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## CONSTRAINING EXECUTIVE ENTRENCHMENT

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Election Day had barely drawn to a close when then-President Trump began his protests that the election had been “stolen.”<sup>1</sup> He claimed, among other things, that voting software had been compromised; that ballot boxes had been stuffed; and that voter fraud had been rampant.<sup>2</sup> By January 6, 2021, Trump and his allies had filed at least sixty-two lawsuits aiming to overturn election results in swing states that Trump had narrowly lost.<sup>3</sup> No judge agreed with the claim that the election had been “rigged” or plagued by widespread fraud.<sup>4</sup> Nevertheless, Trump’s assertions continued to spread through social media and conservative news outlets.<sup>5</sup> When some Trump Administration officials publicly disavowed the allegations, they were fired or quickly resigned.<sup>6</sup>

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<sup>1</sup> Amy Gardner, *How Trump Drove the Lie that the Election Was Stolen, Undermining Voter Trust in the Outcome*, WASH. POST (Dec. 20, 2020, 5:22 PM), [https://www.washingtonpost.com/politics/trump-election-voter-trust/2020/12/20/00282aa6-407a-11eb-8db8-395dedaaa036\\_story.html](https://www.washingtonpost.com/politics/trump-election-voter-trust/2020/12/20/00282aa6-407a-11eb-8db8-395dedaaa036_story.html) [<https://perma.cc/Z57F-HU8L>] (noting that Trump used his “pulpit at the White House and his Twitter feed to let loose a fusillade of conspiracy theories”).

<sup>2</sup> Ann Gerhart, *Election Results Under Attack: Here Are the Facts*, WASH. POST (Mar. 11, 2021, 7:10 PM), [https://www.washingtonpost.com/elections/interactive/2020/election-integrity/?tid=lk\\_inline\\_manual\\_9](https://www.washingtonpost.com/elections/interactive/2020/election-integrity/?tid=lk_inline_manual_9) [<https://perma.cc/ME8D-XV6D>].

<sup>3</sup> William Cummings et al., *By the Numbers: President Donald Trump’s Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001> [<https://perma.cc/42G5-V5PV>].

<sup>4</sup> Jacob Shamsian & Sonam Sheth, *Trump and His Allies Filed More than 40 Lawsuits Challenging the 2020 Election Results. All of Them Failed.*, BUS. INSIDER (Feb. 22, 2021, 5:03 PM), <https://www.businessinsider.com/trump-campaign-lawsuits-election-results-2020-11> [<https://perma.cc/8X4S-RDLR>]; Amy Sherman & Miriam Valverde, *Joe Biden Is Right that More than 60 of Trump’s Election Lawsuits Lacked Merit*, POLITIFACT (Jan. 8, 2021), <https://www.politifact.com/factchecks/2021/jan/08/joe-biden/joe-biden-right-more-60-trumps-election-lawsuits-1> [<https://perma.cc/XZH3-PDC3>].

<sup>5</sup> Jim Rutenberg et al., *Trump’s Fraud Claims Died in Court, But the Myth of Stolen Elections Lives on*, N.Y. TIMES (Sept. 12, 2021), <https://www.nytimes.com/2020/12/26/us/politics/republicans-voter-fraud.html> [<https://perma.cc/9RME-3JA9>].

<sup>6</sup> On December 1, 2020, Attorney General William Barr publicly stated that the Justice Department had found “no evidence of widespread voter fraud.” Jonathan D. Karl, *Inside William Barr’s Breakup with Trump*, THE ATLANTIC (June 27, 2021), <https://www.theatlantic.com/politics/archive/2021/06/william-barrs-trump-administration-attorney-general/619298> [<https://perma.cc/6E5S-CBDC>]. He resigned by the end of the year. *Id.* Chris Krebs, the then-Director of the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency, was fired after saying the 2020 presidential election was the “most secure in American history.” Tim Reid, *Former Head of U.S. Election Security Calls Trump Team Fraud Allegations “Farcical,”* REUTERS (Nov. 27, 2020, 8:24 PM), <https://www.reuters.com/article/us-usa-election-krebs/former->

Trump’s “big lie” continued to find significant support among Republican voters. One March 2021 poll, for example, found that fifty-five percent of Republicans believed that Trump’s electoral defeat “resulted from illegal voting.”<sup>7</sup> That same month, another poll claimed that sixty-six percent of Republicans either completely or mostly agreed that “the 2020 election was stolen from Donald Trump.”<sup>8</sup> Whether these respondents actually believed their answers (versus just expressed their partisan loyalty) is an open question. But to those that did believe the claim, the Biden Administration represented an illegitimate power grab.<sup>9</sup>

These recent events underscore the relationship between perceived election integrity and the felt legitimacy of the incoming administration.<sup>10</sup> To be sure, it cannot be the case that a losing candidate’s baseless claims threaten the objective legitimacy of the winner. The observation for now is simply the positive correlation between valid elections that are recognized as such and acceptance of a transition in power — precisely why Trump’s meritless claims pose such a democratic threat.<sup>11</sup> Indeed, this nexus was perhaps felt most keenly after the Supreme Court’s decision in *Bush v. Gore*,<sup>12</sup> which essentially decided the 2000 presidential election.<sup>13</sup> Following that election, there was a substantial

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head-of-u-s-election-security-calls-trump-team-fraud-allegations-farcical-idUSKBN288o1G [https://perma.cc/NW6U-JKP4].

<sup>7</sup> Press Release, Ipsos, Reuters/Ipsos: Trump’s Coattails (Apr. 2, 2021), https://www.ipsos.com/sites/default/files/ct/news/documents/2021-04/topline\_write\_up\_reuters\_ipsos\_trump\_coattails\_poll\_-\_april\_02\_2021.pdf [https://perma.cc/A8F8-DM7S].

<sup>8</sup> *The “Big Lie”: Most Republicans Believe the 2020 Election Was Stolen*, PRRI (May 12, 2021), https://www.prii.org/spotlight/the-big-lie-most-republicans-believe-the-2020-election-was-stolen [https://perma.cc/5J2N-S28R].

<sup>9</sup> See Philip Bump, *Voters Have Seen Past Presidents as Illegitimate. This Time Is Different.*, WASH. POST (May 17, 2021, 12:32 PM), https://www.washingtonpost.com/politics/2021/05/17/voters-have-seen-past-presidents-illegitimate-this-time-is-different [https://perma.cc/F69X-4LTW]; Robert Pape, *Why We Cannot Afford to Ignore the American Insurrectionist Movement*, CHI. PROJECT ON SEC. & THREATS (Aug. 6, 2021), https://cpost.uchicago.edu/research/domestic-extremism/why\_we\_cannot\_afford\_to\_ignore\_the\_american\_insurrectionist\_movement [https://perma.cc/JA7U-DT2C].

<sup>10</sup> Pippa Norris, *Can Our Democracy Survive If Most Republicans Think the Government Is Illegitimate?*, WASH. POST (Dec. 11, 2020, 8:58 AM), https://www.washingtonpost.com/outlook/trump-democratic-legitimacy-election/2020/12/11/1adfe688-3b14-11eb-9276-ae0ca72729be\_story.html [https://perma.cc/R5UF-5ZUH] (“The evidence demonstrates that public faith in electoral integrity matters for feelings of political legitimacy among supporters of all parties.”).

<sup>11</sup> See *id.*

<sup>12</sup> 531 U.S. 98 (2000).

<sup>13</sup> See, e.g., Michael J. Klarman, *The Supreme Court, 2019 Term — Foreword: The Degradation of American Democracy — And the Court*, 134 HARV. L. REV. 1, 212 (2020) (“On December 12, 2000, the Supreme Court shut down the recount, handing the presidency to Governor Bush.”).

partisan divide in the perceived validity of Bush Administration decisions.<sup>14</sup> Electoral legitimacy, however, has both subjective and objective dimensions. Subjective legitimacy arises from the perceptions of those affected by an election, whereas objective legitimacy stems from the “actual properties” of the election.<sup>15</sup> One objective account, for example, looks at the extent to which elections are inclusive, facilitate policy-directed voting, and allow effective aggregation.<sup>16</sup> Some of these criteria overlap with other objective conceptions that emphasize compliance with “international conventions and universal standards about elections reflecting global norms.”<sup>17</sup> While objective and subjective legitimacy can arise from different sources, they are interrelated: if elections are objectively marred, for example, voters may refuse to consent to them going forward.<sup>18</sup> In this manner, valid elections require both subjective and objective legitimacy.

Both of these components of electoral legitimacy, in turn, are critical premises of Professor Cristina Rodríguez’s bold Foreword. There, Rodríguez argues that democratic elections justify rapid and wholesale regime change. In her words, democracy features the “reciprocal values of accepting losses” — a subjective state of mind — and “seizing wins in the political process.”<sup>19</sup> As such, in Rodríguez’s view, the law should not treat the policy whiplash that can come with new presidential administrations as something that demands judicial skepticism.<sup>20</sup> Rather, courts should enable, even facilitate, the energy and dynamism that a new government promises.<sup>21</sup>

Importantly, Rodríguez’s account is grounded in a distinctive view of democracy: one that “mak[es] the government work for the people.”<sup>22</sup> Put differently, Rodríguez ultimately wants responsive government, one that can actually accomplish its promised outcomes, not one hamstrung

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<sup>14</sup> Nearly all (99%) Bush voters believed that President Bush was the legitimate president, but only 61% of Gore voters believed the same. See David W. Moore, *Eight in Ten Americans to Accept Bush as “Legitimate” President*, GALLUP (Dec. 14, 2000), <https://news.gallup.com/poll/2212/eight-ten-americans-accept-bush-legitimate-president.aspx> [<https://perma.cc/5DA5-XWKP>].

<sup>15</sup> See Yuka Fukunaga, *Civil Society and the Legitimacy of the WTO Dispute Settlement System*, 34 BROOK. J. INT’L L. 85, 87 (2008) (discussing two types of legitimacy). To be sure, electoral legitimacy is not the same thing as democratic legitimacy, which can depend on “other institutions of liberal democracy.” PIPPA NORRIS, *WHY ELECTORAL INTEGRITY MATTERS* 7 (2014). Many would agree, however, that electoral legitimacy is a necessary, even if insufficient, condition, for democratic legitimacy. *Id.*

<sup>16</sup> See SARAH BIRCH, *ELECTORAL MALPRACTICE* 17–19 (2011).

<sup>17</sup> NORRIS, *supra* note 15, at 21.

<sup>18</sup> See Fukunaga, *supra* note 15, at 87.

<sup>19</sup> Cristina M. Rodríguez, *The Supreme Court, 2020 Term — Foreword: Regime Change*, 135 HARV. L. REV. 1, 108 (2021).

<sup>20</sup> *Id.* at 7.

<sup>21</sup> *Id.* at 7–8.

<sup>22</sup> *Id.* at 9.

by judges that are political actors in their own right.<sup>23</sup> Her view does not hinge on the well-worn idea that the President represents the national polity and is therefore more politically accountable.<sup>24</sup> To the contrary, Rodríguez wants to “decenter” the President and focus our attention instead on the regime as a whole<sup>25</sup> — the slew of “people and ideas” that come into government to effect change.<sup>26</sup>

As a result, Rodríguez discounts the traditional countervailing concerns about stability and reliance interests in favor of her bold vision for a government that actually delivers. After all, she argues, “pluralism and disagreement demand acceptance that preferences other than one’s own may prevail.”<sup>27</sup> This condition only holds when the means through which disagreements are settled — elections — are valid and recognized as such. Otherwise, losers do not, in fact, accept that the other side has prevailed.

To her credit, Rodríguez recognizes the threats that pitched battles over voting rights and immigration pose to her theory.<sup>28</sup> Indeed, she writes that her argument “presumes reasonably fair terms of competition”<sup>29</sup> — a more objective conception of electoral legitimacy. But her justified criticisms narrowly target the role of a politicized Supreme Court in election-related matters.<sup>30</sup> She objects, for instance, to the Court’s efforts to “disconnect[] the Voting Rights Act from its history and narrow[] its reach,” thus “making it less likely that the law will be of use in combatting far more serious threats to democracy now emerging from state legislatures.”<sup>31</sup>

But the threat to electoral legitimacy also arises from another source, an inescapable fact about federal elections: the President plays an integral role in their administration.<sup>32</sup> States are primarily responsible for running elections, but the Constitution grants the federal government the authority to preempt certain state regulations with respect to federal elections, as well as to combat voter discrimination.<sup>33</sup> These statutes sometimes grant the President direct authority, but more commonly the President exercises his traditional administrative oversight over their execution.<sup>34</sup> That is, he supervises and directs the interpretation and

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001).

<sup>25</sup> Rodríguez, *supra* note 19, at 60.

<sup>26</sup> *Id.* at 13.

<sup>27</sup> *Id.* at 99.

<sup>28</sup> *Id.* at 140.

<sup>29</sup> *Id.* at 139.

<sup>30</sup> See *id.* at 140–41.

<sup>31</sup> *Id.* at 146.

<sup>32</sup> See Lisa Marshall Manheim, *Presidential Control of Elections*, 74 VAND. L. REV. 385, 405 (2021); Jennifer Nou, *Sub-Regulating Elections*, 2013 SUP. CT. REV. 135, 144.

<sup>33</sup> See Manheim, *supra* note 32, at 396–97; Nou, *supra* note 32, at 143.

<sup>34</sup> See Manheim, *supra* note 32, at 406–07; Nou, *supra* note 32, at 144.

implementation of election-related statutes. Unsurprisingly, Presidents have historically done so in ways that benefit their parties.<sup>35</sup> As a result, Presidents themselves also pose a danger to democratic ideals.

This Response argues that Rodríguez's call for full-throated regime change has limits in the realm of election administration. If an incoming administration could freely implement election-related policies to entrench itself in power, doing so would undermine the democratic legitimacy of regime change itself. Indeed, when politicians attempt to keep themselves in power, public confidence in elections suffers.<sup>36</sup> Common methods of entrenchment are almost always deeply unpopular, as with partisan gerrymandering,<sup>37</sup> or divisive, as with restrictions on the electorate.<sup>38</sup> As such, courts and other actors should not blindly defer to a new regime's attempts to influence future elections.

At the same time, Rodríguez convincingly endorses the attitudinal view of judges as political actors themselves.<sup>39</sup> Accordingly, there is also an important role for presidential self-restraint. Part I below provides some background on the historical role that Presidents have played in federal election administration. Part II explores how to think about the appropriate baseline for legitimate federal elections given the risks of partisan entrenchment. Given congressional paralysis on voting rights, Part III then considers how courts and, more importantly, the President should respond to these temptations — namely, by engaging in a kind

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<sup>35</sup> See Manheim, *supra* note 32, at 411–12; Nou, *supra* note 32, at 170.

<sup>36</sup> See, e.g., Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL'Y 57, 59–60, 64, 90, 93–94 (2017) (arguing that a “toxic mix” of fake news, *id.* at 64, hyperpolarization, and partisan attempts at entrenchment has greatly reduced voter confidence in elections); Anthony J. Gaughan, *Was the Democratic Nomination Rigged? A Reexamination of the Clinton-Sanders Presidential Race*, 29 U. FLA. J.L. & PUB. POL'Y 309, 352 (2019) (arguing that public confidence in “the integrity of the election system” was eroded when Senator Bernie Sanders claimed that the system of superdelegates was “rigged” to benefit Hillary Clinton on a partisan, albeit intraparty, basis).

<sup>37</sup> According to a 2013 Harris poll, Americans overwhelmingly oppose partisan gerrymandering, with just two percent of American adults agreeing that state legislatures should draw the lines of legislative districts. *Americans Across Party Lines Oppose Common Gerrymandering Practices*, HARRIS POLL (Nov. 7, 2013), <https://theharrispoll.com/new-york-n-y-november-7-2013-ask-a-person-on-the-street-what-they-think-of-congress-and-you-likely-know-what-sort-of-response-youll-get-the-harris-poll-did-and-the-response-was-more-dismal> [<https://perma.cc/WME8-JLAF>].

<sup>38</sup> A 2016 PRRI poll found that forty-one percent of Americans consider voter suppression to be a bigger issue than voter fraud, while thirty-seven percent of Americans think fraud is the larger problem. Giovanni Russonello, *Voters Fear Their Ballot Won't Count, Poll Shows*, N.Y. TIMES (Oct. 25, 2016), <https://www.nytimes.com/2016/10/26/us/politics/voter-fraud-poll.html> [<https://perma.cc/BP5V-UXEK>]. There is a significant partisan divide on this issue. See Betsy Cooper et al., *The Divide over America's Future: 1950 or 2050? Findings from the 2016 American Values Survey*, PRRI (Oct. 25, 2016), <https://www.prrri.org/research/poll-1950s-2050-divided-nations-direction-post-election> [<https://perma.cc/TM96-3HCD>].

<sup>39</sup> Rodríguez, *supra* note 19, at 10.

of electoral forbearance. Forbearance in election administration, in other words, would help justify the kind of robust regime change that Rodríguez seeks.

## I. ELECTIONS AND THE EXECUTIVE BRANCH

By virtue of his position as head of the executive branch, the President plays an important role in federal election administration. Because Congress has passed a number of statutes that necessarily require discretion to execute, the President makes administrative decisions that can influence electoral results. Whether these choices are outcome-determinative is difficult to assess empirically,<sup>40</sup> but at the very least, the perception and potential that they are is clear.<sup>41</sup> Moreover, the President's authority in this arena is only likely to increase in coming years, given the erosion of norms against politicization.<sup>42</sup> The general polarization of the country, in turn, only heightens the stakes involved.<sup>43</sup>

Federal elections, as mentioned, are administered by a number of federal agencies in collaboration with state and local governments, which take primary responsibility on the ground for the “time, place, and manner” of the elections.<sup>44</sup> Congress, for its part, has exercised its constitutional power to “make or alter” these regulations selectively — perhaps most notably in the areas of campaign finance,<sup>45</sup> antidiscrimination,<sup>46</sup> ballot provision,<sup>47</sup> vote-counting technology, and voter registration by both domestic<sup>48</sup> and overseas voters.<sup>49</sup>

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<sup>40</sup> See Manheim, *supra* note 32, at 395.

<sup>41</sup> See *id.* at 411–12; Nou, *supra* note 32, at 179.

<sup>42</sup> Manheim, *supra* note 32, at 446; see also *id.* at 446–47.

<sup>43</sup> See Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L.J. 1, 35 (2019).

<sup>44</sup> See Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 117 (2010) (“[E]lection administration remains mostly a matter of state law and local practice, as has been the case throughout U.S. history.”).

<sup>45</sup> See, e.g., Federal Election Campaign Act of 1971, 52 U.S.C. §§ 30101–30146 (as amended). In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Supreme Court assumed plenary congressional power over federal election campaigns and campaign finance based on the Elections Clause. *Id.* at 13 & n.16.

<sup>46</sup> Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

<sup>47</sup> The 1975 amendments to the VRA require jurisdictions to provide ballots and instructions in the language of covered language-minority groups when particular population conditions exist. Act of Aug. 6, 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400, 401–02 (codified as amended at 52 U.S.C. § 10503). A number of federal statutes concern electoral access by the disabled, including the 1982 amendment to the VRA, Act of June 29, 1982, Pub. L. No. 97-205, § 5, 96 Stat. 134 (codified as amended at 52 U.S.C. § 10508), and the Voting Accessibility for the Elderly and Handicapped Act of 1984, 52 U.S.C. §§ 20101–20107.

<sup>48</sup> See, e.g., National Voter Registration Act of 1993, 52 U.S.C. §§ 20501–20511; Help America Vote Act of 2002, 52 U.S.C. §§ 20901–21145.

<sup>49</sup> Members of the uniformed services and U.S. citizens who live abroad are eligible to register and vote absentee in federal elections under the Uniformed and Overseas Citizens Absentee Voting

Congress, in turn, has delegated many of these election-related responsibilities to various agencies, both executive and independent in structure.<sup>50</sup> The Department of Justice (DOJ), for example, has played a key role in enforcing various sections of the Voting Rights Act (VRA).<sup>51</sup> The Census Bureau within the Department of Commerce runs the decennial census,<sup>52</sup> which impacts congressional apportionment and state redistricting efforts. Independent agencies like the Federal Election Commission (FEC) and Election Assistance Commission (EAC) administer the Federal Election Campaign Act and Help America Vote Act, respectively.<sup>53</sup>

The President has the most direct control over single-headed executive agencies, which are generally led by his Senate-confirmed appointees who are removable at will.<sup>54</sup> As a matter of norms and design, these agencies are most easily influenced by the White House. By contrast, the FEC and EAC are even-numbered commissions that are often mired in deadlock.<sup>55</sup> They are more difficult for the President to influence, though he can help to facilitate inaction.<sup>56</sup> The broader observation is that different “regimes,” in Rodríguez’s sense of the term, have various mechanisms — some more effective than others — to influence election administration on the ground. These regimes include the President at the top, but also his appointees and career staff below.

To illustrate the role of the executive branch, consider its historical approach to section 2 of the VRA. The provision bans electoral structures that result in certain minority groups “hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>57</sup> In this sense, section

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Act of 1986 (UOCAVA), Pub. L. No. 99-410, 100 Stat. 924 (codified as amended at 52 U.S.C. §§ 20301–20311 and scattered sections of other titles). Since 1942, a number of federal laws have been enacted to assist these voters: the Soldier Voting Act of 1942, Pub. L. No. 77-712, 56 Stat. 753 (amended 1944); the Federal Voting Assistance Act of 1955, Pub. L. No. 84-296, 69 Stat. 584 (repealed 1986); the Overseas Citizens Voting Rights Act of 1975, Pub. L. No. 94-203, 89 Stat. 1142 (1976) (repealed 1986); and finally UOCAVA in 1986.

<sup>50</sup> Nou, *supra* note 32, at 144 (“Congress . . . has delegated many of these election-related responsibilities to a constellation of federal administrative agencies. . . . Some of these agencies, for example, have traditionally independent features such as for-cause removal restrictions and multimember boards, while others are more recognizably executive in nature through at-will removal of their agency heads by the President.”); *see also* Manheim, *supra* note 32, at 402.

<sup>51</sup> *Voting Section*, U.S. DEP’T JUST., <https://www.justice.gov/crt/voting-section> [<https://perma.cc/KJ5M-VZRJ>]; *see also* Nou, *supra* note 32, at 148–49.

<sup>52</sup> *Decennial Census*, U.S. CENSUS BUREAU, [https://www.census.gov/history/www/programs/demographic/decennial\\_census.html](https://www.census.gov/history/www/programs/demographic/decennial_census.html) [<https://perma.cc/TN3N-PVED>].

<sup>53</sup> Nou, *supra* note 32, at 145–46.

<sup>54</sup> *See id.* at 148.

<sup>55</sup> *See id.* at 146–48; Manheim, *supra* note 32, at 404.

<sup>56</sup> Manheim, *supra* note 32, at 427–28.

<sup>57</sup> 52 U.S.C. § 10301(b).

2 is a nationally applicable prohibition against voting practices and procedures — such as redistricting — that discriminate on the basis of race, color, or language minority status. It prohibits not only election-related practices that are intended to be racially discriminatory, but also those that are shown to have a racially discriminatory impact.<sup>58</sup> For these reasons, there is likely a “causal relationship” between “the practices governed by section 2” and “electoral outcomes.”<sup>59</sup>

The VRA allows the Attorney General, as well as private citizens, to bring suit to obtain court-ordered remedies.<sup>60</sup> Across different administrations, the DOJ has strategically engaged in enforcement as well as changed its interpretation of section 2 through litigation.<sup>61</sup> There is debate about whether the agency has done so for partisan gain,<sup>62</sup> but the point here is to illustrate some of the levers that the executive branch possesses in election administration. For example, in an amicus brief, the Reagan Administration interpreted an amendment to section 2 to preclude a violation if a racial minority achieved proportional representation in a single election.<sup>63</sup>

President George H.W. Bush’s Administration was particularly active in interpreting section 2 through litigation. As both a litigant and amicus curiae, the Bush Administration argued that section 2 is broad enough to cover judicial elections.<sup>64</sup> The Clinton Administration, in

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<sup>58</sup> See *id.* (noting that a violation is determined “based on the totality of circumstances”).

<sup>59</sup> Manheim, *supra* note 32, at 414.

<sup>60</sup> 52 U.S.C. § 10308(d) (providing for civil action by Attorney General). While section 2 of the VRA does not explicitly provide a private right of action, the Supreme Court has routinely considered section 2 lawsuits from private plaintiffs. See, e.g., *Morse v. Republican Party of Va.*, 517 U.S. 186, 232 (1996) (opinion of Stevens, J.); *City of Mobile v. Bolden*, 446 U.S. 55, 60 & n.8 (1980) (plurality opinion) (explicitly reserving this question). Despite this history, Justices Gorsuch and Thomas recently expressed the view that this remains an open issue. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring).

<sup>61</sup> Manheim, *supra* note 32, at 414 (“DOJ is aware of the opportunity it has to benefit a particular political party or political candidates, including those allied with the president, through strategic enforcement of section 2.”); see also *id.* at 414 n.126.

<sup>62</sup> See, e.g., *id.* at 414–15, 415 n.127.

<sup>63</sup> Brief for the United States as Amicus Curiae Supporting Appellants at 24–26, 32, *Thornburg v. Gingles*, 478 U.S. 30 (1986) (No. 83-1968). The Reagan Administration also argued for a narrower definition of “racial bloc voting,” which would have further limited the scope of section 2. *Id.* at 29–31.

<sup>64</sup> Brief for the United States at 20, *Chisom v. Roemer*, 501 U.S. 380 (1991) (No. 90-757); Brief for the United States as Amicus Curiae Supporting Reversal at 11, *Hous. Laws’ Ass’n v. Att’y Gen.*, 501 U.S. 419 (1991) (No. 90-813). The Solicitor General also argued that, in such cases, courts should consider legitimate and nondiscriminatory rationales for structuring a state judicial system in a particular way when weighing the totality of the circumstances. See Brief for the United States as Amicus Curiae Supporting Reversal, *supra*, at 23. Lastly, the Bush Administration twice argued that a previous Supreme Court holding regarding necessary conditions for finding racially polarized voting in multimember districts should apply more broadly to single-member districts. Brief for the United States as Amicus Curiae Supporting Appellants at 11–12, *Grove v. Emison*, 507 U.S. 25 (1993) (No. 91-1420); Brief for the United States as Amicus Curiae Supporting Appellants at 14–15, *Voinovich v. Quilter*, 507 U.S. 146 (1993) (No. 91-618).

turn, argued that (1) the use of a single election commissioner instead of a multimember commission may be challenged under section 2;<sup>65</sup> (2) proportional representation should be assessed on a statewide basis for section 2 vote dilution claims;<sup>66</sup> and (3) section 2 required “the creation of a majority-minority district in east-central Georgia.”<sup>67</sup> Both President George W. Bush and President Trump also advanced their interpretations of section 2 through litigation. The second Bush Administration used an amicus brief to argue that section 2 did not require the adoption of certain districts in Texas that would allegedly provide additional electoral control to racial minorities.<sup>68</sup> The Trump Administration argued in favor of a strong presumption of legislative good faith in section 2 intentional vote dilution claims, especially when a legislature adopts a court-ordered interim redistricting plan.<sup>69</sup>

Different administration priorities are also reflected in different enforcement decisions.<sup>70</sup> The Bush Administration, for instance, pursued the “first-ever § 2 case against an African-American defendant for discriminating against white voters.”<sup>71</sup> By contrast, President Obama’s DOJ instead instructed Voting Section attorneys to “focus on ‘traditional civil rights’ cases and . . . political equality for racial and ethnic minorities.”<sup>72</sup> More recently, the Trump Administration brought only one new section 2 case.<sup>73</sup> In this manner, the executive branch can influence

<sup>65</sup> Brief for the United States as Amicus Curiae Supporting Respondents at 7, *Holder v. Hall*, 512 U.S. 874 (1994) (No. 91-2012).

<sup>66</sup> Brief for the United States as Appellee at 19–26, *Johnson v. De Grandy*, 512 U.S. 997 (1994) (No. 92-519).

<sup>67</sup> Brief for the United States as Appellant at 12, *Abrams v. Johnson*, 521 U.S. 74 (1997) (No. 95-1425).

<sup>68</sup> Brief for the United States as Amicus Curiae Supporting Appellees at 11, *League of United Lat. Am. Citizens v. Perry*, 548 U.S. 399 (2006) (No. 05-204).

<sup>69</sup> Brief for the United States as Appellee in Support of Appellants at 29–31, *Abbott v. Perez*, 138 S. Ct. 2305 (2018) (No. 17-586). Despite the title of this amicus brief, the Trump Administration did not outright reverse any Obama-era interpretations of section 2 in *Perez*. Under the Obama Administration, the DOJ had intervened in the case to challenge Texas’s 2011 redistricting plans. *Id.* at 13. On appeal, *Perez* concerned only Texas’s 2013 redistricting plans, which the Obama-era DOJ had never challenged. *Id.* at 2, 13.

<sup>70</sup> See Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1034 (2013) (“[P]residential influence over agency enforcement activity has been a primary mechanism for effecting national regulatory policy.”).

<sup>71</sup> Michael T. Morley, *Republicans and the Voting Rights Act*, 54 TULSA L. REV. 281, 287 (2019) (reviewing JESSE H. RHODES, *BALLOT BLOCKED: THE POLITICAL EROSION OF THE VOTING RIGHTS ACT* (2017)).

<sup>72</sup> *Id.* at 289 (alteration in original) (quoting OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., *A REVIEW OF THE OPERATIONS OF THE VOTING SECTION OF THE CIVIL RIGHTS DIVISION 75* (2013)).

<sup>73</sup> Complaint, *United States v. Chamberlain Sch. Dist.*, No. 20-cv-4084 (D.S.D. May 27, 2020); see Tierney Sneed, *Trump’s DOJ Has Not Filed a Single New Voting Rights Act Case*, TALKING POINTS MEMO (Mar. 5, 2020, 9:32 AM), <https://talkingpointsmemo.com/muckraker/trumps-doj-has-not-filed-a-single-new-voting-rights-act-case> [https://perma.cc/3H5C-3FRT] (criticizing the Trump Administration for not filing any section 2 cases as of March 2020).

election administration through litigation and enforcement, as well as other traditional tools such as appointments decisions and guidance documents.<sup>74</sup>

## II. TOWARD A PROCEDURAL BASELINE

Critics of executive branch efforts to influence federal elections often deride these efforts as “politicized.”<sup>75</sup> By this adjective, commentators generally mean that agency decisions are made by political appointees in a nontechnical manner to achieve some partisan outcome.<sup>76</sup> Legal judgments, however, rarely admit of one objectively correct or manifestly clear answer.<sup>77</sup> Indeed, in Rodríguez’s estimation, they are often little more than thinly veiled attempts at political maneuvering.<sup>78</sup> As a result, most executive branch interpretations are likely to have some partisan valence. After all, government lawyers are socialized to serve the needs of their client, which, in this case, includes the administration in power.<sup>79</sup>

The question, again, for Rodríguez’s theory of regime change is how to draw the line between permissible, perhaps even inevitable,<sup>80</sup> partisan interpretation and impermissible self-entrenchment in federal election

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<sup>74</sup> See Manheim, *supra* note 32, at 419; Nou, *supra* note 32, at 138, 149.

<sup>75</sup> See, e.g., MARK A. POSNER, AM. CONST. SOC’Y, THE POLITICIZATION OF JUSTICE DEPARTMENT DECISIONMAKING UNDER SECTION 5 OF THE VOTING RIGHTS ACT: IS IT A PROBLEM AND WHAT SHOULD CONGRESS DO? 2 (2006); Pamela S. Karlan, *Lessons Learned: Voting Rights and the Bush Administration*, 4 DUKE J. CONST. L. & PUB. POL’Y 17, 19 (2009); Manheim, *supra* note 32, at 415; Morley, *supra* note 71, at 287–91 (noting differences in enforcement priorities between the Bush and Obama Administrations); Nou, *supra* note 32, at 168.

<sup>76</sup> See DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS 209 (2010) (defining politicization as “practices associated with political intervention in administration, including that of recruiting appointees only on the basis of party loyalty, involving civil servants in political fights, and making appointment and promotion decisions in the civil service on the basis of political attitudes”); Karlan, *supra* note 75, at 19 (applying the term “politicized” to the “transform[ation] of the Department of Justice, and particularly the Civil Rights Division’s Voting Section, from a non-partisan protector of voting rights into a political actor”).

<sup>77</sup> Cf. Ryan D. Doerfler, *Can a Statute Have More than One Meaning?*, 94 N.Y.U. L. REV. 213, 222 (2019) (arguing that statutes are likely to have multiple meanings).

<sup>78</sup> Rodríguez, *supra* note 19, at 7.

<sup>79</sup> Anthony Saul Alperin, *The Attorney-Client Privilege and the White House Counsel*, 29 W. ST. U. L. REV. 199, 209 (2002) (suggesting the Office of the White House Counsel is responsible for advancing “the [P]resident’s concerns” (alteration in original)); Bruce Ackerman, *Abolish the White House Counsel*, SLATE (Apr. 22, 2009, 3:47 PM), <https://slate.com/news-and-politics/2009/04/abolish-the-white-house-counsel-and-the-office-of-legal-counsel.html> [https://perma.cc/ZF2Z-37TY] (arguing that the Office of the White House Counsel is composed of lawyers “selected for their loyalty to the president” and, together with the Office of Legal Counsel in the DOJ, advances the President’s interests).

<sup>80</sup> See Manheim, *supra* note 32, at 442 (discussing the inevitability of some presidential control of elections).

administration.<sup>81</sup> On the one hand, her theory posits that new regimes should be allowed to engage in full-throated policy change. On the other hand, it also requires some notion of legitimacy to justify the new government's dynamism in the first place. Elections are subjectively and objectively illegitimate, however, when they reflect not democratic preferences but rather successful efforts to entrench power.<sup>82</sup> Under these circumstances, the critical link to democratic responsiveness — much celebrated by Rodríguez — is missing.

But entrenchment must be assessed against some baseline and these “normative baselines . . . are themselves hotly disputed.”<sup>83</sup> Nevertheless, it is important to consider the criterion against which to evaluate an administrative decision. Existing scholarship has proposed baselines of a hypothetical majoritarian mechanism<sup>84</sup> or, alternatively, the costs required to achieve the status quo in the first place.<sup>85</sup> One natural way to think about the former is in terms of elections that yield the majoritarian winner of a national popular vote. Doing so aligns with the intuitive notion that the candidate or party receiving the most votes should win.<sup>86</sup>

Presidential elections, however, are not majoritarian in large part because of the Electoral College; some have even called these elections “antimajoritarian.”<sup>87</sup> Indeed, candidates can win the presidency despite losing the national popular vote.<sup>88</sup> Constitutional designers intended this outcome to reflect federalism values, among others.<sup>89</sup> In this manner, presidential elections attempt to combine visions of the relevant electorate at both the national and individual state levels.<sup>90</sup> In fact, none of the elected constitutional actors — including Senators and

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<sup>81</sup> See, e.g., Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 413 (2015) (“In democratic politics, power holders — whether incumbents, political parties, or electoral coalitions — will often possess the means and motivation to preserve their privileged positions by rigging the rules of the electoral system.”).

<sup>82</sup> See *supra* notes 15–18 and accompanying text.

<sup>83</sup> Manheim, *supra* note 32, at 457.

<sup>84</sup> Levinson & Sachs, *supra* note 81, at 411 (noting one baseline as the “(more or less hypothetical) alternative of effecting political change through some process that (better) tracks the preferences of democratic majorities or the median voter”); see also Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 497–98 (1997).

<sup>85</sup> See Levinson & Sachs, *supra* note 81, at 411 (noting that a baseline is “set by the degree of difficulty of creating the status quo”).

<sup>86</sup> Miriam Seifter, *Counter-majoritarian Legislatures*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 21) (on file with the Harvard Law School Library).

<sup>87</sup> Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173, 184 (2011) (“[T]he principal charge against the Electoral College is that it is antimajoritarian.”).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 179.

<sup>90</sup> See *id.*

Representatives — likely channel majoritarian preferences either.<sup>91</sup> The majoritarian criterion therefore does not align with the constitutional structure of American federal elections by design.<sup>92</sup>

Given our current institutions, the question then remains how to think about the appropriate baseline for evaluating election administration decisions that inevitably have some partisan effect. Consider now the alternative baseline of the costs that were necessary to attain the status quo. In this view, entrenchment occurs when “a political arrangement is now more difficult to change than it was to create in the first place.”<sup>93</sup> If the new burdens on voting, for example, make it harder for the pre-existing electorate to change the new election rule, then this would constitute entrenchment.<sup>94</sup>

A major challenge with this baseline, however, is the difficulty of measuring the relevant costs — both the baseline costs as well as those imposed by the new election rule. Among other things, one would need to isolate the burdens narrowly caused by the administrative decision, while controlling for a number of variables that are likely to be shifting at the same time. Moreover, this definition also does not answer the question of how high the new burdens must be to be deemed “entrenchment”: Is any new cost sufficient or must it result in outright vote denial? Finally, this approach also ignores the many ways in which election administration decisions can functionally entrench interests as well.<sup>95</sup>

Given these conceptual and empirical difficulties, another possibility is to turn from a more substantive criterion to a more procedural one: an approach that focuses instead on the process through which an agency decision is made. In this view, there is a baseline procedure that should be followed when election administration decisions are made, departures from which detract from the decision’s legitimacy. This procedure could be a more formal version of what I have elsewhere referred to as a “reciprocal hierarchy” within agencies — the notion that admin-

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<sup>91</sup> See Levinson & Sachs, *supra* note 81, at 411 (“With respect to statutes, we might push past the caricature of ‘majority rule’ to notice, for example, the different majorities implicated by electing senators, representatives, and the President, and the likely supermajorities necessary to assemble a prevailing legislative coalition.”); Seifter, *supra* note 86 (manuscript at 20) (“The problem is that none of the federal branches is majoritarian.”).

<sup>92</sup> Williams, *supra* note 87, at 194 (“[S]trict majoritarianism offers a normatively unappealing account of and prescription for the American constitutional order.”).

<sup>93</sup> See Levinson & Sachs, *supra* note 81, at 411.

<sup>94</sup> See *id.* at 412 (describing as “entrenchment” when “a party or coalition manipulates the rules of election law upon gaining office — for instance, by disfranchising opponents or reducing their voting power — such that a subsequent majority of voters who would prefer to replace the incumbents will be thwarted,” assuming “that same majority would have been sufficient to prevent the incumbents from being elected in the first place”).

<sup>95</sup> See *id.* at 426–30.

istrative decisions should be the result of a structured deliberation between civil servants and political appointees.<sup>96</sup> This internal procedural formality is arguably more important in the election context than in ordinary policymaking.

More specifically, an ideal bureaucratic process contains both means of internal control to facilitate accountability, as well as bottom-up input from expert civil servants with institutional memory and experience.<sup>97</sup> This concept arguably underlies competing accounts of broader administrative legitimacy. The civic republican emphasis on deliberation, for instance, depends heavily on a back-and-forth between career staff and appointees to vindicate its vision.<sup>98</sup> The pluralist account similarly requires a pathway from civil servants and interest groups to political decisionmakers within the agency.<sup>99</sup> Finally, expert-driven justifications also require channels for information and data to help inform final decisionmaking by agency heads.<sup>100</sup> To be clear, the claim here is not that appointees must adopt the views of civil servants — they can (and often should) reject them altogether; rather, it is simply that consideration of their views is an important part of an ideal administrative process.

This internal deliberative procedure can take various forms. For example, many agencies currently use what are known as “clearance procedures” before a decision is finalized.<sup>101</sup> These require different offices within an agency to review documents in a specified order before the agency head signs off.<sup>102</sup> In this manner, agency heads have a robust means of aggregating information and diverse views. Some agencies formalize these procedures even further, for example, by requiring written recommendations from civil servants, rather than more informal, verbal ones.<sup>103</sup> These more formal procedures arguably discipline underlying rationales as well as make it more difficult for political appointees to reverse the decisions without some explanation.<sup>104</sup> Moreover, if

<sup>96</sup> Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349, 363–64 (2019).

<sup>97</sup> See *id.* at 363.

<sup>98</sup> See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992).

<sup>99</sup> See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1808–10 (1975).

<sup>100</sup> See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 196–97 (1997) (calling models that depend on experts “expertocratic”).

<sup>101</sup> While possessing clearance authority does not mean that one government office can “authoritatively stop the issuance of a document by its sibling office,” an office can use an assigned clearance process to delay the draft rules by raising objections during the sign-off process. Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 94 (2014).

<sup>102</sup> See *id.*

<sup>103</sup> See sources cited *infra* note 107 and accompanying text.

<sup>104</sup> See Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267, 1292 (1975) (discussing the many benefits of written opinions in the administrative agency context).

an appointee is deceptive about the basis for a decision or offers a rationale clearly contrary to law, there will now be a written record more susceptible to leaks or available to serve as evidence in a whistleblower action or litigation.<sup>105</sup>

Take, for instance, the DOJ, which had such a system in place for enforcing the VRA. As background, the Civil Rights Division within the agency has a dedicated Voting Section traditionally containing about thirty-five to forty career attorneys at any given time, though that number has recently increased.<sup>106</sup> For years, the staff attorneys had offered written recommendations in major VRA cases — a procedure “meant to insulate such decisions from politics.”<sup>107</sup> During the Bush Administration, however, political officials at the DOJ reportedly prohibited career attorneys from making recommendations in writing.<sup>108</sup> This new policy against written recommendations was also followed by rare reversals of career staff preclearance recommendations by high-

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<sup>105</sup> See Emily Bazelon & Michael Wines, *How the Census Bureau Stood Up to Donald Trump's Meddling*, N.Y. TIMES (Aug. 12, 2021), <https://www.nytimes.com/2021/08/12/sunday-review/census-redistricting-trump-immigrants.html> [<https://perma.cc/8EC2-NFCY>].

<sup>106</sup> See OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., A REVIEW OF THE OPERATIONS OF THE VOTING SECTION OF THE CIVIL RIGHTS DIVISION 9 (2013) <https://oig.justice.gov/reports/2013/s1303.pdf> [<https://perma.cc/4ZB5-Y5FS>]. Prior to the recent increase in the number of career attorneys employed by the Voting Section, the number of attorneys occasionally fluctuated slightly beyond the typical range of thirty-five to forty, with thirty-one attorneys in 1998 and forty-five in 2010. *Id.* In June 2021, Attorney General Merrick Garland announced plans to double the size of the Voting Section. Katie Benner, *Merrick Garland Announces Justice Dept. Plans to Protect Voting Access*, N.Y. TIMES (June 14, 2021), <https://www.nytimes.com/2021/06/11/us/politics/merrick-garland-voting-rights.html> [<https://perma.cc/ZDB8-C7SS>].

<sup>107</sup> Dan Eggen, *Staff Opinions Banned in Voting Rights Cases*, WASH. POST (Dec. 10, 2005), <https://www.washingtonpost.com/wp-dyn/content/article/2005/12/09/AR2005120901894.html> [<https://perma.cc/7FWE-55XM>]; see also Thomas Perez, *U.S. Department of Justice's Enforcement of the Voting Rights Act*, 64 RUTGERS L. REV. 939, 941 (2012) (“[T]he longstanding tradition in the Voting Section in both Republican and Democratic administrations . . . was changed in 2005 to exclude career attorneys and analysts from full participation in the process,” which meant career staff “were directed to no longer put their recommendations in writing.”).

<sup>108</sup> See sources cited *supra* note 107.

level political officials.<sup>109</sup> This dynamic of silencing internal dissent appears to have continued into the Obama Administration<sup>110</sup> but has since been disavowed.<sup>111</sup>

Going forward, election administration decisions made without the requisite internal deliberation should arguably be treated as more suspect by the courts and Congress, that is, more likely to reflect pure efforts at partisan entrenchment. They should be rejected even under Rodríguez's own theory of regime change. They should not, that is, receive the deference that she otherwise calls for in the context of other agency decisions.<sup>112</sup> Indeed, this perspective aligns with Rodríguez's broader regime-based analysis. In her words, democratic responsiveness is a function of "appointees and civil servants"<sup>113</sup> who are "collaborative and bring to bear sometimes rivalrous, but more often complementary, forms of reasoning and approaches to decisionmaking."<sup>114</sup> When these conditions are violated in the realm of election administration, however, the regime itself becomes further untethered to democratic preferences.

### III. SCRUTINY AND SELF-RESTRAINT

In this manner, internal administrative process can serve as a check on partisan efforts to entrench power. When this process has been compromised, judicial or political monitors would be justified in scrutinizing the resulting electoral policy more closely. In this sense, internal and external review can serve as substitutes of sorts.<sup>115</sup> The internal procedure itself is likely to check the most blatant attempts at self-entrenchment in a world where such effects are otherwise difficult to measure. In addition, it should also result in more transparent and well-reasoned public justifications, qualities that would enhance electoral legitimacy.

But when there are signs that internal deliberation has been subverted or is otherwise lacking, courts in particular should evaluate the

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<sup>109</sup> A career staff attorney, for example, had recommended pursuing a VRA section 5 claim against a Georgia plan to require photo identification because it would harm African American voters. Eggen, *supra* note 107. DOJ officials, however, overruled the staff findings. *Id.*

<sup>110</sup> See J. Christian Adams, *Internal DOJ Documents Argued for SC Voter ID Approval . . . But Obama Appointees Overruled*, PJ MEDIA (Sept. 11, 2012, 8:10 PM), <http://pjmedia.com/jchristianadams/2012/09/11/doj-documents-argued-for-sc-voter-id-approval> [<https://perma.cc/A9B9-RCPJ>] (describing how President Obama's political appointees in the DOJ objected to preclearance of a South Carolina voter ID law over the recommendation of career DOJ lawyers and supervisors).

<sup>111</sup> See Perez, *supra* note 107, at 941 (announcing as Assistant Attorney General for DOJ's Civil Rights Division that the DOJ had ended the previous practice of not allowing career staff attorneys to offer written recommendations in voting rights cases).

<sup>112</sup> See Rodríguez, *supra* note 19, at 110–11.

<sup>113</sup> *Id.* at 75.

<sup>114</sup> *Id.* at 75–76.

<sup>115</sup> See Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 425–26 (2009).

underlying legal and policy rationales more closely under *Chevron*<sup>116</sup> and arbitrariness review.<sup>117</sup> *Chevron*, of course, requires courts to defer to agency interpretations of ambiguous statutes.<sup>118</sup> Perhaps unsurprisingly, Rodríguez celebrates the doctrine's ability to promote the "democratic evolution of the law"<sup>119</sup> in that it allows "the government to adapt to changing circumstances and changing times . . . by giving agencies the freedom to choose among plausible interpretations to advance their policy goals."<sup>120</sup>

However, as argued here, such flexibility cannot be left unchecked in the context of election administration. In these circumstances, courts should perhaps apply a form of heightened *Skidmore*<sup>121</sup> deference instead, which requires judges to be more independently persuaded by the administration's legal argument.<sup>122</sup> Under *Skidmore*, courts traditionally look at a number of factors such as the "thoroughness" of the agency actor's consideration, the reasoning's "validity" and "consistency," and, more generally, any factors which give an interpretation "power to persuade, if lacking power to control."<sup>123</sup> When applying these factors in the context of election administration, judges should adopt a more skeptical stance.<sup>124</sup> To be sure, there are difficult boundary problems — what constitutes election-related versus ordinary administration?<sup>125</sup> — but courts can confront these difficulties on a case-by-case basis.

To illustrate the proposed approach, consider an interpretation of VRA section 2 advanced by the Reagan Administration. Under the plain text of the amended section 2, a trial court must assess section 2 violations based on a "totality of the circumstances."<sup>126</sup> Despite this, the

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<sup>116</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>117</sup> Under *Chevron*, when congressional intent is unclear, courts defer to an agency's "reasonable" and "permissible" construction of a statute administered by that same agency. *Id.* at 842–44. Separately, the Administrative Procedure Act allows courts to "hold unlawful and set aside agency action, findings, and conclusions" if they are arbitrary and capricious. 5 U.S.C. § 706(2). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>118</sup> *Chevron*, 467 U.S. at 843–44.

<sup>119</sup> Rodríguez, *supra* note 19, at 114.

<sup>120</sup> *Id.* at 114–15.

<sup>121</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>122</sup> *Id.* at 140.

<sup>123</sup> *Id.*

<sup>124</sup> For example, judges could place greater weight on consistency as a factor in election administration, since interpretive flip-flops between administrations may be more likely to signal attempts to entrench power.

<sup>125</sup> Manheim, *supra* note 32, at 442–45.

<sup>126</sup> 52 U.S.C. § 10301(b); *see also Thornburg v. Gingles*, 478 U.S. 30, 46 (1986).

Reagan DOJ essentially argued that a single factor — electoral success in any recent election — should be dispositive.<sup>127</sup> The government’s amicus brief did not even attempt to reconcile this with the statutory text, nor the legislative history which made it clear that Congress intended the amendment to codify the “results test” as previously applied by the Court.<sup>128</sup> The validity of this argument, however, is clearly suspect under a less deferential version of *Skidmore* review.<sup>129</sup>

Now consider arbitrary and capricious review under the Administrative Procedure Act.<sup>130</sup> The doctrine demands that agencies provide technocratic reasons to justify their decisions.<sup>131</sup> When election administration is at stake, however, the logic above suggests that courts should apply a harder look than usual. In fact, one could argue that judges have already been adopting this principle. Consider the Court’s recent application of the standard in *Department of Commerce v. New York*.<sup>132</sup> Commerce Secretary Wilbur Ross sought to add a citizenship question to the decennial census on the grounds that doing so was necessary to enforce the VRA.<sup>133</sup> Media accounts quickly circulated, however, detailing objections from career staff and irregularities in the internal decisionmaking process.<sup>134</sup> A coalition of states, cities, and counties sued the agency all the way to the Supreme Court.<sup>135</sup>

Chief Justice Roberts, writing for the majority, found that the agency had not violated traditional arbitrariness review.<sup>136</sup> Nevertheless, he remanded the agency’s decision on the grounds that its explanation was pretextual.<sup>137</sup> In other words, Roberts refused to credit

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<sup>127</sup> Brief for the United States as Amicus Curiae Supporting Appellants at 24–26, 32, *Gingles*, 478 U.S. 30 (No. 83-1968); *Gingles*, 478 U.S. at 75 (“Essentially, appellants and the United States contend that if a racial minority gains proportional or nearly proportional representation in a single election, that fact alone precludes, as a matter of law, finding a § 2 violation.”).

<sup>128</sup> *Gingles*, 478 U.S. at 35; see *White v. Regester*, 412 U.S. 755, 766–67 (1973).

<sup>129</sup> Indeed, the Supreme Court had no difficulty unanimously rejecting the Reagan Administration’s argument. *Gingles*, 478 U.S. at 76; see also *id.* at 99 (O’Connor, J., concurring in the judgment) (“[A] court should consider all relevant factors” and “not focus solely on the minority group’s ability to elect representatives of its choice.”).

<sup>130</sup> See 5 U.S.C. § 706(2)(A).

<sup>131</sup> Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 5 (2009).

<sup>132</sup> 139 S. Ct. 2551 (2019).

<sup>133</sup> *Id.* at 2562.

<sup>134</sup> See, e.g., Justin Elliott, *Wilbur Ross Overruled Career Officials at Census Bureau to Add Citizenship Question* (Mar. 27, 2018, 1:33 PM), <https://www.propublica.org/article/wilbur-ross-overruled-career-officials-at-census-bureau-to-add-citizenship-question> [<https://perma.cc/K9AJ-CYRX>].

<sup>135</sup> *Commerce*, 139 S. Ct. at 2563. A second group of plaintiffs included “several non-governmental organizations that work with immigrant and minority communities.” *Id.*

<sup>136</sup> *Id.* at 2571.

<sup>137</sup> *Id.* at 2575–76.

a clearly manufactured rationale, even if a traditional arbitrariness analysis might have done so.<sup>138</sup> In this manner, the majority applied a kind of heightened scrutiny to a decision that had been marred by aberrations in internal agency procedure. Note, in line with Roberts’s approach, that the argument here does not require a wholesale rejection of partisan influence on election administration. Instead, it can be consistent with Rodríguez and others’ view that agency actions may result from permissibly political reasons.<sup>139</sup> In the realm of election administration, however, those reasons must be disclosed transparently rather than concealed behind pretext. Such disclosure, in turn, would enhance the legitimacy of the decision.

At the same time, Rodríguez rightly notes that judges themselves are partisan actors, going as far as to characterize them as “agents of regime change.”<sup>140</sup> In her estimation, the current Court reflects the efforts of a decades-long attempt by the “Reagan coalition” to consolidate power in the judiciary.<sup>141</sup> Because judges possess life tenure, they represent a kind of “partisan entrenchment run amok” that threatens to delegitimize courts themselves.<sup>142</sup> But Rodríguez does not go as far as to reject judicial supremacy, nor does she attempt to resolve how to manage the conflicts between the two kinds of regimes (political and legal) — simply noting that they will be a continuing “source of debate.”<sup>143</sup>

In light of Rodríguez’s valid concerns — particularly at a time when courts are increasingly minoritarian<sup>144</sup> and Congress is moribund on voting rights reform<sup>145</sup> — perhaps the ideal constraint on partisan entrenchment would come from the executive branch itself. That is, an incoming President could embrace robust regime change by agreeing to restrain himself in the arena of election administration and letting his policies be judged fairly at the polls. Adopting this stance publicly, in

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<sup>138</sup> See Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1398 (2016) (noting that traditional arbitrariness review may be insufficient to defeat agency actions advanced for “bad reasons” if a “plausible pretext” may nevertheless be advanced).

<sup>139</sup> There is a rich literature arguing that arbitrary and capricious review should consider openly disclosed political reasons among the valid reasons for agency action. See, e.g., Kagan, *supra* note 24, at 2380–82; Watts, *supra* note 131, at 8.

<sup>140</sup> Rodríguez, *supra* note 19, at 126.

<sup>141</sup> *Id.* at 130–31 (“The courts today arguably represent the long arc of the Reagan coalition consolidated in the judiciary, even as that coalition crumbles in American politics — a culmination of decades of political struggle and concerted effort to control the membership of the courts in order to curb political action counter to the substantive goals of the movement.” (footnote omitted)).

<sup>142</sup> *Id.* at 130.

<sup>143</sup> *Id.* at 132.

<sup>144</sup> See Joshua P. Zoffer & David Singh Grewal, *The Counter-Majoritarian Difficulty of a Minoritarian Judiciary*, 11 CALIF. L. REV. ONLINE 437, 443 (2020) (documenting the “growing presence of minoritarian judges in our federal judiciary”).

<sup>145</sup> Ed Kilgore, *Bipartisan Voting-Rights Legislation May Simply Be Impossible*, N.Y. MAG. (June 29, 2021), <https://nymag.com/intelligencer/article/bipartisan-voting-rights-legislation-impossible.html> [https://perma.cc/P4QE-5ZCQ].

turn, could go a long way toward increasing the objective and perceived legitimacy of his administration. Establishing robust internal procedures to govern election administration would be an example of just that. The President could make his precommitment more credible by adopting these self-constraints through notice and comment, which increases the potential that they would be judicially enforceable.<sup>146</sup> Like Odysseus tying himself to the mast, this restraint would only further empower a President's administration<sup>147</sup> — exactly the kind of robust regime change that Rodríguez, in this year's Foreword, seeks.

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<sup>146</sup> See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–68 (1954) (discussing how an Attorney General's power can be limited beforehand by regulations); Jennifer Nou, Essay, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 519 (2017) (noting that “*Accardi* has particular bite with legislative rules . . . [which] are generally required to go through notice and comment.”).

<sup>147</sup> See JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 275 (2000) (“The paradigmatic case of self-binding — [Odysseus] having himself tied to the mast — was unambiguously a free choice. When individuals or collectivities constrain themselves in this manner, we must assume that they do so because they believe they will benefit from being bound.”).