

ARTICLES

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ARTICLES

THE DEATH OF ADMINISTRATIVE DEMOCRACY

Joshua Ulan Galperin*

INTRODUCTION

Unelected bureaucrats are the very heart of administrative law's relentless conflict over democratic legitimacy. Critics and supporters of the administrative state are united in their certainty that the federal bureaucracy is unelected, and from that agreement, they proceed to debate the best alternative source of legitimacy beyond elections.

* This Article is part of a series of articles exploring the attempt at electoral democracy evident in the USDA Farm Service Agency's elected county committees. The companion article is Joshua Ulan Galperin, *The Life of Administrative Democracy*, 108 GEO. L.J. 1213 (2020). For both articles I owe thanks to many. Alex Schluntz, Christine Kwon, Will Liang, and Heather Wong are former students at Yale University who brought the elected committees to my attention. Susan Schneider taught me a heck of a lot about agriculture law. Nate Rosenberg persuaded me that my initial positive reaction to the elected committees might be naive. The many who workshoped this Article with me: Phil Hackney, Blake Emerson; participants in the Academy of Food Law and Policy workshop at Harvard Law School, especially Melissa Mortazavi and Peter Barton Hutt; participants at the AALS New Voices in Administrative Law workshop, most importantly Jack Beerman, Kent Barnett, Bill Buzbee, Chip Murphy, and David Rubenstein; participants in the AALS Food Law Section workshop, including Sarah Morath, Robert Glicksman, Laurie Beyranevand, and Mathilde Cohen; participants in Mike Pappas' online workshop, including Ed Richards, Justin Pidot, Katy Kuh, Brigham Daniels, Deepa Badrinarayana, Shi-Ling Hsu, Dave Owen, and Sharmila Murthy; finally, Miriam Seifter and the participants in the Administrative Law New Scholarship Roundtable, especially Michael Sant'Ambrogio, Kati Kovacs, Nick Bagley, Kristin Hickman, Matt Lawrence, Chris Walker, and Nick Parillo, the last of whom said to me early in my research that if there are indeed elected federal regulators it would force us to reconsider our entire notion of administrative law. I haven't gone that far . . . yet.

Judge Wald, long one of the leading administrative law experts on the D.C. Circuit, fretted over “unelected administrators.”¹ Justice White once warned of “unaccountable policymaking by those not elected to fill the role.”² Justice Scalia, too, noted the ubiquity of “unelected federal bureaucrats.”³ Chief Justice Roberts, for a majority of the Supreme Court, lamented that “people do not vote for [o]fficers of the United States.”⁴ In late June 2019, Justice Gorsuch dissented for himself, the Chief Justice, and Justice Thomas in *Gundy v. United States*, objecting broadly to administrative policymaking on the grounds that administrators are not elected.⁵ In June 2020 the Chief Justice again wrote for a majority of the Court in *Seila Law v. CFPB*, describing the president’s unique electoral role within the executive branch.⁶ Concurring, Justice Thomas repeated the Chief’s words, restating that “people do not vote for [o]fficers of the United States.”⁷

Critics of the administrative state like Steven Calabresi and Christopher Yoo argue that a strong presidency is the only way to assure answerable administrators.⁸ Calabresi points to the President’s electoral accountability, in contrast to the insulation of bureaucrats, as a reason to maximize presidential power.⁹ Then-Professor Kagan’s work on presidential power may have brought the chorus to a crescendo: “unelected administrative officials”; “unelected administrators”; “agency officials who are not elected.”¹⁰

Administrative defenders, such as Jerry Mashaw, Cass Sunstein, and Lisa Bressman, do not defer to the President so readily, but they do recognize the truth of the underlying critique that administrators are not elected. Bressman complains of

¹ *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981).

² *INS v. Chadha*, 462 U.S. 919, 968 (1983) (White, J., dissenting).

³ *City of Arlington v. FCC*, 569 U.S. 290, 305 (2013).

⁴ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497–98 (2010) (quoting U.S. CONST. art. II, § 2, cl. 2).

⁵ *Gundy v. United States*, 139 S. Ct. 2116, 2131, 2134 (2019) (Gorsuch, J., dissenting).

⁶ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020).

⁷ *Id.* at 2212 (Thomas, J., concurring) (citing *Free Enter. Fund*, 561 U.S. at 497–98).

⁸ STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3* (2008).

⁹ Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 43–45 (1994).

¹⁰ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2262–63, 2331 (2001).

too much attention on majoritarianism in administrative law, though she takes the lack of direct majoritarian accountability for granted.¹¹ Mashaw accepts the premise that bureaucrats are unelected but locates accountability in other features of the administrative state.¹² Sunstein puts the core of the agreement simply: “[t]he modern administrative agency has attenuated the links between citizens and governmental processes.”¹³

Because everybody agrees that administrators are unelected and because of that lack of direct accountability, Richard Stewart briefly considered the prospect of electing administrators but dismissed the idea.¹⁴ His other vital insights have since swamped his unusual electoral proposition.¹⁵

Everybody agrees. Everybody is certain. There are not, nor have there ever been, elected bureaucrats.

That pervasive certainty must come as quite a surprise to *elected* bureaucrats.

Federal bureaucracy presents a handful of examples of administrative elections, but the most significant is the United States Department of Agriculture’s Farm Service Agency county committees. Across the country, there are over 7,500 elected farmers sitting on over 2,000 committees, and these committees carry out paradigmatic administrative duties, including policymaking and adjudication.¹⁶ Other examples of electoral administration exist,¹⁷ but the farmer committee system disproves what we have always known. There are elected bureaucrats.

If the elected committees of the United States Department of Agriculture seem too esoteric to be meaningful, consider the renowned case *Wickard v. Filburn*.¹⁸

¹¹ Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462–63, 478 (2003).

¹² JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 5 (2018).

¹³ Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 505 (1987).

¹⁴ Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1791–93 (1975).

¹⁵ *Id.* at 1800–02.

¹⁶ U.S. DEP’T OF AGRIC., FARM SERV. AGENCY, 2018 FARM SERVICE AGENCY COUNTY COMMITTEE ELECTIONS 2 (2018), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/NewsRoom/County-Committee-Elections/pdf/2018_fsa_county_committee_elections_briefing.pdf.

¹⁷ See *infra* Section I.A.

¹⁸ *Wickard v. Filburn*, 317 U.S. 111 (1942).

Constitutionally, as all first-year law students know, *Wickard* is about the applicability of the Commerce Clause to purely intrastate activity that has a substantial effect on interstate commerce.¹⁹ Practically, *Wickard* is the endpoint of a conflict that started at an elected farmer committee. A committee of elected farmers, implementing federal agriculture law at the county level, initially told Filburn how much wheat he could produce.²⁰ That same committee discovered that Filburn was producing in excess of his wheat allotment, and that committee levied the fine that Filburn challenged all the way to the United States Supreme Court.²¹ In other words, elected administrators are real, they impact real lives, and they have already played an important role in constitutional history.

* * *

The goal of this Article is to understand what electoral administration might teach us about more common approaches to administrative governance.

Since everybody agrees that there are no elected administrators, the eternal struggle in administrative law has been to find the source of administrative legitimacy absent a direct connection with voters.²² A leading proposition, which, to a significant degree, the Supreme Court has favored, is that the President is the fount of democratic legitimacy, the connection between voters and the bureaucracy. As a result, there is a doctrine of Presidentialism that prioritizes presidential control of agencies.²³

When we introduce electoral administration into this system, something strange happens. The doctrine that prioritizes presidential control *because* the President has a majoritarian connection will reject administrators who have an electoral

¹⁹ *Id.* at 124.

²⁰ *Id.* at 114.

²¹ *Id.* at 113–15.

²² Nick Bagley persuasively argues that legitimacy debates are overblown in administrative law and tend to focus on proceduralism (whether procedures that advance a connection with the President or procedures that seek to assure some fidelity to facts, as just two examples) as the proper legitimizers. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 351 (2019). I am inclined to agree with his conclusion that at base the fights are not about the practice of administration, but the “distrust of state power, full stop.” *Id.* at 387. Nevertheless, as his work demonstrates, it is not enough to declare that *special* attention to legitimacy is unnecessary, we need to justify that claim, which is larger the goal of this Article.

²³ *See infra* Section III.A.

responsibility more direct than one that funnels through the President.²⁴ The Court's precedent on appointment and removal of federal officers, even though it champions electoral responsiveness, cannot bear bureaucracy tied directly to an electorate but untethered from the President. Current doctrine demands a level of presidential control over administrative officials that cannot coexist with elected administrators who must, to one degree or another, respond to their voters rather than the President.

Presidentialist claims of democratic legitimacy turn out to reject "too much democracy" though what is really at stake is not democracy, but mere majoritarianism. Given the functional and constitutional failures of the elected farmer committees and the text and structure of the Constitution, this Presidentialist rejection is the right result.²⁵ Yet, while Presidentialism may get it right in this situation, it is a meager victory. Presidentialist doctrine rejects electoral administration because electoral administration relies too much on majoritarianism. But Presidentialism embraces the same majoritarianism, the same one-dimensional oversimplification of democracy. Applying majoritarian Presidentialist doctrine to majoritarian electoral administration lays bare an error of Presidentialist theory. Both electoral administration and Presidentialism go a step too far. They seek to tidy up the constitutional structure of democracy rather than embrace intentional constitutional complexity.

Instead of a superficial majority-rule notion of democracy, a comparison between elected administration, Presidentialist administration, and what we might call "constitutional administration" helps clarify the ways the Constitution integrates diverse structures of participation to combine the intersubjective and reflexive will of the people with visions of individualism, rationality, and consideration. Majoritarianism alone presumes that public values and goals are pre-political and pre-legal, existing apart from the various processes of debating, making, and enforcing the law. If we can accept that these legal processes do not just filter public values, but also shape values, then we should also accept that the fundamental processes of administrative democracy should recognize this *value-shaping* function of law. Constitutional design certainly recognizes this function.

Evident in the Constitution are processes for deliberation, reason-giving, and demands for individual participation in governance along with, of course, the vote.²⁶

²⁴ See *infra* Section III.B.

²⁵ See *infra* Part IV.

²⁶ See *infra* Part V.

The already famous “census case,” *Department of Commerce v. New York*, hints at this more complex view of administration. Chief Justice Roberts, for the majority, explained that agencies certainly might, for purely ideological and political reasons, prefer certain courses of action, but they must explain that preference honestly.²⁷ “It is hardly improper for an agency head to come into office with policy preferences and ideas . . . ,”²⁸ but “[t]he reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts *and the interested public.*”²⁹ Agencies, according to the Court, have a responsibility to engage with the public and judiciary honestly. The rule of law and heart of democracy require individual participation, deliberation, and reason-giving, none of which can be fully washed out by majoritarian insinuations.

A consideration of elected administrators clarifies that this more complex view of democracy may be a better source of legitimacy than the majoritarianism that animates electoral administration and Presidentialism. Administrative governance need not rely on contrived sources of legitimacy because administration is not a different kind of governance than the rest of our constitutional system.

The next section introduces electoral administration by uncovering its few instances at the federal level. It concludes that, in most cases, the hints of electoral administration fall shy of either “electoral,” “administration,” or both. However, Part I reintroduces the USDA’s elected farmer committees, which are both genuinely elected and bona fide administrators. Part II parses the legal constitution of the farmer committees, confirming that in the strictest sense, they are “appointed” through a popular election and are removable only by voters. Based on that structure, Part III examines the constitutional challenge that Presidentialism poses to the farmer committees. Part IV exposes the unlikely lesson of the Presidentialist challenge as a challenge of “too much democracy.” Part V contends that there is a constitutionally “just right” democracy, and constitutional administration, unlike Presidentialism or electoral administration, best embodies that notion of democracy. This Article concludes by emphasizing that whether it is direct electoral administration or Presidentialism rooted in majoritarianism, simplistic implementation of complex democracy does more harm than good by evading difficult questions and creating a

²⁷ *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019).

²⁸ *Id.* at 2574.

²⁹ *Id.* at 2575–76 (emphasis added).

sense of certainty where a sense of collective and continuing reckoning should prevail.

I. ELECTORAL ADMINISTRATION

Professor Stewart's classic article, *The Reformation of American Administrative Law*, is remembered for many brilliant contributions.³⁰ A proposition for which it is rarely, if ever, cited is Professor Stewart's treatment of electoral administration. Deep in his analysis, Stewart remarks that popularly electing administrators might help legitimize a bureaucracy that makes myriad policy decisions.³¹ That seemed to be the end of the matter. For all the attention *Reformation* receives, the suggestion of electoral administration has gone unnoticed. Stewart himself seems not to have noticed that as he was writing, there was an ongoing, nearly 50-year-old experiment in electoral administration within the United States Department of Agriculture.³²

Electoral administration is not widespread, but contrary to popular opinion, it does exist, albeit in largely esoteric fields and, except for USDA farmer committees, without meaningful authority.³³ This section attempts to locate several examples of electoral administration within the larger administrative state. Therefore, it is important to have a working definition of the keywords "administrators" and "elected." Although the meanings will become clearer as this section progresses and concrete examples enter the picture, the basic ideas are as follows. Administrators are the individuals who carry out the day-to-day work of the executive branch of the federal government and, for the purposes of this Article, are particularly those individuals who participate in authoritative decisions that can change legal rights and obligations of private persons.³⁴ I use "bureaucrat" and "administrator"

³⁰ Stewart, *supra* note 14.

³¹ *Id.* at 1800–02. Although it is not explicit in his discussion, it is likely that Stewart was thinking not of local elections, but of national elections, which, as will become clear, are distinct from the locally-bound nature of the elected farmer committees, though local and national elections for federal officials naturally have much in common.

³² CHARLES M. HARDIN, *THE POLITICS OF AGRICULTURE* 116 (1952).

³³ The examples in this section are gathered from a survey of the United States Code and the Code of Federal Regulations based on a search of the root "elect! ". After the search results were returned, I removed any references to congressional or Presidential elections, or other electoral regulations. I likewise removed references to the oversight of private elections by federal regulators such as oversight of and requirements for labor union elections under the Labor-Management Reporting and Disclosure Act of 1959, codified at 29 U.S.C. § 481 (2018).

³⁴ *E.g.*, *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 187 (1975).

synonymously. “Elected” means placed into a position by a vote. Again, in this section, I develop both ideas further through the survey of various entities that are contestants for the title of electoral administration.

After reviewing several candidates, this section concludes that the examples either do not fit the definition of administration, or they are not, in fact, elected. That conclusion sets the stage for a closer look at the USDA farmer committee system as the only example that can validly claim the mantle of “electoral administration.”

A. *Surveying Electoral Bureaucracy*

The focus of this Article is the farmer committee system, in which local farmers elect their peers to administrative committees with quasi-legislative and quasi-judicial authorities parallel to those of more typical federal agencies.³⁵ These farmer committees stand out for several reasons, not least of which is their scale and authority. Though they are the only example of elected administrators who both actually administer federal law and are actually elected, the farmer committees are not the only example of elections within the federal bureaucracy.

The Federal Home Loan Bank system holds elections for directorships of each bank.³⁶ The Department of Housing and Urban Development supports elected “resident councils” in public housing projects in order to increase the engagement of residents in local decisionmaking.³⁷ Within the Department of Labor, state labor statistics directors elect, from their own ranks, a committee to work within the Department and help the Department plan for its regular employment statistics assessment.³⁸ Grazing advisory boards are elected bodies that represent ranchers and are elected from the ranks of other ranchers operating on federal lands.³⁹ Also attached to USDA, a variety of commodity management committees are elected to control the production and marketing of specific agricultural products.

The Federal Home Loan Banks (FHL Banks) are government-affiliated and hold elections for directors, but they are arguably not a government entity at all and are certainly not regulatory or adjudicatory administrative units. FHL Banks are a

³⁵ See *infra* Section I.B.

³⁶ 12 C.F.R. § 1261.2(c) (2020).

³⁷ 24 C.F.R. § 964 (2020).

³⁸ 29 C.F.R. 44.1 (2019). *But see* Workforce Innovation and Opportunity Act, Pub. L. No. 113-128, 128 Stat. 1425 (2014).

³⁹ 36 C.F.R. § 222.11 (2019).

system of federally-chartered but privately-owned cooperative wholesale banks.⁴⁰ Within each of the 11 FHL Bank regions is a single bank cooperatively owned by private banks.⁴¹ The mission of the system is to help private lending banks make funds available to the public, particularly for housing finance.⁴² A board of directors governs each regional FHL Bank.⁴³ Member Directors, elected from among the member banks, and Independent Directors, likewise elected but not affiliated with any member institutions, make up each FHL Bank board.⁴⁴

These federally-chartered banks are born from federal initiative and closely monitored by the Federal Housing Finance Agency,⁴⁵ but they are probably best categorized as private rather than public entities. Professor O’Connell describes entities like the FHL Banks as government-supported entities or “quasi-government organizations.”⁴⁶ But the banks themselves do not carry out regulatory or adjudicatory duties akin to those of traditional administration. Their work is commercial, not governmental, and the details of their electoral structure and governance are not promulgated by the elected directors or staff of each bank, but by the Federal Housing Finance Agency.⁴⁷ The banks are not included in the *United States Government Manual*, which catalogs agencies and activities of the entire government, including “quasi-official agencies.”⁴⁸ And in at least one instance, a federal court held that Federal Home Loan Banks are not federal agencies.⁴⁹

⁴⁰ *Cooperative Structure*, FHLBANKS, <https://fhlbanks.com/cooperative-structure/> (last visited Aug. 29, 2020).

⁴¹ *Id.*

⁴² *E.g., FHLBank’s Mission*, FHLBANKS, <http://www.fhlbanks.com/mission/> (last visited Aug. 29, 2020).

⁴³ 12 C.F.R. § 1261.2(a) (2020); *see also Corporate Governance*, FED. HOME LOAN BANK: N.Y., <https://www.fhlbny.com/about-us/about-corporate-governance/> (last visited Aug. 29, 2020).

⁴⁴ 12 C.F.R. § 1261.3(c) (2020); *id.* § 1261.2(a); *Governance and Regulation*, FHLBANKS, <https://fhlbanks.com/governance-and-regulation/> (last visited Aug. 29, 2020).

⁴⁵ *Federal Home Loan Bank System*, FED. HOUSING FIN. AGENCY, <https://www.fhfa.gov/SupervisionRegulation/FederalHomeLoanBanks> (last visited Aug. 29, 2020).

⁴⁶ Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 857 (2014).

⁴⁷ 12 C.F.R. pt. 1261 (2020).

⁴⁸ *The United States Government Manual*, U.S. GOV’T MANUAL, <https://www.usgovernmentmanual.gov/> (last visited Aug. 29, 2020).

⁴⁹ *Fed. Home Loan Bank of Seattle v. Deutsche Bank Sec., Inc.*, 736 F. Supp. 2d 1283, 1289 (W.D. Wash. 2010).

The Department of Housing and Urban Development (HUD) supports the establishment of elected “resident councils” in order to “recognize the importance of resident involvement in creating a positive living environment and in actively participating in the overall mission of public housing.”⁵⁰ Resident councils, sometimes alternatively called tenant councils, may exist at two levels. A resident council will represent each HUD-supported housing development, and these local councils may join together to form a jurisdiction-wide resident council.⁵¹ In order to receive certain federal support, residents must “have a democratically elected governing board”⁵² The councils must adopt bylaws or a constitution, which must lay out the electoral process, but by regulation, elections must be held at least every three years, must include recall provisions, and must be open to all heads of household or persons over 18 who are named on a lease within the development.⁵³ A resident council may also choose to incorporate as a non-profit corporation in the state in which it is located,⁵⁴ which presumably allows the council to undertake a wider array of activities, including acceptance of tax-deductible gifts and other corporate undertakings. When incorporated, the body is called a resident management corporation.⁵⁵ These corporations can consist of a single resident council or a group of resident councils, and in the latter case, the corporate board must be elected and represent residents from each local council area.⁵⁶

Once elected, these councils and corporations may “be involved and participate in the overall policy development and direction of Public Housing operations.”⁵⁷ But the real administration of public housing developments lies not with these elected residents but with the local or state Housing Authority, which “has responsibility for

⁵⁰ 24 C.F.R. § 964.1 (2020); *id.* § 964.115(b).

⁵¹ *Id.* § 964.105(a). For simplicity, I am using the term “development” to encompass a larger swath of arrangements that a resident council may represent. According to HUD regulations, a resident council may represent “residents residing: (1) In scattered site buildings; (2) In areas of contiguous row houses; or (3) In one or more contiguous buildings; (4) In a development; or (5) In a combination of these buildings or developments.” *Id.* § 964.115(a).

⁵² *Id.* § 964.115(c).

⁵³ *Id.* § 964.115 (b)–(c).

⁵⁴ *Id.* § 964.120.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* § 964.135.

management operations . . .”⁵⁸ The Housing Authority must, however, “ensure strong resident participation”⁵⁹ “in manners such as modernization, security, maintenance, resident screening and selection, and recreation.”⁶⁰ Should a council chose to incorporate, the corporation may formally contract with the Housing Authority to carry out certain management functions at the discretion of the Housing Authority.⁶¹ Because the councils are a voluntary opportunity for residents and any given development has a governing structure prior to and independent of the councils or corporations, these corporations seem to play a primarily advisory role.

These are federally-authorized entities, but the resident committees are primarily providing advice and information to local, state, and federal officials rather than implementing federal law. As HUD describes it, the core role of a resident council is to “bring a wide variety of issues to the attention of the [Public Housing Authority] from safety . . . to pet and eviction policy.”⁶² The resident councils’ main interactions, despite being federally enabled, are with state- or local-level housing authorities.⁶³ These authorities administer federal law.⁶⁴ The resident council advises on that implementation.

The Department of Labor maintained an electoral system for well over a decade before Congress replaced it with a more traditional appointment system in 2014. The Wagner-Peyser Act of 1933, as amended by the Workforce Investment Act of 1998, required that the Department of Labor create a system to develop, maintain, and improve nationwide employment statistics.⁶⁵ Congress directed the Department to coordinate with states to develop an annual plan for collecting nationwide statistics.⁶⁶

⁵⁸ *See id.* § 964.135(c).

⁵⁹ *Id.*

⁶⁰ *See id.* § 964.135(b).

⁶¹ *See id.* § 964.135(a).

⁶² *Resident Councils: A Voice for Public Housing Tenants*, RESIDENT NEWSLETTER (HUD, Wash., D.C.) Dec. 2011, at 2, https://www.hud.gov/sites/documents/RESIDENT_DEC2011.PDF.

⁶³ *See* 24 C.F.R. § 5.100 (2020) (defining Public Housing Agency, with which resident councils are designed to interface, as “any State, county, municipality, or other governmental entity or public body, or agency or instrumentality of these entities, that is authorized to engage or assist in the development or operation of low-income housing under the 1937 Act.”).

⁶⁴ *Id.*

⁶⁵ Workforce Investment Act of 1998, Pub. L. No. 105-220, § 309, 112 Stat. 936, 1082.

⁶⁶ *Id.* § 309(d)(2).

The core of that coordination was a consultative body, the Workforce Information Council, made up of state employment statistics directors who were elected by state employment statistics directors in each of the Department of Labor's ten regions.⁶⁷ In 2014 the Workforce Innovation and Opportunity Act⁶⁸ amended the Workforce Investment Act by, among other things, turning the annual planning process into a two-year process and replacing the electoral system with an appointed advisory council.⁶⁹ Prior to this congressional change, Labor used the electoral system to gather advice for data collection and statistics from state programs. When Congress amended the law in 2014, it replaced the electoral system with an appointed body because the new body was meant to cover a wider range of expertise that would be unwieldy to manage electorally.⁷⁰ Despite the statutory change, the Bureau of Labor Statistics (BLS) has informally maintained the elected councils under the new moniker BLOC, "BLS Labor Market Oversight Council."⁷¹ BLS maintains the system because the Workforce Information Councils proved a critical source of advice from state-level experts. The electoral system, in particular, was a good way to gather high-quality input from individuals who were proactive about the federal-state partnership.⁷²

The Workforce Advisory Councils (and now BLOCs) have parallels to the HUD resident councils. They are advice-giving bodies, designed to gather knowledge from state-level experts in order to improve federal data collection.⁷³ They are not administrative; they do not regulate, enforce, or resolve conflicts. They do not change legal rights or obligations in any way. They are not elected from populations at large, but from specific and narrow populations that are uniquely

⁶⁷ *Id.* § 309(c).

⁶⁸ Workforce Innovation and Opportunity Act, Pub. L. No. 113-128, 128 Stat. 1425 (2014).

⁶⁹ Workforce Innovation and Opportunity Act, Pub. L. 113-128, § 308(d)–(e), 128 Stat. 1425, 1628–1629 (2014). Interestingly, despite this clear statutory change in 2014, setting up an appointment system to replace the electoral system, Labor regulations have not changed since the electoral system was promulgated in 2000.

⁷⁰ Telephone Interview with Rebecca Rust, Assistant Comm'r for Occupational Statistics and Emp't Projections, Bureau of Labor Statistics, U.S. Dep't of Labor (Mar. 11, 2019).

⁷¹ *Id.*

⁷² *Id.*

⁷³ 29 C.F.R. § 44.1 (2019).

situated to have information on the substantive issue, in this case, employment statistics,⁷⁴ which reinforces their advisory role.

The New Deal was an apt time for the emergence of electoral administration because the expanding role of the federal government butted against activities like farming and ranching that were—at least in the minds of farmers, ranchers, and politicians—the epitome of local individualism. Recognizing this localism, elections were a promise that Washington would merely build a framework for progress but would leave the real decisions in local, even private, hands. In ranching, electoral administration began with the Taylor Grazing Act of 1934, Section 9 of which directed the Secretary of the Interior to manage newly regulated grazing lands cooperatively with ranchers.⁷⁵ In 1950 Congress explicitly mandated the creation of elected boards,⁷⁶ and in 1976 the Federal Land Policy and Management Act (FLPMA) restructured what was then called “local advisory boards” into the modern “grazing advisory boards.”⁷⁷

Elections populate these boards and materialize them in the first place. Grazing Advisory Boards are not mandatory, but if a majority of permittees in a particular grazing region vote to establish such a board, then the Secretary of Agriculture is bound to constitute a board.⁷⁸ FLPMA establishes the outlines of the grazing board electoral system. The Act directs that the boards must have between three and 12 members and must meet at least once annually.⁷⁹ USDA regulations provide the remaining details. Only National Forest System permittees are eligible for the board.⁸⁰ Election slates are established by nominations from eligible permittees, and the elections are then conducted by secret ballot.⁸¹

Despite the formal electoral provisions, the actual role of the grazing advisory boards is circumscribed. The statute clearly articulates that the purpose of the boards

⁷⁴ *Id.*

⁷⁵ Taylor Grazing Act of 1934, 43 U.S.C. § 315h (2018).

⁷⁶ An Act to Facilitate and Simplify the Work of the Forest Service and for Other Purposes, Pub. L. No. 81-478, 64 Stat. 82, 87 (1950).

⁷⁷ National Resource Lands Management Act, Pub. L. No. 94-579, 90 Stat. 2743 (1976).

⁷⁸ 16 U.S.C. § 580k (2018).

⁷⁹ *Id.* § 580k(a)(3)–(4).

⁸⁰ 36 C.F.R. § 222.11(b) (2019).

⁸¹ *Id.* § 222.11(c).

is to give “advice and recommendations” to the Forest Service.⁸² At the same time, the regulations reiterate that the “[f]unction of the grazing advisory boards will be to offer advice and make recommendations concerning the development of allotment management plans and utilization of range betterment funds.”⁸³ Thus, like the HUD advisory councils or the Labor employment statistics organizations, these elected bodies serve as advisory panels and liaisons, as points of connection *within* the administration, but not as bona fide administrators with outward-facing authorities.

The final example in this survey of potential electoral administration is agricultural commodity committees. (To be clear, these *commodity* committees are not the same as the *county* committees that I will detail soon and that will make up the core of this study. The name and jurisdiction make the distinct agencies easy to confuse.) Unlike the grazing boards and most of the other examples, commodity committees are not mere advisors. These committees organize to self-regulate under the auspices of the USDA. Congress allows the agriculture industry to establish cartels that set a wide array of standards for certain agricultural products.⁸⁴ Standards cover a range of issues, including packaging, marketing limits, and the quality or appearance of a product.⁸⁵ A marketing agreement is an agreement among handlers of a specific commodity, approved by the Secretary of the USDA, that sets rules only for those who participate in the agreement; in contrast, a marketing order establishes mandates even for producers and handlers who do not voluntarily engage in the cartel.⁸⁶ In the case of marketing orders, industry or the USDA may initiate establishment, but the final decision rests with industry, which typically must approve the marketing order by referendum.⁸⁷

Once the industry and the USDA establish an order, the USDA sets up an agency, often called a commodity committee, to administer the program.⁸⁸ Each committee thus has a different structure. By way of example, two committees regulate oranges and grapefruits. One committee regulates oranges and grapefruits

⁸² 16 U.S.C. § 580k(b) (2018).

⁸³ 36 C.F.R. § 222.11(e) (2019).

⁸⁴ 7 U.S.C. § 608b (2018); *Marketing Orders & Agreements*, U.S. DEP’T OF AGRIC., AGRIC. MARKETING SERV., <https://www.ams.usda.gov/rules-regulations/moa> (last visited Aug. 29, 2020).

⁸⁵ 7 U.S.C. § 608c(6) (2018); *Marketing Orders & Agreements*, *supra* note 84.

⁸⁶ *Marketing Orders & Agreements*, *supra* note 84.

⁸⁷ 7 U.S.C. § 608c(19) (2018).

⁸⁸ *Id.* § 608c(7)(C).

grown in the lower Rio Grande Valley in Texas.⁸⁹ Another committee regulates oranges and grapefruits, tangerines, and pummelos grown in Florida.⁹⁰ Both committees are empowered to hold elections from which they select nominees for membership on the committee.⁹¹ The Texas committee holds meetings at which the vote takes place, and all votes must happen in person.⁹² The Florida committee likewise holds election meetings but, in contrast to Texas, allows electronic or mail-in votes in addition to in-person votes.⁹³

In both cases, and in the case of all commodity committee elections, the electoral process is important and is the *de facto* means of selecting members, but is not the legal process of appointing members. Technically, these elections merely identify potential nominees, and the Secretary of Agriculture formalizes the legal appointment.⁹⁴ It appears that the Secretary has always honored the election process.⁹⁵

These committees stand out from other examples because they directly implement federal programs. The committees make decisions regarding quantity, quality, and packaging of agricultural products, which can involve limiting the amount of product a farmer grows or even acquiring excess product to assure that it does not reach the market.⁹⁶ In that respect, the committees are distinctly administrative and not advisory. On the other hand, the commodity committees are an oddity even among this survey of oddities because their elections are merely

⁸⁹ 7 C.F.R. pt. 906 (2020).

⁹⁰ *Id.* at 905.

⁹¹ *Id.* § 905.22; *id.* § 906.23.

⁹² *Id.* § 906.23.

⁹³ *Id.* § 905.22(c).

⁹⁴ *See, e.g., id.* § 905.23(a) (establishing that the Secretary of USDA “shall” select members from the list of elected nominees “or from other qualified persons.”). *See also id.* § 906.23 (“The Secretary may select members of the committee and alternates from nominations which may be made in the following manner . . .”).

⁹⁵ Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 SAN JOAQUIN AGRIC. L. REV. 3, 17 (1995).

⁹⁶ *See, e.g., Horne v. Dep’t of Agric.*, 576 U.S. 350, 355 (2015).

preliminary to a secretarial appointment, a much more common form of staffing the federal bureaucracy.⁹⁷

Other than the commodity committees, none of the examples in this section—examples that may well be a complete census of elections in the federal bureaucracy—are quite what we mean when we say “administrative agency.” In most cases, the elected bodies, like the employment statistics experts, the HUD resident councils, or the FLPMA grazing advisory boards, are merely providing advice rather than administering federal programs. The commodity committees come close to, perhaps achieve, the title of real administration, but their electoral credentials are practical, not legal, insofar as they formally rely on secretarial appointment.

All of this is to say that there are examples of something that approaches electoral administration, but all of these case studies look like exceptions that tend to prove the rule against electoral administration. The USDA farmer committees discussed in the next part are different. The farmer committees have a range of authority to set policy, to adjudicate individual facts, to enforce policy, and to otherwise implement federal law.

B. USDA’s Elected Farmer Committees

As with so much of the modern administrative state, the USDA’s elected farmer committees began during the New Deal. The slow collapse of the agricultural economy was one of the priorities of Roosevelt’s New Deal and transformed the USDA from a research and education outfit into a regulatory agency.⁹⁸ The basic structure of the New Deal agriculture program was to reduce the output of certain crops in order to limit supply and raise prices.⁹⁹ Rather than mandating that farmers limit production, the Agricultural Adjustment Act of 1933 established a payment system in which USDA would pay farmers to reduce their output voluntarily.¹⁰⁰ In an agency built around education rather than regulation, “a vast amount of help was needed to sign up millions of farmers [for the payment and reduction program],

⁹⁷ See STAFF OF S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 114TH CONG., REP. ON POLICY AND SUPPORTING POSITIONS (Comm. Print 2016) (identifying roughly 9,000 appointed positions within the federal government. But note that the Plum Book does not list marketing order committee members among the 9,000 appointed positions).

⁹⁸ MURRAY R. BENEDICT, FARM POLICIES OF THE UNITED STATES 1790–1950 283 (1953).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

inspect their fields, and certify them for payments.”¹⁰¹ The elected committees were ultimately the help that USDA needed.

Candidate Roosevelt had assured farmers that he would take drastic action to save agriculture and also that the action would be decentralized, local, and rooted in “agricultural democracy.”¹⁰² The Agricultural Adjustment Act authorized the Secretary to “establish, for the more effective administration of the functions vested in him by this title, State and local committees. . . .”¹⁰³ Although these committees were appointed in most of the Southeast, in the Midwest they were elected from the very beginning.¹⁰⁴ By 1936, the electoral committee structure was a widespread custom, and although the text is ambiguous, the Soil Conservation and Domestic Allotment Act of 1936 was understood to require elected rather than appointed farmer committees.¹⁰⁵ The ambiguity of the 1936 law apparently did nothing to slow the adoption of electoral selection, but it was not until 2002 that the electoral program was fully defined. The 1994 and 2002 Farm Bills created an explicit electoral structure, established eligibility requirements for voting and serving, term limits, and nondiscrimination safeguards, among other features, and directed the Secretary of USDA to promulgate further election standards.¹⁰⁶ The details of this electoral system are essential for understanding the very nature of electoral democracy and are therefore described in much greater detail in the next section.

Once elected, the responsibilities of these committees were, and to a lesser extent still are today, broad and varied. In the early days of implementing supply control measures, the elected committees were essential at each step. The committees established “base acres” for each farm, meaning committees determined how much

¹⁰¹ HARDIN, *supra* note 32, at 115.

¹⁰² Dale Clark, *The Farmer as Co-Administrator*, 3 PUB. OPINION Q. 482, 483 (1939) (“Governor Roosevelt in his Topeka campaign address, in which he outlined farm policy, spoke for decentralized administration.”); Reed L. Frischknecht, *The Democratization of Administration: The Farmer Committee System*, 47 AM. POL. SCI. REV. 704, 705 (1953).

¹⁰³ Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, § 10(b), 48 Stat. 31, 37. Again, though similar in some respects, these committees, which I will variously call county committees or elected farmer committees, or occasionally elected county committees, are distinct from the commodity committees described above.

¹⁰⁴ HARDIN, *supra* note 32, at 115–16.

¹⁰⁵ *Id.* at 116; Soil Conservation and Domestic Allotment Act of 1936, Pub. L. No. 74-461, § 8(b), 49 Stat. 1148, 1150.

¹⁰⁶ 16 U.S.C. § 590h(b)(5)(B)(iii) (2018); Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10708, 116 Stat. 134, 522–25.

farmers historically produced so the committees could calculate how much the farmers were reducing production under the new payment program.¹⁰⁷ The committees then determined allotments for each farm—how much each participating farm in a county was permitted to produce.¹⁰⁸ They would inspect farms to confirm farmers were complying with their allotments.¹⁰⁹ They would hand out the cash payments owed as compensation for the output reductions.¹¹⁰ And when disputes arose over the size of payments or the allocation of allotments across the county, as just two examples, the elected committees would resolve those disputes.¹¹¹

Although it is remembered for its expansive reading of the Commerce Clause, the decision in *Wickard v. Filburn* is a helpful example of the important role the elected committees played at mid-Century.¹¹² Farmer Filburn was challenging the validity of the USDA's production limits on Commerce Clause grounds after the USDA issued a fine for overproduction of wheat.¹¹³ It was the elected farmer committee from Montgomery County, Ohio that issued Filburn his wheat allotment, discovered his overproduction, and levied the fine.¹¹⁴

Wickard is evidence of one sort of controversy, a legal controversy, but a social controversy was also part of the committee's role. Although of somewhat less importance in the Midwest where most farms were family farms (although wealth disparities were indeed reflected in the committees), in the Southeast, the even more hierarchical farming system forced elected committees to devise ways to divide, or not, program payments between landowners and tenant farmers.¹¹⁵ The racial and economic implications of this role were vast, and leaving the crucial decisions to

¹⁰⁷ *E.g.*, JESS GILBERT, PLANNING DEMOCRACY: AGRARIAN INTELLECTUALS AND THE INTENDED NEW DEAL 84–85 (2016).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Wickard v. Filburn*, 317 U.S. 111, 113–15 (1942).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ U.S. COMM'N ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN FARM PROGRAMS: AN APPRAISAL OF SERVICES RENDERED BY AGENCIES OF THE UNITED STATES DEPARTMENT OF AGRICULTURE 90 (1965).

committees rather than making them in Congress helped to avoid political fights over race and wealth disparities at the national level.

Over the last 80 years, the structure of the farm programs has changed, altering the specific duties of the elected committees but not the general scope of their responsibilities.¹¹⁶ Today, the farm programs are no longer based on production controls requiring committees to make allotment decisions. The programs are now based on direct payments tied to market conditions.¹¹⁷ The market-oriented farm programs somewhat limit committee discretion by linking decisionmaking to more quantitative signals, but committees still play an important role.¹¹⁸ And in many areas, broad discretionary powers still rest with the elected committees. One of the key roles of the committees is to hire and fire county executive directors,¹¹⁹ who are themselves responsible for carrying out all the day-to-day tasks of local farm program administration, from hiring and firing other local staff to accounting for all committee property and finances.¹²⁰ Committees are empowered to relieve farmers of certain conservation restrictions if the committee determines that compliance with the restrictions would lead to economic hardship.¹²¹ Committees determine eligibility for various federal payment programs.¹²² They decide whether one farmer can transfer federal payments to a successor farmer.¹²³ The elected committees also make important county-wide legislative-type policies, such as setting the dates by which farmers must plant specific crops in order to be eligible for disaster payments.¹²⁴ The important discretionary policy of this “final planting date”

¹¹⁶ For a more thorough look at the committees’ history and current responsibilities, see generally *Life of Administrative Democracy*, *supra* note *.

¹¹⁷ MEGAN STUBBS, CONG. RESEARCH SERV., CONSERVATION COMPLIANCE AND U.S. FARM POLICY 3 (2016).

¹¹⁸ *Id.* at 62, 70–71.

¹¹⁹ 7 C.F.R. § 1230.607 (2020).

¹²⁰ CAROL CANADA, CONG. RESEARCH SERV., FARM SERVICE AGENCY: STATE EXECUTIVE DIRECTORS, AND STATE AND COUNTY/AREA COMMITTEES 5 (2009), <https://nationalaglawcenter.org/wp-content/uploads/assets/crs/R40179.pdf>.

¹²¹ SUSAN A. SCHNEIDER, FOOD, FARMING, AND SUSTAINABILITY: READINGS IN AGRICULTURAL LAW 180 (2d ed. 2016).

¹²² U.S. DEP’T OF AGRIC., FORM CCC-471 NAP BP, NONINSURED CROP DISASTER ASSISTANCE APPLICATION 5 (2015).

¹²³ *Id.* at 17.

¹²⁴ *Id.* at 3.

authority is likely to grow in importance in an ever more volatile climate. As weather patterns become less predictable and crop failures more common, the survival of farms and huge amounts of federal money will hinge on each elected committee's decisions about threshold planting dates.

If the statutory authorization and the past and present functions of the elected committees are not enough to demonstrate their genuine administrative functions—that their decisions can result in real legal consequences for members of the public—one need only consider that committee decisions have been the source of plenty of litigation. Beyond *Wickard*, the modern committees have also been the subject of suits. In only very recent years, there have been suits challenging the committee decisions on disaster assistance,¹²⁵ conservation payments,¹²⁶ and loan repayment.¹²⁷

Unlike the other examples of electoral administration described in this section, the USDA farmer committees are both elected, and they serve traditional adjudicative and policymaking functions.

Although it is not the crux of this Article, and I discuss it in much greater detail in another paper,¹²⁸ the ideological drivers of elected committees and the committee failures both shine a light on the deeper lessons of electoral administration discussed later in this Article. A brief summary is therefore helpful.

There is no one definitive reason that Congress and the USDA decided on an electoral system for agricultural governance, but several ideological positions fit together to explain the unique program. The most popular explanation for local electoral control is Jeffersonianism, the assertion that the rugged self-sufficiency of farmers was both an ideal individual quality and a prerequisite for leadership.¹²⁹ Jeffersonianism, therefore, argues that farmers should govern the nation.¹³⁰ It follows that those who believed farmers must run the nation also believed farmers should govern themselves. A system in which farmers elect other farmers to implement the

¹²⁵ *Hixson v. U.S. Dep't of Agric.*, No. 15-cv-02061-RBJ, 2017 WL 2544637 (D. Colo. June 13, 2017).

¹²⁶ *Mittelstadt v. Perdue*, 913 F.3d 626 (7th Cir. 2019).

¹²⁷ *United States v. Pratt*, No. 4:16-cv-00108-DCN, 2017 WL 4341850 (D. Idaho Sept. 29, 2017).

¹²⁸ *Life of Administrative Democracy*, *supra* note *.

¹²⁹ Jess Gilbert, *Agrarian Intellectuals in a Democratizing State: A Collective Biography of USDA Leaders in the Intended New Deal*, in *THE COUNTRYSIDE IN THE AGE OF THE MODERN STATE* 213, 220–21 (Catherine McNicol Stock & Robert D. Johnston eds., 2001).

¹³⁰ *Id.*

laws that govern them is an obvious manifestation of this belief. The related ideals of deliberative democracy and civic republicanism offer another justification for elected farmer committees. Civic republicanism and deliberative democracy overlap on the idea that “government’s primary responsibility is to enable the citizenry to deliberate about altering preferences and to reach consensus on the common good.”¹³¹ Decentralized administrators based in local communities can certainly help the process of deliberation and consensus-building. The problem with this explanation is that the committees only welcome farmers to the deliberation. While they scale properly, they do not properly invite the participation necessary for genuine deliberation and consensus. The narrow scope of participation in the elected committees better reflects the corporatist pluralism of the New Deal, which promised that the government would merely mediate between various interests rather than make proactive policy decisions.¹³² In this case, Congress and the Roosevelt Administration determined that farmers, as an industry, should self-govern, but not in a libertarian sense, instead giving elected farmers the authority to wield the coercive power of government.¹³³ By granting industry this authority, Congress was able to establish needed regulations without industry opposition.¹³⁴ Finally, the electoral system may be the result of racist and elitist interests. Although elections have a semblance of egalitarianism, when local leaders are able—as they originally were—to establish the rules of elections, the elections become merely a means to reinforce existing social structures.¹³⁵

There was probably too little discussion about the motivations for using *elected* farmer committees. One result of failing to articulate *why* such a unique system was appropriate is that, in hindsight, it just seems obvious that “democracy” is best. But that easy acceptance of an undefined “democracy” and easy dismissal of competing

¹³¹ Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1514 (1992).

¹³² James Q. Whitman, *Of Corporatism, Fascism and the First New Deal*, 39 AM. J. COMP. L. 747, 749–50 (1991).

¹³³ THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 68 (40th anniversary ed. 2009) (1969).

¹³⁴ *Id.* at 77.

¹³⁵ PETE DANIEL, *DISPOSSESSION: DISCRIMINATION AGAINST AFRICAN AMERICAN FARMERS IN THE AGE OF CIVIL RIGHTS* 9–12 (2013); R.G. Tugwell & E.C. Banfield, *Grass Roots Democracy—Myth or Reality?*, 10 PUB. ADMIN. REV. 47, 48–49 (1950) (reviewing PHILIP SELZNICK, *TVA AND THE GRASS ROOTS; A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATION* (1949)).

justifications lets the electoral system entrench without meaningful critique. As a result, the system has bred a variety of serious problems.¹³⁶

The most basic underlying problem is that the committees have no clear principal. Their role as administrators is to carry out Congress' prime directives and USDA's regulatory policy. That requires fidelity to Congress and responsiveness to political appointees and the President. Adding another layer of electoral oversight may offer some degree of additional accountability and local engagement, but it creates an impossible suite of bosses to whom the committees must answer, generating unavoidable confusion. That fundamental confusion is evident in the more specific problems that burden the elected farmer committees.

The remaining problems that plague the elected committees are overt racism, inept administration, and general disinterest. The racial motivation of the committees manifests into deeply rooted discrimination at the local level and within central USDA.¹³⁷ As the U.S. Commission on Civil Rights once wrote, "The virtual exclusion of Negroes from the [USDA farm program implementation] structure poses one of the most serious problems with which the Department of Agriculture should be concerned, particularly since this exclusion is compounded by the discriminatory operation of the county committee elections."¹³⁸ Also inherent in an electoral structure is the lack of expertise that can come with popularity-based selection. Elections may select the most popular, even the most proficient farmers, but they do not select for those farmers who are most adept at administering federal law. Critique after critique during the 20th Century points to the inability of committees to carry out their responsibilities properly.¹³⁹ Part of the problem with inept administration is that most farmers were and are simply disinterested in the farmer committees. Few people know of or understand the role of the farmer

¹³⁶ In another article, I dedicate more attention to understanding both the ideological foundations and the justifications for the elected committees. *Life of Administrative Democracy*, *supra* note *.

¹³⁷ There are two articles that specifically address the racial discrimination that has long been part of these elected committees. These two articles happen to be the only other legal scholarship that has given extended attention to the committees. See Cassandra Jones Havard, *African-American Farmers and Fair Lending: Racializing Rural Economic Space*, 12 STAN. L. & POL'Y REV. 333 (2001); Note, *The Federal Agricultural Stabilization Program and the Negro*, 67 COLUM. L. REV. 1121 (1967); see also U.S. COMM'N ON CIVIL RIGHTS, *supra* note 115.

¹³⁸ U.S. COMM'N ON CIVIL RIGHTS, *supra* note 115, at 96 (1965).

¹³⁹ Frischknecht, *supra* note 102, at 713; U.S. DEP'T OF AGRIC., REVIEW OF THE FARMER COMMITTEE SYSTEM I (1962).

committees.¹⁴⁰ Even fewer people actually vote in committee elections: the most recent voter turnout data shows only 9.4 percent participation, and the highest participation in recent years was only 15 percent.¹⁴¹

The committees have important failings. That does not mean that the committees are entirely a failure. Certainly, Congress and the USDA do not think the committees are beyond saving, having reinvigorated them in the 1994 and 2002 Farm Bills. What is most interesting about that legislative action is that while it formalized the electoral system far beyond its prior incarnations, it also took much of the wind from the sails of local electoral decisionmaking. The 2002 Farm Bill, for instance, allows the Secretary to appoint committee members, outside of the election system, if the election results do not sufficiently reflect local demographics.¹⁴² I take this as a positive change to increase diversity and blunt the racial history of farm program implementation. However, according to extensive interviews conducted by Nate Rosenberg, a lawyer and scholar of civil rights at the USDA, it seems farmers and farm advocates report that the change has had little to no effect on the discriminatory nature of the committees.¹⁴³

Moreover, the appointment process does undercut electoral purity. In 1994 Congress also engineered a major overhaul of USDA, which included the creation of a National Appeals Division to hear appeals across the USDA programs.¹⁴⁴ The new creation does not explicitly remove powers from the elected committees, but final committee decisions are now reviewable not by local elected farmers, but in the final instance by those dreaded, unelected, experts in D.C.

The interplay between the elected committees and employees or appointed leadership in D.C. is a critical element in understanding the full scope of committee authority, responsibility, and their basic legal existence. The next section looks

¹⁴⁰ *E.g.*, Telephone Interview with Cara Fraver, Bus. Servs. Dir., Nat'l Young Farmer's Coal. (Mar. 11, 2019).

¹⁴¹ U.S. DEP'T OF AGRIC., FARM SERV. AGENCY, NATIONAL BALLOTS CAST (2006), <https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/NewsRoom/County-Committee-Elections/pdf/election-results/2006electionresults.pdf>.

¹⁴² 16 U.S.C. § 590h(b)(5)(B)(iii)(VII)(cc) (2018).

¹⁴³ E-mail Interview with Nathan Rosenberg, Visiting Scholar, Food Law & Policy Clinic, Harvard Law Sch. (June 7, 2019).

¹⁴⁴ CHRISTOPHER R. KELLEY, THE USDA NATIONAL APPEALS DIVISION: AN OUTLINE OF THE RULES OF PROCEDURE 1 (2003), https://nationalaglawcenter.org/wp-content/uploads/assets/articles/kelley_nad.pdf; Alan R. Malasky & William E. Penn, *USDA Reorganization—Fact or Fiction?*, 25 U. MEM. L. REV. 1161, 1165 (1995).

closely at the legal constitution of the elected committees before this Article turns to a careful consideration of what that constitution means for committees' legality.

II. THE LEGAL CONSTITUTION OF ELECTED FARMER COMMITTEES

The history, responsibility, and various competing and complementary justifications for the elected USDA farmer committees together paint a picture of a widespread, complex, and longstanding system that administers many aspects of federal agriculture law. That elected officials populate the system sets it apart from any similarly large and powerful unit in the federal government, so a closer look at the legal nuances of the electoral system is in order. This section will consider the specific nature of electoral "appointment" by looking at how members are seated on farmer committees, how they are supervised, and to whom they are ultimately responsible. Answers to these technical statutory questions will help to further explore the constitutional aspects of farmer committees, which is the subject of the next section.

A. *County Committees are Formally "Appointed" By Electors*

It is one thing to say that a farmer committee is elected. It is another thing to explore what exactly that means. For instance, Part I of this Article briefly described the USDA *commodity* committees. These committees are distinct from the *county* committees as the commodity committees have a much larger geographic reach and much narrower substantive jurisdiction, related only to very specific farm products such as Texas oranges or California raisins.¹⁴⁵ The commodity committees are, to an extent, elected. But a closer look at the regulatory structure of the commodity committees shows that the elections are only a process for recommending appointees to the Secretary of Agriculture.¹⁴⁶ It may be that the appointment is *pro forma*, and the Secretary makes no independent judgment, but it is nevertheless the case that the formal legal action for seating a commodity committee member is not an election but a traditional secretarial appointment. The same is not true for the county farmer committees.

¹⁴⁵ See *supra* Part I.

¹⁴⁶ See, e.g., 7 C.F.R. § 905.23(a) (2020) (establishing that the Secretary of USDA "shall" select members from the list of elected nominees "or from other qualified persons."); see also *id.* § 906.23 ("The Secretary may select members of the committee and alternates from nominations which may be made in the following manner. . . .").

The county farmer committees are, in both the practical and formal sense, seated through an election, not through a secretarial appointment. This fact is obvious on the face of the statute. Title 16, Section 590h of the United States Code establishes the state and county committees.¹⁴⁷ With respect to the state committees, the law is clear: “The Secretary shall appoint in each State a State committee. . . .”¹⁴⁸ By contrast, while the Secretary “shall establish” county committees,¹⁴⁹ the law also provides that the committee “shall consist of not fewer than 3 nor more than 5 members that . . . are elected by the agricultural producers. . . .”¹⁵⁰

It is true that the statute also provides for limited appointments to the county committees, but this serves to further cement the conclusion that the normal method of seating is elections. In response to the widespread racial discrimination that the county committees have wrought, Congress amended the electoral process in several ways. Most importantly, the Secretary “may ensure inclusion of socially disadvantaged farmers and ranchers through provisions allowing for the appointment of 1 additional voting member. . . .”¹⁵¹ The contrast between the explicit language about appointing state committees or socially disadvantaged members to the county committees, and electing the general membership should put to rest any question about the formal means of seating committees. Committees are seated by elections.

If further evidence is needed,¹⁵² one can look to the level of thought Congress put into assuring that the elections are fair and open. It would be difficult to explain such congressional attention to a process that was merely preliminary to a secretarial appointment. For instance, Congress has detailed: timelines for public notice of

¹⁴⁷ 16 U.S.C. § 590h(b)(5)(A)–(B) (2018).

¹⁴⁸ *Id.* § 590h(b)(5)(A).

¹⁴⁹ *Id.* § 590h(b)(5)(B)(i)(I).

¹⁵⁰ *Id.* § 590h(5)(B)(ii)(I). The fact that only farmers are eligible to elect the county committees may raise a constitutional issue in addition to those discussed later in this Article. The Supreme Court has held that restricting votes to only a subset of eligible voters may run afoul of the Equal Protection Clause. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632 (1969).

¹⁵¹ 16 U.S.C. § 590h(b)(5)(B)(iii)(VII)(cc) (2018).

¹⁵² I emphatically do not think more evidence is needed, but in developing this Article many colleagues remarked that certainly these committees are only functionally and not formally elected. I belabor the point here only to overcome what seems to be a natural presumption among administrative law scholars against believing that administrators could *actually* be elected.

elections;¹⁵³ assurances against opening ballots in advance of the noticed date;¹⁵⁴ guarantees of transparent ballot counting;¹⁵⁵ reporting requirements for each election that committees must submit with specific data and on a short timeline;¹⁵⁶ a national report that the Secretary must release summarizing the aggregate election data;¹⁵⁷ and, finally, the process by which USDA should promulgate more detailed election guidelines if necessary.¹⁵⁸ These are not the sort of details on which Congress would dwell if they were only establishing a show election. It is even less likely that the USDA would use resources to promulgate further election details if it were possible for the Secretary, at his discretion, to simply overrule the election results and appoint members of his choosing. In fact, USDA issued interim national election guidelines in 2012 and finalized those guidelines in 2013.¹⁵⁹

B. Committee Members are Not Removable by the President or a Presidential Appointee

While the question of appointment is clear, the question of removal is more nuanced. There are no statutory provisions for removal, but USDA regulations claim that elected committee members are removable only for cause. The committee members, then, may legally answer to both their voting constituency and supervisors within the USDA. But it is not clear that the for-cause removal regulation is valid in light of a statutory scheme that clearly presumes electoral, not bureaucratic, supervision.

The regulations purport to establish a for-cause removal system for elected committee members. The Deputy Administrator for the Farm Service Agency holds the removal authority.¹⁶⁰ The Deputy Administrator may remove elected committee members “for failure to perform the duties of their office, impeding the effectiveness of any program administered in the county, violating official instructions, or for

¹⁵³ 16 U.S.C. § 590h(b)(5)(B)(iii)(IV)(aa) (2018).

¹⁵⁴ *Id.* § 590h(b)(5)(B)(iii)(IV)(bb).

¹⁵⁵ *Id.* § 590h(b)(5)(B)(iii)(IV)(cc).

¹⁵⁶ *Id.* § 590h(b)(5)(B)(iii)(V).

¹⁵⁷ *Id.* § 590h(b)(5)(B)(iii)(VI).

¹⁵⁸ *Id.* § 590h(b)(5)(B)(iii)(VII).

¹⁵⁹ 7 C.F.R. pt. 7 (2020).

¹⁶⁰ *Id.* § 7.29(a).

misconduct.”¹⁶¹ This is certainly a for-cause removal structure, with only a limited scope of reasons that can justify removal, and the USDA recognizes it as such: the heading of this section of the regulations is “Removal from office or employment for cause.”¹⁶² In addition to the for-cause provision, the Deputy Administrator can only remove an elected member of a committee after the member receives written notice of the reason for removal, an opportunity to reply to the notice, and an opportunity for appeal of the removal decision.¹⁶³ Both the limited criteria for removal and the detailed removal procedures create a robust but not absolute tenure protection during each three-year term in office.

The fact that there is not complete protection, however, raises a red flag. Congress provided for elected farmer committees and nowhere created a mechanism for removal outside of the electoral process.¹⁶⁴ USDA established the removal restrictions through regulation,¹⁶⁵ under a general grant of authority to make rules “relating to the selection and exercise of the functions of the respective committees, and to the administration through such committees of the programs described. . . .”¹⁶⁶ It is not clear that this delegation of authority includes the authority to regulate removal. Were the removal restrictions focused only on appointed state committees, there would be little reason to question their propriety, as the statute authorizes the secretary to make appointments and then grants authority to promulgate rules related to the committees. In those circumstances, the authority to remove, or regulate removal, seems a natural counterpart to the authority to appoint and is significantly bolstered by the grant of rulemaking authority.

The elected committees are structured differently. The Secretary has no authority to appoint the general membership of the county committees, as their selection is left to voters.¹⁶⁷ As a general rule, “the appointing official,” in this case the county electorate, “is considered to have the removal power unless otherwise

¹⁶¹ *Id.* § 7.28(a).

¹⁶² *Id.* § 7.28.

¹⁶³ *Id.* § 7.28(b).

¹⁶⁴ *See* 16 U.S.C. § 590h(b)(5) (2018) (providing for the election of county committee members and detailing the process of election, but not including any provisions for removal).

¹⁶⁵ 7 C.F.R. § 7.28 (2020) (incorporating an earlier interim rule which specifically includes the regulatory language on removal, 77 Fed. Reg. 33063-01, 33075 (June 5, 2012)).

¹⁶⁶ 16 U.S.C. § 590h(b)(5)(E) (2018).

¹⁶⁷ *Save for the appointment of a single representative of socially disadvantaged farmers. Id.* § 590h(b)(5)(B)(ii)(III).

specified by statute.”¹⁶⁸ And the statute here creating the electoral system says nothing of removal. Without authority to appoint, in fact, with authority explicitly granted to voters and *not* the Secretary, more justification is needed if one is to infer authority to remove. The grant of rulemaking powers might be the additional justification needed, except that the rulemaking delegation is not open-ended. The rulemaking authority is limited only to: “selection,” which is relevant only to those members the Secretary may select, the state committee members and representatives of socially disadvantaged farmers; “exercise of [] functions,” which deals with committee activities, but not their constitution; and “administration through such committees of the programs described [earlier in the statute] . . . ,” which also deals with committee activities and not committee make-up.¹⁶⁹ The lack of inherent authority to remove that is associated with the initial authority to appoint, as well as the lack of authority to promulgate rules related to removal, strongly suggests that Congress did not authorize USDA to include removal provisions in its regulations.

When Congress provides for administrative elections, it is fair to assume that it has not implicitly granted removal authority to other administrators. If Congress intends to grant removal authority to an actor other than the appointing authority—in this case, to the agency rather than the voters—it must be explicit.¹⁷⁰ The very nature of an electoral system is to turn authority over to voters. It would be an arduous reading of the statute to find that Congress wanted to give voters appointment authority and then, by vague implication, hollow that authority by making it dependent on bureaucratic consent. In simpler terms, when voters are given the power to elect, the power to remove also lies with the voters absent statutory removal provisions.¹⁷¹

While the USDA has established a careful and limited system of only for-cause removal, the face of the statute and the obvious proposition of an electoral scheme show that only the end of a statutory term of office or the will of voters are valid

¹⁶⁸ Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 552 (2018); see *Myers v. United States*, 272 U.S. 52, 119 (1926) (stating that the power of removal is incident to the power of appointment); see also *Wiener v. United States*, 357 U.S. 349, 355–56 (1958) (holding that the Constitution does not grant inherent removal authority in the President and no such authority is implied from congressional silence. On the contrary, silence, in a larger statutory scheme that reflects insulation from the President, implies limited rather than expansive removal authority.).

¹⁶⁹ 16 U.S.C. § 590h(b)(5)(E) (2018).

¹⁷⁰ See Mashaw & Berke, *supra* note 168, at 552.

¹⁷¹ See *id.*

forms of removal from an elected farmer committee. The only argument against this reading is the canon of constitutional avoidance. As the next section demonstrates, both the electoral mode of appointment and removal restrictions may not be constitutionally viable forms under the emerging Presidentialist administrative law doctrine. That is as much an indictment of the Presidentialist theory as it is of the elected committees.

III. THE CONSTITUTIONAL CHALLENGE TO ELECTORAL DEMOCRACY

The United States Supreme Court's approach to administrative law over the past decade has turned sharply to a doctrine demanding presidential control.¹⁷² The requirement of unified presidential control presents a constitutional threat to electoral administration, especially as manifest in elected farmer committees. Recent cases from the Court, principally *Seila Law LLC v. Consumer Financial Protection Bureau*,¹⁷³ *Free Enterprise Fund v. Public Company Accounting Oversight Board*,¹⁷⁴ and, to a lesser extent, *Lucia v. Securities and Exchange Commission*,¹⁷⁵ reveal a doctrine of presidential power as against partial bureaucratic independence. Presidentialist theory and doctrine are both placed in an awkward situation, however, when we recognize that the dichotomy may not always be President versus bureaucrats, or even President versus Congress, but sometimes President versus voters, as is the case with electoral administration.

This section describes how the modern Presidentialist doctrine has picked a clear winner, the President, all the while thinking that it was picking the President over dubious, isolated bureaucrats rather than local, elected administrators. The next section points out the consequence of that outcome: Presidentialist doctrine grows out of a promise of accountability, but the doctrine rejects the accountability that arguably comes with electoral administration.¹⁷⁶ The rejection of electoral

¹⁷² Mashaw & Berke, *supra* note 168, at 614; Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 37–38 (2017).

¹⁷³ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (“The entire ‘executive Power’ belongs to the President alone.”)

¹⁷⁴ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

¹⁷⁵ *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

¹⁷⁶ I use the term “Presidentialist” here to recognize a theory and doctrine of robust presidential authority even in the face of congressional attempts to limit presidential control or to spread authority throughout the executive branch. The phrase Unitary Executive would also be apt. I acknowledge that there are nuances between Presidentialist and Unitary Executive theories. *Compare, e.g.*, Kagan, *supra* note 10, at 2326 (promoting the idea of presidential control but distancing herself from Unitary Executive theory),

administration is almost certainly the correct outcome, given the practical and constitutional failures the farmer committees demonstrate. But the rejection of electoral administration that is necessarily part of a Presidentialist doctrine does not recommend unified presidential power as the alternative. Instead, as the final section of this Article will explain, the rejection of electoral administration demonstrates the error of one-dimensional thinking about democratic legitimacy. It demonstrates the error of promising that democratic legitimacy is merely majoritarian vote counting, whether that vote counting is for federal administrators or the President.

This section will first describe Presidentialist theory. It will next briefly highlight how the theory has emerged in recent Supreme Court doctrine related particularly to presidential removal authority. This section concludes by applying appointment and removal rules to the elected farmer committees, explaining that under the current doctrine the Court must reject electoral administration.

A. *Presidentialist Theory*

The theory of Presidentialism finds its roots in both the Constitution and normative political arguments.¹⁷⁷ The essence of the constitutional argument is textual and structural. The textual argument posits that the Vesting Clause of Article II—“[t]he executive Power shall be vested in a President of the United States of America”¹⁷⁸—is an exclusive grant of executive power to a single President.¹⁷⁹ Where Congress diffuses the power to administer laws throughout the executive branch and limits presidential control thereof, Congress has violated the Vesting Clause, shifting execution of laws to a unit other than the President.¹⁸⁰ There may be a variety of agencies, cabinet departments, presidential advisors, and others within the Executive Branch, but the Constitution “eliminates conflicts in law enforcement and regulatory policy by ensuring that all of the cabinet departments and agencies

with Calabresi, *supra* note 9 (describing and supporting Unitary Executive theory and not relying on the term “presidentialism”). But those nuances are not essential and not relevant to the argument that doctrine arising from the theories would reject electoral administration.

¹⁷⁷ Kagan, *supra* note 10, at 2325–26 (supporting both the textualist and political claims); Calabresi, *supra* note 9, at 59 (supporting the political claim); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 570–71 (1994) (supporting the textualist claim).

¹⁷⁸ U.S. CONST. art. II, § 1, cl. 1.

¹⁷⁹ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020); CALABRESI & YOO, *supra* note 8, at 3.

¹⁸⁰ *E.g.*, *Seila Law*, 140 S. Ct. at 2205; CALABRESI & YOO, *supra* note 8, at 3.

that make up the federal government will execute the law in a consistent manner and in accordance with the president's wishes."¹⁸¹ This argument further looks to the Take Care Clause and reasons that the clause demands the President "shall take Care that the Laws be faithfully executed,"¹⁸² and without direct control over administrators, the President cannot "take care."¹⁸³

The textual argument is paired with a structural argument, with precisely the same consequences. The structural argument points not only to the Vesting Clause of Article II, but to the vesting clauses of each of the first three articles of the Constitution, manifesting the separation of powers between the legislative, executive, and judicial branches.¹⁸⁴ Having defined which powers belong to which unit of the federal government, the argument goes, Congress cannot then create administrative units that are not wholly devoted to the President, insulated from the President, or, worse, subject to congressional or judicial control.¹⁸⁵ As professors Steven Calabresi and Sai Prakash, leading proponents of the unitary executive theory, argue, this "exclusive trinity of powers" is the only permissible constitutional structure, and an administrative body not under the exclusive control of the President is an impermissible "fourth" branch of the government.¹⁸⁶

Accepting that the Constitution's text unambiguously and exclusively puts the President in charge of the execution of federal law, it follows that Congress cannot limit or fracture the President's unified authority by allowing a subordinate administrator to make decisions that the president herself is not allowed to make, or by restricting her ability to control administrators, including removing them from office.¹⁸⁷

This textualist approach to unitary presidential control is reasonable, but it is also controversial.¹⁸⁸ Professors Larry Lessig and Cass Sunstein, for instance, have

¹⁸¹ CALABRESI & YOO, *supra* note 8, at 3.

¹⁸² U.S. CONST. art. II, § 3, cl. 5.

¹⁸³ *Seila Law*, 140 S. Ct. at 2198; Calabresi & Prakash, *supra* note 177, at 582–84.

¹⁸⁴ Calabresi & Prakash, *supra* note 177, at 663.

¹⁸⁵ *Id.* at 559–60.

¹⁸⁶ *Id.* at 560.

¹⁸⁷ Calabresi & Prakash, *supra* note 177, at 599; *Seila Law*, 140 S. Ct. at 2192.

¹⁸⁸ See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (arguing that the text of the Constitution is much more ambiguous as to presidential control of administration than others have proposed); Calabresi & Prakash, *supra* note 177 (responding directly

written: “the view that the framers constitutionalized anything like the [unitary Presidentialist] vision is just plain myth.”¹⁸⁹ Lessig and Sunstein remind that the theory of pure presidential power seems to make other constitutional text “unnecessary scribbles.”¹⁹⁰ For instance, what is the purpose of a clause allowing the President to demand reports from the heads of departments if those departments are not distinctive units, but instead part of the unitary President?¹⁹¹ They also point out that when we read the vesting clauses, we read them with modern conceptions of the presidency and do not appreciate that they meant something quite different at the time the Constitution was ratified.¹⁹² To oversimplify, Lessig and Sunstein demonstrate that “executive power” today seems to mean power to lead and administer, but to the framers “executive” meant the political authority of a head-of-state to lead, rather than the administrative authority to manage.¹⁹³ A modern example of this distinction might be found in the line of presidential succession. The Secretary of State is the first non-elected official in that chain.¹⁹⁴ Elevating a representative of state to fill the presidency is arguably a demonstration that the office was, and still could be, seen primarily as one of political leadership, a figurehead of state. If the framers indeed meant that the “executive power” was the power of a political leader and not necessarily the power of a managerial administrator, then a more diverse administrative structure, in which Congress is more creative about how it delegates authority, is constitutionally welcome.

While the constitutional argument is controversial, the political argument is not. The political argument asserts that federal bureaucrats are unelected and therefore

to Lessig and Sunstein and attempting to lay out the textualist argument in greater detail); *see also* Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 1011 (2001) (“By this view, the president may advise agency heads concerning his views on particular rules, but the president has no authority to dictate regulatory decisions entrusted to them . . .”).

¹⁸⁹ Lessig & Sunstein, *supra* note 188, at 2.

¹⁹⁰ *Id.* at 13.

¹⁹¹ *Id.* at 38.

¹⁹² *Id.* at 12–13.

¹⁹³ *Id.* at 39–40. Julian Mortenson takes a different approach to this argument in a new article that explores the understanding of “executive power” in the early republic, and he also concludes that the early understanding was not one of pure presidential administration, but of presidential execution under the direction of Congress. *See* Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019).

¹⁹⁴ 3 U.S.C. § 19(d)(1) (2018).

unaccountable. Everybody agrees that bureaucrats are unelected and, therefore, without more, lack political legitimacy.¹⁹⁵ By tying these unelected bureaucrats directly to presidential control, however, the President's democratic authority can legitimize them. Even Sunstein, for instance, a critic of the Presidentialist argument, has written that "the modern administrative agency has attenuated the links between citizens and governmental processes."¹⁹⁶ Interestingly, the same critique about the electoral disconnect has been levied at courts, questioning the legitimacy of judicial

¹⁹⁵ The agreement that agencies are not directly democratically accountable is far reaching and comes from both defenders and critics of the administrative state. *E.g.*, Sunstein, *supra* note 13, at 453, 505 (asserting that accountability is a problem in the administrative state and an argument for the unitary executive); CALABRESI & YOO, *supra* note 8, at 3 (noting that a policy argument for the unitary executive is to create accountability); Bressman, *supra* note 11, at 462, 478 (recounting the argument that important policy decisions should be made only by elected officials and lamenting the almost uniform focus on majority rule); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 549 (2000) ("The inquiry into accountability in administrative law currently focuses inordinately on formal accountability to the three branches of government."); Kagan, *supra* note 10, at 2354; Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1619 (2018) (identifying the presumption underlying many critiques of the administrative state that voting is the only form of legitimacy and representation); Stewart, *supra* note 14, at 1801–02 (lamenting the lack of legitimacy in exercising power without electoral accountability and thinking through the possibility of elected administrators); MASHAW, *supra* note 12, at 5 (stating that electoral legitimacy in the administrative state is indirect, coming from presidential appointment, Senate confirmation, and congressional delegations of authority); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95–96 (1985) (arguing that the President's direct electoral position helps legitimize broad administrative discretion); Metzger, *supra* note 172, at 36 (noting that one of the key attacks on the administrative state is the argument that administration is undemocratic); Clark, *supra* note 102, at 483 ("[H]ow [could] the broad powers delegated to the administrative branch . . . be exercised in a manner most consistent with our democratic traditions."); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 140 (2000) (suggesting that administrative agencies are better than courts at making policy choices because although agencies, like courts, "lack democratic accountability," at least the President and Congress can check agencies); BLAKE EMERSON, *THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 150 (2019) ("why, and under what conditions, [is it] appropriate for unelected officials and administrative organizations to exercise political authority."); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497–98 (2010) ("The people do not vote for the 'Officers of the United States.'") (quoting U.S. CONST. art. II, § 2, cl. 2); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–86 (1984) (explaining that agencies have more claim to policy decisions than courts because agencies are politically accountable through congressional delegations and the electoral authority of the presidential administration); *INS v. Chadha*, 462 U.S. 919, 968 (1983) (White, J., dissenting) (leaving broad policy choices to administrators risks "unaccountable policymaking by those not elected to fill that role"); *Morrison v. Olson*, 487 U.S. 654, 728–29 (1988) (Scalia, J., dissenting) ("The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect. Moreover, [if there is misbehavior] the President pays the cost in political damage to his administration.") The list certainly goes on.

¹⁹⁶ Sunstein, *supra* note 13, at 453, 505.

review from unelected judges.¹⁹⁷ Scholars have long answered that critique by turning to the democracy-enhancing nature of appointment and moderate political insulation.¹⁹⁸

The concern with democratic legitimacy in the administrative state goes back in time and spreads beyond the bounds of the modern debate over presidential control. Dale Clark, a USDA administrator who in 1939 wrote about the elected farmer committees, was himself thinking in these terms. When implementing significant delegations of authority, he wrote, we must consider “how the broad powers delegated to the administrative branch could be exercised in a manner most consistent with our American democratic traditions.”¹⁹⁹ Nearly 50 years later, Professor Stewart asked the same question as he sought to understand the major trends in administrative law, opening *The Reformation of Administrative Law* with an epigraph lamenting that administrative policymaking is not “reconciled with the processes of democratic consultation, scrutiny and control.”²⁰⁰

Obviously, the strongest advocates of stout Presidentialism have made the democratic argument. Calabresi and Yoo wrote that lodging all power in the President “promotes accountability,”²⁰¹ while Professor Calabresi explains that “the President is unique in our constitutional system as being the only official who is accountable to a national voting electorate and no one else. As we have seen, this constitutes the President’s unique claim to legitimacy. . . .”²⁰² Both ideologically and temporally, the legal academy has consistently found that democratic legitimacy is either lacking in a bureaucracy or unique in a President.

Federal courts agree. The late Judge Patricia Wald, one of the leading voices on administrative law in the federal judiciary, worried in *Sierra Club v. Costle*, about “unelected administrators.”²⁰³ Judge Wald was considered a liberal jurist, but her

¹⁹⁷ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

¹⁹⁸ *E.g.*, CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 65 (2001).

¹⁹⁹ Clark, *supra* note 102, at 483.

²⁰⁰ Stewart, *supra* note 14, at 1669 (citing Aneurin Bevan, in *THE SELECT COMMITTEE ON DELEGATED LEGISLATION, MINUTES OF EVIDENCE*, 1953, at 144, *quoted in* C.K. ALLEN, *LAW AND ORDERS* 164–65 (3d ed. 1965)).

²⁰¹ CALABRESI & YOO, *supra* note 8, at 3.

²⁰² Calabresi, *supra* note 9, at 59.

²⁰³ *Sierra Club v. Costle*, 657 F.2d 298, 400–01 (D.C. Cir. 1981).

former colleague, the quite conservative Justice Scalia, writing for a Supreme Court majority, also looked askance at “unelected federal bureaucrats.”²⁰⁴

Likely the strongest judicial critique of the democratic legitimacy of unelected administrators is from *Free Enterprise Fund*, in which Chief Justice Roberts’s majority opinion opens with the argument that if administrators are exercising power in the people’s name, they must be responsible to the President, who is the people’s representative.²⁰⁵ “The diffusion of power carries with it a diffusion of accountability,” wrote the Court, and continued “[t]he people do not vote for the ‘Officers of the United States.’”²⁰⁶ Since the administration is unelected, Roberts explained, there must be an electoral connection to make administration legitimate and accountable. That connection is to the President: “No one doubts Congress’s power to create a vast and varied federal bureaucracy. But where, in all this, is the role for oversight by an elected President? The Constitution requires that a President chosen by the entire Nation oversee the execution of laws.”²⁰⁷ Only when the President has control over bureaucrats is democratic legitimacy present, Roberts reasoned. The philosophical demand for democratic legitimacy, therefore, links presidential control to administrative action. Without that link, the administrative state “may slip from the Executive’s control, and thus from that of the people.”²⁰⁸ The Chief’s and the Court’s language about the legitimacy of administrators was not as grand, but the implication was just as plain in *Seila Law*, where the Justice Thomas reiterated that “[t]he people do not vote for the ‘Officers of the United States’”²⁰⁹ and the Court held that as a general rule, at-will removal is constitutionally necessary to protect presidential power.²¹⁰

The widespread agreement among scholars and jurists on the need for electoral legitimacy makes the doctrinal aspects of *Free Enterprise Fund*, *Seila Law*, and

²⁰⁴ *City of Arlington v. FCC*, 569 U.S. 290, 305 (2013).

²⁰⁵ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010). It is worth noting that the rhetoric of Presidentialism in this case rings louder than the actual impacts on presidential power since the decision gives the SEC more power than it gives the president.

²⁰⁶ *Id.* at 497–98 (quoting U.S. CONST. art. IX, § 2, cl. 2).

²⁰⁷ *Id.* at 499.

²⁰⁸ *Id.*

²⁰⁹ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2212 (2020) (Thomas, J., concurring) (citing *Free Enter. Fund*, 561 U.S. at 497–98).

²¹⁰ *Id.* at 2198 (“*Free Enterprise Fund* left in place two exceptions to the President’s unrestricted removal power.”).

similar cases, seem almost foregone. The next part will sketch that doctrine and how it applies to elected bureaucrats.

B. Presidentialist Doctrines and the Rejection of Electoral Administration

Presidentialist thinking is changing, or could change, many aspects of administrative law, including congressional delegation to officers other than the President,²¹¹ the standard expectations of judicial scrutiny, transparency, regulatory authority, and more.²¹² Arguably, however, the ideas have made the most significant inroads in the doctrine surrounding appointment and removal of administrative officers. These are also the areas of most interest in a discussion of electoral administration given that elections are, at least, just tools for appointment and removal. This part will demonstrate why, under today's Supreme Court doctrine, the elected committees are unconstitutional.

1. Appointment

The elected farmer committees have all the markings of officers of the United States, which means that the electoral mode of selection violates the Appointments Clause. This conclusion follows the Supreme Court's recent articulation of Appointments Clause doctrine in *Lucia v. Securities and Exchange Commission*,²¹³ as well as earlier cases.²¹⁴ *Lucia* reiterates that the Appointments Clause provides three constitutional options for the appointment of "Officers of the United States,"

²¹¹ In the case of elected county committees, the congressional delegation of authority is not only to officers other than the President, it is arguably a delegation of public power to private industry. This raises the issue of private non-delegation. *E.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Dep't. of Transp. v. Ass'n of Am. R.R.s.*, 575 U.S. 43, 45–46 (2015). That constitutional issue—however interesting, important, and possibly fatal to the committees—is outside the scope of this Article for two reasons. First, the doctrine is less clear than appointment and removal and the Court would likely find flaws with the electoral structures under the latter doctrines more readily than private nondelegation. Second, appointment and removal are more closely aligned with presidential power and majoritarian thought than private nondelegation, so they provide a better framework for thinking through electoral administration. Of course, private non-delegation invites careful consideration of how power is wielded and transferred, of modes of participation in government, and of due process. The question, therefore, is not irrelevant, but better left to another day.

²¹² *Seila Law*, 140 S. Ct. 2183; *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020).

²¹³ *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018).

²¹⁴ *United States v. Germaine*, 99 U.S. 508 (1878); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976); *Freytag v. Comm'r*, 501 U.S. 868, 881 (1991).

and an election is not among those options.²¹⁵ The central question in *Lucia* was, therefore, how to determine which government actors are indeed “officers” subject to constitutional appointment.²¹⁶ *Lucia* offers a two-part test for making that determination.²¹⁷ The first prong asks whether the government position in question is congressionally created and permanent.²¹⁸ The second prong asks whether that position exercises significant authority.²¹⁹

With respect to the first part of the test, regarding permanence and congressional authorization, there is no doubt that the farmer committees are both established by Congress and permanent. In their current incarnation, the farmer committees are a creature of statute, as the law provides for “Establishment and elections for county, area, or local committees.”²²⁰ The farmer committees, locally oriented as they are, distinctly carry out federal law. Regarding permanence, the farmer committees are unquestionably continuing as opposed to ad hoc agencies. The committees are empowered by statute, not by administrative design or temporary necessity. While the statute provides mechanisms for the consolidation of specific farmer committees, there is no built-in sunset provision for any given committee or the larger committee system.²²¹

As expected, the more difficult issue is the second prong of *Lucia*’s officer test, which asks whether the farmer committees wield significant authority. Similar to the special tax judges under consideration in *Freytag v. Commissioner*,²²² the farmer committees are parts of a larger regulatory scheme in which they often do not issue

²¹⁵ *Lucia*, 138 S. Ct. at 2050.

²¹⁶ *Id.* at 2049. Given electoral appointment, there is no reason to struggle with the question of whether the committees are principal or inferior officers. In either case, the Constitution does not allow electoral appointment. U.S. CONST. art. II, § 2, cl. 2.

²¹⁷ *Lucia*, 138 S. Ct. at 2052.

²¹⁸ *Id.* A 2019 decision from the First Circuit sees this, probably correctly, as two questions and therefore turns the *Lucia* test into three prongs rather than two, asking whether “(1) the appointee occupies a ‘continuing’ position established by federal law; (2) the appointee exercises significant authority; and (3) the significant authority is exercised pursuant to the laws of the United States.” *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 842 (1st Cir. 2019), *rev’d on other grounds*, 140 S. Ct. 1649 (2020).

²¹⁹ *Lucia*, 135 S. Ct. at 2052.

²²⁰ 16 U.S.C. § 590h(b)(5)(B) (2018).

²²¹ *Id.* § 590h(b)(5) (establishing the farmer committee system but not providing for automatic or inevitable termination).

²²² *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991).

final decisions because their actions are subject to higher-level review by the Farm Service Agency Administrator, the state committees, and the USDA's National Appeals Division.²²³ But *Freytag* held that finality does not decide the question of officialdom, rather scope-of-authority does.²²⁴ And the scope of the farmer committees' authority goes well beyond the adjudicatory oversight of the special tax judges. Farmer committees do oversee adjudicatory proceedings when they make individualized decisions about, for instance, farm program eligibility, but they also make legislative-type judgments on county-wide policies such as final planting dates for covered crops and the availability of federal programs.²²⁵ There is wide discretion in many committee judgments, such as the judgment to grant exemptions from conservation programs if compliance with such programs would cause a "hardship" to the participating farmer.²²⁶ There is also wide discretion in the procedures that the committees use in exercising their authority. *Lucia* points to the wide discretion Congress gave to the Security and Exchange Committee's Administrative Law Judges in that case,²²⁷ but Congress has not provided *any* boundaries to guide farmer committees in their decisionmaking. As the Farm Service Agency itself declares, the elected committees "use their judgment" to administer federal farm programs.²²⁸ In addition to all the power the committees exercise directly, they also hire the Farm Service Agency executive director for their county.²²⁹ The person in that position is a full-time USDA employee and holds significant authority to administer farm programs, including "staffing the county office; receiving, disposing of, and accounting for county office property and money; advising the county committee on election procedures; and assisting the county committee."²³⁰ In addition to the power to hire and fire, which goes far beyond the power of any Administrative Law Judge or special tax judge, all of the executive director's powers can be imputed to the

²²³ 7 C.F.R. § 7.1(a), (c) (2020); *id.* § 11.5(a).

²²⁴ *Freytag*, 501 U.S. at 881.

²²⁵ *See supra* Section I.C.

²²⁶ STUBBS, CONG. RESEARCH SERV., *supra* note 117, at 2.

²²⁷ *Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018).

²²⁸ U.S. DEP'T OF AGRIC., FARM SERV. AGENCY, COUNTY COMMITTEE ELECTIONS FACT SHEET—2018 (2018), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/2018/COC_fact_sheet_may-2018.pdf.

²²⁹ 7 C.F.R. § 1230.607 (2020).

²³⁰ CANADA, CONG. RESEARCH SERV., *supra* note 120, at 5.

committees themselves because the county executive director is an agent of a committee.

Though no decision of a committee is final, and though the USDA leadership ultimately retains all statutory authority, the breadth of adjudicatory and legislative discretionary powers that originate with the committees places them in even a narrow conception of “officers of the United States.” Their authority is more diverse than that of the special tax judges or the SEC’s Administrative Law Judges, and the Court has been clear, on repeated occasions, that finality and intervening authority elsewhere in an agency do not categorically remove an administrator from the “officer” category.²³¹

Because the committees’ authority goes well beyond the authority of other administrators that the Supreme Court has already ruled are “officers,” it is clear that the elected farmer committees are also subject to constitutional appointment standards. However, in June 2020 the Supreme Court issued an opinion in *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*,²³² which, read too quickly, provides a shadow of support for the constitutionality of electoral appointment. This case stems from the creation of the Financial Oversight and Management Board of Puerto Rico, which is made up of officials appointed by the president without Senate confirmation.²³³ The challengers asserted that members of the Board were indeed principal “Officers of the United States” and, therefore, their appointment required Senate approval.²³⁴ The Court held that appointment without Senate consent does not violate the Appointments Clause.²³⁵ In its opinion, the Court writes that the application of the Appointments Clause “turns on whether the Board members have primarily local powers and duties.”²³⁶ Out of context, this quote suggests that restrictions of the Appointments Clause may not apply to the elected farmer committees because they apply federal law only within their very local jurisdictions. If the Appointments Clause does not apply, then elections would be an acceptable mode of appointment. However, upon closer reading, the Court’s reasoning here does not apply to the local farmer committees because the “local”

²³¹ *Lucia*, 138 S. Ct. at 2052.

²³² *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020).

²³³ *Id.* at 1654.

²³⁴ *Id.* at 1657–58.

²³⁵ *Id.* at 1665.

²³⁶ *Id.* at 1658.

designation to which the Court refers is not *any* local administration but specifically to local administrators established under “two provisions of the Constitution [that] empower Congress to create local offices for the District of Columbia and for Puerto Rico and the Territories.”²³⁷ In other words, local administrators empowered under the Territories Clause have a unique place because they are not, strictly speaking, “Officers of the *United States*.”²³⁸ Without question, this territorial exemption does not apply to the USDA farmer committees.

Because the elected farmer committees are permanent and authoritative administrators, and officers *of the United States*, for the purposes of the Appointments Clause, they can only be appointed according to the terms of that Clause. Of course, the Clause distinguishes between “officers” and “inferior officers,” but in either case, the Constitution does not recognize electoral appointment.²³⁹

Normatively underlying all of this thinking is the persistent worry that federal administration is not democratically accountable. This is especially true in the thinking of Justices Thomas and Gorsuch, who argue that even more federal government employees should be subject to constitutional appointment.²⁴⁰ But the farmer committees are unconstitutionally populated *because* of their majoritarian accountability. This surprise is even more acute with respect to the Court’s current thinking on removing officers from their administrative posts.

2. Removal

Locating the power to remove administrative officers and determining the boundaries of that power is orders of magnitude more difficult than understanding the Appointments Clause because the Appointments Clause is explicit about appointments and silent on removal. As a result, the contours of removal doctrine are traced from the implications of the Appointment Clause, the Take Care Clause, and, as with appointments, notions of the President’s democratic legitimacy in comparison to the bureaucracy’s alleged democratic deficit.²⁴¹ Even more than

²³⁷ *Id.* at 1654 (citing U.S. CONST. art. I, § 8, cl. 17; U.S. CONST. art. IV, § 3, cl. 2.)

²³⁸ *Id.* at 1658.

²³⁹ U.S. CONST. art. II, § 2, cl. 2.

²⁴⁰ *Lucia v. SEC*, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring).

²⁴¹ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484, 497 (2010).

appointments, removal is infused with breathless agonizing over the legitimacy of the bureaucracy and lavish admiration of the President's special democratic accountability.²⁴²

The Court's leading modern cases on removal are 2020's *Seila Law v. Consumer Financial Protection Bureau*²⁴³ and 2010's *Free Enterprise Fund v. Public Company Accounting Oversight Board*.²⁴⁴ Although both articulate important doctrine and offer important insight into Presidentialism, *Free Enterprise Fund* proves more relevant to the case of elected administrators because it deals with multi-member agencies and distributed removal authority while *Seila Law* is largely focused on single-headed agencies.²⁴⁵ Both cases, however, are also relevant here because of their explicit and repeated focus on Presidentialism. The Court roots both holdings in the idea that too much limitation of presidential authority is unconstitutional because of the President's democratic legitimacy. For instance, the *Free Enterprise Fund* Court wondered how an administrative agency could exercise power "in the people's name" when that agency is not meaningfully controlled by the President, who is the manifestation of the people's will.²⁴⁶ The special connection between the President and the people was no mere implication. "The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so," wrote the Court.²⁴⁷ "[P]eople do not vote for [administrators],"²⁴⁸ unlike the President, who is "chosen by the entire Nation."²⁴⁹ Thus, when unelected administrators are not properly accountable to the President, the administrative state "may slip from the Executive's control, and thus from that of the people."²⁵⁰

Removal has some nuances, but we can synthesize it without political theory. After *Seila Law*, the general rule for removal seems to be that Congress may not limit

²⁴² E.g., *Free Enter. Fund*, 591 U.S. at 499; Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1257 (2014).

²⁴³ *Seila Law*, 140 S. Ct. 2183.

²⁴⁴ *Free Enter. Fund*, 561 U.S. 477.

²⁴⁵ *Id.* at 484; *Seila Law*, 140 S. Ct. at 2192.

²⁴⁶ *Free Enter. Fund*, 561 U.S. at 497.

²⁴⁷ *Id.* at 513.

²⁴⁸ *Id.* at 497–98.

²⁴⁹ *Id.* at 499.

²⁵⁰ *Id.*

the President's authority to remove officers except in certain limited cases.²⁵¹ Specifically, from older precedent, Congress may not insert itself into the removal process.²⁵² Congress may not limit removal of the President's closest advisors or those who play an inherently executive role—those whose power comes from the President rather than from Congress.²⁵³ Congress may not tie the President's hands to the point of ineffectiveness,²⁵⁴ or limit at-will removal of single-headed agency directors.²⁵⁵ While Congress may prohibit the President from firing some officers as described below, *somebody* in the administration must have the authority to remove that officer, even if only for-cause, and whoever that somebody is, the President must have authority to remove her.²⁵⁶

What Congress may do is limit a President's authority to remove certain officers for purely political reasons, using for-cause provisions, so long as the protected officer is; (1) filling a congressionally-created inferior office that is not part of the President's core executive functions,²⁵⁷ or (2) the protected officers are principle officers who serve on an independent, multi-member commission with partisan balance and the commission has only quasi-legislative and quasi-judicial, but not executive functions.²⁵⁸

The elected county committees do not fit into this framework. They pose a conundrum because they are entirely novel. They do not even use the standard tools of administrative staffing. What we can confidently say about the farmer committees is that they are multi-member and the statute provides for three-year terms of office based on election, without provisions for removal.²⁵⁹ The regulations then provide a strict for-cause removal protection, and the Deputy Administrator for the Farm Service Agency may exercise that right of removal when a cause is found.²⁶⁰ The

²⁵¹ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2206 (2020).

²⁵² *Myers v. United States*, 272 U.S. 52, 164 (1926).

²⁵³ *Id.*

²⁵⁴ *Free Enter. Fund*, 561 U.S. at 514.

²⁵⁵ *Seila Law*, 140 S. Ct. at 2191–92.

²⁵⁶ *Free Enter. Fund*, 561 U.S. at 496.

²⁵⁷ *Seila Law*, 140 S. Ct. at 2199–2200 (citing *Morrison v. Olson*, 487 U.S. 654, 662–63, 696–97 (1988)).

²⁵⁸ *Seila Law*, 140 S. Ct. at 2198–99.

²⁵⁹ 16 U.S.C. § 590h(b)(5)(B)(iv) (2018).

²⁶⁰ 7 C.F.R. § 7.28 (2020).

Deputy Administrator is not a tenure-protected position, and the Secretary of the USDA is a cabinet appointment, likewise removable at-will.²⁶¹ Thus, by the terms of the regulations, there is only a single for-cause limit. By these terms, to remove a committee member for cause, the President must ask the Deputy Administrator to act. Were the Deputy Administrator to refuse, the President could fire the deputy. But elections provide a wrinkle in this structure.

As noted in Section II.B, because the statute calls for an electoral appointment with term limits and is silent on removal, the appropriate reading of the statute is that it does not provide removal authority to anybody in the Administration. The statute's delegation of rulemaking authority is explicitly cabined and does not include authority to make rules addressing removal. Thus, the regulatory for-cause provision is not valid, and a reversion to the statutory terms leaves removal only in the hands of voters.²⁶² With removal limited to electors, there is no removal power in the presidency, and as such, the electoral structure goes beyond the permissible boundaries identified in any of the Court's removal decisions. As with the appointment process, the removal provisions do not pass constitutional muster.

The Court's thinking on removal, and to a lesser extent appointment, has given the President's purported electoral legitimacy almost unconditional weight and therefore forecloses the possibility of relying on an alternative form of electoral accountability to validate administrative authority—direct accountability to voters. Because of the Court's focus on the President, the elected farmer committees would not stand under judicial scrutiny. Whether this doctrine is the best reading of the Constitution, or whether its application to the farmer committees is correct, the analysis shows the importance of the President's majoritarian claim to both Court and Presidentialist thinking. Presidentialist doctrine promises more majoritarian accountability but turns its nose up at a majoritarian experiment untethered from the President. To an extent, that is the way it should be, as the next two sections explain.

²⁶¹ See 7 U.S.C. § 1-9097 (2018); 7 C.F.R. § 1-4290.3099 (2020) (establishing and regulating USDA programs and administration without any stated limits on removal of Deputy Administrator, Farm Service Agency).

²⁶² The canon of constitutional avoidance might suggest that, in order to avoid a statutory construction that would invalidate the electoral structure of the farmer committees, the Court would read Congress' silence as enabling the for-cause removal rule. But the clarity of Congress on USDA's limited rulemaking authority and the exceedingly clear establishment of an electoral rather than traditional appointment-removal structure, would make any such construction a stretch that might tear the statute rather than bend it into a constitutionally valid form.

IV. THE PRESIDENTIALIST OBJECTION TO TOO MUCH DEMOCRACY

This section argues that on one count Presidentialism, particularly as manifest in appointment and removal doctrines, is right; electoral administration is not a valid constitutional design.²⁶³ But that is a small victory because the larger problem of “too much democracy” proves a failure of presidential theory. Presidentialist doctrine is right that electoral administration is not a good constitutional model, but electoral administration is not a good model because—like Presidentialist theory—electoral administration puts too much emphasis on a one-dimensional oversimplification of democracy. In fact, the problem is not that electoral administration is “too much” democracy, but that Presidentialism and electoral administration both credit democracy with *too little* nuance. This conclusion does not rely on the outcome of appointment and removal doctrines as applied to electoral administration, but that application does lay bare the oddity of such heavy reliance on majoritarianism in administration.

This section demonstrates that despite Presidentialist attempts to prove the one-dimensional theory with textual, structural, and theoretical arguments, those arguments are not strong enough to sufficiently distinguish presidential majoritarianism from majoritarian electoral administration. These models, similarly justified, should similarly fall.

Debates about the legitimacy of the administrative state gravitate to questions of democratic accountability. The concern is that “unelected bureaucrats” are not accountable to the people. As James Landis said of the larger debate around the administrative process, the “literature abounds with fulmination.”²⁶⁴ But there are a variety of solutions to the so-called democratic deficit. Some find legitimacy in bureaucratic insulation that allows administrators to exercise technical expertise, or “specialization.”²⁶⁵ Others locate legitimacy in administrative reasoning and

²⁶³ I take no position on whether appointment and removal doctrines are correct as they stand, only that as they stand, with their Presidentialist underpinnings, they clearly invalidate electoral administration.

²⁶⁴ JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 22–23 (1938).

²⁶⁵ *Id.* at 4; *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 624 (1935) (“[I]ts members are called upon to exercise the trained judgement of a body of experts ‘appointed by law and informed by experience.’”); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 531 (2010) (Breyer, J., dissenting) (“And this Court has recognized the constitutional legitimacy of a justification that rests agency independence upon the need for technical expertise. . . . Here, the justification for insulating the ‘technical experts’ on the Board from fear of losing their jobs due to political influence is particularly strong.”); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2236 (2020) (Kagan, J., concurring in part).

deliberative participation.²⁶⁶ Sub-constitutional separation-of-powers within agencies is another justification.²⁶⁷ But the solution that has made the most headway in the halls of political power,²⁶⁸ and, most importantly, in the Supreme Court, is to carefully subordinate administrators to the President, who can claim a particular majoritarian mandate.²⁶⁹ This is the Presidentialist model.

The Presidentialist doctrine, premised as it is on bringing more majoritarian power to administration, has focused too much on the President alone. Landis, again, cautioned that “[s]uch apotheosizing obscures rather than clarifies thought.”²⁷⁰ Luckily, the test case of elected farmer committees does not apotheosize; it clarifies. That the Presidentialist doctrine will undermine other models of majoritarian legitimation, such as the electoral administration seen in USDA’s elected farmer committees, helps us see the problems of Presidentialist overreliance on a too-simple constriction of democratic legitimacy. Presidentialism rallies for majoritarian accountability but retreats from a direct election.

The core concern of Presidentialist thinking and doctrine is that in certain circumstances, Congress “withdraws from the President” proper oversight of her administration and places that power instead in unelected bureaucrats.²⁷¹ Although not beyond dispute, there is a textual and structural constitutional argument for why the President must retain this power regardless of her electoral credentials. Perhaps given interpretive disputes, scholars and courts alike emphasize the essential democratic function of Presidentialism. However, democratic validation, we can

²⁶⁶ Seidenfeld, *supra* note 131, at 1514; MASHAW, *supra* note 12.

²⁶⁷ E.g., Neal K. Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316 (2006); see Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 573 (2015).

²⁶⁸ CALABRESI & YOO, *supra* note 8, at 3; see also Common Legislative Encroachments on Executive Branch Authority, 13 Op. O.L.C. 248 (1989); Stuart Taylor, Jr., *A Question of Power, A Powerful Questioner*, N.Y. TIMES (Nov. 6, 1985), <https://www.nytimes.com/1985/11/06/us/a-question-of-power-a-powerful-questioner.html> (describing Attorney General Ed Meese’s position on presidential authority over the bureaucracy: “But he said the framers of the Constitution did not intend Federal agencies to be independent of the President or to be run by bureaucrats who are not politically accountable.”); Memorandum from Bill Barr to Deputy Attorney General Rod Rosenstein and Assistant Attorney General Steve Engel on Mueller’s “Obstruction” Theory, para. 9 (June 8, 2018), <https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-mue/b4c05e39318dd2d136b3/optimized/full.pdf>.

²⁶⁹ E.g., *Free Enter. Fund*, 561 U.S. 477; *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020).

²⁷⁰ LANDIS, *supra* note 264, at 4.

²⁷¹ *Free Enter. Fund*, 561 U.S. at 495.

now see, is not only in the President, but in some cases, it is also in bureaucrats: elected bureaucrats. The example of elected bureaucrats forces us to confront the Presidentialist insistence that constitutional ambiguity can only be read as empowering the uniquely majoritarian President.

At this point, a Presidentialist would likely agree that the county committees are officers of the United States, that they are indeed unconstitutionally appointed, and that the USDA's for-cause removal rule is, at the very least, suspect. "But," the Presidentialist might counter, "*the constitutional flaws of electoral administration do not demonstrate a problem with Presidentialism.*" "First," they would argue,

Presidentialism is a textual and structural argument.²⁷² The theorizing around democratic legitimacy is window dressing, not law. If the problems of electoral administration prove that mere elections are not enough, that is because Presidentialism is about the President's special responsibilities, not just his electoral authority.²⁷³ Second, even if it did come down to the normative theoretical argument, the President is still unique and distinguishable from county committees.²⁷⁴

The Presidentialists' constitutional argument, discussed in Section III.A. says that the vesting clauses of Articles I, II, and III demonstrate three distinct federal powers, and Congress cannot design administrative offices that are not wholly at the mercy of the President because that merges Article I and Article II powers.²⁷⁵ Further, the Vesting Clause of Article II vests the "executive Power" in "a President."²⁷⁶ This allows for all executive authority to accumulate in a single President, and none can reside in officers the President does not control. Finally, the Take Care Clause requires that the President have as much power as necessary to "take care" that the laws are faithfully executed, and limiting the President's power

²⁷² Calabresi & Prakash, *supra* note 177, at 559–60.

²⁷³ Calabresi, *supra* note 9, at 59.

²⁷⁴ *Id.*

²⁷⁵ Calabresi & Prakash, *supra* note 177, at 559–60.

²⁷⁶ U.S. CONST. art. II, § 1, cl. 1 (emphasis added).

over administrators inhibits her ability to take care.²⁷⁷ Or so argue the Presidentialists.

These readings are acceptable, but not unavoidable, and weaker than they may first seem. The Take Care Clause may not be a limit on Congress' power to direct how the laws are executed, for instance, but instead a demand that the President executes the laws as Congress designed them.²⁷⁸ If the vesting clauses are meant to establish an inviolable seal between different government powers, why would the Opinions Clause explicitly give the President authority to demand opinions from her executive officers? Would not the vesting of executive power imply, as the Presidentialists demand, the inherent authority of the President to control administrators?²⁷⁹ More broadly, why should we assume that vesting an "executive" authority, which might mean a political authority, includes vesting an administrative or managerial authority?²⁸⁰

The structural and textual arguments for presidential control are not so plain as to end the search for normative theories to justify the constitutional readings. The Presidentialist would then say that even without indisputable constitutional directions, a doctrine of presidential control is proper because the President has a unique claim of electoral legitimacy.²⁸¹ One can imagine the following argument: "*We should discard elected bureaucrats but not discard the electoral justification for presidential administration because the President is the only elected official who represents the entire nation while the elected farmer committees represent more parochial interests.*" This is the argument that Calabresi has already made, but without the farmer committees in mind.²⁸²

This argument has two flaws. First, the President is not nationally elected; she is elected through the states.²⁸³ States have plenary authority to select presidential electors, and those electors are apportioned according to the size of the states.²⁸⁴ The

²⁷⁷ *Free Enter. Fund. v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020).

²⁷⁸ Lessig & Sunstein, *supra* note 188, at 62.

²⁷⁹ *Id.* at 38.

²⁸⁰ *Id.* at 39–40.

²⁸¹ Calabresi, *supra* note 9, at 59.

²⁸² *Id.*

²⁸³ U.S. CONST. art. II, § 1.

²⁸⁴ *Id.*

Electoral College is certainly unique to the President, but it does not carry the same sense of rarified national responsiveness as Professor Calabresi urges.²⁸⁵ For one thing, the Electoral College is a constitutional structure designed to mitigate naked majoritarianism.²⁸⁶ For another thing, it means that the President is more responsive to large states with more electors.²⁸⁷ Moreover, practicalities of modern politics force presidential candidates to focus not only on large states with more electors but also only on large “purple” states that are not already statistically certain to vote for one candidate or another.²⁸⁸ In practice then, a presidential candidate will focus time, money, and policy proposals—and a sitting President will focus actual executive authority—on Pennsylvania, Florida, Ohio, Michigan, and similarly large and politically divided states.²⁸⁹ Primary elections similarly make the President more representative of Iowa and New Hampshire than of the entire United States.²⁹⁰ And finally, of course, five times in history and twice in the past four presidential elections, the Electoral College resulted in a President who received fewer popular votes than the opposing candidate.²⁹¹

A similar argument in favor of Presidentialism might be that the President is subject to a uniquely high level of public scrutiny through media, advocacy organizations, partisan politics, and the like, which shines a bright and legitimizing light on the President’s behavior both before and after elections.²⁹² This suggests special presidential accountability and has appeal as a descriptive matter because certainly there is an opportunity for accountability through careful scrutiny and regular elections. Edward Rubin, however, has persuasively argued that elections are

²⁸⁵ Of course, Calabresi’s argument on this front emerged in the early 1990s before the two modern elections in which the winner of the popular vote lost the election in the Electoral College and in which key battleground states gained the central role they currently play.

²⁸⁶ THE FEDERALIST NO. 68 (Alexander Hamilton).

²⁸⁷ *A Recent Voting History of the 15 Battleground States*, CONST. DAILY (Nov. 2, 2016), <https://constitutioncenter.org/blog/voting-history-of-the-15-battleground-states/>.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ Ronald Brownstein, *The Early States’ Stranglehold on the Presidential Primary*, ATLANTIC (Jan. 24, 2019), <https://www.theatlantic.com/politics/archive/2019/01/2020-primary-early-states-could-be-crucial-ever/581146/>.

²⁹¹ D’Angelo Gore, *Presidents Winning Without Popular Vote*, FACTCHECK.ORG, <https://www.factcheck.org/2008/03/Presidents-winning-without-popular-vote/> (last updated Dec. 23, 2016).

²⁹² See Calabresi, *supra* note 9, at 59, 62–63 (arguing that the national and national-electoral accountability of the president makes her, and only her, appropriately subject to national scrutiny).

more about representation than accountability, giving an opportunity for voters to support the candidate who most clearly matches their interests rather than to hold candidates accountable.²⁹³ Moreover, scrutiny and accountability do not offer much analytically useful clarity. The President is subject to more scrutiny, which makes presidential authority more normatively justifiable than, for example, elected farmer committee authority. But the line-drawing problem built into this argument is too great to overcome.

There must be an area above which public scrutiny is legitimizing and below which lack of scrutiny is delegitimizing. Accepting for the sake of argument that the county committees fall below and the President sits comfortably above, finding agreement on the actual location of the gray area of questionable legitimacy is probably an impossible task. On which side does a member of Congress sit? Does it matter if the member represents Manhattan, New York or Manhattan, Montana? And how would one aggregate these individual representatives with apparently variable legitimacy into a single body, Congress, which must have a singular legitimate authority?

Professor Miriam Seifter's work has addressed state administration.²⁹⁴ That research demonstrates how the lack of attention to and oversight of state administrators, many of whom are elected, drives a wedge between administrators and the public.²⁹⁵ But that practical challenge cannot itself delegitimize state government in part because state governments do not earn legitimacy from the federal Constitution and also because esoterica and scrutiny are not manageable standards. The impossibility of locating the area of legitimacy means it can only be a qualitative argument and not one that provides a principle of constitutional law for determining the proper level of oversight for any given public power.

To put the line-drawing concern slightly differently, when we begin to debate the proper level of majoritarian representation and attention, we are debating irreducible preferences—representation at the national level or the county level? With 24-hour news scrutiny or only 7 a.m. and 7 p.m. news scrutiny? The Constitution, conveniently, does not force us into that particular debate because it provides a framework that balances majoritarianism with other tools of good governance rather than only one tool that requires vague and undefinable line drawing. The comparison between electoral administration and Presidentialism need

²⁹³ Edward Rubin, *The Myth of Accountability and the Anti-administrative Impulse*, 103 MICH. L. REV. 2073, 2077–82 (2005).

²⁹⁴ Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107 (2018).

²⁹⁵ *Id.* at 269–70.

not be a comparison between scale in majoritarianism; it can be a lesson about majoritarianism in a larger ecosystem of governance.

Presidentialism is based on a reading of the Constitution that is plausible but hardly undeniable, especially without further justification. The normative justifying theory for intense and unified presidential control over administration is the President's electoral legitimacy. As it turns out, the presidency is not, as most believe, the only electoral office in the Executive Branch. The USDA's farmer committees are another example; they are *elected bureaucrats*. But they do not withstand constitutional scrutiny. The committees wither because they are not tied to the President as the Presidentialist doctrine demands, even though they are directly responsive to voters, as Presidentialist rhetoric and normative arguments stress. This is ironic, and it demonstrates a flaw in Presidentialism: democratic legitimacy is not truly the touchstone of the doctrine. The touchstone could be the President's *particular* electoral connection. But the counter-majoritarian purpose of the Electoral College, the practicalities of modern politics, and the limited usefulness of a local-to-national spectrum of scrutiny all demonstrate that the President's electoral legitimacy is not so special as Presidentialists, including those on the Supreme Court, contend.

If the failed majoritarian justification does not support elected bureaucrats or pure Presidentialism, then where is the legitimacy in administrative law?

V. THE MODEL OF "JUST RIGHT" DEMOCRACY

Legitimacy in administrative law comes from democracy, but not a one-dimensional take, not a forcing of a round democracy into a square hole of majoritarian vote counting. Instead, legitimacy comes from the robust democracy of participation that makes room for individualism, reason-giving, deliberation, *and* majoritarianism. So much is written about the meaning of democracy—of particular relevance to this discussion is an objective Weberian view that narrows democracy into strict instrumentalism versus a Deweyan view that magnifies democracy into every social interaction.²⁹⁶ This section does not try to add substantially to the canon. The thinking here is not a perfect definition or idealization, it merely rejects any single, essential, exalted justification for administration and argues that when administration reflects the varied constitutional structures that surround coercion, then it is legitimate. I chose the word "coercion" here as opposed to, say, "decisionmaking" to draw on Lowi's claim that so much administration seeks to hide

²⁹⁶ *E.g.*, GILBERT, *supra* note 107, at 4.

the coercive nature of government by claiming it is not coercive if it is the result of pluralist negotiations.²⁹⁷ I add to this that unmitigated focus on majoritarian legitimacy hides the coercive nature of government by focusing on “the people” rather than the process for decisionmaking and the specific coercive results. I do not argue that coercion is wrong, only that it should be justified and transparent. Majoritarianism alone fails in that respect. This might be seen as a pragmatic repudiation of fundamentalist tropes about democracy.²⁹⁸ But it need not be so brazen. It is a caution that we should seriously and humbly think and talk about democracy, rather than assume it embodies a single obvious meaning. Democracy demands discourse, not certainty.²⁹⁹

The first part of this section justifies the claim that the Constitution provides for a robust, manifold, democracy beyond majoritarianism. The second part of this section argues that the dominant structure of administrative governance reflects that robust constitutional democracy. In other words, administration—so long the subject of handwringing about legitimacy—is today a form of governance of the same kind as our larger constitutional system, and therefore administration does not beg for special attention. The final part offers a comparison of how three models of administrative law create different opportunities for a participatory constitutional democracy.

A. *Majoritarianism, Deliberation, Reasoning, and Participation in the Constitution*

The Constitution presents a multi-faceted democracy that emerges from individual participation, reason, deliberation, *and* majoritarian accountability. This is the constitutional model of “just right” democracy. It might also be described as a republican-liberal-populist-rationalist democracy.³⁰⁰ Republican because it spreads out authority and allows contestation. Liberal because it is limited at least insofar as it respects certain basic rights and liberties. Populist because it applies majoritarianism. Rationalist because it demands reasons and reasoning towards some

²⁹⁷ LOWI, *supra* note 133, at 62 (writing that “interest group” liberalism, negotiations, participation, partnership, self-governance, and other “halo words” mask the coercive force of government).

²⁹⁸ See, e.g., Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 609 (2016).

²⁹⁹ *Id.* at 608–09.

³⁰⁰ HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 56, 83 (2002).

conception of truth.³⁰¹ The view presented in this section also has a significant overlap with Blake Emerson's very recent reconstruction of Progressive thought as a driver of a deliberative administrative law. That is, rather than instrumental formalism, technocracy, or Presidentialism, administrative law is a forum for creating and reflecting shared public values.³⁰²

Today there is a "complac[cy] about the dominance of majoritarianism as a constitutional value. . . ."³⁰³ But only in recent times have we begun to idolize majoritarianism over competing theories of good governance.³⁰⁴ Rather than tracing unadulterated majoritarianism to the founding or the Constitution, Professor Bressman attributes its dominance to Bickel and his legendary critique of the Supreme Court's "counter-majoritarian difficulty."³⁰⁵ The critique took on a life of constitutional theory beyond the courts.³⁰⁶ Of course, Bickel was right that the Supreme Court is, and all Article III courts are, at least, non-majoritarian. This reality may have normative weight, but there is no purely legal critique of unelected federal judges since the non-majoritarianism of Article III courts is by constitutional design.³⁰⁷ This constitutional feature is one of a series of such features that should point us towards "a more balanced approach" than majoritarian accountability.³⁰⁸ For instance, while the Constitution does demand accountability (that is, some majoritarian mechanisms), it also demands reason (that is, non-arbitrary decisionmaking).³⁰⁹ "The concern for arbitrariness can be seen as one of the primary evils at which our traditional checks and balances are aimed."³¹⁰

³⁰¹ *Id.*

³⁰² EMERSON, *supra* note 195.

³⁰³ Bressman, *supra* note 11, at 466.

³⁰⁴ *Id.* at 466, 478.

³⁰⁵ *Id.* at 478.

³⁰⁶ *See id.* ("Although the notion of majoritarianism had been lurking in constitutional theory, it crystallized into a paradigm when Alexander Bickel (in)famously characterized judicial review of legislative decisionmaking as 'countermajoritarian.'").

³⁰⁷ U.S. CONST. art. III, § 1.

³⁰⁸ Bressman, *supra* note 11, at 462, 515; *see also* EISGRUBER, *supra* note 198, at 65.

³⁰⁹ Bressman, *supra* note 11, at 462–63.

³¹⁰ *Id.* at 468.

Arbitrariness, the inverse of reason-giving, is thus one concern of the constitutional structure that works in concert with, rather than at the mercy of, majoritarianism. There is ample evidence—in constitutional text, structure, and writings—that the founders did not prefer unchecked majoritarianism.³¹¹ This preference is manifest throughout constitutional law. Whenever government action, including administrative action, treads on constitutional guarantees, constitutional law demands not that the action is tied to majoritarian preference, but that the government give exceedingly reasoned justifications for the action and demonstrate that the action is the least restrictive means available.³¹² The Fourth Amendment specifically prohibits “unreasonable” that is, arbitrary, searches and seizures; the Due Process Clause demands both that any government action “bear some reasonable relationship to the pursuit of a public purpose” and in more limited circumstances that the government has employed safeguards to maximize careful decisionmaking.³¹³ Mashaw writes, “[w]hile we prize elections, we seldom believe that politicians have received a mandate for relentless and unchecked pursuit of their vision of the good.”³¹⁴ Hence “reasoned administration may provide the most democratic form of governance available to us in a modern, complex, and deeply compromised political world.”³¹⁵

The Fifth Amendment provides another example. That Amendment creates an unambiguous deliberative process in the form of the grand jury requirement.³¹⁶ (And, of course, the Sixth Amendment provides even more examples in the criminal justice context.)³¹⁷ But the Fifth Amendment also nudges at deliberation and reason-giving in the Takings and Compensation Clauses.³¹⁸ The Takings Clause only permits the confiscation of private property when the government will put that property to public

³¹¹ MASHAW, *supra* note 12, at 144.

³¹² *Id.* at 44.

³¹³ *Id.* at 43–44.

³¹⁴ *Id.* at 11.

³¹⁵ *Id.* See also Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control*, 28 J.L. & POL. 129, 131 (2013) (arguing the individuals within administrative agencies can vindicate arbitrariness or unreasonable action even when those actions are supported by majoritarian political preferences).

³¹⁶ U.S. CONST. amend. V, cl. 1.

³¹⁷ *Id.* amend. VI.

³¹⁸ *Id.* amend. V, cl. 3.

use.³¹⁹ The public-use requirement is, at its base, a demand for reason. The Compensation Clause compels “just compensation” for any private property that the government does appropriate for public use.³²⁰ Practically, calculating compensation requires deliberation over both the financial consequences of the government’s action and the impact of that action on the private property owner.³²¹

Beyond the specific provisions, we must not overlook the larger structures. Bicameralism and presentment are both tied to the political branches, but the existence of such vital procedural barriers to political action undoubtedly serves to limit majoritarian whims in favor of deliberation.³²² In the words of the Supreme Court, “There is an unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.”³²³ And of course, most dramatically, the Article III courts are insulated from electoral politics in order to promote constitutional democracy by, among other things, assuring that Congress, with its majoritarian pressures, does not offend constitutional restrictions.³²⁴

The broad and specific demands for reason and deliberation accord with Mark Seidenfeld’s argument that the Constitution is “an attempt to ensure that government decisions are a product of deliberation that respects and reflects the values of all members of society.”³²⁵ Deliberation differs from reason-giving because it does not presume an objective goal against which we can measure our progress by transparency and consideration.³²⁶ Instead, deliberation marks process as valuable in

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ Joshua Ulan Galperin, *Does the Compensation Clause Burden the Government or Benefit the Owner: The Compensation Clause as Process*, 1 U. BALT. J. LAND & DEV. 27, 36–37 (2011) (When I look back at this article, my first after law school, I find a lot about which I am embarrassed. But I am still satisfied with the general argument that the Compensation Clause is a procedural rather than substantive safeguard. No need to read further into this article than Section II!).

³²² *INS v. Chadha*, 462 U.S. 919, 959 (1983); THE FEDERALIST NO. 39 (James Madison); Sarah E. Light, *Regulatory Horcruxes*, 67 DUKE L.J. 1647, 1654 (2018).

³²³ *Chadha*, 462 U.S. at 959.

³²⁴ *Marbury v. Madison*, 5 U.S. 137, 177–79 (1803); *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring); EISGRUBER, *supra* note 198, at 65.

³²⁵ Seidenfeld, *supra* note 131, at 1514; AMY GUTMANN & DENNIS THOMPSON, *DELIBERATION AND DISAGREEMENT* 12 (1996).

³²⁶ Seidenfeld, *supra* note 131, at 1528.

and of itself if the process is inclusive and respectful.³²⁷ These values are evident in the Constitution. Deliberation, kneading popular preference into articulate will, was “the rationale given by the Federalists for the separation of powers, a bicameral legislature, indirect election of the President and Senate, and the dual system of state and federal government.”³²⁸ Likewise, “[t]he counter-majoritarian nature of courts provides some constraints.”³²⁹ Deliberation, therefore, is a process for shaping political will and ideally making that will collaborative, if not consensual. Reason-giving is then a demand for some articulate connection between deliberate will and coercive action. Deliberation and reason-giving are distinct but reinforcing.

The Constitution likewise demands an avenue for non-majoritarian, non-electoral, individual participation in order to instigate and contribute to both deliberation and reasoning. Professor Maggie Blackhawk recently published a study of the petitioning process in the early republic.³³⁰ Blackhawk’s contribution adds an explicit and specific constitutional authorization for an unelected administrative state, pointing to the Petition Clause of the First Amendment. From careful archival research, she traces the incremental growth of the administrative state out of that Clause.³³¹ The petition process has a number of forms, including private bills, lobbying, and the Administrative Procedure Act’s invitation for private petitions.³³² Regardless of the form, what petitioning allowed, and allows, is an “avenue for political participation distinct from the vote. The process was available to even the unfranchised and did not operate by a majoritarian decision rule.”³³³ This is much like the legal process in Article III courts, also open to all and separated from the political process, but unlike the courts of law, the petition process was not limited to those with an identifiable cause of action, standing, or other threshold qualifications for judicial review.³³⁴

Although the Petition Clause is a new basis of direct constitutional support for a bureaucracy, it fits with earlier arguments that partial majoritarian insulation is not

³²⁷ *Id.* at 1514.

³²⁸ *Id.* at 1533.

³²⁹ *Id.* at 1574.

³³⁰ McKinley, *supra* note 195, at 1546–47.

³³¹ *Id.*

³³² *Id.* at 1555.

³³³ *Id.* at 1559.

³³⁴ *Id.*

a weakness of the bureaucracy, but a strength. Partial majoritarian insulation is ubiquitous within our constitutional democracy. The Petition Clause “offered the politically powerless a means of participating that was formal, public, and not driven by political power.”³³⁵

We learn at least two things from this analysis of how the Constitution may address democratic and participatory ideals. First, the Constitution establishes a diverse democracy for the United States, not merely a system of vote-counting and majoritarian rule. This complex democracy balances majoritarian impulse and accountability with processes for deliberation, safeguards against arbitrariness, and opportunities for individual disaggregated participation. Where others rightly focus on separation of power, the way different players carry specific authority, whether through constitutional or sub-constitutional division,³³⁶ the view I present here adds meaningful democracy as a constraint, alongside separation of powers. Second, this “just right” democracy can explain the modern structure of the administrative state. We need not accept that “just right” democracy is the theoretically ideal democracy, only that it is the democracy embodied in the Constitution.

B. Majoritarianism, Deliberation, Reasoning, and Participation in Administration

The general structure of the administrative state is legitimate because it is a structure that mimics constitutional design. The Constitution demands majoritarian motivation and oversight; the administrative state is built by Congress and driven by the President. The Constitution demands deliberation; the administrative state, in its regulatory and adjudicatory functions, is rife with mandatory dialogue. The Constitution demands reason-giving, and few administrative actions can survive without articulate explanations. The Constitution demands deliberation to facilitate reasoning and participation. The administrative state welcomes engagement in substantively meaningful ways. Electoral administration, like Presidentialism, necessarily subverts all of this to some vision of majoritarian will.

This is not to say that the administrative state is perfect, just that it tracks with constitutional principles of legitimacy. There is room for improvement in administrative governance, particularly when the conversation moves beyond baseline legitimacy to broader efforts at advancing administration as a tool of lively,

³³⁵ *Id.* at 1547.

³³⁶ Michaels, *supra* note 267, at 533–34.

inclusive, and sustainable democracy.³³⁷ But even the flawed administrative framework of today offers plenty to praise.

The majoritarian direction and oversight of the administrative state come from two obvious constitutional mandates. Both Congress and the President are “constitutionally appointed monitors” of administrative agencies.³³⁸ Congress makes laws;³³⁹ the President makes appointments.³⁴⁰ The mission of federal agencies is to carry out the direction that Congress gives them through the law. Despite wide discretion on tools, strategies, and even specific goals, agencies may not, *sua sponte*, invent new powers.³⁴¹ Congress can structure the nuanced details of agency behavior, including specific scientific formulations³⁴² and regulatory timelines,³⁴³ and Congress can even create novel mechanisms to enforce its demands.³⁴⁴ Once Congress empowers an agency, the President oversees its operations. The President appoints agency leadership.³⁴⁵ And the President or the President’s appointees can remove high-level administrators at-will or according to congressional guidelines.³⁴⁶ In practice, presidential control goes even further. Presidents exert daily, direct influence over agencies through the agency budget-request process and through regulatory review from the Office of Management and Budget, which requires careful cost-benefit analysis for major rules.³⁴⁷ At the time of this writing, President

³³⁷ See, e.g., EMERSON, *supra* note 195; RICHARDSON, *supra* note 300.

³³⁸ MASHAW, *supra* note 12, at 86.

³³⁹ U.S. CONST. art. I.

³⁴⁰ *Id.* art. II, § 1.

³⁴¹ See, e.g., 5 U.S.C. § 706(2)(C) (2018) (granting courts the authority to overturn agency action that is not compliant with statutory commands).

³⁴² E.g., 16 U.S.C. § 1853 (2018) (describing requirements for “maximum sustainable yield” and “optimum yield” standards in fisheries management).

³⁴³ E.g., 42 U.S.C. § 7491(a)(2) (2018) (establishing a six-month timeline for action on Clean Air Act visibility standards).

³⁴⁴ E.g., *id.* § 7604 (authorizing citizen suits to enforce the Clean Air Act).

³⁴⁵ 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 51 (5th ed. 2009). See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

³⁴⁶ See, e.g., *Free Enter. Fund*, 561 U.S. 477.

³⁴⁷ MASHAW, *supra* note 12, at 92–93.

Trump is working to expand this measure of presidential, and therefore majoritarian, oversight over administrators.³⁴⁸

The notice-and-comment process of the Administrative Procedure Act is the clearest example of structured administrative deliberation. The notice-and-comment process requires that agencies give public notice of their proposed actions, receive public comment on those actions, engage with public input, and incorporate input into their final decision.³⁴⁹ This is all part of the run-up to administrative reasoning, but it has a stand-alone deliberative quality. In *United States v. Nova Scotia Food Products Corp.*, for instance, the Second Circuit held that the Food and Drug Administration's failure to disclose the scientific studies on which their rulemaking relied was a violation of the Administrative Procedure Act.³⁵⁰ The problem was not that the agency made a bad substantive decision, misread the science, or failed to explain itself, but that by not disclosing the studies on which it relied, the agency had not given the interested public a reasonable opportunity to engage in the policy deliberation.³⁵¹ "We can think of no sound reasons," the court wrote, "for secrecy or reluctance to expose to public view . . . the ingredients of the deliberative process."³⁵²

Closely related to deliberation is reason-giving, or its inverse, arbitrariness. Concern for reasonableness, of course, is explicit in the Administrative Procedure Act, which directs courts to overturn agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."³⁵³ Professor Mashaw identifies Judge Wilkie's opinion in *National Tire Dealers*³⁵⁴ as the epitome of this distinctive demand for reason-giving in the administrative state.³⁵⁵ The D.C. Circuit there threw out several National Highway Traffic Safety Administration

³⁴⁸ Memorandum from Acting Dir. Russell T. Vought, to the Heads of Exec. Dep'ts & Agencies on Guidance on Compliance with the Cong. Review Act (Apr. 11, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf>.

³⁴⁹ 5 U.S.C. § 553 (2018).

³⁵⁰ *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977).

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ 5 U.S.C. § 706(2)(A) (2018).

³⁵⁴ *Nat'l Tire Dealers & Retreaders Ass'n v. Brinegar*, 491 F.2d 31 (D.C. Cir. 1974).

³⁵⁵ MASHAW, *supra* note 12, at 3.

standards because the agency did not offer sufficient reasons for the standards.³⁵⁶ In addition to its new standards, the National Highway Traffic Safety Administration also reiterated standards that Congress had itself developed in the underlying statute.³⁵⁷ The court found that, even though Congress had given no reasons for its rules, “[it] must faithfully carry out the express mandate of Congress. No administrative procedure test applies to an act of Congress.”³⁵⁸ But applied to agencies, the test clearly demands reason.³⁵⁹

This same sentiment that agencies must give particularly systematic reasons is embodied in the “hard look” doctrine of judicial review, which the Supreme Court approved in *Motor Vehicle Manufacturers Association v. State Farm*.³⁶⁰ The Court held that “the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.”³⁶¹

In the June 2019 “census case,” the Court added to this aspect of reason-giving, demanding that the agency not only give reasons but give honest reasons. According to Chief Justice Roberts, for the majority, “the reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts *and the interested public*.”³⁶² Even more recently, in June 2020, Chief Justice Roberts, writing for the Court, again reiterated the importance of careful and genuine reason-giving. In *Department of Homeland Security v. Regents of the University of California*, the “DACA case,” the Court reinforced the longstanding rule that agencies must give contemporaneous reason for their actions, not “*post hoc* rationalizations.”³⁶³ Likewise, the Court explained that this procedural rule in

³⁵⁶ *Id.* (citing *Nat’l Tire Dealers & Retreaders Ass’n*, 491 F.2d at 37).

³⁵⁷ *Nat’l Tire Dealers & Retreaders Ass’n*, 491 F.2d at 37.

³⁵⁸ *Id.*

³⁵⁹ This administrative law demand for rationality provides the space for what Professor Walters calls “litigation-fostered bureaucratic autonomy.” Walters, *supra* note 315, at 130. Where lower-level administrators see lack of reasoning they can “reveal evidence of dissonance in the agency’s decisionmaking process” thereby teeing up issues for litigation. *Id.* at 131.

³⁶⁰ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

³⁶¹ *Id.* (internal quotation marks omitted).

³⁶² *Dep’t of Comm. v. New York*, 139 S. Ct. 2551, 2575–76 (2019) (emphasis added).

³⁶³ *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1908 (2020) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971)).

administrative law is not an “idle and useless formality.”³⁶⁴ Instead, procedural rules like the demand for contemporaneous reason-giving serve important values such as public engagement and deliberation.³⁶⁵ Reason-giving is the groundwork for democratic debate, without honest reasons, just as there is no basis for judicial review, there is no structure for democratic debate.

The final embodiment of robust constitutional democracy in the administrative state is the non-majoritarian, non-electoral, channel of individual participation. In an electoral framework, participation is aggregate only, and there are thresholds for who may become part of that aggregation, for example, minimum voting age³⁶⁶ or citizenship.³⁶⁷ Participation in administrative decisionmaking comes with no such thresholds, and it can be direct rather than aggregate. Direct participation comes in at least three prominent forms. There is the constitutional right to petition the government that creates low-cost and individual access to government.³⁶⁸ There is the notice-and-comment process of the Administrative Procedure Act, which welcomes all public input in the form of “written data, views, or arguments.”³⁶⁹ The Act also creates a statutory petition process by which “interested persons [have] the right to petition for the issuance, amendment, or repeal of a rule.”³⁷⁰ Finally, there is a broad scope of judicial review of agency action that provides for individual substantive input. Many substantive statutes provide causes of action under which an aggrieved person can petition for review of, for example, an agency rulemaking.³⁷¹ Where no such cause of action exists in the substantive statutes, the Administrative Procedure Act creates a fallback channel to the courts.³⁷² In each of these examples, the individual participation is, again, not limited by age, citizenship, or expertise. And yet, in each example, participation can have significant and direct

³⁶⁴ *Id.* at 16.

³⁶⁵ *Id.*

³⁶⁶ U.S. CONST. amend XXVI, § 1.

³⁶⁷ *Id.* art. IV, § 2; *id.* amend. XIV.

³⁶⁸ McKinley, *supra* note 195, at 1547.

³⁶⁹ 5 U.S.C. § 553(c) (2018).

³⁷⁰ *See id.* § 553(e).

³⁷¹ *E.g.*, 42 U.S.C. § 7607(b)(2) (2018) (creating a framework for appellate review of Environmental Protection Agency rules under the Clean Air Act); 15 U.S.C. § 78y(a)(1) (2018) (creating a framework for appellate review of Securities and Exchange Commission actions).

³⁷² 5 U.S.C. § 702 (2018).

consequences. Administrative petitions can force regulatory action.³⁷³ Commenters can change administrative direction.³⁷⁴ And even when comments do not do the trick, litigation can have a powerful impact.³⁷⁵ The power of participation in the administrative process is evident in, for instance, the environmental movement where there are far more advocacy groups focused on litigation and administrative engagement than voter mobilization.³⁷⁶

The Constitution assembles majoritarian and non-majoritarian structures to produce a robust democracy that includes political will, reason, deliberation, and non-majoritarian engagement. Taking these features together, it seems that one key feature of constitutional democracy is participation. Participation comes in the form of voting, but also in legal, technical, and equitable contributions. Individuals vote for representatives, senators, and (indirectly) the President. Individuals can litigate to demand government action or inaction comply with constitutional or statutory mandates. Individuals are invited to engage in administration through the notice-and-comment process that does not count votes but instead counts substantive, often technical, input. These features assure that people have the opportunity to “be present, not merely represented.”³⁷⁷ All of this led to Professor Blackhawk’s conclusion that we are looking not at the “administrative state,” but at the “participatory state.”³⁷⁸ The electoral and Presidentialist models both reflect the importance of participation, but they shunt much of it to votes.

C. *Comparing Models*

Participation has always been part of administration.³⁷⁹ As early as 1902, Congress directed USDA to consult with experts in a specific rulemaking process.³⁸⁰

³⁷³ *Massachusetts v. EPA*, 549 U.S. 497, 510 (2007).

³⁷⁴ *E.g.*, *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973) (reasoning that agencies must have the flexibility to change rules in response to public comments).

³⁷⁵ *E.g.*, *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977).

³⁷⁶ Joshua Ulan Galperin, *Board Rooms and Jail Cells: Assessing NGO Approaches to Private Environmental Governance*, 71 *ARK. L. REV.* 403 (2018).

³⁷⁷ DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* 242 (2008).

³⁷⁸ *E.g.*, McKinley, *supra* note 195.

³⁷⁹ *Id.*

³⁸⁰ FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 105 (1941) [hereinafter FINAL REPORT].

The 1946 Administrative Procedure Act famously established participation as a central component of rulemaking.³⁸¹ If participation was populist in the early republic, it was distinctly corporatist at mid-century, aimed at giving regulated industry access to their would-be regulators,³⁸² or even turning over regulatory authority directly to industry.³⁸³ When the rulemaking revolution arrived later in the century, there was renewed interest in making participation genuinely *public* and avoiding regulatory “capture” of agencies.³⁸⁴ In vogue from the 1980s through today, the Presidentialist model champions flattened participation only in the form of voting for the President.³⁸⁵

At present, we are left with two dominant participatory models in administration: the interest representation model (which I suggest we call the “information representation model” or even the “constitutional administration” model), which lives on from the statutes and administrative law doctrine of the late 20th Century and is the general form of administrative law described in the previous parts;³⁸⁶ and the Presidentialist model, which is rapidly gaining sway and dismantling the status quo.³⁸⁷ Electoral administration is hardly a dominant model, but uncovering it provides a helpful comparison. The comparison of interest representation, Presidentialism, and electoral administration brings into relief the distinct qualities of each form of participation by showing that participation has more variables than we typically consider. This comparison is detailed further in Table 1.

³⁸¹ 5 U.S.C. § 553(c) (2018).

³⁸² FINAL REPORT, *supra* note 380, at 105.

³⁸³ Whitman, *supra* note 132, at 749–50.

³⁸⁴ Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 381 (1972).

³⁸⁵ Calabresi, *supra* note 9, at 59.

³⁸⁶ Stewart, *supra* note 14, at 1670.

³⁸⁷ Calabresi, *supra* note 9, at 59.

Table 1: Comparing the Different Qualities of Participation Between Different Models of Administration

	Electoral Admin.	Presidentialism	Info. Representation
Scope: Breadth of public invited to participate.	<u>Narrow.</u> Only farmers participating in federal programs may vote and serve.	<u>Broad.</u> The entire electorate is eligible to vote in presidential elections.	<u>Broad.</u> Participation welcome beyond electorate, including those ineligible to vote, may, at minimum, comment in rulemaking.
Content/Depth: Nature of invited participation.	<u>Deep.</u> Voting and direct administration.	<u>Shallow.</u> Voting only.	<u>Deep.</u> Substantive technical/factual and legal input.
Barriers: Procedural hurdles to participation.	<u>High.</u> Participation limited to select farmers based on government benefits and location.	<u>Low.</u> Must be eligible to vote in the presidential election.	<u>Low.</u> Input must be substantively valuable or legally effective to be impactful but basic participation is easy and even available online.
Proximity: Space between participatory action & administrative action.	<u>Direct.</u> Direct election of administrators and the opportunity to serve.	<u>Indirect.</u> Wide gap between voting and administration includes presidential election, a presidential appointment, presidential direction, etc.	<u>Direct.</u> All participants can comment directly on rulemaking. If properly situated, engage in adjudication and initiate a judicial review.

	Electoral Admin.	Presidentialism	Info. Representation
Impact Potential: Possibility that participation will influence administrative action.	<u>High.</u> Few candidates and voters, paired with local scope, allows the possibility of significant influence.	<u>Low.</u> Only aggregate votes influence administrative direction.	<u>High.</u> Although the majority is non-substantive, substantive comments can have meaningful influence; litigation can have a direct impact.
Costs to Participants: Expense associated with meaningful engagement.	<u>High.</u> Low cost for voting, but a higher cost for gathering candidate info than normal elections. The cost of time and energy for serving is high.	<u>Low.</u> Low to no costs for voting.	<u>High.</u> Expenses associated with research, expertise, and especially judicial engagement are extremely high.
Costs to Government: Expense of operating the participatory system.	<u>High.</u> High cost of maintaining thousands of committees with staff and running thousands of elections.	<u>Low.</u> No added cost over regular elections.	<u>High.</u> High cost of adjudications and RM and especially judicial review.
Transparency: Clarity to participants on the role & effect of their participation.	<u>Medium.</u> Purpose not clear because elections imply political discretion, but only statutory discretion exists.	<u>Low.</u> Presidential voting bundles together more issues than a single voter can realistically parse and prioritize.	<u>High.</u> Though some commenters misunderstand substantive (not vote counting) nature of comments, other (cont'd)

	Electoral Admin.	Presidentialism	Info. Representation
			participants have a clear understanding. The goal of participation, to influence rulemaking, is clear.
Deliberation: Space for explicit policy consideration and dialogue.	<u>High.</u> Local and esoteric nature plus a limited number of participants allows for robust deliberation.	<u>Low.</u> Votes only, the administration is packaged with broader political issues, no designed deliberation.	<u>High.</u> APA and judicial review structure mandate procedures aimed at deliberation.

The interest representation model relies on a robust but costly form of engagement built on interaction, technical comments, and the possibility of litigation. Though barriers to entry, such as submitting comments, are low, the barriers to meaningful participation, that is, changing policy, are high. But once crossed, the effort can be wildly fruitful. With substantial technical expertise, a participant can have a meaningful impact on administration. This model is uniquely public because the opportunity is open to anybody, even more than the opportunity to vote, although the cost for effective participation is higher. But given that the currency of this participation is substance and expertise, it might better be called the “information representation model.”³⁸⁸ Alternatively, it could equally be called the constitutional administration model because it so encompasses the participatory, reason-giving, deliberative, and electoral pillars of the Constitution.

³⁸⁸ This term reflects both a pro and a con of the modern administrative state. Information representation creates important and comparatively powerful and democratic opportunities. But these opportunities are rooted, ultimately, in information, not moral and ethical claims or collective decisionmaking without a priori demands about the variables that may hold sway within that decisionmaking. Although this has much to recommend it, it falls short of the higher aspirations to which—although outside the scope of this Article—some scholars (probably myself included) hold the administrative state. *See, e.g.*, EMERSON, *supra* note 195; *see also* K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2017).

The Presidentialist model relies on slender but broadly accessible participation, voting in presidential elections. Voting does not provide the means of direct interaction as in the information/interest representation model, and as it is based on vote aggregation, it does not present opportunities for an individual to have direct influence over administration. However, the cost of participation is negligible, and regardless of expertise or resources, each person has the same formal role in electing the President to control the administration.

The electoral model, at least as it is visible in the farmer committees, offers something different still. Participation is open to a limited group, farmers only. On the one hand, the formal nature of participation is voting, just as in Presidentialism, though the voting is limited to a smaller band of policy issues. On the other hand, there is an opportunity to become an administrator, not just to influence an administrator. However one slices this, the impact of participation is higher than Presidentialism because even in voting, the cabined issue-scope will provide for clearer policy signals. As compared to the information representation model, *being* an administrator is likely more impactful than *informing* an administrator, but voting for an administrator does not compare as clearly. Of course, participation as an administrator also comes with a very high investment of time.

Recognizing that different models provide different qualities of participation, if participation is indeed an important aspect of administrative legitimacy, one must ask how either electoral administration or Presidentialism can compete with the constitutional information representation model. The information representation model welcomes political input—that is, input without reason-giving—through various mechanisms of presidential control, from appointment (and often removal) of administrators to presidential directives and through initial congressional delegation and appropriations. The information representation model further welcomes substantive technical input, rationality, and demands deliberation through, for example, the notice-and-comment process. The electoral and Presidentialist models do not necessarily refuse rationality and deliberation, but both claim to trump reason-giving and deliberation with political will. At the very least, electoral administration may not claim to trump other modes of participation, but if elected administrators are not free to exercise their political will, one wonders whether the election has any meaning.

Of course, the ancient knowledge that has renewed political salience today is that unbridled majoritarianism, electoral or Presidentialist, can lead to hateful

populism, which tramples the individual rights of those not part of the majority.³⁸⁹ Over generations that majoritarianism can create such structural injustices—as it has against Black people in America, in farm country and everywhere else—that the injustice becomes durable even in a more enlightened political process.³⁹⁰ Majoritarianism can also let those in the victorious majority punish political rivals without reason or deliberation.³⁹¹ When judicial supervision worries largely about election victories, there is too little recourse.

The Constitution generates existential legitimacy for the coercive authority of government by cobbling together multiple qualities of participation. The administrative state should not be faulted for doing exactly the same thing. It is imperfect and should live up to higher aspirations that may require significant reforms, but it demonstrates value and offers promise, perhaps more than any other features of the federal government. The goal of administrative law should be to build up a multi-faceted, complex, participatory structure rather than one that promises to tidy up democracy with easy answers and facile promises of shallow plebiscites.

VI. CONCLUSION: AGAINST EASY ANSWERS

Administrative governance has claims to legitimacy that go well beyond majoritarianism. And it is a good thing that the majoritarian claim does not stand alone because the impending death of electoral administration betrays the hollowness of mere vote counting. Susan Rose-Ackerman and Lena Riemer recently wrote that “mechanical efforts to justify controversial policies by reference to the chain of legitimacy are inadequate.”³⁹² Essentialist claims of legitimacy may be easy and

³⁸⁹ E.g., Sarah Rapucci, *The Leaderless Struggle for Democracy*, 31 J. DEMOCRACY 137, 137 (2020), <https://muse.jhu.edu/article/753200/pdf>.

³⁹⁰ See, e.g., Curtis Milam, *How I Learned to Relax and Love Donald Trump*, THE PHILA. INQUIRER, June 23, 2020, <https://www.inquirer.com/opinion/commentary/donald-trump-revolution-uprising-election-2020-20200623.html> (“We fought a civil war to end slavery but failed in its aftermath to establish the more perfect union mentioned by our Founders. What we are seeing in our current moment is not only a race war but a class war. America must confront systemic racism to move forward, but it also must acknowledge that we have created a permanent underclass of all colors (though mostly black and brown).”)

³⁹¹ E.g., Christine Wilkie, *Trump says coronavirus ‘bailouts’ for blue states are unfair to Republicans*, CNBC.COM (May 5, 2020), <https://www.cnbc.com/2020/05/05/coronavirus-trump-says-blue-state-bailouts-unfair-to-republicans.html>.

³⁹² Susan Rose-Ackerman & Lena Riemer, *Strengthening Democracy Through Public Participation in Policymaking: The EU, Germany, and the United States*, YALE J. ON REG. (May 6, 2019), <http://yalejreg.com/nc/strengthening-democracy-through-public-participation-in-policymaking-the-eu-germany-and-the-united-states-by-susan-rose-ackerman-lena-riemer/>.

appealing, but they are, as Rose-Ackerman and Riemer say, inadequate because they do not force meaningful consideration. Easy answers of this nature, in the words of Doug Kysar, “prove[] disruptive to the project of reasoning through certain daunting collective issues.”³⁹³ By demonstrating the problem of electoral administration and remarking on what the weakness of electoral administration says about other majoritarian strategies in the administrative state, the goal of this Article is to use the unlikely case study of elected bureaucrats to support the more complex view of democracy. Participatory, deliberative, rational, and electoral strands of democracy all work together to maintain a constitutionally sound government.

But there can be no doubt that welcoming multiple, sometimes competing, justifications depart from the parsimony of simple majoritarianism. Perhaps, however, a simple and efficient account is actually a disservice to democracy for those very reasons. Perhaps when we offer easy answers, we lull democracy into a sense of inevitability. We prefer that the easy answer is the right answer, and any debate becomes a zero-sum endeavor. Inevitability breeds laziness in lieu of consideration, and zero-sum conditions breed antagonism in lieu of collaboration. To paraphrase Alf Ross, to invoke voting, and voting alone, is equivalent to banging on the table.³⁹⁴ Without more, it is an emotional appeal and a claim to victory without debate. Or, to instead paraphrase Jerome Frank, relying on a formal but simplistic rule of majoritarianism is akin to the father gently promising his children security, and we the children accept that authority because we crave the easy assurance.³⁹⁵

It is finally time for an extended sports comparison. An effective taunt in competitive sports is for a player who is ahead in the game to point at the scoreboard to show that what really matters, the score, is on her side.³⁹⁶ The braggadocio aims to put an end to another conflict in the game, perhaps a questionable call by the referee. In sports judged by final scores, the scoreboard point is a powerful argument. As long as all that matters is the final score. In a constitutional democracy, the final score is definitively not all that matters. The majority preference, the winner of an election, has significant authority based on that victory. But the essential role of a

³⁹³ KYSAR, *supra* note 377, at 15.

³⁹⁴ See ALF ROSS, ON LAW AND JUSTICE 364 (Jacob v. H. Holtermann ed., Uta Bindreiter trans., Oxford 2019) (1953).

³⁹⁵ See JEROME FRANK, LAW AND THE MODERN MIND (1930).

³⁹⁶ *E.g.*, Harry Lyles, Jr., *Kyrie Irving Taunted Isaiah Thomas by Pointing to the Scoreboard in Game 1*, SBNATION (May 17, 2017), <https://www.sbnation.com/2017/5/17/15656646/kyrie-irving-isaiah-thomas-trash-talk-point-scoreboard-cavs-celtics>; Adam Gretz, *Vinny Prospal Gets 10-Minute Misconduct for Scoreboard Point*, CBS SPORTS (Mar. 9, 2013), <https://www.cbssports.com/nhl/news/vinny-prospal-gets-10-minute-misconduct-for-scoreboard-point/>.

written constitution is to explain what is necessary beyond winning votes. Pointing to the electoral scoreboard simply is not enough.

Electoral administration emerged in the New Deal agriculture programs because Congress and the administration were searching for ways to avoid confronting the most difficult challenges in agriculture policy. Rather than facing racist and classist social structures, failing economic models, and ideological dissent, electoral administration was, at least in part, a strategy to cover up these challenges by turning them over to “the people.” What could be simpler, more honorable, and less ideologically controversial? This ploy worked insofar as Congress and the Roosevelt administration advanced their policy. If there was a concern, they could point to the scoreboard. But they avoided solving many larger problems, and today we continue to wrestle with racism in farm governance,³⁹⁷ floundering farm economies,³⁹⁸ and ideological objection to farm programs.³⁹⁹ I can hardly suggest that a different policy approach would have solved any of these problems, but an approach that admitted the problems were intricate and required a purposeful attitude grounded more in problem-solving than problem-avoidance might have spurred a public conversation about substantive solutions.⁴⁰⁰

More general in scope, Presidentialism suffers from the same flaw of hiding complexity in soothing promises or competitive taunts. Where farm controversy was simplified to “let the farmer decide,” Presidentialism goes further. Whether it is food and agriculture, environmental protection, immigration, or corporate accounting, whatever the complexity, Presidentialism resolves that complexity into a melodious tonic: “The President, the people, accountability.” That is too simple. It smothers debate.⁴⁰¹ As a process for resolving conflicts, the law should welcome debate where it is warranted. The participatory constitutional system of individuality, deliberation,

³⁹⁷ Nathan Rosenberg & Bryce Wilson Stucki, *How USDA Distorted Data to Conceal Decades of Discrimination Against Black Farmers*, COUNTER (June 26, 2019), <https://newfoodeconomy.org/usda-black-farmers-discrimination-tom-vilsack-reparations-civil-rights/>.

³⁹⁸ Mary Kay Thatcher, *Farm States Slammed by Double Whammy of US-China Trade War and Immigration Woes*, CNBC (July 10, 2019), <https://www.cnbc.com/2019/07/10/farm-states-slammed-by-us-china-trade-war-and-immigration-woes.html>.

³⁹⁹ Molly Ball, *How Republicans Lost the Farm*, ATLANTIC (Jan. 27, 2014), <https://www.theatlantic.com/politics/archive/2014/01/how-republicans-lost-the-farm/283349/>.

⁴⁰⁰ Joshua Galperin, Graham Downey & D. Lee Miller, *Eating Is not Political Action*, 13 J. FOOD L. & POL'Y 113, 118, 124 (2017).

⁴⁰¹ See, e.g., EMERSON, *supra* note 195, at 183 (“Politics in such a situation becomes a winner-take-all phenomenon. It becomes a clash of ideologies represented by heroic figures, rather than a considered and constructive debate between representatives in whom we invest provisional confidence.”).

reasoning, and voting is a system that embraces debate and a template for administrative governance.