

## DISCOUNTING ACCOUNTABILITY

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*Several of the Supreme Court's most controversial constitutional doctrines hinge on claims about electoral accountability. Restrictions on the President's power to remove agency heads are disfavored because they reduce the President's accountability for agency actions. Congress cannot delegate certain decisions to agencies because then Congress is less accountable for those choices. State governments cannot be federally commandeered because such conscription lessens their accountability. And campaign spending must be unregulated so that more information reaches voters and helps them to reward or punish incumbents for their performances.*

*There is just one problem with these claims. They are wrong—at least for the most part. To illustrate their error, I identify four conditions that must be satisfied in order for incumbents to be held accountable. Voters must (1) know about incumbents' records; (2) form judgments about them; (3) attribute responsibility for them; and (4) cast ballots based on these judgments and attributions. I then present extensive empirical evidence showing that these conditions typically are not met in the circumstances contemplated by the Court. The crux of the problem is that voters are less informed than the Court supposes, more likely to be biased by their partisan affiliations, and less apt to vote retrospectively than in some other way. Accountability thus does not rise in response to the Court's interventions—at least not much.*

*The qualifiers, though, are important. If the Court's claims are mostly wrong, then they are partly right. If accountability does not rise much due to the Court's efforts, then it does go up a bit. These points are established by the same studies that document the general inadequacy of the Court's reasoning. With respect to certain voters in certain settings, accountability is influenced by presidential control over agencies, congressional delegation to agencies, federal commandeering of state governments, and regulation of campaign spending. That is why this Article discounts accountability but not does reject it altogether.*

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## INTRODUCTION

Say (not implausibly) that a natural disaster strikes and the Federal Emergency Management Agency responds poorly to it. FEMA is an executive agency whose head may be removed by the President at her discretion.<sup>1</sup> At the next election, does this feature of FEMA's mean that voters will punish the President more harshly for the agency's performance than if it were an independent body more insulated from presidential control? In other words, is the President more electorally accountable for the actions of an agency over which she exercises more authority?

Now assume (a bit less accurately) that Congress previously delegated to FEMA the power to respond to disasters as the agency sees fit.<sup>2</sup> Thanks to this delegation, Congress need not take any new steps when the present calamity arises. Instead, it may sit back and allow FEMA to lead the relief effort. At the next election, will voters be more apt to support members of Congress than if they had needed to address the emergency themselves (stipulating legislative ineptitude equal to the agency's)? That is, does Congress reduce its electoral

<sup>1</sup> See *About the Agency*, FEMA, <http://www.fema.gov/about-agency>.

<sup>2</sup> This assumption is imperfect because FEMA was created by an executive order in 1979, not by an explicit delegation of congressional power. See *id.* However, Congress did provide the agency with statutory authority—and establish the current cooperative federalist approach to emergency relief—in the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, 102 Stat. 4689 (1988).

accountability by delegating authority in earlier periods and so avoiding difficult decisions in later ones?

A third scenario: Under current law, state governments are the front-line responders to disasters. It is up to them whether to deal with crises on their own or to request a federal declaration that paves the way for federal assistance.<sup>3</sup> They cannot be commandeered into carrying out a federal relief program against their will. If state politicians bungle the situation, then, does their autonomy mean they will incur worse consequences at the polls than if they *had* been dragooned by the feds? Does the ban on commandeering increase their electoral accountability?

And a fourth case: At present, campaign spending is unrestricted in all American elections.<sup>4</sup> There is no limit on the amount of money that may be used to convey to voters unattractive aspects of incumbents' records—such as their flawed responses to disasters. Do these unchecked outlays cause incumbents to pay a steeper price for poor performance than if the river of money (and information) did not gush as freely? Does campaign finance deregulation improve electoral accountability?

The Supreme Court gives the same answer to all of these questions: *yes*. Yes, the President is more accountable for the actions of agencies whose heads she may remove at will.<sup>5</sup> Yes, Congress is less accountable when it farms out important decisions to agencies.<sup>6</sup> Yes, state governments are more accountable when they are not pressed into service by their federal overseers.<sup>7</sup> And yes, incumbents at all levels are more accountable when campaign spending is legally unbound.<sup>8</sup>

What is more, the Court's accountability claims are no casual asides. Rather, they are pillars of some of the most consequential holdings of all of constitutional law. The President's (allegedly) enhanced accountability for agencies with easily discarded heads helps explain why limits on her removal power are disfavored.<sup>9</sup> Congress's (supposedly) lessened accountability when it assigns significant matters to agencies is one of the justifications for the nondelegation doctrine.<sup>10</sup>

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<sup>3</sup> See 42 U.S.C. § 5170 (providing that “[a]ll requests for a declaration by the President that a major disaster exists shall be made by the Governor of the affected State”).

<sup>4</sup> See *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (finding “no basis for allowing the Government to limit . . . independent expenditures”).

<sup>5</sup> See, e.g., *Free Enter. Fund v. Pub. Co. Account. Oversight Bd.*, 561 U.S. 477, 498 (2010) (holding that a limit on the President's removal power “subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts”); see also Part II.A, *infra*.

<sup>6</sup> See, e.g., *Ind. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment) (“When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress . . . .”); see also Part II.B, *infra*. This answer is phrased differently than the others (Congress is *less* accountable when it *delegates*, not *more* accountable when it does *not*) because of the desuetude of the nondelegation doctrine. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (quipping that the doctrine “has had one good year, and 211 bad ones”).

<sup>7</sup> See, e.g., *New York v. United States*, 505 U.S. 144, 168 (1992) (“[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.”); see also Part II.C, *infra*.

<sup>8</sup> See, e.g., *Citizens United*, 558 U.S. at 339 (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”); see also Part II.D, *infra*.

<sup>9</sup> See *supra* note 5.

<sup>10</sup> See *supra* note 6.

That state governments are (ostensibly) more accountable when they are not federally conscripted partly accounts for the prohibition of commandeering.<sup>11</sup> And that incumbents are (purportedly) more accountable when campaign spending is unfettered is one reason why expenditure restrictions are unlawful.<sup>12</sup>

As the parentheticals hint, this Article's thesis is that the Court's accountability claims are wrong—at least for the most part. In recent years, there has been an outpouring of political science scholarship on the causes of electoral accountability. This literature is largely inconsistent with the Court's assertions. It suggests that accountability does not budge, at least not much, in response to factors as fine as presidential removal authority, congressional delegation, federal commandeering, and campaign finance regulation. But the caveats—for the most part, largely, at least not much—are noteworthy too. There *is* a grain of truth in the Court's analysis, though only in certain unusual circumstances. That is why this Article *discounts* accountability but not does reject it altogether.

Before delving into the political scientists' findings, a working definition of electoral accountability is essential. It is voters rewarding (by voting for) elected officials for good decisions and outcomes, and punishing (by voting against) them for bad ones. So conceived, electoral accountability operates through the mechanism of *retrospective voting*, that is, voting on the basis of incumbents' past records. Retrospective voting, in turn, occurs only if four conditions are met: (1) voters *know* about these records; (2) voters *form judgments* about them; (3) voters *attribute responsibility* for them; and (4) voters cast ballots *based* on these judgments and attributions.<sup>13</sup>

Of course, not all accountability is electoral. Within hierarchical organizations we find *managerial* accountability: subordinates being rewarded by their supervisors for good decisions and outcomes, and punished for bad ones. In many contexts there is also *legal* accountability: the judicial system's imposition of penalties for violations of the law. More colloquially, people are *personally* accountable to their friends and loved ones, *ethically* accountable to themselves, and so on. But while they are undeniably important, I bracket these other types of accountability here. They are not the types about which the Court has made strong claims in the course of mandating controversial policies. There are therefore not my present concern.<sup>14</sup>

Similarly, not all voting is retrospective. One alternative, in fact, is its exact opposite: *prospective* voting based on candidates' expected *future* behavior. Another option is *spatial* voting for candidates whose policy positions are closer to the voter's. Still other possibilities include voting on the basis of candidates' partisan affiliations, demographic traits, or valence qualities. And this is not a pick-one game; voters can (and do) vote on multiple grounds simultaneously.<sup>15</sup>

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<sup>11</sup> See *supra* note 7.

<sup>12</sup> See *supra* note 8.

<sup>13</sup> See *infra* Part I.A.

<sup>14</sup> See *infra* Part I.B.

<sup>15</sup> See *infra* Part I.C.

Unlike the other kinds of accountability, I do not bracket these rival modes of voting. Their existence is actually an essential reason why the Court's claims fall flat. If voters are not voting retrospectively to begin with, then electoral accountability cannot be improved by requiring or forbidding certain institutional arrangements. So what have political scientists concluded about how voters make up their minds? At the presidential level, some retrospective voting *does* take place—but based on coarse-grained factors like the state of the economy, not subtler points like specific agency actions. Moreover, in direct comparative tests, retrospective voting is dominated by prospective, spatial, partisan, and demographic voting.<sup>16</sup>

At the congressional level, retrospective economic voting is even less prevalent, and the vast majority of members' votes carry no electoral consequences. Meanwhile, a non-congressional variable—the President's approval rating—emerges as a potent driver of vote choice. Congressional elections are thus partly *second-order*: races shaped by developments at other governmental levels.<sup>17</sup> As for the states, their elections are not just somewhat but rather primarily second-order affairs. State legislative results correlate nearly perfectly with national trends, while scholars debate whether governors' economic and fiscal records in any way affect their showings at the polls.<sup>18</sup>

This evidence relates to the fourth condition for retrospective voting: whether voters cast ballots based on their judgments of, and attributions for, past decisions and outcomes. The answer is no, or more precisely, not to a significant extent. Other studies shed light on the first condition: whether voters even know about the decisions and outcomes in the first place. Here too the empirical verdict is negative, revealing another reason why the Court's accountability claims are implausible. Voters simply are not informed enough about agency actions, Congress members' positions, or state government policies to vote on their basis.

A half-century of survey research documents Americans' startling ignorance of officeholders' records. Most respondents cannot name a single bill their congressional representatives have supported or opposed over the past few years. Their awareness of agency regulations and state legislative enactments, which typically attract less media coverage, is even scander. And their lack of knowledge of individual decisions is not offset by familiarity with the decisions' overall effects. Large fractions of respondents hold inaccurate views of economic growth, the unemployment rate, the budget deficit, and a host of other indicators.<sup>19</sup>

Turning to the second condition for retrospective voting—whether voters are able to form judgments about policies and their consequences—the literature points to a superficially optimistic but ultimately gloomy conclusion. The good news is that voters are willing to offer assessments of all sorts of issues. The

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<sup>16</sup> See *infra* Part III.A. I note that, to save space and avoid repetition, I do not provide citations here for my summary of the political science literature on accountability. The relevant citations are supplied—in abundance—in Part III, *infra*.

<sup>17</sup> See *infra* Part III.B.

<sup>18</sup> See *infra* Part III.C.

<sup>19</sup> See *infra* Parts III.A-C.

trouble is that these assessments are weakly tethered to objective reality and heavily swayed by voters' partisan affiliations. Democratic voters tend to approve of Democratic officeholders' records (even when poor) and to frown on those of Republican incumbents (even when strong). Republican voters exhibit the opposite pattern. As a result, the policy appraisals on which retrospective voting depends are distorted. Incumbents are not punished by their co-partisans even when they should be, nor rewarded by the opposing party's supporters even when they deserve it.<sup>20</sup>

This leaves the third condition: whether voters are able to attribute responsibility correctly to elected officials. Most of the Court's accountability claims involve this condition; their premise is that voters make better attributions when the President has more control over agencies, Congress delegates fewer decisions, and state governments are more autonomous. But for a pair of reasons that should already be unsurprising, this premise is flawed. First, most voters know little about which institution is in charge of which policy. Only about half of the public can identify the majority party in Congress, and this proportion drops further for state legislatures. Much of the public also believes the President is responsible for events that are outside her ambit: congressional gridlock, national economic trends, natural disasters, and the like.<sup>21</sup>

Second, voters' attributions are biased by their partisan affiliations. When conditions are good, they tend to give credit to their own party. When circumstances are direr, they usually deem it the other party's fault. Who is thought to be in charge is therefore highly variable, shifting in response to policy assessments (themselves driven by partisanship) and configurations of party control. In combination, these arguments pull the rug from under the Court's claims. Accountability cannot rise much due to greater presidential authority, less congressional delegation, or more state governmental independence, because these factors are dwarfed by voters' ignorance of institutional duties and readiness to adjust their attributions on partisan grounds. The Court assumes a level of sophistication and impartiality on the part of voters that they mostly fail to meet.<sup>22</sup>

The Court also errs in its assertions about campaign finance regulation, though for different reasons that relate jointly to all four conditions for retrospective voting. Here the problem is that while regulation may reduce total outlays, and so the information available to voters about candidates' records, it also makes elections more competitive, thus *increasing* accountability. Why does regulation lead to more competitive elections? Because it typically constrains incumbents more than challengers, shrinking the former's spending advantage and, along with it, their margin of victory. And why does more intense competition result in greater accountability? Both because incumbents are more likely to lose in closer races and, intriguingly, because voters become better informed and more apt to vote retrospectively as elections grow more

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<sup>20</sup> See *infra* Parts III.A-C.

<sup>21</sup> See *infra* Parts III.A-C.

<sup>22</sup> See *infra* Parts III.A-C.

unpredictable. Put these findings together and the Court has it exactly backward. It is the *imposition* of campaign finance limits, not their removal, that makes incumbents more accountable to the electorate.<sup>23</sup>

By this point, a reader may be forgiven for wondering why this Article insists on discounting—but not rejecting—accountability. What is left to salvage in the Court’s claims? In fact, they may have some validity, at least for certain voters in certain situations. Their outright disavowal is therefore premature. Start with the President’s power to remove agency heads. Recent studies find that voters attribute more responsibility to the President when they learn from the media that she has more sway over an agency. Of course, many voters fail to receive this information, and even those that do may cast their ballots on other grounds. Nevertheless, one of the conditions for retrospective voting is more likely to be satisfied under the Court’s preferred institutional arrangement.<sup>24</sup>

Likewise, other work shows that while members of Congress face no electoral consequences for most of their votes, some of their stances do matter at the polls. This suggests that if the nondelegation doctrine were enforced, obliging Congress to tackle issues it currently assigns to agencies, members would be held accountable for at least a few of their extra decisions.<sup>25</sup> Additionally, even though most voters cannot say which level of government is responsible for which policy, better educated voters sometimes possess this knowledge. This informed minority can reward or punish state officeholders for decisions that were, in fact, theirs to make.<sup>26</sup> Lastly, one major category of campaign finance regulation—the banning of “soft money” donations to political parties—does reduce competition, and with it, accountability. Parties channel most of their soft money to challengers, so when this spigot is turned off, incumbents can breathe a bit easier.<sup>27</sup>

But these are all silver linings on a dark cloud. The Court’s accountability claims are much more wrong than right, which raises the question of *why* the Court’s assertions are so inaccurate. The most sympathetic explanation is that the Court wishes to promote accountability because it (justifiably) considers it a vital democratic value. The Court then latches onto the forces under its control that seem most apt to improve accountability, most of which involve the relations between governmental institutions. But these forces are not actually as potent as the Court thinks. *Fundamental* institutional decisions—whether to separate powers or fuse them, or whether to create a unitary or federal system—indeed have dramatic implications for accountability. These kinds of choices, though, are not within the Court’s jurisdiction, and nor are the key *non*-institutional drivers of accountability: voters’ knowledge, partisanship, and mode of voting. At their core, these are matters of voter psychology, not constitutional law.<sup>28</sup>

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<sup>23</sup> See *infra* Part III.D.

<sup>24</sup> See *infra* Part III.A.

<sup>25</sup> See *infra* Part III.B.

<sup>26</sup> See *infra* Part III.C.

<sup>27</sup> See *infra* Part III.D.

<sup>28</sup> See *infra* Part IV.A.

This is not to say the Court could not advance accountability more adeptly than it has to date. For one thing, it could temper its hostility toward campaign finance regulation, which unlike the policies the Court *believes* make incumbents more accountable, demonstrably does so. For another, the Court could disrupt the many anticompetitive practices that dot American elections: bipartisan gerrymanders that insulate both parties' incumbents from serious challenges, ballot access rules that make it difficult for third parties to vie for office, nonpartisan races that deprive voters of their most useful cue, and so on. These examples hint that the Court's project might be more successful if it shifted foci from institutional relations to the fostering of competition. Most aspects of governmental structure do not move the accountability needle, while electoral dynamism both has an impact and can be enhanced by the Court.<sup>29</sup>

More drastic measures are possible as well. One understandable response to the Court's mistakes is to argue that it should get out of the functionalism game altogether. If it cannot predict with any certainty whether its chosen democratic value will be furthered by its intervention, perhaps it simply should not intervene on this basis. Perhaps, that is, it should stick to more conventional modalities: text, history, precedent, and the like. A different response, to which I am more partial, is to suggest that the problem might be with the *particular* value endorsed by the Court. *Other* values, like participation, deliberation, or congruence with voters' preferences, might be more amenable to judicial cultivation.<sup>30</sup> If this is the case, then there is no need for the Court to abandon its democratic mission. The mission just needs to be revised to be more feasible.<sup>31</sup>

The Article takes the following route. First, in Part I, I elaborate on the concept of accountability. I identify the elements that are necessary for retrospective voting to occur, and contrast electoral accountability and retrospective voting with their alternatives. Next, in Part II, I explicate the Court's accountability claims. They involve the President's power to remove agency heads, Congress's delegation to agencies, the federal commandeering of state governments, and the regulation of campaign spending. Part III is then the Article's empirical core. In it, I present the political science evidence that rebuts the Court's assertions, proceeding in order through all four conditions for retrospective voting. I also highlight the minority of studies that lend some tentative support to the Court's analysis. Finally, in Part IV, I address some of the intriguing issues implicated by the preceding discussion: why the Court errs so profoundly, how the Court could promote accountability more effectively, and whether the Court should intervene on other, more defensible grounds.

I also note at the outset that I am not the first to notice—or even to criticize—the Court's accountability claims. Several other scholars have done so,

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<sup>29</sup> See *infra* Part IV.B.

<sup>30</sup> For an article-length defense of judicial intervention based on congruence with the median voter's preferences, see Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283 (2014).

<sup>31</sup> See *infra* Part IV.C.

typically asserting that accountability is an unappealing value<sup>32</sup> or that it cannot be achieved through elections.<sup>33</sup> My contributions, then, are to reveal the full range of the Court's claims, to parse retrospective voting into its constituent elements, to shift the conversation from normative argument to empirical assessment, and to advance a more nuanced thesis, skeptical but not wholly dismissive of the Court's reasoning. These are significant points that have been overlooked by the existing literature.

## I. THE CONCEPT OF ACCOUNTABILITY

Jerry Mashaw has described accountability as “a protean concept, a placeholder for multiple contemporary anxieties.”<sup>34</sup> Similarly, Jane Schacter has observed that “[a]ccountability is . . . strikingly undertheorized” and implored “scholars [to] focus more precisely on the meaning of accountability.”<sup>35</sup> I concur both that accountability is often conflated with other ideas and that it is important to define it as carefully as possible. In this Part, I therefore concentrate on definitional matters, reserving my critique of the Court's accountability claims for the balance of the Article.

I begin by specifying the electoral form of accountability that is my subject here. Electoral accountability exists when voters reward elected officials for good records by voting for them, and punish officials for bad records by voting against them. It relies on the mechanism of retrospective voting, which in turn makes a series of demands of voters: that they know about incumbents' records, that they form judgments about these records, that they attribute responsibility for the records, and that they vote based on these judgments and attributions. Next, I compare electoral accountability to other variants—managerial, legal, professional, and so on—that are beyond this Article's scope. Lastly, I distinguish retrospective voting from other ways in which voters may choose to cast their ballots: prospectively, spatially, demographically, and the like. These other voting modes are very much this Article's business because, to the extent they are employed, retrospective voting is not.

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<sup>32</sup> See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003); Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998).

<sup>33</sup> See, e.g., Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073 (2005); Jane S. Schacter, *Political Accountability, Proxy Accountability, and the Democratic Legitimacy of Legislatures*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 45 (Richard W. Bauman & Tsvi Kahan eds., 2006); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253 (2009).

<sup>34</sup> Jerry Louis Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in *PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES* 115, 115 (Michael W. Dowdle ed., 2006).

<sup>35</sup> Jane S. Schacter, *Accounting for Accountability in Dynamic Statutory Interpretation and Beyond* 2-3, *ISSUES IN LEG. SCHOLARSHIP* (2002); see also, e.g., RICHARD MULGAN, *HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES* 5 (2003) (describing accountability as “highly controversial,” “the subject of considerable political conflict,” and “unclear and contested”); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1180 (2000) (“Commentators uniformly praise [accountability]. Unfortunately, it is not exactly clear what they are praising.”).

### A. Retrospective Voting

Accountability is, at its core, a *relational* concept. It contemplates two parties, one of whom acts on the other's behalf.<sup>36</sup> It also requires that the party on whose behalf the other party acts be able to *reward* that party for good performance and *punish* it for bad performance. In this way, the acting party can be held accountable for its actions by the party for whom the actions are taken. As James Fearon has put it, "We say that one person, A, is accountable to another, B, if two conditions are met. First, there is an understanding that A is obliged to act in some way on behalf of B. Second, B is empowered . . . to sanction or reward A for her activities or performance in this capacity."<sup>37</sup>

With this general definition in mind, it is easy to identify the distinctive aspects of *electoral* accountability. *Voters* are the ones on whose behalf actions are taken. *Elected officials* are the ones who take these actions. And the *ballot* is the indispensable tool that voters use to hold officeholders accountable. Voters vote *for* incumbents whose records they approve of, and *against* incumbents whose records they dislike.<sup>38</sup>

In the literature on electoral accountability, voters are typically thought to hold elected officials accountable for overall policy outcomes: poverty or prosperity, crime or safety, war or peace, and so on.<sup>39</sup> But there is no reason why officeholders cannot also be held accountable for their specific policy stances—or for anything else, for that matter. Voters are sovereign actors, and it is their

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<sup>36</sup> These parties can be specified in economic terms: the *principal* on whose behalf the *agent* acts. See, e.g., Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEG. ANALYSIS 185, 185-86 (2014). But see Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 32 (2005) (pointing out some limits of the principal-agent model when applied to political representation).

<sup>37</sup> James D. Fearon, *Electoral Accountability and the Control of Politicians: Selecting Good Types Versus Sanctoining Poor Performance*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 55, 55 (Adam Przeworski et al. eds., 1999); see also, e.g., Rubin, *supra* note 33, at 2073 ("Accountability can be roughly defined as the ability of one actor . . . to reward or punish [a] second actor on the basis of its performance or its explanation."). Other scholars define accountability in more elaborate terms, highlighting each aspect of the relationship between the parties. See, e.g., ROBERT D. BEHN, RETHINKING DEMOCRATIC ACCOUNTABILITY 62-63 (2001); Mashaw, *supra* note 34, at 118 (considering "*who* is liable or accountable *to whom*; *what* they are liable to be called to account for; *through what processes* accountability is to be assured; *by what standards* the putatively accountable behavior is to be judged; and, what the potential *effects* are of finding that those standards have been breached").

<sup>38</sup> For similar conceptions of electoral accountability, see Bernard Manin et al., *Elections and Representation*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION, *supra* note 37, at 40 ("Governments are 'accountable' if voters can discern whether governments are acting in their interest and sanction them appropriately, so that those incumbents who act in the best interest of citizens win reelection and those who do not lose them."), and David Samuels, *Presidentialism and Accountability for the Economy in Comparative Perspective*, 98 AM. POL. SCI. REV. 425, 426 (2004) ("[E]lectoral accountability occurs because voters retrospectively judge whether governments have acted in their best interests and then reward or sanction them appropriately.").

<sup>39</sup> See, e.g., MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS 8 (1981) ("The traditional theory of retrospective voting implicitly assumes that citizens are more concerned about actual outcomes than about the particular means of achieving those outcomes, that citizens care about *results* rather than the *policies* that produce those results . . .").

prerogative to appraise incumbents' records as they wish.<sup>40</sup> The literature also tends to stress voting to the exclusion of all other steps that voters might take.<sup>41</sup> But while the ballot is the essential device through which voters reward or punish elected officials, voter *approval* serves a similar function in periods before and after elections. Officeholders with high approval ratings usually govern more effectively than their less popular peers.<sup>42</sup>

Its proponents deem electoral accountability to be desirable for two complementary reasons. First, it enables voters to oust elected officials who have performed poorly. The quality of governance presumably improves when these officials are removed from office.<sup>43</sup> Second, it incentivizes incumbents to produce strong records so they will *not* lose their reelection bids. Incumbents know they will be judged based on how they have done, and thus are motivated to do well. This motivation, of course, is exactly what voters want from their representatives.<sup>44</sup>

Scholars frequently confuse electoral accountability with other democratic values,<sup>45</sup> but their meanings are distinct. For instance, accountability is not synonymous with the holding of free and fair elections. If voters do not vote retrospectively, then these elections do not result in accountability. Likewise, elected officials can be accountable to voters without being responsive to their preferences. This situation arises if voters do vote retrospectively—but based on criteria other than whether their representatives share their views.<sup>46</sup>

As this discussion suggests, retrospective voting is the crucial prerequisite for electoral accountability.<sup>47</sup> Retrospective voting is simply voting based on the records accrued by incumbents while in office. If these records are strong, voters

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<sup>40</sup> See, e.g., Paul M. Sniderman et al., *Information and Electoral Choice*, in INFORMATION AND DEMOCRATIC PROCESSES 117, 118 (John A. Ferejohn & James H. Kuklinski eds., 1990) (“Voters may focus on many or few aspects of the incumbent’s record, interpreting the notion of a record broadly or narrowly.”).

<sup>41</sup> See, e.g., Michael S. Lewis-Beck, *Does Economics Still Matter? Econometrics and the Vote*, 68 J. POL. 208, 208 (2006) (commenting that while “[i]n this literature, there are two standard dependent variables, popularity or vote,” “vote is generally preferred because . . . [it] is the ‘ultimate dependent variable in our theoretical scheme’”).

<sup>42</sup> See, e.g., Jeffrey E. Cohen & James D. King, *Relative Unemployment and Gubernatorial Popularity*, 66 J. POL. 1267, 1267 (2004) (“Job approval also provides a mechanism for the public to hold [officeholders] accountable.”). Strictly speaking, accountability through voter approval is not *electoral* accountability since it does not rely on the ballot.

<sup>43</sup> See, e.g., Eric Maskin & Jean Tirole, *The Politician and the Judge: Accountability in Government*, 94 AM. ECON. REV. 1034, 1049 (2004) (observing that electoral accountability “allows voters to remove officials whose interests appear to be noncongruent with the electorate”).

<sup>44</sup> See, e.g., Gersen & Stephenson, *supra* note 36, at 189 (“[B]ecause an incumbent agent knows that her principals will assess her fitness for continuation in office (or other rewards) based on her performance, she will make better choices than she would otherwise.”).

<sup>45</sup> See, e.g., Brown, *supra* note 32, at 533 (conflating “political accountability” with “the requirement that public officials stand periodically for election”); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 615 (2002) (conflating “accountability” with “responsiveness”); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 65 (2008) (treating “the closely related concepts of political accountability and political representativeness as synonymous”).

<sup>46</sup> See, e.g., Stephanopoulos, *supra* note 30, at 322 n.160 (“[V]oters may well want to hold representatives accountable for more than their voting records. Constituent service, seniority, good character, and many other factors also may play into voters’ decisions.”).

<sup>47</sup> See, e.g., Seok-Ju Cho, *Retrospective Voting and Political Representation*, 53 AM. J. POL. SCI. 276, 276 (2009) (“The classic idea of accountability is related to retrospective voting: voters reject a badly behaved incumbent and retain a well-behaved one.”).

cast their ballots for the incumbents; if they are weak, voters throw their support to the challengers.<sup>48</sup> Retrospective voting, in turn, occurs only if four conditions are satisfied. These conditions are necessary and sufficient, meaning that if they are present, retrospective voting and electoral accountability ensue, but if they are absent, these values cannot be realized.<sup>49</sup>

First, voters must *know* about incumbents' records while in office. (Again, records can mean overall policy outcomes, specific policy stances, or any other aspects of prior performance that voters deem relevant.<sup>50</sup>) Retrospective knowledge is what makes retrospective voting possible in the first place; without it, voters lack the necessary information to cast their ballots based on past developments.<sup>51</sup> And *actual* knowledge is generally required, not mere reliance on informational cues or shortcuts.<sup>52</sup> Partisan affiliation, for example, is a valuable prompt for other types of voting, but it tells voters little about what incumbents have done. Likewise, interest group endorsements can substitute for actual knowledge only to the extent they are based on prior events rather than prospective factors.

Second, voters must *form judgments* about officeholders' records. In other words, they must appraise the records and decide whether, in their view, the records are strong or weak. This appraisal is ultimately subjective, as there is no intrinsically right or wrong way to evaluate officeholders' performances. However, the more detached the appraisal is from objective indicators, the more erratic (and the less attractive) retrospective voting becomes. In the extreme case, if voters' assessments are entirely unrelated to real-world evidence, this evidence loses its ability to drive voters' decisions.<sup>53</sup>

Third, voters must *attribute responsibility* for the records. That is, they must determine whom to credit or blame for the performances they have observed and appraised. Accurate attribution is easy when the records at issue are incumbents' own policy stances. Plainly, incumbents are responsible for the positions they have chosen to take. But correct attribution is more difficult when the relevant records are overall policy outcomes. In this case, voters must decide how much

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<sup>48</sup> See, e.g., FIORINA, *supra* note 39, at 6-11; James E. Campbell et al., *The Theory of Conditional Retrospective Voting: Does the Presidential Record Matter Less in Open-Seat Elections?*, 72 J. POL. 1083, 1083 (2010) ("The theory of retrospective voting is that voters base their votes on their perceptions of the past performance of the parties and candidates in governing.").

<sup>49</sup> For similar lists of conditions for retrospective voting, see Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1300 (2004), and Staszewski, *supra* note 33, at 1266.

<sup>50</sup> See *supra* notes 39-40 and accompanying text.

<sup>51</sup> See, e.g., Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 CARDOZO L. REV. 871, 924 (1999) ("Before the public can hold elected representatives responsible for decisions, they must know the substance of the policy adopted . . .").

<sup>52</sup> See, e.g., Somin, *supra* note 49, at 1320 ("[I]nformation shortcuts, while certainly useful, cannot provide an adequate substitute for basic factual knowledge about politics.").

<sup>53</sup> See, e.g., Christopher J. Anderson, *The End of Economic Voting? Contingency Dilemmas and the Limits of Democratic Accountability*, 10 ANN. REV. POL. SCI. 271, 279 (2006) (observing that in most models of retrospective voting, "the translation process requires that this objective economy is perceived by voters and perceived somewhat accurately").

credit or blame each elected official is due for conditions that are partly the government's doing and partly the product of many other factors.<sup>54</sup>

And fourth, voters must actually vote *on the basis* of their judgments and attributions. They must support officeholders whom they credit for outcomes they regard as good, and oppose officeholders whom they blame for results they see as bad. Similarly, they must vote for incumbents whose policy stances they favor, and against incumbents whose positions they dislike. Only in this way do the earlier stages in the causal sequence ultimately bear fruit. If voters take the trouble to learn, to appraise, and to attribute—but then cast their ballots on other grounds—there is no retrospective voting, and hence no electoral accountability.<sup>55</sup>

As this analysis is fairly abstract, a graphical illustration may be helpful. Take the state of the economy, which is by far the most studied variable in the accountability literature. Assume also that voters (1) are accurately informed about this state; (2) assess the state reasonably (so that a good economy produces a good evaluation and vice versa); (3) attribute responsibility for the state to the President; and (4) vote on this basis. Then, as shown in Figure 1, Scenario 1, there is a strong and steeply sloped relationship between voters' appraisal of the economy and the probability they will vote for the President. This relationship reveals that the President is highly accountable for the economy's condition. When it is weak, voters are much less likely to vote for her. But when it is strong, she is much more apt to win their support.

Now assume that while voters still know about the economy's state and assess it reasonably, they attribute responsibility for it to the vagaries of the stock market, not the President. (This means the third condition for retrospective voting is not satisfied, but the point holds no matter which criterion is unmet.) In this case, displayed in Figure 1, Scenario 2, there is a weak and flat relationship between voters' appraisal of the economy and the probability they will vote for the President. This link indicates that the President is mostly *unaccountable* for the economy's condition. As it varies from weak to strong, voters become only slightly more likely to cast their ballots for her.

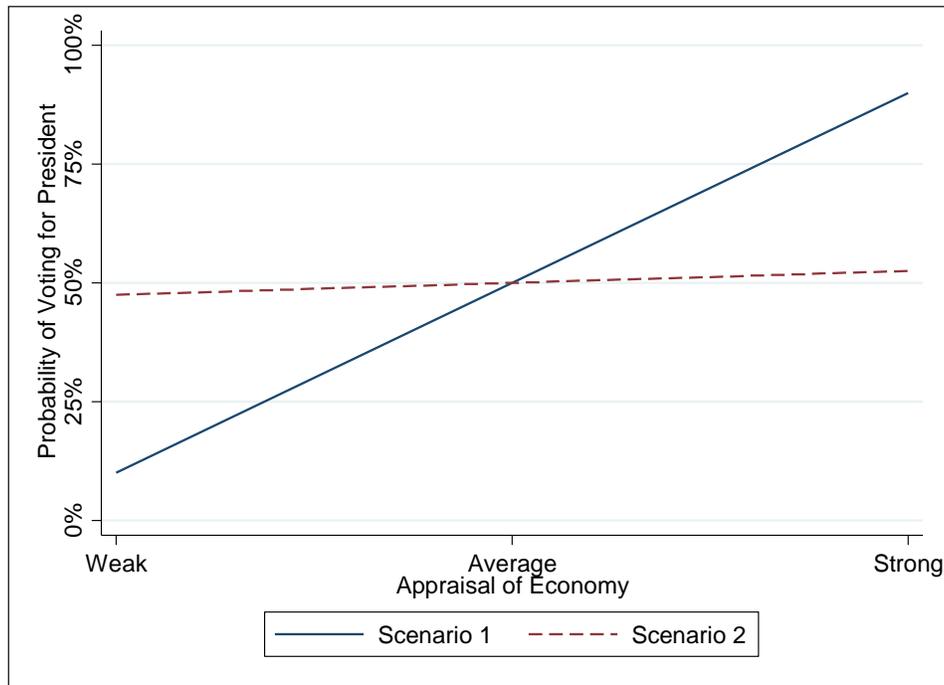
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<sup>54</sup> See, e.g., Thomas J. Rudolph, *The Meaning and Measurement of Responsibility Attributions*, 44 AM. POL. RESEARCH 106, 107 (2016) (explaining that “attributional judgments in politics are comprised of two complementary but distinct considerations,” namely “how much responsibility does an actor or institution bear for a particular outcome,” and “[h]ow much responsibility does an actor bear . . . compared with other relevant actors”). Note that by requiring *reasonable* evaluations of incumbents' records and *accurate* attributions of responsibility for them, I am articulating requirements for a normatively appealing form of retrospective voting. A distorted form of retrospective voting occurs if voters unreasonably assess incumbents' records or incorrectly assign responsibility for them.

<sup>55</sup> See, e.g., Anderson, *supra* note 53, at 279 (pointing out that “[t]he next step in the chain of necessary events,” “that these evaluations translate into a vote for or against the government,” is not always satisfied). My inclusion of this fourth condition means I am deliberating conflating the *possibility* of accountability (captured by the first three conditions) with its *reality*. Officeholders *may* be held accountable if the first three conditions are satisfied, while they *are* held accountable if the fourth condition is met as well. Though the Supreme Court's language is hard to parse, see *infra* Part II, it is plausible that some of its claims involve *potential* rather than *actual* accountability. To the extent the claims are construed this way, only evidence about the first three conditions is relevant to them. It is immaterial, on this account, whether voters *in fact* choose to vote retrospectively and thus to hold officeholders to account.

Figure 1 can be generalized beyond this example, of course. The y-axis can represent any kind of support that voters might give to incumbents: not just their votes but also their dollars, their time, or their positive responses to opinion surveys.<sup>56</sup> Likewise, the x-axis can capture voters' evaluations of any aspects of incumbents' records, or even the records themselves. And the curves that plot the relationships between voters' support and their evaluations can depict the impact of almost anything on accountability: levels of voter knowledge, types of institutional arrangements, modes of voting, and so on. Again, a steeper slope is the telltale sign of higher accountability, while a flatter line denotes the opposite.<sup>57</sup>

FIGURE 1: PRESIDENTIAL ACCOUNTABILITY FOR THE ECONOMY



<sup>56</sup> And even with respect to votes, the y-axis can represent voters' own voting intentions, the incumbent party's vote share, that party's seat share, or whether that party remains in control of the government. See David Samuels & Timothy Hellwig, *Elections and Accountability for the Economy: A Conceptual and Empirical Reassessment*, 20 J. ELECTIONS, PUB. OPINION & PARTIES 393, 396 (2010) (pointing out "the range of observable measures of electoral accountability").

<sup>57</sup> In slightly more technical terms, suppose we are interested in determining the effect of some variable on accountability. The key is to *interact* this variable with voters' evaluations, in a model in which voters' support is the dependent variable. The coefficient of the interaction term then reveals the variable's impact on accountability. See, e.g., Robert Johns, *Credit Where It's Due? Valence Politics, Attributions of Responsibility, and Multi-Level Elections*, 33 POL. BEHAVIOR 53, 68 (2011) (commenting that "[t]his is the stock approach to inferring the relevance of an issue in vote choice").

### B. Other Forms of Accountability

Some of these extensions of Figure 1 start to implicate non-electoral forms of accountability. For instance, voters' *approval* of officeholders is closely related to their *voting* for officeholders, but it is not the same thing. Voters can express approval (or disapproval) at any time, not just when an election is held. Voters' sentiments also have less drastic consequences for incumbents than actual election results. The former merely enhance or undermine incumbents' effectiveness, while the latter either keep them in office or oust them from it.<sup>58</sup>

Other voter actions that reward (or punish) officeholders, like contributing (or not contributing) money to them or joining (or not joining) their campaigns, are even further removed from the ballot. Crucially, *all* voters vote, by definition, and can express their feelings in surveys, but only a small subset donate their funds or time to candidates.<sup>59</sup> Nevertheless, it is perfectly coherent to speak of incumbents' accountability to donors or to activists. These are simply non-electoral kinds of accountability, through acts other than voting, to certain groups of voters rather than the electorate as a whole.<sup>60</sup>

Many elected officials are also accountable to other politicians. Within parties' legislative caucuses, in particular, rank-and-file members are rewarded by their leadership for good behavior (like toeing the party line) and punished for bad conduct (like undercutting party unity) through committee assignments, campaign contributions, and other tools.<sup>61</sup> This sort of *managerial* accountability is even more important for unelected public officials—that is, bureaucrats. Bureaucracies are hierarchical organizations in which inferiors are accountable in many ways to their superiors for their records. Supervisors can praise or criticize their subordinates, give them better or worse work, promote or demote them, and so on. As Edward Rubin has observed, this is a much richer array of accountability devices than the ballot to which voters are limited.<sup>62</sup>

Still another variant worth noting is *legal* accountability. This is the accountability of officeholders (and everybody else) not to a concrete counterparty but rather to the law itself. Officeholders (and all other persons) are subject to fines, imprisonment, and other penalties when they transgress legal norms. In the words of Ruth Grant and Robert Keohane, “agents [must] abide by

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<sup>58</sup> See, e.g., Samuels & Hellwig, *supra* note 56, at 395 (noting that “[p]oliticians might take note of the general thrust of voters’ expressed opinion, but they also might ignore these signals altogether”).

<sup>59</sup> For a discussion of the unrepresentativeness of campaign donors, see Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1474-75 (2015).

<sup>60</sup> See, e.g. Schacter, *supra* note 35, at 10 (discussing officeholders’ accountability to groups that can offer “substantial campaign contributions . . . and other political resources”).

<sup>61</sup> See, e.g., Mashaw, *supra* note 34, at 121 (observing that “political accountability includes . . . a host of other political processes in which elected officials hold their fellows . . . accountable for their actions based on essentially political criteria”).

<sup>62</sup> See Rubin, *supra* note 33, at 2134 (discussing “how fully the concept of accountability is tied into an administrative hierarchy and requires the sort of continuous, intensive interaction between superior and subordinate that is characteristic of this hierarchy”); see also, e.g., BERNARD ROSEN, *HOLDING GOVERNMENT BUREAUCRACIES ACCOUNTABLE* 209 (3d ed. 1998) (covering “an awesome armada of politics, mechanisms, and processes for overseeing government bureaucracies”).

formal rules and be prepared to justify their actions in those terms, in courts or quasi-judicial arenas.”<sup>63</sup>

More could be said about these non-electoral types of accountability, which raise many interesting issues. But I flag these types only to bracket them. Almost all of the Supreme Court’s claims involve accountability via voting rather than through any other mechanism.<sup>64</sup> I therefore turn next from alternatives to electoral accountability to alternatives to retrospective voting. These other voting modes are highly relevant here because the more they are used, the less persuasive the Court’s claims become.

### C. Other Forms of Voting

*Prospective* voting—voting based on candidates’ expected *future* records<sup>65</sup>—is the obvious antithesis of retrospective voting. Prospective voting differs starkly from retrospective voting in its orientation toward the future rather than the past. More subtly, it differs in the demands it makes of voters. It requires them to assess *all* candidates, not just the incumbent, before choosing for whom to cast their ballots.<sup>66</sup> These contrasts, though, should not be overstated. As Morris Fiorina has explained, voters’ evaluations of incumbents’ past records are key drivers of their expectations of incumbents’ future performances.<sup>67</sup> Prospective voting is thus intertwined, at least partly, with retrospective voting.

Closely tied to prospective voting is *spatial* voting, or voting for the most ideologically proximate candidate. To vote in this way, a voter must first ascertain her own ideology as well as those of all candidates in the race, typically on a single left-right continuum. The voter must then vote for the candidate who is ideologically closest to her own position. Spatial voting resembles prospective voting in its future orientation and consideration of all candidates. It is distinct, though, in its exclusive focus on ideological distance. This may be *one* of the factors that a prospective voter takes into account, but it is the entirety of the decision-making process for a spatial voter.<sup>68</sup>

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<sup>63</sup> Grant & Keohane, *supra* note 36, at 36; *see also, e.g.*, Helene V. Smookler, *Accountability of Public Officials in the United States*, in PUBLIC SERVICE ACCOUNTABILITY: A COMPARATIVE PERSPECTIVE 39, 41 (Joseph G. Jabbara & O.P. Dwivedi eds., 1988) (“[A]gencies are also legally accountable to the courts for the administrative observance of statutes and constitutionally granted rights and liberties . . .”).

<sup>64</sup> A handful of Court decisions address inter-branch rather than electoral accountability. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731, 773 (1982) (discussing impeachment as a form of “accountability to the other branches”); INS v. Chadha, 462 U.S. 919, 968 (1981) (White, J., dissenting) (discussing the legislative veto as a tool through which “Congress secures the accountability of executive and independent agencies”).

<sup>65</sup> As in the retrospective voting context, records can refer to overall policy outcomes, specific policy stances, or any other aspects of candidate performance that voters deem relevant. *See supra* notes 39-40 and accompanying text.

<sup>66</sup> *See, e.g.*, Campbell, *supra* note 48, at 1083 (“Unlike prospective voting, which requires the electorate to know, evaluate, and contrast the sometimes complex or ambiguous positions of the parties and candidates, retrospective voting requires relatively little of voters.”).

<sup>67</sup> *See* FIORINA, *supra* note 39, at 200 (“Retrospective judgments have direct impacts on the formation of future expectations and on party identification, and through these factors, indirect influences on the vote.”).

<sup>68</sup> For illuminating discussions of spatial voting, *see* Stephen A. Jessee, *Spatial Voting in the 2004 Presidential Election*, 103 AM. POL. SCI. REV. 59, 59-63 (2009), and Boris Shor & Jon C. Rogowski, *Congressional Voting by Spatial Reasoning, 2000-2010*, at 1-6 (Oct. 11, 2012).

Another, even simpler approach in the same family is *partisan* voting, or voting for the candidate who shares the voter's partisan affiliation. This approach, the so-called "Michigan model" of voting, is based on the centrality of partisanship for many voters.<sup>69</sup> Partisanship, on this account, is the "unmoved mover" that enables voters to make sense of a complicated political world and to feel as if they are part of a political team.<sup>70</sup> To be sure, Michigan modelers acknowledge that partisan affiliation can change over time as voters update their "running tally" of parties' successes and failures.<sup>71</sup> Nevertheless, these scholars view partisan affiliation as a highly durable attribute that, in most circumstances, translates directly into votes.

Still another mode of voting might be termed *demographic*: voting for the candidate who shares the voter's race, ethnicity, gender, or other defining characteristic. Demographic voting underpins the Supreme Court's case law construing the Voting Rights Act; it must be shown, for both minority and majority voters, to establish a violation of the Act.<sup>72</sup> In the Court's view, demographic voting is also quite common: "Because both minority and majority voters often select members of their own race as their preferred representatives, it will frequently be the case that a black candidate is the choice of blacks, while a white candidate is the choice of whites."<sup>73</sup>

A final option is *valence* voting based on candidate qualities that are intrinsically appealing but unrelated to public policy. These valence qualities include good looks, charisma, a winning personality, and the like. When voters cast their ballots in reliance on these qualities, they disregard ideological and partisan factors. Instead, their choices are driven by the degree to which candidates exhibit personal traits that voters find attractive.<sup>74</sup>

Again, the key point about these voting modes is that they are fundamentally different from retrospective voting based on incumbents' records. When voters vote in these ways, their attention is *not* on the past alone and extends to *all* candidates in the race. Arguments built on the assumption of retrospective voting thus founder to the extent this premise fails to capture actual voter behavior. It should also be stressed that the voting modes are not exclusive. That is, voters do not vote in one way, in perfect consistency with a single theory of voting, but rather for a messy mix of reasons that stem from multiple models at once.<sup>75</sup> It is

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<sup>69</sup> The definitive work setting forth this approach remains ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* (unabr. ed. 1980).

<sup>70</sup> MICHAEL S. LEWIS-BECK ET AL., *THE AMERICAN VOTER REVISITED* 134-36 (2008).

<sup>71</sup> FIORINA, *supra* note 39, at 84.

<sup>72</sup> See *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986) (requiring showings that "the minority group . . . is politically cohesive" and that "the white majority votes sufficiently as a bloc").

<sup>73</sup> *Id.* at 68. In the political science literature, the canonical work on demographic voting, which gave rise to the so-called "Columbia model," is PAUL F. LAZARSFELD ET AL., *THE PEOPLE'S CHOICE: HOW THE VOTER MAKES UP HIS MIND IN A PRESIDENTIAL CAMPAIGN* (2d ed. 1948).

<sup>74</sup> For a good discussion of valence voting, distinguishing between "character valence" and "campaign valence" traits, see Walter J. Stone & Elizabeth N. Simas, *Candidate Valence and Ideological Positions in U.S. House Elections*, 54 AM. J. POL. SCI. 371, 371-74 (2010).

<sup>75</sup> See, e.g., Schacter, *supra* note 35, at 14 (doubting that "we could persuasively conceive of elections as all selection or all sanction" and suggesting that "[p]erhaps some combination of selection and sanction characterize most elections").

therefore unlikely that retrospective voting plays *no* role in voters' decision-making. Instead, the crucial question is *how much* of a role it plays—how its influence compares to those of other forms of voting. That is one of the issues I address below in the Article's empirical section.<sup>76</sup>

## II. ACCOUNTABILITY ACCORDING TO THE COURT

Before getting to the empirics, though, I pinpoint the claims about electoral accountability made by the Supreme Court. These claims involve four distinct issues: (1) the President's degree of control over administrative agencies; (2) the degree of congressional delegation to agencies; (3) the extent to which state governments are commandeered by the federal government; and (4) the amount of money in politics. The first three of the claims apply primarily to the third condition for retrospective voting: voters' *attribution of responsibility* for incumbents' records. In contrast, the campaign finance claim relates mostly to the first condition: voters' *knowledge* of these records.

I note that I consider accountability claims in opinions both by Court majorities and by individual Justices (though I prioritize the former over the latter). I also note that I cover only what I deem to be the most common accountability claims in the case law.<sup>77</sup> I do *not* comment on certain one-off arguments made by individual Justices,<sup>78</sup> nor do I evaluate assertions that particular doctrinal rules are required by particular actors' greater or lesser accountability.<sup>79</sup> A last proviso: In all of the cases I examine, the Court justifies its conclusions partly on the basis of its accountability claims and partly on other grounds. These other grounds are beyond the scope of this project, and so are omitted from the discussion that follows.

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<sup>76</sup> See *infra* Part III.

<sup>77</sup> My sense of these claims is shared by other scholars. See, e.g., Gersen & Stephenson, *supra* note 36, at 1 (“The concept of political accountability plays a particularly central role in administrative law, the constitutional law of the separation of powers, and the law of democracy.”).

<sup>78</sup> See, e.g., *Dept. of Transp. v. Ass'n of Am. Rrs.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring) (claiming that accountability is diminished “by passing off a Government operation [Amtrak] as an independent private concern”); *Vieth v. Jubelirer*, 541 U.S. 267, 361 (2004) (Breyer, J., dissenting) (claiming that accountability is diminished when, due to partisan gerrymandering, “voters find it far more difficult to remove those responsible for a government they do not want”); *Branti v. Finkel*, 445 U.S. 507, 531 (1980) (Powell, J., dissenting) (claiming that accountability is diminished when political patronage is prohibited because its ban weakens parties and so “limits the ability of the electorate to choose wisely among candidates”).

<sup>79</sup> See, e.g., *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 865 (1984) (justifying judicial deference to agency interpretations of ambiguous statutes on the ground that “[w]hile agencies are not directly accountable to the people, the Chief Executive is”); *Motor Vehicle Manufrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (justifying judicial deference to changes in agency policies on the ground that “people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations”). These are assertions about what doctrinal consequences should follow *if* certain actors are more or less accountable. They are *not* claims about what increases or decreases accountability in the first place.

### A. *The President*

Beginning with the President, the Court contends that she is more electorally accountable for an agency's actions when she exercises more control over the agency. The removal power—the President's authority to dismiss an agency official—is the principal method of control addressed by the Court's decisions. The same logic, though, applies to other means of control such as the appointment power (the President's authority to select agency staff)<sup>80</sup> and the directive power (the President's authority to instruct them what to do).<sup>81</sup> Under this logic, restrictions on the President's control over an agency are disfavored because they reduce the President's accountability for the agency's actions. In fact, such restrictions are sometimes unconstitutional, a violation of the democratic principles embodied in the separation of powers.

The Court articulated this claim most clearly in the 2010 case of *Free Enterprise Fund v. Public Company Accounting Oversight Board*.<sup>82</sup> At issue was a two-level protection from removal for the members of the Board, an entity created by the Sarbanes-Oxley Act of 2002. The Board members could be dismissed only for good cause by the Securities and Exchange Commission, and the Commissioners, in turn, could be dismissed only for good cause by the President. Two layers of removal restrictions thus separated the President from the Board members.<sup>83</sup>

According to the Court, this arrangement unlawfully eroded the President's accountability for the Board's actions. The dual removal restraints broke the “clear and effective chain of command” and the “‘chain of dependence’” on which voters rely to “‘determine on whom the blame or the punishment [for] a pernicious measure . . . ought really to fall.’”<sup>84</sup> The restraints therefore “subvert[ed] . . . the public's ability to pass judgment on [the President's] efforts” and rendered the President “not . . . fully accountable for discharging his own responsibilities.”<sup>85</sup> Now “the buck would stop somewhere else,” “‘greatly diminish[ing] the intended and necessary responsibility of the chief magistrate.’”<sup>86</sup>

Justice Scalia made the same argument in his renowned 1988 dissent in *Morrison v. Olson*.<sup>87</sup> He commented that, ordinarily, when the President can dismiss federal prosecutors at will, “the President pays the cost in political

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<sup>80</sup> See, e.g., *Freytag v. C.I.R.*, 501 U.S. 868, 921 (1991) (Scalia, J., concurring in part and concurring in the judgment) (observing that if the President “has no control over the appointment of inferior officers,” she “may have less incentive to care about such appointments”).

<sup>81</sup> See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2299 (2001) (noting that President Clinton's more extensive use of the directive power changed “norms of accountability”).

<sup>82</sup> 561 U.S. 477 (2010).

<sup>83</sup> See *id.* at 484-87.

<sup>84</sup> *Id.* at 498; see also *Myers v. United States*, 272 U.S. 52, 131-32 (1926) (also discussing this “‘chain of dependence’” and asking, if the President cannot remove a subordinate at will, “where is the responsibility?”).

<sup>85</sup> *Free Enterprise Fund*, 561 U.S. at 498, 514.

<sup>86</sup> *Id.* at 514.

<sup>87</sup> 487 U.S. 654 (1988).

damage to his administration” if prosecutors abuse their authority.<sup>88</sup> “[T]he unfairness” of the prosecutors’ conduct “will come home to roost in the Oval Office.”<sup>89</sup> However, a provision limiting to good cause the Attorney General’s ability to remove an independent counsel meant that “a process is set in motion that is *not* in the full control of persons ‘dependent on the people,’ and whose flaws cannot be blamed on the President.”<sup>90</sup> “[E]ven if it were entirely evident” that the counsel had behaved badly, “there would be no one accountable to the public to whom the blame could be assigned.”<sup>91</sup>

More implicitly, in cases not involving restrictions on the President’s removal power, Justices have assumed that the President wields more (less) control over executive (independent) agencies, and so is more (less) accountable for their actions. In a 1991 case, the Court stated that “Cabinet-level departments” are “subject to the exercise of political oversight” by the President, and thus “share the President’s accountability to the people.”<sup>92</sup> In a 2000 case, similarly, Justice Breyer wrote that “politically elected officials . . . must (and will)” be held “politically accountable” for “important, conspicuous, and controversial” decisions by the Food and Drug Administration (an executive agency).<sup>93</sup> Conversely, Justice Breyer asserted in 2009 that the Federal Communications Commission (an independent agency) is “insulate[d] . . . from ‘the exercise of political oversight,’” is “not directly responsible to the voters,” and so possesses a “comparative freedom from ballot-box control.”<sup>94</sup> Likewise, Justice Scalia opined in 1991 that the “congressional restriction upon arbitrary dismissal of the heads of [independent] agencies” makes “such agencies less accountable to [the President], and hence he less responsible for them.”<sup>95</sup>

This claim, that the President’s accountability for an agency’s actions stems from her control over the agency, is based on voters’ attributions of responsibility. The idea is that the more control the President *actually* has over an agency, the more control she is *perceived* as having. Voters therefore become more likely to credit the President for agency actions they support, and to blame her for agency actions they oppose, as her sway over the agency rises. In contrast, voters are less apt to see the President as responsible for the policies of an agency that is further outside her influence. As Alex Ruder has summarized the argument, “presidential control over agencies promotes the value of greater political accountability by increasing institutional clarity of responsibility.”<sup>96</sup>

<sup>88</sup> *Id.* at 729 (Scalia, J., dissenting).

<sup>89</sup> *Id.*; see also *id.* at 729, 731 (stating that “[t]he people know whom to blame” and “the blame can be assigned to someone who can be punished” when prosecutors are removable at will by the President).

<sup>90</sup> *Id.* at 729.

<sup>91</sup> *Id.* at 731 (italics omitted).

<sup>92</sup> *Freytag v. C.I.R.*, 501 U.S. 868, 886 (1991).

<sup>93</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 190 (2000) (Breyer, J., dissenting).

<sup>94</sup> *FCC v. Fox*, 556 U.S. 502, 547 (2009) (Breyer, J., dissenting).

<sup>95</sup> *Freytag*, 501 U.S. at 921 (Scalia, J., concurring in part and concurring in the judgment).

<sup>96</sup> Alex I. Ruder, *Institutional Design and the Attribution of Presidential Control: Insulating the President from Blame*, 9 Q.J. POL. SCI. 301, 331 (2014); see also, e.g., Kagan, *supra* note 81, at 2323 n.306 (“[I]f the President can remove an official, the public will hold him accountable for that official’s decisions.”); Edward H. Stiglitz, *Unitary Innovations and Political Accountability*, 99 CORNELL L. REV. 1133, 1149 (2014) (“[A] unitary

But while the third condition for retrospective voting is the one most directly implicated here, it is important to recognize that the Court's claim also depends on the satisfaction of the other criteria. The President cannot be held accountable for agency actions that voters do not know about. Nor can she be held accountable for actions as to which voters have reached no normative judgments. And nor is there presidential accountability if voters ultimately cast their ballots on grounds other than their judgments of, and attributions for, agency policies. These are simply the implications of the retrospective voting conditions being necessary and sufficient. If any of them is unmet, voters do not vote retrospectively and the President is neither rewarded nor punished for agency performance.<sup>97</sup>

It is also necessary to acknowledge that the Court sometimes phrases its claim in a subtly—but substantively—different way. Under this variant, the point is not that greater presidential control over an agency produces greater presidential accountability. Rather, it is that because the President is elected by voters, and thus accountable to them, she should have plenary authority over the entire executive branch.<sup>98</sup> Stated like this, the argument is above all one about democratic legitimacy, not about the drivers of presidential accountability. In this form, the argument also cannot be empirically validated or refuted; plainly, the President *is* elected, agency officials are *not*, and certain normative conclusions may or may not follow from these facts.<sup>99</sup> Because my subject here is the empirical (not the normative) soundness of the Court's reasoning, I do not further discuss this version of the claim. Its cogency does not hinge on any of the political science evidence I present below.

## B. Congress

Moving from one end of Pennsylvania Avenue to the other, certain Justices maintain that Congress is more electorally accountable for decisions it does not delegate to agencies but rather makes itself. When agencies act pursuant to congressional authorization, these Justices believe that voters are unlikely to reward or punish legislators for the actions. But when the actions are taken

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executive removes some ambiguity surrounding the 'author' of the administrative actions. . . . and hence allows [voters] to reward or punish government performance.”).

<sup>97</sup> See *supra* Part I.A.

<sup>98</sup> See, e.g., *Free Enter. Fund v. Pub. Co. Account. Oversight Bd.*, 561 U.S. 477, 513-14 (2010) (“The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties.”); *Myers v. United States*, 272 U.S. 52, 123 (1926) (arguing that because “the President [is] elected by all the people,” “there would seem to be no reason for construing [the Constitution] in such a way as to limit and hamper [the President’s executive] power”). Still another variant of the claim (which I also do not address) is that when the President has less control over an agency, the agency is less managerially accountable to the President. See *Free Enter. Fund*, 561 U.S. at 496 (commenting that the President’s “ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired” by the dual removal restraints).

<sup>99</sup> See, e.g., Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 196 (1995) (“[I]f one simply defines ‘accountability’ as the vesting of ultimate decisional authority in a person who is elected, not appointed, it is, indeed, self-evident that the President is elected, and bureaucrats are not.”).

directly by Congress, in these Justices' view, they are more apt to result in political gains or losses for legislators. This alleged rise in accountability is one reason why the nondelegation doctrine nominally remains good law, in theory barring Congress from assigning certain policy choices to agencies.

Then-Justice Rehnquist asserted this claim most forcefully in a 1980 case involving the setting of a benzene exposure limit by the Occupational Safety and Health Administration.<sup>100</sup> He wrote that “the nondelegation doctrine serves three important functions,” one of which is that “it ensures . . . that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will,” not by “politically unresponsive administrators.”<sup>101</sup> He added that “[i]t is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people.”<sup>102</sup> “When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress . . . .”<sup>103</sup>

Justice Harlan echoed this argument in a 1963 case, stating that the nondelegation doctrine “insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people.”<sup>104</sup> So did Justice Brennan in a 1967 case, commenting that, “to the extent Congress delegates authority under indefinite standards, [its] policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people.”<sup>105</sup> And so did a Court majority in 1996, declaring that through its “clear assignment of power to [Congress],” the nondelegation doctrine “allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.”<sup>106</sup>

This claim about congressional accountability, like its presidential analogue, centers on voters' attributions of responsibility. Its crux is that when Congress authorizes agencies to decide matters, voters are less likely to deem legislators responsible for the ensuing decisions. Those decisions tend to strike voters as the handiwork of agencies, not of Congress. Conversely, when Congress does not delegate but rather makes policy choices itself, voters are more inclined to credit

<sup>100</sup> *Ind. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607 (1980).

<sup>101</sup> *Id.* at 685-87 (Rehnquist, J., concurring in the judgment).

<sup>102</sup> *Id.* at 687.

<sup>103</sup> *Id.*

<sup>104</sup> *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).

<sup>105</sup> *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J., concurring in the result).

<sup>106</sup> *Loving v. United States*, 517 U.S. 748, 758 (1996). The idea that Congress is more accountable for decisions it does not delegate to agencies but rather makes itself also helps justify the so-called “nondelegation canon,” under which courts construe ambiguous statutes so as to preclude agency authority to make sweeping policy choices. *See, e.g., King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (“[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”); Sunstein, *supra* note 6, at 329-37.

Additionally, concerns about diminished congressional accountability due to delegation are sometimes answered by pointing out that the popularly elected *President* is responsible for the agencies to whom authority has been assigned. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 421 (1989) (Scalia, J., dissenting) (noting that when Congress delegates to agencies, it “aggrandize[s] its primary competitor for political power, and the recipient of the policymaking authority, while not Congress itself, would at least be politically accountable”).

or blame legislators. Those choices cannot reasonably be attributed to any other actor. As David Schoenbrod has written, “when Congress delegates, its fingerprints are not left on the duties imposed on the public,” and it “obscure[s] [its] responsibility for the eventual costs and disappointments.”<sup>107</sup>

Also like the presidential claim, the congressional argument requires the rest of the conditions for retrospective voting to be satisfied too. Even if legislators make the hard decisions themselves, they can be held accountable for those decisions only if voters know about them, appraise them, and cast their ballots accordingly. And again as with the presidential claim, there exist both empirical and normative forms of the congressional argument. The empirical variant—the one that is my concern here—is that congressional delegation to agencies reduces congressional accountability. The normative variant is that Congress, not agencies, should make policy choices because Congress, not agencies, is elected by the people.<sup>108</sup> As before, I bracket this assertion because political science evidence cannot confirm or rebut it.

### C. State Governments

Turning next to state governments, the Court contends that their electoral accountability is lessened when they are compelled to act by the federal government. According to the Court, state governments can usually choose for themselves which policies to enact, and then can be held accountable for those choices by their state electorates. But this salutary state of affairs breaks down when federal authorities require state governments to take certain steps. Then state governments risk being rewarded or punished for decisions they did not actually make—and the federal government may avoid accountability for decisions it *did* make. For this reason (among others), federal commandeering of state governments is prohibited.

The Court set forth this claim at greatest length in the 1992 case, *New York v. United States*, in which it announced the anti-commandeering doctrine.<sup>109</sup> A federal statute, the Low-Level Radioactive Waste Policy Act, directed states to provide for the disposal of radioactive waste generated within their borders.<sup>110</sup> In the absence of such a law, “[w]here Congress encourages state regulation rather than compelling it,” “state governments remain responsive to the local electorate’s preferences” and “state officials remain accountable to the

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<sup>107</sup> David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 744 (1999); see, also, e.g., Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1478 (2015) (arguing that “delegation may allow members of Congress to avoid responsibility for difficult choices”).

<sup>108</sup> For an example of an academic stating the normative argument, see Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2141 (2004) (“Congress . . . is the most democratically accountable political institution; hence, if we want policy made by actors accountable to the people, we should require that policy . . . be made by Congress rather than by unelected administrators.”). The empirical variant was stated most clearly by the Court in *Loving*. See *supra* note 106 and accompanying text.

<sup>109</sup> 505 U.S. 144 (1992).

<sup>110</sup> See *id.* at 149-54.

people.”<sup>111</sup> But “where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.”<sup>112</sup> “[I]t may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”<sup>113</sup>

Justice O’Connor, the author of *New York*, defended the same proposition in a 1982 case involving federal requirements imposed on state utility commissions.<sup>114</sup> Typically, “[c]itizens . . . understand that legislative authority . . . includes the power to decide . . . which policies to adopt,” and “hold their utility commissions accountable for the choices they make.”<sup>115</sup> “Congressional compulsion of state agencies,” however, “blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs.”<sup>116</sup> In a 1997 case about a federal mandate that state law enforcement officers check handgun buyers’ backgrounds, the Court reasoned along similar lines.<sup>117</sup> “By forcing state governments to [act],” the federal government puts them “in the position of taking the blame for [the policy’s] burdensomeness and for its defects.”<sup>118</sup> “Under the present law . . . it will likely be the [state officer], not some federal official, who will be blamed for any error . . . that causes a purchaser to be mistakenly rejected.”<sup>119</sup>

Outside the commandeering context too, the Court has asserted that Congress may exercise its Spending Clause power in such a way that states have no choice but to comply with its preferences, thus again eroding accountability. In the 2012 blockbuster, *National Federation of Independent Business v. Sebelius*, in particular, both the plurality and the dissenters argued that Congress’s threat to withhold all Medicaid funds from states that declined to expand their Medicaid programs amounted to unlawful compulsion.<sup>120</sup> The plurality wrote that “[p]ermitt[ing] the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system.”<sup>121</sup> “[W]hen the State has no choice, the Federal Government can achieve its objectives without accountability.”<sup>122</sup> Likewise, the dissenters declared that “[w]hen Congress compels the States to do its bidding, it blurs the lines of political accountability.”<sup>123</sup>

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<sup>111</sup> *Id.* at 168.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 169.

<sup>114</sup> *FERC v. Mississippi*, 456 U.S. 742, 745-51 (1982).

<sup>115</sup> *Id.* at 787 (O’Connor, J., concurring in the judgment in part and dissenting in part).

<sup>116</sup> *Id.*

<sup>117</sup> *Printz v. United States*, 521 U.S. 898, 902-04 (1997).

<sup>118</sup> *Id.* at 930.

<sup>119</sup> *Id.*

<sup>120</sup> 132 S. Ct. 2566, 2581-82 (2012).

<sup>121</sup> *Id.* at 2602 (plurality opinion).

<sup>122</sup> *Id.* at 2603.

<sup>123</sup> *Id.* at 2660 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). Justice Kennedy has also invoked accountability in the related Commerce Clause context, contending that “[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.” *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring).

This claim, that state governments' accountability declines when they are forced to act (overtly or implicitly) by the federal government, both converges on and diverges from the arguments discussed above. It is similar to the presidential and congressional arguments in that it too revolves around voters' attributions of responsibility. The essence of the claim is that voters correctly assign responsibility to state governments when these bodies are not federally coerced, but become unsure whom to credit or blame when they are effectively carrying out federal orders.<sup>124</sup> The claim is also similar in that it too relies on the satisfaction of the other conditions for retrospective voting. Even if state governments are free from federal interference, they are accountable for their decisions only if voters are aware of those decisions, assess them, and vote on their basis.

However, the claim is different in that it does not stray from empirical onto normative terrain. The Court does not assert that state governments, rather than the federal government, should make policy choices because they are popularly elected. Nor would such an assertion be sensible since the federal government also enjoys the legitimacy of democratic election. The claim is different as well in that it applies to two kinds of institutions: the states and the federal government. Federal compulsion of state governments supposedly undermines *both* state and federal accountability.<sup>125</sup> Of these two sides to the argument, I focus below on the state aspect. It is the one that is more prominent in the case law, more illuminated by the political science evidence, and more distinct from the Court's other contentions.<sup>126</sup>

#### D. *Incumbents*

The Court's final claim about electoral accountability pertains to incumbent politicians generally, not to any particular branch or level of government. It is that when campaign expenditures are unregulated, corporations, unions, and other groups are able to deploy more funds to inform voters about incumbents' records, thus rendering incumbents more accountable. Conversely, when campaign spending is restricted, concerned entities cannot convey as much

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<sup>124</sup> See, e.g., Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180, 2201 (1998) (arguing that commandeering may cause voters to "hold state officers politically accountable for a choice that was not theirs" or to "fail to hold federal officials politically accountable for choices they do make"); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1360-61 (2001) ("If the people cannot assign blame for an unpopular federal policy, because the lines of political accountability are not transparent, then the national government responsible for the policy has avoided internalizing the political costs of its actions.").

<sup>125</sup> For an unusual case involving *state* interference with *federal* accountability, see *Cook v. Gralike*, 531 U.S. 510, 528 (2001) (Kennedy, J., concurring) (criticizing a ballot initiative requiring Congress members' opposition to term limits to be noted on the ballot because it "interfere[d] with the direct line of accountability between the National Legislature and the people who elect it").

<sup>126</sup> The state governmental claim also differs from the presidential and congressional arguments in that it is really about the *distortion*, not the *reduction*, of state governmental accountability. If state governments are deemed responsible for actions they were compelled to take, then they may well be held accountable for those actions too. But objectively, they should *not* be held accountable for those actions because they were *not* actually responsible for them.

information to voters about incumbents' performances, meaning that voters cannot reward or punish incumbents as effectively. This reasoning helps explain why expenditure limits are now considered a violation of the First Amendment.

The Court voiced this claim in the landmark 2010 case, *Citizens United v. FEC*, in which it struck down the federal prohibition on independent expenditures by corporations and unions.<sup>127</sup> The Court proclaimed that “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”<sup>128</sup> The Court then listed the ways in which “speech”—that is, campaign spending—allegedly promotes accountability. It enables voters “to inquire, to hear, to speak, and to use information to reach consensus.”<sup>129</sup> It also enhances “the ability of the citizenry to make informed choices among candidates”<sup>130</sup> as well as the “[d]iscussion of public issues and debate on the qualifications of candidates.”<sup>131</sup> Accordingly, “political speech must prevail against laws that would suppress it.”<sup>132</sup>

Justice Kennedy, the author of *Citizens United*, advanced the same argument in a 1990 case involving a state ban on corporate expenditures.<sup>133</sup> He wrote that the ban “prevents a nonprofit corporate speaker from using its own funds to inform the voting public that a particular candidate has a good or bad voting record.”<sup>134</sup> The ban therefore eliminates one of the “mechanisms for holding candidates accountable for the votes they cast” and perpetuates the “lack of accountability [that] is one of the major concerns of our time.”<sup>135</sup> In a 2003 case, Justice Scalia objected to the prohibition that was later invalidated in *Citizens United* on similar grounds.<sup>136</sup> “[T]his legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice.”<sup>137</sup> The law thus “mute[s] criticism of [Congress members’] records and facilitate[s] [their] reelection.”<sup>138</sup>

This claim, that limits on campaign spending reduce incumbents’ accountability, differs from the Court’s other assertions in that it does not apply to a specific institution. More importantly, the claim differs in that it primarily implicates the *first* condition for retrospective voting (voters’ information about incumbents’ records) rather than the third one (voters’ attributions of responsibility). The basic reason why campaign spending is thought to influence

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<sup>127</sup> 558 U.S. 310 (2010).

<sup>128</sup> *Id.* at 339.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976)).

<sup>131</sup> *Id.* at 340 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

<sup>132</sup> *Id.* at 340.

<sup>133</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

<sup>134</sup> *Id.* at 706 (Kennedy, J., dissenting).

<sup>135</sup> *Id.*

<sup>136</sup> *McConnell v. FEC*, 540 U.S. 93 (2003).

<sup>137</sup> *Id.* at 248 (Scalia, J., concurring in the judgment in part and dissenting in part).

<sup>138</sup> *Id.* at 262. For a similar claim that campaign finance regulation benefits incumbents and harms challengers, see Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 *YALE L.J.* 1049, 1072 (1996) (“Campaign finance reform measures . . . insulate the political system from challenge by outsiders, and hinder the ability of challengers to compete on equal terms with those already in power.”).

accountability is that it informs voters about incumbents' performances. Advertisements, mailers, rallies, and all the other items paid for by the spending educate voters about the choices made by incumbents and those choices' consequences.

It is worth noting, though, that depending on how they are deployed, electoral outlays can affect the other retrospective voting criteria too. Campaign funds can be used not just to inform voters about incumbents' records but also to persuade them that the records are strong or weak. Likewise, funds can be spent on linking incumbents to positive or negative developments that occurred on their watch. Funds can be devoted as well to convincing voters to cast their ballots retrospectively rather than on some other basis. So while the key function of money in politics might be informational, that is far from its only purpose.

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In sum, the Supreme Court makes four kinds of claims about electoral accountability: (1) that the President is more accountable for an agency's actions when she exercises more control over the agency; (2) that Congress is more accountable for decisions it does not delegate to agencies but rather makes itself; (3) that state governments are more accountable for their policies when they are not compelled to enact them by the federal government; and (4) that incumbents are more accountable for their records when campaign spending is unregulated. As is evident, all of these claims exhibit a common structure. Accountability is said to be higher under certain institutional arrangements than under others. Accountability is also said to be *high* (not higher but still *low*) under the Court's preferred approach. And for these accountability gains to materialize, each condition for retrospective voting must be satisfied.

Thanks to their shared logic, the Court's claims can all be depicted graphically using a variant of the chart presented earlier. The x-axis now represents voters' appraisal of the relevant actor's record: the President, a member of Congress, a state government official, or a generic incumbent.<sup>139</sup> The y-axis now denotes the likelihood that voters will support this actor. According to the Court, as shown in Figure 2, Scenario 1, there is a strong and steeply sloped relationship between the two variables if the President exerts more control over agencies, Congress delegates fewer decisions to them, state governments enact their own policies, or campaign expenditures are unrestricted. But per the Court and Figure 2, Scenario 2, this relationship becomes weak and flat if the President has less sway over agencies, Congress assigns more choices to them, state governments are forced to act by their federal overseers, or campaign spending is

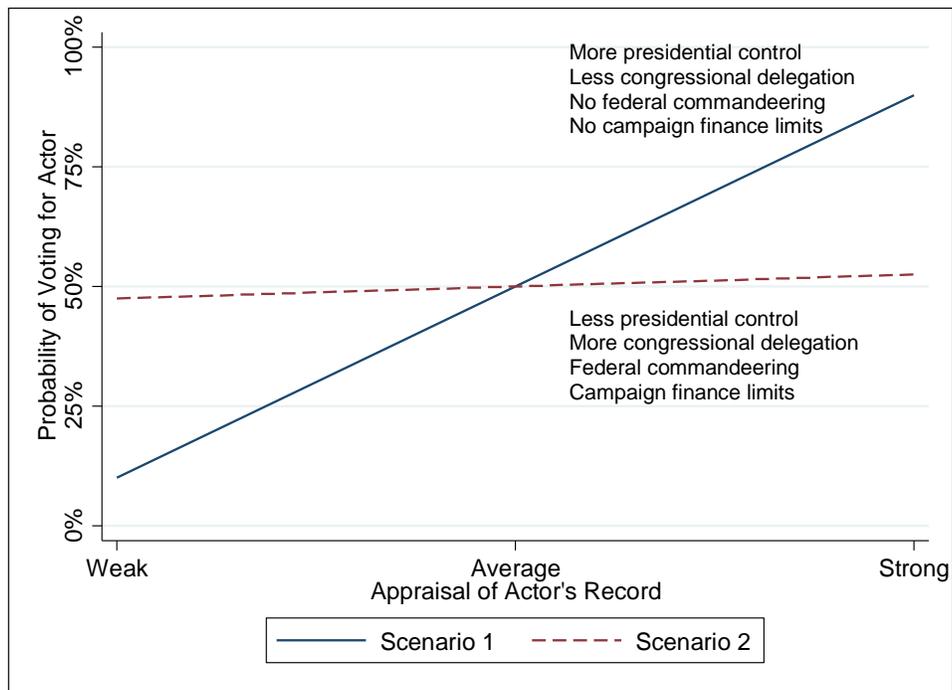
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<sup>139</sup> Voters' appraisal of an incumbent's record works well as the x-axis for the Court's first three claims because all of them primarily involve voters' attributions of responsibility—the next of the conditions for retrospective voting. But for the Court's campaign finance claim, which mostly relates to voters' knowledge of an incumbent's record, the record itself is a better choice for the x-axis. Here the idea is that when voters know more about the record, thanks to higher campaign spending, there is a steeper relationship between the record and voters' likelihood of supporting the incumbent. Conversely, when voters know less about the record, thanks to lower campaign spending, the relationship between the record and voters' behavior is flatter.

limited. In other words, accountability is both high absolutely in Scenario 1 and higher relatively than in Scenario 2.

This chart, though, gives the Court's claims a patina of empiricism they have not actually earned. It is striking, in fact, that in the many cases in which the Court has made assertions about accountability, it has *never* backed these assertions with any facts.<sup>140</sup> Instead, the Court's analysis has been highly abstract and theoretical, "a matter of words rather than of evidence," as Cass Sunstein once quipped.<sup>141</sup> The goal of the next Part, then, is to progress from words to evidence—to subject the Court's claims to rigorous empirical scrutiny and see how they fare. To give away the ending, my conclusion is that they do not fare well at all, at least in most circumstances.

FIGURE 2: ACCOUNTABILITY ACCORDING TO THE COURT



<sup>140</sup> See, e.g., Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 14 (2015) (noting in the federalism context that "the Court's political accountability argument turns on a dubious empirical claim for which the Court has supplied no empirical evidence"); Magill, *supra* note 35, at 1181 n.166 (observing in the separation-of-powers context that "accountability rests on unproved empirical assumptions").

<sup>141</sup> Sunstein, *supra* note 6, at 326 (discussing the nondelegation doctrine).

### III. ACCOUNTABILITY ACCORDING TO THE EVIDENCE

I carry out my empirical assessment in the same way (more or less<sup>142</sup>) for all of the Supreme Court's claims about electoral accountability. I first partition each claim into four constituent pieces corresponding to the four conditions for retrospective voting. For each condition, I then present the political science evidence that refutes the Court's reasoning, typically by showing that the criterion is unmet even though it would have to be satisfied for the Court to be correct. Lastly, I discuss the findings that partly redeem the Court's claims, at least for certain voters in certain settings. These findings are why this Article discounts accountability but does not entirely dismiss it.

I concede at the outset that there is only a limited amount of *direct* evidence about the Court's claims.<sup>143</sup> In future work, I plan to add to this small stock. But here I have no choice but to highlight the vast body of *indirect* evidence, drawing inferences from it about the validity of the Court's analysis. Why is the explicit proof so sparse? One reason is that few surveys ask voters the right questions about their knowledge, judgments, attributions, and modes of voting, in part because these queries are so challenging that they "undermine rapport between interviewers and interviewees."<sup>144</sup> Another explanation is that it is difficult to study retrospective voting observationally since key aspects of voter psychology cannot be gleaned from aggregate election results.<sup>145</sup> And perhaps most importantly, "the statistical literature examining" retrospective voting "has focused almost exclusively on whether the incumbent party is rewarded for economic performance or punished for unpopular wars."<sup>146</sup> There is far less work on the subtler forms of accountability implicated by the Court's claims.

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<sup>142</sup> The exception is the Court's campaign finance claim, whose rebuttal requires a different analytical structure. See *infra* Part III.D.

<sup>143</sup> See Schacter, *supra* note 35, at 2 ("[W]hat is missing is a sustained, empirical analysis of the political accountability that is offered to support claims . . .").

<sup>144</sup> Stephen Earl Bennett, *Trends in Americans' Political Information, 1967-1987*, 17 AM. POL. Q. 422, 424 (1989); see also, e.g., Martin Gilens, *Political Ignorance and Collective Policy Preferences*, 95 AM. POL. SCI. REV. 379, 380 (2001) ("Survey questions that assess the level of general political information are relatively uncommon, and items that assess policy-specific information are rare indeed.").

<sup>145</sup> See, e.g., Johns, *supra* note 57, at 61 (pointing out that observational analysis "based on aggregate election results . . . is a highly indirect means of inferring the basis for voters' decisions"); Alex I. Ruder, *Agency Design, the Mass Media, and the Blame for Agency Scandals*, 45 PRES. STUD. Q. 514, 515 (2015) ("One challenge facing observational studies . . . on responsibility attributions is controlling and measuring the information that voters encounter . . .").

<sup>146</sup> Lawrence W. Kenny & Babak Loftinia, *Evidence on the Importance of Spatial Voting Models in Presidential Nominations and Elections*, 123 PUB. CHOICE 439, 440 (2005); see also, e.g., George C. Edwards III et al., *Explaining Presidential Approval: The Significance of Issue Salience*, 39 AM. J. POL. SCI. 108, 109 (1995) ("Issues, such as the economy and war, underlie virtually all studies . . .").

## A. *The President*

### 1. Voter Knowledge

To start, consider the Court’s argument that the President is more electorally accountable for agency actions when she exerts more control over the bodies.<sup>147</sup> For this argument to hold, voters must *know* about the agency conduct. If this first condition for retrospective voting is not fulfilled, voters cannot appraise the agency actions, attribute responsibility for them, or vote based on these appraisals and attributions. Unfortunately, I am unaware of any survey that has asked voters about their knowledge of agency regulations or adjudications.<sup>148</sup> However, all of the indirect evidence on this score suggests that most voters know very little about most agency activity. The first criterion for holding the President accountable for agency behavior, then, is typically unmet.

In a useful study, Ruder tracked the *New York Times*’s coverage of regulatory agencies. Most agencies, including significant ones like the Consumer Product Safety Commission, the National Highway Traffic Safety Administration, the National Labor Relations Board, and the Occupational Safety and Health Administration, received very little coverage: fewer than fifty articles per year that even mentioned them.<sup>149</sup> Only a handful of agencies earned more extensive attention, on the order of two hundred annual articles or more: the Environmental Protection Agency, the Federal Communications Commission, the Federal Reserve, the Food and Drug Administration, and the Securities and Exchange Commission.<sup>150</sup> And even these figures paled compared to the coverage of other issues often thought to be within the President’s purview. In the final year of Ruder’s study, 2007, more than 6000 articles mentioned the Iraq or Afghanistan wars, and almost 9000 referred to the economy.<sup>151</sup>

The implication of this work—that voters tend to be uninformed about agency actions because these actions are rarely reported by the media—is confirmed by the available survey evidence. In what remains the definitive examination of voter knowledge, Michael Delli Carpini and Scott Keeter assembled all survey questions addressing some aspect of public information over a sixty-year period.<sup>152</sup> For the category of questions involving “specific issue stands taken by candidates, parties, and officeholders,” “fully 62 percent . . .

<sup>147</sup> See *supra* Part II.A.

<sup>148</sup> In their definitive study of voters’ political knowledge, Michael Delli Carpini and Scott Keeter tallied approximately 200,000 survey questions over a sixty-year period. It appears that *none* of these questions involved voters’ awareness of (as opposed to views on) agency actions. See MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* 62-104 (1996). Nor did I find any such queries when I examined questionnaires for the American National Election Study, the General Social Survey, or the National Annenberg Election Survey—all prominent political polls.

<sup>149</sup> See Ruder, *supra* note 145, at 530.

<sup>150</sup> See *id.*

<sup>151</sup> See *id.* at 528 (noting coverage range of 1987 to 2007). My Lexis searches produced 6547 hits for Iraq or Afghanistan and 8930 hits for the economy.

<sup>152</sup> See DELLI CARPINI & KEETER, *supra* note 148, at 62-104.

. were answered correctly by fewer than half of those surveyed.”<sup>153</sup> Similarly, Ilya Somin analyzed answers to the 2000 American National Election Study (ANES), the preeminent recurring poll about voter behavior.<sup>154</sup> He found that only about one-third of respondents knew that the crime rate had fallen and that federal spending on the poor had risen during President Clinton’s tenure, even though these were “indisputably [some] of the most important political issues of the 1990s.”<sup>155</sup> The 2012 ANES painted a similarly grim picture; fewer than 30% of respondents knew that the economy had improved and that unemployment had declined over the previous year.<sup>156</sup>

Thanks to findings like these, in Delli Carpini’s words, “[t]here is a consensus that most citizens are politically uninformed.”<sup>157</sup> Somin has reached an even stronger conclusion: “The most important point established in some five decades of political knowledge research is that the majority of American citizens lack even basic political knowledge.”<sup>158</sup> That this ignorance applies to presidents’ specific policy stances as well as general economic conditions during their terms has been demonstrated by survey evidence. That the ignorance further extends to agency actions has *not* been shown, but cannot reasonably be doubted. The same voters who are unaware of key presidential positions and vital economic indicators cannot plausibly be expected to know about lower-salience agency regulations and adjudications.<sup>159</sup> Without such knowledge, though, these voters cannot vote retrospectively based on agency performance.<sup>160</sup>

## 2. Voter Judgments

For the Court’s claim about presidential accountability to be valid, the next requirement is that voters *form judgments* about agency actions. Unless voters come to hold opinions about them, the actions cannot result in any electoral reward or punishment for the President. Unsurprisingly, given that there is no work on voters’ knowledge of agency conduct, there is also none on voters’

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<sup>153</sup> *Id.* at 77-78. Likewise, “[m]ore than 60 percent of the items tapping knowledge of domestic politics could not be answered by as many as half of those asked,” *id.* at 82, and “more than half of the 553 foreign affairs items could be answered by less than half the general public,” *id.* at 85-86.

<sup>154</sup> See Somin, *supra* note 49, at 1306-07.

<sup>155</sup> *Id.* at 1315-16; see also ILYA SOMIN, *DEMOCRACY AND POLITICAL GOVERNANCE* 17-46 (2d ed. 2016) (reporting similar statistics for the 2000-2014 period).

<sup>156</sup> See AMERICAN NATIONAL ELECTION STUDIES, *USER’S GUIDE AND CODEBOOK FOR THE ANES 2012 TIME SERIES STUDY* 325, 331 (2015).

<sup>157</sup> Michael X. Delli Carpini, *In Search of the Information Citizen: What Americans Know About Politics and Why It Matters* 4 (Nov. 1999).

<sup>158</sup> Somin *supra* note 49, at 1304; see also, e.g., Larry M. Bartels, *Uninformed Votes: Information Effects in Presidential Elections*, 40 AM. J. POL. SCI. 194, 194 (1996) (“The political ignorance of the American voter is one of the best-documented features of contemporary politics.”).

<sup>159</sup> Importantly, Delli Carpini and Keeter found that “citizens who are the most informed about one aspect of national politics tend to be the most informed about other aspects.” DELLI CARPINI & KEETER, *supra* note 148, at 18. The public’s general lack of knowledge about politics can therefore be assumed to hold for agency activity. See also Schacter, *supra* note 35, at 9 (arguing that studies of voter knowledge “make it wildly implausible to believe that voters know enough . . . to make workable the accountability axiom”).

<sup>160</sup> As noted earlier, in theory at least, informational cues based on knowledge that voters themselves lack, such as newspaper endorsements, could enable voters to cast their ballots *as if* they were properly informed. See *supra* note **Error! Bookmark not defined.** and accompanying text.

*appraisal* of it. However, political scientists have begun to study how voters evaluate other elements of presidents' records, finding that partisanship infects these evaluations to their core. Assuming that this conclusion is generalizable, it means that any retrospective voting that occurs based on agency performance deviates markedly from the theoretical ideal.

Larry Bartels has conducted the most probing analysis of how partisanship biases voters' judgments of objective indicators. For a series of variables—unemployment, inflation, crime, and so on—he compared Democratic and Republican respondents' views of how the measures changed during President Reagan's and President Clinton's terms.<sup>161</sup> In many cases, he found gaping and self-serving partisan differentials, with Democrats stating that conditions improved under Democratic control and worsened under Republican rule, and Republicans exhibiting the opposite pattern.<sup>162</sup> For example, Democrats (wrongly) thought that unemployment and inflation increased during President Reagan's tenure.<sup>163</sup> Likewise, Republicans (incorrectly) asserted that federal spending on the poor rose under President Reagan and that the crime rate went up under President Clinton.<sup>164</sup>

Delli Carpini and Keeter relied on the same survey data as Bartels, but added a twist showing how factual misperceptions distort retrospective voting. Like Bartels, they determined the proportions of respondents who mistakenly believed that the federal government's spending on the poor, the environment, and public schools increased under President Reagan.<sup>165</sup> But unlike Bartels, they then calculated the shares of these respondents who *approved* of the supposed spending increases and who *voted* for Vice President Bush in the 1988 presidential election.<sup>166</sup> These shares were very high, between two-thirds and three-fourths, suggesting that many voters held inaccurate views of the federal government's activity in the 1980s, favored this purported activity, and voted to continue it.<sup>167</sup> In essence, these voters rewarded Republican administrations for policies they did not actually enact, or alternatively, failed to punish the administrations for adopting policies the voters opposed.

If this finding applies to agency actions, it implies that retrospective voting on their basis is warped. Democrats and Republicans who know about the actions assess them differently, with Democrats supporting steps taken during Democratic administrations and opposing ones implemented in Republican terms, and Republicans doing the opposite. The reward-punishment model on which accountability depends is thus compromised. To some degree, presidents

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<sup>161</sup> See Larry M. Bartels, *Beyond the Running Tally: Partisan Bias in Political Perceptions*, 24 POL. BEHAVIOR 117, 126-38 (2002).

<sup>162</sup> See *id.*

<sup>163</sup> See *id.* at 136.

<sup>164</sup> See *id.* at 136-37; see also Christopher H. Achen & Larry M. Bartels, *It Feels Like We're Thinking: The Rationalizing Voter and Electoral Democracy* 13-14 (Aug. 28, 2006) (reporting similar findings); Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 380 (same).

<sup>165</sup> See DELLI CARPINI & KEETER, *supra* note 148, at 263-64.

<sup>166</sup> See *id.*

<sup>167</sup> See *id.*

are rewarded by their copartisans and punished by the other party's adherents no matter what agencies actually do.

### 3. Voter Attributions

This brings us to the third and most important criterion that must be met for the Court's claim to be correct: when the President exercises more control over agencies, voters must *attribute more responsibility* to her for the agency conduct. Two of the reasons for doubting this linkage should be familiar from the preceding discussion. Many voters have no idea how much influence the President wields over different agencies; and many voters' attributions of responsibility for agency actions are driven more by partisanship than by the President's sway over the bodies. These problems with the Court's account are complemented by another one: many voters *over-attribute* responsibility to the President, deeming her fully in charge even of independent agencies.<sup>168</sup>

Again, no data exists on voters' knowledge of presidential control over agencies. But again, Ruder's study of the *New York Times's* coverage of agency activity is instructive. For an array of agencies, he calculated the fraction of newspaper articles that mentioned *both* the agency and the President—a rough but passable proxy for presidential authority over a body.<sup>169</sup> He found that there is essentially no connection between this fraction and whether an agency is executive or independent. The President was named in fewer articles (below 15%) on executive agencies like the Fish and Wildlife Service and the National Highway Traffic Safety Administration.<sup>170</sup> But she was cited in more articles (above 30%) on independent agencies like the Federal Election Commission and the Federal Reserve.<sup>171</sup>

According to Ruder, this analysis “reveals one possible way that the accurate assignment of blame can be undermined by news coverage of agencies.”<sup>172</sup> “[A]gencies that are relatively insulated from presidential control [can] receive a

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<sup>168</sup> A further problem, highlighted conceptually by Aziz Huq and empirically by Jed Stiglitz, is that presidential powers *thought* to increase control over agencies may not actually have this effect. Instead, the exercise of these powers may prompt responses by other actors, Congress in particular, leaving presidential control unchanged or even diminished. See Aziz A. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 53 (2013) (discussing these “[s]trategic response effects”); Stiglitz, *supra* 96, at 1163-65 (finding that after the legislative veto was invalidated in Missouri, the legislature compensated for its loss by enacting more specific statutes); Edward H. Stiglitz, *Folk Theories, Dynamic Pluralism, and Democratic Values* 19-20 (Feb. 25, 2016) (finding that the presence of the legislative veto *increases* gubernatorial accountability for economic performance).

<sup>169</sup> See Ruder, *supra* note 145, at 531 (“This measure captures media attention to the broad range of issues that involve the president and federal agencies: appointments, political controversy, and public discussions of agency policy.”); see also Stiglitz, *supra* note 96, at 1170-71 (using newspaper mentions of the governor to measure gubernatorial control over state agencies).

<sup>170</sup> See *id.*

<sup>171</sup> See *id.* Ruder carried out a similar analysis for newspaper articles mentioning executive agencies and referring specifically to regulation. One might expect the President to be named in about the same proportion of these articles no matter which agency is covered. But in fact, the proportion of articles identifying the President varies from about 20% (for the Food and Drug Administration and the National Highway Traffic Safety Administration) to roughly 60% (for the Department of Health and Human Services and the Small Business Administration). See *id.* at 534.

<sup>172</sup> *Id.* at 532.

large share of articles that mention the president,” and vice versa.<sup>173</sup> But there is an even more obvious way that accurate responsibility attributions can be foiled. Voters can simply be *uninformed* about presidential influence over agencies, not *misinformed* by the media. Survey evidence shows that only about one-quarter to one-third of respondents can identify agency heads such as the Treasury Secretary and the Chair of the Federal Reserve.<sup>174</sup> These low figures make it highly implausible that much of the public knows, say, whether an agency is led by a single official or a multimember board, or whether the President’s removal power is plenary or limited to good cause.

Beyond voters’ lack of information, their partisanship also impairs their attributions of presidential responsibility. Thomas Rudolph has found that, under divided government in the late 1990s, Democrats who thought the economy was improving were more inclined to credit President Clinton for the progress.<sup>175</sup> Conversely, Democrats who saw the economy as worsening tended to blame the Republican Congress for the deterioration.<sup>176</sup> More recently, Steven Nawara has extended Rudolph’s work to the Obama era, to foreign policy as well as the economy, and to current and former presidents.<sup>177</sup> Again, as Democrats’ impressions brightened of conditions in the economy and in Iraq, they became more likely to deem President Obama rather than President Bush responsible for the gains, and vice versa.<sup>178</sup>

If these results hold for agency actions, they mean that presidents’ credit or blame for the actions often does not stem from their control over the bodies. Instead, presidents’ copartisans commonly consider them responsible only for agency conduct they favor, assigning authorship to other actors (like the agency itself) for conduct they dislike. The other party’s backers tend to behave in the opposite fashion, crediting anyone but the President for appealing agency measures and blaming her for unwelcome ones. A mix of partisanship and perception thus drives responsibility attribution—not, as the Court asserts, presidential authority.

A final factor that drives responsibility attribution, especially among less sophisticated voters, is the “tendency to see the president as the sole relevant (perhaps omnipotent) governmental actor in the U.S. political system.”<sup>179</sup> In a

<sup>173</sup> *Id.*

<sup>174</sup> See, e.g., DELLI CARPINI & KEETER, *supra* note 148, at 79 (“[F]ewer than a quarter of those asked were able to identify the holders of any but the most visible and prestigious cabinet posts . . . .”); SOMIN, *supra* note 155, at 36 (36% of the public could name the Treasury Secretary and the Chair of the Federal Reserve in 2008).

<sup>175</sup> See Thomas J. Rudolph, *Who’s Responsible for the Economy? The Formation and Consequences of Responsibility Attributions*, 47 AM. J. POL. SCI. 698, 704-06 (2003).

<sup>176</sup> See *id.*; see also Brad T. Gomez & J. Matthew Wilson, *Causal Attribution and Economic Voting in American Congressional Elections*, 56 POL. RESEARCH Q. 271, 277 (2003) (finding that “Democrats are much more likely than Republicans to see President Clinton as primarily responsible for both the general state of the national economy and for the federal budget surplus”).

<sup>177</sup> See Steven P. Nawara, *Who Is Responsible, the Incumbent or the Former President? Motivated Reasoning in Responsibility Attributions*, 45 PRES. STUD. Q. 110, 120-21 (2015).

<sup>178</sup> See *id.* at 122-24; see also Cigdem V. Sirin & Jose D. Villalobos, *Where Does the Buck Stop? Applying Attribution Theory to Examine Public Appraisals of the President*, 41 PRES. STUD. Q. 334, 346 (2011) (reporting similar results from an experiment involving the economy and foreign policy).

<sup>179</sup> Brad T. Gomez & J. Matthew Wilson, *Political Sophistication and Attributions of Blame in the Wake of Hurricane Katrina*, 38 PUBLIUS 633, 637 (2008).

series of amusing studies, scholars have shown that presidents are punished at the polls for many events that, objectively, are not their fault: droughts and floods,<sup>180</sup> tornados,<sup>181</sup> college football defeats,<sup>182</sup> even shark attacks.<sup>183</sup> If this logic of “blind retrospection”<sup>184</sup> is valid for agency actions too, then once more it is immaterial how much control the President *actually* has over the bodies. Whether her influence is high or low, many voters *perceive* it to be high, and therefore hold her responsible for agency conduct.<sup>185</sup>

#### 4. Modes of Voting

This leaves the fourth premise on which the Court’s claim rests: that voters cast their presidential ballots *based on* their judgments of, and attributions for, agency actions. If voters evaluate these actions, credit or blame the President for them—but nevertheless vote on other grounds—then the three preceding steps are all for naught. Unfortunately for the Court’s argument, this scenario appears to be the norm. Even retrospective voters focus on broader issues than agency performance. Retrospective voting also occurs only sporadically, under certain atypical conditions. And other modes of voting tend to dominate retrospective voting when pitted against it.

Predictably, there is no direct evidence on the prevalence of retrospective voting based on agency conduct. However, the inferential case is very strong that such voting is, at best, highly infrequent. Agencies take an enormous number of actions, almost all of which are less salient than the economic and foreign policy conditions that are usually thought to motivate retrospective voting. It beggars belief that many voters are making their presidential choices in any large part because of these actions. As Aziz Huq has remarked, “Federal administration comprises a vast array of entities taking on an incalculable number of decisions .

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<sup>180</sup> See Christopher H. Achen & Larry M. Bartels, *Blind Retrospection: Electoral Responses to Drought, Flu, and Shark Attacks* 24-25 (June 2004).

<sup>181</sup> See Andrew Healy & Neil Malhotra, *Random Events, Economic Losses, and Retrospective Voting: Implications for Democratic Competence*, 5. Q.J. POL. SCI. 193, 197-98 (2010).

<sup>182</sup> See Andrew J. Healy et al., *Irrelevant Events Affect Voters’ Evaluations of Government Performance*, 107 PROC. NAT’L ACAD. SCI. 12804, 12806 (2010).

<sup>183</sup> See Achen & Bartels, *supra* note 180, at 14.

<sup>184</sup> *Id.* at 8.

<sup>185</sup> Of course, this point cuts in a somewhat different direction from the previous one. If voters attribute all responsibility to the President, then they do *not* assign credit and blame on partisan grounds. As with most aspects of voter psychology, the solution to this puzzle is that there are many kinds of voters, all behaving in complicated ways. Partisanship, for instance, tends to be a more powerful driver for higher-information voters, see Achen & Bartels, *supra* note 163, at 66, 69, while lower-information voters are more prone to holding the President responsible for external developments, see Gomez & Wilson, *supra* note 176, at 277.

Voters’ tendency to attribute too much responsibility to the President also gives rise to a different kind of argument for greater presidential control over agencies: If voters are going to credit or blame the President anyway for agency actions, why not grant the President more authority over the bodies? This way voters would *assign* responsibility to an actor who *actually is* responsible. This argument, though, is quite distinct from the Court’s. Its crux is that greater presidential control is advisable given voters’ attribution errors, not that greater presidential control yields greater presidential accountability.

. . . How can voters use a single quadrennial ballot to express preferences on that enormous range of policy decisions?”<sup>186</sup>

Interestingly, in many circumstances, voters do not even use their ballots to reward or punish presidential incumbents for the state of the economy—the classic basis for retrospective voting. In a recent review of the literature on economic voting, Christopher Anderson concluded that its impact is “intermittent, highly contingent, and substantively small.”<sup>187</sup> Underpinning this conclusion are psychological points that have been covered already: voters “systematically misjudge the state of the economy even when it is presented to them on a silver platter,”<sup>188</sup> and assign “responsibility for good performance to the party they support and blame parties they do not like for inferior economic performance.”<sup>189</sup> Plainly, if retrospective *economic* voting is uncommon, retrospective voting based on *agency performance* must be even rarer. The lack of knowledge and partisan bias that afflict the former are still more pervasive for the latter.

If voters do not cast their ballots retrospectively in presidential elections (at least not primarily), how *do* they cast them? Scholars have not settled on a single answer, but they have found that several other modes of voting are more influential than retrospective voting. For example, Brad Lockerbie determined that, in presidential elections from 1956 to 2000, “prospective economic items” relating to voters’ future economic expectations were “much more powerful than their retrospective counterparts.”<sup>190</sup> Party identification and ideology were also stronger determinants of vote choice than the retrospective items, which were statistically significant in only three years.<sup>191</sup> Similarly, James Campbell and his coauthors showed that, in presidential elections from 1972 to 2004, party identification, ideology, and demographic variables such as income, race, and religion were significant drivers of vote choice.<sup>192</sup> Retrospective economic evaluations, though, were not.<sup>193</sup>

The upshot of these studies is that the Court’s argument about presidential accountability is mostly wrong. Even if voters know about agency actions, judge

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<sup>186</sup> Huq, *supra* note 168, at 64; *see also, e.g.*, Rubin, *supra* note 33, at 2080 (observing that most agency “decisions are simply too fine-grained to become factors in an electoral campaign”).

<sup>187</sup> Anderson, *supra* note 53, at 286.

<sup>188</sup> *Id.* at 280.

<sup>189</sup> *Id.* at 281. For other scholars pointing out the limits of economic voting, see Justine D’Elia & Helmut Norpoth, *Winning with a Bad Economy*, 44 PRES. STUD. Q. 467, 471 (2014) (noting that its assumptions are “highly contingent and need not hold in many situations and political contexts”); Joel A. Middleton, *What Do We Know About Economic Voting?* 30 (2011) (“[A]fter decades of research, fundamental debates are unresolved, and it is difficult to say which of the competing theoretical accounts of this phenomenon have carried the day.”).

<sup>190</sup> BRAD LOCKERBIE, DO VOTERS LOOK TO THE FUTURE? ECONOMICS AND ELECTIONS 67 (2008).

<sup>191</sup> *Id.* at 65.

<sup>192</sup> *See* Campbell et al., *supra* note 48, at 1092.

<sup>193</sup> *See id.* For additional work in this vein, see DELLI CARPINI & KEETER, *supra* note 148, at 254-61 (finding that issue positions are a statistically significant driver of presidential vote choice for well-informed citizens but economic evaluations are not); FIORINA, *supra* note 39, at 197 (“In analysis after analysis . . . future expectations dwarfed the effects of retrospective judgments . . . .”); and LEWIS-BECK ET AL., *supra* note 70, at 376 (finding that “for the typical contemporary American voter,” “more lasting factors” than economic assessments, “such as socioeconomic status and party identification, are formed first”).

them impartially, and attribute responsibility for them accurately—all flawed assumptions themselves—voters generally do not cast their presidential ballots based on these judgments and attributions. Indeed, voters often do not cast their presidential ballots based on *any* prior developments, not even the state of the economy.

### 5. Countervailing Evidence

However, the Court’s argument is *mostly* wrong—which is to say slightly *right*—for two reasons. The first is implicit in the analysis to this point. While most voters cannot satisfy the conditions for retrospective voting based on agency conduct, there are presumably some who can. These exemplary voters know about higher-profile agency actions, appraise them reasonably objectively, deem the President more responsible if the agency is executive and less so if it is independent, and make their voting decisions partly on these grounds. These voters, that is, hold the President more electorally accountable for agency performance when she exercises more control over the bodies, just as the Court supposes.

But while the number of these model citizens is not zero, it is surely very small. The members of this “information elite”<sup>194</sup> are also highly unrepresentative of the electorate as a whole—not just in their voting behavior but in their age, gender, income, and race as well. According to both Delli Carpini and Keeter<sup>195</sup> and Somin,<sup>196</sup> the most politically knowledgeable respondents are disproportionately old, affluent, white men. Even if there is accountability along the lines contemplated by the Court, then, it is likely to be *skewed* accountability to a *subset* of the public. This sort of “asymmetric” accountability, “with too much to some voters and not enough to others,” is at least as normatively troublesome as no accountability at all.<sup>197</sup>

The second reason not to reject the Court’s claim entirely is more empirical. Observationally, Ruder has found that national newspapers are more than twice as likely to mention the President when reporting on the antitrust activities of the Department of Justice as when covering those of the Federal Trade Commission (an independent agency).<sup>198</sup> Experimentally, Ruder has also determined that when subjects read a newspaper article that cites the aspects of the Commission that insulate it from presidential control, their attributions of presidential

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<sup>194</sup> Delli Carpini, *supra* note 157, at 27.

<sup>195</sup> See DELLI CARPINI & KEETER, *supra* note 148, at 156-74.

<sup>196</sup> See Somin, *supra* note 49, at 1354-64.

<sup>197</sup> Schacter, *supra* note 35, at 11; see also Stephanopoulos, *supra* note 59, at 1474-79 (discussing the problems caused by officeholders’ asymmetric responsiveness to donors sharing these demographic traits). Worth noting, though, is the possibility that officeholders might be asymmetrically responsive to *different* issue publics depending on the policy, not the *same* information elite at all times. This sort of *shifting* asymmetric accountability may not be as problematic.

<sup>198</sup> See Ruder, *supra* note 96, at 313; see also *id.* at 321 (finding that coverage of the Justice Department more often has a political valence).

responsibility for the Commission's actions do not change significantly.<sup>199</sup> Conversely, when subjects read an article that refers to the key structural features of the Minerals Management Service (an executive agency), their assignments of presidential responsibility rise dramatically.<sup>200</sup> These results dovetail nicely with the Court's reasoning. The media sometimes distinguishes between executive and independent agencies in its coverage, and this distinction affects people's responsibility attributions exactly as the Court expects.

As noted earlier, though, the media does not always distinguish between executive and independent agencies in its reporting.<sup>201</sup> It is also doubtful that people accurately process the information conveyed by the media in non-experimental settings. And even in controlled experiments, subjects' responsibility attributions have not been linked to their voting behavior. It has not been shown, that is, that subjects become more likely to vote for (against) the President after finding out that an executive agency has a strong (weak) record. Accordingly, Ruder's work is not enough to vindicate the Court's assertion. Rather, the fairest conclusion from the available evidence is that presidential control over an agency is largely—but not wholly—unrelated to presidential accountability for the body's actions.

## B. Congress

### 1. Voter Knowledge

Next, take the Court's claim that Congress is more electorally accountable for decisions it does not delegate to agencies but rather makes itself.<sup>202</sup> For this

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<sup>199</sup> In this experiment, the key passage that subjects read was: "The FTC, led by a 5-member bipartisan commission, is designed to function independently from presidential control. The commission's current chairman was appointed by the president." *Id.* at 326. Compared to the no-information condition, respondents were somewhat more likely to attribute "a little" or "some" responsibility to the President, and somewhat *less* likely to attribute "a lot" of responsibility. *Id.* at 329.

<sup>200</sup> In this experiment, the key passage that subjects read was: "MMS is under the direction of Secretary of the Interior Ken Salazar, who has led the cabinet-level department as part of the Obama administration. According to the U.S. Office of Management and Budget, since 2009 alone the Obama administration has reviewed and approved several MMS regulations related to deepwater oil exploration." Ruder, *supra* note 145, at 521; *see also id.* at 523 (showing that respondents in the treatment group were much more likely to assign "a lot" of responsibility to the President).

<sup>201</sup> *See supra* notes 169-173 and accompanying text.

<sup>202</sup> *See supra* Part II.B. Interestingly, Eric Posner and Adrian Vermeule rebut this claim in essentially the opposite way that I do. My response is that, empirically, Congress is rarely electorally accountable for *anything* it does, so giving Congress more to do would not significantly boost its accountability. Posner and Vermeule's argument, on the other hand, is that Congress is *already* accountable for its decisions to delegate authority to agencies. Therefore there is no accountability shortfall that less congressional delegation could redress. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1748 (2002) ("Congress is accountable when it delegates power—it is accountable for its decision to delegate power to the agency.").

My only quarrel with Posner and Vermeule's claim is that it is based on normative assertion about what voters *should* do, not empirical evidence about what they *in fact* do. *See, e.g., id.* at 1746 ("If citizens have the capacity to sanction politicians who make bad policy in statutes, they should also have the capacity to sanction politicians who . . . delegate authority to . . . agencies . . ."). My reading of the literature is that most citizens do not have the capacity to sanction politicians for *either* making decisions themselves or delegating those decisions to other bodies.

claim to hold, the first prerequisite is that voters know about the decisions, whether they are made by Congress or by another body. Earlier, I described the work suggesting that most voters know very little about most agency activity. The media tends not to cover this activity in any depth, and most voters are so generally uninformed that they cannot be expected to know much about matters as specific as agency regulations and adjudications.<sup>203</sup>

This work is complemented by a sizeable literature showing that most voters know little about congressional activity either. In their landmark study of political knowledge, Delli Carpini and Keeter noted that majorities of the public were unaware of the passage of major education, immigration, and urban affairs laws in the 1960s.<sup>204</sup> In the 1990s, Douglas Arnold cited surveys revealing “virtually no awareness of important [bills] that the media had covered more lightly,” addressing issues such as “abortion, campaign finance, bank bailouts, defense spending,” and several others.<sup>205</sup> Also in this period, John Zaller found that only about 12% of respondents could identify any bill that their House member had voted on in the previous two years.<sup>206</sup> And more recently, Jeffrey Mondak and his coauthors reported that only slim majorities of the public could state correctly whether Congress had declared war or enacted legislation on handgun sales or campaign finance during George W. Bush’s presidency.<sup>207</sup>

These results are in stark tension with the idea that Congress’s accountability would improve if only it made more of the hard policy choices itself. Most voters are unaware of these choices when (as is often the case today) they are delegated to agencies. But most voters would *remain* unaware of the choices if Congress were compelled to grapple with them directly. That, at least, is the import of the fact that most voters do not know about the bills that Congress *already* considers.

## 2. Voter Judgments

For the Court’s argument to persuade, the second requirement is that voters would appraise the additional decisions that Congress would make if the nondelegation doctrine were enforced. Stephen Ansolabehere and Philip Jones have shown that most respondents *are* willing to give their opinions on items on the congressional agenda. In a survey that asked about eight congressional bills, “over 90% of the sample answered at least four of the questions,” and a plurality

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Also worth noting here is Stiglitz’s finding that, at the state level, legislatures do not change their drafting practices in response to judicial decisions striking down their laws on nondelegation grounds. See Jed Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine* 19 (Sept. 9, 2015). If this result generalizes to the federal level, then a revival of the nondelegation doctrine obviously would not increase congressional accountability because it would not actually change Congress’s behavior.

<sup>203</sup> See *supra* Part III.A.1.

<sup>204</sup> See DELLI CARPINI & KEETER, *supra* note 148, at 80-81.

<sup>205</sup> R. DOUGLAS ARNOLD, CONGRESS, THE PRESS, AND POLITICAL ACCOUNTABILITY 117, 123 (2004).

<sup>206</sup> JOHN R. ZALLER, THE NATURE AND ORIGINS OF MASS OPINION 76 (1992); see also Donald R. Songer, *Government Closest to the People: Constituent Knowledge in State and National Politics*, 17 POLITY 387, 388 (1984) (reporting a similar finding).

<sup>207</sup> See Jeffery J. Mondak et al., *Does Familiarity Breed Contempt? The Impact of Information on Mass Attitudes Toward Congress*, 51 AM. J. POL. SCI. 34, 38 (2007).

offered their views on all eight.<sup>208</sup> However, several experimental studies have determined that the preferences that subjects express on congressional bills are a function less of the bills' policy content and more of the subjects' partisanship.

All of these experiments proceeded in roughly the same fashion. Subjects were provided with information about a particular congressional bill: the Energy Independence Act,<sup>209</sup> the DREAM Act,<sup>210</sup> the Aviation Reauthorization Act,<sup>211</sup> and so on. Subjects in the control group were then asked to what extent they approved or disapproved of the bill. In contrast, subjects in the treatment group were told about the parties' respective positions on the bill before being prompted for their own opinion. In all cases, subjects in the treatment group voiced preferences that were significantly more aligned with their parties' stances (and so significantly more polarized). For example, Democrats' and Republicans' views on the Energy Independence Act became 10-15% more reliably partisan in response to the cue.<sup>212</sup> Attitudes toward the DREAM Act shifted even further toward the party line, by 15-25%.<sup>213</sup>

These experiments suggest that congressional accountability would not rise much even if voters knew about the extra congressional activity undertaken due to a revival of the nondelegation doctrine. As with existing legislation, Democratic voters would favor (disfavor) bills supported (opposed) by Democratic elites, and Republican voters would exhibit the opposite pattern. Members of Congress thus would not be rewarded or punished based on the substance of the new legislation. Instead, its political consequences would largely follow the same partisan fault lines that underlie the work that Congress already performs.

### 3. Voter Attributions

The third criterion for the Court's claim to be correct is that voters would attribute responsibility accurately for Congress's additional actions. At the aggregate level, voters would know which party backed a given decision and which party objected to it. Likewise, at the individual level, voters would know whether their member of Congress voted for or against a particular bill.<sup>214</sup>

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<sup>208</sup> Stephen Ansolabehere & Philip Edward Jones, *Constituents' Responses to Congressional Roll-Call Voting*, 54 AM. J. POL. SCI. 583, 586 (2010).

<sup>209</sup> See Toby Bolsen et al., *The Influence of Partisan Motivated Reasoning on Public Opinion*, 36 POL. BEHAVIOR 235, 244 (2014).

<sup>210</sup> See James N. Druckman et al., *How Elite Partisan Polarization Affects Public Opinion Formation*, 107 AM. POL. SCI. REV. 57, 61 (2013).

<sup>211</sup> See Matthew S. Levendusky, *Clearer Cues, More Consistent Voters: A Benefit of Elite Polarization*, 32 POL. BEHAVIOR 111, 119 (2010).

<sup>212</sup> See Bolsen et al., *supra* note 209, at 248.

<sup>213</sup> See Druckman et al., *supra* note 210, at 69. A related literature finds partisan differences in overall congressional approval, with Democrats tending to approve (disapprove) of Congress when it is controlled by Democrats (Republicans), and Republicans exhibiting the opposite pattern. See, e.g., PAUL J. QUIRK & SARAH A. BINDER, *THE LEGISLATIVE BRANCH* 477-78 (2005); Mondak, *supra* note 207, at 41.

<sup>214</sup> Additionally, voters would need to attribute more responsibility to Congress for decisions it does not delegate but rather makes itself. At least in experiments, subjects told about the institution responsible for a policy do exactly that. See Adam Hill, *Does Delegation Undermine Accountability? Experimental Evidence on*

Stephen Bennett tracked the percentage of respondents who knew which party held more seats in the House of Representatives from 1960 to 1984. This percentage typically hovered between 40% and 50%, though it dropped to 14% in 1980.<sup>215</sup> Analogously, the Pew Research Center asked respondents which party controlled a majority of the House from 1989 to 2009. Anywhere from 31% of respondents (in 2001) to 86% (in 2009) answered this question correctly, with a long-term average near 50%.<sup>216</sup> Around *half* of the public therefore has a mistaken impression (or none at all) of the majority party in Congress. It is doubtful that these individuals can carry out the more difficult task of crediting or blaming the right party for any new congressional legislation.

At the individual level, Ansolabehere and Jones<sup>217</sup> and Chris Tausanovitch and Christopher Warshaw<sup>218</sup> have conducted the most useful research on voters' knowledge of their Congress members' positions. Both pairs of scholars found that survey respondents *are* often able to distinguish between the stances of Democratic and Republican members. Over a set of eight congressional bills, "[t]he overall correlation between the perceived and actual positions of legislators . . . is .66."<sup>219</sup> However, respondents' awareness of *intra*-party differences in voting records is much lower. The correlation between perceived and actual positions falls to .28 for Democratic members and .10 for Republican members.<sup>220</sup> Similarly, while 59% of the variance in legislators' voting records is captured by a model including both parties' members, this proportion drops to 15% for a Democrat-only model and 8% for a Republican-only model.<sup>221</sup>

These findings mean that if the nondelegation doctrine required Congress to enact more legislation, the correct *party* would sometimes be deemed responsible but the correct *politicians* frequently would not be. Members who voted against their party would be especially prone to be credited or blamed for stances they did not actually take. Once again, voters' lack of information would prevent congressional accountability from responding in the manner predicted by the Court.<sup>222</sup>

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*the Relationship Between Blame Shifting and Control*, 12 J. EMP. LEG. STUD. 311, 322, 327 (2015) (finding that subjects assign less blame to Congress when it delegates to agencies than when it legislates directly).

<sup>215</sup> See Bennett, *supra* note 144, at 427-28.

<sup>216</sup> See Pew Research Ctr., *Well Known: Public Option, Sonia Sotomayor; Little Known: Cap and Trade, Max Baucus* 7 (Oct. 14, 2009); see also, e.g., DELLI CARPINI & KEETER, *supra* note 148, at 76 ("Over half of those surveyed could . . . say which party controlled the U.S. House and Senate.").

<sup>217</sup> See Ansolabehere & Jones, *supra* note 208, at 586-89.

<sup>218</sup> See Chris Tausanovitch & Christopher Warshaw, *Does the Spatial Proximity Between Legislators and Voters Affect Voting Decisions in U.S. House Elections* 20-23 (Feb. 2015).

<sup>219</sup> *Id.* at 23; see also Ansolabehere & Jones, *supra* note 208, at 587 ("Of those who did offer a judgment about how their members voted on some roll calls, the average percent right equals 72% . . .").

<sup>220</sup> See Tausanovitch & Warshaw, *supra* note 218, at 23.

<sup>221</sup> See Ansolabehere & Jones, *supra* note 208, at 588; see also *id.* (finding that when members voted with their party, 82% of respondents correctly stated their votes, but that when members voted against their party, only 42% of respondents correctly stated their votes).

<sup>222</sup> As noted earlier, voters' responsibility attributions for economic and foreign policy conditions are also skewed by their partisan affiliations. See *supra* notes 175-178 and accompanying text. This dynamic has not been studied with respect to congressional bills, but seems less likely to apply in this context. It is ambiguous who should be credited or blamed for general conditions, but quite clear who voted for or against legislation. Partisanship thus probably manifests itself more at the appraisal stage and less at the attribution stage for congressional bills.

#### 4. Modes of Voting

The fourth premise of the Court's argument is that voters would cast their congressional ballots based on their appraisals of, and attributions for, Congress's additional actions. This premise's doubtfulness is illustrated by a number of studies that have examined how legislators' roll call votes influence their vote shares in subsequent elections. These studies have determined that most roll call votes have a negligible electoral impact. For instance, Brandice Canes-Wrone and her coauthors found that votes on environmental policy never significantly affected House incumbents' vote shares from 1988 to 2004, and that votes on criminal policy rarely did so.<sup>223</sup> Similarly, Gregory Bovitz and Jamie Carson showed that, over the 1974-2000 period, 80-84% of House incumbents' votes on "key" bills had no effect on their electoral performance.<sup>224</sup> And assessing House incumbents' key votes from 2003 to 2012, Tausanovitch and Warshaw concluded that "there is no evidence to support the hypothesis that voters hold legislators . . . accountable on important votes."<sup>225</sup>

That retrospective voting is not a common voting mode at the congressional level has also been demonstrated with respect to overall economic conditions. According to Lockerbie, voters' prospective economic expectations dominated their retrospective economic assessments in House and Senate elections from 1956 to 2002, just as they did in presidential elections.<sup>226</sup> According to Raymond Duch and Randolph Stevenson, likewise, voters' evaluations of the economy were less influential in American congressional elections from 1980 to 2000 than in the parliamentary elections of the seventeen other countries in their study.<sup>227</sup> These recent analyses confirm what was a contrarian verdict when Robert Erikson first reached it twenty-five years ago: that past "economic conditions in fact matter little in congressional elections."<sup>228</sup>

If past economic conditions and roll call votes matter little, what factors matter more? The literature on congressional voting is too rich and varied to be easily summarized, but almost all studies agree on the importance of three

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<sup>223</sup> See Brandice Canes-Wrone et al., *Issue Accountability and the Mass Public*, 36 LEG. STUD. Q. 5, 18, 24 (2011).

<sup>224</sup> See Gregory L. Bovitz & Jamie L. Carson, *Position-Taking and Electoral Accountability in the U.S. House of Representatives*, 59 POL. RESEARCH Q. 297, 300-01 (2006) (considering votes on bills deemed important by *Congressional Quarterly*).

<sup>225</sup> Tausanovitch & Warshaw, *supra* note 218, at 46.

<sup>226</sup> See LOCKERBIE, *supra* note 190, at 82, 90; see also *supra* notes 190-191 and accompanying text.

<sup>227</sup> See RAYMOND M. DUCH & RANDOLPH T. STEVENSON, THE ECONOMIC VOTE: HOW POLITICAL AND ECONOMIC INSTITUTIONS CONDITION ELECTION RESULTS 72 (2008).

<sup>228</sup> Robert E. Erikson, *Economic Conditions and the Congressional Vote: A Review of the Macrolevel Evidence*, 34 AM. J. POL. SCI. 373, 375 (1990); see also, e.g., Owen G. Abbe et al., *Agenda Setting in Congressional Elections: The Impact of issues and Campaigns on Voting Behavior*, 56 POL. RESEARCH Q. 419, 420 (2003) (noting that "economic policy outcomes . . . are either much weaker or absent [as a driver of vote choice] at the congressional level"). However, past economic conditions may be more influential for certain kinds of voters, such as those with ambivalent partisan attitudes, see Scott J. Basinger & Howard Lavine, *Ambivalence, Information, and Electoral Choice*, 99 AM. POL. SCI. REV. 169, 175 (2005), or those who are more politically sophisticated, see Gomez & Wilson, *supra* note 176, at 279.

variables.<sup>229</sup> The first is voters' partisan affiliation; unsurprisingly, voters are very likely to support candidates who belong to the same party as them. Indeed, "party typically swamps all else in individual-level models of voting behavior."<sup>230</sup> The second variable is voters' ideology; voters are strongly inclined to back candidates who share their political philosophy. As Boris Shor and Jon Rogowski have written in the best work on the topic, "spatial proximity between voters and their House incumbents does very well in predicting individual vote choice."<sup>231</sup> And the third driver is the President's approval rating. In both House and Senate elections, the more popular the President is with the public, the better candidates from her party do, and vice versa.<sup>232</sup>

The potency of presidential approval is notable because the President is a distinct political actor from Congress. Congressional elections become what political scientists call *second-order* to the extent they are shaped by external presidential forces rather than internal congressional ones.<sup>233</sup> Electoral accountability is impossible in second-order elections since incumbents prosper or suffer based on developments beyond their control. Of course, party and ideology are first-order variables relating to Congress members themselves. But they too are inconsistent with the Court's claim that accountability would rise if the nondelegation doctrine were enforced. Voters who cast their congressional ballots based on partisan affiliation and political philosophy would *not* cast them based on the extra decisions that Congress would make.

## 5. Countervailing Evidence

At least, voters would not *generally* cast their ballots based on those extra congressional decisions. *Sometimes* they would, though, especially if the

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<sup>229</sup> See, e.g., Matthew K. Buttice & Walter J. Stone, *Candidates Matter: Policy and Quality Differences in Congressional Elections*, 74 J. POL. 870, 875 (2012) (referring to party identification, ideology, and presidential approval as "standard predictors in the congressional elections literature"). Two more variables worth noting are incumbency and demography. Incumbents enjoy a substantial advantage over challengers—albeit one that has shrunk in recent years. See, e.g., Gary C. Jacobson, *It's Nothing Personal: The Decline of the Incumbency Advantage in U.S. House Elections*, 77 J. POL. 861, 863 (2015). Aspects of voters' demography, race in particular, significantly influence vote choice as well. See, e.g., Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1351-59 (2016).

<sup>230</sup> Ansolabehere & Jones, *supra* note 208, at 592; see also, e.g., GARY C. JACOBSON, POLITICS OF CONGRESSIONAL ELECTIONS 124 (8th ed. 2012) (referring to "partisanship as the single most important influence on individuals' voting decisions"); Elizabeth N. Simas, *Proximity Voting in the 2010 U.S. House Elections*, 32 ELEC. STUD. 708, 711 (2013) (finding that "93.9% of all voters voted for the candidate from their own party" in the 2010 House election).

<sup>231</sup> Shor & Rogowski, *supra* note 68, at 24; see also, e.g., Ansolabehere & Jones, *supra* note 208, at 591 (finding that ideological distance is a highly significant variable in House elections); Brendan Nyhan et al., *One Vote Out of Step? The Effects of Salient Roll Call Votes in the 2010 Election*, 40 AM. POL. RESEARCH 844, 856 (2012) (same).

<sup>232</sup> See, e.g., Jamie L. Carson et al., *The Electoral Costs of Party Loyalty in Congress*, 54 AM. J. POL. SCI. 598, 609 (2010) (finding that presidential approval is a highly significant variable in House elections); Benjamin J. Kassow & Charles J. Finocchiaro, *Responsiveness and Electoral Accountability in the U.S. Senate*, 39 AM. POL. RESEARCH 1019, 1031 (2011) (same in Senate elections).

<sup>233</sup> See, e.g., David Schleicher, *Federalism and State Democracy* 12 (2016) (noting that elections are second-order when "voters use preferences developed at one level of government . . . as a guide for voting at an entirely different level of government"). However, the distinction between presidential and congressional elections is less stark than that between, say, presidential and municipal elections.

decisions were highly salient. That is the consensus of several recent studies finding that while most congressional votes carry no electoral consequences, a few high-profile votes do matter at the polls. That is also why the Court's argument cannot be dismissed out of hand. If Congress could no longer delegate policy choices to agencies, it would have to make some of those choices itself. Typically, the additional choices would be electorally immaterial. But on occasion, the choices would strike a chord with voters, and congressional incumbents would be punished or rewarded for their positions.

The same pieces that established the electoral irrelevance of most congressional votes also identified several exceptions to the rule. For example, Canes-Wrone and her coauthors showed that Democratic House incumbents who supported stringent anti-crime measures in the 1994-1998 period performed several percentage points better at the polls.<sup>234</sup> This was a time of "extraordinary public concern about the issue," during which it paid to be tough on crime.<sup>235</sup> Similarly, if 80-84% of the key votes examined by Bovitz and Carson from 1974 to 2000 did not affect House incumbents' vote shares, then 16-20% of the votes *did* have an impact.<sup>236</sup> These more influential matters tended to be ones that attracted more media coverage and as to which Congress was more evenly divided.<sup>237</sup>

In the 2000s too, Ansolabehere and Jones determined that three of the eight roll call votes they analyzed were statistically significant drivers of voter behavior. Voters were more likely to support House incumbents who backed tax breaks for energy companies, capital gains tax cuts, and the reauthorization of the Patriot Act.<sup>238</sup> And still more recently, Gary Jacobson<sup>239</sup> and Brendan Nyhan and his coauthors<sup>240</sup> found that House incumbents were punished for voting for items on President Obama's legislative agenda. At the district level, they did three to five percentage points worse in 2010 if they supported health care reform, financial regulation, or the stimulus package.<sup>241</sup> At the individual level, survey respondents were about five points less likely to vote for them if they backed Obamacare.<sup>242</sup>

Plainly, most of the decisions that Congress would have to make if the nondelegation doctrine grew teeth would not be as momentous as Obamacare—or even tax breaks for energy companies. This mine run of new legislation would not change incumbents' electoral fortunes, and the Court's claim is wrong with respect to it. But the Court's claim is not necessarily wrong with respect to that small subset of agency business that draws widespread attention and that would have to be handled by Congress, not the administrative state, if nondelegation

<sup>234</sup> See Canes-Wrone et al., *supra* note 223, at 18, 22.

<sup>235</sup> *Id.* at 20.

<sup>236</sup> See Bovitz & Carson, *supra* note 224, at 300-01.

<sup>237</sup> See *id.* at 303; see also Tausanovitch & Warshaw, *supra* note 218, at 46 (finding "a relatively modest relationship between the roll call positions of legislators on important votes and citizens' vote choice").

<sup>238</sup> See Ansolabehere & Jones, *supra* note 208, at 591.

<sup>239</sup> See Gary C. Jacobson, *The Republican Resurgence in 2010*, 126 POL. SCI. Q. 27 (2011).

<sup>240</sup> See Nyhan et al, *supra* note 231.

<sup>241</sup> See Jacobson, *supra* note 239, at 49.

<sup>242</sup> See Nyhan et al, *supra* note 231, at 856.

were a binding rule. The available evidence indicates that congressional incumbents *would* sometimes be held accountable for this atypical activity.<sup>243</sup>

### C. State Governments

#### 1. Voter Knowledge

Now turn to the Court's argument that state governments are more electorally accountable when they are not commandeered (or otherwise compelled to act) by the federal government.<sup>244</sup> This argument has the same four prerequisites as the Court's claims about presidential and congressional accountability: in the absence of federal commandeering (or its equivalent), voters must be aware of state governments' actions, appraise them, attribute responsibility for them, and vote based on these appraisals and attributions. The argument also has the same flaws as the Court's other claims, namely, that the four prerequisites are rarely satisfied. As these flaws should be familiar by this point (and as the body of relevant work is smaller for state governments than for the President or Congress<sup>245</sup>), I march through them fairly briskly.

First, with respect to voter knowledge, people are at least as unaware of state policies as of federal ones. Delli Carpini and Keeter conducted a state-level survey of political information in Virginia. They found a high correlation between respondents' (low) knowledge of national politics and their (even lower) knowledge of state politics.<sup>246</sup> They also found that state political knowledge has almost the same demographic and socioeconomic determinants (age, education, gender, income, and so on) as national political knowledge.<sup>247</sup> Donald Songer carried out another state-level informational survey, this time in Oklahoma. He determined that about one-quarter of respondents could identify their state representative, compared to roughly half who could name their member of Congress.<sup>248</sup> He also showed that respondents were about three times more likely to state correctly their Congress member's votes on high-profile bills (31%) than their state representative's stances (11%).<sup>249</sup>

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<sup>243</sup> For this to be true, congressional incumbents would also have to be deemed more responsible for bills they vote on than for policies enacted by agencies. As noted earlier, this is indeed the case. *See supra* note 222. It is also worth flagging the potential downside of *asymmetric* accountability if the nondelegation doctrine were revived. *Cf.* John D. Griffin & Patrick Flavin, *Racial Differences in Information, Expectations, and Accountability*, 69 J. POL. 220, 226 (2007) (finding that white constituents are more likely than African American constituents to hold House members accountable for their voting records).

<sup>244</sup> *See supra* Part II.C.

<sup>245</sup> *See* Kevin Arceneaux, *Does Federalism Weaken Democratic Representation in the United States?*, 35 *PUBLIUS* 297, 297 (2005) ("Few studies have focused on representational linkages in a federal system.").

<sup>246</sup> *See* DELLI CARPINI & KEETER, *supra* note 148, at 151 (reporting a correlation of 0.66).

<sup>247</sup> *See id.* at 149. The main differences are that employment status is significant at the state but not at the national level, and that race is significant at the national but not at the state level. *See id.*

<sup>248</sup> *See* Songer, *supra* note 206, at 390; *see also* Steven Rogers, *Electoral Accountability in State Legislative Roll-Calls and Ideological Representation* 5 (Aug. 13, 2015) (reporting a similar result).

<sup>249</sup> *See* Songer, *supra* note 206, at 393; *see also* Rogers, *supra* note 248, at 5 (noting that state legislative elections receive less than one-fourth of the media coverage of congressional elections).

The implication of these results is that even when state governments make their own decisions, free from any federal interference, voters are often unaware of the decisions. Lacking this knowledge, voters are often unable to reward or punish state governments for their choices. As Steven Rogers has observed, the combination of “uninformed voters” and “little media attention” “creates an unfavorable setting for accountability at the state level.”<sup>250</sup>

## 2. Voter Judgments

Second, with respect to voter judgments, they are distorted by partisanship whether they involve specific state policies or general state conditions. At the policy level, John Bullock performed an experiment in which he informed his subjects about either an expansion or a contraction of a state’s Medicaid program.<sup>251</sup> He also told some of his subjects about the positions taken on the issue by the state’s Democratic and Republican legislators. As in the analogous congressional studies, Democratic subjects became more (less) supportive of Medicaid expansion if they learned that Democratic legislators backed (opposed) the measure.<sup>252</sup> Republican subjects’ views swung even further toward the stances of Republican elites.<sup>253</sup>

At the level of state economic conditions, Adam Brown found that they were assessed differently in 2006 by Democratic and Republican respondents living in states with Democratic governors. Democrats (Republicans) in these states tended to think that the state economy was stronger (weaker) than the national economy, whose situation was associated with President Bush and the Republican Congress.<sup>254</sup> Conversely, Democrats’ and Republicans’ state economic evaluations were nearly identical in states with Republican governors.<sup>255</sup> There was no partisan distinction that these respondents could make between local and national conditions, both of which were linked to Republican rule.

These findings suggest that even when voters know about the records that state governments have autonomously compiled, their partisanship still impairs them from holding the governments accountable. Democratic voters tend to approve of poor performances by Democratic administrations and to frown on good ones by Republican administrations. Republican voters tend to do the opposite. As a result, objective accountability is replaced, to some degree, by a partisan dynamic untethered to reality.

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<sup>250</sup> Rogers, *supra* note 248, at 6.

<sup>251</sup> See John G. Bullock, *Elite Influence on Public Opinion in an Informed Electorate*, 105 AM. POL. SCI. REV. 496, 500 (2011).

<sup>252</sup> See *id.*

<sup>253</sup> See *id.*; see also, e.g., Geoffrey L. Cohen, *Party Over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERSONALITY & SOC. PSYCH. 808, 811 (2003) (finding that subjects’ opinions on a state welfare program are much more affected by party endorsements than by the program’s generosity or stringency).

<sup>254</sup> See Adam R. Brown, *Are Governors Responsible for the State Economy? Partisanship, Blame, and Divided Federalism*, 72 J. POL. 605, 610-11 (2010).

<sup>255</sup> See *id.*

### 3. Voter Attributions

Third, with respect to voter attributions, they are compromised both by a lack of information about state governmental duties and by partisanship. As to information, Rogers determined that respondents in 2010 were about thirty percentage points less likely to know which party controlled their state legislature than which party held a majority in Congress.<sup>256</sup> Similarly, Fred Cutler showed that respondents essentially guess when asked to rate states' authority over various policy areas—agriculture, health care, taxes, and so on. “[V]ariation across issues is strikingly minimal,” and all of “[t]he means are between six and eight on the 0-10 scale.”<sup>257</sup> Because respondents' assignments of state responsibility are little more than speculation, it is unsurprising that, in a separate analysis, Robert Johns was unable to explain the vast majority of their variation. The weakness of Johns's models implied that the assignments “were in many cases nonattitudes, delivered off the top of respondents' heads and not tightly linked to their broader political thinking.”<sup>258</sup>

As to partisanship, both Lonna Atkeson and Cherie Maestas<sup>259</sup> and Neil Malhotra and Alexander Kuo<sup>260</sup> examined the attitudes of Louisiana Democrats and Republicans in the aftermath of Hurricane Katrina. According to Atkeson and Maestas, about four-fifths of Democrats blamed the federal government, then under unified Republican control, for failing to respond adequately to the storm, compared to only two-fifths of Republicans.<sup>261</sup> Likewise, according to Malhotra and Kuo, roughly three-fifths of Democrats thought President Bush was most to blame for Katrina's devastation, as opposed to only one-fifth of Republicans.<sup>262</sup> In place of President Bush, Republicans were much more likely to fault Louisiana Governor Kathleen Blanco and New Orleans Mayor Ray Nagin (both Democrats).<sup>263</sup>

These studies add to the pessimistic account of state governmental accountability. Voters cannot properly reward or punish state governments for

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<sup>256</sup> See Steven Rogers, *Accountability in State Legislatures: How Parties Perform in Office and State Legislative Elections* 5 (Oct. 17, 2013); see also *id.* at 25 (showing empirically that due to their confusion over party control, voters “sometimes punish the party that actually is in power when they intend to reward them”).

<sup>257</sup> Fred Cutler, *Whydunnit? Voters and Responsibility in Canadian Federalism*, 41 CAN. J. POL. SCI. 627, 638 (2008) (surveying respondents in Ontario and Saskatchewan).

<sup>258</sup> Johns, *supra* note 57, at 67 (surveying respondents in Ontario and Scotland); see also Kevin Arceneaux, *The Federal Face of Voting: Are Elected Officials Held Accountable for the Functions Relevant to Their Office*, 27 POL. PSYCHOLOGY 731, 743-44 (2006) (finding that voters' responsibility attributions have little impact on their voting decisions in state and federal elections).

<sup>259</sup> See LONNA RAE ATKESON & CHERIE D. MAESTAS, *CATASTROPHIC POLITICS: HOW EXTRAORDINARY EVENTS REDEFINE PERCEPTIONS OF GOVERNMENT* (2012).

<sup>260</sup> See Neil Malhotra & Alexander G. Kuo, *Attributing Blame: The Public's Response to Hurricane Katrina*, 70 J. POL. 120 (2008).

<sup>261</sup> See ATKESON & MAESTAS, *supra* note 259, at 81; see also Cherie D. Maestas et al., *Shifting the Blame: Federalism, Media, and Public Assignment of Blame Following Hurricane Katrina*, 38 PUBLIUS 609, 620 (2008) (finding that Republicans were more likely to blame the Democratic-run state government for failing to ask for enough help).

<sup>262</sup> See Malhotra & Kuo, *supra* note 260, at 127.

<sup>263</sup> See *id.*

their actions when, due to voters' lack of information and partisan bias, they cannot accurately attribute responsibility for those actions. The evidence of voters' confusion over state governments' duties is especially damning for the Court's claim. It means that even when states are *not* being compelled to do anything by their federal overseers, many voters are unsure which level of government is in charge of each policy area. The lines of accountability, that is, are blurred even in the absence of federal commandeering.<sup>264</sup>

#### 4. Modes of Voting

Lastly, with respect to modes of voting, state legislative elections are mainly second-order and gubernatorial elections are considerably so. To the extent these elections are first-order, they are also dominated by non-retrospective voting. Rogers recently completed the most thorough analysis of the drivers of state legislative outcomes, showing in several ways that they are mostly national in scope. For instance, seat changes in state legislative elections were almost perfectly correlated with seat changes in congressional elections from 1910 to 2010.<sup>265</sup> Likewise, state legislative results were largely unaffected by states' economic growth rates, standardized test scores, and crime rates from 1972 to 2010.<sup>266</sup> At the voter level, presidential approval exerted more than three times the influence of state legislative approval on respondents' state legislative vote choices in 2008 and 2010.<sup>267</sup> And at the state legislator level, out of twenty-eight bills that both representatives and the public voted on from 1998 to 2014 (because they doubled as referenda), twenty-four had no perceptible impact on representatives' subsequent vote shares.<sup>268</sup>

As for gubernatorial elections, scholars have debated for years whether they are shaped mostly or entirely by national forces. The early "conventional wisdom" was that a "national-level effect" prevailed, "whereby only incumbent candidates of the president's party are rewarded or punished based upon

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<sup>264</sup> As with the Court's congressional accountability claim, *see supra* note 202, some scholars rebut the Court's state governmental accountability claim in the opposite way that I do. I argue that state governmental accountability is low whether or not federal commandeering takes place. In contrast, they assert that state governmental accountability is *high* even in the presence of commandeering because voters can accurately discern which level of government is responsible for each policy. *See, e.g.,* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1062 (1995) (contending that voters "can investigate whether those actions lie within the discretion of that [state] executive . . . or whether they are mandated by . . . federal statute"); Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1632 (2006). The problem with this position is again empirical; there is no evidence that most voters can distinguish between state and federal policy responsibilities, and much evidence that they usually cannot.

<sup>265</sup> *See* Rogers, *supra* note 256, at 6.

<sup>266</sup> *See id.* at 13-15.

<sup>267</sup> *See id.* at 20; *see also id.* at 24 (confirming this result with New Jersey survey data from 1973 to 2007).

<sup>268</sup> *See* Rogers, *supra* note 248, at 21; *see also id.* at 12 (finding that a one standard deviation increase in a state legislator's ideological extremism reduces her vote share by only 0.6%); Nathaniel A. Birkhead, *The Role of Ideology in State Legislative Elections*, 40 LEGIS. STUD. Q. 55, 70 (2015) (coming to a nearly identical conclusion); Robert E. Hogan, *Policy Responsiveness and Incumbent Reelection in State Legislatures*, 52 AM. J. POL. SCI. 858, 867 (2008) (finding that a state legislator's vote share is unrelated to her voting record).

prevailing economic conditions” nationwide.<sup>269</sup> But more recent studies have effectively challenged this consensus, finding that gubernatorial outcomes are a function of *both* national factors, especially the state of the economy and the President’s approval rating, *and* state variables.<sup>270</sup> There is no need to settle this argument here; the key point for present purposes is that “[f]ew dispute that national partisan trends and national economic conditions influence gubernatorial approval and elections.”<sup>271</sup> Gubernatorial elections are thus at least partly second-order.

Moreover, insofar as state legislative and gubernatorial elections are first-order, retrospective voting takes a back seat in them to other voting modes. These other modes are the usual suspects from the earlier discussions of presidential and congressional voting: party, ideology, and demography.<sup>272</sup> In state legislative elections, Bradford Bishop and Rebecca Hatch determined that all three of these factors are more potent than voters’ approval of the state legislature’s performance.<sup>273</sup> Similarly, in gubernatorial elections, Atkeson and Randall Partin<sup>274</sup> and Richard Niemi and his coauthors<sup>275</sup> both showed that evaluations of the state economy are less influential than other forms of first-order voting.

These results further illustrate the implausibility of the Court’s argument. Even if voters know about state governments’ decisions, assess them reasonably, and assign responsibility for them correctly (perhaps thanks to a lack of federal coercion), voters still need to cast their ballots based on these assessments and assignments for there to be accountability. An ocean of evidence, though, indicates that this is simply *not* how voters tend to cast their state ballots. Instead, voters tend to cast them above all on national grounds, and in part on non-retrospective state grounds.

## 5. Countervailing Evidence

What is left, then, of the Court’s claim? Not much, which is why this is the domain where I am most inclined to reject the Court’s reasoning outright rather than merely to discount it. But even here, there do exist certain findings that lend some tentative support to the Court’s analysis. First, it appears that at least in a

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<sup>269</sup> Lonna Rae Atkeson & Randall W. Partin, *Economic and Referendum Voting: A Comparison of Gubernatorial and Senatorial Elections*, 99 AM. POL. SCI. REV. 99, 99 (1995); *see also, e.g.*, John E. Chubb, *Institutions, the Economy, and the Dynamics of State Elections*, 82 AM. POL. SCI. REV. 133, 145 (1988) (“[S]tate voters have generally and increasingly looked outside of the state—to the national economy and the president’s imputed performance in managing it.”).

<sup>270</sup> *See, e.g.*, Thomas M. Carsey & Gerald C. Wright, *State and National Factors in Gubernatorial and Senatorial Elections*, 42 AM. J. POL. SCI. 994, 1000 (1998); Cohen & King, *supra* note 42, at 1277; Richard G. Niemi et al., *State Economies and State Taxes: Do Voters Hold Governors Accountable?*, 39 AM. J. POL. SCI. 936, 952 (1995); Justin Wolfers, *Are Voters Rational? Evidence from Gubernatorial Elections* 6-7 (Jan. 30, 2007).

<sup>271</sup> Brown, *supra* note 254, at 606.

<sup>272</sup> *See supra* Parts III.A.4, III.B.4.

<sup>273</sup> *See* Bradford H. Bishop & Rebecca S. Hatch, *Perceptions of State Parties and Voting in Subnational Elections* 25 (2011); *see also* Rogers, *supra* note 256, at 20, 24.

<sup>274</sup> *See* Atkeson & Partin, *supra* note 269, at 104.

<sup>275</sup> *See* Niemi et al., *supra* note 270, at 952-93.

few policy areas, or at least if they are more knowledgeable, voters are able to distinguish between state and federal duties. In a survey conducted by Bryan Caplan and his coauthors, respondents attributed somewhat less responsibility to state and local governments than to the President and Congress for the economy, and somewhat more for education and crime.<sup>276</sup> In Cutler's survey, better educated and more politically aware respondents also came closer in their responsibility attributions to the judgments of a panel of experts.<sup>277</sup> It is conceivable that these positive results would be worsened by federal commandeering of state governments. In that event, voters might become unable to make even the limited intergovernmental distinctions that represent their current capacity.

Second, the flip side of the above summary of voter behavior in state elections is that some retrospective voting does take place. At the state legislative level, Rogers determined that approval of the state legislature is linked to vote choice,<sup>278</sup> that four of twenty-eight bills had measurable electoral consequences,<sup>279</sup> and that extreme incumbents suffer at the polls compared to their more moderate peers.<sup>280</sup> Likewise, at the gubernatorial level, recent studies agree that states' economic conditions affect governors' electoral performances,<sup>281</sup> and the same may also be true of governors' fiscal records<sup>282</sup> and responses to natural disasters.<sup>283</sup> Again, it is possible that these flickers of accountability would die out if the federal government began compelling the states to act. Then voters might abandon even the occasional retrospective voting in which they now engage.

The problem with these two defenses, though, should be readily apparent. Both of them rely entirely on conjecture about what *could* happen if state governments were federally conscripted. There is no evidence that voters' attributions of responsibility or retrospective decisions—such as they are—actually *would* be attenuated in that scenario. There is only a status quo that is not entirely devoid of accountability, and a suspicion that things might change for the worse if federal interference intensified. This suspicion is not wholly fanciful, but it is still a flimsy foundation for a claim of constitutional stature.

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<sup>276</sup> See Bryan Caplan et al., *Systematically Biased Beliefs About Political Influence: Evidence from the Perceptions of Political Influence on Policy Outcomes Survey*, 46 PS: POL. SCI. & POL. 760, 761 (2013); see also Thomas J. Rudolph, *Institutional Context and the Assignment of Political Responsibility*, 65 J. POL. 190, 204 (2003) (finding that “respondents are more likely to attribute responsibility to the governor as the partisan power of the governor’s party increases”).

<sup>277</sup> See Cutler, *supra* note 257, at 645; see also Johns, *supra* note 57, at 66 (finding that “[e]ducation, political knowledge, and willingness to vote are all associated with” more accurate responsibility attributions).

<sup>278</sup> See Rogers, *supra* note 256, at 20.

<sup>279</sup> See Rogers, *supra* note 248, at 21.

<sup>280</sup> See *id.* at 13; see also Birkhead, *supra* note 268, at 70 (same).

<sup>281</sup> See *supra* note 270 and accompanying text.

<sup>282</sup> See Robert C. Lowry et al., *Fiscal Policy Outcomes and Electoral Accountability in American States*, 92 AM. POL. SCI. REV. 759, 765-66 (1998); Niemi et al., *supra* note 270, at 952-53.

<sup>283</sup> See John T. Gasper & Andrew Reeves, *Make It Rain? Retrospection and the Attentive Electorate in the Context of Natural Disasters*, 55 AM. J. POL. SCI. 340, 350 (2011).

## D. Incumbents

### 1. Affirmative Evidence

The Court's final assertion about accountability is that it is enhanced by campaign finance deregulation—specifically, by the unlimited campaign spending that deregulation enables.<sup>284</sup> This assertion differs from the Court's other arguments in that it applies to *all* incumbents, not to officeholders in a particular branch or level of government. For this reason, the assertion is best rebutted not by (once again) going through the conditions for retrospective voting, but rather by following the causal path between campaign finance regulation and accountability. There are three major steps along this path, all of which defy the Court's expectations. First, regulation reduces incumbents' spending advantage over challengers. Second, incumbents' smaller spending advantage produces more competitive elections. And third, voters respond to greater competition by learning more about incumbents' records and more often voting based on them.

The crucial backdrop for the first step is that, in the absence of regulation, incumbents raise and spend far more money than challengers. Incumbents have wider fundraising networks than their opponents, deeper relationships with donors, and more sticks and carrots with which to solicit contributions—and they exploit these assets to the hilt. In 2006, for example, state house incumbents raised an average of \$172,000 in states with no (or very high) contribution limits, while their challengers mustered only \$37,000.<sup>285</sup> In the most recent congressional election, similarly, incumbent House members collected an average of \$1.6 million, compared to only \$258,000 for their challengers.<sup>286</sup>

Precisely because incumbents benefit from deregulation, *regulation* curbs their resources more than it does those of their opponents. Challengers' capacity to attract donations is low enough that it is unaffected by most fundraising restrictions. Incumbents' capacity, in contrast, is much higher, and so is materially constrained by regulation. In the most rigorous study of this topic, Thomas Stratmann found that, in state house elections from 1996 to 2006, tight individual contribution limits increased challengers' share of total spending by seven percentage points, and decreased the fundraising gap between incumbents and challengers by twenty percentage points.<sup>287</sup> Strict contribution limits on

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<sup>284</sup> See *supra* Part II.D. The Court has made this assertion in cases involving expenditure limits, but its logic extends to all campaign finance regulation. See, e.g., Smith, *supra* note 138, at 1072 (advancing the claim with respect to all “[c]ampaign finance reform measures”).

<sup>285</sup> See Thomas Stratmann, *How Close Is Fundraising in Contested Elections in States with Low Contribution Limits?* 9 (May 2009).

<sup>286</sup> See *Incumbent Advantage*, OPENSECRETS.ORG, <https://www.opensecrets.org/overview/incumbents.php?cycle=2014&type=G&party=A> (last visited Aug. 1, 2016). Of course, congressional campaign finance is hardly unregulated. Because it is difficult to make causal inferences based on the unitary congressional system, most of the findings I discuss here come from the states, whose greater regulatory variety facilitates more sophisticated analysis.

<sup>287</sup> See Stratmann, *supra* note 285, at 23; see also Thomas Stratmann & Francisco J. Aparicio-Castillo, *Competition Policy for Elections: Do Campaign Contribution Limits Matter?*, 127 PUB. CHOICE 177, 198

political action committees (PACs) shrank incumbents' spending advantage by a similar amount.<sup>288</sup> So did caps on donations from corporations, unions, and PACs in gubernatorial elections from 1990 to 2000, as reported by Kihong Eom and Donald Gross in another valuable study.<sup>289</sup>

Notably, regulation also tends to equalize candidates' resources when it takes the form of public financing rather than restrictions on contributions. Challengers' spending rises due to the infusion of public funds, while incumbents' spending falls due to the expenditure limits that inevitably accompany the governmental grants. Examining the consequences of full public financing in state legislative elections from 1990 to 2010, Andrew Hall determined that it lessened incumbents' spending advantage by about seventeen percentage points. That is, incumbents accounted for roughly 72% of total spending without the policy, but just 55% with it.<sup>290</sup> Gross and his coauthors came to a comparable (though less dramatic) conclusion for partial public financing in gubernatorial elections from 1978 to 1997.<sup>291</sup>

The second link in the causal chain is that greater parity in candidates' resources gives rise to closer elections. It does so for the simple reason that, controlling for other factors, more spending by a candidate improves her electoral performance.<sup>292</sup> So when the spending differential between incumbents and challengers is smaller, the gap between their vote shares shrinks as well. Stratmann established this point with respect to contribution limits and state house elections from 1980 to 2006. He showed that the average margin of victory declined from about 55% when there were no (or very high) limits to roughly 25% when limits were very low.<sup>293</sup> Likewise, David Primo and his coauthors found that in gubernatorial elections from 1978 to 2004, winning candidates prevailed by about ten percentage points less when contribution limits were in place.<sup>294</sup>

The same logic holds for public financing; by reducing incumbents' spending advantage, it erodes their electoral edge too. According to Hall, the boost that

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(2006) (finding that in state house elections in 1998, "when states switch from no limits to having [maximum] limits . . . incumbents' share of total contributions in an electoral race is lowered by six percent").

<sup>288</sup> See Stratmann, *supra* note 285, at 24.

<sup>289</sup> See Khong Eom & Donald A. Gross, *Contribution Limits and Disparity in Contributions Between Gubernatorial Candidates*, 59 POL. RESEARCH Q. 99, 107 (2006).

<sup>290</sup> See Andrew B. Hall, *How the Public Funding of Elections Increases Candidate Polarization* 11-12 (Jan. 13, 2014).

<sup>291</sup> See Donald A. Gross et al., *State Campaign Finance Regulations and Electoral Competition*, 30 AM. POL. RESEARCH 143, 155 (2002) (focusing on the spending limits attached to public financing).

<sup>292</sup> See, e.g., Thomas Stratmann, *Some Talk: Money in Politics: A (Partial) Review of the Literature*, 124 PUB. CHOICE 135, 136-41 (2005) (reviewing the literature on how candidate spending and electoral performance are related).

<sup>293</sup> See Thomas Stratmann, *Do Low Contribution Limits Insulate Incumbents from Competition?*, 9 ELECTION L.J. 125, 135 (2010); see also Stratmann & Aparicio-Castillo, *supra* note 288, at 189-90 (same).

<sup>294</sup> See David M. Primo et al., *State Campaign Finance Reform, Competitiveness, and Party Advantage in Gubernatorial Elections*, in THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 268, 278 (Michael P. McDonald & John Samples eds., 2006); see also Raymond J. La Raja & Brian F. Schaffner, *The (Non-)Effects of Campaign Finance Spending Bans on Macro Political Outcomes: Evidence from the States* 19 (finding that corporate spending bans reduce incumbents' reelection rate by about three percentage points).

candidates receive due to incumbency falls by roughly 50% in states with generous governmental grants<sup>295</sup>—a result confirmed by Timothy Werner and Kenneth Mayer.<sup>296</sup> According to Malhotra, the average margin of victory drops by ten to forty percentage points when a challenger accepts full public financing.<sup>297</sup> These are striking outcomes, indicating, in Malhotra’s words, that “clean elections laws are . . . effective tools of enhancing competition.”<sup>298</sup>

The last piece of the puzzle is that electoral competition promotes electoral accountability. Voters acquire more of the information they need to vote retrospectively in competitive settings, and they actually use this information to vote retrospectively at higher rates. In a groundbreaking study, Jones analyzed how voter knowledge and voter behavior are related in competitive and uncompetitive Senate elections. In competitive elections, voters are able to state correctly more of the positions taken by incumbent senators on high-profile bills.<sup>299</sup> The jump in voter information from uncompetitive to competitive elections is equivalent to “the difference between constituents with no high school degree and those with a post-college degree,” “the difference between women and men,” and “the difference between whites and blacks.”<sup>300</sup>

Furthermore, voters in competitive milieus not only learn more about incumbent senators’ records, but also are more likely to cast their ballots based on these records. In the least competitive elections, voters who disagree with the bulk of their senators’ positions still vote for the senators about two-thirds of the time.<sup>301</sup> In the most competitive elections, in contrast, “that support all but vanishes,” and poorly represented voters “support the incumbent just 12.3% of the time.”<sup>302</sup> Accountability is thus strongly connected to competition. “The more competitive a state is, the more responsive the electorate, and the more an incumbent can expect to be punished for any ‘out of step’ votes she casts.”<sup>303</sup>

Together, these three causal steps mean that the Court’s view of how campaign finance regulation affects electoral accountability is exactly backward. Regulation does not undermine accountability; rather, it augments it by (1) decreasing incumbents’ spending advantage; and so (2) making elections more competitive; and so (3) increasing the prevalence of retrospective voting. Moreover, this is the case for a wide array of reforms enacted by the states:

<sup>295</sup> See Hall, *supra* note 290, at 15 (showing a decline in the incumbency advantage from 10% to 4%).

<sup>296</sup> See Timothy Werner & Kenneth R. Mayer, *Public Campaign Finance and the Incumbency Advantage* 17 (Mar. 31-Apr. 3, 2011) (showing a decline in the incumbency advantage from 4% to 2%); see also Kenneth R. Mayer et al., *Do Public Funding Programs Enhance Electoral Competition?*, in *THE MARKETPLACE OF DEMOCRACY*, *supra* note 294, at 245, 263 (same).

<sup>297</sup> See Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 ST. POL. & POL’Y Q. 263, 274, 276 (2008).

<sup>298</sup> *Id.* at 277; see also Hall, *supra* note 290, at 14 (“By funding more challengers and reducing incumbent war chests, public funding can therefore deliver large electoral effects.”).

<sup>299</sup> See Philip Edward Jones, *The Effect of Political Competition on Democratic Accountability*, 10 POL. BEHAVIOR 1, 17-20 (2012).

<sup>300</sup> *Id.* at 19.

<sup>301</sup> See *id.* at 27.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 29. This result is confirmed at the state legislative level by Rogers’s work. See Steven Rogers, *Electoral Accountability for State Legislative Roll-Calls and Ideological Representation* 13 (July 14, 2016) (finding that state legislators’ extremism has more negative electoral consequences in competitive districts).

contribution limits on individuals, corporations, unions, and PACs; expenditure limits tied to governmental grants; and partial and full public financing. All of these reforms change the financial and electoral environment in ways that render incumbents more accountable for their actions.

## 2. Countervailing Evidence

As always, though, there is a catch—two of them, in fact. The first is that candidate spending tends to improve voter knowledge. Jacobson showed that, for both House and Senate candidates, voters’ ability to recognize and recall their names rises along with their per-voter expenditures.<sup>304</sup> Similarly, John Coleman and Paul Manna determined that, for House candidates, their spending makes voters more willing to assess their ideologies and to state their positions on various issues.<sup>305</sup> These findings suggest that by lowering candidate outlays, campaign finance regulation could lessen voter knowledge, and with it, accountability.

But this is a remote prospect. Crucially, while incumbents’ spending informs voters to a degree, challengers’ spending does so to a much greater extent. For instance, as Senate incumbents’ expenditures vary from their lowest to their highest level, the likelihood that voters can recall the incumbents’ names increases by only 8%.<sup>306</sup> The equivalent figure for Senate challengers is 57%.<sup>307</sup> Likewise, the impact of House incumbents’ spending on voters’ willingness to rate their ideologies is several times smaller than that of House challengers’ spending.<sup>308</sup> This disparity in the efficacy of incumbents’ and challengers’ outlays is why campaign finance regulation does not reduce accountability even though it cuts candidate spending. It primarily cuts incumbents’ less informative expenditures while leaving largely unscathed challengers’ more edifying ones.

The second catch is that not all restrictions of money in politics foster accountability. Prior to 2003, the major political parties could raise and spend unlimited amounts of “soft money.”<sup>309</sup> The parties disproportionately deployed these funds on behalf of challengers, especially challengers in close races where additional resources might push them over the top.<sup>310</sup> In 2003, though, Congress

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<sup>304</sup> See JACOBSON, *supra* note 230, at 143; see also Jennifer Wolak, *The Consequences of Concurrent Campaigns for Citizen Knowledge of Congressional Candidates*, 31 POL. BEHAVIOR 211, 220, 222 (2009) (same result for House candidates).

<sup>305</sup> See John J. Coleman & Paul F. Manna, *Congressional Campaign Spending and the Quality of Democracy*, 62 J. POL. 757, 772, 774 (2000).

<sup>306</sup> See JACOBSON, *supra* note 230, at 143.

<sup>307</sup> See *id.*

<sup>308</sup> See Coleman & Mann, *supra* note 305, at 772; see also Wolak, *supra* note 304, at 220, 222, 225 (finding that challenger spending has a greater impact on voter recognition, recall, and knowledge than incumbent spending).

<sup>309</sup> See *McCConnell v. FEC*, 540 U.S. 93, 122-32 (2003) (discussing soft money, issue advocacy, and Congress’s investigation into their abuses).

<sup>310</sup> See *id.* at 249-50 (Scalia, J., concurring in the judgment in part and dissenting in part); Raymond J. La Raja & Brian F. Schaffner, *Do Party-Centered Campaign Finance Laws Increase Funding for Moderates and Challengers?* 16 (Jan. 8-11, 2014) (showing that in the absence of party limits, challengers receive 16% of their funds from parties and incumbents receive 7%).

enacted the Bipartisan Campaign Reform Act (BCRA), which banned the solicitation and receipt of soft money.<sup>311</sup> In the wake of the law's passage, the gap between incumbents' and challengers' expenditures in tight House races grew significantly, from about \$600,000 to roughly \$900,000.<sup>312</sup> This spike in incumbents' spending advantage presumably caused a decline in both competition and accountability,<sup>313</sup> though regrettably, this hypothesis has yet to be tested explicitly.

BCRA is a useful cautionary tale, highlighting how hard it can be to predict the consequences of campaign finance regulation. That BCRA likely made members of Congress less accountable, though, in no way implies that other reforms would do the same. For one thing, most other reforms (contribution limits, public financing, and so on) have been around for decades. There has thus been ample time to evaluate their effects at all governmental levels. For another, parties are unique among funding sources in channeling more of their money to challengers than to incumbents. Individuals, corporations, unions, and PACs all give more heavily to incumbents,<sup>314</sup> meaning that when their activities are curtailed, incumbents' spending advantage falls, and competition and accountability rise. Accordingly, the BCRA experience is not generalizable, and most campaign finance laws indeed render incumbents more accountable.

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To recap, the Court contends that electoral accountability is both high in absolute terms and higher in relative terms when (1) the President exercises more control over federal agencies; (2) Congress delegates fewer decisions to agencies; (3) state governments are not federally commandeered; and (4) money in politics is unregulated. An exhaustive canvass of the empirical literature, though, leads to a very different conclusion. This survey reveals that accountability is actually low in absolute terms, and at best marginally higher in relative terms, in the scenarios contemplated by the Court. The Court is not *entirely* wrong, but it is only slightly right.

This point can be made graphically using a final variant of the chart presented earlier. The x-axis again represents voters' appraisal of the relevant actor's record: the President, a member of Congress, a state government official, or a generic incumbent.<sup>315</sup> The y-axis again denotes the likelihood that voters will

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<sup>311</sup> See *McConnell*, 540 U.S. at 133-34.

<sup>312</sup> See Raymond La Raja, *Will the BCRA Strengthen the Political System? Negative: BCRA Is Not Improving the Political System*, 24 J. POL'Y ANAL. & MGMT. 604, 605 (2005).

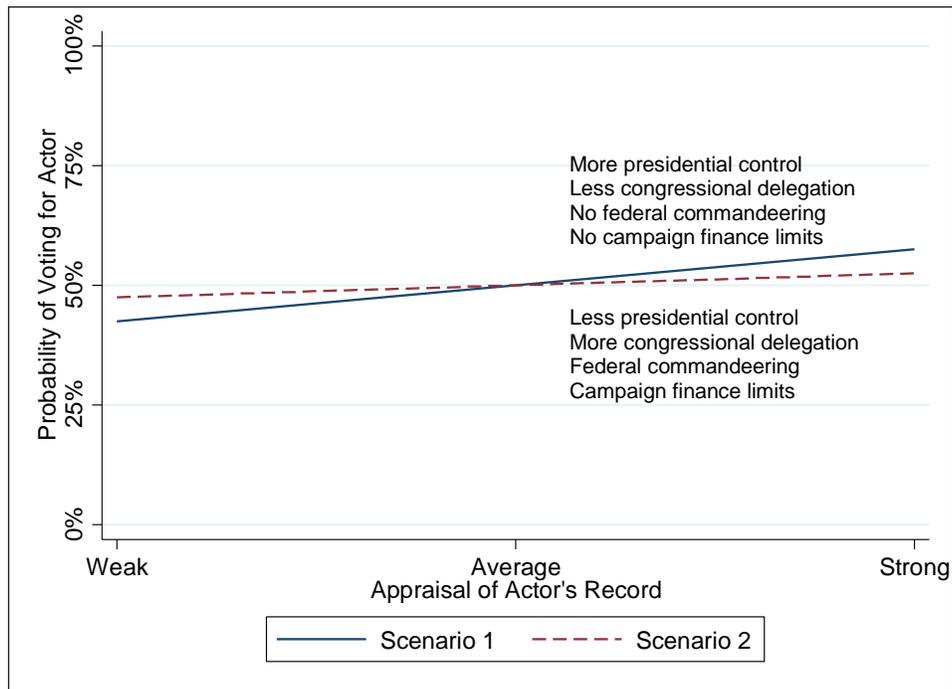
<sup>313</sup> See Stratmann, *supra* note 292, at 151 (“[T]his law has probably benefitted the current office holders relative to their potential challengers.”).

<sup>314</sup> See Michael J. Barber, *Buying Representation: The Incentives, Ideology, and Influence of Campaign Contributors in American Politics* 17 (Sept. 2014); La Raja & Schaffner, *supra* note 310, at 8, 16.

<sup>315</sup> As before, an incumbent's actual record—not voters' appraisal of her record—works better as the x-axis for the Court's campaign finance claim. See *supra* note 139. Additionally, given that campaign finance regulation *improves* accountability and deregulation *worsens* it, the “Campaign finance limits” and “No campaign finance limits” lines should be positioned somewhat differently. I omit this adjustment for the sake of simplicity.

support this actor. According to the empirical literature, as shown in Figure 3, Scenario 1, there is only a weak and flat relationship between the two variables even when presidential control is robust, congressional delegation is rare, federal commandeering is absent, and campaign finance is unfettered. True, this relationship is not *quite* as weak and flat as that captured by Figure 3, Scenario 2 and depicting the opposite institutional arrangements. But weakness and flatness are still its distinctive characteristics.

FIGURE 3: ACCOUNTABILITY ACCORDING TO THE EVIDENCE



#### IV. ACCOUNTS OF ACCOUNTABILITY

The error of the Court's claims raises a number of interesting questions. Why has the Court gone astray in its reasoning about how different policies affect accountability? If the Court is committed to promoting accountability, how might it actually achieve this goal? And is the advancement of accountability an appealing aim, or are there other democratic values—or perhaps other modes of argument entirely—that the Court should be pursuing instead?

These are large questions, too large to be fully answered here. Still, I do begin to engage with them in this Part. In my view, the Court's aversion to empirical evidence is the most important explanation for the inaccuracy of its assertions. Even a cursory look at the relevant facts would expose the assertions' tenuousness, but the Court has never taken this look. To further accountability, I

think the Court would be wise to shift its attention from institutional relations to electoral competition. The Court has no control over the aspects of governmental structure that shape accountability, but its decisions *can* make elections more (or less) competitive. And precisely because it is so difficult to move the accountability needle, the Court should consider prioritizing other democratic goods. The alignment of governmental outputs with voters' preferences, in particular, is both a compelling aspiration and one the Court can help realize.

#### A. Explanations

It is rarely productive to speculate about why the Court makes mistakes. Mistakes tend to be in the eye of the beholder, and guesses about the Court's thinking are often entertaining but seldom useful. I therefore abbreviate my explanations for the Court's incorrect claims about accountability, aware I can offer no proof for them.

That said, the most obvious reason why the Court errs seems to be its insistence on making empirical arguments without first consulting the empirical literature. I noted earlier that in the many cases in which the Court has analyzed accountability, it has never supported its analysis with any factual material.<sup>316</sup> It has not referred to academic articles, nor has it mentioned governmental statistics, newspaper stories, or even anecdotes about voters' ability to reward or punish officeholders in different circumstances. Instead, the Court has relied on what Jed Stiglitz has labeled "folk theories"—intuitive accounts of how policies relate to accountability and other abstract concepts, grounded only in the Court's instincts and citations to the Court's earlier (and equally non-empirical) cases.<sup>317</sup> These folk theories are certainly plausible; indeed, their plausibility is why they have been embraced so readily. But they are folk rather than real theories because they stem from supposition rather than evidence.

A related explanation is that the Court appears to have an overly optimistic opinion of voters' capabilities. It evidently believes that voters are reasonably knowledgeable about officeholders' records and duties, and assess them reasonably objectively. As Justice Scalia once wrote, "the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source."<sup>318</sup> Given this view of the electorate, it is easy to see how the Court could arrive at its positions on accountability. People who are neither sheep nor fools should be able to distinguish between executive and independent agencies,

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<sup>316</sup> See *supra* notes 140-141 and accompanying text.

<sup>317</sup> Stiglitz, *supra* note 168, at 26. Strikingly, the only non-precedential material to receive much attention in the Court's discussions of accountability is *The Federalist*. See *Free Enter. Fund v. Pub. Co. Account. Oversight Bd.*, 561 U.S. 477, 498, 501, 514 (2010). *The Federalist* is impressive in many respects, but empirical analysis is not one of them.

<sup>318</sup> *McConnell v. FEC*, 540 U.S. 93, 258-59 (2003) (Scalia, J., concurring in the judgment in part and dissenting in part); see also, e.g., *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 695 (1990) (Scalia, J., dissenting) ("[T]he people are not foolish but intelligent, and will separate the wheat from the chaff."); *Anderson v. Celebrezze*, 460 U.S. 780, 797 (1983) ("[T]he vast majority of the electorate not only is literate but is informed on a day-to-day basis about events and issues that affect election choices . . .").

between free and commandeered state governments, and so on. But as discussed at length above, this view of the electorate is inaccurate.<sup>319</sup> Voters actually tend to be quite uninformed about matters of public policy, and quite biased in their judgments by their partisanship. The Court fully grasps neither this reality nor its implications for the Court's claims.

Another possibility along these lines is that the Court may discount the significance of factors beyond its control (such as voter psychology) and inflate the role of matters it can influence (such as certain institutional relations). In the empirical literature on accountability, the minds of voters take center stage. Accountability rises or falls based on what voters know, how they evaluate it, and on what grounds they choose to vote.<sup>320</sup> These variables, though, are mostly beyond the Court's purview. What *are* in the Court's domain are aspects of governmental structure not directly addressed by the Constitution: presidential authority over agencies, federal power over the states, and so forth. It is unsurprising that the Court emphasizes these aspects, assigning them great weight as causes of accountability, and downplays the drivers of voter behavior. If the Court were to acknowledge the importance of these drivers, it would also have to concede its own inability to change them.

All of these explanations are basically benign. They attribute the Court's missteps to its unfamiliarity with the empirical scholarship, its rose-tinted perception of the electorate, or its focus on the tools within its grasp. Rubin, though, has suggested a less sympathetic hypothesis: that the Court's accountability claims are essentially a façade, illogical and unsubstantiated but "possess[ing] an underlying unity in their hostility to modern administrative government."<sup>321</sup> On this account, the Court does not really mean what it says when it argues that certain policies raise or lower accountability. Rather, it deploys these arguments to accomplish its true objective: "elected officials gain[ing] power at the expense of the bureaucracy."<sup>322</sup> As Rubin notes, to the extent the Court's claims prevail, the President, Congress, and state governments win clout and federal agencies lose it, and all incumbents are released from the constraints of campaign finance regulation.<sup>323</sup>

Rubin's hypothesis violates the old adage never to attribute to malice that which can be attributed to incompetence.<sup>324</sup> It also relies more than I would like on psychoanalysis of the Court's motivations—a recurrent danger when trying to determine why the Court errs. Still, there may be something to his theory, especially given the conservative (and so anti-regulatory) ideologies of the Justices who have composed most of the Court's paeans to accountability.<sup>325</sup> In

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<sup>319</sup> See *supra* Part III.

<sup>320</sup> See *id.*

<sup>321</sup> Rubin, *supra* note 33, at 2097.

<sup>322</sup> *Id.*

<sup>323</sup> See *id.* Rubin does not address campaign finance regulation, so I am guessing his position on it.

<sup>324</sup> See *Hanlon's Razor*, Wikipedia, [https://en.wikipedia.org/wiki/Hanlon's\\_razor](https://en.wikipedia.org/wiki/Hanlon's_razor) (last visited Aug. 1, 2016).

<sup>325</sup> The only exceptions are Justice Breyer in a pair of administrative law cases, see *supra* notes 93-94 and accompanying text, and Justice Brennan in a congressional nondelegation case, see *supra* note 105 and accompanying text. These are quite minor opinions in the accountability canon.

any event, I think it is very difficult to rate the merits of the various reasons for the Court's mistakes, and I make no further attempt to do so. Instead, I turn next from explanation to prescription—specifically, to identifying some of the ways in which the Court (and other actors) could promote accountability more effectively than they have to date.

### B. *Levers*

To improve accountability, it is necessary to satisfy more fully the conditions for retrospective voting. It is necessary, that is, to make voters more knowledgeable about officeholders' records, more likely to assess the records fairly, more apt to attribute responsibility for them accurately, or more inclined to vote based on these assessments and attributions. As I have stressed, voters' mental states are at the heart of these conditions. Voters' mental states, in turn, can be influenced either directly, by changing what they know and how they evaluate it, or indirectly, by varying the institutional and electoral context in which they find themselves.

The Court has very little power to affect voter psychology directly. It also has much less power than it thinks to shape it indirectly by modifying the institutional backdrop. (Indeed, that was the thesis of the previous Part.<sup>326</sup>) But the Court does have at least some ability to alter the electoral environment, in particular by making elections more competitive. As explained earlier, competition and accountability are tightly linked because voters become better informed and more prone to voting retrospectively when races are closer.<sup>327</sup>

One way the Court could make elections more competitive should already be apparent. Rather than striking down campaign finance laws (as has been its wont in recent years), the Court could uphold them. It is reasonably clear that contribution limits, expenditure limits, and public financing result in narrower contests by reducing incumbents' spending advantage.<sup>328</sup> A Court intent on fostering accountability could acquiesce in these policies rather than subjecting them to stringent scrutiny.

Another tack the Court could try is nullifying bipartisan gerrymanders that protect both parties' incumbents from any serious challenge. These kinds of district plans are typically enacted in states where neither party fully controls the state government. Unable to engage in *partisan* gerrymandering, the parties agree on maps that allocate safe seats to almost all sitting legislators. Plainly, such maps suppress competition by prioritizing seat safety above other redistricting considerations. Equally plainly, the Court could enhance competition by refusing to countenance them.<sup>329</sup>

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<sup>326</sup> See *supra* Part III.

<sup>327</sup> See *supra* notes 299-303 and accompanying text.

<sup>328</sup> See *supra* Part III.D.1.

<sup>329</sup> For a well-known proposal along these lines, see Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 600 (2002) (characterizing "the risk in gerrymandering" as "constriction of the competitive processes by which voters can express choice").

A further proposal is for the Court to intensify its review of regulations that make it difficult for third-party candidates to qualify for the general election ballot.<sup>330</sup> These rules usually take the form of large numbers of signatures that need to be gathered by an early deadline, and they tend to be backed by the major parties, which prefer not to face third-party opposition.<sup>331</sup> The rules, it is true, do not necessarily decrease the winning candidate's margin of victory. Rather, their electoral impact depends on the relative appeal of the major-party candidates and on which of them would be more harmed by the entry of a third-party challenger. But in his valuable work on the topic, Jones determined that it is not just a lower margin of victory that heightens accountability, but also broader notions of competition such as ideological divergence.<sup>332</sup> Third-party candidates certainly contribute to such divergence, so if the Court facilitated their ballot access, it would also render major-party incumbents more accountable.

All of these ideas for judicial intervention involve the lever of increasing competition. Again, this is because the Court's tools do not allow it to change voters' mental states directly or to revise the governmental structures that regulate accountability. Other actors, though, do possess these potent tools, and could use them in a variety of ways. With respect to voter psychology, the media has the capacity both to inform voters and to induce them to make more accurate responsibility attributions. In a useful study, Stephanie Larson placed a series of articles about a House member in a local newspaper, and then tracked awareness of the member's positions among respondents who saw and did not see the publication. Respondents who came across the newspaper learned more about the member's stances, indicating that press coverage can boost voter knowledge.<sup>333</sup>

Also intriguingly, Shanto Iyengar conducted a series of experiments in which he manipulated the framing of television coverage of poverty. Some segments employed "episodic" framing emphasizing specific events and persons, while other segments relied on "thematic" framing discussing the issue more generally.<sup>334</sup> Episodic frames encouraged respondents to attribute responsibility to individual victims or perpetrators, while thematic frames prompted attributions to governmental officials or policies.<sup>335</sup> At present, "television news is heavily episodic," meaning that it "effectively insulates incumbent officials from any rising tide of disenchantment over the state of public affairs."<sup>336</sup> If television

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<sup>330</sup> Issacharoff and Richard Pildes have supported this idea too. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 683 (1998) (criticizing "a bipolar effort to frustrate third-party challenges" by banning fusion candidacies).

<sup>331</sup> See *id.* at 684.

<sup>332</sup> See Jones, *supra* note 299, at 21-29 (also finding that demographic diversity increases accountability).

<sup>333</sup> See Stephanie Greco Larson, *Information and Learning in a Congressional District: A Social Experiment*, 34 AM. J. POL. SCI. 1102, 1109 (1990). Not only can press coverage make voters more knowledgeable, it can also make officeholders more electorally accountable for their roll call votes. See Rogers, *supra* note 303, at 12-13 (finding that state legislators' extremism has more negative electoral consequences when there are more newspaper reporters covering the state government).

<sup>334</sup> SHANTO IYENGAR, IS ANYONE RESPONSIBLE? HOW TELEVISION FRAMES POLITICAL ISSUES 14 (1991).

<sup>335</sup> See *id.* at 67.

<sup>336</sup> *Id.* at 16, 137.

coverage became more thematic, though, “Americans might be more apt to consider society or government . . . responsible.”<sup>337</sup>

While the media may be the institution with the most sway over voter psychology, other bodies could also have an impact. The schools, for instance, could do a better job educating students about the architecture of American government. If students knew more about how federal, state, and local authorities are organized, they might find it easier to assign responsibility for salient developments.<sup>338</sup> Similarly, several scholars have called for the creation of “accountability agencies” that would collect and disseminate information about money in politics, public corruption, the state of the economy, and other sensitive subjects.<sup>339</sup> Assuming this information reached voters, it could help them understand how their government has performed and who is to credit or blame for the performance.

Still another suggestion for facilitating retrospective voting is to add more data to the ballot itself. In local elections, ballots are often nonpartisan, thus barring candidates from stating their party affiliation. Permitting candidates to make this statement, in Christopher Elmendorf and David Schleicher’s words, would give voters “a simple, ballot-based indicator of whether a given candidate would join the dominant coalition or work against it.”<sup>340</sup> More ambitiously, Elmendorf and Schleicher recommend that the ballot specify the partisan balance of power—that is, which party controls the executive branch and each chamber of the legislature.<sup>341</sup> Voters frequently lack this vital information for attributing responsibility, so if they were presented with it, their attribution errors might become less common. And once the ballot has been opened to unconventional material, even more adventurous options are available. Why not also include key economic and social indicators, the government’s fiscal condition, or incumbents’ ideal points derived from their roll call votes?<sup>342</sup>

The final lever for promoting accountability is institutional. Unlike the ones that have preoccupied the Court, certain aspects of governmental structure *do* make a difference, typically by influencing how voters assign responsibility. At all levels of government, term limits are one such aspect. Incumbents who must leave office at the end of their terms can be neither rewarded nor punished for

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<sup>337</sup> *Id.* at 67; *see also, e.g.*, Edwards et al., *supra* note 146, at 119 (finding that greater media coverage of an issue increases the President’s accountability for that issue); Maestas et al., *supra* note 261, at 622 (finding that more exposure to media coverage of Hurricane Katrina increased respondents’ likelihood of blaming both the federal and state governments for their responses to the storm).

<sup>338</sup> *See generally* AMY GUTMANN, *DEMOCRATIC EDUCATION* (rev. ed. 1999).

<sup>339</sup> *See* Manin et al., *supra* note 38, at 50 (listing several such agencies); Mark E. Warren, *Accountability and Democracy*, in *THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY* 39, 49 (Mark Bovens et al. eds., 2014) (same).

<sup>340</sup> Elmendorf & Schleicher, *supra* note 164, at 387. Of course, information on party affiliation would facilitate *partisan* voting in addition to making it easier for voters to attribute responsibility.

<sup>341</sup> *See id.* at 413.

<sup>342</sup> *Cf.* Andrew Healy & Gabriel S. Lenz, *Substituting the End for the Whole: Why Voters Respond Primarily to the Election-Year Economy*, 58 *AM. J. POL. SCI.* 31, 43-44 (2014) (finding that subjects evaluate prior economic conditions more rationally when given information about cumulative (rather than annual) growth). The courts would also have a limited role to play here—namely, not to invalidate the unorthodox ballots. *Cf.* Cook v. Gralike, 531 U.S. 510, 526 (2001) (striking down a Missouri voter initiative that required ballots to note if incumbents had failed to support congressional term limits).

what they do in those final periods. Regardless of their records, they again become civilians when their terms expire. For this reason, Campbell and his coauthors<sup>343</sup> and Thomas Holbrook<sup>344</sup> found that retrospective voting is significantly less common in open-seat presidential elections. Also for this reason, eliminating term limits would boost accountability by increasing the likelihood of incumbents appearing on the ballot.

Another condition that boosts accountability at all levels is unified government. When the same party controls both the executive and legislative branches, it is clearer to voters whom to credit or blame for past events. Conversely, when authority is divided, it is less obvious which officeholders are responsible for the government's record. Consistent with this reasoning, Kevin Leyden and Stephen Borrelli<sup>345</sup> and Robert Lowry and his coauthors<sup>346</sup> showed that incumbent governors' vote shares are more sensitive to state unemployment and the state budgetary situation, respectively, under unified government. Likewise, Duch and Stevenson determined that the incumbent party's presidential performance is less closely tied to voters' perceptions of the economy under divided government.<sup>347</sup>

Of course, neither the Court nor any other actor can guarantee unified government—at least, not as long as powers are separated rather than combined. However, state and local authorities may have some ability to make their elections more first-order, and so less dominated by national forces, by changing the elections' dates. In a series of comparative studies, Timothy Hellwig and David Samuels found that when legislative and executive elections are held concurrently, variables pertaining to the executive largely explain the legislative results.<sup>348</sup> But when the elections are held separately, “nonconcurrency . . . attenuate[s] the impact of national factors” and “focuses voters' and candidates' energies on local factors.”<sup>349</sup> The upshot is that state and local incumbents might become more accountable for their own records if they were not on the same

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<sup>343</sup> See Campbell et al., *supra* note 48, at 1093 (“In each and every test . . . retrospective voting was found to be significantly weaker in open-seat elections.”).

<sup>344</sup> See Thomas M. Holbrook, *Incumbency, National Conditions, and the 2012 Presidential Election*, 45 PS: POL. SCI. & POL. 640, 641 (2012) (“The impact of personal finances and presidential approval is much greater in incumbent races . . . than in open-seat contests . . .”).

<sup>345</sup> See Kevin M. Leyden & Stephen A. Borrelli, *The Effect of State Economic Conditions on Gubernatorial Elections: Does Unified Government Make a Difference?*, 48 POL. RESEARCH Q. 275, 283 (1995).

<sup>346</sup> See Lowry et al., *supra* note 282, at 765.

<sup>347</sup> See DUCH & STEVENSON, *supra* note 227, at 258. Relatedly, legislators' accountability is also higher when their parties are more cohesive. See David R. Jones, *Partisan Polarization and Congressional Accountability in House Elections*, 54 AM. J. POL. SCI. 323, 329 (2010).

<sup>348</sup> See Timothy Hellwig & David Samuels, *Electoral Accountability and the Variety of Democratic Regimes*, 38 BRIT. J. POL. SCI. 65, 76 (2007) (considering the state of the economy and whether an incumbent president was running for reelection); Samuels, *supra* note 38, at 431 (same and also considering whether the president was in a minority government or in a coalition); see also Wolak, *supra* note 304, at 220, 222, 225 (finding that gubernatorial spending usually reduces voter recognition, recall, and knowledge of House candidates).

<sup>349</sup> Samuels, *supra* note 38, at 427; see also Hellwig & Samuels, *supra* note 348, at 76.

ballot as national politicians, especially the President. Then their records might be less swamped by national trends.<sup>350</sup>

Another way to improve state and local accountability could be to transfer policymaking authority away from the legislature and to the executive. Voters know more about national than subnational politics—but subnationally, they know more about governors and mayors than state legislatures and city councils. Governors and mayors are much more recognizable than subnational legislators,<sup>351</sup> and there is evidence of at least some retrospective voting in gubernatorial and mayoral elections.<sup>352</sup> Accordingly, if states augmented governors' appointment and veto powers, and if cities switched from weak to strong mayors, they would add to the clout of the one officeholder who can realistically (though still partially) be held accountable for her actions.<sup>353</sup>

In theory, these same shifts could be carried out at the federal level. Congressional elections could be made fully nonconcurrent with presidential ones, thus rendering them less second-order.<sup>354</sup> Or the President's powers could be formally enhanced at the expense of Congress's, thus concentrating authority in the single official whose elections are most first-order.<sup>355</sup> In practice, these reforms are blocked by the Constitution. Both the timing of congressional elections and the explicit powers of the President and Congress can be changed only by constitutional amendment.

The Constitution also bars even more effective means for heightening the federal government's accountability. A sizeable comparative literature, launched a generation ago by Bingham Powell and Guy Whitten, concludes that both pillars of the American system—the separation of powers and federalism—impede retrospective voting.<sup>356</sup> Thanks to the separation of powers, voters often

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<sup>350</sup> One downside of nonconcurrent elections, though, is significantly reduced turnout. See ZOLTAN HAJNAL, *AMERICA'S UNEVEN DEMOCRACY: RACE, TURNOUT, AND REPRESENTATION IN CITY POLITICS* 159 (2010). State and local governments may therefore face a tradeoff between accountability and participation.

<sup>351</sup> See, e.g., Atkeson & Partin, *supra* note 269, at 101 (“[T]he governor is the second most recognized elected official, behind the president.”); Schleicher, *supra* note 233, at 16 (noting that mayors “are sufficiently high profile that the electorate is able to reward them for good performance”).

<sup>352</sup> See *supra* notes 281-283 and accompanying text; see also R. Douglas Arnold & Nicholas Carnes, *Holding Mayors Accountable: New York's Executives from Koch to Bloomberg*, 56 AM. J. POL. SCI. 949, 958 (2012) (finding that New York City's mayor is held accountable for the city's economic conditions and crime rates).

<sup>353</sup> Interestingly, Christopher Berry and Jacob Gersen argue that *unbundling* the executive's powers would increase accountability, by enabling voters to reward or punish officials for the particular decisions that are within their substantive domains. See Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1403-05 (2008). Berry and Gersen's argument is primarily theoretical, though, and assumes implausibly high levels of voter knowledge. See Schleicher, *supra* note 233, at 67 (offering a similar rejoinder).

<sup>354</sup> For a detailed discussion of the problems with concurrent voting in federal elections, see David J. Andersen, *Pushing the Limits of Democracy: Concurrent Elections and Cognitive Limitations of Voters* (2011).

<sup>355</sup> Cf. Ryan E. Carlin & Shane P. Singh, *Executive Power and Economic Accountability*, 77 J. POL. 1031, 1037-41 (2015) (finding in a comparative study that presidential accountability for the economy is higher when the president has more legislative power and issues more decrees).

<sup>356</sup> See G. Bingham Powell & Guy D. Whitten, *A Cross-National Analysis of Economic Voting: Taking Account of the Political Context*, 37 AM. J. POL. SCI. 391, 398 (1993) (concluding that “[t]he greater the perceived unified control of policymaking by the incumbent government, the more likely is the citizen to assign responsibility . . . to the incumbents.”); see also, e.g., Cameron D. Anderson, *Economic Voting and Multilevel Governance: A Comparative Individual-Level Analysis*, 50 AM. J. POL. SCI. 449, 456-57 (2006) (studying federalism); Johns, *supra* note 57, at 70 (same); Richard Nadeau et al., *A Cross-National Analysis of Economic*

cannot tell which branch (and which chamber within Congress) is responsible for a given development. Similarly, thanks to federalism, voters tend to have trouble distinguishing between federal and state duties. Both of these problems are alleviated by fusing rather than separating the national government's powers and by abrogating the sovereignty of subnational units—in short, by switching to a parliamentary and unitary system like Great Britain's.<sup>357</sup> Accountability reaches its apogee in this sort of system, especially when a single party commands a parliamentary majority, because the clarity of responsibility is maximized.

The point of this discussion is not that any of these reforms should be implemented, let alone that the American model should be scrapped in favor of the British one. Rather, there are two reasons why it is worth considering the various techniques through which accountability could be fostered. The first is the techniques' very existence, which demonstrates that even though the Court has not managed to further this value through its interventions, the value is not incapable of being advanced. In fact, both the Court and other actors have several tools at their disposal that could make American government substantially more accountable than it is today.

The second reason is to highlight the oddity of pursuing accountability in a regime that is, to a considerable extent, designed to frustrate it. Federal, state, and local authorities operate side by side in the United States, and each of them is divided into executive, legislative, and judicial branches, which themselves are segmented even further.<sup>358</sup> True, the extraordinary complexity of this system could be greatly reduced, in which case accountability would rise sharply. But any such effort at rationalization would clash with the dispersion of power that is the system's basic premise. Exaggerating only a bit, one might say that unaccountability is the American way, and accountability is un-American.

### C. Alternatives

There are compelling arguments, then, against the Court's campaign to promote accountability through its constitutional jurisprudence. To date, this campaign has mostly failed to bear fruit. There are only a few other ways in which the Court could try to make officeholders more accountable, all reliant on the link between competition and accountability. And while not an unappealing value, accountability is in tension with what the Court itself has described as the American "system of division and separation of powers," which "produces conflicts, confusion, and discordance."<sup>359</sup>

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*Voting: Taking Account of the Political Context Across Time and Nations*, 21 ELECTORAL STUD. 403, 413 (2002) (studying the separation of powers); Samuels, *supra* note 38, at 430-32 (same).

<sup>357</sup> See DUCH & STEVENSON, *supra* note 227, at 72 (showing that retrospective economic voting is stronger in Great Britain than in all but one of the other countries in the study).

<sup>358</sup> See Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 371 (2010) ("[T]he structures through which [the United States] is governed are probably the most complicated and confusing of any contemporary democracy.").

<sup>359</sup> *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

Moreover, as Jacob Gersen and Matthew Stephenson have recently emphasized, accountability is not an unalloyed good. The crux of the problem is that agents (that is, officeholders) who *are* accountable still have incentives to act contrary to the interests of an imperfectly informed principal (that is, voters).<sup>360</sup> For example, agents might “pander” by enacting popular but imprudent policies rather than unpopular policies that serve the principal’s long-term welfare.<sup>361</sup> Or agents might “posture” by taking needlessly bold actions,<sup>362</sup> or “persist” in adhering to positions even after they have been shown to be unwise.<sup>363</sup> Because of the possibility of these and other harmful behaviors, Gersen and Stephenson propose several measures through which accountability could be *curbed*.<sup>364</sup>

But if the Court stopped aiming to improve accountability in its constitutional cases, what might it do instead? Perhaps the most intuitive option, urged by Stiglitz, is to fall back on more conventional modes of argument: text, history, precedent, and so on.<sup>365</sup> When these modes are enough to decide a case, that could be the Court’s holding. When they do not suffice, the Court could decline to resolve the dispute one way or another. Reasoning along similar lines, Huq has advised against the invocation of democratic values whenever “there is no reliable and stable correlation between a rule of decision and those underlying values.”<sup>366</sup> In these situations, he would simply deem the matter nonjusticiable.<sup>367</sup>

There is much to like about this approach. Its modesty, in particular, is quite attractive in an era in which the Court is all too ready to exert its will over vast swathes of American life. A Court that refrained from relying on democratic values would also be a Court that refrained from making *mistakes* based on those values. Unlike our actual Court, it would not nullify policies—limits on the President’s removal power, delegations of authority by Congress, federal mandates to the states, regulations of money in politics—that are *thought* to lessen accountability, but in fact do not affect or even increase it.

But while these points carry weight, I ultimately find them unpersuasive. Pro-democratic judicial intervention is not especially immodest; rather, as John Hart Ely argued long ago, it implies a more *limited* role for the Court than judicial review based on liberty, equality, and other contested non-electoral concepts.<sup>368</sup> That its track record has been poor with respect to accountability

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<sup>360</sup> See Gersen & Stephenson, *supra* note 36, at 187 (“The over-accountability problem is essentially an information problem: sometimes even a fully rational but imperfectly informed principal . . . will reward ‘bad’ actions rather than ‘good’ actions by an agent . . .”); see also Warren, *supra* note 339, at 43-45 (making a similar point).

<sup>361</sup> See Gersen & Stephenson, *supra* note 36, at 195-98.

<sup>362</sup> See *id.* at 198-200.

<sup>363</sup> See *id.* at 200-02.

<sup>364</sup> See *id.* at 209-31. For another critique of accountability, see HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 58 (1967) (noting that from an accountability perspective, there is nothing objectionable about an officeholder “act[ing] in a completely selfish and irresponsible manner . . . as long as he let himself be removed from office at the end of his term”).

<sup>365</sup> See Stiglitz, *supra* note 168, at 26 (“[C]ourts might explicitly disavow functionalist motivations as the basis for interpretive stances on structural questions.”).

<sup>366</sup> Huq, *supra* note 168, at 5.

<sup>367</sup> See *id.*

<sup>368</sup> See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

also does not mean the Court would be as prone to error if it sought to advance *other* democratic values. It might be clearer how judicial decisions would impact other values, and the Court might have a greater capacity to attain them.

The list of democratic goods is long, but typically includes (among others) popular participation in politics, deliberation by citizens and officeholders, governmental responsiveness to voters' preferences, and governmental alignment with voters' preferences.<sup>369</sup> (Responsiveness and alignment differ in that the former refers to the *rate of change* of representation or policy given a shift in voters' positions, while the latter denotes the *congruence* of representation or policy with voters' views.<sup>370</sup>) This is not the place for full assessments of what constitutional law would look like if it prioritized each of these goods. Instead, I offer three brief observations about the alternatives to accountability.

First, participation and deliberation seem ill-suited for star turns because they would sweep either not far enough or much too far. Doctrine based on these values would be too confined in its reach if it extended only to the relatively few policies that directly burden citizens' ability to vote or to debate public affairs.<sup>371</sup> Conversely, if the Court were willing to call into question laws that were enacted without sufficient participation or deliberation, then it is hard to say what statutes would be safe. These values are rarely targeted overtly, but they are also rarely present to the extent we might like.

Second, responsiveness appears to have the same drawback as accountability: that empirically, there is little the Court can do to further it.<sup>372</sup> In earlier work, Eric McGhee, Rogers, and I calculated the responsiveness of median state house members' ideal points to shifts in voter sentiment from 1992 to 2012.<sup>373</sup> We then analyzed whether a host of electoral policies—political party regulations, campaign finance laws, redistricting rules, and aspects of governmental structure—affected responsiveness.<sup>374</sup> Essentially *none* of these policies had any impact.<sup>375</sup> As we put it, responsiveness “does not budge in either direction due to the policies with which states experiment,” and “is serenely impervious to reform.”<sup>376</sup> A Court that wished to heighten responsiveness would

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<sup>369</sup> See, e.g., Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103, 1142 (2002); Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 ELECTION L.J. 685, 690 (2004); Stephanopoulos, *supra* note 30, at 313-16.

<sup>370</sup> See Nicholas O. Stephanopoulos et al., *The Realities of Electoral Reform*, 68 VAND. L. REV. 761, 780 (2015).

<sup>371</sup> See Stephanopoulos, *supra* note 30, at 357-58 (discussing the few areas of election law to which participation is particularly relevant). *But see* RON LEVY & GRAEME ORR, *THE LAW OF DELIBERATIVE DEMOCRACY* (2016) (considering how election law might incorporate the insights of deliberative democracy).

<sup>372</sup> Interestingly, responsiveness is the value that critics of accountability have often argued should replace it. See, e.g., Anderson, *supra* note 53, at 290; Schacter, *supra* note 35, at 15.

<sup>373</sup> See Stephanopoulos et al., *supra* note 370, at 792-93.

<sup>374</sup> See *id.* at 806-24.

<sup>375</sup> See *id.*

<sup>376</sup> *Id.* at 834; see also Chris Tausanovitch & Christopher Warshaw, *Representation in Municipal Government*, 108 AM. POL. SCI. REV. 605, 615-20 (2014) (finding that electoral institutions do not affect responsiveness at the municipal level).

thus quickly find itself at a loss. It would not be able to vary the value much either by upholding policies or by striking them down.<sup>377</sup>

And third, this empirical difficulty does *not* apply to alignment. To the contrary, McGhee, Rogers, and I found that numerous policies are statistically significant drivers of representational congruence, at the levels of both the individual district and the legislative chamber as a whole. For instance, contribution limits shrink the ideological gap between legislators and their constituents, and redistricting commissions do the same with respect to the median legislator and the median voter statewide.<sup>378</sup> Likewise, certain types of party primaries, certain redistricting criteria, and term limits widen the divide between legislators and voters.<sup>379</sup> There would therefore be plenty for an alignment-minded Court to do. Unlike with accountability and responsiveness, its efforts, if grounded in solid evidence rather than folk theory, would not yield mostly null results.

Of course, empirical tractability is not the only criterion by which a democratic value should be chosen. The value's place in the American historical tradition, its role in prior cases, and its normative appeal are all important yardsticks too. My claim, then, is not that the Court should necessarily drop accountability from its constitutional jurisprudence and replace it with alignment. Rather, I merely think that before embarking on any mission of pro-democratic judicial intervention, the Court should carefully consider the mission's likelihood of success. Quixotic quests may inspire great literature, but they do not make for sound doctrine.

#### CONCLUSION

Several legal scholars have noted the Court's tendency to wield electoral accountability "as a rhetorical trump card . . . to justify particular institutional arrangements or legal/constitutional positions."<sup>380</sup> In this Article, I have tried to show that accountability has no (or almost no) business being used in this way. Contrary to the Court's assertions, the President is not more accountable for agency actions when she exerts more control over the bodies; Congress is not more accountable for decisions it does not delegate to agencies but rather makes itself; state governments are not more accountable when they are not federally commandeered; and incumbent politicians are not more accountable when campaign spending is unregulated. At least, any gains in accountability in these circumstances are so small and contingent that they cannot support the invalidation of properly enacted policies.

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<sup>377</sup> However, the Court might be able to rely on the link that also seems to exist between competition and responsiveness. See John D. Griffin, *Electoral Competition and Democratic Responsiveness: A Defense of the Marginality Hypothesis*, 68 J. POL. 911, 915-19 (2006).

<sup>378</sup> See Stephanopoulos et al., *supra* note 370, at 810-15.

<sup>379</sup> See *id.* at 806-09, 813-18.

<sup>380</sup> Gersen & Stephenson, *supra* note 36, at 49; see also, e.g., Merrill, *supra* note 108, at 2141; Siegel, *supra* note 264, at 1681.

If accountability were to lose its trump card status, it is not clear how the Court's constitutional reasoning would change. The Court could analyze a range of conventional factors without giving pride of place to any of them. It could anoint another democratic value, like alignment, as the linchpin of its case law. Or, as Guy-Uriel Charles has counselled, it could exercise its power of judicial review only if multiple democratic goods were threatened.<sup>381</sup> What *is* clear, though, is that it is time for the Court's constitutional deck to be reshuffled. Accountability, a value the Court has tried and failed to promote for decades, does not belong on top of it.

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<sup>381</sup> See Charles, *supra* note 369, at 1106.