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Administering Election Law

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ADMINISTERING ELECTION LAW

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In recent years, commentators have expressed heightened concern about the harms to democratic legitimacy caused by political actors making decisions about the electoral process on partisan or incumbent-protecting bases. This concern has been recognized in a number of judicial opinions, but has not taken form in election law doctrine. This Article argues that administrative law presents a well-developed doctrinal resource for addressing concerns about democratic legitimacy in the electoral process. Administrative law trades off some direct electoral control for some demonstrated expertise and shores up the democratic element through lines of accountability to the legislature, the executive, and the public. The resulting framework seeks an optimal balance in effective democratic governance. Despite the institutional differences between administrative law and election law, both confront the central challenge of securing democratic legitimacy in contexts of governance by state actors who are shielded from robust accountability mechanisms. In connecting the treatment of democratic values across the administrative law and election law settings, reflecting the operation and selection of government, I contend that these settings demand similar models of governmental decisionmaking. This approach calls for regulation of elections on a standard of instrumental rationality as to the means of reaching politically determined and constitutionally valid ends, thereby promoting the effective operation of the democratic process. To illustrate this approach, I sketch a framework for adapting administrative law tools to the election law setting, with examples from current controversies in the field.

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I. INTRODUCTION

Democratic ideals shape the legal treatment of state action in numerous ways. Courts accord a presumption of constitutionality to statutes enacted by the legislature,[1] and a number of doctrines reflect a

1. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 607 (2000) (describing, as a "presumption of constitutionality," that "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds").

preference for decisions made by the political branches.[2] In contrast, concerns arise when non-elected actors make decisions for the polity. Hesitations about judicial review are familiar,[3] as are doubts about the legitimacy of actions taken by administrative officials.[4] In these settings, state actors who are not directly accountable to the public through elections are justified as legitimate authorities only in particular settings characterized by procedural protections and limitations as to substance.

The context of elections complicates this framework because the usual deference to elected officials clashes with the need to ensure the propriety of the process by which those same officials are chosen. Deference to political oversight of the electoral process threatens circular justification, suggesting that those making decisions about the electoral process are democratically accountable via the very election procedures being challenged. In egregious situations, like the severely malapportioned state legislatures at issue in the early one person–one vote decisions, the federal courts have intervened in the electoral process in order to promote accountability.[5] However, the courts have not settled on what, if anything, to do in settings of less dramatic harm.

In recent years, commentators and judges have displayed heightened concern about political actors making decisions about the electoral process on partisan or incumbent-protecting bases, and have called for greater policing of this dynamic.[6] Such arguments have been advanced in a variety of election law contexts, including election administration, the redistricting process, campaign finance law, and political party regulation, but the concerns they raise have not been well integrated into election law doctrine or into the broader framework of constitutional law. As a result, despite awareness of district lines drawn to dissuade challengers or to maximize partisan gains, campaign finance

2. *See infra* notes 89–92 and accompanying text.

3. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (1962) (explaining the counter-majoritarian difficulty).

4. *See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) (discussing the means of legitimating agency action through administrative law).

5. *See* Reynolds v. Sims, 377 U.S. 533, 545, 586–87 (1964) (striking down a state districting scheme with a disparity in population of up to 41-to-1 between districts); *cf.* District of Columbia v. Heller, 554 U.S. 570, 680 n.39 (2008) (Stevens J., dissenting) (noting that the Court's involvement in the oversight of legislative districting "was justified because the political process was manifestly unable to solve the problem of unequal districts").

6. *See infra* Part II (discussing these arguments).

laws that make it difficult to effectively challenge incumbents, election administration provisions that constrain the ability of certain voters to vote, and ballot access rules that limit the capacity of third parties to appear before the voters, election law doctrine has generally allowed for these manipulations.

Though the right to vote might be thought to provide a robust vehicle for judicial oversight of the electoral process, challenges to the operation of the democratic process often prove difficult to formulate as effective rights claims. As a result, some commentators have advocated a structural approach in the election setting, but this model presents its own difficulties due to the limited guidance provided by the constitutional text regarding the democratic process as well as hesitations about a judicial role in choosing among political theories. Consequently, despite the explosion of election law litigation since the eye-opening events surrounding the 2000 election, and the corresponding growth in popular and scholarly interest in these issues, the federal courts have not developed a comprehensive account of the appropriate judicial treatment of claims addressing the operation of the democratic process. In this Article, I leverage the doctrinal and conceptual frameworks of administrative law to advance such an account.

This Article contends that the tools and thinking that courts have developed in response to concerns about democratic legitimacy in the administrative law setting can provide guidance for the effort to confront analogous concerns in election law. In a context in which demands for accountability can collide with the governance needs of the modern regulatory state, administrative law doctrine draws an elaborate framework presenting multiple tracks of political oversight that are balanced against the deployment of expertise-based judgment by agency officials.[7] Administrative law promotes lines of responsiveness to the legislature, the executive, and the people,[8] and trades off some electoral control for the demonstrated exercise of instrumental knowledge, in part through a framework of means-ends reasoning. This framing of

7. *See* Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 988 (1997) (arguing that "[n]o single mode of democratic legitimation can serve to mediate between the conflicted, protean, often inchoate will of the people and the modern regulatory enterprise").

8. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2363 (2001) (arguing that "most of administrative law is best understood as a set of rules for allocating control over agency action to diverse individuals and institutions").

administrative law doctrine reveals a nuanced judicial response to the challenge of balancing popular accountability and effective governance.

Although the election law concerns I discuss here implicate the content of substantive law rather than the identity of the lawmaker, as administrative law does, the challenge posed by state actors shielded from effective accountability mechanisms counsels a similar framework of legitimation. Much as administrative law doctrine seeks to counteract any deficit of democracy by demanding that agency officials act on the basis of reasoned judgment, I argue that political actors enacting election provisions should likewise be held to a standard of instrumental rationality as a means of promoting the effective operation of the electoral process.[9] In doctrinal terms, I propose that courts considering election claims evaluate whether the challenged provision reflects a reasonable judgment as a means of reaching politically determined and constitutionally valid ends.

In developing this claim, I (1) specify the democratic concerns at issue in the election law setting; (2) articulate the mechanisms by which courts have approached the problem of democratic legitimacy in the administrative law setting, a framework embedded within a broader account of constitutional law; (3) explain how the administrative law framework is a desirable model in that the democratic concerns to which it responds and the forms of judgment it demands are usefully analogous to those at issue in the election setting; and (4) sketch specific ways in which the administrative law tools might be adapted and applied to the election law context, using as examples challenges to voter identification provisions and districting claims. The four Parts of this Article address these points in turn.

Through this discussion, I aim to sharpen the connection between the role of democratic values in the operation of government and in the selection of government. Though both administrative law and election law are broadly characterized by concerns about democratic legitimacy and accountability, the doctrines and scholarly dialogues have thus far proceeded largely in parallel, with little overlap.[10] In drawing this

9. By "democracy," I mean to invoke a colloquial and basic account of democratic practice, characterized by state action based on popular will as reflected through fair elections that broadly allow for both ex ante selection of governing officials and retrospective power to remove those officials. I say more about my account of democracy in Part IV.

10. For some exceptions, see Heather K. Gerken, Essay, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 746–48 (2006) (examining administrative law frameworks in the election law setting); Note, *A Federal*

account of democracy in operation across governmental settings, I seek to build on those who have pointed to connections between the election and governing settings[11] and to explore the integration of election law with a larger account of public law, encompassing the various bodies of law that shape the structural operation of the state.[12] While scholars have demonstrated "why voting is different" and should not casually be treated like other rights,[13] this Article considers one way in which election law presents a component of an integrated body of public law shaping an appealing model of democratic governance.

The recent rise in arguments that decisions regarding the democratic process should not be made on a partisan or incumbent-protecting basis, and the recurring echo in judicial opinions of this concern, reflect an anxiety about the democratic legitimacy of the political struggle over the structures that legitimize political decisions. Given longstanding concerns about authority exercised by unelected agency officials, are independent districting commissions a good idea? Should we view the districting process as akin to, say, monetary policy, a matter historically shielded from political whim but also not subjected to some form of heightened judicial review?[14] To what extent is the electoral process a

Administrative Approach to Redistricting Reform, 121 HARV. L. REV. 1842, 1843 (2008) (advocating creation of a federal agency for review of partisan redistricting claims but "providing a safe harbor for states that use independent agencies to redraw district lines").

11. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131–33 (1980) (calling for a more robust nondelegation doctrine and arguing that "[t]here can be little point in worrying about the distribution of the franchise and other personal political rights unless the important policy choices are being made by elected officials"); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1707–08 (1993) (describing right to vote to include interests in participation, aggregation, and governance).

12. *See generally* Saul Zipkin, *Democratic Standing*, 26 J.L. & POL. 179 (2011) (offering an account of integration of election law and federal courts doctrine in the justiciability context).

13. Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201, 1202–04 (1996).

14. *See* Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, LAW & CONTEMP. PROBS., Summer/Autumn 2005, at 15, 42 (noting that in domestic administrative law schemes, accountability mechanisms may not apply uniformly and that "[e]xceptions, or at least lower standards, commonly apply, for instance, to matters of national security and to the decisions of central banks"); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 622 n.202 (1984) (noting that "it has long been argued that the conduct of monetary policy, although not carried out using formal procedures, must be free of the suspicion of political influence"); *cf.* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 983–84 (2005) (arguing that for

matter of constitutional concern and of heightened judicial skepticism? Or do the demands of democracy require that decisions about the democratic process be left to the political process? I suggest here one orientation toward these issues, following on the elaborate doctrinal model developed in another area of democratic concern.

II. ELECTION LAW AND THE CONCERN ABOUT SELF-DEALING

In recent years, commentators and judges have expressed heightened concern about electoral provisions that appear to be motivated by "political" interests, designed to promote particular outcomes on partisan or incumbent-protecting grounds (or both).[15] Across a number of election law settings, such provisions have been challenged on the basis that they compromise the democratic legitimacy of the electoral process by distorting that process to achieve a specific result. While these criticisms have mostly not been endorsed in doctrine, they have been taken seriously by individual justices and judges, and they now reflect a significant focus in election law scholarship.

This Part sets out this concern and its treatment by the federal courts. After describing this dynamic in a number of electoral contexts, I explain why an individual rights framework has not succeeded in dealing with this concern, and discuss the need for a structural account of the democratic process that is consistent with the broader framework of constitutional law.

A. Democratic Legitimacy Concerns in Election Law

Across a variety of election law settings, we see a recurring concern about manipulation of the electoral process. This is not a particularly unexpected result of a process that leaves the players—or some players—to act as the umpires.[16] In the winner-take-all setting of American elections, the incentives all point in one direction, especially to the extent that election law doctrine does not give courts the tools

the election administrator "[t]he desired model is that of Alan Greenspan, not Katherine Harris").

15. For an influential version of this point, see ELY, *supra* note 11, at 102–03, calling for judicial intervention "only when the 'market,' in our case the political market, is systematically malfunctioning," such as when "the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out."

16. *See* IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 64 (2003).

with which to effectively police such practices. In this Part, I describe this dynamic in four prominent settings.

1. The Districting Process

The districting process is the election context in which concerns about self-dealing are most pronounced. The basic point is straightforward: whoever controls the line-drawing process has the power to draw districts they and their cohorts are likely to win, a power line-drawers have often been willing to exercise since at least the days of Elbridge Gerry.[17] Despite its vintage and claims to tradition, numerous commentators have criticized and sought to limit this practice, arguing that a system in which few incumbents are confronted by meaningful challenge[18] cannot be said to ensure democratic accountability, a fundamental commitment of the democratic process.

Samuel Issacharoff advances such an argument, contending that "[a]llowing partisan actors to control redistricting so as to *diminish* competition runs solidly counter to the core concern of democratic accountability,"[19] and calling for "blue-ribbon commissions, panels of retired judges, and Iowa's computer-based models"[20] as possible alternatives to the status quo. Other observers have likewise advocated models for independent districting commissions,[21] as well as various other doctrinal responses.[22] Concerns about self-interested districting

17. *See* STEPHEN ANSOLABEHERE & JAMES M. SNYDER JR., THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS 55–56 (2008) (describing the birth of the "gerrymander"); *see also* Vieth v. Jubelirer, 541 U.S. 267, 274 (2004) (noting that "[o]ne scholar traces [gerrymanders] back to the Colony of Pennsylvania at the beginning of the 18th century").

18. *See* Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 256–57 & tbl.1 (2006) (presenting data demonstrating that "congressional elections in the wake of the post-2000 redistricting were the least competitive in American history"); Jane S. Schacter, *Digitally Democratizing Congress? Technology and Political Accountability*, 89 B.U. L. REV. 641, 646 (2009) (noting that "[e]ven in the 2008 election, only fifty of 435 House seats were decided by fewer than ten percentage points, and that number is itself higher than the average in most recent elections").

19. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 623 (2002).

20. *Id.* at 644.

21. *See generally* Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 ELECTION L.J. 425 (2006) (surveying possibilities for the use of independent electoral commissions).

22. *See* Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 783, 838–53 (2005) (elaborating on the constitutional prohibition on "excessive partisanship" in the districting process and suggesting decision rules to implement that prohibition); Richard

are shared by the public to some extent, as suggested by a recent study which concluded that "among the minority of voters with an opinion on the question, voters generally favor a redistricting process that requires bargaining and is run by disinterested actors."[23]

The Supreme Court has recognized concerns about partisanship in the districting process even as it has declined to do much about it. In 1986, the Court allowed for a partisan gerrymandering claim, with the perhaps-impossible-to-demonstrate standard that the challenged scheme "will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[24] Eighteen years later, in *Vieth v. Jubelirer*, the Court took back whatever it had given, with a plurality finding a lack of judicially manageable standards for identifying a constitutional violation.[25] Justice Scalia's opinion indicated that excess partisanship was nonetheless constitutionally troublesome, a conclusion apparently shared by all the Justices.[26] In short, commentators and courts have expressed concerns of varying degrees about districting done on a partisan basis, while disagreeing about what, if anything, courts can or should do about it.[27]

2. Election Administration

While the pathologies of the districting process are the subject of longstanding debate, analogous concerns in the area of election administration have blossomed in the last decade, owing largely to the

Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 397, 413–18 (2005) (emphasizing the "excessive partisanship" account of the problem); Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 604–05 (2007) (arguing that "the central harm of political gerrymandering is what I term institutional distortion—political elites' manipulation of governance institutions or electoral structures to distort electoral outcomes in order to produce a particular result"); Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 668–69 (2006) (calling for a direct democracy solution to concerns about redistricting).

23. Joshua Fougere et al., *Partisanship, Public Opinion, and Redistricting*, 9 ELECTION L.J. 325, 341 (2010).

24. Davis v. Bandemer, 478 U.S. 109, 132 (1986).

25. 541 U.S. 267, 305–06 (2004).

26. *Id.* at 293 (noting Justice Stevens' argument that "an *excessive* injection of politics [in districting] is *un*lawful" and responding "[s]o it is and so does our opinion assume").

27. Courts have used the one person–one vote doctrine in some instances to enforce concerns about partisan line-drawing. *See* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS 875–80 (3d ed. 2007) (discussing Cox v. Larios, 300 F. Supp. 2d 1320 (N.D. Ga.), *summarily aff'd*, 542 U.S. 947 (2004), and other cases).

debacle revealed in the 2000 presidential election. Commentators have detailed the many problems of election administration in America today, and they are fairly dispiriting.[28] These distortions have been ascribed to practices of local and partisan control of elections.[29] The partisanship element in particular has been the focus of commentators in recent years,[30] and it raises the same entrenchment and democratic legitimacy concerns as the districting setting.[31] Where the Secretary of State in charge of administering the election is the campaign chair for one of the candidates, one might reasonably question the democratic propriety of her decisions.[32] A desire for nonpartisan election administration is apparently shared by the public as well.[33] Reflecting a somewhat analogous challenge, commentators have raised concerns about the Department of Justice's preclearance practices under Section 5 of the Voting Rights Act as well, suggesting that some decisions may have been made for partisan advantage.[34]

But the partisan actions of election officials affiliated with one of the competitors may be the low-hanging fruit in this setting. Because election law is made by political actors, such as the state legislature, all practices are subject to partisan or incumbent-protecting motivations. Some commentators have addressed these concerns, advancing proposals for apolitical institutions and regulatory practices that would

28. *See* HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT 1–3, 11–14 (2009) (discussing problems of the electoral system).

29. *See* Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE. L. & POL'Y REV. 125, 127 (2009) [hereinafter Tokaji, *The Future*] (noting that "*decentralization* and *partisanship* remain the two dominant characteristics of American election administration").

30. *See* Hasen, *supra* note 14, at 973–91 (calling for non-partisan state election administration).

31. *See* Michael S. Kang, *To Here from Theory in Election Law*, 87 TEX. L. REV. 787, 789–90 (2009) (reviewing GERKEN, *supra* note 28) ("Although entrenchment is understood as central to certain concerns, such as partisan gerrymandering, it has not been a prominent element of scholarship or jurisprudence about many other election-law concerns, such as campaign finance and election administration." (footnote omitted)).

32. *See* Daniel P. Tokaji, *Lowenstein Contra Lowenstein: Conflicts of Interest in Election Administration*, 9 ELECTION L.J. 421, 431–35 (2010) [hereinafter Tokaji, *Lowenstein Contra Lowenstein*] (discussing problems of conflicts of interest in the context of election administration).

33. *See* Tokaji, *The Future*, *supra* note 29, at 132 (discussing survey results on this point).

34. *See* Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 807–19 (2006) (discussing preclearance of the Texas redistricting plan in 2003 and Georgia voter identification law in 2005).

allow for the shoring up of democratic legitimacy in the electoral process, encompassing both election administration and districting.[35] Here again, we see some concern about election rules promulgated on improper bases, even when not rising to the level of a remediable voting rights violation.[36]

While judicial doctrine has not embraced partisan self-dealing as a basis for striking down election administration practices, expressions of concern about this dynamic do appear in the case law. In *Crawford v. Marion County Election Board*, a challenge to an Indiana voter identification law, a plurality of the Supreme Court did not view the fact that the provision had been enacted on a party-line vote as a basis for finding the law unconstitutional.[37] While the plurality noted that "[i]t is fair to infer that partisan considerations may have played a significant role in the decision to enact" the law, it concluded that "if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators."[38] On the Court's account of the right to vote, the fact that the state could invoke the interest in ballot security was sufficient; even so, the fact that it is difficult to imagine the Court taking seriously a claim based on a party-line vote or partisan advantage in challenges to non-electoral laws highlights the relevance of the issue in this setting.

This recognition was brought out somewhat more strongly in Judge

35. *See* Richard L. Hasen, *Election Administration Reform and the New Institutionalism*, 98 CALIF. L. REV. 1075, 1085–88 (2010) (reviewing GERKEN, *supra* note 28) (discussing this "New Institutionalism" approach); *see also* GERKEN, *supra* note 28, at 5 (calling for development of "Democracy Index" as "a data-driven, information-forcing device designed to generate pressure for reform while helping us make more sensible choices about which reforms to pursue").

36. *See* Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 650 (2008) ("When one political party uses its position of control over the legislative and executive branches of government to enact voting requirements that the other major party regards as a ploy to deter its constituents from exercising the franchise, the need for representation-reinforcing review would seem to have reached its apogee."). Professors Issacharoff and Pildes have emphasized that individual rights violations in the election setting may likewise rest on partisan motivations. *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 660–66 (1998) (discussing Texas Democrats' motivations to bar African Americans from voting in the party primaries at issue in the *White Primary Cases*).

37. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 203–04 (2008).

38. *Id.*

Evans's dissent to the Seventh Circuit's *Crawford* opinion, which begins, "Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."[39] Judge Evans called for something like "strict scrutiny light" in response,[40] but, beyond asserting that the sliding scale scrutiny level framework applicable to the claim allows for this move, he did not develop the doctrinal analysis.[41] These treatments of the voter identification law call for a more developed constitutional account of this concern.[42]

3. Campaign Finance

The concern about self-dealing has arisen in the campaign finance context as well, often on an incumbent-protecting basis. Justice Scalia has argued that campaign finance limitations serve as a means of protecting incumbents against challengers,[43] and commentators have made this point as well.[44] On this account, incumbent politicians know they have numerous inherent advantages, and enact campaign finance regulations to deny potential challengers the ability to overcome those advantages by raising and spending more money. Inasmuch as the advantages of incumbency may include the ability to raise vast funds,

39. Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting).

40. *Id.* at 954, 956.

41. *See* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 325 (2007) (making this point as part of a discussion of the failure of lower courts "to develop and apply explicitly intent-informed standards of review").

42. *See* Recent Case, Crawford v. Marion Cnty. Election Bd., *472 F.3d 949 (7th Cir. 2007)*, 120 HARV. L. REV. 1980, 1980, 1984–85 (2007) (analogizing the *Crawford* case to the campaign finance concerns about entrenchment).

43. *See* McConnell v. FEC, 540 U.S. 93, 249–50 (2003) (opinion of Scalia, J.) (arguing that "*any* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents" and that "the present legislation *targets* for prohibition certain categories of campaign speech that are particularly harmful to incumbents").

44. *See* Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 134 & n.455 (2004) (listing sources viewing the Bipartisan Campaign Reform Act as "little more than an incumbent-protection scheme"); Peter J. Wallison & Joel M. Gora, *Burying the Incumbent Protection Racket*, THE AMERICAN (June 16, 2010), http://www.american.com/archive/2010/june-2010/burying-the-incumbent-protection-racket; *cf.* SHAPIRO, *supra* note 16, at 62 (noting that bipartisan institutions like the Federal Election Commission "have incentives to behave as a duopoly, exempting themselves from the law and undermining political competition").

the empirical underpinnings of this argument might be questioned. Nonetheless, this argument reflects the same concerns as those advanced in the districting and election administration settings, that political actors manipulate the regulations of the electoral process to favor certain outcomes.

Justice Breyer, who has generally been sympathetic to campaign finance measures, has raised this point as well. Concurring in a decision upholding strict contribution limits in 2000, he noted that the Court "should not defer in respect to whether [the legislature's] solution, by imposing too low a contribution limit, significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from effective electoral challenge."[45] This concern was dispositive a few years later, in a decision striking down Vermont's contribution limits as too low, because "contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability."[46] This explicit protection of the competitive process reveals an underlying account of election law as necessary to ensure the democratic accountability that elections are designed to guarantee.

4. Political Parties

The law governing political parties, and especially the question of ballot access restrictions that affect the ability of third parties to get on the ballot, reflects these concerns as well. For example, in dissenting from a decision upholding a state law banning "fusion"[47] candidacies, Justice Stevens indicated that "[t]he fact that the law was both intended to disadvantage minor parties and has had that effect is a matter that should weigh against, rather than in favor of, its constitutionality."[48] Similarly, in a case brought by a third party that wanted to allow participation in its primary by members of other parties,[49] Justice

45. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 404 (2000) (Breyer, J., concurring).

46. Randall v. Sorrell, 548 U.S. 230, 248–49 (2006).

47. "'Fusion,' also called 'cross-filing' or 'multiple-party nomination,' is 'the electoral support of a single set of candidates by two or more parties.'" Timmons v. Twin Cities Area New Party, 520 U.S. 351, 353 n.1 (1997) (quoting Peter H. Argersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287, 288 (1980)).

48. *Id.* at 378 (Stevens, J., dissenting).

49. "In a semi-closed primary, independent and non-affiliated voters are permitted to participate in the primaries, but not members of the opposing party." ISSACHAROFF ET AL.,

O'Connor observed that

> [a]lthough the State has a legitimate—and indeed critical—role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit.[50]

Much like the *Crawford* plurality, Justice O'Connor concluded that skeptical review was nonetheless only required when the challenged restrictions are severe "and particularly where they have discriminatory effects,"[51] highlighting the disconnect between the concern and the doctrine. Commentators have likewise criticized the Court's protection of the two-party system and approval of ballot access restrictions for third parties.[52]

Yet another setting in which this concern has come up is access for candidates within a party to the primary ballot. Nathaniel Persily has explored the obstacles impeding John McCain's ability to get on the ballot for the 2000 Republican primary in New York, and described the "common sense approach" of the court considering the challenge to those rules, asking: "If Senator John McCain—a candidate who agreed to accept federal matching funds and spending limits, the main challenger to Governor Bush, a leader in the polls in several states, and the victor in the New Hampshire primary—could not get on the ballot, then how could the laws possibly be constitutional?"[53] Professor Persily's paraphrase of the Court's question—"Why have a primary at all if the practical barriers to candidate entry can only be surmounted by the nominee already backed by the party establishment?"[54]—reflects the larger issue in these cases.

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supra note 27, at 283.

50. Clingman v. Beaver, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring in part and concurring in the judgment).

51. *Id.*

52. *See, e.g.*, Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 332–33 (1997); Issacharoff & Pildes, *supra* note 36, at 674–90.

53. Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181, 2205 (2001).

54. *Id.*

5. Other Election Law Settings

These concerns have taken two related forms as well. One theme has been the appearance of judicial discomfort, not with specifically partisan or incumbent-protecting actions, but with politics more generally.[55] *Bush v. Gore*[56] provides a striking example of this dynamic; in a setting whose mechanisms are provided for by law,[57] the Court intervened to resolve the situation without letting the specified procedures for decision by Congress occur.[58] While some commentators praised the Court for avoiding the chaos that this process might yield,[59] others criticized the plurality on this ground.[60] What is interesting here is not whether the Court was right or wrong; rather, the instinctual concern—not explained in the Court's per curiam opinion—that leaving the matter to the political process would somehow be harmful is consistent both with the recurring sense that politically based decisionmaking is troubling in this setting and with the inability or refusal to formally incorporate these concerns into the doctrine.

This dynamic also connects to a growing concern that judicial treatment of election law claims can likewise be infected by partisanship and harm democratic legitimacy. Empirical studies suggest that courts may be influenced by ideological considerations when deciding Voting Rights Act claims,[61] presenting a challenge to the hope of judicial salvation from the pathologies of political decisions about elections. Commentators have raised the concern that judicial intervention in election disputes threatens harm to democratic legitimacy based on the

55. *See* Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 716 (2001) (developing this argument).

56. 531 U.S. 98 (2000).

57. *See id.* at 153–54 (Breyer, J., dissenting) (noting that "the Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes").

58. *See id.* at 111 (per curiam) (rejecting Justice Breyer's argument and stating that "[w]hen contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront").

59. *See* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 4 (2001) (arguing that *Bush v. Gore* "averted what might well have been (though the Pollyannas deny this) a political and constitutional crisis").

60. *See* Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 650–53 (2001) (contending that the judiciary was not the proper entity to make this decision).

61. *See* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 3 (2008) (concluding that "judicial ideology significantly influences judicial decisionmaking in Voting Rights Act cases").

threat of perception of partisan bias,[62] and have, for example, called for the formation of special election courts to resolve disputed elections.[63] As this discussion suggests, every element and each stage of the process of determining the rules that govern elections have been subject to anxieties about the democratic legitimacy of the electoral process.

The common thread across these accounts is the sense that the operation of the democratic process has been unfairly distorted. To the extent the electoral process necessarily rests on a foundation of democratic values, these arguments assert that election provisions made on self-dealing bases undermine those values. Supreme Court decisions in an array of election law settings corroborate this concern, even if not framed on this account; this Article seeks to situate these concerns as an account consistent with public law more broadly.

B. Rights and Structural Claims in the Election Context

Inasmuch as these election issues implicate the fundamental right to vote, a right the Supreme Court has indicated is "preservative of all rights,"[64] the instinct might be to respond to these concerns through the medium of rights claims, much as concerns about the operation of criminal law have largely been developed through litigation invoking the procedural protections found in the Bill of Rights.[65] Yet this approach has not effectively addressed the problem, as election claims often do not work well when framed as individual rights claims, for a variety of practical and conceptual reasons. We should then consider how a framework of constitutional law could address these concerns about democratic legitimacy on a structural approach.

The doctrine implementing the right to vote relies on a sliding-scale model of scrutiny, under which non-severe burdens incur a minimal

62. *See, e.g.*, Elmendorf, *supra* note 36, at 645–50 (discussing this concern as presented in voter participation cases).

63. *See* Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL'Y REV. 350, 376–79 (2007) (arguing for "specialized election courts to handle election contests").

64. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

65. *See, e.g.*, William J. Stuntz, *Substance, Process, and the Civil–Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 3–7 (1996) (detailing ways constitutional law protects only criminal procedure and not substantive criminal law). The individual rights model has been criticized in criminal law settings as well. *See, e.g.*, Eva Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 3 (2010) (arguing that "the federal habeas system is broken largely because of its resolute focus on individual petitioners" and calling for structural approach).

level of scrutiny and are likely to be upheld, whereas demonstrations of heightened burdens trigger heightened review.[66] This framework, recently confirmed in *Crawford*, demands that plaintiffs provide evidence of a serious burden before the state is put to its evidence.[67] Where plaintiffs are unable to do so, as in *Crawford*, the state's simple invocation of an interest in election security is usually sufficient to deny the constitutional claim.[68]

A number of practical hurdles impede the treatment of election administration claims on an individual rights model. These hurdles, exacerbated by the disfavor with which the Court has recently treated facial claims in this setting,[69] include the lack of reliable data resulting from the pre-election nature of many of these claims and the limited ability of the individuals who would be harmed by these provisions to bring suit ex ante,[70] as well as any distortions stemming from the focus on the specific circumstances of particular individuals.[71] While districting claims present fewer practical hurdles, they pose conceptual difficulties that are similarly problematic because these aggregate claims are largely inexplicable on an individual rights account.[72]

In light of these and similar points, a number of scholars have argued that election claims are often not amenable to being framed as a question of rights and have called for a structural account, in which courts would protect the electoral process as well as individual rights.[73]

66. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992). *See generally* Elmendorf, *supra* note 41 (providing comprehensive analysis of the *Burdick* model prior to the *Crawford* decision).

67. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189–91 (2008).

68. *See Burdick*, 504 U.S. at 434 (indicating that "[w]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions" (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983))).

69. *See* Zipkin, *supra* note 12, at 216–23.

70. *See id.* at 219–20.

71. *See* Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, 1373–74 (N.D. Ga. 2007) (denying standing to individual plaintiffs on basis of evidence about the availability of rides from their children or of taking a bus to the registrar's office).

72. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666 (2001) (explaining that, because they implicate an aggregate right, "[v]ote dilution claims implicate a special kind of injury, one that does not fit easily with a conventional view of individual rights").

73. *See* Elmendorf, *supra* note 36, at 653 (arguing that "[w]hatever may be the best understanding of the right to vote as a matter of first principles, a structural approach is the most plausible way to avoid quagmire and resulting injury to the courts' reputation for

This call for a structural rather than individual rights framing of election claims has been the subject of some debate in election law scholarship but has not been developed in the doctrine.[74]

It is worth distinguishing two elements of the structural account of election law that are easily conflated. The first is the argument that an individual rights approach is inappropriate or insufficient in the election law setting, and that courts should assess these claims with reference to a structural model instead. This argument is distinct from, and prior to, a second claim that specifies the particular structural account that courts should employ, for example, the claim associated with Professors Issacharoff and Pildes that courts should seek to ensure protection of a competitive electoral process.[75] The criticism that courts should not select any particular structural account to serve as a constitutional standard brings these two points together.[76] The basic question here is

reasoned, impartial decision-making"); Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 504 (2004) (arguing that "[t]he Court has long tried to use a conventional individual-rights framework—the bread-and-butter of legal analysis—to adjudicate what are often claims about the structure of the political process" but that "[a]n individual-rights framework . . . does not provide adequate analytic tools for resolving such challenges"); Issacharoff & Pildes, *supra* note 36, at 717 (arguing that "the crucial issues are not so much ones of individual rights of participation as ones of the preservation of the robustly competitive partisan environment"); Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 HARV. L. REV. 80, 81 (2009) (contending that "*Caperton* continues the Court's problematic insistence on addressing structural problems through the lens of protecting individual rights"); Pildes, *supra* note 44, at 40–41 (arguing that "understandings of individual rights, associational rights, and conceptions of equality must be modified to develop an appropriate constitutional framework for the increasingly important task of judicial oversight of democratic politics").

74. *See* Charles, *supra* note 22, at 622–25 (discussing disagreements between individual rights and structural accounts).

75. Issacharoff, *supra* note 19, at 600 (arguing that "the risk in gerrymandering is not so much that of discrimination or lack of a formal ability to participate individually, but that of constriction of the competitive processes by which voters can express choice"); Richard H. Pildes, Commentary, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1606–07 (1999); *see also* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269 (1942) (defining "the democratic method" as "that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote").

76. *See, e.g.*, RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 152–53 (2003) (emphasizing, in response to Issacharoff's structural argument, concern "about the belief that the Court not only can and should make deeply contested normative judgments about the appropriate functioning of the political process but also come down on one side of an empirical debate without really taking a serious look at the evidence"); Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—and Be Thankful for Small Favors*, *in* THE U.S. SUPREME

whether disagreement about the content of structural protection of the democratic process should be treated differently than disagreements about the content of rights within the democratic process[77] or the content of other structural models, such as federalism or separation of powers, which also demand that the courts identify contested theoretical commitments to enforce as constitutional law. Following the belief that courts can enforce structural election models as well as they do individual voting rights, I focus here on how the electoral process might be protected as a structural matter.

Ensuring electoral competition is not the only structural ideal that courts could vindicate in the democratic process. Alternatives might include ideals of proper representation,[78] avoiding entrenchment,[79] ensuring non-domination,[80] or opportunity for deliberation. These models may well overlap and any would require a fair bit of elaboration. I argue for protection of democratic legitimacy in a sense specified below,[81] and for now address the challenge that confronts all of these accounts: Where in the Constitution does any of this come from?[82]

In response to this point, Professor Issacharoff acknowledges "that the search for a textual justification was unlikely to be fruitful" but

COURT AND THE ELECTORAL PROCESS 283, 297–302 (David K. Ryden ed., 2d ed. 2002) (arguing against structural theories and indicating that "[t]he Supreme Court should not select a political theory and impose it on the nation any more than it should impose an economic theory"); *cf.* Holder v. Hall, 512 U.S. 874, 901–02 (1994) (Thomas, J., concurring in the judgment) ("The matters the Court has set out to resolve in vote dilution cases are questions of political philosophy, not questions of law. As such, they are not readily subjected to any judicially manageable standards that can guide courts in attempting to select between competing theories." (footnote omitted)).

77. *See* Charles, *supra* note 22, at 653 (making a similar point).

78. *See* Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051, 1055, 1076–95 (2010) (proposing an "effective accountability canon" as a canon of construction rather than an enforceable constitutional requirement, which would promote the constitutional principle that "electoral systems should render elected bodies responsive to the interests and concerns of the normative electorate").

79. *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 497–501 (1997) (arguing for anti-entrenchment approach).

80. *See* SHAPIRO, *supra* note 16, at 51–52; Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1416–19 (2008).

81. *See infra* Part III.B.

82. *See* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 652 (2002) ("Most would criticize Issacharoff's argument, as well as the political markets approach more generally, on the grounds that it is completely disconnected from the text of the Constitution.").

argues that "[t]here is no narrow textual justification for almost any of the body of law governing the political process."[83] He elaborates:

> It is difficult to see the gain from making believe that the need to fill in the gaps in an aging Constitution is anything other than a response to our experience with democratic governance. There is certainly no gain in pretending that the answers to the questions of how to make democracy work are compelled by vague terms such as "due process," "equal protection," or "republican form of government." The same theoretical work would have to be done to make concrete the democratic values to be read into these open-textured clauses.[84]

My claim here is that this theoretical work should be incorporated into a larger account of American constitutional law. The remainder of this Article will engage that task in advancing administrative law as a model for the way ideals of democratic legitimacy might be translated into a doctrinal response to concerns about self-dealing in the crafting of election provisions as a means of protecting the electoral process itself.

III. DEMOCRATIC ACCOUNTABILITY AND ADMINISTRATIVE LAW

As numerous observers have explained, a central project of administrative law—perhaps *the* central project—is the effort to cabin the discretion of administrative officials.[85] In this Part, I examine how this commitment takes form in a model of promoting the democratic accountability of agencies through multiple overlapping ties to democratic actors and trading off some democratic accountability for some instrumental expertise. I first describe the general framework of legal justification in public law as premised on deference to elected actors unless the challenged action is one not permitted to the political process because it implicates a right. Where an actor not subject to democratic accountability mechanisms takes action, the usual presumptions about democratic legitimacy may not apply, and alternative forms of justification are required. As a body of law addressing the powers given entities not bearing the basic presumption

83. Samuel Issacharoff, *Why Elections?*, 116 HARV. L. REV. 684, 687 (2002).

84. *Id.* at 688.

85. For the canonical treatment of this issue, see Stewart, *supra* note 4.

of democratic legitimacy, administrative law encompasses a variety of doctrines designed to compensate for the lack of direct democratic accountability in shaping a framework of instrumental justification.

I sketch a broad account of legal legitimation in public law in Part III.A, and explain that the democratic accountability of the legislature generally justifies state action but that when the action is presumptively improper—whether it infringes on rights or was taken by the "wrong" actor—the government is subject to heightened requirements of justification. In Part III.B, I turn to administrative law and canvass an array of doctrines to demonstrate that the thrust of the law in this area is to funnel political decisions to democratically accountable actors and to ensure that instrumental decisions are made on the basis of demonstrable evidence that furthers the ends specified by those actors. I argue that the use of instrumental rationality serves alongside democratic accountability as a justificatory resource in this setting.

A. Legal Legitimation in Public Law

The problem of state action is not a new one. Thinkers have long grappled with the question of how limitations on individual liberty can be justified, and have largely embraced consent as a basis of legitimacy,[86] nowadays largely instantiated through democratic procedures. Here, I consider the ways in which state action is validated in constitutional law, a setting in which the terms of legal legitimacy turn partly on underlying ideals of moral legitimacy,[87] with those ideals often taking the form of commitments to democratic values.[88] My aim is not to confront deeper questions about the ultimate legitimacy of the state, but to identify ways

86. *See* EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 144–60 (2005) (discussing and criticizing this account of legitimacy and observing that "[s]ocial contract theories are the dominant account of political legitimacy in modern Western thought"); Stewart, *supra* note 4, at 1672 ("The doctrine against delegation appears ultimately to be bottomed on contractarian political theory running back to Hobbes and Locke, under which consent is the only legitimate basis for the exercise of the coercive power of government."); *see also* THE FEDERALIST NO. 22, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority.").

87. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–1802 (2005) (discussing ideas of legal, sociological, and moral legitimacy).

88. *See* Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 61–65 (1993) (arguing that, in constitutional law, democracy "began to be considered a foundational concept around 1940" as a means of justifying both restraints on and exercises of judicial power).

in which beliefs about the values that conduce to that legitimacy (focusing on democratic values) shape judicial practice in various constitutional settings.

The democratic pedigree of the legislature plays a prominent legitimating role in public law. The broad deference given the legislature upon judicial review of statutes not implicating constitutional rights reflects the strong presumption of legitimacy accorded the democratic process.[89] Debates over statutory interpretation turn largely on the best way of properly deferring to the democratic process.[90] The denial of procedural due process rights in the legislation context provides a further example of such deference,[91] as does the provision in standing doctrine that generalized grievances are to be left to the political branches.[92] In these settings, the democratic process is treated as the source of presumptive legitimacy of state action and the basis for denying judicial review, unless the litigant provides a basis for rebutting that presumption.

How is the presumption of legitimacy rebutted? Constitutional challenges take two broad forms: either the particular action is substantively improper, or a particular state actor cannot take that action. The distinction is between (1) you can't do *that* and (2) *you* can't do that, with the first reflecting the domain of constitutional rights, while the second addresses issues of structural constitutional law such as

89. *See* Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 38 (2010) ("The Court recognizes that ours is a democratic government and that elected officials answerable to 'the people' should make controversial policy decisions, rather than unelected judges.").

90. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) ("According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature. . . . The judicial task is to discern and apply a judgment made by others, most notably the legislature." (footnote omitted)).

91. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) ("General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.").

92. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992) (holding that "a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy"); United States v. Richardson, 418 U.S. 166, 179 (1974) (concluding that "the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process").

federalism and separation of powers as well as doctrines of administrative law.

1. You Can't Do *That*: Rights Violations

Rights can be seen to structure the relationship of the individual and the state, and the contested scope of constitutional rights reflects the contested boundaries of state power in various settings. When a right protected by the First or Fourteenth Amendment is infringed,[93] courts engage in heightened scrutiny of the state action, taking either a strict form, which tends to result in invalidation,[94] or an intermediate form, which resembles a model of balancing.[95] Both forms of scrutiny are comprised of three elements: an assessment of the validity of the legislative end; an evaluation of the fit of the means of reaching that end; and the second-order specification of a level of deference under which the assessment of means and ends will be conducted.[96] The challenged action is thus weighed in two dimensions—as a means of accomplishing a valid end and as a burden on a protected right—and the usual deference to the democratic process either does not apply at all or applies less strongly. In short, once the right is seen to be of a kind that incurs some heightened level of protection, the government is called upon to justify the infringement as an effective means of achieving some valid end.[97]

93. Other constitutional rights incur different forms of scrutiny. *See* District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008) (shaping a somewhat categorical model for the Second Amendment); Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 404–11 (2009) (discussing and criticizing *Heller*'s categoricalism approach); Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 229–32 (2006) (noting different standards of review for various Bill of Rights guarantees).

94. *See generally* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007) (discussing development and application of strict scrutiny inquiry).

95. *See* Blocher, *supra* note 93, at 392.

96. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2723 (2010) (describing the intermediate scrutiny model, "under which a 'content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests'" (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997))); Fallon, *supra* note 94, at 1273 ("In modern constitutional law, the term 'strict scrutiny' refers to a test under which statutes will be pronounced unconstitutional unless they are 'necessary' or 'narrowly tailored' to serve a 'compelling governmental interest.'").

97. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 441 (6th ed. 2009) ("The modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is

The departure from the usual democratic deference in the rights setting can be seen as either external or internal to a democratic account. On one hand, we might believe that some individual interests are simply not subject to majority rule because of commitments to fundamental liberties or basic human equality or the demands of justice.[98] Criminal procedure, due process, or equal protection rights can be seen to be of this sort, reflecting an ideal that certain basic guarantees must be protected against the government, no matter how proper the process by which the decision was made.[99] On this account, certain individual rights are not subject to the political process due to overriding value commitments, and the state's democratic legitimacy, however impeccable, cannot suffice to justify their infringement.

A second approach views some constitutional rights to be necessary for the democratic process itself. Free speech rights have been defended on this basis, as crucial for the public discussion that allows democracy to operate properly.[100] Equal protection or other rights may present similar baselines for democratic action,[101] and others have argued that the Bill of Rights more generally reflects this model as well.[102] Here,

sufficiently related to the goals it is pursuing."); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–24 (1972) (developing account of equal protection review focused on the state's choice of means to legislatively determined end).

98. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at xi, 184–205 (1977) (developing an account of rights as "political trumps held by individuals"); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 727–29 (1998) (describing and criticizing this view and noting that "[t]he view of rights as immunities for fundamental attributes of the person is also the prevailing view among rights philosophers").

99. *See* Richard H. Pildes, *Dworkin's Two Conceptions of Rights*, 29 J. LEGAL STUD. 309, 311 (2000) (noting that in "the immunities view, rights emanate from some conception of the self; rights demarcate spheres of belief and conduct insulated from majoritarian preferences to enable fundamental attributes of that self to develop").

100. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT 22–27 (1948).

101. *See* Horwitz, *supra* note 88, at 64 (arguing that "the Warren Court majority believed that *Brown* [*v. Board of Education*] was a precondition for, and fulfillment of, democratic ideals" and that "[f]or the Warren Court majority, some degree of social inclusiveness was a necessary precondition for a well-functioning democracy"); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1534–35 (1988) ("Just as property rights—rights of having and holding material resources—become, in a republican perspective, a matter of constitutive political concern as underpinning the independence and authenticity of the citizen's contribution to the collective determinations of public life, so is it with the privacies of personal refuge and intimacy." (footnote omitted)).

102. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131,

viewing the invocation of rights to deny the usual deference to the legislature reflects a view that a democratic process denying these rights is not a properly operating democratic process and thus not deserving of democratic deference. As this suggests, the invocation of rights claims allows the presumption of validity to be rebutted either by showing that democratic legitimacy is non-dispositive in light of the constraints imposed by other values or that the rights violation itself demonstrates that the political process is democratically flawed.[103]

Of course, judicial deference is not absolute even outside these rights contexts, and legislation must also meet minimal requirements of basic rationality, a standard that appears to have its sharpest bite in cases of animus.[104] This requirement confirms that deference to democracy only goes so far. In sum, democratic accountability serves as a presumptively sufficient legitimating resource, a presumption superseded or rebutted by claimed violations of rights. And, where that presumption is overcome, courts evaluate state action on metrics of both means and ends.

2. *You* Can't Do That: Structural Claims

Claims that the "wrong" governmental actor was responsible for the challenged action arise in settings of structural constitutional law, such as separation of powers or federalism contexts, as well as in administrative law. This issue of the wrong actor making decisions presents a concern about a "democratic deficit," the idea that power is being exercised outside of settings subject to democratic control.[105] In a

1132 (1991) (arguing that "[t]he main thrust of the Bill was not to downplay organizational structure, but to deploy it; not to impede popular majorities, but to empower them").

103. These competing accounts of rights speak to varying political theory accounts as well. For example, Corey Brettschneider notes that "[t]he view that a theory of basic rights both has a root distinct from democracy and also constrains democracy is present in major historical and contemporary accounts of liberalism" and opposes this view in "recast[ing] the idea of substantive rights as an aspect of the democratic ideal." COREY BRETTSCHNEIDER, DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT 8–9 (2007).

104. *See* Romer v. Evans, 517 U.S. 620, 631–32 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448–50 (1985).

105. *See* Peter L. Strauss, *Legislation that Isn't—Attending to Rulemaking's "Democracy Deficit*," 98 CALIF. L. REV. 1351, 1351–54 (2010); Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 633 (1999) (noting that "[t]here is, one might say, a basic 'democratic deficit' (to use a phrase that has gained wide currency in Europe) common to both" delegation to administrative agencies and supranational institutions).

number of settings, including judicial review,[106] administrative action,[107] the use of international or foreign law in American courts,[108] and privatization of governmental functions,[109] unelected actors exercise (or are thought to exercise) forms of governance, giving rise to concerns about democratic legitimacy.[110] The wrong actor concern can also arise across elected settings, questioning whether the state or federal government may take a particular action or whether Congress or the President may do so. Such questions often involve relative assessments of democratic accountability as well as the proper execution of government powers.[111] Here too, ideals of accountability and democratic legitimacy can play a role in the treatment of difficult cases.

Consider contexts involving elected actors. Viewing the Constitution as establishing a government of divided and enumerated

106. *See infra* text accompanying notes 116–120.

107. *See infra* Part III.B.

108. *See, e.g.*, Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527, 529 (2003) (arguing that "because supranational lawmaking operates outside [the constitutional] systems of checks and balances and accountability, it risks undermining our Constitution's institutional strategy"); *cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 750 (2004) (Scalia, J., concurring in part and concurring in the judgment) ("The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty, could be judicially nullified because of the disapproving views of foreigners." (citation omitted)).

109. *See generally* Jody Freeman & Martha Minow, *Reframing the Outsourcing Debates*, *Introduction* to GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 1 (Jody Freeman & Martha Minow eds., 2009) (discussing questions surrounding "the compatibility of the American outsourcing regime with the country's professed commitment to the democratic values of public participation, accountability, transparency, and rule of law").

110. Scholars have compared concerns about judicial review to those about administrative law on this basis. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 464–65 (2003) (analogizing shift in administrative law to preoccupation with the "countermajoritarian difficulty" in constitutional law); Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 540–41, 547–50 (1998) (relating concerns about judicial review to concerns about independent agencies); Matthew D. Adler, *Justification, Legitimacy, and Administrative Governance*, ISSUES IN LEGAL SCHOLARSHIP, art. 3, at 1 & n.3, http://www.bepress.com/cgi/viewcontent.cgi?article=1060&context=ils (noting that "Bickel and Stewart attack the same general question: How to legitimate non-legislative governance," and crediting the insight to Professor Bressman (footnote omitted)).

111. *See* Printz v. United States, 521 U.S. 898, 920 (1997) ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens."). *See generally* V.F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835 (2004) (developing account of structural constitutional claims, like separation of powers and federalism, based on representational bases rather than formal or functional assessment of powers).

powers, the Court has often treated actions taken by actors to whom the relevant power was not given as not merely presumptively improper, but as categorically invalid. In separation of powers contexts, the Court struck down the legislative veto and the line-item veto without allowing the government to demonstrate that these democratically enacted schemes were effective means of achieving compelling state interests,[112] as the government potentially could if the infringement were of a right.[113] Indeed, in some instances the Court explicitly rejected functional defenses of the challenged framework.[114] The Court has likewise found legislation unconstitutional on the basis that it commandeered state legislatures or executive officials, thereby contravening the federal system, without allowing instrumental justification.[115] In these cases, actions taken by actors not given the relevant power by the Constitution were not given much deference, despite the apparent desire of contemporary political actors to reshuffle the allocation of powers.

In contexts where the state actor taking the relevant action is not one with direct electoral accountability and thus putatively facing a democratic deficit, courts have developed various models of justification. The question of judicial review of legislative action has famously raised this issue.[116] The intuition is simple: when non-elected

112. *See* Clinton v. City of New York, 524 U.S. 417, 447–48 (1998); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983).

113. At other times, the Court has used a balancing model in this setting. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 691 (1988) (noting that "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light"); Nixon v. Adm'r of Gen. Servs. 433 U.S. 425, 443 (1977) (focusing inquiry "on the extent to which [the challenged act] prevents the Executive Branch from accomplishing its constitutionally assigned functions" and concluding that "[o]nly where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress").

114. *See* Bowsher v. Synar, 478 U.S. 714, 736 (1986) ("No one can doubt that Congress and the President are confronted with fiscal and economic problems of unprecedented magnitude, but 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.'" (quoting *Chadha*, 462 U.S. at 944)).

115. Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 188 (1992); *see also* Evan H. Caminker, Printz*, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 200 (noting that in *Printz*, "[t]he Court announced a categorical anti-commandeering rule, one not subject to any case-by-case balancing of interests or measurement of burden").

116. *See* BICKEL, *supra* note 3, at 16 (developing the concept of countermajoritarian

judicial actors strike down decisions enacted by elected representatives, the polity suffers a democratic harm.[117] Multiple responses to this concern have been advanced, which roughly track the reasons for protections of individual rights and structural provisions more generally: that judicial review in practice is not actually countermajoritarian,[118] that judicial review is democracy-promoting because it supports democratic commitments,[119] and that in protecting rights, judicial review protects crucial values in addition to democracy.[120] These accounts legitimate judicial review as consistent with democratic values or, alternatively, as following from external values that can trump democracy in particular settings. In the next Part, I examine the structure of analysis used in administrative law doctrine, a setting which poses its own challenges to democratic commitments.

B. The Administrative Law Model

Against this backdrop, I turn to administrative law to assess how these democratic concerns play out in this setting. In this Part, I discuss a variety of legal doctrines that shape a response to the lack of presumptive democratic legitimacy of agency action.[121] To summarize

difficulty); *see also* Edward Rubin, *Judicial Review and the Right to Resist*, 97 GEO. L.J. 61, 65 (2008) ("The countermajoritarian difficulty is probably the dominant theme in contemporary legal scholarship about judicial review.").

117. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353 (2006) ("By privileging majority voting among a small number of unelected and unaccountable judges, [judicial review] disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights."); *see also* BRETTSCHNEIDER, *supra* note 103, at 142 (criticizing substantive accounts for "fail[ing] to recognize that there is a loss to democracy every time a nonmajoritarian institution is needed to protect substantive democratic rights").

118. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 14 (2009) (arguing that "over time, as Americans have the opportunity to think through constitutional issues, Supreme Court decisions tend to converge with the considered judgment of the American people").

119. *See, e.g.*, BRETTSCHNEIDER, *supra* note 103, at 136–59 (developing an argument that judicial review is sometimes justified as a means of protecting democratic rights); ELY, *supra* note 11, at 73–104 (arguing that judicial review can reinforce representation).

120. *See, e.g.*, Rubin, *supra* note 116, at 105–06 (arguing that judicial review serves as a means of holding government subject to higher law).

121. *See, e.g.*, Rachel E. Barkow, Essay, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1336 (2008) ("The overriding purpose behind almost every doctrine in administrative law is to control the exercise of agency discretion."); Bressman, *supra* note 110, at 462 ("From the birth of the administrative state, we have struggled to describe our regulatory government as the legitimate child of a constitutional

the discussion that follows, courts have sought to trade off some direct popular control for some effective governance, demanding frameworks promoting accountability to the legislature, the executive, and the people, along with the demonstrated exercise of instrumental knowledge by administrative agencies. My goal here is to trace the broad structure of administrative law and frame it in a way that can provide guidance for the election law setting. I therefore center my discussion on administrative law doctrines of governmental structure and rulemaking, as these best highlight the ways the federal courts have treated democratic values in this setting.

The concern about discretion exercised by unelected administrative officials extends beyond courts. Rachel Barkow has illustrated how the demise of ideas of mercy in criminal law traces to the development of the administrative state and anxieties about unaccountable discretion.[122] Likewise, the rise of cost–benefit analysis as a "technology of trust" speaks to the strong incentive to justify administrative decisions in objective terms.[123] In these settings, concerns about discretion shape the nature and content of administrative decisions before they reach the courts (if they ever do). Indeed, similar concerns about discretion and case-by-case decisionmaking have been advanced with regard to the courts themselves,[124] and the longstanding rules–standards debate likewise rests in part on a divide over the propriety of administrative and judicial discretion.[125]

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democracy."); Lindseth, *supra* note 105, at 645 (explaining that administrative rulemaking "is inescapably problematic from the standpoint of democratic legitimacy" both because "administrative agencies do not derive their power directly from a *constitutional* delegation of legislative authority from the people" and because "agencies do not depend directly on periodic popular approval—that is, they do not depend directly on the vote—for their continuing legitimacy").

122. *See* Barkow, *supra* note 121, at 1334–35.

123. *See* THEODORE M. PORTER, TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE 90 (1995) (arguing that "[r]igorous quantification is demanded in these contexts[, including cost–benefit analysis,] because subjective discretion has become suspect" and that "[m]echanical objectivity serves as an alternative to personal trust").

124. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2272 (2009) (Roberts, C.J., dissenting) (arguing that "[t]here is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle"); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–79 (1989) (arguing that courts should adopt rules rather than follow a case-by-case approach).

125. *See* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992) (noting, in discussing the Court's treatment of rules and standards, that "[r]ules, once formulated, afford decisionmakers less discretion than do standards").

In response to such concerns about discretion and accountability, administrative law doctrine structures an elaborate model that legitimates administrative action through four means: (1) tracing agency action to a legislative directive (that is, explained in terms of a legislatively imposed principle); (2) subjecting the action to the oversight and accompanying democratic accountability of the executive branch; (3) reaching the decision pursuant to processes characterized by transparency, inclusion, and public responsiveness; and (4) defending agency action on the basis of demonstrated expert judgment. The first three reflect a three-pronged model of democratic accountability, while the fourth promotes the ideal of effective governance. Importantly, each of these doctrines reflects a balance between the demands of democracy and effective governance in a particular setting; as a result, each element is not only a component, but also itself a microcosm, of the larger administrative law model.

Administrative law doctrine thus reflects a broad framework in which democratic accountability is promoted and departures from directly democratic procedures are justified to the extent that corresponding gains in effectiveness can be shown.[126] In short, "[t]he task of administrative law is to generate institutional designs that appropriately balance the simultaneous demands of political responsiveness, efficient administration, and respect for legal rights."[127] I focus here on the calibration of the first two of these, exploring the intricate trade-offs designed to maximize these two commitments, which can be in some tension. As I suggest below, the variety of tools used to shore up the democratic legitimacy of administrative action may likewise provide guidance for debates about the legitimacy of political actors regulating the electoral process.

126. *See* Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 399–408 (2006) (discussing administrative accountability model and explaining that the model "regulates decisionmaking to promote rationality, responsiveness to public norms, and reviewability by others").

127. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1263–64 (2006); *see also* CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 3 (1990) (identifying three models of decisionmaking: "*adjudicatory fairness*, *politics*, and *'scientific' expertise*").

1. Democratic Governance

In significant part, administrative law doctrine seeks to ensure the democratic legitimacy of agency action by demanding multiple forms of attribution, accountability, oversight, and participation by elected representatives and the people themselves. Here, I describe the ways the doctrine tracks agency action to the legislature, the executive, and the public. This three-pronged framework appears almost Madisonian in the way it disperses powers, and includes an element of popular participation as well, which we might view as an acknowledgement of the democratic deficit that administrative law entails and as an attempt to bolster its legitimacy.[128] I do not evaluate in this Article the precise balance between these three elements, or the different models of representation they allow for and create; rather, my goal is to highlight the development, through judicial elaboration of the Constitution and Administrative Procedure Act (APA), of a doctrinal model designed to minimize the perceived democratic deficit in this setting.

a. Legislative Accountability

Administrative law directs political decisions to democratically accountable actors through the nondelegation doctrine. This doctrine, stemming from the vesting of the "Legislative Powers" in Congress by Article I of the Constitution,[129] is commonly seen to be in a state of desuetude,[130] as the Supreme Court has only used it to strike down two statutes (technically, two parts of the same statute) in its history, both in 1935.[131] Proponents of a robust doctrine see the limitation on delegation

128. *See* HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 214–30 (2002) (arguing for model of administrative rulemaking consistent with ideal of rule by the people).

129. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives . . . .").

130. *See, e.g.*, Paul Diller, *Habeas and (Non-)Delegation*, 77 U. CHI. L. REV. 585, 588 (2010) (remarking on "the nondelegation doctrine's descent into desuetude in the area of administrative law"); Lisa Schultz Bressman, Essay, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1402 (2000) (observing that "[s]ince the effective demise of the original nondelegation doctrine in 1935, the Court has searched for ways to assuage its abiding worry about broad delegations").

131. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935); *see also* Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 332 (1999) (referring to 1935 as "the nondelegation doctrine's only good year").

as a means of protecting democratic ideals,[132] in contrast to those who view delegation as necessary for effective governance or as more consistent with democratic values.[133] On its terms, the doctrine requires that delegations to agencies be made pursuant to an "intelligible principle,"[134] thereby denying the agency the authority to make fundamental political decisions itself. In doing so, the doctrine formally distributes political authority to the legislature and limits agencies to instrumental decisions predicated on the legislatively provided principle.

Though the Court has approved numerous delegations in which the intelligible principle is rather capacious (the FCC's authority to regulate broadcasting "in the public interest" is one example[135]), the doctrine may still do some work in shaping agency action. For example, while the Court has indicated that it will assess the presence of an intelligible principle based on its own reading of the statute, without regard to the agency's explanation,[136] the realities of litigation demand that the agency be able to argue to the Court in those terms, likely affecting the agency's rulemaking practice.[137] In doing so, the doctrine constructs a model of

132. *See* Indus. Union Dep't, AFL–CIO v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in the judgment) (explaining that the nondelegation doctrine "ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will"); ELY, *supra* note 11, at 131–33; David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 732 (1999) (discussing "the harm that delegation does to democracy").

133. *See* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 152–57 (1997) (noting that "it may make sense to imagine the delegation of political authority to administrators as a device for improving the responsiveness of government to the desires of the general electorate"); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 776 (1999) (contending that "delegation—when backed (as it is in our system) by many powerful institutional and informal controls over agency discretion—constitutes one of the most salutary developments in the long struggle to instantiate the often competing values of democratic participation, political accountability, legal regularity, and administrative effectiveness").

134. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (citing J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

135. *See Am. Trucking*, 531 U.S. at 474 (citing this as example of broad delegation); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–27 (1943) (upholding this delegation against constitutional challenge).

136. *Am. Trucking*, 531 U.S. at 472–73 ("Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.").

137. Professor Strauss advanced a similar argument prior to the *American Trucking* decision. *See* Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on*

means-ends reasoning, distinguishing the principle that must be attributed to Congress from the agency's authority to decide how to attain that goal.[138] Notwithstanding the apparent impossibility of allocating decisions about ends to the legislature and ensuring the agency makes only means decisions,[139] by demanding that divide and thereby requiring that administrative action be defended by the agency and approved by the courts on those terms, the nondelegation doctrine shapes a model of legislative accountability for the ends of agency actions.

Scholars have explored the ways in which nondelegation ideals take shape in subconstitutional form. Cass Sunstein argues that nondelegation values are furthered through canons of statutory construction,[140] while Lisa Schultz Bressman explores the Court's promotion of decisionmaking through the democratic process in performing the *Chevron* analysis.[141] These discussions, and the Court's decisions that underlie them, speak to the bluntness of the nondelegation doctrine as a tool for promoting democratic accountability to the legislature. But the broader goal remains: through administrative law, courts seek to ensure that agency action is attributable to ends decisions made through the democratically accountable legislative process.

b. Executive Accountability

The democratic underpinnings of administrative action are likewise supported by their connection to the democratic accountability of the executive. In particular, the treatment of the appointment and removal powers shapes an administrative structure responsive to a popularly

Rubin, 89 COLUM. L. REV. 427, 442–43 (1989).

138. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 982 (3d ed. 2000) ("The open-ended discretion to choose ends is the essence of legislative power; it is *this* power which Congress possesses but its agents necessarily lack and with which its agents could not be endowed by mere legislation.").

139. *See* RICHARDSON, *supra* note 128, at 116–18.

140. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316–17 (2000); *see also* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223–24 (criticizing this approach).

141. Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 764 (2007); *see also* Lisa Schultz Bressman, *Disciplining Delegation After* Whitman v. American Trucking Ass'ns, 87 CORNELL L. REV. 452, 459–60 (2002) (arguing for the enforcement of values of the nondelegation doctrine through administrative law rather than constitutional law).

elected President. In the appointments setting, Congress is denied the power to appoint administrative officials[142] (though the Senate is given an advise-and-consent role[143]) in order to ensure a direct line of democratic accountability.[144] The removal power, unaddressed by the constitutional text,[145] presents a more complex framework. While the Supreme Court originally indicated that the executive needed an exclusive removal power, even for the postmaster of Portland, Oregon,[146] in order to ensure effective execution of the laws, it later approved "independent" agencies whose heads may be removed only for cause,[147] limiting the President's removal authority and, at least in an idealized way, the agency's democratic responsiveness.[148] This reasoning reflects a vision of effective administration: that some decisions, as specified by Congress, should be made apolitically. The doctrine allows the President's removal power to be limited but not transferred,[149] an echo of the larger effort to balance democratic accountability and effective administration.

Recently, a closely divided Court recalibrated this balance. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, plaintiffs challenged the structure of the Public Company Accounting Oversight Board (PCAOB), an entity comprised of five members removable by the Securities and Exchange Commission (SEC) only for cause.[150] In an opinion by Chief Justice Roberts, the Court struck down

142. *See* Buckley v. Valeo, 424 U.S. 1, 127–28 (1976) (per curiam).

143. U.S. CONST. art. II, § 2, cl. 2.

144. *See* Freytag v. Comm'r, 501 U.S. 868, 884 (1991) ("The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people.").

145. *See* Morrison v. Olson, 487 U.S. 654, 723 (1988) (Scalia, J., dissenting) ("There is, of course, no provision in the Constitution stating who may remove executive officers, except the provisions for removal by impeachment.").

146. *See* Myers v. United States, 272 U.S. 52, 163–64 (1926).

147. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935).

148. *But see* Strauss, *supra* note 14, at 596 (arguing that "any assumption that executive agencies and independent regulatory commissions differ significantly or systematically in function, internal or external procedures, or relationships with the rest of government is misplaced").

149. *See id.* at 614 (explaining that when Congress asserts a role in removal, "[i]t has not only limited the President's ordinary political authority by imposing a 'for cause' requirement, but also greatly expanded its own political authority by insisting on a voice in that determination," thus "defeat[ing] any claim that the measure has an apolitical end such as assuring objectivity").

150. 130 S. Ct. 3138 (2010).

the for-cause limitation largely because it compromised the agency's democratic accountability. The Court noted that "[t]he diffusion of power carries with it a diffusion of accountability,"[151] and that "[w]ithout 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.'"[152] The Court thus concluded that "[b]y granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts."[153] In short, without the removal power, "the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."[154] This framing is reminiscent of the Court's decision in *New York v. United States*, in which the Court advanced a similar argument about the public's inability to ensure democratic accountability where the federal government was seen to "commandeer" state government.[155]

Justice Breyer's dissent in *Free Enterprise Fund* strikes a different balance in seeking to promote effective governance. He emphasizes that "to free a technical decisionmaker from the fear of removal without cause can similarly help create legitimacy with respect to that official's regulatory actions by helping to insulate his technical decisions from nontechnical political pressure."[156] On this account, premised on the characterization of administrative responsibility as primarily "technical," direct democratic accountability is not only unnecessary but potentially harmful, and it is abstention from political considerations that builds legitimacy. This point is confirmed by Justice Breyer's challenge that "in a world in which we count on the Federal Government to regulate matters as complex as, say, nuclear-power production, the Court's assertion that we should simply learn to get by 'without being' regulated 'by experts' is, at best, unrealistic—at worst,

151. *Id.* at 3155.

152. *Id.* (quoting THE FEDERALIST NO. 70 (Alexander Hamilton)).

153. *Id.*

154. *Id.* at 3164.

155. 505 U.S. 144, 169 (1992) (emphasizing that "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision").

156. *Free Enter. Fund*, 130 S. Ct. at 3169 (Breyer, J., dissenting).

dangerously so."[157] To the extent we view administrative action as primarily expertise-intensive decisions like nuclear-power production or auditing standards (and assuming we view even those settings as more expertise-intensive than values-reflecting[158]), it follows that the Court's decision "will create an obstacle, indeed pose a serious threat, to the proper functioning of that workable Government that the Constitution seeks to create."[159] The Court's contrary conclusion envisions agency activity as political and thus demands greater democratic oversight.[160]

This divide between opposing accounts of the balance between democratic accountability and effective governance—in the *Free Enterprise Fund* opinions' terms, between "democratic government"[161] and "workable government"[162]—presents the debate about administrative action in miniature: how do we balance political considerations, reflecting the will of the people, and the rule of experts, putatively independent of popular will, in governing? The *Free Enterprise Fund* decision—and rhetoric—pushes this balance in the direction of popular accountability.

This framework aligns with the model of administrative law shaped by the nondelegation doctrine, which likewise seeks to track political accounts of administrative action back to democratically accountable actors. From a pro-delegation perspective, Jerry Mashaw argues that administrators should make political decisions "as a device for facilitating responsiveness to voter preferences expressed in presidential elections."[163] Then-Professor Elena Kagan's argument that presidential involvement in agency decisionmaking should insulate against a challenge based on the nondelegation doctrine presents a similar account, premised on the increased accountability that presidential

157. *Id.* at 3175 (Breyer, J., dissenting) (quoting *id.* at 3156).

158. *See* PORTER, *supra* note 123, at 51 ("We must be wary of dismissing [accounting] as routine and unoriginal. The reputation of accounts and statistics for grayness helps to maintain their authority. Considered as a social phenomenon, accounting is much more powerful and problematical than scholars and journalists generally realize.").

159. *Free Enter. Fund*, 130 S. Ct. at 3184 (Breyer, J., dissenting).

160. *Id.* at 3156 (stating that the concern about popular control "is largely absent from the dissent's paean to the administrative state").

161. *Id.* (internal quotation omitted).

162. *Id.* at 3167 (Breyer, J., dissenting) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgment and opinion of the Court))).

163. MASHAW, *supra* note 133, at 152.

involvement provides.[164] Taken together, the nondelegation doctrine and the appointment and removal doctrines are complementary in preserving multiple sources of accountability, reflecting commitments to the selection of ends and oversight of the selection of means through elected officials.

c. Popular Accountability

Administrative law does not rely solely on representative forms of democratic accountability to promote legitimacy, but on frameworks promoting popular accountability as well, most prominently through notice and comment procedures for administrative rulemaking. These procedures, set out in the Administrative Procedure Act and further developed by the federal courts, promote public input and oversight over administrative action through publicity, disclosure, and responsiveness requirements.[165] They thereby present a separate means of promoting democratic legitimacy, providing the public the opportunity and capacity to participate in the rulemaking process and to some extent dispelling the specter of secretive bureaucrats cooking up rules in their lair.[166] Much as when balancing legislative or executive oversight with agency expertise, courts have sought in this setting as well to calibrate responsiveness with the demands of workable agency procedures.

The notice and comment process comprises three primary elements. First, the agency must provide notice of the rule it seeks to enact,[167] a *publicity* requirement for agency rulemaking, but one with some edge based on the judicial insistence that the ultimately enacted rule conform

164. *See* Kagan, *supra* note 8, at 2369.

165. 5 U.S.C. § 553 (2006) (setting forth requirements for informal rulemaking).

166. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992) (arguing that "although the Congress, the President, and the courts retain an important reviewing function, having administrative agencies set government policy provides the best hope of implementing civic republicanism's call for deliberative decisionmaking informed by the values of the entire polity"). Participation by nongovernmental actors takes other forms as well in the administrative setting. *See, e.g.*, Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004) (discussing development of a "new governance model [that] supports the replacement of the New Deal's hierarchy and control with a more participatory and collaborative model, in which government, industry, and society share responsibility for achieving policy goals").

167. *See* 5 U.S.C. § 553(b).

to the publicized rule.[168] Second, the agency must supply the information relied upon in its development of the proposed rule.[169] This serves as a *disclosure* requirement, on the theory that "[t]o suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether."[170] Consistent with this requirement, Peter Strauss has suggested that the provisions of the Freedom of Information Act,[171] codified into the APA, help promote these disclosure interests as well.[172] Finally, the agency must respond to relevant comments in the statement of basis and purpose that must accompany the final rule,[173] a *responsiveness* requirement that ensures that the public's input is not solicited and then ignored.[174] Together, these requirements of publicity, disclosure, and responsiveness promote a more publicly responsive framework within the rulemaking process.[175] At the same time, the Supreme Court has limited the ability of courts to add additional procedural requirements wholly beyond those set out by

168. *See, e.g.*, Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985) (concluding that "if the final rule materially alters the issues involved in the rulemaking or . . . if the final rule 'substantially departs from the terms or substance of the proposed rule,' the notice is inadequate" (quoting Rowell v. Andrus, 631 F.2d 699, 702 n.2 (10th Cir. 1980))).

169. *See* Am. Radio Relay League v. FCC, 524 F.3d 227, 236–37 (D.C. Cir. 2008) ("It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment.").

170. United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977).

171. 5 U.S.C. § 552.

172. *See* Peter L. Strauss, *Statutes That Are Not Static—The Case of the APA*, 14 J. CONTEMP. LEGAL ISSUES 767, 785–87, 796–98 (2005).

173. *See* 5 U.S.C. § 553(c) ("After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").

174. *See Nova Scotia*, 568 F.2d at 252–53.

175. For some concerns about notice and comment practice, see David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 231–32 (noting that "[a]s practiced in the shadow of the courts, notice and comment often functions as charade"); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 178 (1997) (arguing that "[a] threshold amount of participation is necessary to deliberative decisions, but at some point participation creates significant institutional costs for deliberative administrative process"); and Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 96–97, 157–62 (2003) (criticizing APA model and advocating alternative based on instrumental rationality). For discussion of the actual operation of the notice and comment process, see Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414–16 (2005) (finding that the public does participate, in a somewhat useful and influential way, in the regulatory process, and suggesting improvements).

the legislature[176] (or at least those arguably stemming from legislative directive), further calibrating the delicate balance between elected and non-elected actors.

Political theorist Bryan Garsten has argued that "a chief purpose of representative government is to multiply and challenge governmental claims to represent the people,"[177] an effort supported by the multiple lines of democratic accountability drawn by administrative law doctrine. These frameworks—tracing political decisions back to legislative delegation, ensuring oversight by the executive, and promoting popular input and oversight in rulemaking—combine and contend to advance democratic values within the administrative context. Given the challenge of squaring decisions made by agency officials with the basic account of democracy, this mixture of procedural, substantive, and structural demands fosters the maximization of democratic ideals in this setting.

2. Expert Governance

Alongside these responses to democratic concerns, judicial review simultaneously serves to justify the delegation to the agency by ensuring that any democratic deficits are compensated for by the agency's exercise of expert knowledge. The basic question here is why agency action is permitted at all unless the agency is doing something that the legislature could not do itself. Administrative law, largely through the "hard look" doctrine, strives to ensure that the agency take action on the basis of expertise and instrumental judgment, rather than for political or arbitrary reasons. This doctrinal framework encompasses three elements: a requirement that the challenged action be defended on the basis on which it was originally promulgated; a heightened level of skepticism in review; and a demand for instrumental rather than political justification for agency action. Together, these elements of judicial review shape the agency as an actor legitimated through its

176. *See* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 524 (1978).

177. Bryan Garsten, *Representative Government and Popular Sovereignty*, *in* POLITICAL REPRESENTATION 91 (Ian Shapiro et al. eds., 2009) (emphasis omitted); *see also* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1028 (1984) (arguing that, on the model of representation developed in *The Federalist Papers*, "the separation of powers operates as a complex machine which encourages each official to question the extent to which other constitutional officials are successfully representing the People's true political wishes").

exercise of expertise.

In *SEC v. Chenery Corp.*, the Supreme Court ruled that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."[178] This rule limits the agency to defending the challenged action on the basis it relied on in enacting it, rather than any post hoc sources of support. Kevin Stack has argued that the *Chenery* rule presents another face of the nondelegation doctrine, requiring the agency to connect its action back to the statutory delegation.[179] By forcing the agency to supply and then rely upon reasons in reaching decisions, the *Chenery* doctrine structures the agency as an actor accountable not only on the basis of institutional legitimacy or procedural propriety but also on the basis of defensible reasons. The doctrine further ensures that those reasons are not merely plausible, but actually reflect the originally stated basis for the action. This combination promotes the democratic bona fides of the administrative system by ensuring that delegations can only be justified when the agency can defend its exercise of the delegated power with reference to the original delegation.

Though the pre-APA form of review of administrative action was not very skeptical,[180] courts now apply a more searching form of review under the APA's arbitrary and capricious standard.[181] Judge Merrick Garland has observed that the Court's decision in the *State Farm* case shaped a substantive hard look doctrine, in which judicial scrutiny exceeds that traditionally given legislative action.[182] This trend has continued: as Gillian Metzger has noted, "It is generally accepted, at least by scholars, that 'arbitrary and capricious' review under *State Farm* is a far cry from the lenient scrutiny originally intended by the Congress that enacted the APA."[183] In short, not only the form of inquiry, but

178. 318 U.S. 80, 95 (1943).

179. *See* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 958, 992–1004 (2007) (arguing that "[t]he *Chenery* principle operates both to bolster the political accountability of the agency's action and to prevent arbitrariness in the agency's exercise of its discretion").

180. *See, e.g.*, Pac. States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935).

181. 5 U.S.C. § 706(2)(A) (2006).

182. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 545–49 (1985).

183. Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 491 (2010).

also the level of deference given in pursuing that inquiry, differs from that given challenges to legislative action, indicating a model of compensating for democratic deficits by ensuring the effectiveness of administrative governance.[184]

Most significantly for this discussion, the hard look model defines judicial review in terms of what the court requires the agency to demonstrate in order to defend the challenged action. In the words of the *State Farm* Court, the agency action must be vacated if the agency

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it], or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[185]

The agency is required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[186] In short, the courts "will take a hard look at the quality of the agency's overall decision making"[187] and will demand that the agency demonstrate the quality of its decision through reasoned explanation.

This inquiry funnels political decisions to elected rather than administrative actors by denying the agency the ability to defend the challenged action on the basis of political considerations.[188] While the Court has in some cases accommodated political decisions,[189] it indicated

184. *Cf.* Berger, *supra* note 89, at 5–9 (arguing that deference given to administrative agencies in constitutional cases should take into account the political and epistemic authority of the agency in that setting).

185. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

186. *Id.* (internal quotations omitted).

187. Rubin, *supra* note 175, at 140.

188. *See* Jody Freeman & Adrian Vermeule, Massachusetts v EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 88 ("*State Farm* is expertise-forcing in the sense that the Court expects the agency to make discretionary policy decisions that can be justified by the relevant statutory factors, and not politics."); Garland, *supra* note 182, at 542–49 (discussing *State Farm* holding).

189. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 865 (1984) (indicating that "[w]hile 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"); *see also* Nina A. Mendelson, *Disclosing "Political" Oversight of*

in *Massachusetts v. EPA* that political considerations remain an insufficient basis for decision, concluding that the EPA had not adequately justified its approach to the regulation of greenhouse gasses under the statutory factors.[190] In permitting the agency to invoke only instrumental considerations when defending an enacted rule, the arbitrary and capricious requirement channels agency justifications, in the words of Professors Freeman and Vermeule, "from politics to expertise."[191] Scholars have concluded from these and other recent cases that "hard look review prioritizes expertise and technocratic decisionmaking within the agency, in the process downplaying more raw political considerations,"[192] and that these decisions are "expertise-forcing" in their attempt "to ensure that agencies exercise expert judgment free from outside political pressures."[193]

In shaping this demanding oversight, hard look review of rulemaking serves to shore up democratic legitimacy by ensuring the agency's exercise of expertise. Professor Mashaw explains:

> As Max Weber noted long ago, the legitimacy of bureaucratic action resides in its promise to exercise power on the basis of knowledge. Administrative legitimacy flows primarily from a belief in the specialized knowledge that administrative decisionmakers can bring to bear on critical policy choices. And the only evidence that this specialized knowledge has in fact been deployed lies in administrators' explanations or reasons for their actions.[194]

Here again, administrative law doctrine balances democratic and

Agency Decision Making, 108 MICH. L. REV. 1127, 1130–31 (2010) (discussing this issue and advocating greater transparency, including disclosure of executive influence); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 (2009) (arguing for judicial acceptance of political considerations in reviewing agency action).

190. Massachusetts v. EPA, 549 U.S. 497, 532–34 (2007); Freeman & Vermeule, *supra* note 188, at 83–92 (advancing this reading of the case).

191. Freeman & Vermeule, *supra* note 188, at 51.

192. Metzger, *supra* note 183, at 492; *see also* Watts, *supra* note 189, at 19 ("Ever since *State Farm*, courts engaging in arbitrary and capricious review routinely have demanded more than mere minimum rationality, and they have searched agency decisions to ensure they represent expert-driven, technocratic decisionmaking.").

193. Freeman & Vermeule, *supra* note 188, at 52.

194. Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 117 (2007) (footnote omitted).

expertise means of legitimation.

Hard look review is not the only means of promoting an expertise-based justification for agency action, as the structure of notice and comment rulemaking is likewise seen to play an epistemic role. The Second Circuit has explained that "[w]hen the basis for a proposed rule is a scientific decision, the scientific material which is believed to support the rule should be exposed to the view of interested parties for their comment. One cannot ask for comment on a scientific paper without allowing the participants to read the paper."[195] This account treats notice and comment procedures as a means of accessing the expertise of the public,[196] and requires that the APA procedures be followed in such a way to best achieve such results. Here too, administrative law doctrine promotes the maximization of exercised knowledge, shaping the trade-off between values of democracy and effective governance.

We can read the *Chevron* doctrine to support this account as well.[197] Even if we call it "interpretation,"[198] agencies do not approach statutory interpretation the same way courts do, but rather are filling in a statutory ambiguity using the tools and expertise in which they specialize.[199] Agencies may be better seen to be engaging in *specification*, "a process whereby an end (or norm) is made more specific."[200] Put another way, on an ends-means framework, Congress must supply the end (pursuant to the nondelegation doctrine) and the agency must then determine the means (subject to hard look review).

195. United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977).

196. For a fascinating account of this technique in classical Athens, see JOSIAH OBER, DEMOCRACY AND KNOWLEDGE: INNOVATION AND LEARNING IN CLASSICAL ATHENS (2008).

197. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

198. *See id.* at 844 (invoking the "principle of deference to administrative interpretations").

199. *See* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 118 (2008) (noting "the particular forms of administrative decisionmaking through expertise, representation, and accountability—modes of inquiry inaccessible to judges"); Jerry L. Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 U. TORONTO L.J. 497, 519 (2005) (noting that "[i]f both agencies and courts are doing their proper interpretive jobs, it would appear that they should constantly disagree about interpretative method and, if method matters, about meaning"); Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 309 (2011) (arguing that "[c]hoosing interpretations from those allowed by a statute seem more akin to policymaking than to divinations of statutory meaning").

200. RICHARDSON, *supra* note 128, at 104.

Chevron speaks to the agency's responsibility to "come up with more concrete and specific interpretations of th[o]se ends"[201] in the context at issue. The doctrine requires that the end the agency is specifying was actually left insufficiently concrete in the relevant setting (Step One) and that the agency properly perform the process of end-specifying, employing the required procedures and reaching a defensible result (Step Two). *Chevron* thus calibrates the sites of democratic accountability by promoting specification in particular settings as an exercise calling for the type of judgment engaged in by agencies rather than that of courts, an approach based on responsiveness and expertise.

The *Mead* doctrine further promotes the protection of popular democracy by providing that the presumptions underlying the *Chevron* doctrine apply only when Congress has delegated to the agency to act with the "force of law," often through notice and comment rulemaking.[202] In doing so, *Mead* dictates that agency specifications will be treated like means determinations only in the contexts most compatible with democratic forms of oversight. *Mead* creates incentives for agencies to engage in decisionmaking through processes that promote public participation in order to obtain the higher level of deference for the eventual agency action. While scholars have raised doubts as to whether the different frameworks of review yield different results in practice,[203] the judicial structuring of the doctrine to promote democracy-enhancing practices reflects the commitment to legitimating agency action through democratic models.

In requiring agencies to defend their actions on the basis of demonstrated rational judgment, while demanding politically accountable sources of delegation and oversight, and encouragement of and responsiveness to popular participation in promulgating rules, administrative law seeks to funnel political decisions to democratically accountable actors and expertise decisions to agencies. Administrative law doctrine today thus reflects a blend of the three models identified by Richard Stewart, the "transmission belt" model, the "expertise" model, and the "interest representation" model.[204] By simultaneously insisting

201. *Id.* at 105.

202. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

203. *See, e.g.*, David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 137 (2010) (concluding that "the 'reasonable agency' standard is, increasingly clearly, the standard that courts *actually* apply to all exercises of judicial review of administrative action, no matter what standard they purport to use").

204. *See* Stewart, *supra* note 4, at 1671–88. As an alternative approach integrating such

on adherence to legislatively dictated ends, accountability to the executive, effective popular participation, and the exercise of instrumental rationality as to means, the current framework of administrative law strives to ensure the legitimacy of agency action by mitigating some democratic deficits with effectiveness gains.

This model—imperfectly realized, to be sure—presents a recognition of the benefits and dangers of agency action that is neither naïve nor cynical: allowing the state to take advantage of specialized knowledge while at the same time providing mechanisms of popular oversight and limits on both the scope and domain of administrative action. More generally, this model of administrative law responds to basic challenges presented by democracy itself, seeking a balance between the demands of consent-based, autonomy-regarding democratic government and those of knowledge-driven, instrumentally effective, workable government.

Administrative law reflects an attempt to embody and calibrate the virtues and limitations of democratic governance in one doctrinal setting. In doing so, it serves as a useful model of a judicial response to a setting not characterized by the presumptively legitimate democratic ideal, presenting a developed structural framework for validating state action in the absence of such a presumption. While mindful of concerns about the individual elements of the balance, I contend that the basic model distinguishing political or ends decisions from instrumental or means decisions and seeking to funnel the former to democratically accountable actors while subjecting the latter to procedures reflecting responsiveness to public input and requirements of exercised expertise presents a viable approach for translating democratic values into law. I turn now to consider the possibility of employing the insights of the administrative law setting in the context of election law, another setting in which our democratic values run up against the realities of political governance.

representative or expertise-based accounts, Evan Criddle has advanced a fiduciary model of administrative law. *See* Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 448 (2010) (arguing that administrative law should "safeguard popular sovereignty in agency rulemaking by adopting a fiduciary model of popular representation" (footnote omitted)); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 163 (2006) ("While legal theorists have tended in the past to treat agency expertise, interest representation, and political accountability as competing approaches to the problem of agency discretion, the fiduciary model suggests that these elements should be integrated and coordinated to maximize agency fidelity." (footnote omitted)).

IV. CONNECTING ADMINISTRATIVE LAW AND ELECTION LAW

Can administrative law provide useful guidance for election law? Is the administrative law response to questions about democratic legitimacy relevant in approaching those that arise in election law contexts? The fact that the concerns can be grouped under the same heading of course does not mean that they should be treated identically, and these settings undoubtedly present different variables regarding the role and capabilities of the federal courts. I nonetheless contend that administrative law provides a useful model.

My claim is that a central concern of administrative law—the need to ensure democratic legitimacy in the face of real-world governance by state actors without a reliably effective accountability mechanism—mirrors that at issue in election law. Further, I argue that the two contexts demand similar models of governmental decisionmaking in response. Just as agency officials' lack of direct accountability to the people yield administrative law requirements of reasoned decisions, the nature of election law as both necessary for and embedded within the democratic process likewise calls for demonstrations of both responsiveness and effectiveness. However, despite recurring expressions of concern about self-serving regulation of the electoral process, courts have not developed an effective means of approaching this dynamic in the election law setting. Administrative law, with a significant head start, has developed resources for confronting these issues, and there is much to gain by understanding and adapting that response.

I begin this Part by examining two differences between administrative law and election law as a means of getting at the connections between these two settings. These differences stem from the distinct institutional settings in which concerns about accountability emerge and the possibly varying role of the federal courts in responding to these concerns. Establishing the precise ways in which administrative law and election law may be seen to diverge will shed light on the connections between them in terms of the concerns to which they respond and the forms of decisionmaking they demand, which I address in Part IV.B.

A. Differences

1. Accountability Through Elections

Though administrative law and election law both confront concerns of democratic legitimacy, the precise nature of those concerns is

somewhat different. Administrative law addresses a structure external to a model of democratic legitimacy: the decisionmaker is unelected and therefore unaccountable. We don't need a robust account of democracy to understand this basic concern. Election law, in contrast, confronts an internal challenge, where an elected actor faces doubts about his or her accountability based on some inadequacy of the election itself. The difference is that between concerns about the identity of the decisionmaker and the nature of the decision.

These two models could correspond to separate theoretical accounts and practical concerns. We might believe that political actors are inherently more democratically accountable than administrative actors, even if elected from gerrymandered districts or with various distortions of the electoral process, because those distortions may operate at the margins, or may be of limited effect, and because, in extreme circumstances, they will not protect the incumbent against a militant electorate.[205] Put simply, some election may be better than no election. In contrast, agency officials are not undermining the electoral process, but are acting outside that process altogether. We can debate which is worse, at a principled or practical level, but the difference may counsel distinct tactics in response.

On this point, consider two recent Supreme Court decisions decided with roughly identical lineups:[206] the partisan gerrymandering claim in *Vieth*, and the separation of powers claim in *Free Enterprise Fund*, both discussed above.[207] In *Free Enterprise Fund*, the Court ruled that the Public Company Accounting Oversight Board (PCAOB) was not sufficiently democratically accountable because its head could only be removed for cause by the SEC, whose own leadership could

205. *Cf.* Baker v. Carr, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting) ("In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives.").

206. In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), Justice Scalia wrote the plurality opinion joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas, with Justice Kennedy concurring in the judgment in a separate opinion that allowed for the possibility that judicially manageable standards might one day appear. In *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010), Chief Justice Roberts wrote for the Court, joined by Justice Scalia, Justice Kennedy, Justice Thomas, and Justice Alito. Justice Sotomayor replaced Justice Souter in dissent in the later case.

207. *See supra* notes 25–26, 150–162 and accompanying text.

(presumably)[208] only be removed for cause.[209] Conversely, the Court concluded in *Vieth* that there were no judicially manageable standards for finding the partisan Pennsylvania Congressional districting scheme to be constitutionally problematic.[210] In reality, however, the PCAOB may be more responsive to public will than the gerrymandered legislature,[211] especially to the extent that the carefully constructed district lines dissuade any challenger from appearing and leave the incumbent unopposed.[212] If so, what work is the idea of accountability doing here?

The juxtaposition of these decisions suggests a view in which the existence of elections provides accountability, even if the nature of particular elections and administrative government makes that unlikely in the real world. The question of democratic legitimacy then turns on what it means to be "accountable"—if all "accountable" means is that the people can conceivably vote you out of office, there is no tension here. This discussion presents a question similar to the familiar formalist/functionalist divide in separation-of-powers law,[213] here asking whether we simply ensure that there is an election in order to satisfy the concern for accountability or if we look behind the fact of the election to ensure the system's actual capacity for accountability. The difficulty the Court has had in dealing with elections takes the form of a refusal to pierce the veil of the election and assess its internal workings.[214] Instead,

208. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3182–83 (2010) (Breyer, J., dissenting) ("How can the Court simply *assume* without deciding that the SEC Commissioners themselves are removable only 'for cause'? . . . It is certainly not obvious that the SEC Commissioners enjoy 'for cause' protection.").

209. *Id.* at 3164.

210. *Vieth*, 541 U.S. at 305.

211. *See* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 600–03 (2010) (discussing ways in which independent agencies are responsive to presidential preferences, focusing on contexts of financial policy).

212. *See, e.g.*, Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 OHIO ST. L.J. 1121, 1125 (2007) (noting that "the effect of the [post-2000 Arkansas] redistricting was to put a number of districts sufficiently out of competition so as to dissuade any effort by the party out-of-power to even challenge the incumbent").

213. *See* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 29 (1998) (arguing that these models are interconnected); Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) (discussing Court's vacillating use of formal and functional approaches).

214. *See* Richard H. Pildes, *Formalism and Functionalism in the Constitutional Law of Politics*, 35 CONN. L. REV. 1525, 1528 (2003) ("A significant problem in this body of law, in

the fact of elections is treated as ensuring sufficient accountability.[215] On this view, elected actors are democratically accountable and non-elected actors are not. The quality of the election is not an issue for the courts.

But the mere existence of elections cannot be sufficient.[216] We long ago moved from an era of popular acclamation to one of actual selection; democratic legitimacy nowadays demands a model of choice rather than simply consent.[217] And courts have been willing to look at certain elements of the electoral process, as the doctrine has shown.[218] So it is not simply the presence of an election, but a broader judicial hesitance to get involved in the electoral process that is at issue here.

The varying treatment of the administrative law and election law settings must be defended on some more comprehensive theory of what democratic commitments demand. In particular, we should consider the ways in which the concepts of democratic accountability and responsiveness operate differently in the contexts of the operation of government and the selection of government. While the need to ensure that administrative decisions are made subject to ideals of democratic accountability might require removal power in the President or a removable subordinate, and might demand a nondelegation doctrine, and so forth, elections might inherently possess enough possibility for accountability that there is less need for judicial monitoring. Even if the theoretical commitments to democratic accountability are analogous, those commitments play out differently in the different institutional settings. The concern for accountability does not vanish, but must take form in a manner fitted to the electoral setting.

Ultimately, the administrative law and election law models present

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my view, is not that the Court has the wrong functional view of how democracy ought best be understood; it is that the Court refuses to approach these issues in functional terms at all. Instead, the law of democracy remains one of the last bastions of legal formalism in constitutional law.").

215. *Burdick v. Takushi*, 504 U.S. 428 (1992), may serve as a useful example here. *See* Issacharoff & Pildes, *supra* note 36, at 670–74 (describing how, through Hawaii's ban on write-in ballots, a ban upheld by the *Burdick* Court, "a singularly powerful political party used its control over the state electoral machinery to devise rules of engagement that prevented internal defection").

216. *See, e.g.*, Stephen Ansolabehere et al., *More Democracy: The Direct Primary and Competition in U.S. Elections*, 24 STUD. AM. POL. DEV. 190, 190 (2010) ("Ever since the spread of democratic norms in the nineteenth century, autocratic regimes also have resorted to balloting to legitimize their rule, but only apologists endorse the results as 'democratic.'").

217. *See* DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 197–99 (1989) (discussing the move from acclamation to selection).

218. *See, e.g.*, *supra* notes 5, 46 and accompanying text.

varying manifestations of the same basic concern: that the decisionmaker is not sufficiently accountable through democratic processes and therefore need not be responsive to the public.[219] This concern emerges straightforwardly in the administrative context, and the election law setting presents the same dynamic to the extent we recognize that our democratic demand is not for elections per se, but for elections that foster accountability and responsiveness. The question reduces to how we attain this ideal in the electoral setting. I return to this point after considering another institutional difference.

2. Institutional Competence

As an analogue to the claim that the demands of accountability play out differently in these settings, the institutional competence or legitimacy of the courts might likewise be seen to vary in the different contexts. On this account, courts may either be better able to monitor administrative activity and deal with the democratic accountability concerns arising in that setting than to engage with election law disputes, or may act with more legitimacy in doing so. Accordingly, even if the problems that arise are relevantly analogous, the courts can deal with them better in one setting than the other for practical or institutional reasons.

This concern can take a variety of forms. Administrative law claims regularly involve the Administrative Procedure Act,[220] providing a statutory hook for decision, in contrast to election settings, which often raise constitutional claims.[221] If courts tend to be more hesitant to intervene in constitutional settings, where their decisions are not subject to legislative overrule, than in statutory settings,[222] administrative law may not provide a useful model. Professor Metzger has suggested that the Supreme Court has recently enforced federalism constraints through frameworks of administrative law rather than constitutional

219. *See* HERZOG, *supra* note 217, at 207 (arguing that "responsiveness can serve as the core of a theory of legitimacy, obligation, and disobedience" and that responsiveness "is also . . . at the core of the consent of the governed; it's what people are most deeply gesturing toward when they invoke that phrase"); Charles, *supra* note 22, at 608 ("Under the standard democratic account, the democratic ideal is responsiveness.").

220. 5 U.S.C. §§ 551–559 (2006).

221. Of course, many election claims are statutory—for example, those involving the Voting Rights Act—but those discussed in Part II rely largely on constitutional arguments.

222. *Cf.* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2513–17 (2009) (relying on questionable statutory construction to avoid deciding the constitutionality of Section 5 of the Voting Rights Act).

adjudication,[223] and a similar hesitance to directly engage constitutional issues may be at work in this setting. The apparent shift in protecting nondelegation principles through administrative law rather than constitutional law speaks to this dynamic as well.[224]

Likewise, election claims are unavoidably political, in multiple senses. Decisions about the electoral process often present readily discernible partisan valences, the same effects (or their mirror images) that may be the motivation for the challenged provision in the first place, and courts may hesitate to play the role of anointer. While judicial decisions in the administrative setting can have partisan effects, for example, if a particularly publicly salient regulation is struck down,[225] such decisions will rarely directly affect electoral outcomes. In contrast, because challenges to electoral provisions are often advanced in the pre-election period,[226] the electoral effects may be particularly striking. The very reasons for courts to skeptically review such provisions may then equally provide reasons to stay out of the dispute.

A further difference may stem from remedial concerns. Where the concern is that an unelected actor has exercised too much discretion, a solution is apparent: ensure that the agency decision can be attributed to an elected actor somewhere upstream.[227] In contrast, if the issue is that the election itself is somehow flawed, the remedy may be more complicated, requiring the court to devise a change to the electoral process that would solve the problem. Remedial ambivalence may be playing a role here as well.

Finally, the target of inquiry in administrative law is often the agency rather than Congress or a state actor.[228] For basic separation of powers and federalism reasons, federal courts may not only feel more comfortable taking on an agency, a fellow non-elected actor, but may be justified in doing so as a constitutional or theoretical matter because the

223. *See* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2027–28 (2008).

224. *See supra* text accompanying notes 140–141.

225. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 534–35 (2007) (rejecting the Bush Administration's approach to global warming regulation).

226. *See* Zipkin, *supra* note 12, at 189 (discussing the pre-election posture of election claims).

227. *See* Garland, *supra* note 182, at 586–90 (analyzing model of judicial review of agency action as focused on "fidelity" to Congressional intent).

228. *See* Metzger, *supra* note 223, at 2054 (emphasizing relevance of the fact that "[u]nder an administrative law framework, the Court's scrutiny targets not Congress but federal agencies").

agency is not a legislature, without all that goes along with that status.[229] The lower bar for vacating agency action, perhaps connected to the courts' knowledge of the ease with which a vacated action can be repromulgated, may funnel judicial action to that setting and counsel against it in the context of review of legislation.[230]

In light of these factors, even if administrative law and election law present identical concerns and raise similar demands, these demands might still not be best enforced by courts, but left instead to the political branches to enforce themselves.[231] Any approach modeled on the administrative framework must therefore be attentive to the particular considerations surrounding judicial review in the electoral setting.

B. Democratic Judgment

Both election law and administrative law present the problem of a state actor who cannot be systematically trusted to act in the people's interests because of the lack of an effective accountability mechanism. As a general matter, the legislature is presumed to be acting in the people's interests and the fact of a party-line vote is legally irrelevant. If the Democrats all vote for a tax increase and the Republicans all vote against, voters who feel strongly about the issue can express those views at the polls. But when the PCAOB enacts a draconian auditing regulation, there is no effective electoral recourse, just as it is difficult to remove from office a legislator who draws the district lines to ensure that no challenger is willing to enter the race and thus runs unopposed. These settings leave tenuous the link between state action and accountability for that action.

Crucially, the judicial response in the administrative law context is neither to reject administrative action as illegitimate nor to bless it following cursory review. Instead, courts have crafted an elaborate framework, building on the Constitution and the APA, to balance and channel ideals of democracy and expertise, with the aim of developing a system sufficiently accountable and effective at governance to ensure

229. *Cf.* Waldron, *supra* note 117, at 1353–54 (noting that his argument against judicial review only applies to review of legislative, rather than executive, actions).

230. *See* Metzger, *supra* note 183, at 532–33 (discussing ways in which "[a]dministrative agencies . . . can respond to judicial reversal more easily than Congress").

231. *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (developing an account of "judicially underenforced constitutional norms").

legitimacy.[232] In administrative law, concerns about democratic accountability are treated as entitled to a rigorous and full judicial response.

The recognition that the commitment to democratic accountability can play out differently in the institutional setting of administrative action from the context of crafting election provisions calls attention to complex questions about the regulation of the democratic process. How must decisions about the electoral process be made? As discussed, in administrative law political decisions are disfavored and instrumentally rational decisions are required, as a means of overcoming the democratic deficit.[233] We should likewise ask whether elected political actors can make decisions about the regulation of the electoral process on a political basis. If so, self-dealing is to be expected and accepted. In order to justify heightened judicial intervention, there must be some basis for holding decisionmakers to a particular standard beyond political will. In terms of the differences described in the previous Part, questions about the judicial role are only relevant if we can identify a substantive, constitutionally enforceable ideal to which to hold political actors.

In a recent article, Nadia Urbinati highlights the distinction between political judgment and judicial judgment.[234] She explains that while "political judgment has *generality* (the general interest of the political community at large) as its criterion," judicial judgment "aims instead at *impartiality* in evaluating a certain fact or a set of data or deeds."[235] This distinction, which takes form in administrative law as the *Londoner*/*Bi-metallic* divide,[236] sees the hallmark of legislation largely in its abstraction from the particulars of any individual.[237] In contrast, the

232. *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 487 (1989) ("But the Court's long struggle to reconcile the growth of agencies with the Constitution yielded a solution far more complex than carte blanche for Congress to give agencies whatever power it wishes them to have.").

233. *See supra* Part III.B.

234. *See* Nadia Urbinati, *Unpolitical Democracy*, 38 POL. THEORY 65, 81–85 (2010).

235. *Id.* at 81.

236. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915); Londoner v. City & Cnty. of Denver, 210 U.S. 373, 384–86 (1908).

237. *See* Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. REV. 335, 347 (2009) (arguing that "[w]hatever its relevance in other functions of government, the abstraction that representation involves is particularly appropriate for lawmaking, where what we are striving to produce are abstract norms—abstract in the sense of *general*—rather than directives focused on some particular person or situation").

requirements of adjudication demand that the judge not consider her own interests in deciding the particular case on the basis of the law.[238] The legitimacy of each form of decisionmaking stems from these characteristics, with proper adjudication dependent on independence from the parties and with adherence only to the law, while legitimate legislative action depends not on the content of the laws (within the bounds imposed by constitutional rights) but on their having been produced through proper means, their general applicability, and their being subject to democratic revision.[239]

Building on this framework, we can see administrative judgment to incorporate a third model, that of expertise or applied knowledge, with *effectiveness*, or instrumental rationality, as its primary criterion,[240] a model consistent with the historical development of administrative law in America.[241] While this account of administrative judgment will overlap with the judicial and legislative models, particularly insofar as the agency is engaged in rulemaking or adjudication processes, it is accompanied by the demand for instrumental judgment, distinguishing it both from the rule of law focus of the judiciary and the leeway given legislative actors to engage in political decisionmaking based on their democratic pedigree. In short, as a state actor operating outside the scope of direct democratic authorization or the representational framework, agency decisions are held to a higher standard of rationality in judgment as a means of legitimation.

The juxtaposition of these models presses the question of whether decisions about the electoral process are to be made by the legislature relative to its usual model of political judgment, or if the legislature is

238. *See* Urbinati, *supra* note 234, at 81–82.

239. *Id.* at 83–84 (indicating that "[t]he *presumption of generality* is essential to the moral legitimacy of political decisions" and that "[o]penness to revision, rather than the interruption or containment of democratic practices, is the democratic answer to unsatisfactory democratic decisions").

240. *See* Rubin, *supra* note 175, at 148–49 (noting that "according to Weber, instrumental rationality is the dominant principle of modern bureaucratic government").

241. *See* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 406 (2007) (presenting historical argument that the New Deal gave rise to a "*prescriptive* vision of how public policy should be made" according to which "[t]he democratic process identified social problems at the most general level" and "[i]t was then the job of experts to discern the best way to solve a particular problem and implement the appropriate policy"); *see also* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 142–45 (1938) (arguing for deferential review of administrative action based on "the belief that the expertness of the administrative, if guarded by adequate procedures, can be trusted to determine these issues as capably as judges").

held to a different standard of justification because of the tensions inherent in the electoral setting. As discussed, election law doctrine presently reflects a political model of judgment, with allowance for the rule of law or judicial values implicated by voting rights commitments.[242] However, because of the character of provisions shaping the electoral process as both prior to and demanding of democratic resolution, I contend that democratic legitimacy demands something more than a purely political decision in this setting. That something more is administrative judgment's demand for instrumental rationality, reflecting a requirement that decisions about the electoral process be made on the basis of promoting an effective and legitimate electoral process rather than private interest. My claim is that decisions about the electoral process call for the exercise of both political and administrative judgment—a sort of "democratic judgment"—even when made by the legislature.

Professor Urbinati explains that the main legitimator of political judgment by legislators is the "openness to revision" of those judgments,[243] an account she attributes to Mill and Tocqueville.[244] This means of legitimation would require that the electoral process, as a precondition of representation and the exercise of political judgment, be structured to allow for such revision. Consistent with this model, the demand for administrative judgment as to means serves both to further the attainment of the politically determined ideals of the democratic process and to ensure that the claimed ends are plausible and appropriate, and, in doing so, mitigates the threats posed to democratic values in these settings. Effectively, the nature of the legislature's decision as specifying procedures for its own election compromises presumptive legitimacy to the level enjoyed by administrative officials and calls for analogous justification in response.

242. *See supra* Part II.A.

243. Urbinati, *supra* note 234, at 84.

244. Nadia Urbinati, *Representation as Advocacy: A Study of Democratic Deliberation*, 28 POL. THEORY 758, 774 (2000) ("In his parliamentary speeches, Mill restated Tocqueville's idea that while democracies are 'perpetually making mistakes, they are perpetually correcting them too, and that the evil, such as it is, is far outweighed by the salutary effects of the general tendency of their legislation.'" (quoting John Stuart Mill, Representation of the People [2] (Apr. 13, 1866), *in* PUBLIC AND PARLIAMENTARY SPEECHES 66 (John M. Robson & Bruce L. Kinzer eds., 1988))); *see also* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 231 (Phillips Bradley ed., 1945) ("The great privilege of the Americans does not consist in being more enlightened than other nations, but in being able to repair the faults they may commit.").

The account I borrow from Professor Urbinati stems from her elucidation of a theory of representative democracy,[245] but it is compatible with the demands of democracy on an array of procedural accounts, such as a minimalist competition model or more demanding representative or deliberative approaches. On these accounts, the electoral process structures political decisionmaking, complicating any preference for political treatment of democracy itself.[246] Likewise, on substantive accounts of democratic requirements that emphasize the outputs of the democratic process, decisions about the election process designed to further purposes at odds with those the people would choose or otherwise unexplainable on a public good account are similarly problematic.

For these reasons, decisions about the electoral process shape a hybrid model, ensuring the generality and popular will reflection that is a hallmark of political decisions, while at the same time demanding the sort of disinterested judgment premised on effectiveness that would allow the continuing electoral process to function properly as a means of legitimating political action. Adapting the administrative means-end model to review decisions made by a political actor in this setting can better ensure both sides of the political–instrumental commitment that foster a truly democratic electoral process.

By invoking an ideal of instrumental effectiveness, I mean to set out a model of identifying an effective means of reaching the politically specified end through the application of practical knowledge. This model, reminiscent of that described in the rights setting,[247] but not dependent on the trigger created by a particular individual who can claim a severe burden,[248] reflects the need to look behind the presumption of democratic legitimacy and to demonstrate the validity of the legislative decision more directly.[249] Requiring evidence of

245. *See generally* NADIA URBINATI, REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY (2006) (developing a theoretical account of representative democracy).

246. *Cf.* SHAPIRO, *supra* note 16, at 52 ("Questions relating to boundaries and membership seem in an important sense prior to democratic decision making, yet paradoxically they cry out for democratic resolution.").

247. *See supra* Part III.A.

248. *See supra* text accompanying notes 67–71.

249. *See* Gunther, *supra* note 97, at 20–21 (suggesting a model of equal protection review that "would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends"); *see also* Garland, *supra* note 182, at 555 n.283 (observing that "the hard look is remarkably similar to the test Gunther proposed for application in constitutional review").

instrumental rationality both avoids the circularity problem of decisions about the electoral process being made by actors elected via that process and justified with reference to that same process, and it simultaneously promotes the administration of a fair and efficient electoral system. In short, for elections to serve as a democratically legitimate model of ensuring accountability, the elections must themselves be conducted on a democratically legitimate basis.[250] Viewing regulation of the electoral process as not merely political but as instrumental as well will aid in attaining that goal.

Though the question of whether this is the appropriate model for political actors to follow in enacting provisions governing the electoral process is distinct from the question whether the federal courts should enforce any such requirement, the argument developed here speaks to that point as well. To the extent the primary argument about the proper model of decisionmaking in this setting is persuasive, it simultaneously calls for extra-political enforcement, as it is premised on not fully trusting political actors to make decisions governing the terms of their own elections. This claim stems from ideals of both effectiveness and democratic legitimacy. Whatever epistemic or institutional advantages the democratic process generally confers,[251] those advantages are unlikely to be realized in the context of political regulation of the electoral process because the partisan or personal gains that certain procedures can be expected to yield threaten to swamp considerations based on expert knowledge directed to public ends.[252] Further, to the

250. *See* Charles, *supra* note 22, at 609 (noting that "in order for elections to fulfill their purpose in a polity, they must be meaningful," in other words, "their processes must provide the opportunity for genuine contestation, and their outcomes must not be preordained by the design of institutional structures").

251. *See* John Ferejohn, *The Lure of Large Numbers*, 123 HARV. L. REV. 1969, 1969–70 (2010) (reviewing CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE (2009); and ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON (2009)) (describing the "many-minds" arguments made by both authors, according to which "the popular branches may sometimes enjoy an informational advantage over the courts, insofar as they take account of the judgments of a wide range of people in making decisions; this advantage, other things being equal, may lead them to produce better decisions").

252. *See id.* at 1995 (explaining, in response to the "many-minds" arguments for judicial deference to the political branches, that "[t]o the extent that experts have different preferences than their nonexpert superiors, their bosses are less likely to accept their advice and the overall quality of decisions will be reduced"). As Professors Levinson and Pildes highlight, the realities of partisan competition have undermined the Madisonian ideal of separation of powers as well. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006) (contending that "[t]he success of

extent we privilege decisions made by political actors over those by courts because of their democratic pedigree and so grant a broad presumption of constitutional validity, that presumption applies less strongly, if at all, in this setting because of the content of the decision as shaping the terms of election going forward. As a result, despite the hesitations about judicial oversight described above, courts must play a role in this setting in holding political decisionmakers to the demands of democratic governance of the electoral process.

As this suggests, the substantive framework of election regulation demands judicial oversight, not as an exclusive province of courts, but on a shared basis with political actors. Much as the administrative law setting provides a framework of judicial review but with a general posture of deference as to substance, incorporating a means-ends model in the electoral setting would leave ends decisions to political actors operating within constitutional bounds while overseeing the exercise of instrumental rationality in effectuating the desired ends in practice. Such a model could limit the concerns about judicial competence in this setting, especially as to remedies, evaluating the actions taken by political actors on the familiar means-ends dimension rather than seeking some optimal model of democratic practice. In short, the administrative law model of ensuring a democratic source for administrative action and allowing the tradeoff for the exercise of knowledge in effective governance presents a valuable paradigm for the electoral setting.

V. AN ADMINISTRATIVE MODEL FOR ELECTION LAW

The complex and intricate approach to ensuring democratic legitimacy in the administrative law setting presents a model for a similar approach in the election law context. I do not argue for the administrative law model to be transported intact to election law nor develop a full doctrinal account of an idealized approach to election cases. Rather, I elaborate in this Part how the tools employed by the Court as a means of responding to these legitimacy concerns in one setting might provide guidance for a judicial response in the electoral context.

American democracy overwhelmed the Madisonian conception of separation of powers almost from the outset," and that "[a]s competition between the legislative and executive branches was displaced by competition between two major parties, the machine that was supposed to go of itself stopped running").

The move I draw on in the administrative law context is the framework of means-ends reasoning and the funneling of ends, or political, decisions to democratically accountable actors, and ensuring that means, or instrumental, decisions are made on the basis of exercised expertise. My focus is therefore on the combination of political and administrative judgment that broadly characterizes administrative law. Before addressing the specifics, I will say a few things about this framework as a model.

I recognize that the distinction between means and ends can be theoretically tenuous and difficult to fully specify in practice.[253] It is nonetheless a useful construct in articulating the proper division of responsibility and authority between elected actors and agencies, as well as providing content for the idea of expertise. Making decisions about the community's values is what actors who are directly democratically accountable are tasked to do.[254] In contrast, while such actors can of course make decisions as to how to attain those values and accomplish those ends, the model of delegating such decisions to those with technical expertise in the given context, while unavoidably "political" to some extent, is a coherent position, at least when suitably cabined and monitored. Administrative law reflects this dynamic.

Election law presents a contrast here. In administrative law, the ends and means responsibilities are broadly divided between two actors, with one specializing in politics and the other in expertise. A recurring claim in election law is that elected officials have greater expertise in politics and the administrative process than do judges.[255] Whether or not

253. *See* RICHARDSON, *supra* note 128, at 114–18 (describing the distinction as naïve).

254. *See* JEREMY WALDRON, THE DIGNITY OF LEGISLATION 90–91 (1999) (discussing the model of the legislature as "the primary forum where our thinking and disagreement about justice takes place").

255. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) ("Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments—at least where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge."); Buckley v. Valeo, 424 U.S. 1, 261 (1976) (White, J., concurring in part and dissenting in part) ("Congress was plainly of the view that these expenditures also have corruptive potential; but the Court strikes down the provision, strangely enough claiming more insight as to what may improperly influence candidates than is possessed by the majority of Congress that passed this bill and the President who signed it."); Baker v. Carr, 369 U.S. 186, 324 (1962) (Frankfurter, J., dissenting) ("Legislative responses throughout the country to the reapportionment demands of the 1960 Census have glaringly confirmed that these are not factors that lend themselves to evaluations of a nature that are the staple of judicial determinations or for

that is true, election law often leaves the legislature to play both roles in practice—the political actor on the one hand, and the expert on the other, and its work product can usefully be reviewed on that bifurcated basis.

On the model proposed here, subject to substantive constitutional protections, the legislature can adopt the democratic value of its choosing. However, the means of achieving that goal would not be subject to pure political discretion, but to a requirement of exercised instrumental judgment. As I develop below, this requirement serves as a means of ensuring that the stated end is a plausible purpose and of protecting the effective operation of the democratic process by preserving the possibility of accountability.

I describe here the broad outlines of how the administrative law framework might be adapted for use in the election law setting and sketch how the doctrine could apply in two controversial and complicated election law settings: challenges to voter identification provisions and to partisan districting schemes.

A. Adapting the Administrative Law Framework

Adapting an administrative law model for use in the election law setting requires some changes, especially when the issue involves only one actor—the legislature as enactor of the challenged provision—rather than multiple actors (e.g., the agency, Congress, the executive). The framework proposed here would apply whether the challenged action is promulgated by Congress, a state legislature, a state administrative official, or a local elections body. Likewise, in light of the localized nature of American election governance,[256] I do not distinguish in terms of framework of review between decisions made at the federal, state, or local levels. This approach is thus actor-indifferent across election settings.

Adapting the administrative law model requires that we distinguish the ends and means of the challenged election provision and apply distinct forms of review to each. The ends of the provision would be treated as political and granted the usual deference accorded the legislative process, subject to constitutional right to vote principles, such as the requirement that the only permitted ends are those internal to the

which judges are equipped to adjudicate by legal training or experience or native wit.").

256. *See* Tokaji, *The Future*, *supra* note 29, at 130–31 (discussing "decentralization of election administration authority").

election process,[257] the demands of constitutional equality,[258] and protections against severe burdens on voters.[259] Where this framework has added bite is in the demand that there be a specified public-regarding end and not merely incumbent protection or partisan gain. To be sure, the Supreme Court has indicated that incumbent protection can be a "legitimate factor in districting,"[260] and commentators have criticized this form of manipulation along with others discussed above.[261] The argument that incumbent protection is an inappropriate justification for a districting scheme follows from the basic argument here, that democratic legitimacy demands that decisions about the electoral process be made not on a purely political basis and that the process be open to revision.[262]

Subjecting the government's choice of means to a standard of exercised expertise or instrumental rationality would depart from Supreme Court decisions that provide that the state is not required to present evidence supporting its claimed purposes.[263] As these holdings demonstrate, the current *Burdick* or *Crawford* sliding-scale model for evaluating right to vote claims is at heart a political rather than expertise model. The approach advanced here would not necessarily bar the state from acting prophylactically or subject the state to rigorous evidentiary demands, but would merely require the State to show that the challenged provision is a rational means of achieving the specified end.

257. *See* Hill v. Stone, 421 U.S. 289, 299–300 (1975) ("The use of the franchise to compel compliance with other, independent state objectives is questionable in any context.").

258. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (finding a poll tax unconstitutional under Equal Protection clause).

259. *See supra* note 66–67 and accompanying text.

260. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 440–41 (2006) ("The Court has noted that incumbency protection can be a legitimate factor in districting, but experience teaches that incumbency protection can take various forms, not all of them in the interests of the constituents." (citing Karcher v. Daggett, 462 U.S. 725, 740 (1983))).

261. *See* Issacharoff & Pildes, *supra* note 36, at 709–10 & n.274 (listing sources criticizing "self-serving manipulation of the rules of political engagement").

262. *See supra* Part IV.B.

263. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997) (explaining that the Court does not "require elaborate, empirical verification of the weightiness of the State's asserted justifications"); Burson v. Freeman, 504 U.S. 191, 208 (1992) (noting that "this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question" (quoting Munro v. Socialist Workers Party, 479 U.S. 189, 195 (1986))); *Munro*, 479 U.S. at 195–96 (concluding that "[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights").

I turn now to describe how this approach might proceed in two prominent settings.

B. Voter Identification

Consider voter identification provisions. The Indiana law challenged in *Crawford* provides a useful example.[264] This statute requires voters to display valid, government-issued photo identification before casting a ballot.[265] The statute further provides that voters who cannot do so may cast a provisional ballot at the polls, which would be counted if the voter appears within ten days at a Board of Elections office either presenting such identification or executing an affidavit that she is indigent or has a religious objection to being photographed.[266] The requirement does not apply to absentee ballots or to voters living and voting in nursing homes.[267] This law is broadly similar to, though somewhat more stringent than, voter identification provisions enacted in other states.[268]

The provision was justified on the basis of protecting the security of elections against voter fraud. While this explanation is plausible at some level, we should consider what this requirement has the capacity to accomplish: it can only protect against the type of electoral fraud premised on not being able to show such identification at the polls.[269] A model of review concerned with instrumental rationality will focus foremost on how well this means serves the relevant end.

How would this review work? Security of the electoral process against fraud is an undoubtedly legitimate end, as the Supreme Court has recognized,[270] and one within the capacity of democratic actors to make as a political choice. But, whereas under the *Burdick* framework

264. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008). As noted above, the statute was enacted along party lines. *See id.* at 203 (noting that "all of the Republicans in the General Assembly voted in favor of SEA 483 and the Democrats were unanimous in opposing it").

265. *Id.* at 185.

266. *Id.* at 186.

267. *Id.* at 185–86.

268. *Id.* at 222 (Souter, J., dissenting) (noting that "Indiana's photo identification requirement is one of the most restrictive in the country").

269. *See* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 649–50 (2007) (noting that "[p]hoto-identification advocates also often cite irregularities that would not be prevented by a photo-identification requirement" and providing examples).

270. *Crawford*, 553 U.S. at 196 ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.").

that would be the end of the analysis (unless the requirement constituted a severe burden), the model advanced here would go on to ask whether the challenged provision is an instrumentally rational means of achieving that end.

The State may run into trouble here, insofar as there is no evidence of this type of fraud ever occurring in Indiana,[271] much as Georgia was likewise unable to provide any such evidence in defending its voter identification provision.[272] Indeed, the Supreme Court plurality upholding the voter identification law in *Crawford* was able to supply only two examples of such fraud: one nearly 150 years ago and the other involving a single fraudulent voter in the closely examined 2004 Washington gubernatorial election.[273] Under a hard look type of review like that set out in *State Farm*,[274] the lack of evidence of such fraud simultaneously calls into question the legislature's choice of means and the plausibility of the stated end.[275]

Is it possible, as Judge Posner suggests in his opinion for the Seventh Circuit in *Crawford*, that this fraud is so difficult to detect that we could never determine its real extent and that the legislature must therefore act prophylactically?[276] While it may be possible, this framing, which relies on a sort of variant of the precautionary principle, is at odds with Judge Posner's claim in the same opinion that the instrumental value of the ballot to the individual citizen is effectively non-existent because one vote will almost never sway an election.[277] If that is correct, there seems little reason to protect against the threat of someone risking a felony conviction to cast an extra ballot, a failure of rationality that would be caught by the proposed inquiry. Perhaps more significantly, this argument presumes a contested value commitment about democracy, that preventing a fraudulent vote is worth deterring a legitimate voter,

271. *Id.* at 194 ("The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history.").

272. *See* Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326, 1350 (N.D. Ga. 2005) (noting Georgia Secretary of State's testimony on this point).

273. *Crawford*, 553 U.S. at 195 nn.11–12.

274. *See supra* text accompanying notes 185–186.

275. *See* Tokaji, *Lowenstein Contra Lowenstein*, *supra* note 32, at 437 (noting that his suggested approach—for "closer scrutiny of decisions made by party-affiliated state or local election officials"—"might be analogized to 'hard look' review in administrative law").

276. Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 953–54 (7th Cir. 2007).

277. *Id.* at 951 (arguing that "[t]he benefits of voting to the individual voter are elusive (a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote)").

the inverse of the criminal justice balance or a model of overprotection of rights more generally.[278] Even if this balance reflects a permissible substantive decision under the right to vote, a difficult question I do not engage here, there is surely some upper bound on the striking of that balance, an assessment that an inquiry as to instrumental rationality would shed light on as well.

Employing a means-ends analysis premised on instrumental rationality as to means thus raises hard questions as to why the requirement to show valid, government-issued photo identification at the polls was thought an effective way of preventing ballot fraud. Raising such questions does not answer them, as the ultimate outcome of the analysis will potentially vary depending on the extent to which voters lack identification, on the various exceptions or work-arounds provided, or on the efforts to expand the availability of identification attached to the requirement. My aim here is to highlight the types of questions courts should be asking in these cases, focusing on the state action and whether it can be defended on political-instrumental terms rather than as a manipulation of the democratic process.

C. Districting

Districting claims pose some intractable problems: On what criteria should district lines be drawn? Which considerations are permissible and which not? Can these decisions be made on political bases, or is there some objective apolitical means of drawing district lines? These questions have long been debated, and numerous approaches have been advanced. My purpose is not to reprise or survey the various proffered solutions but to sketch how the framework proposed here would apply in the districting setting.

The *Vieth* decision highlights the difficulties inherent in approaching these claims, as it is predicated on the idea that even though partisan districting may be constitutionally problematic, there are no manageable standards by which courts can identify where the "too much" line is.[279]

278. *See* Richard H. Fallon, Jr., *The Core of an Uneasy Case* for *Judicial Review*, 121 HARV. L. REV. 1693, 1695–96, 1709 (2008) (using federal jury system in criminal cases as model of system designed to overprotect rights, and uneasily defending judicial review on that account).

279. Vieth v. Jubelirer, 541 U.S. 267, 281 (2004) (concluding that "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged"). This is Justice Scalia's position on the nondelegation doctrine as well: the Constitution prohibits "too much" delegation, but the line at which a delegation is too much

And, despite valiant efforts to identify the point at which partisanship is too great,[280] it is plausibly difficult to specify the border of constitutionality. Some have tried to get around this hurdle with a "wherever the line is, this is clearly too much" framing, arguing, for example, for a rule against mid-decade redistricting.[281] The administrative law model would avoid this issue, resting not on the competitiveness of the districts directly, but by focusing on the means-ends relationship of the districting scheme.

How would this work? When faced with a challenge to a districting scheme, the court would evaluate whether the lines drawn reflect a viable instrumental means to a legitimate political end. What counts as a legitimate political end? The thrust of the argument here indicates that protecting incumbents would not be valid nor, correspondingly, would a goal of advancing the interests of one political party against the other. So the defenders of the districting scheme would have to identify other values or interests the line-drawers sought to further, many or most of which would be legitimate political choices.[282] The demand of

is impossible for courts to identify and so the doctrine is unenforceable. *See* Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) (noting that "while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts" and that ultimately "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree").

280. *See, e.g.*, *Vieth*, 541 U.S. at 335–39 (Stevens, J., dissenting) (arguing for application of standard from racial gerrymandering cases to partisan gerrymandering claims); *id.* at 346–52 (Souter, J., dissenting) (advocating burden-shifting framework focused on unfairness of individual districts); *id.* at 361–67 (Breyer, J., dissenting) (developing standard targeted at the "democratic harm of unjustified entrenchment" based on "strong indicia of abuse"); Berman, *supra* note 22, at 838–44 (developing possible decision rule for partisan gerrymandering claims requiring showing "that the expected partisan value of the challenged scheme (to the party with majority control of the legislature) is more than x% greater than the expected partisan value of the redistricting scheme in the yth percentile of all maps generated in an appropriately pseudo-random fashion").

281. *See* Berman, *supra* note 22, at 845–52 (arguing that "[c]ourts should conclude that mid-decade redistrictings undertaken by a single-party-controlled state government are motivated by excessive partisanship—hence are unconstitutional—unless narrowly tailored to achieve a compelling interest"); Adam Cox, Commentary, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 754–55 (2004) (arguing that "a procedural limitation on the frequency of redistricting that prohibits redistricting more than once each decennial cycle" would promote partisan fairness).

282. For an illustration of these challenging decisions, see Hays v. Louisiana, 862 F. Supp. 119, 127 (W.D. La. 1994) ("The agricultural regions of District 4 include cotton, soybean, rice, sugar cane, and timber. Such diverse agricultural constituency have few common interests. We continue to question how one Congressional representative could adequately represent the varying interests of residents in such far-flung areas of the State.").

instrumental rationality as to means would then serve as a way to ensure that the stated ends were actually furthered. In short, a state defendant would not be able to defend a gerrymander designed to protect one political party by claiming that the scheme was drawn to ensure representation for communities of interest unless it in fact plausibly does so. In this way, subjecting the state to this sort of means-ends analysis—while ruling out partisan or incumbent-protecting manipulations as valid ends—can function as an alternative to the difficult line-drawing called forth by an approach premised on protecting against too much partisanship or too little competitiveness.

Undoubtedly, the districting context is extraordinarily complicated, with a multitude of factors going into the placement of each line, combined with the requirements of compliance with the demands of one person–one vote, *Shaw v. Reno*, and the Voting Rights Act.[283] Nonetheless, in the face of continuing interest in the use of independent districting commissions, and given the Court's indication that there is some constitutional concern underlying this area, a solution that leaves districting within the political process but cabins it with the demands of administrative rationality may present a desirable alternative.

What do I expect to come of this framework? Ideally, not very much. One would hope that our representatives and election officials are already exercising reasoned judgment as to means of reaching public-regarding, constitutionally valid ends when regulating the electoral process, and I believe that they may often be doing so. This approach would be relevant when they do not. Indeed, I would not expect this model to significantly increase the volume of litigation in the federal courts, as any case where adopting this approach would affect the outcome is likely a case that already will come before the federal courts under existing doctrine.

The administrative law doctrine developed over many years presents a considered and elaborate response to concerns about democratic legitimacy that has proven enforceable by courts and supportive of the legitimacy of state action. In promoting political oversight of ends decisions and exercised rationality as to means, the doctrine combines effective governance with a democratic imprimatur. Given the continuing concerns about self-dealing in the electoral process, the

283. *See* Voting Rights Act, 42 U.S.C. §§ 1971, 1973–1973j (2006); Shaw v. Reno, 509 U.S. 630, 649 (1993); Karcher v. Daggett, 462 U.S. 725, 732–33 (1983) (demanding exact equality between districts).

administrative law model presents an appealing and viable alternative approach.

VI. CONCLUSION

In the end, my framework reduces to something resembling a blend of intermediate scrutiny and arbitrary and capricious review; I consider this a virtue of the argument. In pursuing this inquiry, my intention is to highlight resources for confronting these issues that have been developed by courts in a related setting and to urge courts to make use of those tools. Much as psychological research shows that people find arguments more persuasive when they believe they are their own ideas,[284] to the extent a promising approach to election claims has already been formulated and applied by courts in other contexts, that approach might find purchase in the election setting as well. The Court has made clear its distaste for complicated rules in this setting,[285] and has elsewhere demonstrated some comfort with "borrowing" frameworks from one context to another.[286] If the concerns about responsiveness are clear in the operation of the government, they are equally salient in the formation of the government, and judicial monitoring provides one useful model of ensuring the commitments to popular selection and accountability that are the very purposes of elections. Judicial oversight of this sort will not solve all the concerns in this area any more than it does in administrative law, but it would be a good start.

284. *See* DAN ARIELY, *THE* UPSIDE *OF* IRRATIONALITY: THE UNEXPECTED BENEFITS OF DEFYING LOGIC AT WORK AND AT HOME 107–22 (2010) (describing the "Not-Invented-Here bias" and "our tendency to overvalue what we create"); *cf.* INCEPTION (Warner Bros. 2010) (suggesting the business value of convincing a competitor that an idea is his own).

285. *See, e.g.*, *Karcher*, 462 U.S. at 732 ("[A]ppellants argue that a maximum deviation of approximately 0.7% should be considered *de minimis*. If we accept that argument, how are we to regard deviations of 0.8%, 0.95%, 1%, or 1.1%?").

286. *See generally* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010) (examining the practice of borrowing in constitutional law).