THE ACCOUNTABILITY-ACCESSIBILITY DISCONNECT

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The administrative state is a favorite target of the current Supreme Court. A majority of the justices would like to see the size and scope of the federal bureaucracy significantly limited. One rationale that these justices consistently advance is the idea that the administrative state is unaccountable to the electorate. In an effort to reintroduce accountability into federal policymaking, these justices promote three different administrative law doctrines: the nondelegation doctrine, the major questions doctrine, and the unitary executive theory.

But at the same time these justices decry the lack of political accountability in the administrative state, they have steered the Court's election jurisprudence away from a rigorous examination of state election regulations. Through signaling some interest in the independent state legislature theory, abandoning judicial review of partisan gerrymandering, and refusing to address the constitutionality of voter identification ("ID") laws, these justices miss a crucial connection between administrative law and election law.

By failing to safeguard considerations of democratic accessibility in its election law jurisprudence, the Court undermines its stated goal of ensuring that voters can hold their elected policymakers accountable. By focusing only on the political accountability concerns raised in administrative law cases, these justices overlook the fact that full democratic accessibility is a fundamental prerequisite to electoral accountability.

This Article identifies the disconnect and suggests possible causes and potential remedies. Ultimately, the

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Article suggests that the Court should recognize political accountability as a value worth promoting and should rectify the disconnect by incorporating these political accountability concerns into its election law jurisprudence.

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INTRODUCTION

In its penultimate decision, in what proved to be a momentous 2021–2022 term, the Supreme Court made clear its intentions to significantly restrict the ways in which Congress can delegate authority to the administrative state.[1] The majority opinion in *West Virginia v. EPA*[2] explicitly adopted—for the first time in the Court's history—the so-called major questions doctrine.[3] To be sure, prior cases considered the scope and significance of the relevant issue to evaluate whether the agency acted within the scope of a valid congressional delegation of authority.[4] *West Virginia*, however,

1. West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).
2. 142 S. Ct. 2587 (2022).
3. *Id.* at 2610 ("Under our precedents, this is a major questions case.").
4. *See, e.g.*, King v. Burwell, 576 U.S. 473, 478–79 (2015) (reviewing delegation of taxing authority under the Affordable Care Act); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 333–34 (2014) (reviewing delegation of authority to EPA to regulate greenhouse gases from stationary sources); FDA v. Brown &

provided the Court's most fulsome explanation of the doctrine to date. But, while *West Virginia* may announce new force for the major questions doctrine, it does not signal a new direction for jurists who would like to reduce the size of the administrative state. Rather, it is the latest in a string of majority, concurring, and dissenting opinions criticizing a slew of administrative law doctrines.[5]

This Article will examine a trio of these doctrines: the nondelegation doctrine, the major questions doctrine, and the expansion of the president's removal power. What Gillian Metzger would label anti-administrative[6] jurists have argued with increasing frequency over the last three decades that the text and structure of the Constitution prohibit the legislature from delegating policymaking authority to administrative agencies;[7] require Congress to legislate with a heightened level of specificity when confronting broad assertions of agency authority;[8] and necessitate that agency directors be responsible to the president through his unfettered ability to remove them.[9] But though these anti-administrativist advocates make strong formalist claims about the constitutional legitimacy of their views, they also seek to justify their vision of these doctrines with a functionalist gloss. Namely, they argue that placing these restrictions on the administrative state enhances democracy by requiring politically accountable actors to make policy decisions.[10]

Williamson Tobacco Corp., 529 U.S. 120, 125–26 (2000) (reviewing FDA's attempt to regulate tobacco).

5. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. (*OSHA Vaccine Case*), 142 S. Ct. 661, 665 (2022) (per curiam) (major questions doctrine); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021) (per curiam) (major questions); Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191–92 (2020) (removal power); *King*, 576 U.S. at 485–86 (major questions doctrine); *Util. Air*, 573 U.S. at 325–28 (major questions doctrine); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483–84 (2010) (removal power). For recent opinions indicating growing support among the current majority to institute a more robust nondelegation doctrine, see, e.g., Gundy v. United States, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting); *id.* at 2130–31 (Alito, J., concurring in the judgment); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in denial of petition for certiorari) (mem.).

6. *See* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3–4 (2017) (coining the term "anti-administrativism" to refer to jurists' and scholars' intent on restricting the powers of the administrative state through more formalist doctrines like the nondelegation doctrine). *But see* Aaron L. Nielson, *Confessions of an "Anti-Administrativist"*, 131 HARV. L. REV. F. 1, 1 (2017) (contesting Professor Metzger's description of "anti-administrativists").

7. *See infra* Subpart I.A.

8. *See infra* Subpart I.B.

9. *See infra* Subpart I.C.

10. *See infra* Part I.

At the same time, these jurists endorse a vision of election law that significantly limits the number of voters who are ultimately allowed to hold political actors accountable in the voting booth.[11] Though roots of the current majority's "hands-off" approach to voting rights restrictions have a long history,[12] this movement appears to have picked up steam since 2013 when the Court struck down section 5 of the Voting Rights Act.[13] Restrictive voting rights laws,[14] exclusionary legislative districting,[15] and consolidation of election administration in the hands of often nonmajoritarian (or even minoritarian) state legislatures[16] have all received support from some of the same jurists who have questioned the legitimacy of the administrative state, in part because of a lack of political accountability.[17]

These two lines of thought form the central inquiry of this Article: Can the political accountability rationale presented in the administrative law context be reconciled with the ways in which the Court weighs democratic accessibility in the election law context? If the need to hold decision makers accountable through the political process requires limitations on the administrative state, why is there not a similar need to ensure that those who get to cast the votes that exact political consequences on those policymakers represent the full extent of the polity? The Article proposes that this dissonance cannot be reconciled without either accepting political accountability as a mythical or aspirational vision of democracy, or acknowledging that this functionalist justification plays no real role in the administrative law doctrines themselves.[18] The Article ultimately suggests that the best way to address the accountability-accessibility disconnect may be to accept political accountability as an aspirational virtue of a

11. For examples in the case law, see, e.g., Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2343–46 (2021); Bethune-Hill v. Va. State Bd. of Elections, 580 U.S. 178, 181–83 (2017); Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 259–62 (2015); Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013). For examples in the literature, see, e.g., Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 5 (2021).

12. *See infra* Part II.

13. *Shelby Cnty.*, 570 U.S. at 557.

14. *See, e.g.*, *id.* at 534–35.

15. Rucho v. Common Cause, 139 S. Ct. 2484, 2491 (2019).

16. *See, e.g.*, Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 1–2 (2020) (statement of Alito, J., dissenting from denial of stay application) (mem.); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 28–30 (2020) (Gorsuch, J., concurring) (mem.); *see also*, the Court's recent certiorari grant in Moore v. Harper, 142 S. Ct. 2901, 2901 (2022) (challenging a state court's ability to implement its own redistricting map).

17. *See infra* Part II.

18. *See infra* Part III.

modern democracy and to then give weight to this normative value when reviewing state election regulations.[19]

This Article thus fits into a larger conversation about accountability, democracy, and inconsistency.[20] But the Article adds to this debate by comparing the accountability-based functionalist justifications in the administrative law context with a seemingly inconsistent treatment of democratic accessibility in the election law context.[21] The Article then examines some potential sources of this dissonance[22] and explores the ways in which acknowledging this inconsistency may impact the relevant doctrines.[23]

What then explains this disconnect? As Professor Miriam Seifter points out, the idea that political accountability helps legitimize government actions in a democracy is intertwined with a baseline assumption that privileges majoritarian decision-making.[24] But if accountability adds legitimacy by ensuring that policy decisions remain subordinate to the will of the majority, why do the proponents of accountability-promoting interpretations of administrative law doctrines so frequently approve of (or at least acquiesce to the enforcement of) legislative activity that restricts which voters comprise that "majority"?[25]

It may well be that the jurists and scholars trumpeting the accountability mantle do so as a mere rhetorical nod toward functionalist reasoning and do not see political accountability as integral to the doctrinal changes they advocate. The judge or justice who is fully committed to a formal reading of separation of powers may not actually care about the functional consequences of what they view as a constitutional command. Instead, they tack on a weak

19. *See infra* Part IV.

20. For some recent examples see, e.g., Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 373–78 (2022) (examining the seemingly inconsistent ways in which the Roberts Court uses political theory to justify its results); Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1734–41 (2021) (criticizing the way the Supreme Court and state courts have relied on the "myth" of the majoritarian state legislature despite the fact that state legislatures are often minoritarian, and never as democratically majoritarian as statewide elected officials); Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U. L. REV. 989, 990–98 (2018) (criticizing the Court's reliance on political accountability to justify its decisions in various areas—including its nondelegation jurisprudence—despite evidence from political science literature severely undermining the extent to which voters hold legislators accountable for the mine run of policy decisions).

21. *See infra* Part II.

22. *See infra* Part III.

23. *See infra* Part IV.

24. *See* Seifter, *supra* note 20, at 1738–40.

25. *See infra* Part II.

functional argument about accountability as an afterthought to make significant doctrinal upheavals appear more palatable. This is not to say that those committed to reducing the scope of the administrative state doubt the correctness of their constitutional interpretation, but rather this explanation acknowledges the reality that the committed formalist may not care what lies beyond that interpretation.[26]

Alternatively, another benign explanation for the anti-administrativist fixation on political accountability is the staying power of democratic myths. The idea that voters understand, judge, and vote based on policy decisions made by elected officials has a strong foothold in the legal tradition and literature.[27] Or it may be that the opinions promoting this view of accountability give voice to an idealized version of how democracy *should* work. Under this romanticized framing, voters actually do make informed policy-based decisions and do not simply follow partisan divisions. In such a world, this rhetorical focus on how political accountability should work might make sense. Indeed, creating an aspirational vision of democracy has value, especially when proposed by powerful institutions like the Supreme Court. But as the discussion in Part I will demonstrate, the Court does not discuss accountability in this idealized way.[28] Instead, it presents accountability as a fact about our democracy.[29]

Another possibility is that proponents of the administrative and election law theories discussed in Parts I and II fully understand that political accountability does not exist for the mine run of policy decisions.[30] But they also see value in establishing a doctrine that creates the conditions for political accountability in the exceptional case where a policy decision is so politically salient that it captures voter attention and results in electoral consequences. But again, this is not the framing provided in judicial rhetoric. Moreover, the exceptionalized view presents a more fundamental problem, namely, that the proposed doctrinal solutions do not seem tailored to address only those rare instances where agency policymaking captures voter attention.

The failure to explain this dissonance in other ways leaves open the possibility of a more concerning rationale for the Court's dissonant approach in these different doctrinal areas—namely, that the Court fails to appreciate the ways in which the regulated parties in administrative and election law cases can advocate for themselves

26. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 487 (2001) (Thomas, J., concurring) ("[T]he Constitution does not speak of 'intelligible principles.' Rather, it speaks in much simpler terms: '*All* legislative Powers herein granted shall be vested in a Congress.'").

27. *See infra* Subpart III.B.

28. *See infra* Part I.

29. *See infra* Part I.

30. *See infra* Parts I, II.

in the political sphere. In the vast majority of the literature and case law surrounding the administrative law doctrines discussed in this Article, the regulated entities are commercial industries.[31] The accountability rhetoric in the administrative law space tends to restrict agencies' abilities to regulate the industries under their purview.[32] But these regulated industries tend to have the resources to actively engage in well-funded, well-organized political activity.[33] By contrast, the vast majority of voter restriction laws (and, to a lesser extent, extreme gerrymandering of voter districts) tend to disproportionately impact poor communities and communities of color—precisely those communities that are poorly positioned to remedy these impacts through political action.[34]

This shows just how detrimental the dichotomous view of administrative and election law can become. Regulated entities with the resources to publicize policy decisions (and thereby influence political accountability) are given a helping hand by anti-administrativist thinking. But individual voters, who have far less capability to correct anti-majoritarian legislative acts in the election law sphere, receive no help from the Court and face a growing chorus of scholarly defenses for restricting electoral accessibility.

The Article will flesh out this argument in the following four Parts. Part I will survey accountability-related judicial decisions in nondelegation, major questions, and removal powers cases. This account will demonstrate that the Court—sometimes through majority opinions and sometimes through the opinions of individual justices—bandies about seemingly inconsistent notions of accountability as their primary (and in some cases only) functional defense of their anti-administrativist views of these doctrines. This Part will also highlight the parties that often benefit from these pro-accountability views and discuss the ways in which these views of accountability have no real-world support. Part II will perform a similar survey of the case law surrounding a number of election law challenges, focusing specifically on voter ID laws and redistricting cases. Parts III and IV provide the primary contributions of this Article. Part III attempts to delineate the apparent disconnect in these narratives of accountability and accessibility. It then proposes various explanations for this disconnect, concluding that the best explanation might be the Court's failure to consider the political power of the regulated parties. Finally, Part IV examines the impact this doctrinal and scholarly dissonance has on the legitimacy of the Court's decisions and assesses whether the doctrine itself should change as a result. Ultimately, this Part suggests that the Court

31. *See* cases cited *infra* Part I.
32. *See infra* Part III.
33. *See infra* Subpart III.B.3.
34. *See infra* Subpart III.B.3.

should attempt to harmonize its election law doctrine with its view of political accountability by analyzing whether the election regulation at issue allows voters to better hold their elected officials accountable.

I. POLITICAL ACCOUNTABILITY IN THE ADMINISTRATIVE STATE

Before turning to the cases and scholarship employing accountability as a functionalist defense of the administrative doctrines discussed below,[35] it is important to define the way in which anti-administrativists present accountability. Accountability has multiple meanings and has been discussed in many different ways, even within the administrative law space.[36] But this Article assesses the anti-administrativist use of what Nicholas Stephanopoulos calls "electoral accountability," and this Article will call "political accountability"—namely, the idea that voters will punish or reward elected officials for their policy decisions at the next election.[37] As Professor Stephanopoulos explains, in order for voters to hold their representatives politically accountable for their voting records in office, four things must be true: "(1) [V]oters *know* about these records; (2) voters *form judgments* about them; (3) voters *attribute responsibility* for them; and (4) voters cast ballots *based* on these judgments and attributions."[38]

It is precisely because critics of the administrative state view accountability this way that the argument provides little in the way of actual functional justification. As the political science literature on which Professor Stephanopoulos relies makes clear, voters simply do not possess the level of knowledge necessary to hold decision makers accountable for the vast majority of policy decisions they make.[39] Indeed, despite the flourish of rhetoric regarding the need for politically accountable actors to make policy decisions, the Court seems to ignore the reality that voters take notice of these types of

35. *See infra* Subparts I.A, I.B, I.C.

36. *See, e.g.*, HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION 15–16 (2015) (contrasting the conception of formal (electoral) accountability with "substantive" accountability); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462–66 (2003) (criticizing the judicial and scholarly focus on political accountability); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2075 (2005) (defining accountability as requiring concepts of "hierarchy, monitoring, reporting, internal rules, investigations, and job evaluations").

37. Stephanopoulos, *supra* note 20, at 993.

38. *Id.*

39. *Id.* at 1022–24, 1032–34; *see also* R. DOUGLAS ARNOLD, CONGRESS, THE PRESS, AND POLITICAL ACCOUNTABILITY 1–28 (2004); MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 41–42, 62–63 (1996).

policy decisions only in exceedingly rare circumstances.[40] Without knowledge of policy decisions, voters simply cannot hold officials accountable for the policies themselves. Instead, partisan loyalties present a much more accurate account of how voters behave in the real world.[41]

Another important caveat to the analysis below is that various formalist arguments underlie the most common critiques of the administrative state. Proponents of the anti-administrativist impulse contend that (1) the vesting clauses of the Constitution,[42] (2) history and tradition regarding the delegation of authority and presidential removal,[43] and (3) the understanding of separation of powers at the time of the Founding dictate significant reductions in the scope of the administrative state.[44] These assertions have sparked significant debate within the academy, with "pro-administrativists" and "anti-administrativists" each conducting their own historical and structural analyses to advocate for the "correct" formalist reading of how best to situate the administrative state within our constitutional structure.[45] This Article does not wade into this rapidly growing textual/structural/historical morass where scholars and jurists wrestle over what level of delegation falls within

40. Stephanopoulos, *supra* note 20, at 994 ("Voters simply are not informed enough about agency actions, Congress members' positions, or state government policies to vote on their basis.").

41. *Id.* at 995 ("[V]oters' attributions are biased by their partisan affiliations.").

42. *See, e.g.*, Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1378–79 (1994); Saikrishna Prakash, *Executive Vesting Clause*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 237, 237–39 (David F. Forte & Matthew Spalding eds., fully rev. 2d ed. 2014).

43. *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 1–7 (2014); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 336–37 (2002); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1493–94, 1503–04 (2021).

44. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2133–35 (2019) (Gorsuch, J., dissenting); HAMBURGER, *supra* note 43, at 323–24; Wurman, *supra* note 43, at 1502–03.

45. *Compare* Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 85–86 (2021) (discussing a robust history of delegation during the early years after ratification of the constitution), Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 278–82 (2021) (same), *and* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1293–1305 (2021) (conducting an in-depth case study of delegation in the context of early taxation statutes), *with* HAMBURGER, *supra* note 43, at 31–32 (recounting the traditional narrative claiming that delegation was almost nonexistent at the founding), Lawson, *supra* note 43, at 334–35 (same), *and* Wurman, *supra* note 43, at 1497–98 (same).

constitutional commands. That terrain has been well trodden, and battle lines have become so entrenched that additional historical "revelations" seem unlikely to sway hearts and minds.[46] Instead, this Article will address the pragmatic justifications offered in defense of the anti-administrative position and the apparent disconnect between these justifications and the way in which election law cases are discussed and decided.

With these limitations in place, the Article turns to an examination of political accountability in three areas of administrative law jurisprudence: the nondelegation doctrine, the major questions doctrine, and the president's removal power.

A. Nondelegation and Accountability

In the summer of 2019, after the Supreme Court issued its decision in *Gundy v. United States*,[47] administrative law scholarship erupted, discussing the dissent of Justice Gorsuch and the concurrence of Justice Alito.[48] The question at issue in *Gundy* was whether the attorney general had the authority to make a sex offender registration requirement retroactive.[49] Justice Kagan authored the majority opinion, which upheld Congress's delegation of this authority to the attorney general.[50] But it was Justice Gorsuch's lengthy dissent—joined by Chief Justice Roberts and Justice Thomas—laying out one of the most extensive opinions ever issued by a sitting justice advocating for a strong and enforceable nondelegation doctrine[51] that captured the attention of the academy.[52] Justice Alito also issued a three-paragraph opinion concurring in the judgment but expressing his willingness to go along with Justice Gorsuch's vision for the doctrine if it could attract a majority of the Court.[53]

Just a few months later, Justice Kavanaugh—who had not yet been confirmed when the Court issued its opinion in *Gundy*—issued

46. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2625 n.6 (2022) (Gorsuch, J., concurring).

47. 139 S. Ct. 2116 (2019).

48. *See supra* note 45 and accompanying text; *see also* Wayne A. Logan, Gundy v. United States: *Gunning for the Administrative State*, 17 OHIO ST. J. CRIM. L. 185, 185–87 (2019); Johnathan Hall, Note, *The Gorsuch Test:* Gundy v. United States, *Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175, 176–80 (2020).

49. *Gundy*, 139 S. Ct. at 2122.

50. *Id.* at 2121.

51. The nondelegation doctrine posits that legislative power is vested in the legislature and cannot be delegated to executive agencies without running afoul of the separation of powers principles underlying the U.S. Constitution. *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237–41 (1994).

52. *Gundy*, 139 S. Ct. at 2131–48 (Gorsuch, J., dissenting).

53. *Id.* at 2130–31 (Alito, J., concurring in the judgment).

a concurrence in a denial of certiorari in *Paul v. United States*.[54] The newly minted justice wrote that he agreed with the denial of certiorari because the "case ultimately raises the same statutory interpretation issue that the Court resolved last Term in *Gundy*[.]"[55] But Justice Kavanaugh went further, signaling his agreement with Justice Gorsuch's dissent in *Gundy* and suggesting a need to reexamine the nondelegation doctrine, especially in the context of "major questions."[56]

Most of the academic sound and fury that followed these decisions seemed to agree that these dissents and concurrences signaled a willingness on the part of a majority of the current Court to give teeth to the infamously toothless nondelegation doctrine.[57] This scholarly deluge split mostly along ideological lines when discussing the desirability of such a jurisprudential sea change.

The scholarly excitation spawned by *Gundy* and *Paul* was warranted not by the novelty of the legal reasoning or rationales presented in the relevant judicial writings, but rather by an ability to count to five: For the first time since 1935,[58] a majority of justices

54. 140 S. Ct. 342 (2019) (mem.).

55. *Id.* (Kavanaugh, J., concurring in denial of petition for certiorari).

56. *Id.*

57. *See, e.g.*, Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy*,* Kisor*, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 164–68 (2019); Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 873 (2020) ("Until recently, reviving the nondelegation doctrine appeared a fringe project, the hobbyhorse of lone rangers like Justice Thomas. Last Term's decision in *Gundy v. United States*, where three Justices would have invalidated a provision under the nondelegation doctrine and a fourth showed interest in reviving the nondelegation doctrine in a later case, takes such arguments off the wall. This is especially so given that Justice Kavanaugh, who later in the Term was amenable to Justice Gorsuch's skeptical critique of *Auer* deference, did not sit for *Gundy*." (footnotes omitted)); Joseph Postell, *The Nondelegation Doctrine After* Gundy, 13 N.Y.U. J.L. & LIBERTY 280, 281 (2020) ("A close reading of the opinions in *Gundy*, however, reveals that a majority of the Court may be willing to apply the nondelegation doctrine in future cases."). *But see* Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 5 ("The case in which the anti-administrativist view gained the most traction was *Gundy v United States*, where four Justices signaled sympathy for a full-bore assault on the constitutionality of broad delegations. Even so, a plurality upheld the measure in question applying the Court's well-established doctrine on delegation, and as of this writing it remains unclear (and in my view unlikely) whether a majority will materialize for a major doctrinal recalibration on delegation that would call the constitutionality of the administrative state into question." (footnote omitted)).

58. And arguably for only the second time in the history of the Court. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) ("[T]he [nondelegation] doctrine has had one good year, and 211 bad ones (and counting).").

indicated they would vote to strike down a delegation of authority under the nondelegation doctrine. But the underlying rationale employed by Justices Kavanaugh and Gorsuch echoed strains of prior criticisms that remain largely unchanged, at least since Justice Rehnquist's separate opinion in a nondelegation case decided more than four decades ago.[59]

Indeed, in his first opinion addressing the nondelegation issue, then-Associate Justice Rehnquist raised concerns about the lack of political accountability inherent in agency policymaking. In *Industrial Union Dept. AFL-CIO v. American Petroleum Institute*,[60] Justice Stevens's opinion for the Court invalidated the Occupational Safety and Health Administration's regulation of benzene.[61] It did so on the ground that the agency failed to make a necessary finding that benzene levels at or below the then-existing standard posed a material risk to worker health.[62] Justice Rehnquist concurred with this result but would have gone even further, striking down a whole section of the Occupational Safety and Health Act for not sufficiently cabining a congressional delegation to the secretary of labor.[63] In his concurrence, Justice Rehnquist claimed that such broad delegations of authority to administrative agencies would allow elected members of Congress to avoid making difficult policy decisions by punting tough issues to unaccountable bureaucrats.[64] In other words, delegating these decisions to the bureaucracy would insulate elected lawmakers from political accountability.

For nearly two decades, Justice Rehnquist's position on delegation and accountability[65] remained an outlier. Scholars and

59. *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (*The Benzene Case*), 448 U.S. 607, 671–88 (1980) (Rehnquist, J., concurring in the judgment).

60. 448 U.S. 607 (1980).

61. *See id.* at 614–15 (majority opinion).

62. *Id.* at 661–62.

63. *Id.* at 686 (Rehnquist, J., concurring in the judgment).

64. *See id.* at 687 ("It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge.").

65. Notably, Justice Rehnquist's concern with congressional delegation seemed to wane after he assumed the position of chief justice. *See, e.g.*, Touby v. United States, 500 U.S. 160, 161, 167 (1991) (Justice Rehnquist joining Justice O'Connor's opinion for the Court rejecting a nondelegation claim against the Controlled Substances Act's delegation of authority to the attorney general to temporarily add substances to the act's drug schedule without the same procedural protections required to permanently add a substance); Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 214 (1989) (Justice Rehnquist again joining a Justice O'Connor opinion this time upholding a congressional delegation to the secretary of transportation to set a fee schedule to recoup costs incurred by

jurists alike largely disregarded his statements as bearing no resemblance to the current state of administrative law.[66] Eventually, however, as the Court's composition changed, Rehnquist's expressed reservations about congressional delegation began to attract support from additional justices.

In 2001, for example, Justice Thomas wrote a concurrence in *Whitman v. American Trucking Associations*,[67] questioning whether the "intelligible principle" standard (which has governed nondelegation doctrine jurisprudence since 1928)[68] comported with the structure of the Constitution.[69] The majority opinion, drafted by Justice Scalia, reversed the DC Circuit's ruling that a portion of the Clean Air Act unconstitutionally delegated too much discretion to the Environmental Protection Agency ("EPA").[70] Justice Thomas concurred in the result but indicated that he would be open to overruling the whole intelligible principle scheme in a future case.[71] The reasoning in this brief concurrence focused on the language of the Vesting Clause and the original understanding of separation of powers and did not explicitly raise any concerns about political accountability.[72] But in later cases, Justice Thomas authored and signed on to opinions raising accountability concerns.[73]

Justice Alito joined the accountability bandwagon in force with his concurring opinion in *Department of Transportation v. Association*

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administering the Hazardous Liquid Pipeline Safety Act of 1979 and the Natural Gas Pipeline Safety Act of 1968).

66. *See, e.g.*, Lawson, *supra* note 43, at 371 n.171 (observing that no other justices had taken nondelegation seriously since Rehnquist's concurrence in *The Benzene Case*).

67. 531 U.S. 457 (2001).

68. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

69. *Whitman*, 531 U.S. at 486–87 (Thomas, J., concurring).

70. *Id.* at 464–65 (majority opinion).

71. *Id.* at 486–87 (Thomas, J., concurring).

72. *Id.*

73. *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."); *see also* Justice Thomas's votes in *Gundy v. United States,* 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) and *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 525 (2014) (Scalia, J., dissenting) ("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.").

of American Railroads ("the *Amtrak Case*").[74] Justice Alito agreed with the majority's narrow holding—that Amtrak, a private corporation, exercised delegated authority as a governmental entity, not a private actor[75]—but chose to write separately to highlight what he viewed as the significant constitutional questions raised by the act's delegation, regardless of Amtrak's private or governmental status.[76] In one of the more direct judicial statements connecting delegation with accountability, Justice Alito wrote simply: "Liberty requires accountability."[77] He continued by returning to the very concern Justice Rehnquist raised thirty-five years earlier—namely, that politicians in Congress would struggle to resist the temptation to pass off potentially divisive policy decisions to agencies outside the political arena.[78]

With the addition of Justices Gorsuch and Kavanaugh to the Court in 2017 and 2018,[79] the number of justices willing to question the status quo of the nondelegation doctrine increased to a majority of the Court. As discussed previously, Justice Gorsuch issued a lengthy dissent in *Gundy v. United States*, criticizing the broad scope of authority delegated by Congress to the attorney general.[80] The dissent raised the traditional anti-administrativist structural and historical claims in support of limiting Congress's ability to delegate its authority.[81] But the opinion also revivified the specter of unaccountable civil servants and agency officials making policy decisions instead of leaving those decisions to politically accountable elected legislators.[82] Indeed, Justice Gorsuch returned to Justice Rehnquist's central accountability theme—namely, that the ability to

74. (*The Amtrak Case*), 575 U.S. 43 (2015).

75. *Id.* at 56 (Alito, J. concurring). This distinction mattered because if the Court had determined that Amtrak exercised delegated legislative authority in its capacity as a private company, the delegation would have run afoul of the so-called "private nondelegation doctrine." *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

76. *Ass'n of Am. R.Rs.*, 575 U.S. at 57–58 (Alito, J., concurring).

77. *Id.* at 57.

78. *See id.* ("When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences.").

79. *Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Feb. 16, 2023).

80. Gundy v. United States, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting); *see supra* notes 47–59 and accompanying text.

81. *Gundy*, 139 S. Ct. at 2133–35 (Gorsuch, J., dissenting).

82. *See id.* at 2134 ("And by directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow.").

pawn off policy decisions to unelected bureaucrats would incentivize Congress and the president alike to avoid making difficult choices.[83]

Just a few months later, Justice Kavanaugh, now on the bench, returned to these same concerns: "Justice Rehnquist opined [in *Industrial Union Dept. AFL-CIO v. American Petroleum Institute*] that major national policy decisions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive Branch."[84] Though Justice Kavanaugh more explicitly limited his own concerns to "major" policy decisions, he also commended Justice Gorsuch's *Gundy* dissent and encouraged further consideration of the delegation issue.[85]

The opinions of Justices Gorsuch, Alito, and Kavanaugh in *Gundy* and *Paul*, along with the previous voting records of Justices Roberts and Thomas, seemed to indicate five votes in favor of revisiting (and perhaps overruling) the Court's nondelegation doctrine precedent. And many commentators on both sides of the debate believed that the Court was poised to do just that in *West Virginia v. EPA*.[86] But, as discussed in Subpart I.B *infra*, the Roberts-authored majority opinion chose instead to decide the case through application of a reformulated major questions doctrine.[87]

Justice Gorsuch, however, chose to write a concurring opinion highlighting the separation of powers concerns that connect the major questions doctrine and the nondelegation doctrine.[88] This concurrence emphasized Justice Gorsuch's belief that ensuring elected lawmakers follow the difficult lawmaking procedures outlined in the Constitution would prevent the promulgation of unjust laws by

83. *Id.* at 2135 ("Legislators might seek to take credit for addressing a pressing social problem by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue. In turn, the executive might point to Congress as the source of the problem. These opportunities for finger-pointing might prove temptingly advantageous for the politicians involved, but they would also threaten to 'disguise . . . responsibility for . . . the decisions.'" (alteration in original) (quoting Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1478 (2015))).

84. Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in denial of petition for certiorari) (mem.).

85. *Id.* ("Like Justice Rehnquist's opinion 40 years ago, Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.").

86. 142 S. Ct. 2587 (2022). For a sample of the nondelegation anticipation surrounding the case, see, e.g., Alison Gocke, Chevron*'s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 984–88 (2021).

87. *See infra* Subpart I.B.

88. *West Virginia v. EPA*, 142 S. Ct. at 2616–26 (Gorsuch, J., concurring).

"unaccountable ministers."[89] Though nominally discussing the major questions doctrine, Justice Gorsuch's concurrence once again injected the political accountability rationale underlying the anti-administrativist case for the nondelegation doctrine.

B. Major Questions and Accountability

Like the nondelegation doctrine, the major questions doctrine seeks to limit Congress's ability to delegate decision-making authority to administrative agencies. But rather than focusing on legislative power writ broadly, the major questions doctrine emphasizes the supposed importance of limiting agency discretion in matters of "political or economic significance[.]"[90] In the doctrine's infancy, courts would review agency attempts to regulate these significant issues with a "common sense" approach to determine whether Congress really intended to delegate the type of broad authority claimed by the agency.[91] This Subpart will describe the evolution of the doctrine from this modest beginning to its most recent expansion into a "plain statement rule" in *West Virginia v. EPA*.[92]

The "key case" in the development of the major questions doctrine is the Court's 2000 decision in *FDA v. Brown & Williamson Tobacco Corp*.[93] In her 5–4 opinion for the Court, Justice O'Connor struck down FDA regulations on tobacco.[94] In holding that the regulations exceeded the authority delegated to the FDA by statute, Justice O'Connor reasoned that "[g]iven the economic and political significance of the tobacco industry at the time, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the [Food, Drug, and Cosmetics Act] absent any discussion of the matter."[95]

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89. *Id.* at 2617 ("It is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers.'" (citing THE FEDERALIST NO. 11, at 85 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

90. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

91. *Id.* at 133 ("[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."). For a thorough discussion of the development of the doctrine, see, e.g., Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine,* 109 U. VA. L. REV. (forthcoming 2023) (manuscript at 2–6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724; Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 477–78 (2021).

92. *West Virginia v. EPA*, 142 S. Ct. at 2594.

93. 529 U.S. 120 (2000); *see also West Virginia v. EPA*, 142 S. Ct. at 2641 (Kagan, J., dissenting) ("[A]ll agree [*Brown and Williamson*] is the key case in this sphere.").

94. *Brown & Williamson*, 529 U.S. at 125–26.

95. *Id.* at 147.

This concept, that courts "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency[,]"[96] formed the basis of the major questions doctrine. So framed, the doctrine initially presented a carve-out from the traditional deference given to agency decisions under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[97] Essentially, the doctrine instructed courts to review agency regulations de novo if the regulation dealt with matters of economic and political significance.[98]

The majority in *Brown & Williamson* seemed to prioritize legislative accountability over presidential accountability when assessing the legitimacy of a "major question" regulation, writing that "regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."[99] Justice Breyer in dissent, however, pointed to the political accountability of the executive as a safeguard against agency overreach.[100]

This discussion of accountability makes sense given the interplay between this nascent version of the major questions doctrine and *Chevron* deference. More than fifteen years before *Brown & Williamson*, the *Chevron* majority reasoned that deference to agency decision-making was appropriate in large part *because of* the president's accountability to the public.[101] But in recent years, the

96. *Id.* at 133.

97. 467 U.S. 837 (1984).

98. Sunstein, *supra* note 91, at 476–78.

99. *Brown & Williamson*, 529 U.S. at 161 (citation omitted).

100. *See id.* at 190 (Breyer, J., dissenting) ("[T]he very importance of the decision taken here, as well as its attendant publicity, means that the public is likely to be aware of it and to hold those officials politically accountable.").

101. *Chevron*, 467 U.S. at 865–66 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."). The assault against *Chevron* deference presents another apparent inconsistency in the functionalist reasoning undergirding the anti-administrativist agenda. As the quoted language above shows, the *Chevron* majority explicitly acknowledged the political accountability of the president as a justification for deferring to agency interpretations of ambiguous statutes. And indeed, anti-administrativist jurists and scholars seem to recognize this aspect of political accountability when arguing for additional presidential control of agency appointments and removal. *See infra* Subpart I.C. But these same individuals then discount presidential accountability entirely when discussing major questions or nondelegation doctrine cases, implying that only Congress can be accountable for the types of

Court has expanded the reach of the major questions doctrine.[102] Under the current understanding of the doctrine, the Court has signaled a willingness to view delegations with a heightened level of skepticism if the policy at issue presents "a question of deep 'economic and political significance.'"[103] As noted in the Introduction, this push culminated this past term in *West Virginia v. EPA*.[104]

The expansion of the major questions doctrine has been justified on both traditional Article III grounds and political accountability grounds. As with the arguments in favor of a robust and stringent nondelegation doctrine, more formalist reasoning does much of the heavy lifting here. Supporters of the major questions doctrine reach back to *Marbury v. Madison*'s[105] admonition that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[106] This justification for the major questions doctrine aligns with myriad judicial and academic critiques of *Chevron* deference. Stripped to its essence, the dominant critique of *Chevron* asserts that deference to an agency interpretation of a congressional statute usurps the judiciary's role in statutory interpretation.[107] This usurpation is exacerbated—so proponents of the major question doctrine claim—when the interpretation advanced by the agency allows for regulation of politically and economically significant areas.[108]

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decisions agencies routinely make. *See* Emerson, *supra* note 20, at 376. How anti-administrativist scholars and jurists view the role of political accountability in applying *Chevron* deference, therefore, seems in tension with the removal power cases but perhaps in alignment with cases involving congressional delegations.

102. *See, e.g.*, *OSHA Vaccine Case*, 142 S. Ct. at 664–66; Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2488–89 (2021) (per curiam); King v. Burwell, 576 U.S. 473, 485–86 (2015); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 310–11 (2014); Gonzales v. Oregon, 546 U.S. 243, 267 (2006).

103. *King*, 576 U.S. at 486. Cass Sunstein identifies this as the development of a "weak" and "strong" version of the major questions doctrine. *See* Sunstein, *supra* note 91, at 477; *see also* Deacon & Litman, *supra* note 91 (manuscript at 26–27).

104. *See supra* notes 1–5 and accompanying text.

105. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

106. *Id.* at 177. *See also King*, 576 U.S. at 498 (quoting *Marbury* to support application of the major questions doctrine).

107. *See, e.g.*, Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 939 (2018) (summarizing the anti-administrativist arguments against *Chevron*).

108. *See, e.g.*, *OSHA Vaccine Case*, 142 S. Ct. at 669 (Gorsuch, J., concurring) ("Sometimes, Congress passes broadly worded statutes seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation. Later, the agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment. The major questions doctrine guards against this possibility by recognizing that Congress does not usually

While this formalist reasoning has remained consistent over the last two decades, jurists have in recent years begun to apply a political accountability rationale as well.[109] Some in the academy trace this trend to Chief Justice Roberts's opinion in *King v. Burwell*.[110] At issue in *King* were provisions in the Affordable Care Act governing the establishment of health care exchanges.[111] The majority opinion ultimately upheld the agency's proposed interpretation of the statute but without deferring to the agency's rationale.[112] Instead, the chief justice invoked *Brown & Williamson*'s formulation of the major questions doctrine and refused to apply *Chevron* deference.[113] The majority opinion justified this departure from *Chevron* in part on democratic legitimacy grounds.[114]

A few years later, Justice Gorsuch—perhaps the Court's most vocal proponent of applying a more robust nondelegation doctrine—began to explicitly link the major questions doctrine with the nondelegation doctrine and the political accountability issues raised in nondelegation cases. In his *Gundy* dissent, for example, Justice Gorsuch asserted that the major questions doctrine provided another avenue for enforcing nondelegation concerns.[115] Similarly, in his concurrence to *National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration* (the "*OSHA Vaccine*" case),[116] Justice Gorsuch argued that "the major

'hide elephants in mouseholes.'" (citation omitted)); *King*, 576 U.S. at 485 (reasoning that in "extraordinary cases" the implicit assumptions underlying *Chevron* deference may not apply).

109. *See, e.g.*, *OSHA Vaccine Case*, 142 S. Ct. at 668–69 (Gorsuch, J., concurring) (explaining that the major questions doctrine serves the same accountability-enforcing purpose as the nondelegation doctrine); *West Virginia v. EPA*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (same).

110. 576 U.S. 473 (2015). *See, e.g.*, Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2022–24 (2018); Deacon & Litman, *supra* note 91 (manuscript at 10–11) (noting the expansion of the major questions doctrine as applied in *King*); Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 65 (2015).

111. *King*, 576 U.S. at 478–79.

112. *Id.* at 494–98.

113. *Id.* at 485–86.

114. *Id.* at 498 ("In a democracy, the power to make the law rests with those chosen by the people.").

115. Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) ("Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.").

116. 142 S. Ct. 661 (2022) (per curiam).

questions doctrine is closely related to what is sometimes called the nondelegation doctrine."[117] According to Justice Gorsuch, the connection between the doctrines comes from their shared purpose of "protect[ing] the separation of powers" and protecting the role of a "robust democratic process" in lawmaking.[118] As discussed previously, his concurrence in *West Virginia* highlighted the similarity of purpose between the major questions doctrine and the nondelegation doctrine.[119] Justice Thomas also blended the (then-nascent) major questions doctrine with his own view of the nondelegation doctrine by insisting that when "the significance of the delegated decision is simply too great," it cannot be delegated because such delegation would amount to a "legislative" act.[120]

The expansion of the major questions doctrine and its increasing reliance on political accountability came to a head this past summer. In June 2022, the anti-administrativist wing of the Court explicitly adopted the major questions doctrine by name for the first time and gave the doctrine its most expansive definition yet.[121] As described in the chief justice's opinion, the major questions doctrine will now apply whenever "agencies assert[] highly consequential power beyond what Congress could reasonably be understood to have granted."[122] The opinion further instructed reviewing courts to adopt a "skeptical" posture when an agency has "'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'"[123] Finally, when such "unheralded" agency action is involved, courts must require "clear congressional authorization" to uphold the regulation under review.[124] Put differently, the *West Virginia* opinion firmly entrenches the major questions doctrine as a "clear statement rule."[125] As Justice Gorsuch makes clear in his concurrence, the goal of this formulation of the major questions doctrine is to promote

117. *Id.* at 668 (Gorsuch, J., concurring).

118. *Id.* at 669.

119. West Virginia v. EPA, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring); *see supra* notes 88–89 and accompanying text.

120. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring). The insistence that "significant" legislative decisions are somehow more "legislative" than others ignores the long history of private bills that made up significant portions of congressional activity prior to 1946. *See* Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1543–47 (2018). The extent to which the prevalence of private bills belies the anti-administrativist focus on "significant" policy decisions remains underexplored in the literature and would benefit from additional research.

121. *West Virginia v. EPA*, 142 S. Ct. at 2609.

122. *Id.*

123. *Id.* at 2609–10 (alteration in original).

124. *Id.*

125. *Id.* at 2616 (Gorsuch, J., concurring).

policymaking by the "people's elected representatives" in the legislature instead of "largely unaccountable 'ministers.'"[126]

C. Removal Power and Accountability

A third pillar of the current trend toward reimagining the administrative state includes a significant expansion of the president's removal power. Proponents of this aspect of the unitary executive theory[127] once again invoke political accountability as the functional justification for increasing the president's control over the administrative state.[128] Remember that anti-administrativist jurists focus on the accountability of *legislative* policymakers in the nondelegation major questions cases.[129] In removal power cases, by contrast, these same jurists insist that the administrative state must be accountable to the executive as well. Indeed, at the same time that rhetoric in nondelegation and major questions opinions has exulted the superior political accountability of the legislative branch over executive agencies, these same jurists have also consistently claimed that the president is "the most democratic and politically accountable official in Government."[130] This national constituency provides a necessary level of accountability to the administrative state. But this accountability exists if, and only if, the executive has sufficient removal authority.[131]

Questions regarding the scope and extent of the president's removal power—as well as Congress's ability to limit that power—

126. *Id.* at 2617 (quoting THE FEDERALIST NO. 11, at 85 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

127. *See* Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1354–55 (2012) (connecting presidential removal powers with the unitary executive theory).

128. *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 3 (2008); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws,* 104 YALE L.J. 541, 639 (1994) ("The Framers wished to construct a unitary Executive since they felt it was conducive to energy, dispatch, and responsibility. Insofar as officers exercise that authority independent of the Supreme Magistrate, there is no presidential accountability and the design of the founding generation is thwarted.").

129. *See supra* notes 6–9 and accompanying text.

130. Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020); *see also* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496 (2010).

131. *Free Enter. Fund*, 561 U.S. at 498 ("Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" (quoting THE FEDERALIST NO. 70, at 476 (Alexander Hamilton) (Jacob E. Cooke ed., 1961))).

have a long history in the case law.[132] But by the mid-1930s, the Court had established that the president had *some* inherent power to remove executive branch officials, but this power was not unlimited.[133] Congress could, for example, limit the president's ability to remove executive officers who exercised "quasi-judicial" or "quasi-legislative" powers.[134]

The modern anti-administrativist push toward a presidency with significantly increased removal power began to emerge after the excesses of Kenneth Starr's investigation into President Clinton and the Whitewater scandal.[135] Starr's role as an independent prosecutor was created by a provision in the Ethics in Government Act.[136] Under the act, an independent prosecutor would be appointed by a Special Division court (upon recommendation of the attorney general)[137] and would be removable by the attorney general only for "good cause."[138] Though appointed to investigate potentially fraudulent land transfers, Starr's investigation became a sprawling entity that eventually resulted in President Clinton's impeachment for charges related to lying about an illicit affair.[139]

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132. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803); Myers v. United States, 272 U.S. 52, 286–95 (1926).

133. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935) (holding that Congress can place *some* restrictions on the president's removal power); *Myers*, 272 U.S. at 293–94 (holding that the president does not need Senate approval to remove executive officers).

134. *Humphrey's Ex'r*, 295 U.S. at 629.

135. *See* Emerson, *supra* note 20, at 379. "Whitewater" was the name of a political scandal involving President Clinton's involvement in certain land deals in Arkansas. Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 605 (1998). Professor Ken Gormley provides the following succinct summary of the sprawling nature of the Starr investigation:

> At the time he was appointed in 1994, Starr's jurisdictional charter was a narrow one authorizing him to investigate an Arkansas land deal involving Bill and Hillary Clinton that took place in the 1980s. From that launch pad he has gone on to investigate the suicide of Clinton friend and deputy White House Counsel Vince Foster (1994); irregularities in firings within the White House Travel Office (1996); alleged false statements to the House Committee on Government Reform and Oversight by White House Counsel Bernard Nussbaum; the improper request for FBI background files on prominent Republicans by White House officials (1996); and alleged perjury and subornation of perjury by President Clinton, in denying a sexual affair with White House intern Monica Lewinsky, during his civil deposition in the Paula Jones case (1998).

Id. (footnotes omitted).

136. *See* 28 U.S.C. §§ 591–99.

137. 28 U.S.C. § 592.

138. 28 U.S.C. § 596(a)(1).

139. *See* Gormley, *supra* note 135, at 605.

Many commentators—including anti-administrativist judges and scholars—began to question the wisdom of the unfettered discretion granted to Starr via the Ethics in Government Act.[140] These commentators began looking back to a lone dissent authored by Justice Scalia in *Morrison v. Olson*,[141] a case challenging the constitutionality of the provision of the act authorizing the independent counsel.[142] Justice Scalia vehemently dissented, arguing in part that the independent counsel was a "principal officer" of the United States and therefore must be removable at will in order to introduce some level of accountability into the position.[143]

Justice Scalia's dissent failed to attract a single vote in 1988.[144] But the "mission creep" of the Starr investigation convinced many commentators from across the ideological spectrum that the independent counsel statute created an unaccountable prosecutor.[145] When the sunset provision of the statute caused it to expire in 1999, Congress did not renew it.[146] But the legacy of Scalia's *Morrison* dissent has impacted anti-administrativist legal thought far beyond the expiration of a single legislative provision. Many proponents of increased presidential removal power point to the stringent for-cause removal protections included in the independent counsel statute as a case study of the type of separation of powers problems that can arise when executive branch actors are not sufficiently accountable to the president.[147]

The Roberts Court took up the removal question in earnest in its 2010 decision *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.[148] At issue was the structure of the Public Company Accounting Oversight Board, which consisted of five members serving

140. *See, e.g.*, Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 395–400 (2001); Gormley, *supra* note 135, at 604–06; William K. Kelley, *The Constitutional Dilemma of Litigation Under the Independent Counsel System*, 83 MINN. L. REV. 1197, 1197–1200 (1999).

141. 487 U.S. 654 (1988).

142. *Id.* at 659; *see also* Emerson, *supra* note 20, at 379 ("Within structural constitutional law, the link between liberty and democracy emerged in the late Justice Scalia's landmark dissent in *Morrison v. Olson*.").

143. *Morrison*, 487 U.S. at 716 (Scalia, J., dissenting).

144. *Id.* at 658 (majority opinion).

145. *See, e.g.*, Julian A. Cook, III, *Mend It or End It? What to Do with the Independent Counsel Statute*, 22 HARV. J.L. & Pub. Pol'y 279, 313 (1998); Gormley, *supra* note 135, at 679; Jerome J. Shestack, *Foreword: The Independent Counsel Act Revisited*, 86 GEO. L.J. 2011, 2014 (1998); *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, 54 WASH. & LEE L. REV. 1515, 1520 (1997).

146. Davis, *supra* note 140, at 396.

147. *See, e.g.*, *id.* at 438–43.

148. 561 U.S. 477 (2010).

five-year terms and removable only by the Securities and Exchange Commission ("SEC") "for good cause shown."[149] In addition, the SEC commissioners, who had the ability to remove board members, could only be removed for "inefficiency, neglect of duty, or malfeasance in office[.]"[150] According to Chief Justice Robert's majority opinion, this dual layer of for-cause removal protections violated "Article II's vesting of the executive power in the President."[151]

More relevant to this Article's inquiry, however, are the chief justice's assertions that political accountability required this result. Indeed, the majority opinion began by asserting in the second paragraph that "[s]ince 1789, the Constitution has been understood to empower the President to keep [executive] officers accountable—by removing them from office, if necessary."[152] One of the primary evils the opinion identified was the creation of "a Board that is not accountable to the President, and a President who is not responsible for the Board."[153] The chief justice even questioned whether the dual layer of for-cause removal went so far as to impair the president's ability to take care that the laws be faithfully executed.[154]

In 2020, the anti-administrativist wing of the Court expanded the removal powers of the president beyond the type of dual-layer scheme at issue in *Free Enterprise Fund*.[155] Once again writing for the majority, Chief Justice Roberts's opinion in *Seila Law LLC v. Consumer Financial Protection Bureau*[156] held that the for-cause removal protection provided to the head of the Consumer Financial Protection Bureau (an independent agency) unconstitutionally infringed on the president's removal powers.[157] The majority opinion reiterated the textual concerns discussed in *Free Enterprise Fund* but then focused heavily on the "novel" structure of the bureau and its implications for accountability.[158]

According to the majority, the fact that the bureau was an "independent" agency with only a single director—as opposed to a

149. *Id.* at 484, 486.

150. *Id.* at 487 (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935)).

151. *Id.* at 484.

152. *Id.* at 483.

153. *Id.* at 495.

154. *Id.* at 496 ("The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.").

155. Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2198 (2020) (citing *Free Enter. Fund*, 561 U.S. at 483).

156. 140 S. Ct. 2183 (2020).

157. *Id.* at 2192.

158. *Id.* at 2191–92 (rehearsing the Vesting Clause and Take Care Clause arguments in support of enhanced presidential removal power). For a criticism of the Court's current focus on the novel statutes, see Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1410–14 (2017).

multimember board—increased political accountability concerns.[159] The majority declared that the bureau head simply had too much executive power to fall under earlier precedents limiting the president's removal power.[160] Without a presidential check, the bureau head was not sufficiently accountable to the president.[161] And because "[o]nly the President (along with the Vice President) is elected by the entire Nation," a lack of accountability to the president translated into a lack of accountability to the public.[162]

As this Part has shown, concerns about political accountability run throughout the anti-administrativist approach to separation of powers concerns in administrative law. The next Part will discuss the Court's failure to pay equal attention to democratic accessibility concerns in several election law doctrines.

II. ELECTION LAW AND DEMOCRATIC ACCESSIBILITY

In contrast to the administrative law doctrines discussed in the previous Part, the Court's recent treatment of election law cases has seemed indifferent to the majoritarian/legitimacy concerns underlying the anti-administrativist focus on political accountability. Instead, the Court has primarily invoked federalism concerns to support a predominantly "hands-off" approach to election law challenges.

Indeed, the Court seems more and more willing to turn a blind eye to what this Article will call "democratic accessibility" concerns. In the context of this Article, democratic accessibility refers to both a voter's ability to access the ballot box *and* whether the electoral system allows each vote to matter. Democratic accessibility does not require full proportional voting, but it does require a relatively level playing field that does not exclude huge sections of the electorate from being able to impact election outcomes.

Before turning to an analysis of the disconnect between these two areas of law, this Part will provide a brief overview of the most prominent ways in which the Court has extricated itself from significant swathes of election law. The following discussion will focus on three different strands of modern election law cases: the independent state legislature theory, partisan gerrymandering, and voter ID laws.

159. *Seila L.*, 140 S. Ct. at 2202 ("In addition to being a historical anomaly, the CFPB's single-Director configuration is incompatible with our constitutional structure.").

160. *Id.* at 2203–04.

161. *Id.* at 2203 ("The CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one.").

162. *Id.*

A. Election Administration and the Independent State Legislature Theory

The independent state legislature theory[163] posits that because the Constitution assigns election administration to state legislatures, the state legislative body is the only entity that can make election rules.[164] Proponents of the theory point to the "Elections Clause" in Article I, which instructs the "Legislature" of each state to establish "[t]he Times, Places and Manner of holding Elections for Senators and Representatives,"[165] and the "Electors Clause" in Article II, which assigns the "manner" of appointing electors to the state "Legislature" as well.[166] Supporters of the theory assert that because election regulations are textually committed to state legislatures, state courts (and even state constitutions) cannot limit the substantive authority of the legislature when it comes to election administration.[167]

Though some scholars have attempted to provide a historical pedigree for the theory in scattered court and congressional precedents,[168] a clear judicial formulation did not appear until Chief

163. Though proponents refer to the "independent state legislature doctrine" (*see* Morley, *supra* note 11, at 9), calling this idea a "doctrine" would be to ignore binding Supreme Court precedent that has foreclosed the theories underlying the concept of the independent state legislature. *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 792–93 (2015). For additional scholarly critiques of the independent state legislature theory see Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV (forthcoming 2023) (manuscript at 1236–39), https://repository.law.umich.edu/articles/2718/; Seifter, *supra* note 20, at 1752–53; Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J.L. & PUB. POL'Y (forthcoming 2023) (manuscript at 2–4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044138.

164. *See* Litman & Shaw, *supra* note 163 (manuscript at 1236); Morley, *supra* note 11, at 8–9.

165. U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

166. U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, *in such Manner as the Legislature thereof may direct,* a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." (emphasis added)).

167. Morley, *supra* note 11, at 8 ("[A]lthough state constitutions may validly restrict states' power to politically gerrymander state and local legislative districts, they cannot limit a legislature's power to regulate most aspects of federal elections—including the legislature's authority to draw congressional district boundaries.").

168. *Id.* at 69–90.

Justice Rehnquist's concurrence in *Bush v. Gore*.[169] Joined by Justices Thomas and Scalia, the chief justice questioned the propriety of deferring to state court judgments regarding election regulations passed by state legislatures.[170] Instead, because the Constitution granted state legislatures the power to appoint electors, judicial review of the manner of appointment must "ensure that postelection state-court actions do not frustrate . . . legislative desire[s]."[171] Rehnquist's concurrence noted that Florida's state legislature delegated authority to resolve election disputes to the secretary of state and the state circuit courts—not the state supreme court.[172] According to the concurrence, any attempt by the state supreme court to organize a recount impermissibly infringed on the state legislature's Electors Clause authority to regulate presidential elections.[173] Put another way, despite the fact that the Florida Constitution authorized the state supreme court to exercise powers of judicial review, when it came to election regulation, Article II's grant of authority to the state legislature prohibited deference to the state supreme court's rulings.

While three justices clearly embraced some portions of the independent state legislature theory, it is worth noting that six justices refused to sign on to the chief justice's concurrence. Even more, the per curiam opinion that commanded a majority explicitly limited itself to the facts of the case at hand.[174] But during the 2020 election, anti-administrativist justices explicitly cited *Bush v. Gore*—including Rehnquist's concurrence—in support of their decisions.[175]

Even more indicative of some sympathy on the Court for the independent state legislature theory, however, are the votes of the

169. 531 U.S. 98, 112–13 (2000) (Rehnquist, J., concurring) ("Article II, § 1, cl. 2, provides that '[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct,' electors for President and Vice President. (Emphasis added.) Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance." (alteration in original)); *see also* Litman & Shaw, *supra* note 163 (manuscript at 1239); Weingartner, *supra* note 163 (manuscript at 11).

170. *Bush*, 531 U.S. at 114 (Rehnquist, J., concurring) ("But, with respect to a Presidential election, the court must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate.").

171. *Id.* at 113.

172. *Id.* at 113–14.

173. *Id.* at 115.

174. For a more in-depth discussion of the precedential nature of *Bush v. Gore*, see Litman & Shaw, *supra* note 163 (manuscript at 1239–41).

175. *See, e.g.*, Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 733 (2021) (Thomas, J., dissenting) (mem.); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring) (mem.).

dissenting justices in the 2015 case, *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[176] The case arose in response to a 2010 redistricting map in Arizona, but the origin of the suit stretched back to a state initiative a decade earlier.[177] In 2000, Arizona voters approved an initiative to amend the state constitution by authorizing the creation of an independent commission to draw districting maps for the state.[178] After the commission drew its first map based on the 2010 census, the state legislature sued, arguing that the US Constitution explicitly delegated authority to regulate elections to the state legislature.[179] In other words, the legislature attempted to invoke the independent state legislature theory.

The majority opinion did not explicitly reject the independent state legislature theory.[180] Instead, Justice Ginsburg acknowledged that the Elections Clause vested regulatory authority in the state "Legislature" but adopted a broader definition of the term.[181] Rather than limiting the Constitution's delegation of power to the formal legislative body of each state, the majority defined legislature to include the legislative *process* adopted by each state, including the use of initiatives and referenda.[182]

But more important for purposes of this Article, Chief Justice Roberts issued a dissent—joined by Justices Alito, Thomas, and Scalia—that embraced some aspects of the independent state legislature theory.[183] The dissent rejected the majority's broad definition of "Legislature," insisting that the term used in the Elections Clause referred only to "the representative body which ma[kes] the laws of the people."[184] How far these justices would push the limits of the theory remains unclear, however, as the dissent acknowledged that "the state legislature *need not be exclusive* in congressional districting, but neither may it be excluded."[185] What is clear from the dissent's position in *Arizona Independent Redistricting Commission* is that it did not consider the ways in which restricting democratic participation in the creation of electoral districts might affect political accountability. In fact, the chief justice and his fellow dissenters flatly rejected the idea that "the people" had a role to play in electoral mapmaking other than to elect representatives who would

176. (*AIRC*), 576 U.S. 787, 825–26 (2015) (Roberts, C.J., dissenting).
177. *Id.* at 792 (majority opinion).
178. *Id.*
179. *Id.* at 792–93.
180. *Id.* at 793.
181. *Id.* at 795–96.
182. *Id.* at 796.
183. *Id.* at 825 (Roberts, C.J., dissenting). In 2017, the Court ruled that using race as a proxy for partisan gerrymandering also violated the Equal Protection Clause. *See* Cooper v. Harris, 137 S. Ct. 1455, 1480 (2017).
184. *AIRC*, 576 U.S. at 829 (Roberts, C.J., dissenting) (alteration in original).
185. *Id.* at 841–42 (emphasis added).

draw districting maps for them.[186] Absent from the dissent, then, is any discussion of whether allowing unrepresentative majorities to entrench an unrepresentative districting map inhibits the electorate's ability to hold elected officials accountable.

The Court may[187] soon issue an opinion accepting or rejecting the independent state legislature theory. In June 2022, the Court granted a petition for certiorari in *Moore v. Harper*,[188] a case challenging a North Carolina state court's implementation of its own redistricting map after the political process failed to produce a constitutionally acceptable version.[189] The Court heard oral arguments in the case in December of 2022. Based on the cases discussed above (especially the chief justice's dissent in *Arizona Independent Redistricting Commission*),[190] it seems likely that the Court will apply some version of the independent state legislature theory to prevent state courts from creating districting maps.[191] Whether the Court will go further and prohibit or severely restrict judicial review of state election maps presents a closer question.

B. Partisan Gerrymandering

While the independent state legislature theory questions the propriety of judicial review of *any* state election regulation, other lines of election law cases show the Court's attempts to disengage from more specific constitutional questions. The Roberts Court's approach to partisan gerrymandering provides the clearest example of this judicial retreat.

Cases challenging the legitimacy of state election districts have formed part of the Court's election docket for more than half a century. In a trio of 1960s cases, the Court made clear that the US Constitution required a minimum level of redistricting in response to census changes;[192] that this requirement was judicially enforceable;[193] and that election districts must be substantially equal

186. *Id.* at 825.

187. On February 3, 2023, the North Carolina Supreme Court granted rehearing in the initial case. *Harper v. Hall*, 882 S.E. 2d 548 (N.C. 2023) (mem.). In response, the US Supreme Court has asked for supplemental briefing to ensure it still has jurisdiction to decide the case. Order in Pending Case, *Moore v. Harper*, No. 21-1271 (U.S. Mar. 2, 2023), https://www.supremecourt.gov/orders/courtorders/030223zr_k536.pdf. Consequently, it is possible that a no merits opinion will be issued.

188. 142 S. Ct. 2901 (mem.).

189. Harper v. Hall, 868 S.E.2d 499, 559–60 (N.C. 2022), *cert. granted sub nom.* Moore v. Harper, 142 U.S. 2901 (2022) (mem.).

190. *See supra* notes 176–89 and accompanying text.

191. *See supra* notes 163–67 and accompanying text.

192. Baker v. Carr, 369 U.S. 186, 232 (1962).

193. Wesberry v. Sanders, 376 U.S. 1, 13, 18 (1964).

in population.[194] In the decades since these decisions, the two most prominent lines of election map cases involve drawing district lines to create racial or partisan advantages. In 1993, the Court prohibited the use of racial gerrymanders.[195] But it has struggled to define a coherent position on partisan gerrymandering. From its earliest cases addressing the issue, the Court has recognized that partisan politics would, and should, play a role in districting,[196] but it has not provided a consistent framework for how to evaluate when this partisanship exceeds constitutional constraints.

For decades, the Supreme Court wrestled with the issue of whether federal courts could prohibit states from using electoral districts designed specifically to provide partisan advantage.[197] In its 1986 opinion, *Davis v. Bandemer*,[198] the Court definitively held that partisan gerrymandering presented a justiciable legal issue.[199] But the thorny issue of determining a judicially manageable standard with which to evaluate the constitutionality of a partisan gerrymander failed to attract a majority of the Court.[200] The sticking point has always been, "How much partisanship is too much?"

The *Davis* opinion did not provide much guidance on the question. At issue was an Indiana electoral map that resulted in Republican overrepresentation in the state legislature, especially in multimember districts.[201] Justice White, writing for the Court, declared that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[202] Justice White then rejected the discrimination claim at issue because the Democrats challenging the map had only shown overrepresentation in one election cycle.[203] But other than this requirement that partisan gerrymandering must provide a "consistent" obstacle to electoral participation,[204] *Davis* did not give any concrete instructions to the lower courts.

194. Reynolds v. Sims, 377 U.S. 533, 568 (1964).

195. Shaw v. Reno, 509 U.S. 630, 657–58 (1993).

196. *See, e.g.*, Gaffney v. Cummings, 412 U.S. 735, 749 (1973) ("From the very outset, we recognized that the apportionment task, dealing as it must with fundamental 'choices about the nature of representation,' is primarily a political and legislative process." (first quoting Burns v. Richardson, 384 U.S. 73, 92 (1966); and then citing *Reynolds*, 377 U.S. at 586)).

197. *See, e.g.*, *Gaffney*, 412 U.S. at 735–36; Davis v. Bandemer, 478 U.S. 109, 113 (1986); Vieth v. Jubelirer, 541 U.S. 267, 271 (2004); Gill v. Whitford, 138 S. Ct. 1916, 1922–23 (2018); Rucho v. Common Cause, 139 S. Ct. 2484, 2491 (2019).

198. 478 U.S. 109 (1986).

199. *Id.* at 143.

200. *Id.*

201. *Id.* at 134.

202. *Id.* at 132.

203. *Id.* at 135–37.

204. *Id.* at 132.

Nearly twenty years later, the Court came close to abandoning its attempt to decipher when partisan line drawing went so far as to create a constitutional violation. But Justice Scalia's plurality opinion in the 2004 case, *Vieth v. Jubelirer*,[205] holding that partisan gerrymandering presented a nonjusticiable political question, could only attract four votes.[206] The plurality opinion canvassed attempts by the lower court to apply the vague guidance of *Davis,* noting that no definitive test had emerged.[207] Justice Scalia then analyzed and ultimately rejected each standard proposed by the parties or the dissenting justices and concluded that no judicially manageable standard existed.[208]

Despite Justice Scalia's efforts, however, Justice Kennedy refused to concede the justiciability question and continued to hold out hope that a judicially enforceable standard could be articulated.[209] Justice Kennedy agreed with the plurality that none of the parties had proposed a workable standard.[210] But he urged caution in abandoning altogether the attempt to apply constitutional principles to partisan gerrymandering.[211] Though no other justices joined Justice Kennedy's concurrence in the judgment,[212] the narrowness of the opinion and Justice Scalia's failure to attract a five-vote majority left the door open for future litigation to question the constitutionality of election maps clearly drafted for partisan advantage.

In 2018, the Court had another opportunity to review a districting map that provided a significant partisan advantage.[213] The map at issue in *Gill v. Whitford*[214] divided up Wisconsin's state legislative districts in a way that would require Democrats to win at least 54 percent of the vote to elect a majority in the state

205. 541 U.S. 267 (2004).

206. *Id.* at 270, 305–06. Justices O'Connor and Thomas joined the opinion as did Chief Justice Rehnquist. *Id.* at 270.

207. *Id.* at 279–81. Justice Scalia also pointed out that while lower courts had entertained many partisan gerrymandering claims in the wake of *Bandemer*, no court had provided relief on such a claim. *Id.*

208. *Id.* at 305.

209. *Id.* at 306 (Kennedy, J., concurring in the judgment) ("I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.").

210. *Id.* at 308.

211. *Id.* at 309 ("There are, then, weighty arguments for holding cases like these to be nonjusticiable; and those arguments may prevail in the long run. In my view, however, the arguments are not so compelling that they require us now to bar all future claims of injury from a partisan gerrymander.").

212. *Id.* at 306.

213. *See* Gill v. Whitford, 138 S. Ct. 1916, 1923 (2018).

214. 138 S. Ct. 1916 (2018).

legislature.[215] Chief Justice Roberts, writing for the majority, recounted the Court's difficulties in prior partisan gerrymandering cases and hinted that perhaps partisan gerrymandering claims did not raise justiciable issues.[216] Ultimately, though, the majority opinion remained neutral on justiciability and held only that the parties challenging the map did not have standing.[217]

But after avoiding the justiciability question in *Gill*, the chief justice took another swing at the issue a year later. In its 2019 decision, *Rucho v. Common Cause*,[218] the Court—by a 5–4 vote—finally pulled the plug on the whole project and declared partisan gerrymandering to raise a nonjusticiable political question.[219] Writing for the majority yet again, Roberts declared that no judicially manageable standard for evaluating partisan gerrymandering existed, and the only available remedy was through the political process.[220] The chief justice reached this result in the face of clear evidence that the maps at issue (one from North Carolina and one from Maryland) were drafted with the intent of preserving a gerrymandered partisan advantage.[221]

Absent from the majority opinion, however, is any discussion of how allowing entrenched political interests to protect an unrepresentative majority will impact political accountability. Despite the consistent call to ensure that elected representatives make important policy decisions in the administrative law context, the majority gives no consideration to the effect partisan gerrymandering will have on the "representative" nature of these elected representatives. Instead, the chief justice cabined political accountability concerns to a rough numerical equality, writing: "[E]ach representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties."[222] And without further discussion of how limiting democratic accessibility inhibits political accountability, the anti-

215. *Id.* at 1925.

216. *Id.* at 1929 ("In particular, two threshold questions remain: what is necessary to show standing in a case of this sort, and whether those claims are justiciable.").

217. *Id.*

218. 139 S. Ct. 2484 (2019).

219. *See id.* at 2500.

220. *See id.* at 2501.

221. *See, e.g.*, *id.* at 2510 (Kagan, J., dissenting) ("[The North Carolina map's drafter] explained the Partisan Advantage criterion to legislators as follows: We are 'draw[ing] the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [I] d[o] not believe it['s] possible to draw a map with 11 Republicans and 2 Democrats.'" (alteration in original)); *id.* at 2511 ("[The creator of Maryland's electoral map] received only two instructions: to ensure that the new map produced 7 reliable Democratic seats, and to protect all Democratic incumbents.").

222. *Id.* at 2501 (majority opinion).

administrativist wing of the Court washed its hands of partisan gerrymandering cases.

C. Voter ID Laws

While the Court has explicitly rejected any role for itself in reviewing partisan gerrymanders, it has used the subtler tool of its discretionary docket to limit its review of another field of political accountability reducing election regulations: voter ID laws.

In 2008, a severely divided Court approved the constitutionality of an Indiana voter ID law.[223] But the fractured opinion in *Crawford v. Marion County Election Board*[224] failed to outline a coherent framework by which to evaluate future voter ID challenges.[225] Justice Stevens, writing for a three-justice plurality, applied a burden-benefit balancing test derived from *Anderson v. Celebrezze*[226] and *Burdick v. Takushi*[227] and determined that the state's interest in preventing voter fraud justified the "minimal" burden of requiring voters to present the required identification.[228] But the plurality opinion explicitly rested its holding on the record presented in the case, with Justice Stevens hinting that if the parties challenging the law had provided more substantial evidence of the burdens imposed, the result might have been different.[229]

Justice Scalia wrote an opinion concurring in the judgment that Justices Thomas and Alito joined.[230] These three justices agreed that the voter ID law at issue passed constitutional muster.[231] But they argued that the Court should not have engaged in any type of balancing test because the burdens imposed by the law were minimal.[232]

The remaining three justices issued two separate dissents and would have struck down the Indiana law.[233] Justice Souter's dissent is noteworthy for its focus on empirical realities about voting behavior in Indiana. Souter seemed especially concerned by the complete lack of support for the state's asserted interest—namely, to prevent in-

223. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 185–88 (2008).

224. 553 U.S. 181 (2008).

225. *See id.* at 201–04.

226. 460 U.S. 780 (1983).

227. 504 U.S. 428 (1992).

228. *Crawford*, 553 U.S. at 202–03.

229. *Id.* at 200 ("[O]n the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.").

230. *Id.* at 204–09 (Scalia, J., concurring in the judgment).

231. *Id.* at 204.

232. *Id.* ("I prefer to decide these cases on the grounds that petitioners' premise is irrelevant and that the burden at issue is minimal and justified.").

233. *Id.* at 209–37 (Souter, J., dissenting); *id.* at 237–41 (Breyer, J., dissenting).

person voter fraud.[234] The dissent accurately observed that while the state had produced *some* evidence of mail-in ballot fraud in a prior election, it could not point to a single instance of in-person fraud in the state of Indiana.[235] Because a voter ID requirement would do nothing to prevent mail fraud, Justice Souter expressed significant skepticism of the state's asserted interest.[236] Despite this dissent's persuasive arguments that the Court should look more closely at empirical realities when assessing election regulations, the doctrine in this area has largely failed to do so.

After hearing this single voter ID law challenge nearly fifteen years ago and failing to issue an opinion that could attract a majority of justices, the Court has simply used its docket discretion to avoid delivering any opinions on the merits of voter ID laws.[237] Instead, when the Court has received challenges to such laws, it has either resolved the case on procedural grounds unrelated to the constitutionality of the law itself[238] or invoked the so-called *Purcell* principle to avoid upsetting the "status quo" too close to an election.[239] But even though the Court has not issued a merits opinion in a voter ID law case since *Crawford*, Chief Justice Roberts's 2013 opinion in *Shelby County v. Holder*[240] opened the door to significant changes in voter eligibility laws in a number of states.

Shelby County was not a voter ID law case, but rather a suit by Shelby County, Alabama, seeking a declaratory judgment that sections 4 and 5 of the Voting Rights Act were unconstitutional.[241] Sections 4 and 5 of the Act required certain states with a history of

234. *Id.* at 226 (Souter, J., dissenting) ("Neither the District Court nor the Indiana General Assembly that passed the Voter ID Law was given any evidence whatsoever of in-person voter impersonation fraud in the State.").

235. *Id.*

236. *Id.* at 230 ("[T]he ultimate valuation of the particular interest a State asserts has to take account of evidence against it as well as legislative judgments for it . . . and on this record it would be unreasonable to accord this assumed state interest more than very modest significance.").

237. The Court has, however, resolved some voter ID law cases on grounds unrelated to the merits of the law at issue. *See, e.g.*, Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 2191, 2197 (2022) (resolving only the issue of whether state legislators could intervene to defend the voter ID law at issue).

238. Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006); Election L. at Ohio State, *The* Purcell *Principle: A Presumption Against Last-Minute Changes to Election Procedures,* SCOTUSBLOG, https://www.scotusblog.com/election-law-explainers/the-purcell-principle-a-presumption-against-last-minute-changes-to-election-procedures/ (last visited Feb. 16, 2023); *see also* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207–08 (2020) (per curiam); Veasey v. Perry, 574 U.S. 951, 951 (2014) (mem.).

239. *See Purcell*, 549 U.S. at 5–6. Though only tangential to the question presented in *Purcell*, the Court has crafted a strong presumption against allowing or making changes to a state's election regulations too close to an election.

240. 570 U.S. 529 (2013).

241. *Id.* at 540–41.

racially discriminatory voting laws to seek "pre-clearance" from the attorney general before making changes to their existing voting laws.[242] The *Shelby County* majority relied on principles of federalism in striking down this preclearance provision, holding that with the passage of time, the conditions that previously justified the federal oversight prescribed in sections 4 and 5 no longer existed.[243]

Because the *Shelby County* decision invalidated the state preclearance requirement of the Voting Rights Act, by its terms, it only applied to those states the act required to seek congressional permission prior to changing certain voting regulations. Despite the limited scope of the actual holding in *Shelby County*, the elimination of the preclearance requirement seems to have inspired several states to change their voting regulations, including many states not covered by section 5 of the act. Indeed, after the Court decided *Shelby County*, more than ten states passed new voter ID laws that imposed additional voting requirements.[244]

Yet, since the Court decided *Shelby County*, it has not issued a single merits decision in a voter ID law case. The failure to do so is, in and of itself, noteworthy. And the Court's inaction in this space may, by itself, signal a more hands-off approach to these election law questions than it has shown in years past.

III. THE ACCOUNTABILITY-ACCESSIBILITY DISCONNECT

As the previous discussion demonstrates, certain justices on the Court—namely, those who would prefer to reduce the size and scope of the administrative state—consistently appeal to political accountability as a necessary limit on administrative agencies.[245] But the votes and opinions of these same justices in election law cases seem to undermine the ability of some voters to cast their ballots or have their ballots weighed appropriately.[246] As a result, these justices do not seem as concerned about obstacles to democratic accessibility as they do about interferences with political accountability.

This Part will explore that disconnect. First, this Part will crystallize exactly what tensions exist between the Court's discussions of accountability and accessibility and explore the ways in which this disconnect manifests. Then, this Part will propose

242. *Id.* at 534–35.

243. *Id.* at 551 ("In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.").

244. *Voter ID Laws*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 25, 2023), https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx.

245. *See supra* Part I.

246. *See supra* Part II.

various potential causes of the disconnect, including a reliance on democratic myths and a failure to sufficiently appreciate the regulated entities' ability to protect their interests in the political sphere.

A. What Is the Disconnect?

Before examining potential causes of the "disconnect" this Article alleges, it is worth taking a step back to see how the disconnect manifests itself. It is also worth observing where political accountability does seem to inject itself into election law.

As the discussion in Part I demonstrates, the anti-administrativist version of political accountability envisions a world in which voters use their votes to hold Congress and the president accountable by rewarding "good" policymakers and punishing "bad" ones.[247] Set aside for now whether this description of voting behavior tracks with reality and accept the argument on its own terms. Implicit in this view of political accountability is a normative determination that voter preference *should* guide policymaking.[248] The reason that delegation creates problems for our constitutional system—according to the anti-administrativists—is because it allows unelected (and therefore unaccountable) bureaucrats to make policy decisions without having to worry about what effect these policy decisions might have on a subsequent election.[249] Delegation also creates an escape hatch for elected officials to avoid taking a stance on difficult policy issues.[250] At their core then, the political accountability arguments raised in the administrative law space are concerned with eliminating the electorate's ability to influence policy. But if the administrative state must be structured in a way that ensures the electorate can guide policy through voting behavior, the failure to consider democratic accessibility concerns in election law cases creates a significant disconnect between the way the system works in theory and what will happen in practice.

Imagine political accountability as two links in a chain.[251] The first link envisions elected officials connected to the voters through elections. The second link connects elected officials to policy decisions. According to the anti-administrativist view, elected officials must maintain significant control over policy decisions—the second link in the chain—so that the electorate's expression of policy

247. Stephanopoulos, *supra* note 20, at 993; *see also* Emerson, *supra* note 20, at 407–08; Seifter, *supra* note 20, at 1766.

248. *But see* Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 306–13 (2014) (arguing that public policy should track *median* voter preference as opposed to majority voter preference).

249. *See supra* Part I.

250. *See supra* Part I.

251. My sincere thanks to Professor Howard Katz for providing this framing device.

preference—the first link in the chain—can travel down the chain and influence policy outcomes. The Court's administrative law jurisprudence focuses on the second link in the political accountability chain: If elected officials do not make policy decisions, then voters cannot hold them accountable for policies they disagree with. But the Court's refusal to give equal weight to democratic accessibility concerns ignores the first link in the chain. Voters cannot hold elected officials accountable if they cannot vote, and voter preference cannot guide policy if majority preferences are skewed by partisan efforts to control the vote.

This, then, is the accountability-accessibility disconnect: the anti-administrativist push to ensure that politically accountable actors make policy decisions coupled with the failure of these same justices to guarantee that elections are sufficiently accessible to allow the electorate to hold elected officials accountable.

Yet, despite this disconnect, there are some areas of alignment between the administrative and election law doctrines explored in this Article. Take, for example, the independent state legislature theory. As discussed above, a Court majority has not yet given its approval of the theory, but many of the Court's anti-administrativist justices have voiced at least some sympathy for the theory.[252] As Professor Miriam Seifter points out, a myth of majoritarianism underlies the political accountability rationale in administrative law and the independent state legislature theory.[253] One justification for the independent state legislature theory rests on the supposed majoritarian supremacy of state legislatures as the "voice of the people."[254] Seifter has exposed the fallacy of this rationale.[255] She persuasively demonstrates that because of manipulated electoral districting maps, state legislatures are at minimum the *least* majoritarian political bodies in a given state and, more often than not, are actually minoritarian institutions.[256] Governors, state judges, and even some secretaries of state, in contrast, overwhelmingly face election from the state as a whole without the minority-enhancing effects of legislative districting.[257]

This idealization of state legislatures in the face of empirical evidence to the contrary mirrors, in some ways, how the Court and scholars treat a mythical conception of political accountability in the

252. *See supra* Subpart II.A.

253. Seifter, *supra* note 20, at 1738.

254. Morley, *supra* note 11, at 34 ("The independent state legislature doctrine bolsters the Constitution's structural allocation of primary authority over federal elections to the political branches—specifically, to representative legislative assemblies.").

255. Seifter, *supra* note 20, at 1735–40.

256. *Id.* at 1755–77.

257. *Id.* at 1768–71.

administrative law context.[258] To the extent the arguments in favor of restricting administrative delegation and in favor of limiting judicial review of election laws rely on the perceived majoritarian advantage possessed by legislatures (including state legislatures), the Court's decisions in both doctrinal spaces give a false primacy to legislatures in the same way.

Another similarity is the way in which anti-administrativist justices ignore empirical reality about voter behavior and voter fraud. As Professor Stephanopoulos has demonstrated, the way in which the Court discusses political accountability in the context of administration law does not map onto the realities of voting behavior.[259] But the Court has, at times, appeared equally unconcerned about whether empirical reality supports state assertions of voter fraud. In *Crawford*, for example, at least six justices[260] rejected Justice Souter's concerns that the state had failed to provide even a single example of in-person voter fraud.[261] Despite the complete absence of empirical support for the state's asserted interest, a majority of justices cast votes based in part on an assumption that voters behaved in a certain way and regulations (in this case election regulations) should be designed to prohibit that behavior.[262]

These overlaps, however, do not diminish the accountability-accessibility disconnect. In fact, the common threads discussed above—namely, the willingness of some justices to ignore empirical realities—serve to highlight the problems caused by the disconnect.[263]

With this understanding in place of how the disconnect manifests itself, the rest of this Part will explore potential causes.

B. Potential Causes

What explains the apparent tension discussed above?[264] This Part will posit various potential rationales to explain the accountability-accessibility disconnect, ranging from the benign to the concerning.

At the outset, it is important to note that, on some level, the disconnect comes from the simple fact that administrative law and election law present different legal questions and analyze those questions in different legal contexts. Many administrative law cases that reach the Supreme Court, for example, deal with the ways in

258. *See supra* Part I.

259. *See supra* notes 37–41 and accompanying text.

260. *See supra* notes 228–32 and accompanying text.

261. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 226 (2008) (Souter, J., dissenting).

262. *Id.* at 194–95, 202 (majority opinion).

263. *See supra* notes 233–36 and accompanying text.

264. *See supra* notes 247–63 and accompanying text.

which the federal government uses its authority.[265] Election law cases, by contrast, tend to center on the actions of state governments.[266] Consequently, the administrative law doctrines discussed above[267] focus on how to preserve the separation of powers in the federal system, while the Court's election law cases focus more on federalism concerns.

But given the relationship between the ability of the electorate to cast their votes and have them weighed appropriately and the desire to have policy influenced by voter preference, it seems inconsistent to view these two areas of law as completely independent. The following discussion proposes three potential causes of this inconsistency in addition to the doctrinal separation addressed above. First, anti-administrativist justices may have accepted long-standing democratic myths about the rational, policy-oriented voter.[268] Or these justices may be well aware of voting realities but may still wish to promote political accountability as a normative good in our democracy. Second, justices critical of the administrative state may wish to promote a system that allows voters to hold policymakers accountable for the rare policy decision that manages to capture the electorate's attention.[269] Third, the Court may not be sufficiently considering the identity of the regulated parties in each context nor those parties' abilities to protect their interests in the political sphere.[270]

1. Democratic Myths

Perhaps the most benign explanation for the Court's consistent focus on political accountability in the administrative law context is the staying power of democratic myths.[271] Here, jurists and scholars alike may simply be too accepting of the myth of the informed and rational voter. Indeed, implicit defenses of the policy-driven voter occasionally make their way into anti-administrativist criticisms of congressional delegations to agencies. These defenses typically take the form of ad hominem attacks on progressives who supported expanding the administrative state, with Woodrow Wilson frequently appearing in the crosshairs.[272] Of course, the fact that Wilson's

265. *See supra* Part I.
266. *See supra* Part II.
267. *See supra* Part I.
268. *See infra* Subpart III.B.1.
269. *See infra* Subpart III.B.2.
270. *See infra* Subpart III.B.3.
271. *See, e.g.*, Seifter, *supra* note 20, at 1738 ("Democracy myths, whether perpetuated in good faith or not, sell well.").
272. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2617 n.1 (2022) (Gorsuch, J., concurring) ("Woodrow Wilson famously argued that 'popular sovereignty' 'embarrasse[d]' the Nation because it made it harder to achieve 'executive

racism informed his distrust of the electorate says nothing about the modern political science literature that repeatedly undermines the vision of political accountability promoted by anti-administrativists.[273] Voters simply do not pay enough attention to policy decisions to allow them to hold elected officials accountable in the way anti-administrativists describe.

Perhaps a more accurate depiction of what is happening in these opinions, then, is that they promote this view of accountability as an idealized version of how democracy *should* work. Under this romanticized framing, voters make informed policy-based decisions and do not simply follow partisan divisions. In such a world, this rhetorical focus on how political accountability should work might make sense. Indeed, creating an aspirational vision of democracy has value, especially when proposed by powerful institutions like the Supreme Court.

Alternatively, perhaps anti-administrativist justices promote an idealized version of political accountability. Or perhaps they possess an unspoken belief that the partisan and ideological alignment that characterizes voter behavior will result in election outcomes that track voters' true policy preferences. Put another way, these justices understand that voters most often lack the type of policy awareness they describe in their discussions of political accountability. But voters can still guide policy by voting for candidates from their preferred party. The goal, then, is to ensure that partisan-elected officials retain enough policymaking authority that voter partisan preferences—expressed through elections—do, in fact, hold elected officials "accountable" by using partisan affiliation as a proxy for policy preferences.

But the opinions themselves do not in any way frame their discussions of political accountability as idealized representations. Nor do they address the "second best" option of partisan influence on policy. Instead, they present political accountability—in the sense of voters rewarding "good" policymakers and punishing "bad" ones—as an undisputed empirical fact about our democracy.[274] Nor would an "aspirational" framing remedy the dissonance between expanding political accountability in the administrative law context with an inconsistent indifference toward contractions in democratic

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expertness.' In Wilson's eyes, the mass of the people were 'selfish, ignorant, timid, stubborn, or foolish.' He expressed even greater disdain for particular groups, defending '[t]he white men of the South' for 'rid[ding] themselves, by fair means or foul, of the intolerable burden of governments sustained by the votes of ignorant [African-Americans].' He likewise denounced immigrants 'from the south of Italy and men of the meaner sort out of Hungary and Poland,' who possessed 'neither skill nor energy nor any initiative of quick intelligence.' To Wilson, our Republic 'tr[ied] to do too much by vote.'" (alterations in original) (citations omitted)).

273. *See* Stephanopoulos, *supra* note 20, at 990–98.

274. *See supra* Part I.

accountability. In fact, this framing makes this dissonance more pronounced. If the Court, for example, wants to value an aspirational ideal of the informed voter motivated by policy disagreements, why would it want to limit the number of these idealized voters who can contribute their voice in each election?

Nor is *political* accountability the only way (or even the best way) to hold the administrative state accountable. Other scholars posit that the agency rulemaking process itself provides levels of participatory democracy absent from modern legislation. Professor Maggie Blackhawk, for example, traces the history of the petition clause throughout American history, making a persuasive case that the right to petition—guaranteed by the First Amendment—provides the constitutional basis for the administrative state.[275] Because the right to petition extended much more widely than the franchise itself—allowing women, Native Americans, convicts, and in some instances freed slaves to submit formal petitions to Congress—one of the core democratic values enshrined in the Bill of Rights rests on participation, not accountability.[276] Professor Blackhawk goes on to demonstrate how the "grievances" previously "redressed" through legislative petitions have steadily shifted to the administrative state, which has preserved the elements of participatory democracy through the notice and comment process and, to a lesser extent, through agency adjudications.[277]

2. The "Exceptionalized" View

Another possibility is that proponents of the administrative and election law theories discussed in Parts I and II fully understand that political accountability does not exist for the mine run of policy decisions.[278] But they also see value in establishing a doctrine that creates the conditions for political accountability in the exceptional cases where a policy decision is so politically salient that it captures voter attention and actually results in electoral consequences. Put another way, perhaps these justices want to ensure that when the conditions for political accountability exist, voters are able to effectively express their preferences.

As an initial matter, this view of political accountability—the "exceptionalized" view—is again absent in the case law or literature advocating the anti-administrativist positions discussed above.[279] But the exceptionalized view presents a more fundamental problem,

275. McKinley, *supra* note 120, at 1541–51.

276. *Id.* at 1547 ("Even the unenfranchised could petition: women, free African Americans, Native Americans, the foreign born, and children turned to the petition process to participate in lawmaking.").

277. *Id.* at 1622–26.

278. *See supra* Parts I, II.

279. *See supra* Part I.

namely, that the proposed doctrinal solutions do not seem tailored to address only those rare instances where agency policymaking captures voter attention. The only doctrine that even purports to address the types of policies that would capture public attention is the major questions doctrine.[280] If the concern was to provide a system that would allow voters to guide only these unusually important policy decisions, the major questions doctrine would suffice.

But after *West Virginia v. EPA,* the major questions doctrine fails to limit itself to the types of policy decisions that capture public attention.[281] Recall that in *Brown & Williamson*—the Court's initial foray into defining a major questions doctrine—Justice O'Connor described major questions as those raising issues of "economic and political significance[.]"[282] If the doctrine had remained confined to these truly exceptional questions, perhaps it would make sense to view the doctrine as a way to facilitate the exceptionalized view of political accountability. But the way the Court has expanded the doctrine in the wake of *King*—including the *West Virginia* decision—has ensured that many agency regulations that would not likely grab public attention will be subject to a "skeptical eye" from the anti-administrativist wing of the Court.

The policy at issue in *West Virginia* illustrates this point. Recall that the regulation at issue was a relatively obscure cap-and-trade plan to limit greenhouse gas emissions from power plants—not the gripping stuff of front-page headlines.[283] Not only was the policy rather technical and dry, but the regulation scheme itself no longer existed.[284] An abandoned regulatory scheme relating to the technical specifications of incentivizing greenhouse gas reductions through a relatively complex cap-and-trade program seems unlikely to capture voter attention. As *West Virginia* makes clear, this type of regulation and other "novel" agency actions will be evaluated under the major questions doctrine, regardless of public interest in the policy itself.[285]

Even if these administrative law doctrines only applied to the types of policy decisions that garnered significant voter interest, the version of political accountability espoused by anti-administrativist judges requires voters to be able to accurately attribute responsibility

280. King v. Burwell, 576 U.S. 473, 485–86 (2015) (reiterating that the major questions precedents apply to "question[s] of deep 'economic and political significance'" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

281. *See supra* Subpart I.B.

282. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

283. West Virginia v. EPA, 142 S. Ct. 2587, 2603 (2022)

284. *Id.* at 2627 (Kagan, J., dissenting) ("The effect of the Court's order, followed by the Trump administration's repeal of the rule, was that the Clean Power Plan never went into effect.").

285. *See id.* at 2615 (majority opinion) (describing cap-and-trade as a "novel and highly touted concept").

to the correct decision maker.[286] Here again, political science literature demonstrates that voters struggle with attribution of responsibility.[287] Indeed, even for those exceptional policy decisions that do filter through to the voting public, the electorate will generally hold the executive responsible.[288]

This reality of voter behavior significantly undermines the legislative accountability goals of the nondelegation and major questions doctrines. But increasing presidential removal power seems to have limited effect on executive branch accountability as well because voters are increasingly likely to attribute blame (or credit) to the executive for policy decisions, regardless of how much actual control the executive has over the policymaker.[289] This is especially true for "exceptional" policy decisions. Elected officials cannot hide behind the actions of an agency head when the policy itself becomes a hot-button political issue. Take, for example, the proliferation of COVID-19 related emergency orders issued by various agency heads like state secretaries of health and elected officials like governors.[290] Polling consistently showed that the states' governors became the focus of voter approval or ire for the popularity of or disgust with various orders, regardless of whether they came from the governor herself or an unelected agency director.[291]

Finally, even if the exceptionalized view would actually create a system of political accountability for politically important policy decisions, it does not explain the Court's failure to address democratic

286. Stephanopoulos, *supra* note 20, at 993 (listing attribution of responsibility as the third necessary step for electoral accountability).

287. *See, e.g.*, Christopher J. Anderson, *The End of Economic Voting?: Contingency Dilemmas and the Limits of Democratic Accountability*, 10 ANN. REV. OF POL. SCI. 271, 278–81 (2007); Thomas J. Rudolph, *The Meaning and Measurement of Responsibility Attributions*, 44 AM. POL. RSCH. 106, 124–26 (2016).

288. Stephanopoulos, *supra* note 20, at 1026 ("[M]any voters *over*attribute responsibility to the President, deeming her fully in charge of even independent agencies.").

289. *Id.*

290. *See, e.g.*, *2020–2021 Executive Orders*, THE COUNCIL OF STATE GOV'TS, https://web.csg.org/covid19/executive-orders/ (last visited Feb. 16, 2023) (collecting COVID-related executive orders from all fifty states).

291. *See, e.g.*, John Johnson, *Tony Evers' Pandemic Popularity Boost is over*, MARQ. UNIV. L. SCH. FAC. BLOG (Sept. 10, 2020), https://law.marquette.edu/facultyblog/2020/09/tony-evers-pandemic-popularity-boost-is-over/ (noting that Wisconsin's governor received a fourteen-point boost in his approval rating at the beginning of the pandemic despite the fact that the state's secretary of health led Wisconsin's pandemic response). The Wisconsin example seems especially salient given the fact that the Wisconsin Supreme Court—in a highly publicized decision—struck down the emergency orders issued by the secretary of health. *See* Wis. Legislature v. Palm, 942 N.W.2d 900, 905–06 (Wis. 2020).

accessibility concerns in election law. In fact, under the exceptionalized view, the dissonance between accountability rhetoric and accessibility rhetoric becomes even more striking. If the goal is to ensure that voter preferences do, in fact, guide those policy decisions that the voting public considers "significant," then a failure to safeguard democratic accessibility could result in a skewed version of voter preference. In other words, the disconnect occurs under both the "idealized" or "exceptionalized" views of political accountability; the difference is merely one of degree.

3. Identity of the Regulated Parties

A final factor that may exacerbate the accountability-accessibility disconnect is the Court's failure to adequately consider the ability of the impacted individuals to effect change through the political process. As the first two Parts of this Article show, proponents of political accountability question the legitimacy of unelected agencies making policy and regulatory decisions.[292] These same individuals, however, seem far less concerned with election regulations that inhibit the electorate's ability to access the ballot and have their votes weighed appropriately.[293] Yet the administrative actions that make up the majority of the anti-administrativist jurisprudence tend to regulate businesses, corporations, industries, or other organized entities [294] Election laws, by contrast, regulate each individual voter and disproportionately impact poor communities and communities of color.[295]

It is well established by now that organized interests are better able to protect their interests through the political process than are individuals.[296] Corporations and industry-wide organizations have more resources to hire lobbyists, contribute to political action committees or directly to campaigns, and even organize large numbers of voters. They also tend to have a more sophisticated understanding of how to promote their agenda within the layers of bureaucracy that make up the modern administrative state.[297]

292. *See supra* Part I.

293. *See supra* Part II.

294. *See* cases cited *supra* Part I.

295. *See, e.g.*, John Kuk et al., *A Disproportionate Burden: Strict Voter Identification Laws and Minority Turnout*, 10 POL., GRPS., & IDENTITIES 126, 127 (2022); Phoebe Henninger et al., *Who Votes Without Identification? Using Individual-Level Administrative Data to Measure the Burden of Strict Voter Identification Laws*, 18 J. EMPIRICAL LEGAL STUD. 256, 258 (2021).

296. *See, e.g.*, Dwight R. Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191, 197 (1988); Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567, 598 (1996) (commenting on "the ability of organized interests to capture representatives or political parties").

297. *See, e.g.*, Reeve T. Bull, *Making the Administrative State "Safe for Democracy": A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611, 627–28 (2013) ("Agencies already

Individual voters, meanwhile, have the capacity to organize but tend to do so less often (and perhaps less effectively) than regulated institutions.[298]

The anti-administrativist focus on political accountability, then, disproportionately removes participatory barriers from those entities that are already best suited to deal with them. The regulated entities at the heart of nondelegation and major questions cases, for example, are already well aware of which policymakers should be held responsible for decisions. They are well resourced enough to spread this message to their target audience of voters if they so choose and well informed enough to know which legislators *and* bureaucrats will support their position.

By ignoring the democratic accessibility concerns discussed above,[299] however, the Court allows obstacles to democratic participation to remain in place—obstacles that individual voters often struggle to overcome. Not only are individual voters at an organizational (and often monetary) disadvantage when compared with many regulated interests in the administrative law cases, but the regulations at issue in election law cases present the very obstacles that voters would seek to remove through their votes. Partisan gerrymandering, for example, puts an entire political party at a structural disadvantage. And depending on the egregiousness of the gerrymandering at issue, it may not be possible for even a significant majority of voters to express their displeasure with the elected officials responsible for the unrepresentative electoral map. The absence of a political remedy for such accessibility injuries weighs strongly in favor of judicial intervention.

This is not to say that all the administrative law cases advancing the anti-administrativist agenda exclusively involve corporate entities and regulated industries. Indeed, *Gundy*, which reignited debate about the nondelegation doctrine, involved the rights of released convicted sex offenders.[300] And Justice Gorsuch's dissent

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solicit public input through the notice-and-comment process of informal rulemaking, but the process is often skewed to favor more organized interests that can marshal the resources to lobby the agencies more effectively." (footnote omitted)).

298. *See* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1386 (2010) (explaining that regulated parties participate in the comment process more than public interest groups); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006) (finding in their study that business interests submitted over 57 percent of comments while nonbusiness/nongovernment interests submitted 22 percent of comments of which public interest groups represented only 6 percent).

299. *See supra* notes 292–98 and accompanying text.

300. Gundy v. United States, 139 S. Ct. 2116, 2122 (2019).

implies at times that the majority's opinion denying the nondelegation challenge does so, in part, because no one would bat an eye at shortchanging the due process rights of sex offenders.[301] Scholars have also identified case studies showing regulations that disadvantaged smaller entities at the expense of better-funded, more well-organized competitors.[302] But most regulations that make up the Court's nondelegation and major questions jurisprudence govern the behavior of companies, corporations, or industries.[303]

Additionally, those nondelegation cases like *Gundy* that regulate individuals often apply to convicted criminals or other individuals under some form of government supervision.[304] Given the vast number of such individuals who are disenfranchised,[305] political accountability seems unlikely to protect the interests of these individuals. In fact, the more formalist separation of powers framework underlying much of the anti-administrativist approach would likely work better than relying on a system of political accountability. Professor Rachel Barkow, for example, has written persuasively on the need to formally separate legislative, executive, and judicial powers in the world of criminal law.[306] In making this argument, Barkow points out that the Court has relied heavily on the availability of judicial review in upholding the constitutionality of much of the modern administrative state.[307] She then criticizes the Court's failure to recognize that the same level of judicial review does not exist in much of our current criminal system because of the prevalence of plea bargaining.[308]

Barkow rightly points out, for example, that "if Congress were allowed to have judicial powers, the protections associated with judicial process could be bypassed. Similarly, if the executive branch

301. *Id.* at 2144 (Gorsuch, J., dissenting) ("It would be easy enough to let this case go. After all, sex offenders are one of the most disfavored groups in our society.").

302. *See, e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 50–54 (1993) (describing how the large conglomerate Sunkist was able to push through regulations of navel oranges in a way that essentially granted Sunkist a monopoly over the industry).

303. *See* cases cited *supra* Part I.

304. *See, e.g.*, United States v. Paul, 140 S. Ct. 342 (2019) (mem.) (regulating the behavior of a sex offender); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 485 (2001) (vehicle monitoring program).

305. The Sentencing Project estimates that in 2020 approximately 5.17 million Americans were barred from voting because of felony convictions. CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 4 (2020).

306. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 990–97 (2006).

307. *Id.* at 993.

308. *Id.* at 1025.

were permitted not merely to bring enforcement actions but to adjudicate them as well, the judiciary and all of its processes would be rendered a nullity."[309] Barkow then goes on to explain "[t]hat is, in fact, what has happened" in criminal law because of the ubiquity of plea bargaining.[310] Barkow's prescriptions are well supported and thoroughly justify an injection of formalism[311] into how the Court treats excessive delegations to executive officers (namely prosecutors) of judicial-like power. Importantly for the focus of this Article, the formal restraints Barkow, and several other scholars,[312] suggests would protect the interests of these regulated individuals far more effectively than appeals to political accountability.

The concern with accountability, then, seems misplaced. The parties who receive the benefit of the Court's focus on accountability are those who need it the least, while those who face significant obstacles in their efforts to hold their elected leaders accountable receive little help from the judiciary. The next Part explores potential ways to remedy this disconnect.

IV. CONNECTING THE DISCONNECT

The previous Part asserts that the accountability-accessibility disconnect manifests as a misplaced focus on structuring the administrative state around a mistaken understanding of voter behavior coupled with a failure to ensure that electoral rules enable voters to accurately express policy preferences at the ballot box. This Part turns to ways in which administrative and election law doctrines could be modified to rectify this disconnect. It does so by proposing three alternatives.

First, proponents of the anti-administrativist agenda could choose to abandon the political accountability rationale altogether. While this would not address the election law issues discussed above,[313] it would require a more honest treatment of the separation of powers issues at stake. If the Court leans more transparently on its textual and historical reasoning, it may also have to start taking critiques of the canonical historical narrative more seriously. Second,

309. *Id.* at 1033.

310. *Id.* ("With the rise of plea bargaining, trials are anomalies, not the norm. And the current individual rights approach to plea bargaining has done nothing to prevent the executive's accumulation of judicial power.").

311. It should be noted that, though Barkow argues for a formalistic approach to separation of powers in criminal law, she does so for valid and significant functionalist reasons. *See id.* at 996 ("[T]he argument for strict enforcement of the separation of powers in criminal matters is grounded in functional reasons.").

312. *See, e.g.*, Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 4–6 (2021); F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 326–27 (2021).

313. *See supra* Part II.

anti-administrativists could devise a new functionalist defense for their preferred structural changes. Third, the Court could acknowledge that political accountability is a normative good that our democracy should value. It could then begin to consider political accountability concerns in its election law cases. This Part suggests that the third option may present the best and most realistic way to remedy the disconnect.

A. Lean into Formalism

One way to remedy the accountability-accessibility disconnect would be to abandon the current anti-administrative pretense that voters hold elected officials accountable for policy decisions. Instead, these justices could jettison this functional justification altogether and openly embrace the formalist rationales that appear to be driving their decisions.

As a purely doctrinal matter, a recognition of the empirical weaknesses and logical dissonance in the functional rationales behind the doctrines discussed in this Article may not have any impact on the justices at all. Indeed, many of the most vocal proponents of the anti-administrativist views discussed in this Article appear to believe that their formalist reading of the text and structure of the Constitution provides sufficient justification for their interpretation of the law.[314] Nor do many critics of the administrative state appear willing to question their own formalist justifications.[315]

At minimum, however, an open and honest approach would strip away the prodemocratic gloss with which critics of the administrative state have gilded their more nakedly formalist arguments. Without this patina of democratic legitimacy, that anti-administrativist wing

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314. See, for example, Justice Thomas's concurring opinion in *The Amtrak Case*:

> The [Constitution] itself and the writings surrounding it reflect a conviction that the power to make the law and the power to enforce it must be kept separate, particularly with respect to the regulation of private conduct. . . . This devotion to the separation of powers is, in part, what supports our enduring conviction that the Vesting Clauses are exclusive and that the branch in which a power is vested may not give it up or otherwise reallocate it.

575 U.S. at 74 (Thomas, J., concurring). *See also* Lawson, *supra* note 43, at 334–35 (firmly stating that delegation of legislative power is unconstitutional while refusing to take a position on whether courts should invalidate such delegations as a matter of policy).

315. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2625 n.6 (2022) (Gorsuch, J., concurring) (dismissing in a footnote all recent scholarly explorations challenging the long-accepted history of the nondelegation doctrine); *OSHA Vaccine Case*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (citing to Wurman, *supra* note 43, at 1502 to support the canonical nondelegation narrative, but failing to even note that this article was in response to Mortenson & Bagley, *supra* note 45).

may be forced to more fully engage with the critiques of its formalist reasoning.

The long-accepted version of the nondelegation doctrine's story has been recounted in more law review articles than it is worth numbering. According to numerous originalist scholars, some limits on congressional delegations have been part of our constitutional structure since the Founding.[316] This standard account has been accepted without much question by anti-administrativists like Justices Gorsuch and Thomas.[317] But the validity of this canonical narrative now faces significant challenges from new additions to the historical literature. In just the past few years, scholars have shown that a wide range of delegations occurred in the very first Congress and in subsequent Founding-era bodies;[318] that these delegations included quintessentially legislative activity, including setting tax rates;[319] and that even the earliest judicial opinions discussing delegation recognized the important role the executive played in carrying out the legislative will.[320]

If the functionalist political accountability rationale were removed from the anti-administrativist toolkit, the justices might be more inclined to reassess the canonical narrative. Take, for example, Justice Gorsuch's treatment of the literature in his *West Virginia v. EPA* concurrence. Justice Gorsuch begrudgingly acknowledged the existence of recent scholarship[321] but likely did so only because Justice Kagan's dissent brought these articles to the fore.[322] Even after acknowledging the existence of this rigorous historical research, however, Justice Gorsuch dismissed the literature in a footnote by citing a deluge of older "originalist" writings that pushed the standard nondelegation narrative.[323] He did not even attempt to respond to the arguments made in any of these works. But if the anti-administrativist defense of the nondelegation and major questions

316. For a small sampling of such recaps, see, for example, HAMBURGER, *supra* note 43, at 377–402; SCHOENBROD, *supra* note 302, at 30–46; Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1310–17 (2003); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 155–161 (2017); Lawson, *supra* note 43, at 334; Wurman, *supra* note 43, at 1493–98.

317. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2133–35 (2019) (Gorsuch, J., dissenting); *The Amtrak Case*, 575 U.S. at 70–76 (Thomas, J., concurring).

318. Chabot, *supra* note 45, at 87–91; Mortenson & Bagley, *supra* note 45, at 279–82.

319. Parrillo, *supra* note 45, at 1293–1311.

320. Mortenson & Bagley, *supra* note 45, at 282–83.

321. *West Virginia v. EPA*, 142 S. Ct. at 2625 n.6 (Gorsuch, J., concurring).

322. *See id.* at 2642 (Kagan, J., dissenting).

323. *Id.* at 2625 n.6 (Gorsuch, J., concurring).

doctrines, or the president's removal power, were reduced to formalist, textual, structural, and historical arguments, the justices might experience a growing pressure to revisit their previously unchallenged historical assumptions.

Even those who favor anti-administrativist results would likely welcome a more thoughtful approach to the formalist rationales supporting the doctrine.

B. Alternative Functionalist Reasoning

Alternatively, the Court could attempt to support its anti-administrative decisions with a new functionalist rationale. But it is worth noting that few alternatives have appeared in the case law or scholarship advocating a more limited role for the administrative state.

Absent from much of the literature favoring a robust nondelegation doctrine, for example, is a workable standard for what the doctrine should look like. This failure stems in large part from a failure to define the functional benefits of the doctrine. This Article does not attempt to sketch out a working version of the doctrine. But perhaps acknowledging how little political accountability has to do with the realities of delegation may encourage those who would seek to invoke the doctrine to think through what functional goals the doctrine should aim to achieve.

Critiquing the lack of democratic accountability in the administrative state is not a new phenomenon in the legal literature either. John Hart Ely, for example, gave the modern version of this idea perhaps one of its most prominent depictions in his classic *Democracy and Distrust*.[324] More than a decade earlier, administrative law scholars decried the detrimental effects to democracy posed by administrative rulemaking.[325]

David Schoenbrod took up the accountability mantle and became one of the late twentieth century's most ardent scholarly advocates for a stronger nondelegation doctrine, publishing multiple articles and books pointing to the pernicious effects of excessive delegation.[326] While Schoenbrod levels multiple attacks on the administrative state, all of the functional ills he identifies rest to some extent on the fact that Congress could use delegation to avoid making tough political

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324. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131–34 (1980).

325. *See, e.g.*, THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY xiii (1969).

326. *See, e.g.*, SCHOENBROD, *supra* note 302, at 99–119; David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1253 (1985); David Schoenbrod, *Goal Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 825–26 (1983).

decisions and thus escape political accountability.[327] As we have seen, this is the traditional pro-accountability argument—namely, instituting a fulsome nondelegation doctrine enforceable by the courts would require members of Congress to go on record in support of or opposition to every policy choice made by the legislature.[328] The voting public can then hold these elected officials accountable for their decisions the next time they are in a voting booth.[329]

One alternative was proposed in 2015 by then-professor (now-Judge) Neomi Rao. Judge Rao argued in favor of a more robust nondelegation doctrine because individual legislators could use delegation to advance their own individual power.[330] Rao asserted that one of the baseline assumptions underlying the Court's reluctance to strike down delegations was a belief in Congress's ability to guard its own power.[331] Because Congress would be jealous of its own authority, so the theory goes, the body as a whole would be reluctant to relinquish its authority to a rival branch.[332] This conception of the relationship between Congress and the executive, Rao contended, misunderstood the personal motivations of individual legislators—rather than seeing delegation as a loss of power, individual legislators can manipulate the tools provided by delegation to elevate their power (even at the expense of Congress's collective power).[333] High-ranking committee members, for example, may be more inclined to delegate important policy decisions to agencies under the committee's purview under the belief that the member's position on the committee would allow them to exercise even more policymaking influence through their position of authority over the agency.[334]

But this criticism of congressional delegation does not explicitly explain why this individualization of congressional power matters as

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327. *See* SCHOENBROD, s*upra* note 302, at 55 ("Rather than insulating lawmaking from legislators and concentrated interests, broad delegation helps to insulate Congress and the White House from political accountability for supporting laws that are harmful to the broad public interest.").

328. *See supra* Subparts I.A, I.B.

329. *See supra* Subpart III.B.1.

330. Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1465–66 (2015).

331. *Id.* at 1466.

332. *Id.* at 1474 ("The failure to enforce directly the nondelegation doctrine must turn in part on the understanding that delegations are not aggrandizing actions by Congress.").

333. *Id.* at 1481 ("Fourth, and perhaps most important, members may realize a variety of individual benefits outside the legislative process. After authority is delegated to an agency, the possibility of intervening in the regulatory process gives members an important opportunity for satisfying interest groups and serving constituents, and thereby promoting political success.").

334. *Id.* at 1482.

a *practical* concern other than to reintroduce political accountability concerns through the back door. The real concern here would be an elected official either guiding administrative policy in secret or taking credit for agency policy that the official did not enact. Either way, the official's constituents would not be able to form an accurate picture of their representative's policy decisions and could not therefore express their approval or disapprobation at the next election.[335]

The lack of a viable and functional alternative to political accountability provides further evidence that support for limiting the scope of the administrative state is, in reality, driven by formalist concerns. Therefore, although the Court's anti-administrativist justices could propose an alternative functionalist rationale, that seems the least likely of the three proposals included in this Part.

C. Integrate Political Accountability into Election Law

Perhaps the best way to resolve the accountability-accessibility disconnect is for the Court to weigh political accountability considerations in its election law decisions. Given the longevity of political accountability as a justification for anti-administrativist doctrines,[336] it seems unlikely that sympathetic jurists will soon abandon the idea in the administrative law context. But in the face of largely unrebutted political science literature questioning the very existence of the rational, informed, policy-driven voter,[337] a dogged adherence to the current framing of political accountability seems equally untenable. Voters simply do not know enough to reward or punish elected officials for individual policy decisions.[338]

A plausible path forward, then, may be for the Court to recognize that political accountability (at least as framed in the administrative law context) may not describe the real-world behavior of voters, but it is still a value that the Court wants to promote. Rather than claiming to be a descriptive model of voter behavior that must be protected by ensuring elected officials make policy decisions, these justices could openly embrace the idea that they want to create a system that allows for what they see as the normative good of political accountability.

If the Court shifted its accountability discussion in this way, that would open the possibility of accepting political accountability as a relevant concern in the election law space as well. When evaluating challenges to the constitutionality of a state statute or regulation governing election administration, the Court could consider whether

335. Nor does Professor Rao's description of congressional behavior track with empirical realities. *See, e.g.*, Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. (forthcoming 2023) (manuscript at 55–66), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4033753.

336. *See supra* Subpart I.A.

337. *See supra* Subpart III.B.1.

338. *See* Stephanopoulos, *supra* note 20, at 1022–24, 1032–35.

the provision at issue impedes the electorate's ability to hold elected officials accountable.

Nor would this require a significant shift in the Court's current election law doctrine. Many of the election law cases discussed in Part II are already governed by the *Anderson-Burdick* test, which evaluates the constitutionality of election regulations by weighing the state interest at issue with the burdens imposed by the regulations.[339] The Court could simply choose to add interference with political accountability to the "burden" side of the ledger. When reviewing a voter ID law, for example, in addition to looking at the burdens imposed on each voter's time and money to acquire the required documentation, the Court could also consider evidence that the voter ID law would suppress voter turnout to the point that it would skew election results by preventing a representative electorate from accessing the polls.

This is not to suggest that any election rule or regulation that diminishes the electorate's ability to hold policymakers accountable would automatically run afoul of the Constitution.[340] This Article's proposal is far less radical than that. Instead, the argument presented here boils down to a plea for consistency. If anti-administrativist justices are truly concerned with ensuring that voters can hold decision makers accountable through their expressed electoral preferences, then state actions that hinder the electorate's ability to do so should be subject to similar levels of scrutiny.

CONCLUSION

The past decade has seen a significant increase in judicial support for erecting a politically accountable administrative state. Given the current makeup of the Court, that trend seems likely to continue. At the same time, the Court has shown a greater reluctance to strike down state election regulations, even if those regulations would inhibit the electorate's ability to access the ballot box and hold their elected leaders accountable. This divergent approach in two separate areas of law has created a disconnect that undermines the Court's efforts to promote political accountability. By failing to ensure that elections reflect voter preference, the Court's current

339. *See* Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159, 2188 (2018); *see also supra* Part II.

340. Left for future work is the question of how best to weigh political accountability in the election law context. But as a starting point, the Court should assign more importance to political accountability concerns depending on how significantly the regulation under review affects the overall election results. It will also be important for the Court to require significant empirical support for both the state interest at issue and the assertions of interference with political accountability.

election law jurisprudence removes the first necessary step: allowing voter preference to guide policy outcomes.

Perhaps this disconnect demonstrates that the anti-administrativist concern over political accountability is more window dressing than genuine concern. After all, extensive political science research has shown that voters most often lack awareness of policy decisions and therefore cannot hold politicians accountable in the way the Court describes.[341]

But if we assume good faith,[342] there are ways to reconcile the tension. This Article has proposed a few different options and suggested that incorporating political accountability concerns into election law cases may provide the best way to "reconnect" these siloed legal fields. But perhaps more important than adopting any one method of reconciliation is for anti-administrativist jurists and scholars alike to recognize that the disconnect exists and to understand the significance of reengaging with electoral regulations that impede democratic accessibility. The first step in this direction might be to acknowledge the difference in who is subject to the regulations at issue and to consider the impact that might have on the regulated parties' ability to promote their own interests politically. Whether proponents of political accountability are willing to take that step in the near future remains to be seen.

341. *See* Stephanopoulos, *supra* note 20, at 1022–24, 1032–35.

342. *See* Seifter, *supra* note 20, at 1745–46 ("Before turning to illustrative doctrines, a word about good faith is in order. Opportunism and insincerity could explain the legislative love in some of the examples in this Article. Faux fealty to legislative majoritarianism, in this view, provides cover to reach desired ends. If that is what is afoot, it might undermine this Article's intervention: Arguments showing the absence of legislative majoritarianism are unlikely to persuade those who peddle it for convenience.").