, um, it's easy to see. And we have other colleagues now who are working on, um, regulation administration from the early stage of the Republic, uh, uh, to the new deal that suggests regulation, uh, and administration has always been with us. Uh, robust forms of government policy making in the name of kind of democracy.

**[00:04:38]** So this book I call *New Democracy*. Um, I think that's right, Gordon Wood, uh, writes a history of the rise of kind of a democratic moment, the, the original moment of American democracy in the late 18th century. These people from 1866 to 1932 before Franklin Roosevelt comes into office are busy trying to now create democratic policies for a mass society and economy, which is a big lift indeed.

**[00:05:06] Lana Ulrich:** Great. Thanks so much for that. Yeah, we'll definitely return, um, to the book, into the history a little bit more. Uh, Lisa, I wanted to ask you since you are, um, more of a lawyer than a historian, but you have worked actively on a lot of the current issues that, um, are being tackled by the modern administrative state that we have today. Um, and it feels a little bit, you know, like, like today we are in a bit of a transformative period as well. And I'm just wondering if from your perspective, you know, working in the field, do you see any parallels between this period of time that Bill has written about and today, um, in relationship to some of the issues that are being tackled by the administrative state and the government?

**[00:05:47] Lisa Heinzerling:** Yes. I think that this, uh, work new work by Bill is so important because we find ourselves in a moment where we are completely captivated by at least the judges and the justices are, and the rest of us are captive to, I would say the myths that Bill is talking about, the notion that we have not had a powerful government, that Congress didn't delegate authority, uh, quite broadly and vaguely to the administrative agencies that do the daily work of

our government. Those are really powerful myths on today's Supreme Court. And what I would add to that is that they empower a project that is deeply destructive of that administrative state that we've established over the years.

**[00:06:37]** So let me just say a couple of things about that. One, the justices on the Supreme Court today purport to be originalists, but they're not historians. They're not careful historians. They're not people who comb through all of the, um, all of the histories and come up with, uh, the answer. It's quite clear that they cherry pick, uh, analysis and so forth so that a project steeped in history is really useful for surfacing some of the myths that they're dealing with. But in addition, they're using their understanding about the structure of the constitution to embark on a project that I think threatens to remake American government.

**[00:07:17]** And let me just give you two examples. One is, uh, we have long had agencies, administrative agencies. Think about the Federal Trade Commission, the Federal Communications Commission, the Securities and Exchange Commission. You may not out there in the audience have ever heard of these agencies. Maybe you think that they don't affect you. They do. Almost everything you do is affected by the power of administrative agency, either not to protect you or to protect you.

**[00:07:35]** And what the Supreme Court has embarked on is I think a project to limit Congress' availability to make at least some of those institutions independent from the president to some extent. And so that the notion that this, this, this sense of the history and what the constitution means in light of that history is incredibly important to that project, because I think the justices, the conservative justices really believe that we were once in the Garden of Eden and we followed the constitution and then along came Franklin Delano Roosevelt, and we've been banished. And they wanna restore that original order.

**[00:08:20]** And one of the ways they'll do that, I think is to make agencies even closer to the political process and the president. The other way that I think is even more destructive is that at least five of the conservative justices have served notice that they're prepared to begin enforcing with some rigor a principle known as the non-delegation principle, which is the idea that Congress can't delegate its legislative powers to any other institution.

**[00:08:46]** And the idea among the, the conservative justices appears to be that the way they'll police that is to look and see if an important policy question was in the works. And if Congress gave that policy question to an agency, then that might be unconstitutional. And I will tell you, you can look through the United States statute books and on every other page find what will be a, a, probably a plausible constitutional question [laughs] about the validity of that statute if the Supreme Court goes down this road. So that's why I think it's quite threatening to the established order.

**[00:09:21] Lana Ulrich:** Thank you, Lisa, for, um, bringing us to today and setting up some of those issues as well, which I think we'll dig into a little bit more where we talk about some specific cases that the current court is facing as, uh, in its current term. So Ilan, Lisa mentioned a couple, um, interesting doctrines, including non-delegation. I know you've written an article, um,

called Non-Delegation at the Founding. So you've dug into the history a little bit and also write about the current court. You also write about originalism as well. So feel free to re- respond to both Bill setting up his book and the history of that period. And also what Lisa said about, um, the state of delegation today and how the, the current court's thinking about it.

**[00:09:58] Ian Wurman:** Yeah. Thanks so much, uh, for having me here. It's really delightful to be able to, um, I guess be the gadfly, uh, to cast some, uh, uh, skepticism about some of the things, uh, that we're hearing, though not much. I actually agree with a, a lot. Um, I've read Bill's book. I actually thought today was about Bill's book. Uh, it tur- it turns out where it's broader and it's, it's a great book, just like his first one. Um, but I do, uh, you know, have some, some questions about it and then I'll, I guess, fast forward, uh, to, to the modern day.

**[00:10:28]** Uh, so I agree that there's a lot of this sort of mythology about, uh, lack of administration, uh, in the founding era, but even Bill says in his book, uh, that there was a transformation of some kind. I think his argument is that it occurred earlier than the new deal, uh, in the period that he discusses. So he talks about the increased proliferation and professionalization and centralization and rationalization of administration. But arguably there also was another transformation, uh, that he talks less about.

**[00:11:01]** Uh, but I think is actually more important to the modern attacks on the administrative state. Uh, and this goes to, to a bit more of what, uh, Lisa was saying about non-delegation, but at least the conservative say or the formalists or the originalists. I mean, how these all connect is, is a complicated [laughs], uh, a, a question. Uh, but they might say that as a result of, or in addition to the transformation that Professor Novak talks about, there was arguably a transformation in executive power in that independent agencies insulated from removal now wielded administrative power.

**[00:11:39]** Uh, I don't think the, uh, Interstate Commerce Commission in 1887 was actually particularly new. For a lot of the reasons we've heard about, I, I, they adjudicated things, but it's not clear that they adjudicated private rights matters. Uh, they exercised some regulatory power, but so did the early departments, but it was new to create this bipartisan multi-member commission that's supposed to be independent of the president. Uh, so that was a transformation.

**[00:12:07]** Uh, there was subsequently in the new deal, especially I think, a transformation with respect to judicial power, if you believe and it's contested, but if you believe as many originalists believe that private rights cases, as opposed to public rights cases. I mean, private rights cases are classic. Either the government's trying to take away your life, liberty, or property, or it's just a dispute between two private individuals.

**[00:12:32]** Historically these had to be heard in article three courts. Uh, starting in the new deal, uh, it... Well, a little before the new deal, actually in a seminal case called Crowell against Benson, the Supreme Court basically, uh, authorized agencies, uh, to resolve either facts or eventually legal questions in private rights cases that historically had to be done by judges, decided by judges. And then there was arguably a transformation in legislative power. Uh, uh, arguably the delegations, uh, did change.

**[00:13:04]** I'm, you know, more of a, a moderate, I guess, about this than a lot of my formalist, uh, friends. I think there's... You know, so some people like Justice Thomas, Philip Hamburger, uh, maybe Gary Lawson, uh, maybe Justice Gorsuch. They think as long, if an agency makes any regulation that affects private rights or conduct or private rights and obligations, it's legislative power, I'm skeptical.

**[00:13:28]** I mean, the 1852 Steamboat Act, uh, allowed the Steamboat inspectors to make passenger limits on ships, uh, to make rules for passing ships. What happens, uh, you know, who, if you're upstream or downstream and what side you're on, who gets to go. Those affect private rights, it affects private conduct. And I doubt, uh, that is something, uh, that we think Congress has to specify, uh, sort of the details about. But arguably, um, today, uh, agencies do a lot more, uh, regulation of private rights and conduct under broader delegations than they did in the past.

**[00:14:02]** It's not to say there weren't broad delegations in the past. There were, but a lot of it was, um, in public rights context, like veterans pensions. Uh, um, a lot of it did not involve, you know, private rights and conduct. I do think some of it did. I do think some of it did and that's a challenge for formalists and originalist. Um, but I do think there was a kind of a transformation now. And I guess I'll, since I've gone on too long, I'll say one more thing and I'll stop there. And this will be fighting words for, for Bill.

**[00:14:31]** So Bill in his book says that the, um, these transformations and modern administration, uh, uh, claimed a democratic mandate, right? That's why he calls it democracy. Uh, and that may be, I have no quibbles with his history. I mean, he's a much better historian, uh, than I am. Uh, but it's important to understand, and he's, he's very open about this. What he means by democracy is what he calls substantive democracy, right? This progressive understanding of democracy where it's not just, you know, who rules, right? But it's also a, a substantively democratic way of life involving social and economic equality as well.

**[00:15:11]** So that is one possible definition of democracy, right? But if democracy is connected to the idea that our elected officials should be making the important policy choices affecting private rights and that our elected officials should be executing the laws. Well, under that, I think more traditional, uh, definition, uh, Bill would have a harder time showing that the administrative state has a democratic mandate. And with those fighting words, I send it back to you too.

**[00:15:37] Lana Ulrich:** Thanks Ilan for that perspective and for, um, digging in a little bit more to Bill's book, um, that we can get a little bit more color on some of the, um, things that you write about Bill. Feel free to address any of the points that he said. And Ilan mentioned this idea, or I guess, definition of formalism. Um, and I know in your book, you talk a little bit about how a modern administrative law emerged out of democratically oriented anti-formalism. So maybe, you know, address of course, anything that Ilan said. And then talk a little bit about this distinction between formalism and anti-formalism and how that led to this radical, critical, and as you say, more democratic outcome.

**[00:16:13] William J. Novak:** Uh, that's a great point. It's a, it's a kind of, one of the more intricate themes of the book, but there's no question that... And I would argue it has 19th century roots as well, but in this early 20th, 20th century period, we have a group of people who consider themselves anti-formalists and a critical realist. Um, they're pragmatists, they're critical realists, and they are quite incredible critics, uh, of judicial formalism and legal formalism. And they precisely, because they're not as worried about, and I'll, I'll address Ilan's point about, uh, democratic administration in a mo- in a moment, but what, where, where do the progressives think anti-democracy lies at the turn of the 20th century? In the courts.

**[00:16:53]** They, they begin with a critique that the, this is an undemocratic counter majoritarian institution that is frustrating over and over again, as they see it. This is the Lochner interpretation, frustrating the will of the people to try to pass laws that solve public problems. And this is one of my, uh, one of the reasons I wrote the book is to try to get away from the abstract formalist mythologies that we sometimes carry around and look at why governmental regulations were adopted in the first place, right?

**[00:17:23]** In this place, in, in this period, the Triangle Shirtwaist Fire. I mean, women are dying, being locked into hideous working conditions, right? Uh, Upton Sinclair and the, and the, the, the product of food poisoning. I mean, there were real public problems that needed to be solved and over and over again, the progressives did indeed, as Ilan suggested, as Lisa, Lisa also acknowledged turned to administration.

**[00:17:48]** And I'd like to make one more point on that 'cause I think Ilan challenged, uh, I think this, there is a great deal of skepticism today. Um, that administration is undemocratic and that these other branches of government are the democratic responses. And I think by going back to at least this period where a modern administration is formed, uh, we can see the democratic aspects in the very first kind of state regulatory administrative agencies that are developed in the case of railroads. Here comes this big corporation, right? That, that's challenging all conventional ways of controlling it in the late 19th century.

**[00:18:25]** Um, why didn't we just rely on the courts and the legislature or the governor? The, the, the farmers had no chance [laughs] against the railroads in court, right? And, and the railroads knew it. I mean, if you were, if, if farmer feels a, a, a, a particular railroad rate is discriminatory to high unscrupulous fraudulent, they're not going to win in court. They have a \$10 case as the reformers said. Um, they're also not gonna win in the legislature, right? There weren't lobbyist invented to talk about the railroad lawyers sitting in the lobby of the state capital basically owning the legis-

**[00:19:02]** The legislature is not a place for a democratic solution here, right? In, in fact, their cap- This is Charles Francis Adams Chapters of Erie. The, we're talking about deep corruption, not people running away with bags of money, right? The progressive solution is, and, and it's not a final solution, but to look at administration as a place for democratic access. Now the farmer can come to the railroad commissioner and fill out a simple complaint. And now the railroad commission can take that complaint and give it to a state's attorney or county attorney. There's a point of access there that is very democratic.

[00:19:38] Um, so we live today, I think as, as we've all said in a, in a period of intense skepticism about governmental power, of administrative discretion and of too much government. I mean, we've come out of a pandemic in which right, anti-vaxing and anti-masking. We, we're all familiar with how violent resistance can be to even some sort of baseline governmental initiatives. Um, and the, and the, the reaction is to one back into some kind of libertarian or liberal, uh, interpretation or originalist, uh, interpretation of the American past.

[00:20:11] And I wanna suggest, and I just, because I think it's true, not because I have a dog in this fight, it's just true, right? Um, democracy, isn't my word. Walter Weyl writes a great book, a, about the progressive period. In that period, he calls it the New Democracy. John Dewey is writing about democracy, democracy, democracy. Jane Addams is writing about democracy, that this, the history of America is a history of democracy. And we need to forefront that issue again.

[00:20:36] Alexis de Tocqueville when he comes from Europe and looks at the United States in the 1830s, writes a book, not called individualism in America, not called rights in America, not called property in America, not called judicial authority in America. The book is called Democracy in America. And my book is I think, part of an effort to recenter both in our judicial conversations and our public conversations, a focus on is the United States still democratic and what are the threats to dem- democracy and really, really what institutions of government do we see now as most of a threat to our democratic aspirations and democratic future?

[00:21:14] So we can focus in on democracy, I think there, we could all agree, we could have different definitions of it, but let's put that at the center of our, our national constitutional conversation again.

[00:21:23] **Lana Ulrich:** That's really interesting, Bill that you brought that up. As administration as a place for democratic access, I don't, I think that, yeah, that's not always the way that it's framed, um, both in the history and today. So, Lisa, um, do you agree with what Bill was saying about administrative agencies as being a place for democratic access? Is that still true today? And, and again, making the parallels to that era and to, and to, uh, what's going on in the courts today, do you see a similar thread with the courts and any skepticism towards regulation?

[00:21:54] You know, our courts, uh, I think you've maybe described as anti-regulatory. If so, why, and some of the issues that Bill brought up, you know, the working conditions, um, these huge societal problems. You know, we now today we have, you know, climate change and he brought up the pandemic. So these larger issues, um, that it seems like the administrative agencies are trying to address. And then we have, you know, big cases that are being heard by the courts today that they're grappling with these questions. So yeah, just interested in, in your thoughts on all those points.

[00:22:22] **Lisa Heinzerling:** Yeah. It's a lot. Um, so I, I mean, one, on the historical parallels, of course. I mean, we are in the midst of the worst pandemic in a century, you all know that. And the Supreme Court saw fit to strike down to important rules issued by, uh, federal agencies that those agencies thought would, um, help to stop or to prevent the further spread of, of, uh, COVID-19. And the court struck them down with this idea that, well, we're Congress has to do

this, e- even though Congress had passed a statute in both cases that ordered agencies to take on major threats to health in the public at large and in the workplace.

**[00:23:08]** And so the, the, we still have the kinds of threats that we had. And if anything, there're worse. I haven't even talked about climate change. If anything they're worse. And yet we are cabined in, I think, by a judiciary that is if not overtly, certainly obviously hostile to the administrative state, and to ambitious, uh, regulatory programs.

**[00:23:34]** You can see this in the application of the doctrines that led to the invalidation of these rules, where the court said, "We think Congress needs to speak clearly if it's gonna take on major questions." And so just think about the irony of that. The more important of the issue, the important, more important attention now is to a social problem, the less an agency will be, um, empowered to take it on, right? And so that it's, it's really cutting at the knees of the most, probably the most essential parts of the administrative state that Bill described, right?

**[00:24:16]** And so that to me is, is, uh, deeply threatening. And those decisions this year show a Supreme Court that's very committed, in my opinion, to the anti-regulatory project. Just a couple words about, about democracy. I will say that administrative agencies loan among the institutions of the federal government have an obligation to explain themselves. They have to say why they're doing what they're doing. They have to say what gives them the legal authority. They have to have it make sense. And then they have to have their explanation after, actually withstand scrutiny by the federal courts, right?

**[00:24:55]** It seems to me that that obligation of reason giving gives them, I don't know if it's a democratic pedigree. Certainly, an accountability that is lacking in the other branches. In addition, I would say that if we're thinking about comparative, it's all comparative. So we're gonna talk about comparative democratic kind of natures, then I would much rather have Congress, uh, whose members are at least in theory electorally accountable, that, that have them make decisions about which problems are big enough and how broadly to delegate power. Then they have the federal courts accountable to no one making decisions about Congress's choices about delegating power to agencies.

**[00:25:42]** We're not, we're not just saying handed over to Congress. We're saying it handed, handed over to Congress by direction of federal courts under often incredibly partial standards. Um, and then last, I just think somebody has to say a word about democracy in the sense of, um, I think often people will pair the idea of democracy. One of the reasons that we love that, and it kind of works as rhetoric is not only that people stand for election and can be thrown out if they're not, um, doing the job we want them to do, but somehow that everybody's vote matters equally.

**[00:26:22]** Like it seems like at least out there in people who don't know better in some way, right? They think everybody's vote matters. But look at the Senate, two senators per state, no matter how small the state. We don't have DC and Puerto Rico as state, so we don't have them in the Senate. We have the filibuster, we have money and politics, we have voter disenfranchisement. So that before we get sort of misty-eyed about democracy and the



comparative advantage of one institution over another, then I think we have to take on, at least what I think is probably a pretty strong lay understanding of democracy, which isn't just about elections, but about votes counting equally.

**[00:27:05] Lana Ulrich:** Thank you, Lisa. Ilan, definitely interested on your thoughts about some of Lisa's comments about the courts, um, you know, the role of the courts, as opposed to administrative agencies, in terms of, you know, who, who is more democratic, who, you know, has to explain their decisions more. And then she also brought up, um, the major questions doctrine, which I think is issue in West Virginia versus EPA case, which is, um, which the court I think, heard argument a couple of weeks ago. Can you explain that doctrine as well, and the significance, um, uh, in it, in that case, West Virginia versus EPA?

**[00:27:37] Ilan Wurman:** Sure. And, um, by the time I'm done, I'll probably have forgotten the first question, but let me start with the major questions.

**[00:27:42] Lana Ulrich:** [laughs].

**[00:27:43] Ilan Wurman:** Um, the, the, this basic idea. I mean, there are a couple ways you can conceive of the major questions, uh, doctrine. One is simply a, a linguistic cannon is that before Congress, uh, passes the book on important and controversial questions, okay. Now, what exactly is important? It's actually not clear. Like, is it just politically controversial? It could be something that's just really significant and important to the statutory scheme, which I'll explain in a second. Before Congress passes the book on a hugely controversial, uh, ec- economically significant, politically significant question to an agency, uh, the idea is we'd expect it to do so in relatively clear language, okay?

**[00:28:22]** So we're not saying Congress can't delegate those questions to the agency. It's purely a linguistic question of whether Congress has in fact delegated that question. So, uh, an example is, uh, Brandon Williamson, the FDA has, has long had authority, uh, under its statutes from 1914, 1930s, and so on, uh, to regulate drugs and drug delivery devices. And so these are the things that, uh, Flonase and aspirin, and, uh, you know, all of these things are the kinds of drugs, uh, that are regulated.

**[00:28:56]** And the question in 2001 in the 1990s arose whether the agency, uh, could through that authority, all of a sudden regulate tobacco and cigarettes. Now, it's actually, you know, it's not crazy to think that they do have that authority because it does seem to literally fall under the definition of drugs and nicotine does, and drug delivery device. Cigarettes seem to be a drug delivery device. Uh, but the problem was, you know, the agency had disclaimed authority over, more or less over tobacco for, you know, 70, 80 years.

**[00:29:28]** Congress has several statutes respecting, uh, tobacco and cigarettes on the books that would seem inconsistent with the FDA's assertion of regulatory authority. And what the court basically said is look, before we're gonna assume that Congress had delegated to this agency, uh, this question of hugely political and economic significance that Congress had been fighting

about for a long time where Congress has already legislated. You know, we might demand a clearer statement just because we're trying to get at what Congress, in fact, intended to give the agency to do.

**[00:30:01]** That's not crazy if the aim of interpretation is to figure out what the legislator with the law giver like intended to accomplish, intended to delegate, whether that's in some tension with textualism is a whole other can of worms, which I don't know if we're gonna get into, but just one more example, it doesn't have to be something just that's politically controversial.

**[00:30:22]** It could be something that's just major to the statutory scheme. So where this really comes from is a case I think in '94 or '96 called MCI where telecommunications companies, and particularly AT&T, they have to file tariff rates, um, with the Federal Communication Commission. It was the central thing that the, uh, statute required them to do. But then there was a provision in the statute that says, uh, that the agency may modify their requirements, you know, the various requirements of, of this, uh, statute.

**[00:30:51]** And so the agency basically said, "Okay, AT&T, you don't have to file the tariff requirements." Like, wait a minute. That was like the central thing that they're supposed to do. And the question was, could Congress possibly have intended to delegate to the agency the power to exempt the nation's largest carrier from the central provision of the statute under so cryptic a term as modify.

**[00:31:12]** And so it's not crazy as a linguistic cannon, I think. Now, the real question is the non-delegation question. If Congress has delegated these questions, does that violate the non-delegation doctrine, and that also might come into play in West Virginia, the EPA. Uh, but, you know, I don't think because a question is important makes it violate the non-delegation doctrine for Congress to give it away. Uh, you know, I think it has more to do with, okay, what's the nature of the right being regulated? Take a, a recent non-delegation, case, Gundy against United State, whether the sex offender registration act applies to sex offenders who were convicted before the act was enacted. Okay.

**[00:31:50]** It said, you know, "Attorney general figure out whether we should apply these registration requirements." Is this important? Is it politically controversial? I don't know, but it's really freaking important for the people who are convicted of these crimes before the act was enacted, right? Uh, and so it can be important for that reason because it deals with criminal law and their life and liberty, you know, uh, are at stake. So, okay. Again, I've gone on, uh, a bit too long, but those are my initial thoughts on the major questions.

**[00:32:17] Lana Ulrich:** Thanks, Ilan. Bill, in the history and the period of history that you write about, was that part of the debate, were they debating, you know, should, should Congress be delegating this? I mean, was that, you know, part of the, the rhetoric of what they were trying to determine in, in creating administrative state, administrative agencies. Were there other things being debated as well? We have a question from Alec Rogers who asks, um, about this distinction between public and private rights, uh, which I think Ilan may have mentioned as well.

Was that at the heart of the debate? Um, just give us a sense of kind of what was being discussed as these, um, changes were occurring.

**[00:32:51] William J. Novak:** Well, you know, as Cass Sunstein once famously said, right? "The non-delegation doctrine has enjoyed one good year and over 200 bad ones," right? I, and maybe, and, and we're trying to resuscitate this thing that had, had this, this one good year, uh, in the early years of the new deal. Uh, but I would say, no, that's not really where the, uh, onus is in the progressive period, right?

**[00:33:13]** Um, Ilan, that was a, a really, a nice tutorial on kind of modern day judicial review of administrative action, but let's make it clear. That's within the four corners of still talking about judges and judicial review in a lease in a small number of, uh, an unelected [laughs] um, non-democratic actors making these decisions. The progressives were very critical of the judiciary. They wrote if you wanna see, these are not... I actually think the progresses are quite radical by contemporary standards.

**[00:33:42]** But these are not people off the political spectrum. These are people, you know, Harvard Law School professors, people at the center of public policy in this period, and they are offering some pretty radical solutions and some pretty fierce, uh, critiques of the courts because they wanna get these public problems solved, and they see the courts as an impediment to passing the kind of legislation that is attentive to, um, the needs of the people. And I, I'm looking at your, your, we the people is the thing, the democratic focus of the, of the constitution center. Uh, and that's what it was for these folks as well.

**[00:34:17]** I'll just add one more thing in response to Lisa's, uh, great point that when these people are talking about democracy, voting, really important, suffrage, really important elections, really important, no one would deny it. But as Dewey Adams at all constantly said, that's only the start of forming a democratic society and economy. And at the end of the day, as, as Lisa put it well, equality is a baseline condition for a fully functioning democracy.

**[00:34:45]** And the fact that our cities in the progressive period, the, the shame of the cities, the problem in the cities had people voting in numbers, record numbers in the early 20th century in St. Louis and other, in Chicago. But, but the politics were corrupt, right? The, the elected politicians were in the pockets of the big businesses of the time. The people who wanted the street car franchises, right? So an administrative solution, a city manager was one of the progressive solutions, um, that might sound anti-democratic in the abstract but is to get around the real limits of the democratic elections of that particular period, right?

**[00:35:23]** That we needed, we needed more expertise. And most importantly, we had to fight the influence of corporations and big money and dark money in these supposedly democratic elections, uh, that we took so seriously. So the quality and anti-corruption, I think, has to be a key, uh, uh, aspect of, of anything we talk about as a democratic approach to law.

**[00:35:47] Lana Ulrich:** Thank you, Bill. Um, Lisa, um, Bill's comments about, you know, um, you need to address equality, anti-corruption brought me to a question from William Dempsey who asks, "It seems like to some of the panel a major justification for administrative power is found in shortcomings of current democratic institutions." And he asked, "To what extent is the administrative solution only temporary? And does the alleviation of some of the democratic roadblocks alleviate the need for an administrative solution? Why or why not?"

**[00:36:16] Lisa Heinzerling:** Well, I think as a matter of practical importance, the more functional Congress is the le- the less is the need for an administrative solution, or at least the same kind of administrative solution that relies on kind of resourcefulness, creativity, looking at old statutes in new ways and so forth. I think the more functional they are, the less that's necessary.

**[00:36:39]** But to me, I, I've never justified administrative, uh, law or the administrative system based on gridlock in the sense that I think no matter how powerfully functioning Congress is, it has always, and will always rely on an intermediary, on someone who can translate its goals and its, um, stipulations into policy and importantly, into, on the ground policy. So it, it strikes me that a lot of people will say, well, we need to... Even presidents have said this. It drives me crazy, crazy. Barack Obama, I've got a phone, phone and a pen, I'll do it on my own unilaterally.

**[00:37:21]** No, it's never new- unilateral. Agencies are the creatures of Congress. They are charged by Congress, funded by Congress, set in motion by Congress, created by Congress. And so it strikes me that it's not just because we have gridlock that we have them. It's not because Congress isn't fully, fully functional. Can I also respond to something that Ilan said just a moment ago? 'Cause I think it's a really important point and, and illustrates something that I think is, is, um, really significant about these principles we're talking about.

**[00:37:52]** Um, the FDA versus Brown and Williamson case where they, the FDA tried to regulate tobacco and the Supreme Court said no is a really important prince- illustration of the biased nature of the major questions principle. I think the, my, biased nature as well as it, as it happens of non-delegation. But think about it. For years, the FDA had said in congressional testimony all sorts of different legal fora. We do not have the authority to regulate tobacco.

**[00:38:22]** Nobody said, "Oh, you're answering a major question." You can't do that. You can't say you can't regulate because to say you can't regulate answers the major question about whether, whether the Food, Drug and Cosmetic Act allows the regulation of tobacco. Then when they come and they say, "Oh, we do have the authority to regulate tobacco." Everybody says, "Oh no, no, no, no. That's a major question. You can't answer that question without clearer language from Congress."

**[00:38:52]** And the question I have is why, why could they answer one question, but not the other? They're the same dispute. The very same controversy, does the Food, Drug and Cosmetic Act cover tobacco? It's just their answer that's different. And so the, the implication is, and this goes right in a through line all the way to the cases on OSHA and um, the CDC on COVID, which is that if you don't regulate, you are fine.

**[00:39:17]** You're good to go. You're answering a question. It's the same question. But as long as you answer, "No, we don't have the power. We can't take that on. We can't help you public." That's fine. But as soon as you say, "Yeah, I think we can do that. Yeah. Yeah. We're good with that. We're gonna try that," then you're in trouble. I just think that embeds an incredible anti-regulatory valance into a doctrine that and, and here I disagree with you, Ilan.

**[00:39:43]** I think it's not a semantic. It, it's not a semantic or as you put it linguistic cannon at all, it's highly substantive cannon that tells Congress, you know, Congress, we expect you... Like a parent telling a child. We expect you to speak more clearly when you wanna do that, right? Speak up. We can't hear you right now. It puts Congress into this incredibly subordinate role having the Supreme Court say, "We know you said the literal words. We don't think you meant it." Right?

**[00:40:16]** And I think that's the fight in all of this is the major fight of today is an actually between the courts and the executive as much it is, as it is between the courts and Congress.

**[00:40:28] Lana Ulrich:** Thank you, Lisa. Ilan, uh, definitely interested in your thoughts and response to what Lisa was saying. And I also wanted to bring up your article, "Beyond Formalism and Functionalism" where I think you talk a little bit about... I mean, is there... You know, I guess my question to you about that article is, is that, you know, is that, is there a middle way, you know, is it, is it a delegation versus a non-delegation? Is there another way of thinking about this? I think you conceive of it as exclusive versus non-exclusive rights. So, um, yeah, again, please feel, feel, feel free to respond to Lisa and then maybe bring up, you know, is there another way we can be thinking about all this?

**[00:40:58] Ilan Wurman:** Uh, so let me just say a couple things. First, I, I generally agree with Professor Heinzerling, with Lisa that, uh, the major questions doctrine is highly problematic because what is major is in the eye of beholder. And the reality is you often don't need the major questions doctrine to solve a lot of these cases, right? Now you might disagree with me on the merits of this question, but if you go back to the FDA's regulatory authority, right? I thought the most compelling point that Justice O'Connor made in the majority there was, look, if the FDA has this authority, okay, then cigarettes, okay and nicotine would ha- would be misbranded under the statute and the statute because they are not safe and affected, effective for their intended use. Okay, because that's what the statute's about, making drugs available for therapeutic uses and they're safe and effective.

**[00:41:44]** But the FDA had found under the Clinton administration that they're not safe and effective, which is why we're trying to restrict the marketing. Well, if you have to misbrand them, if they're misbranded, they'd have to be removed from the market, right? But Congress has a bunch of statutes saying, "No, cigarettes are an important part of the economy. Tobacco's a poor part. We can't misbrand it," you know?

**[00:42:02]** And so it, it just, it was an awkward fit with the structure of the statute, okay? You don't need major questions for that. You might disagree on the merits of that argument that it does or doesn't fit the statute, but that doesn't depend on major questions. Similarly, the, the, can

the EPA through its, its, uh, delegated authority to regulate pollutants, uh, which is a pretty broad definition when you really look at it, at least out of context, can it regulate carbon dioxide?

**[00:42:30]** Uh, you might think the answer is yes. The Supreme court said yes in *Massachusetts v. EPA*, is this a major question? You, politically sure, of course. Carbon cap-and-trade, all of these things, uh, hugely controversial. Congress could never get attacked together, then the EPA assumed authority. Yep. But, but is that the way to decide the case, uh, if you're a, a formalist or a textualist? You know, I, I think as we see in subsequent cases like *Michigan against EPA*, the problem with CO2 being a pollutant is that the rest of the act doesn't really work. It would require the EPA to regulate almost ordinary households because of the amount of CO2 that is distributed, uh, and produced by, uh, out households.

**[00:43:08]** And so if you look at the definition of stationary source and how much they must pollute. And so the EPA even said, "Yes, CO2 is covered, but we're not gonna apply it to all these things that the statute says we would have to apply our pollution regulations to because it just wouldn't work. It, it would be crazy." Is that major questions? You don't need it. It just doesn't fit the statute.

**[00:43:27]** Uh, and for what it's worth, the MCI case, the word modify, that was used in a deregulatory way. The FCC tried to deregulate AT&T and Justice Scalia and Justice Ginsburg agreed. They said, "No, no, no, they, they didn't say major questions." Right? What they said is, okay, this is, this is subsequently interpreting the case. But uh, Justice Scalia sub- subsequently said, "Ordinarily Congress does not hide elephants in mouse holes, right? It does not authorize the agency to do these big, important shifts and changes through cryptic language." And he cites the MCI case. And Justice Ginsburg agreed because the FCC tried to deregulate AT&T.

**[00:44:06]** And Justice Scalia said, "No, you can't deregulate them under the cryptic term, modify. The statute requires you to regulate them." So that was a proper use of what we today might call the major questions doctrine, but it was just a linguistic what I call, I tell my students, the elephants in mouse holes cannon, right? Congress doesn't hide elephants, uh, in mouse holes. So I, I think, I think this is largely me agreeing with Lisa. Is that, is that right? Should I just stop there?

**[00:44:34] Lisa Heinzerling:** Yes. [laughs]

**[00:44:36] Lana Ulrich:** Well, I wanted to see if you wanted to weigh in, on your, on your piece. Um, and whether, you know, there's another way to recast this debate.

**[00:44:43] Ilan Wurman:** Uh, I appreciate your invoking, uh, my recently accepted paper, but can I instead, uh, throw some more fighting words out there, uh, to see if there is any reaction from Bill and Lisa? So, uh, this goes back to the question that you asked me before that I didn't answer about courts reviewing Congress's choices to delegate, uh, and this.... So, so Lisa mentioned that, but it also goes back to something that Bill said about capture. So what about this argument, right? What about Public Choice Theory?

**[00:45:10]** Uh, here's why the court might want to police Congress's choices to delegate because Congress has perverse incentives to delegate. This is John Hart Ely, *Democracy and Distrust* in 1980. Look, Congress wants to pass the book. Why? 'Cause it wins on both ends, On the front end, it can get brownie points from their constituents, right? For saying, we want clean air. Who can be opposed to that?

**[00:45:35]** We want clean air, we want clean water. And then, oh, the agency has to figure out, okay, who has to stop polluting? Who pays the cost? Who suffers the consequences? And then when the constituents complain like, oh, the agency's doing X, Y, and Z to implement the Clean Air Act or the Clean Water Act, which by the way, maybe are bad examples 'cause they're actually quite detailed statutes, right? So I'm, I'm sort of being a little flippant here with those particular examples.

**[00:45:58]** But then on the back end, the agency says, "Oh, I didn't mean for that to happen. I'll lobby the agency on behalf of you, my constituent, so I went on the front end by enacting this great law that who could oppose clean air? And then I went on the back end when I, when I lobbied the agency for my constituents who suffer from it." So, you know, if we worry about regulatory capture and, and corruption, why not Public Choice Theory more broadly and might Public Choice Theory actually be an argument for why the courts should be policing what Congress chooses to delegate? I guess that's for both Bill and Lisa, but, but Lana, you're asking the questions.

**[00:46:33]** **Lana Ulrich:** [laughs] No, it's a great, it's a great question, Ilan. Um, Bill would love your thoughts, uh, in this final round and, and also feel free to add any other points you might have about, you know, why this period in particular, um, period in your book is really important for us to study and to know about.

**[00:46:50]** **William J. Novak:** Great. Yeah. Uh, thank you. And thank you for that, that opportunity. Um, no, I don't think public choice [laughs] theory is the answer. Uh, you know, as, as I finish this book, um, I think returning to kind of, uh, really the distinctive American tradition. The only way to think about problems, uh, is, is democratically and pragmatically. I mean, critical realism. So Public Choice Theory has a history, an intellectual history. We know when it rises up within the academy and it, it is, it is a part and parcel of a series of new formalisms, new formal theories, uh, which again, I think on the ground, uh, don't deal with the reality and the complexity.

**[00:47:27]** And again, if you just deal with judicial review of administrative action and what judges say, and then come up with a Public Choice Theory as to try to figure out what Congress do, does. Um, the people who really study empirically Congress in the courts, um, in detail in the archives over time find that those theories really, uh, are not as helpful as you might think. And that we have to do these, the institutional economists, these detailed, uh, histories of economy, of society, of politics, and you know the history in detail in order to, to really understand, um, what's going on in this particular period.

[00:47:59] Um, but I guess, you know, in terms of, uh, your question about why I, I kind of wrote, wrote the book. Um, I, you know, I am, I'm a late baby boomer and, you know [laughs], uh, that was the period in which critical realism died out and there for, for, for important reasons, right? The US fought really important mid-century battles with totalitarianism of left and right, both fascism and communism and World War II and in the Cold War. And out of that came this thing called American exceptionalism, uh, of the United States as a kind of land of liberty, of freedom, uh, very different from the kind of police state traditions, the regulatory traditions that dominated, destroyed Europe in the middle of the 20th century.

[00:48:40] Um, I believed that for a while. You know, I, I was forced fed this in, in, in grade school, uh, on through high school. And as soon as I started to do the most basic kind of empirical or historical research into US history, it falls apart at, at every scene. I mean, it's just, it was an ideological construct, perhaps necessary in these hot war times. Uh, but it's a fiction, it's a myth. And I think we need, uh, like John Dewey and Jane Addams would say, you know, if we're gonna start thinking like adults again about important questions, we gotta do good research and we gotta, uh, stop living by way of these kind of fairy tales that we tell ourselves about the past and the present, then possibly the future.

[00:49:21] **Lana Ulrich:** Thank you, Bill. Thanks so much for sharing, uh, your thoughts on your book. Um, highly recommend to everyone out there to read it. And I think you're working on a book on the founding now, currently, right? As to round out the, the trio?

[00:49:33] **William J. Novak:** Yeah. I wouldn't recommend this to, to new researchers out there, but I, you know, I, I, I have one question and [laughs] I'm really trying to answer it. So I'm going, I, I went out of order, like the Star Wars. You know, I, so I, I started in the middle. Then I went to this period, the period, uh, to the new deal to get to the new deal. But I really think for reasons, I think we've, we've all talked about here today that, um, really re- the founding as many historians have been saying now for, uh, you know, for about 25 years [laughs] at 30th, it needs to be redone.

[00:50:03] I mean, we have very strange views about what the founders were up to. So I've already begun to do some new research there. And one of the things I, I'm not the first to discover it, but I started working on okay, as soon as the British leave, right? The legislatures, they're gonna set up provincial co- congresses. We, the people will set up provincial congresses, but before they're provincial congresses, there are committees of safety and inspection. There are adminis... We learned about them in grade school as committees of correspondence as if this was a literary event, the American revolution as a, a discussion of political philosophy. Nonsense, right?

[00:50:37] There are problems on the ground that had to be met with and over and over again, uh, in the Western tradition, in the American tradition, uh, administration and administrative discretion is proving useful to solving public problems if in fact we wanna solve public problems.



**[00:50:51] Lana Ulrich:** Lisa, your final thoughts on anything that we talked about today, and I'm also interested in your perspective on the future, um, of regulation based on where you see, uh, either the courts going, um, how Congress is currently acting and, um, yeah, any final thoughts from, from you?

**[00:51:08] Lisa Heinzerling:** Yeah. I, I think the problem of, of accountability and responsibility is profound and nothing I said should, um, be taken otherwise. I think it would be wonderful if Congress were more functional, were acting more on our large problems. I, I, I would welcome that, uh, very much. So to me, the question again is a comparative one between Congress's choices about delegations of authority to tackle major problems that we're facing right now, who do I want to make those choices? Do I want Congress, or do I want the completely unaccountable courts?

**[00:51:43]** And here, I would say that at least members of Congress, at least in theory, are accountable for their own account, lack of accountability. That is if they pass statutes, that don't mean anything that are just symbolic and they pass the buck and on and on down the line, at least people who elect them can see that and maybe take them to account for it.

**[00:52:04]** That's not true of the courts. And so if we leave this with the courts, that even the lack of accountability is not something that the courts are accountable for. So in a fight between Congress and the courts, I think that in, in the cases we're talking about and the kinds of cases we're talking about, I would prefer to leave judgements about delegations to administrative agencies and the power of administration agencies largely, uh, to Congress.

**[00:52:29]** And if we think about the na- nature of the organizations and what Ilan, um, called, uh, capture, think about the court today, incredibly insular body, people of very, very similar backgrounds, even the same educations, right? The, at least I'll even say, uh, in the conservatives mostly hand picked by one organization, the Federalist society, right? That, that, that to me, we are, we are beholden to hostage to almost the public policy ideology of nine people on the Supreme Court when it comes down to it five or six.

**[00:53:11]** And right now their poised. And I don't think this is an overstatement, poised to change the way the government operates. And, uh, I, I find that deeply, uh, troubling and yet I will predict right now it's gonna happen.

**[00:53:28] Lana Ulrich:** Thank you, Lisa. Uh, Ilan, final word to you. Uh, feel free to, to provide any closing thoughts on any, anything we've discussed and share maybe your perspective on the future of, uh, regulation in America.

**[00:53:41] Ilan Wurman:** Sure. And thanks again, this was really fun, uh, to do. I guess I will talk about that article that I've got forthcoming is "Beyond Formalism and Functionalism and Separation of Powers Law." I don't think the world's gonna end, um, at least if the justices read my paper, uh, because the claim and they did and they one has read one, you know, so I don't know. You know, maybe, maybe there's hope, but the claim in this paper is, look, I do think this

I- this formalist idea that the government power divides into three parts, legislative, executive, judicial, all powers one or the other.

**[00:54:15]** And we have to figure out which is which, give it to the respective institution and the administrative state's unconstitutional because it exercises all three kinds of power when it shouldn't. I do think that's actually not correct as an originalist matter. What I claim in this paper is that, yes, look, it's true. If you look at tech structure and histo- and history in particular, those sources fence off three sort of domains of exclusive powers. Some things that only the executive can do and that Congress and the courts never can, certain things that only the courts can do. And the other two branches can't and arguably some things that only Congress can do, you know, that the others can't.

**[00:54:52]** What, what the, you know, how big that category of exclusive power will depend on, your theory of non-delegation, your reading of the historical sources. But I think a lot of government power is not exclusive. I really think in its nature, in its characteristics, uh, government, a lot of government power partakes in legislative and or executive and or judicial qualities. And with respect to that, if the executive or the judiciary can exercise inherently some of that power, then, certainly Congress has authority to, uh, to assign and distribute the exercise of those powers to other branches.

**[00:55:25]** I think a lot of early examples of non-delegation, I think a lot of current examples of non del- of delegation, uh, would probably pass muster, you know, under this idea of non-exclusive power. But the difference again, is I do think there are boundaries. I do think there is real substance to these categories of exclusive power. Uh, but, um, you know, I think a lot of government power is non-exclusive and the, the court's gonna figure that out one way or another, because there's only so much, uh, um, uh, that it's gonna be able to do, I think.

**[00:55:56] Lana Ulrich:** Thank you so much, Bill Novak, Lisa Heinzerling and Ilan Wurman for being here for discussing this really interesting and important topic. Um, thank you to everyone in the audience for, um, for being here for participating, for submitting your questions. We hope to see you a future program. Uh, be sure to check our website for the video, for transcripts, for resources and subscribe to live at the National Constitution Center, our podcast, where we'll be sharing out the audio of this program. Thanks, take care and hope to see you soon.

**[00:56:28] Melody Rowell:** This episode was produced by Tanaya Tauber, John Guerra, Lana Ulrich, and me, Melody Rowell. It was engineered by David Stotz. Visit [constitutioncenter.org/debate](https://constitutioncenter.org/debate) to see a list of resources mentioned throughout this episode. Find the full lineup of our upcoming shows and register to join us virtually. You can join us via Zoom, watch our live YouTube stream or watch the recorded videos after the fact in our media library at [constitutioncenter.org/constitution](https://constitutioncenter.org/constitution). If you like the show, please help us out by rating and reviewing us on Apple podcasts or by following us on Spotify. On behalf of the National Constitution Center, I'm Melody Rowell.